

HAINES LAW GROUP, APC

Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Fletcher W. Schmidt (SBN 286462)
fschmidt@haineslawgroup.com
Andrew J. Rowbotham (SBN 301367)
arowbotham@haineslawgroup.com
2155 Campus Drive, Suite 180
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355
Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

KETEMA NELSON, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

SANTINI FOODS, INC., a Texas
corporation; and DOES 1 through 100,

Defendants.

CASE NO. RG21090890

*[Case assigned for all purposes to the Hon.
Evelio Grillo, Dept. 21]*

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

Date: March 23, 2022

Time: 10:00 a.m.

Dept.: 21

Action Filed: March 4, 2021

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on March 23, 2022, at 10:00 a.m. in Department 21 of the above-entitled Court, located at 1221 Oak Street, Oakland, California 94612, Plaintiff Ketema Nelson (“Plaintiff”), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

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

Settlement Class – All current and former non-exempt employees of Defendant Santini Foods, Inc. (“Defendant”) in California who worked at any time between October 15, 2018, and February 5, 2022 (the “Class Period”), and who did not sign a separation agreement during the Class Period.

3. Preliminary appointment of Plaintiff Ketema Nelson as Class Representative;
4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, and Andrew J. Rowbotham of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award amounts for the Class Representative Enhancement Payment, Settlement Administrator costs, the Private Attorneys General Act (“PAGA”) payment to the Labor and Workforce Development Agency, as well as attorneys’ fees and costs to Class Counsel;
6. Appointment of ILYM Group, Inc. as the third-party Settlement Administrator for mailing notices; and
7. Approval of the Class Notice and entry of the Proposed Order instructing the Class 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,
3 Ketema Nelson, Sean Hartranft of ILYM Group, Inc., the exhibits attached thereto, the pleadings
4 and other papers filed in this action, and on any further oral or documentary evidence or argument
5 presented at the time of hearing.

6
7 Dated: February 24, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

8 By:



9 Fletcher W. Schmidt
10 Attorneys for Plaintiff
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TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. DISCOVERY AND MEDIATION	5
III. THE PROPOSED SETTLEMENT.....	5
A. ESSENTIAL TERMS OF THE SETTLEMENT	5
1. The Settlement Provides for Reasonable Monetary Payments	6
2. Attorneys’ Fees, Costs, and Representative Enhancement Payment.....	7
IV. ARGUMENT.....	9
A. PRELIMINARY APPROVAL IS WARRANTED	9
1. Standard for Preliminary Approval.....	9
a. The Strength of Plaintiff’s Case.....	10
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	10
c. Risk of Maintaining Class Action Status	11
d. Amount Offered in Settlement Given Realistic Value of Claims.....	11
e. The Experience and Views of Counsel	15
2. The Preliminary Approval Standard is Met.....	15
a. The Settlement is Within the Range of Possible Approval.....	15
b. The Settlement Resulted from Serious, Informed, and Non-Collusive Negotiations	16
c. The Settlement is Devoid of Obvious Deficiencies	16
B. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS	16
1. The Proposed Class is Ascertainable and Numerous.....	16
2. Common Issues of Law and Fact Predominate.....	17
3. The Claims of the Named Plaintiff Are Typical.....	17
4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the Class.....	18
C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED CLASS NOTICE.....	18

1	D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	19
2	V. CONCLUSION	19

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLES OF AUTHORITIES

Federal Cases

<i>Eisen v. Carlisle and Jacquelin</i> 417 U.S. 156 (1974).....	18
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9th Cir. 1998)	9
<i>In re Pacific Enterprises Securities Litigation</i> 47 F.3d 373 (9th Cir. 1995)	15
<i>In re Syncor ERISA Litigation</i> 516 F.3d 1095 (9th Cir. 2008)	9

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157	13
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> (1987) 191 Cal.App.3d 1341	17
<i>Bradley v. Networkers Int'l, LLC</i> (2012) 211 Cal.App.4th 1129	17
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	3, 4, 17
<i>Capitol People First v. Department of Developmental Services</i> (2007) 155 Cal.App.4th 676	18
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal.App.5th 504	5
<i>Faulkinbury v. Boyd & Assoc., Inc.</i> (2013) 216 Cal.App.4th 220	17
<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal.App.4th 1380	7
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	9, 15, 16
<i>Laffitte v. Robert Half Int'l Inc.</i> (2016) 1 Cal.5th 480	8
<i>Ling v. P.F. Chang's China Bistro, Inc.</i> (2016) 245 Cal.App.4th 1242	4, 12

1	<i>McGhee v. Bank of America</i>	
2	(1976) 60 Cal.App.3d 442	18
3	<i>Mendoza v. Nordstrom, Inc.</i>	
4	(2017) 2 Cal.5th 1074	3
5	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
6	(2019) 40 Cal.App.5th 444, 4	12
7	<i>Price v. Starbucks Corp.</i>	
8	(2011) 192 Cal.App.4th 1136	4-5
9	<i>Reed v. United Teachers Los Angeles</i>	
10	(2012) 208 Cal.App.4th 322	9
11	<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
12	(2004) 34 Cal.4th 319	17
13	<i>Sevidal v. Target Corp.</i>	
14	(2010) 189 Cal.App.4th 905	17
15	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
16	(2012) 203 Cal.App.4th 1112	5, 14
17	<i>Wershba v. Apple Computer, Inc.</i>	
18	(2001) 91 Cal.App.4th 224	8, 10
19	<u>State Statues and Rules</u>	
20	8 Cal. Code Regs. § 13520.....	4
21	Cal. Code Civ. Proc. § 382	16
22	Labor Code § 2699(e)(2)	14
23	Labor Code § 2699(f)(2).....	13
24	Labor Code § 551.....	3
25	Labor Code § 552.....	3
26	<u>Unpublished Cases</u>	
27	<i>Altamirano v. Shaw Industries, Inc</i>	
28	(N.D. Cal. 2015) 2015 WL 4512372	14
29	<i>Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.</i>	
30	No. 05cv1199–IEG–CAB	
31	2009 WL 2448430 (S.D. Cal. 2009), 13	
32	<i>Bercea v. AE Retail West</i>	
33	Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012)	15

1	<i>Fleming v. Covidien Inc.</i>	
2	(C.D. Cal., Aug. 12, 2011) 2011 WL 7563047.....	5, 14
3	<i>Green v. Lawrence Service Co.</i>	
4	(C.D. Cal. 2013) 2013 WL 3907506.....	14
5	<i>Jones v. Spherion Staffing LLC</i>	
6	(C.D. Cal., Aug. 7, 2012) 2012 WL 3264081.....	12
7	<i>Ressler v. Federated Department Stores, Inc.</i>	
8	Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009)	15
9	<i>Trang v. Turbine Engine Components Technologies Corp.</i>	
10	No. CV 12–07658 DDP (RZx)	
11	2012 WL 6618854 (C.D. Cal. Dec. 19, 2012)	13
12	<u>Other Sources</u>	
13	4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013)	15
14	4 Newberg on Class Actions § 14.6 (4th Ed. 2013).....	8
15	Manual for Complex Litigation § 30.41(3rd Ed. 1995).....	15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Ketema Nelson (“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:

6 **Settlement Class** – All current and former non-exempt employees of
7 Defendant Santini Foods, Inc. (“Defendant”) in California who worked at any
8 time between October 15, 2018², and February 5, 2022 (the “Class Period”),
and who did not sign a separation agreement during the Class Period.³

9 Based upon the data received from Defendant, there are approximately 515 potential
10 Settlement Class members who worked during the Class Period. The \$440,000.00 Maximum
11 Settlement Amount (“MSA”) represents a substantial benefit to Settlement Class members, who
12 will only be agreeing to a release of claims that were actually pled in the Lawsuit, or which could
13 have been pled based on the operative facts alleged in the Lawsuit. After deductions for Plaintiff’s
14 Enhancement Payment, settlement administrator costs, the Private Attorneys General Act
15 (“PAGA”) payment to the Labor & Workforce Development Agency (“LWDA”), and attorneys’
16 fees and costs to Class Counsel, the remaining amount (the “Net Settlement Amount”) of
17 approximately \$227,033.33 will be distributed to Settlement Class members. Employer-side
18

19
20 ¹ The Stipulation of Settlement (“Settlement Agreement”) and the proposed Notice Packet (which is
21 comprised of the Notice of Class Action Settlement (“Class Notice”) and Notice of Settlement Award
22 (“Dispute Form”)) are attached as Exhibits 1 and 2, respectively, to the Declaration of Fletcher W.
Schmidt filed concurrently herewith.

23 ² Defendant previously settled a similar wage and hour class action titled, *Catalina Hernandez, et al. v.*
24 *Santini Foods, Inc.*, Alameda County Superior Court Case No. RG17878049 (final approval granted on
25 February 21, 2020). Schmidt Decl., ¶ 20. The release in the *Hernandez* lawsuit encompasses alleged
violations between October 6, 2013, and October 14, 2018. *Id.* The Class Period in this Settlement
therefore begins on October 15, 2018. *Id.*

26 ³ The Settlement also includes a release of PAGA civil penalties for individuals who were employed by
27 Defendant in California at any time between March 4, 2020, and February 5, 2022 (the “PAGA Period”).
28 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 Plaintiff’s pre-
filing LWDA letter), or which could have been alleged based on the factual allegations therein, that arose
during the PAGA Period. *Id.* § 2.B.

1 payroll taxes on amounts paid as wages will be paid separate and apart from, and in addition to,
2 the Maximum Settlement Amount. Significantly, Settlement Class members do not need to file a
3 claim form in order to receive an Individual Settlement Payment, and all Settlement Class
4 members who do not opt-out will automatically receive Individual Settlement Payments which
5 average approximately \$440.84 on a per capita basis.⁴

6 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping
7 and payroll records for 10% of the employees who worked during the Class Period. Defendant
8 also produced policies, handbooks, and other relevant documents and information necessary for
9 a classwide damages analysis. After extensive legal research and evaluation along with a
10 comprehensive review of the data, the Parties participated in a mediation session with the Francis
11 “Tripper” Ortman, Esq. on December 7, 2021. The Parties debated their respective legal theories
12 and, with the help of Mr. Ortman at mediation, an agreement was reached at the conclusion of
13 mediation. Over the following month, the Parties confirmed their agreement and executed the
14 classwide Settlement Agreement. This proposed Settlement is well within the range of possible
15 approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and
16 costs of further litigation, and the tangible monetary benefits to the Settlement Class. Plaintiff
17 therefore respectfully requests that this Court grant preliminary approval of the Settlement.⁵

18 **II. SUMMARY OF THE LITIGATION**

19 Defendant is a California based manufacturer and importer of various milks, syrups,
20 juices, and sauces. Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶ 8. Plaintiff, like all
21 other Settlement Class members, was an employee of Defendant and worked in California during
22 the Class Period. *Id.*

23 Plaintiff alleges that Defendant regularly required employees to work 7-day workweeks
24

25 ⁴ 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 worked (as opposed to time employed) to
27 calculate Individual Settlement Payments. Settlement, § 4.B.

28 ⁵ 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 without at least one day's rest in each workweek. *See* Labor Code §§ 551-552 (“Every person
2 employed in any occupation of labor is entitled to one day's rest therefrom in seven. No employer
3 of labor shall cause his employees to work more than six days in seven.”); *see also Mendoza v.*
4 *Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1083 (interpreting the day of rest statutes to apply on a
5 per workweek basis rather than a rolling seven-day basis). Defendant argues that it does not
6 require employees to work 7-day workweeks. Schmidt Decl., ¶ 10. Instead, employees are
7 permitted to work extra shifts during the workweek if they so choose. *Mendoza, supra*, 2 Cal.5th
8 at 1091 (“An employer may not encourage its employees to forgo rest or conceal the entitlement
9 to rest, but is not liable simply because an employee chooses to work a seventh day.”) Defendant
10 further contends that these alleged violations do not include a penalty provision, limiting Plaintiff
11 solely to civil penalties under PAGA for any proven violations. Schmidt Decl., ¶ 10.

12 Plaintiff alleges that Defendant failed to provide timely 30-minute first meal periods
13 (commencing before the end of the fifth hour of work).⁶ *See Brinker Restaurant Corp. v. Superior*
14 *Court* (2012) 53 Cal.4th 1004, 1049 (holding that the applicable wage orders and the California
15 Labor Code require employers to provide a first meal period before the end of the fifth hour of
16 work”). Specifically, Plaintiff and other employees were often required to delay their meal periods
17 such that they were not provided until work was less busy, other employees came back from their
18 breaks, or urgent pallets were unloaded. Schmidt Decl., ¶ 11. Defendant contends that it has
19 always provided employees with legally compliant first meal periods and that any meal periods
20 that did not meet that standard were solely the result of employee choice (not Defendant’s
21

22 ⁶ Plaintiff’s complaint also asserts that Defendant miscalculated the regular rate of pay for overtime
23 purposes by failing to include the value of certain bonuses in the regular rate, and that Defendant failed to
24 provide second meal periods and third rest periods to employees who worked shifts in excess of 10.0 hours.
25 Schmidt Decl., ¶ 18. Prior to mediation, Defendant produced information to corroborate the wholly
26 discretionary nature of Defendant’s bonuses. *Id.* Plaintiff reviewed this information and ultimately
27 determined it was unlikely he would be able to prove these bonuses were non-discretionary in nature. *Id.*
28 Plaintiff therefore placed a nominal value on this claim at mediation. *Id.*

26 Additionally, after interviewing Plaintiff and reviewing the putative class member timesheets produced in
27 furtherance of mediation, Plaintiff determined that putative class members generally worked shifts under
28 10.0 hours during the Class Period. Schmidt Decl., ¶ 18. Defendant also produced numerous meal period
waivers signed by putative class members. *Id.* These facts led Plaintiff to conclude that the second meal
period and third rest period claim were not viable on a classwide basis. *Id.*

1 policy/practice). *Id.*, ¶ 12. Defendant further argues that under *Brinker* it is only required to
2 “provide” the opportunity to take meal periods, not “ensure” meal periods are taken – which
3 Defendant contends it has always done. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting “ensure”
4 standard). Finally, Defendant contends that Plaintiff’s meal period claim is not suited for class
5 certification as individual inquiries would be required to assess which employees received non-
6 compliant meal periods, how many meal periods were non-compliant, and the reasons why a
7 particular individual recorded a non-compliant meal period on a particular shift, particularly so in
8 light of Plaintiff’s challenges to the validity of the timekeeping records. *Id.*

9 As a result of these alleged substantive violations, Plaintiff contends that Defendant is
10 liable for derivate wage statement violations, waiting time liability for its failure to pay employees
11 all final wages upon separation of employment, and civil penalties under PAGA. Schmidt Decl.,
12 ¶ 13. Defendant argues that the alleged wage statement violations were not “knowing and
13 intentional,” and that Plaintiff could not show he “suffer[ed] injury,” as required by Labor Code
14 § 226(e) for imposition of penalties. *Id.*, ¶ 16. Defendant contends that any alleged failure to pay
15 meal period premiums cannot support a derivative claim for wage statement or waiting time
16 penalties. *See Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474, *review*
17 *granted Jan. 2, 2020* (S258966); *see also Ling v. P.F. Chang’s China Bistro, Inc.* (2016) 245
18 Cal.App.4th 1242, 1261 (meal and rest period premium pay compensates for the non-provision
19 of meal and rest periods, not for the ‘nonpayment of wages’ as required by Labor Code § 203).
20 Defendant further contends that, even if meal period violations could support waiting time
21 penalties, Defendant possesses strong, good faith defense to Plaintiff’s underlying claims,
22 precluding recovery of waiting time penalties (which are only available for the “willful” failure
23 to pay wages). *See* 8 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages are due
24 will preclude imposition of waiting time penalties under Section 203...A good-faith dispute that
25 any wages are due occurs when an employer presents a defense, based in law or fact which, if
26 successful, would preclude any recovery on the part of the employee.”)

27 Since Plaintiff’s PAGA claim is derivative of the underlying claims, Defendant asserts
28 that the PAGA claim will fail with those claims. *See Price v. Starbucks Corp.* (2011) 192

Cal.App.4th 1136, 1147 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”) Defendant also maintains that given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff’s claims. *See Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming \$5.00 initial violation rate for PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000).

A. DISCOVERY AND MEDIATION

In connection with mediation, Defendant provided Plaintiff with timekeeping and payroll records for 10% of the employees who worked during the Class Period Schmidt Decl., ¶ 21. Plaintiff then conducted an analysis of this data and created a comprehensive damages model to calculate the likely exposure that Defendant faced on each claim for the entire Class Period. *Id.*

On December 7, 2021, the Parties participated in a mediation with Francis “Tripper” Ortman, a respected wage and hour class action mediator in California. Schmidt Decl., ¶ 22. During mediation, the Parties exchanged divergent views on Defendant’s 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. Ortman, 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, Defendant will pay a Maximum Settlement Amount of \$440,000.00. 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.

Defendant will deposit the entire Maximum Settlement Amount within 65 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:	\$440,000.00
Minus Court-approved attorneys' fees (1/3 of MSA):	\$146,666.67
Minus Court-approved attorneys' costs (up to):	\$20,000.00
Minus Court-approved enhancement payment:	\$5,000.00
Minus Court-approved administration costs (up to):	\$11,300.00
Minus PAGA payment to the LWDA:	\$30,000.00
Net Settlement Amount:	\$227,033.33

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for court-approved attorneys' fees and costs, Plaintiff's Enhancement Payment, costs of settlement administration, and the PAGA payment to the LWDA, the Settlement requires Defendant to pay a Net Settlement Amount of approximately \$227,033.33 to Settlement Class members. See Settlement, § 3.C. Employer-side payroll taxes on amounts paid as wages will be paid separate and apart from, and in addition to, the Maximum Settlement Amount. *Id.*, § 3.G.

The Settlement creates separate subclasses for individuals who have standing to pursue wage statement violations, waiting time penalties, and PAGA civil penalties, because these penalties would only be recoverable by a subset of the overall Settlement Class (waiting time penalties are only recoverable by former employees whose employment ended within the three years preceding the filing of the Complaint; wage statement penalties are only recoverable by employees who worked within 1 year of the filing of the Complaint; PAGA penalties are only recoverable by employees who worked within 1 year of the submission of Plaintiff's LWDA notice). See Settlement, § 4.B These subclasses designate a specific percentage of the Net Settlement Amount to be distributed to subclass members as compensation for those claims. *Id.* The Parties agreed upon the subclass apportionments based on the potential exposure the claims represented at mediation.

Defendant's records as of the date of mediation indicate that there are approximately 515 potential Settlement Class members who worked during the Class Period. Schmidt Decl., ¶ 23. Based on the records provided for mediation purposes, there are approximately 18,042

workweeks worked as of November 2021. *Id.* Based on the proposed allocations of the Net Settlement Amount, Settlement Class members will receive average payments of approximately \$440.84. *Id.* The highest potential Individual Settlement Payment that a Settlement Class member could receive is estimated to be approximately \$2,176.96 (if the Settlement Class member worked every pay period during the Class Period). *Id.*

Settlement Class members will have 60 calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, § 9.D. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant that were asserted, or could have been asserted based on the operative facts in the Lawsuit for the period of April 23, 2015, to the date of preliminary approval. *Id.*, § 2.A.⁷

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

Plaintiff will apply for an enhancement payment in the total amount of \$5,000.00 for his service to the Settlement Class and his general release of all claims (known or unknown) against Defendant. *See* Settlement §§ 2.C, 6. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s Enhancement Payment is intended to recognize the significant benefits conferred upon the Settlement Class due to the time and effort that Plaintiff expended on their behalf, including providing factual information and documents to his attorneys, identifying potential witnesses who also worked under the same compensation system and experienced the same alleged Labor Code violations, and participating in meetings with his attorneys to discuss the claims and theories at issue in the litigation. Schmidt Decl., ¶ 24. Plaintiff’s Enhancement Payment is also requested due to the significant risks that Plaintiff undertook by agreeing to serve as the named plaintiff in this case, as well as the fact that

⁷ The Parties propose that any uncashed settlement checks shall be distributed to the cy pres, Legal Aid at Work (EIN 94-2783401), a 501(c)(3) organization dedicated to providing legal services to the indigent population in and around Alameda County. *See* Settlement, ¶ 4.E.

1 Plaintiff agreed to a general release of all claims subject to a waiver of California Civil Code
2 § 1542. Settlement, § 2.C. Should the Court grant preliminary approval of this Settlement,
3 Plaintiff will seek this enhancement payment at the time of seeking final approval of the
4 Settlement.

5 Class Counsel will also apply for an attorneys' fee award of \$146,666.67 (one-third of the
6 Maximum Settlement Amount) and up to \$20,000.00 in verified costs. *See* Settlement, §§ 3.C.4,
7 5. Plaintiff submits that the requested fee is fair compensation for the undertaking of complex,
8 risky, expensive, and time-consuming litigation on a purely contingent fee. Class Counsel
9 incurred substantial attorneys' fees conducting the pre-filing investigation, analyzing Plaintiff's
10 claims, conducting legal research and analysis into those claims, reviewing data and documents
11 produced by Defendant, building a comprehensive damages model, preparing for and attending
12 mediation, negotiating and preparing the long-form Settlement Agreement, preparing this motion
13 for preliminary approval, and otherwise litigating the case. Schmidt Decl., ¶ 25. Class Counsel
14 will also expend future attorney time in attending the hearing on this Motion, overseeing the
15 Notice process and fielding questions from Settlement Class members, drafting the Final
16 Approval Motion along with supporting documents, and attending the final approval hearing,
17 among other tasks. *Id.*

18 Both California and federal courts have recognized that an appropriate method for
19 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
20 as a result of the settlement. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ("the
21 percentage of fund method survives in California class action cases..."); *Wershba v. Apple*
22 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the "percentage of recovery"
23 and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees in the range
24 of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions*
25 § 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable percentage of
26 a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a
27 common fund in order to assure that the fees do not consume a disproportionate part of the
28 recovery obtained for the class, although somewhat larger percentages are not unprecedented.")

1 Class Counsel submits that the request for attorneys’ fees is reasonable when viewed as
2 an overall percentage of the Maximum Settlement Amount (one-third) and in light of the
3 substantial risks presented against the merits of the case. Schmidt Decl., ¶¶ 9-19. The
4 reasonableness of the fee request is also supported by the significant work undertaken by Class
5 Counsel, the significant result obtained for the Settlement Class members, and the efficiency by
6 which the litigation was conducted. *Id.* Should the Court grant preliminary approval of this
7 Settlement, Class Counsel will seek an award of attorneys’ fees and verified litigation costs at the
8 time of seeking final approval of the Settlement.

9 **IV. ARGUMENT**

10 **A. PRELIMINARY APPROVAL IS WARRANTED**

11 California Rule of Court 3.769 conditions the settlement of a class action on court
12 approval. This approval is generally evaluated under the federal standards applicable under Rule
13 23 of the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
14 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the
15 settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir.
16 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine “whether
17 a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the
18 preferred means of dispute resolution, particularly in complex class action litigation. *See In re*
19 *Syncor ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a
20 proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not
21 the product of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150
22 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was
23 negotiated at arm’s length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168
24 Cal.App.4th 116, 130.

25 **1. Standard for Preliminary Approval**

26 To make a fairness determination, the Court should consider several factors, including
27 “the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further
28 litigation, the risk of maintaining class action status through trial, the amount offered in

1 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
2 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
3 “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of
4 factors depending on the circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245.
5 As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the
6 overall balance of factors in this case.

7 **a. The Strength of Plaintiff’s Case**

8 Class Counsel carefully vetted the claims at issue, reviewed timekeeping and payroll
9 records for a sizable number of employees and conducted a detailed analysis of that data to create
10 a comprehensive damages model for Defendant’s classwide liability. *See* Schmidt Decl., ¶ 21.
11 Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges
12 that there were substantial risks and uncertainty in proceeding with class certification and trial.
13 As explained in detail in Section II.B., *supra*, Defendant presented numerous defenses to
14 Plaintiff’s claims, both on the merits and with respect to class certification. Although Plaintiff
15 was prepared to litigate these claims through class certification and trial, given the amount offered
16 in the Settlement, Plaintiff predicted that it was unlikely that further litigation would result in a
17 more beneficial result for the Settlement Class members.

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

19 Although the Parties engaged in extensive informal discovery prior to mediation, the
20 Parties had not yet commenced formal written or deposition discovery at the time the Parties
21 executed the proposed Settlement Agreement. *See* Schmidt Decl., ¶ 21. Absent the Settlement,
22 the Parties would need to expend substantial time and resources to complete formal discovery and
23 prepare this case for class certification and trial. This Settlement avoids the considerable
24 attorneys’ fees and costs associated with conducting formal discovery, moving for class
25 certification, filing for summary judgment or adjudication, and ultimately, participating in trial.
26 The Settlement also limits the risks and the accompanying burden of continued litigation on the
27 Court.
28

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

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

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

7 This proposed Settlement provides a fair and reasonable monetary recovery for the
8 Settlement Class members notwithstanding the disputed claims. After analyzing the data provided
9 by Defendant prior to mediation, Plaintiff prepared a classwide exposure model and forecasted
10 the expected recovery for each claim as follows:

11 **Meal Period Violations: \$192,106**

12 Plaintiff alleges that Defendant failed to provide full, 30-minute first meal periods
13 commencing before the end of the fifth hour of work. *See* Schmidt Decl., ¶ 11. Plaintiff's analysis
14 of the pre-mediation production revealed 71.8% of the shifts in excess of 6.0 hours reflected either
15 a meal period that was less than 30-minutes (59.2% of shifts) or a meal period that commenced
16 after the fifth hour of work (39.4% of shifts). *Id.* Plaintiff extrapolated these figures based on 5.8
17 shifts per average workweek which led to 93,653 first meal period violations (22,489 workweeks
18 x 5.8 shifts x .718). *Id.* Plaintiff further determined the average rate of pay for employees during
19 the Class Period at \$16.41. *Id.* Combining these figures, Plaintiff calculated Defendant's meal
20 period exposure as follows: \$1,536,846 (93,653 first meal period violations x \$16.41 average
21 meal premium). *Id.*

22 Defendant contends Plaintiff's meal period claim is not suited for class certification, since
23 individual inquiries would be required to assess which employees were provided non-compliant
24 meal periods and the reasons why a particular employee recorded a non-compliant meal period
25 on a particular shift. Schmidt Decl. ¶ 12. Defendant also produced a copy of its "Missed or Late
26 Rest Break and/or Meal Period Form" which was available for employees to submit in instances
27 that they were not able to take a meal period. *Id.* Given these potential defenses, Plaintiff
28 discounted Defendant's maximum exposure by 75% for the risk of non-certification and 50% for

1 the risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$192,106. *Id.*
2 ¶ 11.

3 **Wage Statement Violations: \$164,000**

4 According to the data produced by Defendant, there were 13,707 wage statements issued
5 to approximately 328 employees during the time period applicable to wage statement penalties (1
6 year prior to the filing of the complaint to the present). Schmidt Decl., ¶ 14. Defendant's potential
7 exposure for wage statement penalties, cognizant of the \$4,000 per employee cap designated in
8 Labor Code § 226(e)(1), is therefore \$1,312,000 (328 employees x \$4,000 maximum penalty). *Id.*

9 Defendant argues that Plaintiff's meal period claims cannot support derivative wage
10 statement penalties. *See Naranjo, supra*, 40 Cal.App.5th at 474; *see also Jones v. Spherion*
11 *Staffing LLC* (C.D. Cal., Aug. 7, 2012) 2012 WL 3264081, at *8-9 (granting motion for judgment
12 on the pleadings because plaintiffs "cannot advance a claim for noncompliant wage statements or
13 failure to pay wages due upon termination based solely on alleged violations of section
14 226.7.") Defendant also argues that employees could not show that they "suffer[ed] injury," as
15 required by Labor Code § 226(e). Schmidt Decl., ¶ 16. Plaintiff accordingly discounted
16 Defendant's potential liability by 75% for a risk of non-certification, and by an additional 50%
17 for the risk of losing on the merits or failing to prove violations were 'knowing and intentional,'
18 for a projected total of \$164,000. *Id.*, ¶ 14.

19 **Waiting Time Penalties: \$103,383**

20 There are approximately 210 employees who separated their employment with Defendant
21 during the time period applicable to waiting time penalties (3 years prior to the filing of the
22 complaint to the present). Schmidt Decl., ¶ 15. Defendant's potential exposure for waiting time
23 penalties is therefore \$827,064 (210 former employees x 16.41 average hourly rate x 8 hours per
24 workday x 30 days of waiting time penalty). *Id.*

25 Defendant maintains that waiting time penalties are not appropriate to the extent they are
26 derivative of meal period claims as these claims cannot support such penalties. *See Naranjo,*
27 *supra*, 40 Cal.App.5th at 474; *see also Ling, supra*, 245 Cal.App.4th at 1261. Defendant also
28 argues it attempted to pay its employees all wages owed in good faith upon their separation,

1 therefore precluding a finding of wilfulness necessary to obtain waiting time penalties under 8
2 Cal. Code Regs. § 13520. Plaintiff accordingly discounted Defendant’s potential liability by 75%
3 for a risk of non-certification, and by an additional 50% for the risk of losing on the merits or
4 failing to establish wilfulness, for a projected total of \$103,383. *Id.*, ¶ 15.

5 **PAGA Penalties: \$68,535**

6 The success of Plaintiff’s PAGA claim is wholly dependent upon the success of his
7 underlying claims occurring during the time period applicable to PAGA penalties (1 year prior to
8 the submission of the LWDA letter to the present). Schmidt Decl., ¶ 17. According to the data
9 produced by Defendant, there are approximately 328 aggrieved employees and 13,707 applicable
10 pay periods. *Id.*, ¶ 14.

11 Labor Code § 2699(f)(2) provides for PAGA civil penalties in the amount of \$100 for
12 each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved
13 employee per pay period for each subsequent violation. *See* Labor Code § 2699(f)(2). However,
14 courts have interpreted Section 2699(f)(2) to only impose the \$200 subsequent penalty after an
15 employer has been notified that its conduct violates the Labor Code. *See, e.g., Amaral v. Cintas*
16 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate applies until
17 employer is notified that it is violating a Labor Code provision); *Trang v. Turbine Engine*
18 *Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854, at *5 (C.D.
19 Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for
20 subsequent violations unless and until a court or commissioner notifies the employer that it is in
21 violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw*
22 *Transit Services, Inc.*, No. 05cv1199–IEG–CAB, 2009 WL 2448430, at *9 (S.D. Cal.
23 2009) (finding that California law imposes the “subsequent violation penalty” only after an
24 employer has been notified its conduct violates the Labor Code).

25 As partial support for the PAGA claim, Plaintiff contends that Defendant required
26 employees to work 7-day workweeks in violation of Labor Code §§ 551 and 552. *See* Schmidt
27 Decl. ¶ 9. Plaintiff’s analysis of the timekeeping records reveals that approximately 23.4% of the
28 sampled workweeks were 7-day workweeks. *Id.* Extrapolating this figure out for all workweeks

1 worked in the relevant time period results in approximately 5,262 violations (22,489 workweeks
2 x 0.234). *Id.* Assuming that Plaintiff could prove at least one substantive violation in each
3 applicable pay period due to the 7-day workweek violations and frequent meal period violations,
4 Defendant’s potential exposure for PAGA civil penalties is \$1,370,700 (13,707 pay periods x
5 \$100.00 “initial” violation rate). *Id.*

6 However, these penalties derived from the underlying wage and hour violations discussed
7 above, which Defendant disputes. *See e.g., Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013
8 WL 3907506, *5, n.5 (explaining that a PAGA claim’s success was determined by the merits of
9 its underlying claims). Plaintiff also recognizes that the Court has discretion to reduce any award
10 of PAGA penalties if it views them as duplicative. *See* Labor Code § 2699(e)(2); *Thurman, supra*,
11 203 Cal.App.4th at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK (OPx), 2011
12 WL 7563047, *4 (C.D. Cal. Aug. 12, 2011). Plaintiff accordingly discounted Defendant’s
13 potential liability by 50% for the risk of manageability issues preventing the case from proceeding
14 on a representative basis, and by an additional 90% to account for the potential for this Court to
15 reduce the civil penalties, for a projected total of \$68,535. *Id.*, ¶ 9.

16 Taking Defendant’s defenses into account and using the reduced figures for each of the
17 claims described above, Plaintiff predicts that a realistic classwide recovery would be
18 approximately \$528,024. Schmidt Decl. ¶ 19. This Settlement provides a recovery to the
19 Settlement Class of \$440,000, which is approximately 83.33% of Plaintiff’s projected potential
20 recovery, while avoiding the further expense and serious risk of proceeding towards class
21 certification and trial. *Id.* Considering the risk of non-certification and failure to prevail on the
22 merits, as well as the Court’s power to reduce the civil penalties, the proposed Settlement falls
23 well within the realm of being fair, reasonable, and adequate. *See e.g., Altamirano v. Shaw*
24 *Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and
25 hour class action settlement, stating, “[a]lthough 15% represents a modest fraction of the
26 hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to
27 grant preliminary approval given the merits of Plaintiff’s claims.”) Preliminary approval is
28 appropriate since the Settlement will provide tangible monetary relief to Settlement Class

members without the uncertainty, delay, and additional expense of further litigation.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions from both the plaintiff and defense side. *See* Schmidt Decl., ¶¶ 2-6; Declaration of Paul K. Haines (“Haines Decl.”), ¶ 2-9; and Declaration of Andrew J. Rowbotham (“Rowbotham Decl.”), ¶¶ 2-7. Plaintiff’s counsel has been appointed as class counsel in numerous cases alleging similar claims. *Id.* Plaintiff’s counsel conducted an extensive review of Defendant’s records produced for mediation and drew on their extensive experience in similar cases to assess the strengths and weaknesses of this case. *See* Schmidt Decl., ¶ 21. The Settlement was reached with the input and assistance of Tripper Ortman, an experienced wage and hour class action mediator. *Id.*, ¶ 22. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard is Met

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

a. The Settlement is Within the Range of Possible Approval

The proposed Settlement will provide substantial compensation for contested claims and derivative penalties, and the overall average payment of \$440.84 exceeds averages achieved in other wage and hour class action settlements.⁸ The proposed Settlement falls within the range of

⁸ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately \$105); *see also Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90).

possible approval and Plaintiff requests that this Court approve the Class Notice to be mailed to Settlement Class members. The Court will again have the opportunity to assess the reasonableness of the Settlement after the Settlement Class members have had the opportunity to opt-out or object to it.

b. The Settlement Resulted from Serious, Informed, and Non-Collusive Negotiations

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

c. The Settlement is Devoid of Obvious Deficiencies

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

B. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

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

1. The Proposed Class is Ascertainable and Numerous

A class is "ascertainable" where the members "may be readily identified without

unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). The proposed Settlement Class is defined as all current and former non-exempt employees of Defendant in California who worked at any time during the Class Period, and who did not sign a separation agreement during the Class Period. According to Defendant’s records, the Settlement Class consists of approximately 515 individuals, rendering it impracticable to gather all the Settlement Class members and bring them before the Court. *See Schmidt Decl.*, ¶ 23. The proposed Settlement Class therefore satisfies the numerosity requirement.

2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not on the merits of the case, but rather on what types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Plaintiff’s claims are predicated on Defendant’s alleged 7-day workweek policy/practice and failure to provide all meal periods. 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); *Bradley v. Networkers Int’l, LLC* (2012) 211 Cal.App.4th 1129, 1150 (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 Defendant in California during the Class Period. *See Declaration of Ketema Nelson* (“Nelson Decl.”), ¶ 2. Plaintiff worked 7-day workweeks and was not provided all meal periods. *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 classwide defenses forwarded by Defendant. Plaintiff is

1 therefore typical of the Settlement Class.

2 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
3 **Class**

4 The adequacy of representation requirement examines conflicts of interest between named
5 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
6 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Plaintiff and Class Counsel will
7 adequately represent the Settlement Class members, as there are no conflicts between Plaintiff
8 and the Settlement Class he seeks to represent. Plaintiff possesses claims that are in line with
9 those of the Settlement Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450
10 (finding adequacy satisfied where there was no indication that the plaintiff's counsel were not
11 qualified and the named plaintiff had no interests antagonistic to those of the proposed class).
12 Class Counsel also has extensive experience in wage and hour class action litigation. *See Schmidt*
13 *Decl.*, ¶¶ 2-6; *Haines Decl.*, ¶¶ 2-9; *Rowbotham Decl.*, ¶¶ 2-7.

14 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED**
15 **CLASS NOTICE**

16 This Court should order distribution of the proposed Class Notice to the Settlement Class
17 members by first class mail, postage prepaid, using the last known mailing address information
18 provided by Defendant. This manner of giving notice is the "best notice practicable" under the
19 circumstances because it provides "individual notice to all members who can be identified through
20 reasonable effort." *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Plaintiff
21 proposes that the Settlement be administered by ILYM Group, Inc., an experienced class action
22 settlement administrator. *See Declaration of Sean Hartranft* and attached exhibits. Settlement
23 Class members' addresses will be ascertainable through Defendant's personnel and payroll
24 records, which Defendant will provide to ILYM within 10 business days after preliminary
25 approval of the Settlement. *See Settlement*, § 9.A. To the extent that any notices are returned,
26 ILYM will run those addresses through the National Change of Address database and/or conduct
27 skip traces to obtain current address information. *Id.*, § 9.B. The content of the Class Notice
28 satisfies California Rule of Court 3.766(d) because it advises proposed Settlement Class members
of the nature of the claims, the basic contentions and denials of the Parties, the key terms of the
Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the procedure

1 by which to do so; it also explains the recovery formula and includes the expected Individual
2 Settlement Payment for each Settlement Class member. The Class Notice also advises Settlement
3 Class members that they will be bound by the terms of the Settlement if they do not request
4 exclusion, advises them of the final approval hearing date, provides the contact information for
5 Class Counsel, and advises that they may enter an appearance through their own counsel if they
6 wish. *See* Schmidt Decl., Exhibit 2 (Notice Packet). This manner of giving notice satisfies
7 California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching
8 Settlement Class members.

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

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

13 **V. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
15 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
16 Proposed Order submitted concurrently herewith.

17 Dated: February 24, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

18
19 By:



Fletcher W. Schmidt
Attorneys for Plaintiff