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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

LUIS MONTANEZ, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

MEI RIGGING & CRATING, LLC, a
Texas Limited Liability Company;
DUNKEL BROS. MACHINERY
MOVING INC., a California Corporation;
and DOES 1 through 100,

Defendants.

CASE NO. 21STCV04062

*[Case assigned for all purposes to the Hon.
Carolyn B. Kuhl; Dept. 12]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND APPROVAL OF
PAGA SETTLEMENT**

Date: June 30, 2022
Time: 11:30 a.m.
Dept.: 12

Action Filed: February 2, 2021
Trial Date: None Set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on June 30, 2022, at 11:30 a.m. in Department 12 of the above-entitled Court, located at 312 N
3 Spring St, Los Angeles, California 90012, Plaintiff Luis Montanez (“Plaintiff”), individually and
4 on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

- 5 1. Preliminary approval of the proposed Settlement of this lawsuit;
- 6 2. Pursuant to California Code of Civil Procedure § 382, provisional certification of the
7 following Settlement Class defined as follows:

8 **Settlement Class** – All persons who are employed or have been
9 employed by Defendants MEI Rigging & Crating, LLC, Dunkel Bros.
10 Machinery Moving, Inc., and Alondra MM Holdings, Inc. in California
11 as hourly-paid or non-exempt employees at any time during the time
12 period from February 2, 2017, to the date of preliminary approval of
13 the Settlement (the “Class Period”).

- 13 3. Preliminary appointment of Plaintiff Luis Montanez as Class Representative;
- 14 4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, and Andrew J.
15 Rowbotham of Haines Law Group, APC as Class Counsel;
- 16 5. The scheduling of a hearing to consider whether the Settlement should be finally
17 approved and to award amounts for the Class Representative Enhancement Payment,
18 Settlement Administrator costs, the Private Attorneys General Act
19 (“PAGA”) payment to the Labor and Workforce Development Agency, as well as
20 attorneys’ fees and costs to Class Counsel;
- 21 6. Appointment of Simpluris as the third-party Settlement Administrator for mailing
22 notices; and
- 23 7. Approval of the Class Notice and entry of the Proposed Order instructing the Class
24 Notice to be disseminated to Settlement Class members as provided in the Settlement.

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1 This motion is based on this notice of motion, the attached memorandum of points and
2 authorities, the declarations of Fletcher W. Schmidt, Paul K. Haines, Andrew J. Rowbotham, Luis
3 Montanez, Eric Springer of Simpluris, the exhibits attached thereto, the pleadings and other
4 papers filed in this action, and on any further oral or documentary evidence or argument presented
5 at the time of hearing.

6
7 Dated: May 19, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

8 By:



9 Fletcher W. Schmidt
10 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Luis Montanez (“Plaintiff”) respectfully requests that this
4 Court preliminarily approve this non-reversionary class action settlement (“Settlement”)¹ of
5 Plaintiff’s putative class action (the “Lawsuit”) on behalf of the following Settlement Class and
6 PAGA aggrieved employees:

7 **Settlement Class** – All persons who are employed or have been employed by
8 Defendants MEI Rigging & Crating, LLC (“MEI”), Dunkel Bros. Machinery
9 Moving, Inc. (“Dunkel Bros.”), and Alondra MM Holdings, Inc.
10 (“Alondra”) (collectively “Defendants”) in California as hourly-paid or non-
11 exempt employees at any time during the time period from February 2, 2017,
12 to the date of preliminary approval of the Settlement (the “Class Period”).²

13 Based upon the data received from Defendants, there are approximately 81 potential
14 Settlement Class members who worked during the Class Period. The \$395,000.00 Maximum
15 Settlement Amount (“MSA”) represents a substantial benefit to Settlement Class members, who
16 will only be agreeing to a release of claims that were actually pled in the Lawsuit, or which could
17 have been pled based on the operative facts alleged in the Lawsuit. After deductions for Plaintiff’s
18 Enhancement Payment, settlement administrator costs, the Private Attorneys General Act
19 (“PAGA”) payment to the Labor & Workforce Development Agency (“LWDA”), and attorneys’
20 fees and costs to Class Counsel, the remaining amount (the “Net Settlement Amount”) of
21 approximately \$204,838.33 will be distributed to Settlement Class members. Employer-side
22 payroll taxes on amounts paid as wages will be paid separate and apart from, and in addition to,

23 ¹ The Stipulation of Settlement and Release of Claims (“Settlement Agreement”) and the proposed Notice
24 Packet (which is comprised of the Notice of Class Action Settlement (“Class Notice”) and Notice of
25 Settlement Award (“Dispute Form”)) are attached as Exhibits 1 and 2, respectively, to the Declaration of
Fletcher W. Schmidt filed concurrently herewith.

26 ² The Settlement also includes a release of PAGA civil penalties for hourly-paid or non-exempt individuals
27 who were employed by Defendants in California at any time between February 2, 2020, to the date of
28 preliminary approval of the Settlement (the “PAGA Period”). *See* Settlement § 1. These individuals are
referred to in the Settlement as “PAGA Members.” *Id.* The PAGA release covers all PAGA claims pled
in the operative complaint in the Lawsuit, or which could have been alleged based on the factual allegations
therein, that arose during the PAGA Period. *Id.* § 2.B.

1 the Maximum Settlement Amount. Significantly, Settlement Class members do not need to file a
2 claim form in order to receive an Individual Settlement Payment, and all Settlement Class
3 members who do not opt-out will automatically receive Individual Settlement Payments which
4 average approximately \$2,528.87 on a per capita basis.³

5 This proposed Settlement is well within the range of possible approval in light of the
6 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,
7 and the tangible monetary benefits to the Settlement Class. Plaintiff therefore respectfully
8 requests that this Court grant preliminary approval of the Settlement.⁴

9 **II. SUMMARY OF THE LITIGATION**

10 MEI is one of the largest providers of rigging, machinery moving, millwrighting,
11 mechanical installation, industrial storage, crating, and export packing services in the U.S.
12 Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶ 8. In December 2019, MEI acquired the
13 assets of an established machinery moving and warehousing company named Alondra (formerly
14 doing business as Dunkel Bros.) *Id.* Plaintiff worked for Defendants as a non-exempt employee
15 from approximately August 1999 to November 4, 2021. Declaration of Luis Montanez
16 (“Montanez Decl.”), ¶ 2. During his employment, Plaintiff worked as both a warehouse
17 supervisor and rigger. *Id.* Plaintiff, like all other Settlement Class members, was subject to
18 Defendants’ wage and hour policies and practices during the Class Period. *Id.*

19 **A. PLAINTIFF’S CLAIMS AND DEFENDANTS’ DEFENSES**

20 Plaintiff alleges that Defendants failed to schedule or otherwise provide opportunities to
21 take the meal period throughout the workday which prevented employees from taking timely meal
22 periods as required by law. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th
23 1004, 1049 (holding that the applicable wage orders and the California Labor Code require
24

25 ³ To ensure that individuals who experienced more Labor Code violations will receive a greater share of
26 the Net Settlement Amount, the Settlement utilizes workweeks and pay periods worked (as opposed to
27 time employed) to calculate Individual Settlement Payments. Settlement, § 4.B.

28 ⁴ Concurrently with the filing of this motion, Plaintiff provided notice of the proposed Settlement, as well
as copies of the motion and supporting papers, to the LWDA. *See* Exhibit 3 (LWDA Settlement
Confirmation)

1 employers to provide a 30-minute first meal period before the end of the fifth hour of work and a
2 second 30-minute meal period before the end of the tenth hour of work). Plaintiff also contends
3 that Defendants failed to provide second meal periods for shifts in excess of 10.0 hours. Schmidt
4 Decl., ¶ 9. Defendants contend that they provide employees with autonomy to schedule and take
5 their meal periods as they please during the day. *Id.*, ¶ 10. Defendants do not police meal periods.
6 *See Brinker, supra*, 53 Cal.4th at 1040 (“[T]he employer is not obligated to police meal breaks
7 and ensure no work thereafter is performed.”). To the extent that any employee took a meal period
8 later than the fifth or tenth hour of work, or the timekeeping records do not reflect a second meal
9 period, Defendants contend that the decision to delay or waive a meal period was the sole choice
10 of the employee, not Defendants’ policy/practice. Schmidt Decl., ¶ 10. Defendants further argue
11 that Plaintiff’s meal period claims are unmanageable, since individual inquiries would be required
12 to assess whether meal periods were waived, and the reasons why a particular employee recorded
13 a non-compliant meal period or missed a meal period on a particular shift. *Id.*

14 Plaintiff alleges that, during a portion of the Class Period, Defendants deducted 30-
15 minutes from employees daily hours worked on the assumption that employees were provided
16 and took a 30-minute meal period. Schmidt Decl., ¶ 11. Plaintiff contends this practice is unlawful
17 because Defendants have an affirmative obligation under the Labor Code to accurately record all
18 employee work periods, including meal periods. *See* Labor Code § 1174 and Wage Order 9 § 7
19 (“Every employer ... shall keep accurate information with respect to each employee, including
20 the following... Time records showing when the employee begins and ends each work period.
21 Meal periods, split shift intervals, and total daily hours worked shall also be recorded...”.) As a
22 result of this practice, Plaintiff contends employees were deprived of wages for each shift that
23 they were not provided a full 30-minute meal period. Schmidt Decl., ¶ 11. In addition to the
24 unlawfully deducted time, Plaintiff contends that Defendants would be unable to rebut the
25 presumption that a meal period violation occurred on each shift that Defendant applied a meal
26 deduction. *See Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 799 (“The
27 right to be free from employer control for a 30-minute meal period, and the right to be paid for
28 time worked during that meal period, are distinct rights with distinct remedies.”); *see also*

1 *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 77 (“If time records show missed, short,
2 or delayed meal periods with no indication of proper compensation, then a rebuttable presumption
3 [of a meal violation] occurs.”) Defendants contend that any meal deductions that occurred during
4 the Class Period were proper because Defendants provided employees with full 30-minute meal
5 periods each day. Schmidt Decl., ¶ 12. Additionally, Defendants maintain that employees were
6 told to inform management if they believe they were not credited with the correct number of hours
7 at the end of the workweek – this would allow Defendants to adjust the hours in the off-chance
8 that an employee did not take a full 30-minute meal period. *Id.* Defendants also confirm that they
9 discontinued their meal period deduction practice in December 2019, significantly limiting any
10 potential liability for this claim. *Id.*

11 Plaintiff contends that Defendants failed to compensate employees for tasks that occurred
12 outside of the scheduled shift but while still subject to the Defendants’ control. Schmidt Decl.,
13 ¶ 13. Some of these alleged tasks included loading, washing, and putting gasoline in trucks prior
14 to and after deliveries and being required to remain on call so that employees would be available
15 to report to work when not scheduled, should the need arise. *Id.* Defendants contend that they
16 have never required employees to work off the clock or remain on call. *Id.*, ¶ 14. Defendants argue
17 that this claim would be challenging to certify because it would rely on individualized employee
18 testimony as to an alleged unwritten practice that Defendants deny even exists. *Id.*

19 Plaintiff contends that Defendants failed to schedule any breaks throughout the workday
20 and as a result, employees were regularly unable to take 10-minute rest periods due to work
21 demands and inadequate personnel. *See* Wage Order 9 at § 12(A) (employer must authorize and
22 permit rest periods of “ten (10) minutes net rest time per four (4) hours or major fraction thereof”).
23 On occasions when a rest period was authorized, Plaintiff contends employees were often required
24 to interrupt the break and return to work before the end of the 10 minutes. Schmidt Decl., ¶ 15.
25 Defendants assert that they authorized and permitted aggrieved employees to take all lawful rest
26 periods, and that, there was no evidence that employees were prevented from taking rest periods
27 during the workday. *Id.*, ¶ 16. Defendants also maintain that Plaintiff’s rest period claim is
28 unlikely to be certified as it would require an unmanageable series of mini-trials to determine

1 whether employees were authorized to take specific rest periods, or if they decided to forgo it on
2 their volition, especially considering rest periods are not recorded. *Id.*

3 As a result of these alleged substantive violations, Plaintiff contends that Defendants are
4 liable for derivate wage statement violations, waiting time penalties, and civil penalties under
5 PAGA. Schmidt Decl., ¶ 17. Defendants argue that the alleged wage statement violations were
6 not “knowing and intentional,” and that Plaintiff could not show he “suffer[ed] injury,” as
7 required by Labor Code § 226(e) for imposition of penalties. *Id.*, ¶ 20. Defendants contend that
8 any alleged failure to pay meal and rest period premiums cannot support a derivative claim for
9 wage statement or waiting time penalties. *See Naranjo v. Spectrum Security Services, Inc.*
10 (2019) 40 Cal.App.5th 444, 474, review granted Jan. 2, 2020 (S258966); *see also Ling v. P.F.*
11 *Chang’s China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (meal and rest period premium
12 pay compensates for the non-provision of meal and rest periods, not for the ‘nonpayment of
13 wages’ as required by Labor Code § 203). Defendants further contend that, even if meal and rest
14 period violations could support waiting time penalties, Defendants possess strong, good faith
15 defenses to Plaintiff’s underlying claims, precluding recovery of waiting time penalties (which
16 are only available for the “willful” failure to pay wages). *See* 8 Cal. Code Regs. § 13520.

17 Since Plaintiff’s PAGA claim is based upon the same alleged violations as the
18 aforementioned claims, Defendants assert that the PAGA claim will similarly fail. *See Price v.*
19 *Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (“Because the underlying causes of action
20 fail, the derivative UCL and PAGA claims also fail.”) Defendants also maintain that given their
21 good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA
22 penalties if it were to find Defendants liable for any of Plaintiff’s claims. *See Thurman v.*
23 *Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of
24 PAGA penalties); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming
25 \$5.00 initial violation rate for PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12,
26 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000).

27 **B. DISCOVERY AND MEDIATION**

28 In connection with mediation, Defendants provided Plaintiff with timekeeping and payroll

records for *all* members of the putative Class who worked during the Class Period. Schmidt Decl., ¶ 24. Plaintiff, with the help of his retained expert who holds a Ph.D. in labor economics, conducted an analysis of this data and created a comprehensive damages model to calculate the likely exposure that Defendants faced on each claim. *Id.*

On December 15, 2021, the Parties participated in a mediation with Jeffrey A. Ross, a respected wage and hour class action mediator in California. Schmidt Decl., ¶ 25. During mediation, the Parties exchanged divergent views on Defendants' liability and exposure valuations, debated their legal positions, and shared their arguments regarding the likelihood of certification of Plaintiff's claims. *Id.* As a result of a mediator's proposal from Mr. Ross, the Parties were able to reach a classwide settlement which, over the following months, was memorialized the terms into the Settlement Agreement. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Should the Court preliminarily approve this settlement, Defendants will pay a Maximum Settlement Amount of \$395,000.00. Settlement, § 3. This Settlement is non-reversionary and Settlement Class members will automatically receive their Individual Settlement Payment unless they affirmatively opt-out of the Settlement. *Id.*, § 3.C.

Defendants will deposit the entire Maximum Settlement Amount within 30 calendar days of the order granting final approval of the Settlement, assuming there are no objections or appeals. *See* Settlement, § 3.B. The proposed deductions from the Maximum Settlement Amount are itemized below:

Maximum Settlement Amount:	\$395,000.00
Minus Court-approved attorneys' fees (1/3 of MSA):	\$131,666.67
Minus Court-approved attorneys' costs (up to):	\$35,000.00
Minus Court-approved enhancement payment:	\$5,000.00
Minus Court-approved administration costs (up to):	\$3,495.00
Minus PAGA payment to the LWDA:	\$15,000.00
Net Settlement Amount:	\$204,838.33

1 **1. Settlement Provides for Reasonable Monetary Payments**

2 After deducting amounts for court-approved attorneys' fees and costs, Plaintiff's
3 Enhancement Payment, costs of settlement administration, and the PAGA payment to the LWDA,
4 the Settlement requires Defendants to pay a Net Settlement Amount of approximately
5 \$204,838.33 to Settlement Class members. *See* Settlement, § 3.C. Employer-side payroll taxes on
6 amounts paid as wages will be paid separate and apart from, and in addition to, the Maximum
7 Settlement Amount. *Id.*, § 3.H.

8 Defendants' records as of the date of mediation indicate that there are approximately 81
9 potential Settlement Class members who worked during the Class Period. *See* Settlement, § 3.F.
10 Based on the records provided for mediation purposes, there are approximately 10,419
11 workweeks worked as of January 2022. *Id.* Based on the proposed allocations of the Net
12 Settlement Amount, Settlement Class members will receive average payments of approximately
13 \$2,528.87. Schmidt Decl., ¶ 26. The highest potential Individual Settlement Payment that a
14 Settlement Class member could receive is estimated to be approximately \$5,465.50 (if the
15 Settlement Class member worked every workweek during the Class Period). *Id.*

16 Settlement Class members will have 60 calendar days from the mailing of the Class Notice
17 to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice
18 without unduly delaying the Settlement. *See* Settlement, § 9.D. Those Settlement Class members
19 who do not opt-out of the Settlement will be bound by its terms and will release all claims against
20 Defendants that were asserted, or could have been asserted, based on the operative facts in the
21 Lawsuit during the Class Period. *Id.*, § 2.A.⁵

22 **2. Attorneys' Fees, Costs, and Representative Enhancement Payment**

23 Plaintiff will apply for an enhancement payment in the total amount of \$5,000.00 for his
24 service to the Settlement Class and the risks he undertook being the named plaintiff in this lawsuit.
25 *See* Settlement §§ 2.C, 6. "[I]ncentive awards are fairly typical in class action cases . . . and are
26

27 ⁵ The Parties propose that any uncashed settlement checks be provided to the California State Controller
28 Unclaimed Property Fund to be held in the name of the Settlement Class Member or PAGA Member until
such time as they claim their funds. *See* Settlement, § 4.E.

1 intended to compensate class representatives for work done on behalf of the class [and] to make
2 up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee*
3 *Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s Enhancement Payment is
4 intended to recognize the significant benefits conferred upon the Settlement Class due to the time
5 and effort that Plaintiff expended on their behalf, including providing factual information and
6 documents to his attorneys, identifying potential witnesses who also worked under the same
7 compensation system and experienced the same alleged Labor Code violations, and participating
8 in meetings with his attorneys to discuss the claims and theories at issue in the litigation. Schmidt
9 Decl., ¶ 27. Should the Court grant preliminary approval of this Settlement, Plaintiff will seek
10 this enhancement payment at the time of seeking final approval of the Settlement.

11 Class Counsel will also apply for an attorneys’ fee award of \$131,666.67 (one-third of the
12 Maximum Settlement Amount) and up to \$35,000.00 in verified costs. *See* Settlement, §§ 3.C.4,
13 5. Plaintiff submits that the requested fee is fair compensation for the undertaking of complex,
14 risky, expensive, and time-consuming litigation on a purely contingent fee. Class Counsel
15 incurred substantial attorneys’ fees conducting the pre-filing investigation, analyzing Plaintiff’s
16 claims, conducting legal research and analysis into those claims, reviewing data and documents
17 produced by Defendants, retaining an expert, and building a comprehensive damages model,
18 preparing for and attending mediation, negotiating and preparing the long-form Settlement
19 Agreement, preparing this motion for preliminary approval, and otherwise litigating the case.
20 Schmidt Decl., ¶ 28. Class Counsel will also expend future attorney time in attending the hearing
21 on this Motion, overseeing the Notice process and fielding questions from Settlement Class
22 members, drafting the Final Approval Motion along with supporting documents, and attending
23 the final approval hearing, among other tasks. *Id.*

24 Both California and federal courts have recognized that an appropriate method for
25 awarding attorneys’ fees in class actions is to award a percentage of the “common fund” created
26 as a result of the settlement. *See Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480, 506 (“the
27 percentage of fund method survives in California class action cases...”); *Wershba v. Apple*
28 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the “percentage of recovery”

1 and “lodestar/multiplier” methods). Historically, courts have awarded percentage fees in the range
2 of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions*
3 § 14.6 (4th Ed. 2013) (“Usually 50% of the fund is the upper limit on a reasonable fee award from
4 a common fund in order to assure that the fees do not consume a disproportionate part of the
5 recovery obtained for the class...”)

6 Class Counsel submits that the request for attorneys’ fees is reasonable when viewed as
7 an overall percentage of the Maximum Settlement Amount (one-third) and in light of the
8 substantial risks presented against the merits of the case. Schmidt Decl., ¶¶ 9-23. The
9 reasonableness of the fee request is also supported by the significant work undertaken by Class
10 Counsel, the significant result obtained for the Settlement Class members, and the efficiency by
11 which the litigation was conducted. *Id.* Should the Court grant preliminary approval of this
12 Settlement, Class Counsel will seek an award of attorneys’ fees and verified litigation costs at the
13 time of seeking final approval of the Settlement.

14 **IV. ARGUMENT**

15 **A. PRELIMINARY APPROVAL IS WARRANTED**

16 California Rule of Court 3.769 conditions the settlement of a class action on court
17 approval. This approval is generally evaluated under the federal standards applicable under Rule
18 23 of the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
19 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the
20 settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir.
21 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine “whether
22 a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the
23 preferred means of dispute resolution, particularly in complex class action litigation. *See In re*
24 *Syncor ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a
25 proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not
26 the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150
27 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was
28 negotiated at arm’s length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168

1 Cal.App.4th 116, 130.

2 **1. Standard for Preliminary Approval**

3 To make a fairness determination, the Court should consider several factors, including
4 “the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further
5 litigation, the risk of maintaining class action status through trial, the amount offered in
6 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
7 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
8 “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of
9 factors depending on the circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245.
10 As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the
11 overall balance of factors in this case.

12 **a. Strength of Plaintiff’s Case**

13 Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll
14 records for all putative class members and, with the help of an expert, conducted a detailed
15 analysis of that data to create a comprehensive damages model for Defendants’ potential
16 classwide liability. *See* Schmidt Decl., ¶ 24. Although Plaintiff steadfastly maintains that his
17 claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in
18 proceeding with class certification and trial. As explained in detail in Section II.B., *supra*,
19 Defendants presented numerous defenses to Plaintiff’s claims, both on the merits and with respect
20 to class certification. Defendants also obtained declarations from multiple current putative class
21 members, stating that they did not suffer any of the Labor Code violations alleged by Plaintiff.
22 Although Plaintiff was prepared to litigate these claims through class certification and trial, given
23 the amount offered in the Settlement, Plaintiff predicted that it was unlikely that further litigation
24 would result in a more beneficial result for the Settlement Class members.

25 **b. Risk, Expense, Complexity, and Duration of Further Litigation**

26 Although the Parties engaged in extensive informal discovery prior to mediation, the
27 Parties had not yet commenced formal written or deposition discovery at the time the Parties
28 executed the proposed Settlement Agreement. *See* Schmidt Decl., ¶ 24. Absent the Settlement,

1 the Parties would need to expend substantial time and resources to complete formal discovery and
2 prepare this case for class certification and trial. This Settlement avoids the considerable
3 attorneys' fees and costs associated with conducting formal discovery, moving for class
4 certification, filing for summary judgment or adjudication, and ultimately, participating in trial.
5 The Settlement also limits the risks and the accompanying burden of continued litigation on the
6 Court.

7 **c. Risk of Maintaining Class Action Status**

8 At the time of the Parties' proposed Settlement, Plaintiff had not yet filed his Motion for
9 Class Certification. Given Defendants' numerous arguments that individualized issues would
10 predominate Plaintiff's claims, thereby precluding class certification, there was a legitimate risk
11 that there would not be a certified class at the time of trial.

12 **d. Amount Offered in Settlement Given Realistic Value of Claims**

13 This proposed Settlement provides a fair and reasonable monetary recovery for the
14 Settlement Class members notwithstanding the disputed claims. After analyzing the data provided
15 by Defendants prior to mediation, Plaintiff prepared a class-wide exposure model and forecasted
16 the expected recovery for each claim (after discounting the maximum potential exposure for risks
17 of non-certification and being unsuccessful on the merits), as follows:

18 **Meal Period Violations: \$72,633**

19 Plaintiff alleges that Defendants failed to provide full, 30-minute first meal periods
20 commencing before the end of the fifth hour of work. *See* Schmidt Decl., ¶ 9. Plaintiff's expert's
21 analysis revealed that 19,684 shifts over 6.0 hours (shifts without an automatic meal
22 deduction) employee time records reflected what appeared to be late, short, or missing first meal
23 periods (an overall 84.7% violation rate), with the vast majority of the violations in the form of
24 missing meal periods (70.6% of the violations). *Id.* Additionally, Defendants' timekeeping
25 records reveal that 16,383 shifts over 10.0 hours do not reflect a recorded second meal period on
26 over 99% of the shifts. *Id.* However, only 450 of these 10-hour shifts did not already include a
27 first meal period violation. *See United Parcel Service Wage & Hour Cases* (2011) 196
28 Cal.App.4th 57, 69 ("[W]e believe it is more reasonable to construe [Labor Code § 226.7] as

1 permitting up to two premium payments per workday—one for failure to provide one or more
2 meal periods, and another for failure to provide one or more rest periods.”). Plaintiff’s expert then
3 determined that the average rate of pay for non-exempt employees was \$28.86 during the Class
4 Period. Schmidt Decl., ¶ 9. Combining the above figures, Plaintiff calculated Defendants’ meal
5 period exposure as follows: \$581,067 (19,684 first meal period violations + 450 additional second
6 meal period violations x \$28.86 average meal premium). *Id.* Defendants argue that the vast
7 majority of the shifts with no recorded meal period were worked by drivers in the field who were
8 given complete autonomy with respect to their schedule, including whether and when to take a
9 meal period. *Id.*, ¶ 10. Defendants maintain that given the highly technical nature of their
10 assignments and high value of the equipment being transported, the company had every incentive
11 to ensure that employees were fed and focused during work, and that because all jobs were billed
12 hourly, there was no pressure to skip lunches or finish a job within a predetermined timeframe.
13 *Id.* Furthermore, given the small class size and long tenure of most of the employees, Defendants
14 were confident that they would be able to rebut the *Donohue* presumption of a meal period
15 violation in virtually all instances—and had already obtained a number of declarations to this
16 effect which were shared during mediation. *Id.* Defendants therefore contend Plaintiff’s meal
17 period claim is not only poorly suited for class certification, but would also be proven to be
18 meritless. *Id.* Plaintiff discounted Defendants’ maximum exposure by 75% for the risk of non-
19 certification and 50% for the risk of being unsuccessful on the merits, to arrive at an estimated
20 exposure of \$72,633. *Id.* ¶ 9.

21 Automatic Meal Deductions: \$165,001

22 Plaintiff alleges that Defendants automatically deducted time from employees’ daily hours
23 worked to account for meal periods that Defendants did not provide. *See* Schmidt Decl., ¶ 11.
24 Plaintiff’s expert determined that a total of 22,152 shifts were negatively affected by this alleged
25 practice. *Id.* As described above, Plaintiff’s expert determined that 70.6% of shifts in excess of
26 6.0 hours (without a meal deduction) showed no clock-outs for a meal period in the first place. *Id.*
27 Plaintiff then applied this figure to the shifts affected by Defendants’ alleged meal deduction
28 practice, to estimate the number of shifts where a deduction was applied but no meal was actually

1 taken. *Id.* Given that the vast majority of shifts worked by employees exceed 8.0 hours, Plaintiff
2 assumed that each hour of unpaid wages would be paid at the average overtime rate (\$43.29). *Id.*
3 In addition to the unpaid wages, Plaintiff also contends that Defendants are liable for meal period
4 premiums for the estimated 84.7% of shifts that had a meal deduction applied but which did not
5 have a compliant meal period, since these shifts were excluded from the analysis in the preceding
6 section. *Id.* Combining these figures, Plaintiff calculated Defendants' exposure as a result of its
7 automatic meal deduction practice as follows: (22,152 shifts x 0.706 violation rate x 0.5 half hour
8 differential x 43.29 average overtime rate) + (22,152 shifts x 0.847 violation rate x \$28.86 average
9 meal premium) = \$880,006. *Id.* Defendants contend that they provided employees with the
10 opportunity to take full, uninterrupted 30-minute meal periods each workday and that employees
11 were paid for all hours worked for the same reasons as discussed in the preceding section. *Id.*,
12 ¶ 12. Because employees were provided the opportunity to review their hours and inform
13 management of any errors prior to being paid, Defendants argue that this claim will fail on the
14 merits. *Id.* Plaintiff discounted Defendants' maximum exposure by 25% for the risk of non-
15 certification and 75% for the risk of being unsuccessful on the merits, to arrive at an estimated
16 exposure of \$165,001. *Id.* ¶ 11.

17 **Off The Clock Work: \$56,380**

18 Plaintiff contends that Defendants failed to pay employees for time spent loading, washing,
19 and putting gasoline in trucks prior to and after deliveries as well as time spent on call. *See Schmidt*
20 *Decl.*, ¶ 13. Plaintiff estimates that employees spent approximately 1 hour of work each week
21 performing these tasks without compensation. *Id.* A review of the payroll documents provided
22 prior to mediation reflect that employees worked 10,419 workweeks during the Class Period. *Id.*
23 Plaintiff therefore calculates Defendants' exposure due to off-the-clock work as follows: \$451,039
24 (10,419 workweeks x \$43.29 average overtime rate). *Id.* Defendants contend that certification of
25 this claim is reliant on putative class member testimony which would be inherently individualized
26 as Defendants did not maintain a written policy or unwritten practice requiring employees to
27 perform work off the clock. *Id.*, ¶ 14. Plaintiff discounted Defendants' maximum exposure by
28 75% for the risk of non-certification and 50% for the risk of being unsuccessful on the merits, to

1 arrive at an estimated exposure of \$56,380. *Id.* ¶ 13.

2 Rest Period Violations: \$93,966

3 Plaintiff contends that employees were frequently not permitted a reasonable opportunity
4 to take uninterrupted 10-minute rest periods for every four hours worked, or major fraction thereof,
5 due to work demands. *See* Schmidt Decl. ¶ 15. Based on Plaintiff's experience and discussions
6 with other employees, Plaintiff estimated that employees were unable to take at least one of their
7 entitled rest periods for every other shift they worked. *Id.* Accordingly, Plaintiff calculates
8 Defendants' potential exposure for rest period violations as follows: \$751,731 (10,419 workweeks
9 x 2.5 violations per workweek x \$28.86 average rest premium). *Id.* Defendants contend that they
10 do authorize and permit all rest periods, and in practice, employees did take rest periods
11 throughout the day. *Id.*, ¶ 16. Defendants also argue that individualized inquiries would be
12 necessary to determine whether certain rest periods were actually taken by employees on each
13 shift, posing a serious obstacle to certification. *Id.* This is further complicated by the fact that
14 employees do not record their rest periods, resulting in a lack of common evidence. *Id.* Plaintiff
15 discounted Defendants' maximum exposure by 75% for the risk of non-certification and 50% for
16 the risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$93,966. *Id.*,
17 ¶ 15.

18 Waiting Time Penalties: \$35,063

19 There are approximately 27 employees who separated their employment with Defendants
20 during the time period applicable to waiting time penalties (3 years prior to the filing of the
21 complaint to the present). Schmidt Decl., ¶ 18. Assuming Plaintiff prevailed on the underlying
22 unpaid wage claim, Defendants' potential exposure for waiting time penalties is therefore
23 \$187,013 (27 former employees x 28.86 average hourly rate x 8 hours per workday x 30 days of
24 waiting time penalty). *Id.* Defendants maintain that waiting time penalties are not appropriate to
25 the extent they are derivative of meal and rest period claims as these claims cannot support such
26 penalties. *Id.*, ¶ 20. Defendants also argue they attempted to pay their employees all wages owed
27 in good faith upon their separation, therefore precluding a finding of willfulness necessary to
28 obtain waiting time penalties under 8 Cal. Code Regs. § 13520. Plaintiff accordingly discounted

1 Defendants' potential liability by 25% for a risk of non-certification, and by an additional 75%
2 for the risk of losing on the merits or failing to establish willfulness, for a projected total of
3 \$35,063. *Id.*, ¶ 18.

4 **Wage Statement Violations: \$46,500**

5 According to the data produced by Defendants, there were 3,934 wage statements issued
6 to approximately 62 employees during the time period applicable to wage statement penalties (1
7 year prior to the filing of the complaint to the present). Schmidt Decl., ¶ 19. Assuming Plaintiff
8 prevailed on the underlying unpaid wage claim, Defendants' potential exposure for wage
9 statement penalties, cognizant of the \$4,000 per employee cap designated in Labor Code
10 § 226(e)(1), is therefore \$248,000 (62 employees x \$4,000 maximum penalty). *Id.* Defendants
11 argue that Plaintiff's meal and rest period claims cannot support derivative wage statement
12 penalties. *Id.*, ¶ 20. Defendants also argue that employees could not show that they "suffer[ed]
13 injury," as required by Labor Code § 226(e). *Id.* Plaintiff accordingly discounted Defendants'
14 potential liability by 25% for a risk of non-certification, and by an additional 75% for the risk of
15 losing on the merits or failing to prove violations were "knowing and intentional," for a projected
16 total of \$46,500. *Id.*, ¶ 19.

17 **PAGA Penalties: \$19,670**

18 The success of Plaintiff's PAGA claim is wholly dependent upon the success of his
19 underlying Labor Code violation claims occurring during the time period applicable to PAGA
20 penalties (1 year prior to the submission of the LWDA letter to the present). Schmidt Decl., ¶ 21.
21 According to the data produced by Defendants, there are approximately 62 Aggrieved Employees
22 and 3,934 applicable pay periods. *Id.* Assuming that Plaintiff could prove at least one substantive
23 violation in each applicable pay period due to the alleged frequent meal/rest period and off-the-
24 clock violations, Defendants' potential exposure for PAGA civil penalties is \$393,400 (3,934 pay
25 periods x \$100.00 "initial" violation rate). *See Amaral v. Cintas Corp. No. 2* (2008) 163
26 Cal.App.4th 1157, 1207 (finding "initial" violation rate applies until employer is notified that it
27 is violating a Labor Code provision).

28 Beyond proving the merits of each of the alleged violations, Plaintiff also recognizes that

1 the Court has discretion to reduce any award of PAGA penalties if it views them as unjust,
2 arbitrary, oppressive, or confiscatory. Schmidt Decl., ¶ 21. Plaintiff accordingly discounted
3 Defendants’ potential liability by 50% for the risk of manageability issues preventing the case
4 from proceeding on a representative basis, and by an additional 90% to account for the potential
5 for this Court to reduce the civil penalties, for a projected total of \$19,670. *Id.*

6 Taking Defendants’ defenses into account and using the reduced figures for each of the
7 claims described above, Plaintiff predicts that a realistic class-wide recovery would be
8 approximately \$489,214. Schmidt Decl. ¶ 23. This Settlement provides a recovery to the
9 Settlement Class of \$395,000, which is approximately 80.74% of Plaintiff’s projected potential
10 recovery, while avoiding the further expense and serious risk of proceeding towards class
11 certification and trial. *Id.* Considering the risk of non-certification and failure to prevail on the
12 merits, as well as the Court’s power to reduce the civil penalties, the proposed Settlement falls
13 well within the realm of being fair, reasonable, and adequate. *See e.g., Altamirano v. Shaw*
14 *Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and
15 hour class action settlement, stating, “[a]lthough 15% represents a modest fraction of the
16 hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to
17 grant preliminary approval given the merits of Plaintiff’s claims.”). Preliminary approval is
18 appropriate since the Settlement will provide tangible monetary relief to Settlement Class
19 members without the uncertainty, delay, and additional expense of further litigation.

20 **e. Experience and Views of Counsel**

21 “Parties represented by competent counsel are better positioned than courts to produce a
22 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
23 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Plaintiff is represented by
24 competent and experienced counsel who possess extensive experience litigating wage and hour
25 class actions from both the plaintiff and defense side. *See* Schmidt Decl., ¶¶ 2-6; Declaration of
26 Paul K. Haines (“Haines Decl.”), ¶ 2-9; and Declaration of Andrew J. Rowbotham (“Rowbotham
27 Decl.”), ¶¶ 2-7. Plaintiff’s counsel has been appointed as class counsel in numerous cases alleging
28 similar claims. *Id.* Plaintiff’s counsel conducted an extensive review of Defendants’ records

1 produced for mediation and drew on their extensive experience in similar cases to assess the
2 strengths and weaknesses of this case. *See* Schmidt Decl., ¶ 24. The Settlement was reached with
3 the input and assistance of Jeffrey Ross, an experienced wage and hour class action mediator. *Id.*,
4 ¶ 25. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168
5 Cal.App.4th at 130.

6 **2. Preliminary Approval Standard is Met**

7 At this stage, the Court may grant preliminary approval of the Settlement and direct the
8 Class Notice to be mailed if the proposed Settlement: (1) falls within the range of possible
9 approval; (2) appears to be the product of serious, informed, and non-collusive negotiations; and
10 (3) has no obvious deficiencies. *See* Manual for Complex Litigation § 30.41(3rd Ed. 1995); 4
11 *Newberg on Class Actions* § 11:24-25 (4th Ed. 2013).

12 **a. Settlement is Within the Range of Possible Approval**

13 The proposed Settlement will provide substantial compensation for contested claims and
14 derivative penalties, and the overall average payment of \$2,528.87 well exceeds averages
15 achieved in other wage and hour class action settlements. The proposed Settlement falls within
16 the range of possible approval and Plaintiff requests that this Court approve the Class Notice to
17 be mailed to Settlement Class members. The Court will again have the opportunity to assess the
18 reasonableness of the Settlement after the Settlement Class members have had the opportunity to
19 opt-out or object to it.

20 **b. Settlement Resulted from Serious, Informed, Non-Collusive Negotiations**

21 This proposed Settlement is entitled to an initial presumption of fairness (*see Kullar,*
22 *supra*, 168 Cal.App.4th at 130) as it is the result of the exchange of substantial records which
23 were analyzed by Plaintiff's counsel, arm's length negotiations by counsel; mediation with a
24 respected and experienced wage and hour class action mediator; and additional time spent
25 negotiating and finalizing the terms of the long-form Settlement Agreement. *See* Schmidt Decl.,
26 ¶¶ 24-25. The proposed Settlement is thus entitled to an initial presumption of fairness. *See*
27 *Kullar, supra*, 168 Cal.App.4th at 130. §
28

1 **c. Settlement is Devoid of Obvious Deficiencies**

2 The Settlement will provide tangible monetary relief to Settlement Class members.
3 Moreover, the amounts requested for attorneys' fees and costs to Class Counsel, Plaintiff's
4 Enhancement Payment, settlement administration costs, and the PAGA payment to the LWDA
5 are all reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this
6 final factor supports preliminary approval.

7 **B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS**

8 The proposed Settlement Class satisfies the criteria for certification of a settlement class
9 under California law because: (1) the Settlement Class members are so numerous that joinder
10 would be impractical; (2) common questions of law and fact predominate over individual
11 questions such that class certification is the most efficient and desirable way to maintain this
12 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
13 and (4) Plaintiff and his counsel will fairly and adequately represent the interests of the absent
14 Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

15 **1. The Proposed Class is Ascertainable and Numerous**

16 A class is "ascertainable" where the members "may be readily identified without
17 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
18 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). The proposed Settlement Class
19 is defined as all persons who are employed or have been employed by Defendants in California
20 as hourly-paid or non-exempt employees at any time during the Class Period. According to
21 Defendants' records, the Settlement Class consists of approximately 81 individuals, rendering it
22 impracticable to gather all the Settlement Class members and bring them before the Court. *See*
23 Schmidt Decl., ¶ 26. The proposed Settlement Class therefore satisfies the numerosity
24 requirement.

25 **2. Common Issues of Law and Fact Predominate**

26 The focus in a certification dispute is not on the merits of the case, but rather on what
27 types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug*
28 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Plaintiff's claims are predicated on

Defendants’ alleged meal and rest period policies, automatic deduction policies, and off the clock work policies, which Plaintiff contends were applicable to all Class Members and caused them injury. These types of claims are commonly held to be proper for class certification. *See, e.g., Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1033 (“The theory of liability—that Brinker has a uniform policy, and that that policy...allegedly violates the law—is by its nature a common question eminently suited for class treatment.”); *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220, 240 (certifying meal and rest period claims).

3. The Claims of the Named Plaintiff Are Typical

The typicality requirement is satisfied when the class representative has claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347. Plaintiff’s claims are typical of those held by the Settlement Class members. Like other Settlement Class members, Plaintiff was employed by Defendants in California during the Class Period. *See Montanez Decl.*, ¶ 2. Plaintiff alleges he was not provided with all meal and rest periods, worked off the clock, and had time deducted from his daily hours worked for meal periods that was not provided. *Id.* Plaintiff was impacted by the same challenged policies that allegedly injured the Settlement Class as a whole. Plaintiff was also subject to the same class-wide defenses presented by Defendants. Plaintiff is therefore typical of the Settlement Class.

4. Plaintiff and Class Counsel Will Adequately Represent the Class

The adequacy of representation requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 697. Plaintiff and Class Counsel will adequately represent the Settlement Class members, as there are no conflicts between Plaintiff and the Settlement Class he seeks to represent. Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. Class Counsel also has extensive experience in wage and hour class action litigation. *See Schmidt Decl.*, ¶¶ 2-6; *Haines Decl.*, ¶¶ 2-9; *Rowbotham Decl.*, ¶¶ 2-7.

1 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE**

2 This Court should order distribution of the proposed Class Notice by first class mail,
3 postage prepaid, using the last known mailing address information provided by Defendants. This
4 manner of giving notice is the “best notice practicable” under the circumstances because it
5 provides “individual notice to all members who can be identified through reasonable effort.” *See*
6 *Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Plaintiff proposes that the Settlement
7 be administered by Simpluris. *See* Declaration of Eric Springer and attached exhibits. Defendants
8 will provide Simpluris with Settlement Class member information within 21 calendar days of
9 Preliminary Approval of the Settlement. *See* Settlement, § 9.A. Simpluris will run those addresses
10 through the National Change of Address database and/or conduct skip traces to obtain current
11 address information. *Id.*, § 9.B. The content of the Class Notice advises proposed Settlement Class
12 members of the nature of the claims, the basic contentions and denials of the Parties, the key terms
13 of the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the
14 procedure by which to do so, as well as the scope of their release under the Settlement. *See*
15 Schmidt Decl., Exhibit 2 (Notice Packet). This manner of giving notice satisfies California Rule
16 of Court 3.766 as the most reliable and cost-effective method of reaching Settlement Class
17 members.

18 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

19 This Court should set a hearing for the final approval of this Settlement on a date
20 appropriately scheduled to follow the deadline for Settlement Class members to submit any opt-
21 outs or objections to the Settlement. *See* California Rule of Court 3.769.

22 **V. CONCLUSION**

23 Plaintiff respectfully requests that the Court preliminarily approve the proposed
24 Settlement, provisionally certify the Settlement Class, and enter the Proposed Order.

25 Dated: May 19, 2022

HAINES LAW GROUP, APC

26 By: 
27

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Attorneys for Plaintiff