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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ANGEL MEDINA, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

NATIONAL PAVING COMPANY, INC., a
California corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No. CIVSB2108801

*[Assigned for All Purposes to the Hon. Joseph T.
Ortiz, Dept. S-17]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT, CLASS
REPRESENTATIVE'S SERVICE AWARD,
AND ATTORNEYS' FEES AND COSTS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: April 17, 2023
Time: 1:30 p.m.
Dept.: S-17

Action Filed: July 23, 2020
Trial Date: None Set

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on April 17, 2023 at 1:30 p.m. in Department S-17 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Angel Medina (“Plaintiff”), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

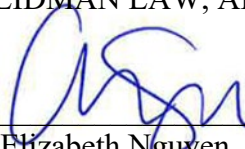
1. Confirming the certification of the Settlement Class for settlement purposes under Section 382 of the California Code of Civil Procedure;
2. Confirming the appointment of Plaintiff Angel Medina as Class Representative for settlement purposes;
3. Confirming the appointment of Scott M. Lidman, Elizabeth Nguyen, and Milan Moore of Lidman Law, APC, and Paul Haines of Haines Law Group, APC, as Class Counsel for settlement purposes;
4. Granting final approval of the Stipulation of Settlement (herein “Settlement”);
5. Approving an award of \$50,000.00 in attorneys’ fees to Class Counsel;
6. Approving an award of \$15,295.69 in costs to Class Counsel;
7. Approving an award of \$5,950.00 in costs to Phoenix Settlement Administrators for its settlement administration services;
8. Approving an incentive payment of \$5,000.00 to Plaintiff Angel Medina for his services as Class Representative;
9. Approving an award of \$7,500.00 to the Labor & Workforce Development Agency (“LWDA”); and
10. Entering final judgment in the form of the [Proposed] Order of Final Approval of Class Action Settlement and Final Judgment filed concurrently herewith.

This Motion is based on this notice of motion, the attached memorandum of points and authorities attached hereto, the declarations of Scott M. Lidman, Elizabeth Nguyen, Paul K. Haines, Milan Moore,

1 Plaintiff Angel Medina,¹ and Kevin Lee of Phoenix Settlement Administrators, and the exhibits attached
2 thereto, the pleadings and other papers filed in this action, and on any further oral or documentary
3 evidence or argument presented at the time of hearing.

4
5 Dated: March 23, 2023

Respectfully submitted,
LIDMAN LAW, APC

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7 By: 

Elizabeth Nguyen
Attorney for Plaintiff
ANGEL MEDINA

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28 ¹ The declaration of Plaintiff Angel Medina was originally filed with this Court on August 17, 2022 in connection with the Motion for Preliminary Approval. For the convenience of the Court, Plaintiff has re-filed his declaration with the instant Motion.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Angel Medina (“Plaintiff”) submits this memorandum of points and authorities in support
4 of his motion for final approval of the class action settlement (the “Settlement”) with Defendant National
5 Paving Company, Inc. (hereinafter “National Paving” or “Defendant”). The Settlement Class is defined
6 as: current and former non-exempt, hourly employees of Defendant National Paving Company, Inc. who
7 worked in California at any time from March 19, 2017 through December 8, 2022.

8 In this non-reversionary Settlement, the average settlement payment to each Settlement Class
9 Member is approximately \$275.99. This is a favorable resolution of the highly disputed wage and hour
10 claims in this case and the significant litigation risks that Plaintiff faced. Since this Court granted
11 preliminary approval on December 8, 2022, nothing has changed to impact the propriety, fairness,
12 adequacy and reasonableness of the Settlement. In addition, after receiving notice of the Settlement and
13 of their projected Settlement payments, no one has opted-out or submitted a written objection to the
14 Settlement.

15 As explained below, the Court should grant Plaintiff’s motion in its entirety because: (1) the Class
16 continues to meet the requirements for class certification for settlement purposes under Code of Civil
17 Procedure section 382; (2) the Settlement warrants final approval because it is a fair, adequate, and
18 reasonable compromise of the disputed claims in this case; and (3) the amounts requested for Class
19 Counsel’s attorneys’ fees and costs, Plaintiff’s Service Award, payment to the Labor Workforce
20 Development Agency (“LWDA”), and settlement administration costs are all fair, adequate, and
21 reasonable. For these reasons, Plaintiff respectfully requests that this Court enter the [Proposed] Order
22 of Final Approval of Class Action Settlement and Final Judgment submitted concurrently herewith.

23 **II. FACTUAL AND PROCEDURAL BACKGROUND**

24 On March 19, 2021, Plaintiff filed a putative class action complaint against Defendant in San
25 Bernardino County Superior Court. *See* Declaration of Elizabeth Nguyen (“Nguyen Decl.”), ¶ 10. On
26 March 19, 2021, Plaintiff sent a letter to the California Labor Workforce Development Agency
27 (“LWDA”) regarding Defendant’s alleged Labor Code violations and Plaintiff’s intent to bring a claim
28 for civil penalties under the Labor Code Private Attorneys General Act (“PAGA”). After exhausting his

1 administrative requirements under the PAGA, Plaintiff filed a First Amended Class and Representative
2 Action Complaint on May 24, 2021 adding one cause of action for civil penalties under the PAGA.
3 Plaintiff's operative complaint alleges that National Paving: (1) failed to pay all minimum wages owed;
4 (2) failed to pay all overtime wages owed; (3) failed to provide all legally required meal periods; (4)
5 failed to authorize and permit all legally required rest periods; (5) failure to reimburse necessary business
6 expenses; (6) failed to provide accurate, itemized wage statements; (7) failed to timely pay all wages
7 upon separation of employment; (8) engaged in unlawful business practices; and (9) is liable for civil
8 penalties under the PAGA. *Id.*

9 **A. Plaintiff's Claims**

10 As explained in detail in the Motion for Preliminary Approval, Plaintiff's primary theories of
11 liability are related to Defendant's alleged failure to pay for all time worked and failure to provide
12 Settlement Class Members all legally compliant duty-free meal and rest periods. Nguyen Decl., ¶¶ 11-
13 24. Plaintiff alleges that Defendant failed to compensate its non-exempt employees for all time worked
14 because Defendant would keep track of Plaintiff's time worked and would unlawfully round/shave time
15 worked such that Plaintiff would not be fully paid for all time worked. *Id.* at ¶ 11. This time-shaving
16 and/or rounding practice utilized by Defendant was not even-handed over time and would almost
17 exclusively round and shave in Defendant's favor such that Plaintiff was routinely underpaid for all his
18 time worked. *Id.* Additionally, during the relevant time period, Defendant had policies and practices of
19 having supervisors fill out employee timecards. As a result of Defendant's failure to properly track the
20 time worked by Plaintiff and other non-exempt employees, Defendant failed to pay Plaintiff and other
21 non-exempt employees for all minimum and overtime wages owed. *Id.*

22 Plaintiff alleges that he and Settlement Class Members were not provided with all legally-required
23 meal periods in compliance with California law due to Defendant's unlawful meal period
24 policies/practices. Nguyen Decl., ¶ 13. Due to Plaintiff's job duties, Plaintiff was often prevented from
25 taking meal periods that commenced before the end of the 5th hour of work and/or which were at least
26 30 minutes in length. Specifically, when using handwritten timesheets, Plaintiff and the other non-
27 exempt employees did not write down his start/stop time for lunch, and instead the foreman wrote down
28 the exact same time for every employee or most would simply put an arrow down. *Id.* As such, the

1 reliability and accuracy of the timesheets are questionable. *Id.*

2 Plaintiff alleges that he and other Settlement Class Members were not authorized and permitted
3 to take all required rest periods due to National Paving's rest period policies/practices which fail to
4 authorize and permit all rest periods for every four hours worked, *or major fraction thereof*. Nguyen
5 Decl., ¶ 15. Specifically, Plaintiff worked shifts in excess of 3.5 hours, but was not authorized or
6 permitted to take a ten-minute paid rest period for every four (4) hour period worked, *or major fraction*
7 *thereof* as a result of the work demands imposed by Defendant. *Id.* In addition, Defendant's policy and
8 practice required employees to remain on the work premises during rest periods, failing to relinquish all
9 control of employees and restricting their movement during required rest periods, and thereby failed to
10 authorize and permit off-duty rest periods. *Id.*

11 Plaintiff alleges that National Paving failed to reimburse them and Settlement Class members for
12 necessary business expenditures, including the maintenance of their uniform required for work activities,
13 as required under Labor Code section 2802. Nguyen Decl., ¶ 17. Plaintiff contends that National Paving
14 deducted from Plaintiff's wages towards to cost of cleaning and maintaining mandatory uniforms
15 between \$4 and \$75 per pay period per employee. *Id.*

16 As a result of the alleged unpaid wages and unpaid meal period and rest period premium wages
17 described above, Plaintiff alleges that Defendant issued inaccurate wage statements in violation of Labor
18 Code § 226, failed to pay all wages to Settlement Class Members upon their separation of employment,
19 and is thus liable for civil penalties under the Labor Code Private Attorney General Act ("PAGA").
20 Nguyen Decl., ¶¶ 19-24.

21 As explained *infra* and in Plaintiff's Motion for Preliminary Approval, Defendant denies
22 Plaintiff's claims and asserts several affirmative defenses, both on the merits and with respect to class
23 certification.

24 **B. Mediation and Settlement**

25 After agreeing to participate in early mediation, Defendant informally produced time records and
26 payroll data as well as its wage and hour policies and other relevant documents and information relevant
27 to the claims alleged in advance of mediation. Nguyen Decl., ¶ 26. Plaintiff conducted an analysis of
28 the payroll data and time records produced by Defendant. After the detailed review of the payroll and

1 time records and other documents and policies produced by Defendant, Class Counsel drew on their
2 extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.*

3 As discussed in the preliminary approval papers, on January 24, 2022, after extensive research and
4 analysis, including a detailed analysis of Defendant's potential exposure by Plaintiff, a full-day mediation
5 was held with Tripper Ortman, Esq., a well-respected wage and hour class action mediator. Nguyen Decl.,
6 ¶ 27. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of
7 certification of Plaintiff's claims, and the legal basis for the claims and defenses, as well as the legal basis
8 for the claims and defenses. *Id.* The Parties were unable to reach a settlement at mediation. *Id.* After
9 the Parties' unsuccessful mediation, National Paving produced information and records regarding its
10 financial condition. *Id.* As a result, Plaintiff's counsel retained a forensic accountant, Keith
11 Messerschmidt, to review and analyze the financial documents, who confirmed that National Paving's
12 representations regarding its financial condition and ability to pay issues were supported by the financial
13 documents. Ultimately, after months of settlement negotiations both with the mediator, the Parties agreed
14 in principle on a class-wide resolution. *Id.* Thereafter, in the weeks that followed, the Parties signed the
15 Stipulation of Settlement ("Settlement"). *Id.*

16 **C. Preliminary Approval of Settlement**

17 Plaintiff submitted the Stipulation of Settlement to the Court with his Motion for Preliminary
18 Approval on August 17, 2022. Nguyen Decl., ¶ 28. On December 8, 2022, the Court signed an Order
19 Granting Preliminary Approval of the Settlement. *Id.*; Exh. A.

20 Plaintiff submitted the Settlement and the Court's Order Granting Preliminary Approval of the
21 Settlement to the LWDA via the LWDA's website on August 17, 2022 and December 21, 2022,
22 respectively. *See* Nguyen Decl., ¶ 42; Exhs. D and E. Plaintiff will also provide the LWDA with a copy
23 of the instant motion for final approval and supporting documents after the instant motion is filed and
24 will file a supplemental proof of service prior to the hearing. Nguyen Decl., ¶ 42.

25 On January 11, 2023, the Settlement Administrator mailed the Court-approved Notice Packet
26 (which consists of the Notice of Pendency of Class Action and Proposed Settlement and Notice of
27 Individual Settlement Award) in English and Spanish to the 231 Settlement Class Members, who had
28 until March 13, 2023 to submit disputes, objections, and/or requests for exclusion. *See* Declaration of

Kevin Lee of Phoenix Settlement Administrators (“Lee Decl.”), ¶ 8. As of the date of this filing, there have been **no objections**, **no disputes**, and **no opt-outs** received. *Id.* at ¶¶ 13-15. Plaintiff now respectfully submits the Settlement for this Court’s final approval.

III. SUMMARY OF THE SETTLEMENT AND NOTICE PROCESS

A. Settlement Class Definition

After the preliminary approval was granted, the Settlement Administrator advised the total number of workweeks worked is 7,987, confirming the escalator clause was not triggered. Lee Decl., ¶ 19. As a result, the Class Period closed on December 8, 2022 (the date on which the Court granted preliminary approval). Therefore, the Settlement Class is defined as: all current and former non-exempt, hourly employees of Defendant National Paving Company, Inc. who worked in California at any time from March 19, 2017 through December 8, 2022. Nguyen Decl., ¶ 28.

B. Monetary Terms of the Settlement

The Settlement provides for Defendant to pay a Gross Settlement Amount of One Hundred Fifty Thousand Dollars and Zero Cents (\$150,000.00). Lee Decl., ¶ 16. The Net Settlement Amount is the amount remaining from the Gross Settlement Amount after deducting requested attorneys’ fees (\$50,000.00) and verified costs (\$15,295.69), proposed Class Representative Service Award to Plaintiff (\$5,000.00), Settlement Administration costs (\$5,950.00), and PAGA payment (\$10,000.00). *Id.* Based on these requested amounts, the Net Settlement Amount is calculated to be approximately **\$63,754.31**. *Id.*

The Net Settlement Amount, shall be allocated to Settlement Class Members who worked during the Class Period, as follows: each participating Settlement Class Member shall receive a proportionate settlement share based upon the number of workweeks worked during the Class Period, the numerator of which is the Settlement Class Member’s total workweeks worked during the Class Period, and the denominator of which is the total workweeks worked by all Settlement Class Members who worked during the Class Period. *See* Settlement, ¶ 5.B.i.

In addition, Two Thousand Five Hundred Dollars and Zero Cents (\$2,500.00) of the Gross Settlement Amount has been designated as the “PAGA Amount” as described above. Each PAGA Employee shall receive a portion of the PAGA Amount proportionate to the number of workweeks that

1 he or she worked during the PAGA Period, which will be calculated by multiplying the PAGA Amount
2 by a fraction, the numerator of which is the PAGA Employee's number of workweeks worked during this
3 time period, and the denominator of which is the total number of workweeks worked by all PAGA
4 Employees. *See* Settlement, ¶ 5.B.ii.

5 For purposes of calculating applicable taxes and withholdings, each Settlement Award shall be
6 allocated as follows: 80% as penalties and interest; and 20% as wages. Settlement, ¶ 6.D.

7 Defendant will pay the employer's share of payroll taxes separately from, and in addition to, the
8 Gross Settlement Amount. *See* Lee Decl., ¶ 18. Defendant agrees to deposit the employer's share of
9 payroll taxes with Phoenix Settlement Administrators by the date on which the fourth and final installment
10 payment is due.

11 **C. Summary of Notice Process**

12 ***1. Mailing of Notice Packets***

13 On December 28, 2022, Defendant provided Phoenix with data files containing the names, last
14 known addresses, phone numbers, social security numbers, the dates of employment during the Class
15 Period, the number of workweeks worked by each Settlement Class member while employed during the
16 Class Period, and the number of workweeks worked by each PAGA Employee during the PAGA Period.
17 Lee Decl., ¶ 4. After performing address updates and verifications, Phoenix mailed the Notice Packet to
18 the 231 Settlement Class Members on January 11, 2023 in English and Spanish. *Id.* at ¶ 8. Following
19 the initial mailing, 11 Notice Packets was returned to Phoenix by the Post Office. *Id.* at ¶ 9. After
20 Phoenix performed a Skip Trace, 8 Notice Packets were re-mailed. *Id.* As of the date of filing this final
21 approval motion, 3 Notice Packets remain undeliverable because no forwarding address was provided
22 and/or no new address could be located through Skip Trace. *Id.*

23 The deadline for Settlement Class Members to submit objections, requests for exclusion, or
24 disputes was March 13, 2023. Lee Decl., ¶ 8. As of the date of this filing, there were no objections, no
25 disputes, and no opt-outs. *Id.* at ¶¶ 13-15. Accordingly, as of the date of this Motion, the participation
26 rate amongst the Settlement Class Members is 100% and the average estimated payment is \$275.99, with
27 the highest estimated payment to a Settlement Class Member being \$2,386.70, the lowest estimated
28 payment to a Settlement Class Member being \$7.98, and the median amount being is \$79.82. *Id.* at ¶¶

13-19.

D. Timing of Payments

the Gross Settlement Amount shall be deposited by Defendant into a qualified settlement fund set up by the Settlement Administrator for the benefit of the participating Settlement Class members, in four (4) equal installments of \$37,500.00, with the first payment due within ten (10) calendar days of the date the Court enters the Final Approval Order/Judgment followed by three more payments of \$37,500 each starting six months after Final Approval Order/Judgment is entered and every six months thereafter until the Gross Settlement Amount is fully funded. Settlement ¶ 4.B.

After disbursement, Settlement Class Members will have 180 days to cash their checks. See Settlement ¶ 5.E. Funds remaining unclaimed will be distributed to the California State Controller's Office – Unclaimed Property Fund in the name of the Settlement Class Member. *Id.*; Nguyen Decl., ¶30.

E. Notice of Judgment

As stated on the Notice of Pendency to Class Action and Proposed Settlement mailed to class members, the final judgment entered by the Court and any changes to the Final Approval hearing date or location will be posted on the Settlement Administrator's website at www.phoenixclassaction.com/national-paving. See Lee Decl., ¶6, Exh A.

IV. ARGUMENT

A. This Court Should Confirm its Conditional Certification of the Class for Settlement Purposes Because It Meets All of the Requirements for Class Certification Under Code of Civil Procedure § 382

Under Code of Civil Procedure section 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest, and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the class' claims; and (4) the representative will fairly and adequately represent the class' interests. See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

Here, this Court found that the Class meets all the requirements for class certification for settlement purposes when it granted preliminary approval of the Settlement on December 8, 2022. See Nguyen Decl., ¶ 28; Exh. A. After the Court entered an order granting preliminary approval, no events

1 have occurred to cast doubt on the propriety of this determination. In fact, the reaction of the Settlement
2 Class Members thus far to the Settlement has been strongly in support of the Settlement. No Settlement
3 Class Members have objected to any portion of the Settlement and no Settlement Class Member has
4 elected to opt-out of the Settlement. *See* Lee Decl., ¶¶ 13-15. This Court should therefore confirm its
5 conditional certification of the Settlement Class.

6 **B. This Court Should Finally Approve the Settlement Because it is a Fair, Adequate, and**
7 **Reasonable Compromise of Disputed Wage and Hour Claims**

8 California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v. Superior*
9 *Court*, 62 Cal.App.3d 231, 236 (1976). Unlike individual settlements, class action settlements involve a
10 court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu*
11 *Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-79 (1980). This approval
12 process consists of preliminary settlement approval, notice being given to class members, and a final
13 fairness and approval hearing being held, at which class members have the opportunity to be heard with
14 respect to the settlement. *Id.* Now that notice has been provided to the Settlement Class, Plaintiff
15 respectfully requests that the Court finally approve the Settlement as fair, adequate, and reasonable.

16 ***1. The Settlement was Reached at Arm's Length, Through Experienced Counsel and***
17 ***An Experienced Mediator, and Was Based on Sufficient Information to Intelligently***
18 ***Negotiate a Fair Settlement in Light of the Claims Asserted and Risks of Continued***
19 ***Litigation***

20 A settlement is presumptively fair where it is reached through arm's length bargaining, based on
21 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
22 experienced in similar litigation, and the percentage of objectors to the settlement is small. *Dunk v. Ford*
23 *Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996). In deciding whether to approve a proposed settlement, a
24 trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the
25 case. *Mallick v. Superior Court*, 89 Cal.App.3d 434 (1979). In exercising these powers, the overriding
26 concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk, supra*, 48
27 Cal.App.4th at 1801 (internal quotations omitted). Relevant factors for the Court to consider include, but
28 are not limited:

[T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of
further litigation, the risk of maintaining class action status through trial, the amount
offered in settlement, the extent of discovery completed and the stage of the

proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive and, as such, trial courts should tailor the factors to each case. *Id.* “In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001). Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because, “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Id.* (quoting *Air Lines Stewards, etc., Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)).

Here, the Settlement resulted from extensive arm’s length settlement negotiations between qualified and experienced counsel, with the assistance of a well-respected mediator, and is fair, adequate, and reasonable for all Settlement Class Members. While Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges that his position includes substantial risks and uncertainty, which justifies a downward departure from the maximum exposure that Plaintiff’s calculated each claim carried.

As detailed in Plaintiff’s Preliminary Approval Motion, there is significant risk of non-certification and/or not prevailing on the merits with respect to each of Plaintiff’s claims. For example, with respect to Plaintiff’s unlawful rounding claims, National Paving contends that it compensated Settlement Class members for all of their time worked, that its rounding practices were lawful, and any unpaid time was *de minimis* and therefore non-compensable. Nguyen Decl., ¶ 12. National Paving further asserts that Plaintiff would be unable to certify a rounding class given the individualized inquiries that would be required, and also that National Paving rounding mechanism was, according to it, allegedly facially neutral. Further, National Paving contends that Plaintiff’s assessment of the claim at the overtime rate is incorrect. *Id.*

As for Plaintiff’s meal period claims, National Paving counters that it has always provided non-exempt employees with an opportunity to take legally compliant meal periods, and any non-compliant meal periods reflected in employee timekeeping records were solely the result of employee choice, rather than any policy or practice of National Paving. Nguyen Decl., ¶ 14. National Paving also points out that under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, it is only required to “provide”

1 the opportunity to take meal periods, not “ensure” meal periods are taken, and that they have always done
2 so. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting “ensure” standard). Finally, National Paving contends
3 Plaintiff’s meal period claim is not suited for class certification and individual inquiries would be required
4 to assess which employees took non-compliant meal periods, how many meal periods were non-compliant
5 or missed, and the reasons why a particular employee took a non-compliant meal period or missed a meal
6 period during a particular shift. *Id.*

7 As for Plaintiff’s rest period claims, National Paving contends it has always maintained and
8 enforced lawful rest period policies and practices, and that Settlement Class Members were authorized
9 and permitted to take all off-duty rest periods in compliance with California law. Nguyen Decl., ¶ 16.
10 National Paving argues that Plaintiff’s rest period claims are inherently unsuited for class treatment as it
11 requires an individualized inquiry into whether each Settlement Class member was in fact authorized and
12 permitted to take a compliant rest period, which would devolve into an unmanageable series of mini-trials.
13 *Id.*

14 As for Plaintiff’s unreimbursed expenses claim, National Paving contends that any purportedly
15 necessary expenses incurred by employees were minimal. Nguyen Decl., ¶ 18. National Paving also
16 argues that this claim is not suitable for class treatment, it maintained a lawful expense reimbursement
17 policy, Plaintiff did not submit a request to be reimbursed, and individualized determinations would be
18 required as to how often each employee cleaned their uniform and how much the cleaning costs. *Id.*

19 As for Plaintiff’s claim for wage statement penalties, National Paving argues that meal and rest
20 period claims cannot support a claim for wage statement penalties after. National Paving further argues
21 that its alleged wage statement violations could not be shown to be “knowing and intentional,” and that
22 Plaintiff cannot show that he or any other employee “suffer[ed] injury” as a result of the alleged wage
23 statement violations, as required by Lab. Code § 226(e) for imposition of penalties. Nguyen Decl., ¶ 20.

24 As for Plaintiff’s claim for waiting time penalties, National Paving asserts it has strong defenses
25 to the waiting time claim because there exist good-faith disputes as to Plaintiff’s underlying claims,
26 precluding imposition of penalties. Nguyen Decl., ¶ 22. *See also* 8 Cal. Code Regs. § 13520 (a “good
27 faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy*
28 *Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that “good faith dispute” over whether employee was

1 exempt precluded imposition of waiting time penalties over contested wages owed). *Id.*

2 Lastly, since Plaintiff's PAGA claim is a derivative claim based on the underlying claims,
3 National Paving argues that Plaintiff's PAGA claim will fail for the same reasons that his underlying
4 claims will fail. Nguyen Decl., ¶ 24. National Paving also maintains that, given its good faith defenses,
5 this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find
6 Green Set liable for any of Plaintiff's claims. *Id.*

7 These considerations, not only bore heavily on the negotiations leading to the Settlement, but also
8 confirm that the Settlement is fair, adequate, and reasonable compromise in view of the risks of further
9 litigation. Nguyen Decl., ¶ 25. As detailed in the Preliminary Approval Motion, Plaintiff carefully vetted
10 the claims at issue and conducted a detailed liability analysis of class-wide data to calculate the damages
11 figures. Thus, while these risks are far from exhaustive, they demonstrate that the Settlement is fair,
12 adequate, and reasonable in view of them.

13 **2. The Settlement Fairly, Reasonably, and Adequately Compensates Class**
14 **Members Because Each Participating Class Member Will Be Paid Based on the**
Extent of His or Her Injury

15 Individual settlement payments will be calculated based on the number of workweeks worked by
16 each Settlement Class Member during the Class Period. *See* Settlement, ¶ 5.B. This method of
17 distribution compensates Settlement Class Members based on the estimated extent of their injuries, as
18 Settlement Class Members who worked more workweeks, would have been subject to more of the alleged
19 wage and hour violations than those who worked fewer weeks. Thus, the formula for compensating
20 Settlement Class Members is fair, adequate, and reasonable, as it is tethered to the damages and penalties
21 that could be recovered by them.

22 **3. The 100% Participation Rate and Absence of Any Objections Further Confirms**
That the Settlement is Fair, Adequate, and Reasonable

23 Class members' response to a settlement is relevant in evaluating whether it merits final approval.
24 *Dunk, supra*, 48 Cal.App.4th at 1801. The lack of objections and requests for exclusion supports a
25 fairness presumption. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
26 Cal.App.4th 1135, 1152-53 (finding 9 objections and 80 opt-outs from a class of 5,454 showed a
27 "particularly impressive" favorable response from class members). Here, as of the filing of this Motion,
28 not a single Settlement Class Member has objected to the Settlement and no Settlement Class Member

1 have elected to opt-out of the Settlement. In addition, only 3 of the 231 Notice Packets were returned
2 undeliverable. Lee Decl., ¶¶ 8-12. The extremely favorable response of the Settlement Class further
3 confirms that the Settlement is fair, adequate, and reasonable.

4 **C. The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the Common**
5 **Fund Confirmed by a Lodestar Cross-Check**

6 Plaintiff and the Settlement Class, as the prevailing parties in settlement, are entitled to recover
7 their attorneys' fees and costs for their wage claims. See Lab. Code §§ 218.5, 226(e) and 2699(g). A fee
8 award is justified where the legal action has produced its benefits by way of a voluntary settlement. See,
9 e.g., *Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Community for Independent Living,*
10 *Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983). When a settlement results in a common fund for the benefit
11 of a class, class counsel may be awarded fees as a percentage of the common fund. See *Wershba, supra*,
12 91 Cal.App.4th at 254 (recognizing the "percentage of recovery" method).

13 Plaintiff has provided written approval of the split of attorneys' fees in this action. Nguyen Decl.,
14 ¶ 40.

15 The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506
16 (2016), that "[t]he percentage of fund method survives in California class action cases." Specifically, the
17 *Laffitte* Court held:

18 The recognized advantages of the percentage method—including relative ease of
19 calculation, alignment of incentives between counsel and the class, a better
20 approximation of market conditions in a contingency case, and the encouragement it
21 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
22 litigation—convince us the percentage method is a valuable tool that should not be denied
23 our trial courts.

24 *Id.* at 503 (internal citation omitted); see also, e.g., *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) ("when a
25 number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or
26 plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs
27 may be awarded attorney's fees out of the fund."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in
28 awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its
equitable power to prevent the other parties' unjust enrichment.); *Rawlings v. Prudential-Bache*
Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating

1 attorneys' fees more accurately reflects the results achieved for the putative class than the lodestar method
2 and "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery;
3 and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid Corp. Securities*
4 *Litigation*, 396 F.3d 294, 300 (3rd Cir. 2005) ("The percentage-of-recovery method is generally favored
5 in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards
6 counsel for success and penalizes it for failure.") (citation omitted).

7 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with tools
8 such as the "lodestar cross-check," whereby the trial court calculates class counsel's lodestar (hours
9 worked multiplied by hourly rate) and determines whether the "lodestar multiplier" needed to bring the
10 lodestar on par with the percentage of recovery is reasonable. *Laffitte* at 503-06. While a trial court may
11 utilize the lodestar cross-check, it need not do so. *Id.* at 506 ("[w]e hold further that trial courts have
12 discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the
13 discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a
14 requested percentage fee.")

15 Here, Class Counsel's fee request of \$50,000.00 (one-third of the Gross Settlement Amount) is
16 fair and reasonable based on a percentage of the recovery confirmed with a lodestar cross-check. First,
17 "regardless of whether the percentage method or the lodestar method is used, fee awards in class actions
18 average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, n.11 (2008);
19 *see also, e.g., Cicero v. DirectTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486 at * 7 (C.D. Cal. July 27,
20 2010) (observing that "30-50% [is] commonly awarded in cases in which the common fund is relatively
21 small" and that in California, "courts usually award attorneys' fees in the 30-40% range in wage and hour
22 class actions..."); *Williams v. Costco Wholesale Corp.*, No. 02-cv-2003 IEG (AJB), 2010 WL 2721452
23 at * 6 (S.D. Cal. July 7, 2010) (collecting cases where courts awarded between 33.33% and 40% in
24 attorneys' fees in wage and hour class actions). This is also consistent with Class Counsel's experience
25 in similar wage and hour class action matters. *See* Nguyen Decl., ¶ 29. Thus, the percentage sought by
26 Class Counsel here (the same percentage sought by class counsel in *Laffitte*) is reasonable.

27 Next, as stated, under the lodestar method the court computes the "lodestar" amount by
28 multiplying the number of hours reasonably expended by each attorney or legal staff member by their

reasonable hourly rates. *See, e.g., Serrano v. Priest* 20 Cal.3d 25, 48 (1977). The court then enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49; *Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001) (“There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation”).

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition for L. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557 (2009). In doing so, “the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market for such services.” *Id.* at 556; *see also Laffitte*, 1 Cal.5th at 503-05.

In this case, Class Counsel have a lodestar of **\$156,752.50** which is 3.14 times more than the \$50,000.00 fee request. *See* Nguyen Decl., ¶ 36. A general summary showing the number of hours of work performed by each attorney and paralegals is set forth below. The billing rates used are reasonable especially in light of the hourly rates identified based on years of experience in the *Laffey* Matrix, submitted concurrently herewith. Nguyen Decl., ¶ 37, Exh. C. Based on the *Laffey* Matrix, the hourly rate for a 25th year attorney is \$997, the hourly rate for a 16th and 17th year attorney is \$829, and the hourly rate for a 7th year attorney is \$508. *Id.*

Name	Rate	Hours	Pre-Multiplier Lodestar
Scott M. Lidman (25th Year Attorney)	\$750	41.1	\$30,825
Elizabeth Nguyen (17th Year Attorney)	\$650	98.7	\$64,155
Paul K. Haines (16th Year Attorney)	\$675	17.4	\$11,745

Milan Moore (7th Year Attorney)	\$450	102.5	\$46,125
Paralegals	\$175	22.3	\$3,902.50
Total Lodestar			\$156,752.50

The fee award requested here is justified because Class Counsel achieved a significant monetary recovery for the Settlement Class in an uncertain and risky case, while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys' fees).

First, Class Counsel negotiated a substantial recovery for the Settlement Class, resulting in a current participation rate of 100%, and not a single Settlement Class Member has objected to the Settlement or to Class Counsel's requested fees as of the date of this filing. *See* Lee Decl., ¶¶ 13-15. Additionally, the *average* settlement payment in this case of approximately \$275.99 is in line with, and above, settlement payments in similar wage and hour class action settlements. *See, e.g., Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. 2008) (wage and hour class action settlement approved where average class member recovery was approximately \$60); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *18 (E.D. Cal. 2012) (finding that average payment to class members of less than \$200 was a "good" result); *Williams v. Centerplate, Inc.*, Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428, at *4 (S.D. Cal. 2013) (granting final approval of class action settlement where average recovery for each class member was approximately \$108). The fact that Class Counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of the results achieved.

As discussed above, this case presented significant risk as to both class certification and merits considerations. Accordingly, it is fair and reasonable to account for these risks in compensating Class Counsel. Class Counsel should also be compensated for the risks involved in undertaking this litigation and expending considerable effort, all while working on a pure contingency basis. Since undertaking representation of Plaintiff, Class Counsel have borne all the costs of litigation without receiving any

1 compensation for over one year. Nguyen Decl., ¶ 33. During this time, Class Counsel have expended a
2 total of \$14,730.69 in actual costs and have devoted substantial time to this litigation and expect to incur
3 approximately \$565.00 in future costs for filing the instant motion, filing the final declaration regarding
4 distribution of settlement, service and messenger fees, postage fees, and/or court costs for future court
5 appearances.² Nguyen Decl., ¶ 33; Exh. B. Class Counsel’s efforts have included conducting pre-filing
6 investigation, analyzing Plaintiff’s claims, conducting legal research, reviewing Defendant’s documents
7 and policies, analyzing Settlement Class Members’ timekeeping data and payroll records, preparing for
8 and attending mediation, reviewing National Paving’s financials, negotiating and revising the long-form
9 Settlement, preparing this Motion, and otherwise litigating the case. *See* Nguyen Decl., ¶ 32. Moreover,
10 Class Counsel have expended time, effort, and money that they could have expended on less risky cases
11 instead. Given the considerable potential for adverse outcomes in this case, including, but not limited to
12 losing on class certification and/or merits issues, the contingent risk borne by Class Counsel was great.
13 Nguyen Decl., ¶¶ 30-33.

14 Class Counsel’s previous experience in litigating wage and hour class actions also supports the
15 reasonableness of the fee request. Class Counsel are well-versed in plaintiff and defense-side wage and
16 hour class action litigation, with substantial experience litigating claims for meal and rest period
17 violations, and related penalties. *See* Nguyen Decl., ¶¶ 3-8; Declaration of Scott M. Lidman (“Lidman
18 Decl.”), ¶¶ 3-8; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 3-8. They have been certified as class
19 counsel in numerous other cases. *Id.* Their experience in similar matters was integral in evaluating the
20 strengths and weaknesses of the case against Defendants and the reasonableness of the Settlement. *See*
21 Nguyen Decl., ¶ 32. Practice in the narrow field of wage and hour litigation requires skill and knowledge
22 concerning the rapidly evolving substantive state and federal law, as well as the procedural law of class
23 action litigation. *Id.* Because it is reasonable to compensate Class Counsel commensurate with their
24 skill, reputation, and experience, a fee award of one-third of the Gross Settlement Amount is reasonable.

25 Other factors also show that the fee amount requested in this case is reasonable under the
26 circumstances. This case involved nuanced legal issues including questions surrounding Defendant’s
27

28 ² This includes total costs incurred by both law firms.

1 requirement to “provide” meal periods and “authorize and permit” rest periods, and the propriety of
2 statutory penalties, to name just a few. Nguyen Decl., ¶¶ 11-24. Thus, Class Counsel’s requested fee
3 award is fair, reasonable, and adequate and should be approved.

4 **D. The Requested Cost Amount Warrants Final Approval as Fair, Adequate, and**
5 **Reasonable**

6 Class Counsel seek to be reimbursed a total of \$15,295.69³ in litigation costs. Class Counsel’s
7 request is fair, adequate, and reasonable, as all of these costs are documented and reasonably incurred.
8 See Nguyen Decl., ¶ 33; Exh. B. Moreover, the costs Plaintiff seeks are the types of costs routinely
9 approved by courts. See, e.g., *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover
10 “those out-of-pocket expenses that would normally be charged to a fee paying client”); *Ashker v. Sayre*,
11 No. 05-03759 CW, 2011 WL 825713, at * 3 (N.D. Cal. 2011)(“costs of reproducing pleadings, motions
12 and exhibits are typically billed by attorneys to their fee-paying clients” and are reimbursable); *Trustees*
13 *of Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59
14 (9th Cir. 2006) (legal research costs are reimbursable); *In re Immune Response Securities Litigation*, 497
15 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, legal
16 research, copies, postage, filing fees, messenger and overnight delivery costs are reimbursable). Because
17 the expense reimbursements requested by Class Counsel were reasonably incurred, and no Settlement
18 Class Member has objected to them, Plaintiff respectfully requests the Court should grant the request for
19 actual costs incurred.

20 **E. The Court Should Finally Approve the Requested Administration Costs**

21 Plaintiff also requests that the Court approve \$5,950.00 in administration costs to the Settlement
22 Administrator, Phoenix. As detailed in the declaration of Kevin Lee on Behalf of Phoenix submitted
23 herewith, Phoenix performed duties in connection with this Settlement that were integral in effectuating
24 the Settlement and the Notice process. Among other things, Phoenix calculated each Settlement Class
25 Member’s individual settlement payment, updated addresses contained in the class data supplied by
26 Defendant, formatted Notice Packets for mailing, mailed Notice Packets to all 231 Settlement Class
27 Members in English and Spanish, kept the parties informed of any objections or requests for exclusion,

28 ³ Class Counsel have expended a total of \$14,730.69 in actual costs and anticipates incurring costs in the amount
of \$565.00 for filing fees, service and messenger fees, and/or postage fees..

1 and have otherwise administered the Settlement. *See* Lee Decl., ¶¶ 2-20. For these reasons, Phoenix’s
2 requested costs are fair, reasonable, and adequate, and should be finally approved.

3 **F. Plaintiff’s Requested Service Award Is Fair, Adequate, and Reasonable in View of**
4 **Plaintiff’s Efforts and the Risks that He Assumed on Behalf of the Class**

5 Courts routinely approve service payments to compensate named plaintiffs for the services they
6 provide and the risks they incur during class action litigation. *See, e.g., Bell v. Farmers Ins. Exchange*,
7 115 Cal.App.4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for their efforts in
8 bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
9 \$50,000 service payment). In analyzing the requested service payment, courts consider the following
10 factors: the risk, both financial and otherwise, the class representative faced in bringing the suit; the
11 notoriety and personal difficulties encountered by the class representative; the actions the plaintiff has
12 taken to protect the interests of the class, the degree to which the class has benefitted from those actions,
13 and the amount of time and effort the plaintiff expended in pursuing the litigation. *See Golba v. Dick’s*
14 *Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1272; *Clark v. Am. Residential Servs. LLC* (2009) 175
15 Cal.App.4th 785, 804.

16 Here, analyzing those factors weigh in favor of approving Plaintiff’s requested service award of
17 \$5,000.00 because request is reasonable given Plaintiff’s efforts in this case and the risks he undertook
18 on behalf of Settlement Class Members. Nguyen Decl., ¶ 41; Declaration of Angel Medina (“Medina
19 Decl.”), ¶¶ 6-11. Plaintiff gathered documents for use in the lawsuit, and worked with Class Counsel on
20 the case, including preparing for mediation and discussing the case, the merits, the defenses, and
21 settlement. *See* Nguyen Decl., ¶ 41; Medina Decl., ¶¶ 6-10. The class has benefited from Plaintiff’s
22 actions as the average settlement amount is \$275.99.

23 Further, Plaintiff understood that the lawsuit is a matter of public record and being part of the
24 lawsuit could stigmatize him and/or affect future employment. Medina Decl., ¶ 8. Plaintiff also
25 understood the risk that he could be liable for Defendant’s costs if he lost the case. *Id.* at ¶ 7. Plaintiff
26 accepted these risks and burdens because he wanted Defendants to compensate their current and former
27 employees for unpaid wages. *Id.* at ¶¶ 7-8. Plaintiff estimates he spent between 8-10 hours on activities
28 related to this case. *Id.* at ¶ 10.

Moreover, Plaintiff has agreed to release, in addition to the released claims included within the

1 Settlement, all claims, whether known or unknown, under federal, state, or local law against Defendants
2 and the Released Parties. Plaintiff's release includes unknown claims, and that he is, as a result, waiving
3 all rights and benefits afforded by Section 1542 of the California Civil Code. *See* Settlement ¶ 3.E.

4 Moreover, after receiving notice of the proposed Class Representative Service Award for Plaintiff,
5 no Settlement Class Member has objected to the proposed award, as of the date of this filing. *See* Lee
6 Decl., ¶ 15. Thus, the service award to Plaintiff is appropriate and justified as part of the Settlement and
7 should be finally approved.

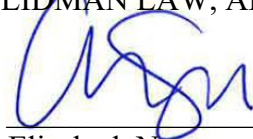
8 **V. CONCLUSION**

9 For the reasons stated herein, Plaintiff respectfully submits that this Court should grant Plaintiff's
10 motion in its entirety and adopt the [Proposed] Order of Final Approval of Class Action Settlement and
11 Final Judgment submitted herewith.

12
13 Dated: March 23, 2023

Respectfully submitted,
LIDMAN LAW, APC

14
15 By:



Elizabeth Nguyen
Attorney for Plaintiff
ANGEL MEDINA