

HAINES LAW GROUP, APC
Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Sean M. Blakely (SBN 264384)
sblakely@haineslawgroup.com
Jaime Castaneda (SBN 344833)
jcastaneda@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 SAN BERNARDINO

EPIGMENIO RIVAS HERRERA, as an
individual and on behalf of all others similarly
situated,

Plaintiff,

vs.

O. W. LEE CO. INC., a California corporation;
and DOES 1 through 100,

Defendants.

Case No. CIVSB 2109747

*[Assigned for all purposes to Hon. David S.
Cohn; Dept. S-26]*

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

Date: December 23, 2022
Time: 9:00 a.m.
Dept.: S-26

Complaint Filed: April 8, 2021
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on December 23, 2022 at 9:00 a.m. in Department S-26 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Epigmenio Rivas Herrera ("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 class settlement of this lawsuit;
2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

All of Defendant O.W. Lee Co. Inc.'s ("O.W. Lee") current and former non-exempt employees who performed work for O.W. Lee in California at any time from October 12, 2016 to March 1, 2021 ("Class Period"), and who did not previously sign a severance agreement with O.W. Lee.

3. Preliminary appointment of Plaintiff Epigmenio Rivas Herrera as Class Representative;
4. Preliminary appointment 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 permit an enhancement award to Plaintiff, civil penalties payable to the LWDA, Settlement Administrator costs, and attorneys' fees and costs to Class counsel;
6. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator for mailing notices;
7. An order granting Plaintiff's unopposed request to file a Second Amended Class and Representative Action Complaint adding a cause of action for waiting time penalties pursuant to Labor Code §§ 201-203 and certain factual allegations; and
8. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

///

///

///

1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the declaration of Paul K. Haines and exhibits attached thereto, the declaration of
3 Jodey Lawrence of Phoenix Settlement Administrators and exhibits attached thereto, the
4 declaration of Plaintiff Epigmenio Rivas Herrera, the Settlement Agreement, and on any further
5 oral or documentary evidence or argument presented at the time of hearing.

6
7 Respectfully submitted,

8 Dated: December 1, 2022

HAINES LAW GROUP, APC

9
10 By:



11 Paul K. Haines
12 Attorneys for Plaintiff
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. THE PARTIES AND BRIEF PROCEDURAL HISTORY	2
B. PLAINTIFF’S CLAIMS AND O.W. LEE’S DEFENSES	3
1. Meal Period Claims.....	3
2. Rest Period Claims.....	4
3. Unpaid Wages Due to Rounding	4
4. Derivative Waiting Time, Wage Statement, and PAGA Penalties	5
C. DISCOVERY AND MEDIATION.....	6
III. THE PROPOSED SETTLEMENT.....	7
A. ESSENTIAL TERMS OF THE SETTLEMENT	7
1. The Settlement Provides for Reasonable Monetary Payments	7
2. Attorneys’ Fees and Costs, Enhancement Award, and LWDA Payment	8
IV. ARGUMENT.....	10
A. PRELIMINARY APPROVAL IS WARRANTED	10
1. Standard for Preliminary Approval.....	11
a. The Strength of Plaintiff’s Case	11
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	11
c. Risk of Maintaining Class Action Status	12
d. Amount Offered in Settlement Given Realistic Value of Claims	12
e. The Experience and Views of Counsel	17
2. The Preliminary Approval Standard Is Met.....	18
a. The Settlement Is Within the Range of Possible Approval.....	18
b. The Settlement Resulted from Serious, Informed Negotiations	18
c. The Settlement Is Devoid of Obvious Deficiencies	18
B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.....	19
1. The Proposed Class Is Ascertainable and Numerous	19

2. Common Issues of Law and Fact Predominate.....	19
3. The Claims of the Named Plaintiff Are Typical.....	20
4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the Class	20
C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE	20
D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	21
V. CONCLUSION	22

TABLE OF AUTHORITIES

Federal Cases

<i>Eisen v. Carlisle & Jacquelin</i> 417 U.S. 156 (1974).....	20
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	10, 11
<i>In re Pac. Enter. Sec. Litig.</i> , 47 F.3d 373 (9th Cir. 1995).....	17
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008)	10
<i>Patel v. Nike Retail Svcs., Inc.</i> , 58 F.Supp.3d 1032 (N.D. Cal. 2014).....	16

State Cases

<i>AHMC Healthcare, Inc. v. Superior Court</i> , 24 Cal.App.5th 1014 (2018).....	5
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008)	16
<i>Augustus v. ABM Sec. Svcs., Inc.</i> , 5 Cal.5th 257 (2016)	4
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> 191 Cal.App.3d 1341 (1987)	20
<i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013).....	19
<i>Bowles v. Sup. Ct.</i> , 44 Cal.2d 574 (1955)	19
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal.4th 1004 (2012)	3
<i>Capital People First v. State Dept. of Developmental Svcs.</i> , 155 Cal.App.4th 676 (2007)	20
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018).....	6
<i>Chindarah v. Pick Up Stix, Inc.</i> , 171 Cal.App.4th 796 (2009)	12
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	11
<i>Ferra v. Loews Hollywood Hotel, LLC</i> , 40 Cal.App.5th 1239 (2019)	5
<i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....	9
<i>Kao v. Joy Holiday</i> , 12 Cal.App.5th 947 (2017)	5
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....	11, 18
<i>Laffitte v. Robert Half Int’l, Inc.</i> , 1 Cal.5th 480 (2016).....	9
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018)	5
<i>Price v. Starbucks Corp.</i> , 192 Cal.App.4th 1136 (2011).....	6
<i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4th 322 (2012).....	10

<i>Sav-On Drug Store, Inc. v. Superior Court (Rocher)</i> 34 Cal.4th 319 (2004).....	19
<i>See’s Candy Shops, Inc. v. Superior Court</i> , 210 Cal.App.4th 889 (2012).....	4
<i>Sevidal v. Target Corp.</i> 189 Cal.App.4th 905 (2010).....	19
<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> , 203 Cal.App.4th 1112 (2012).....	6, 17
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th at 245 (2001).....	11

State Statutes and Rules

Cal. Civ. Proc. § 382.....	19
8 Cal. Code Regs. § 13520.....	5
Lab. Code § 1194.2.....	15
Lab. Code § 2699(e)(2).....	6

Unpublished Cases

<i>Chu v. Wells Fargo Investments, LLC</i>	
Case No. C 05-4526 MHP, 2011 WL 672645 (N.D. Cal. 2011).....	10
<i>Fleming v. Covidien, Inc.</i>	
Case No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 (C.D. Cal. 2011)	6, 17
<i>Green v. Lawrence Service Co.</i>	
2013 WL 3907506 (C.D. Cal. 2013).....	17
<i>Lazarin v. Pro Unlimited, Inc.</i>	
Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013).....	10

Other Sources

Manual for Complex Litigation § 30.41 (3rd Ed. 1995).....	18
4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013)	18
4 Newberg on Class Actions § 14.6 (4th Ed. 2013).....	10

I. INTRODUCTION

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, common-fund class action settlement,² in which O.W. Lee has agreed to pay Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) to the following Settlement Class, which is estimated to consist of approximately 144 individuals:

The Settlement was reached only after extensive informal discovery, and a full-day mediation with the Francis J. Ortman, Esq., a well-respected wage and hour class action mediator. In connection with mediation, O.W. Lee produced timekeeping and payroll records for a 22% sampling of the putative class (including actual-time-punches and rounded entries), a class list

² The Stipulation of Settlement (“Settlement”) is attached as **Exhibit 1** to the Declaration of Paul K. Haines filed concurrently with this Motion. The proposed Class Notice and Notice of Estimated Settlement Award are attached as **Exhibits A** and **B**, respectively, to the Settlement.

1 containing all putative class members' hire and termination dates, data points including the
2 average rate of pay for the Class Period, O.W. Lee's relevant wage and hour policies, and other
3 information and documents. After extensive research and analysis, including a detailed analysis
4 of O.W. Lee's potential exposure, the Parties attended a full-day mediation with Mr. Ortman on
5 January 14, 2022. At mediation, the Parties were able to reach a tentative settlement, subject to
6 O.W. Lee's production of certain financial documents and Plaintiff's expert's review of O.W.
7 Lee's financial condition. Thereafter, O.W. Lee produced the requested financial documents and
8 information, and the Parties finalized the Settlement.

9 Significantly, Settlement Class members do not need to file a claim to reap the financial
10 benefit of the Settlement, as all Settlement Class members will automatically receive a payment
11 unless they affirmatively opt-out. There are approximately 144 Settlement Class members, and
12 the average payment to participating Settlement Class members is projected to be approximately
13 \$1,894.68. This is a favorable result for Settlement Class members, who will be agreeing to a
14 release of only those claims that were asserted in this litigation.

15 The proposed Settlement is within the range of possible approval in light of the significant
16 legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the
17 tangible monetary benefits to be received by Plaintiff and the Settlement Class. For the reasons
18 discussed herein, Plaintiff respectfully requests that this Court grant preliminary approval of the
19 Settlement.

20 **II. SUMMARY OF THE LITIGATION**

21 **A. THE PARTIES AND BRIEF PROCEDURAL HISTORY**

22 O.W. Lee designs and manufactures fine, handcrafted casual furniture. *See* Declaration of
23 Paul K. Haines ("Haines Decl."), ¶ 11. Plaintiff and Settlement Class members worked for O.W.
24 Lee in California up until March 1, 2021, when O.W. Lee ceased operating in California. *Id.*

25 On April 8, 2021, Plaintiff filed a Class Action Complaint against O.W. Lee in San
26 Bernardino County Superior Court alleging causes of actions for: (1) failure to pay all overtime
27 wages; (2) minimum wage violations; (3) meal period violations; (4) rest period violations; (5)
28 wage statement penalties; and (6) unfair competition in violation of California Business &

1 Professions Code § 17200, *et seq.* Haines Decl., ¶ 12. On June 18, 2021, Plaintiff filed a First
2 Amended Class and Representative Action Complaint to add a cause of action for civil penalties
3 under the Private Attorneys’ General Act of 2004 (“PAGA”), Labor Code Section 2698, *et seq.*
4 *Id.* As part of the Settlement and through this Motion, Plaintiff respectfully requests that the Court
5 approve the filing of a Second Amended Class and Representative Action Complaint (“SAC”) to
6 add additional factual allegations and a cause of action for waiting time penalties. *Id.* Plaintiff
7 requests that the Court approve the filing of the SAC as of the date of preliminary approval.

8 **B. PLAINTIFF’S CLAIMS AND O.W. LEE’S DEFENSES**

9 **1. Meal Period Claims**

10 Plaintiff alleges that O.W. Lee failed to provide legally-compliant meal periods. Haines
11 Decl., ¶ 17. Specifically, throughout the Class Period, Plaintiff alleges that first meal periods were
12 at times not provided until after the completion of five hours of work due to work demands. *Id.*
13 Plaintiff further contends that meal periods were at times short (i.e., less than 30 minutes). *Id.*
14 Plaintiff also alleges that O.W. Lee failed to provide legally-compliant second meal periods
15 during shifts in excess of 10.0 hours. *Id.*, at ¶ 18.

16 However, O.W. Lee contends that it maintained compliant written meal period policies
17 throughout the Class Period and provided legally-compliant meal periods in line with those
18 policies. Haines Decl., ¶ 17. O.W. Lee also argues that under *Brinker*, it was only required to
19 “provide” the opportunity to take meal periods, not “ensure” meal periods are taken. *Id.*; *see*
20 *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting “ensure”
21 standard and holding employers only have to “provide” employees the opportunity to take meal
22 periods). O.W. Lee also argues that any short, missed, or late first meal periods were the result of
23 lawful employee waiver or choice, thereby precluding liability. Haines Decl., ¶ 17. With respect
24 to second meal periods, O.W. Lee argues that second meal periods may lawfully be waived on
25 shifts of more than 10.0 hours but less than 12.0 hours per Labor Code § 512, and that employees
26 did so. Haines Decl., ¶ 18. Lastly, O.W. Lee argues individualized inquiries would be needed to
27 determine why each meal period was taken late or short or missed by each employee, and whether
28 there was a valid waiver, making certification of the meal period claim unlikely. *Id.*, at ¶¶ 17-18.

1 **2. Rest Period Claims**

2 Plaintiff alleges that O.W. Lee failed to authorize and permit off-duty rest periods because
3 O.W. Lee required him and other employees to remain on company premises during rest periods.
4 Haines Decl., ¶ 18; *Augustus v. ABM Sec. Servs., Inc.*, 5 Cal.5th 257, 272 (2016) (during rest
5 periods employers must “relieve their employees of all...employer control...”). Plaintiff also
6 alleges that O.W. Lee failed to authorize and permit third rest periods on shifts in excess of 10.0
7 hours throughout the Class Period. Haines Decl., ¶ 19.

8 O.W. Lee argues that it always maintained and enforced lawful rest period policies and
9 practices during the Class Period, and never required employees to remain on premises during
10 rest periods. Haines Decl., ¶ 19. In fact, O.W. Lee asserts that many employees would testify that
11 they did, in fact, leave the premises during rest periods. *Id.* O.W. Lee further contends that, even
12 if it (or individual managers) had required employees to remain on premises, *Augustus* rejected
13 Plaintiff’s “on premises” theory when it observed that “one would expect that employees will
14 ordinarily have to remain onsite or nearby. This constraint, which is of course common to all rest
15 periods, is not sufficient to establish employer control.” *Augustus*, 2 Cal.5th at 270. Finally, O.W.
16 Lee argues that Plaintiff’s rest period claim is not amenable to class treatment, since individual
17 inquiries would be required to determine which employees failed to take rest periods, how many
18 rest periods they failed to take, the reasons why each employee failed to take rest period(s) on a
19 particular shift, and whether each employee was in fact allowed to leave the premises during each
20 rest period. Haines Decl., ¶ 19. These manageability concerns are especially present with respect
21 to rest period claims, O.W. Lee argues, given that rest periods are not recorded. *Id.*

22 **3. Unpaid Wages Due to Rounding**

23 Plaintiff argues that O.W. Lee maintained an unlawful policy/practice of rounding
24 timekeeping entries, resulting in an underpayment of wages to Settlement Class members. Haines
25 Decl., ¶ 20. O.W. Lee argues that its rounding policies/practices were lawful, since it was both
26 neutral on its face and resulted, over time, in employees being paid for all hours worked. *Id.*; *see*
27 *also See’s Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 901 (2012) (rounding
28 policy lawful if employer “applies a consistent rounding policy that, on average, favors neither

overpayment nor underpayment.”). O.W. Lee also contends that multiple Courts of Appeal have found rounding mechanisms to be lawful under similar circumstances. Haines Decl., ¶ 20; *see, e.g., Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal.App.5th 1239, 1254 (2019) (review granted on other grounds) (affirming summary judgment for employer on rounding claim where employees were underpaid on 54.6% of shifts, finding that such facts do not establish that employees were “systematically undercompensate[d]”); *AHMC Healthcare, Inc. v. Superior Court*, 24 Cal.App.5th 1014, 1028 (2018) (affirming summary judgment for employer where “bare majority” of employees were underpaid due to rounding). O.W. Lee further argues that Plaintiff would not be able to certify this claim given the individualized inquiries as to whether employees were in fact underpaid, or overpaid, for each workday in question. Haines Decl., ¶ 20.

4. Derivative Waiting Time, Wage Statement, and PAGA Penalties

As a result of these alleged wage and hour violations, Plaintiff asserts that O.W. Lee failed to comply with its final wage payment and wage statement obligations, in violation of Labor Code §§ 203 and 226, respectively. Haines Decl., ¶¶ 21-22. Finally, Plaintiff seeks civil penalties under the PAGA, based on the aforementioned claims. *Id.*, at ¶ 23.

O.W. Lee asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, precluding imposition of waiting time penalties, which are only available for the “willful” failure to pay wages. Haines Decl., ¶ 22; *see* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting time penalties). O.W. Lee further contends that any alleged wage statement violations could not be shown to be “knowing and intentional,” particularly given its good-faith defenses; that Plaintiff cannot show he or other employees “suffer[ed] injury” due to alleged wage statement violations, as required by Lab. Code § 226(e), and that the wage statements always accurately reflected amounts *paid* to employees. Haines Decl., ¶ 21; *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1337 (2018) (“The purpose of section 226 is to ‘document the paid wages to ensure the employee is fully informed regarding the calculation of those wages’”).

Finally, O.W. Lee contends the PAGA claim fails because the underlying claims fail.

Haines Decl., ¶ 23; *see Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). O.W. Lee further maintains that given its good-faith defenses, the Court would substantially reduce any PAGA penalties awarded. Haines Decl., ¶ 23; Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court’s discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, the Parties engaged in extensive informal discovery. O.W. Lee produced timekeeping and payroll records for a 22% sampling of the putative class (including actual-time-punches and rounded entries), a class list containing all putative class members’ hire and termination dates, data points including the average rate of pay for the Class Period, O.W. Lee’s relevant wage and hour policies, and other information and documents. Haines Decl., ¶ 13. Plaintiff hired a labor economist with a Ph.D. in economics to assist in the analysis and extrapolation of the data produced by O.W. Lee to calculate damages for each of Plaintiff’s claims. *Id.* This information allowed the Parties to assess the merits and value of Plaintiff’s claims, the chances for class certification, and O.W. Lee’s potential defenses. *Id.*

On January 14, 2022, the Parties participated in a full-day mediation with Francis J. Ortman, Esq., a well-respected wage and hour class action mediator. Haines Decl., ¶ 14. At mediation, the Parties vigorously debated their legal positions, the likelihood of certification of Plaintiff’s claims, the legal bases for the claims and defenses, as well as O.W. Lee’s financial condition. *Id.* At the mediation, the Parties agreed to a class-wide settlement, subject to Plaintiff’s review of O.W. Lee’s financial records, which was documented in a Memorandum of Understanding (“MOU”). *Id.* During the months that followed, Plaintiff engaged a forensic accountant to analyze certain financial documents produced by O.W. Lee, who determined that

O.W. Lee could not reasonably afford to pay more than the settlement achieved at mediation, and the Parties negotiated and finalized the Settlement Agreement now before this Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, O.W. Lee will pay a Gross Settlement Amount of \$500,000.00. *See* Settlement, § 3. Significantly, this Settlement is non-reversionary, and no Settlement Class member will have to submit a claim form to receive an individual Settlement Award. *Id.*, at §§ 3-4. Each Settlement Class member will automatically receive an individual Settlement Award unless he or she affirmatively opts out of the Settlement. *Id.* The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	\$500,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$166,666.67
• Minus Court-approved, verified costs (up to):	\$25,000.00
• Minus Court-approved Enhancement Award (up to):	\$7,500.00
• Minus Amount designated as PAGA Penalties:	\$20,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$8,000.00</u>
Net Settlement Amount (“NSA”):	\$272,833.33

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys’ fees and costs, Class Representative Enhancement Award to Plaintiff, the amount set aside as PAGA civil penalties, and Settlement Administrator costs, the Settlement requires O.W. Lee to pay a Net Settlement Amount (“NSA”) of at least \$272,833.33 to all Settlement Class members who do not timely opt out. Haines Decl., ¶ 15; *see also* Settlement, § 4(A). There are approximately 144 Settlement Class members, and an estimated total of 27,950 Workweeks worked during the Class Period. Haines Decl., ¶ 16; *see also* Settlement, § 1. Therefore, the average Individual Settlement Award is estimated to be approximately \$1,894.68. Haines Decl., ¶ 16.

The NSA will be distributed proportionally among participating Settlement Class members based on the number of workweeks worked by each Settlement Class member during the Class Period. *See* Settlement, § 4(C). In addition to their respective share of the NSA, Settlement Class members that worked for O.W. Lee during the PAGA Period (October 12, 2019 through March 1, 2021) (“Aggrieved Employees”) will receive a *pro rata* share of the PAGA

1 Amount based on their proportionate number of pay periods (if any) worked during the PAGA
2 Period. *Id.*, § 4(B).

3 Pursuant to the Settlement, O.W. Lee was to deposit the GSA with the Settlement
4 Administrator in three (3) installments: (1) the first installment of \$150,000.00 was initially due
5 to be deposited no later than September 1, 2022; (2) the second installment of \$150,000.00 no
6 later than December 1, 2022; and (3) the third and final installment, of \$200,000.00 on or before
7 the earlier of: (1) March 1, 2023 or (ii) 21 days after the court grants final approval of the
8 Settlement. *See* Settlement, § 3(C).³ However, O.W. Lee failed to make the first installment
9 payment of \$150,000.00, and as of the date of this filing, has not made any installment payments
10 pursuant to the Settlement. Haines Decl., ¶ 29.

11 Within ten (10) Court days of the Effective Date, the Settlement Administrator will
12 calculate Settlement Award amounts, and provide the same to counsel for review and approval.
13 *See* Settlement, § 4(D). Settlement Class members' Individual Settlement Awards will be mailed
14 within ten (10) Court days after receiving approval by counsel for the Parties. Settlement, § 4(E).

15 For tax purposes, each Settlement Award shall be allocated as follows: all payment from
16 the PAGA Amount shall be treated as 100% penalties, and all payments from the NSA shall be
17 treated as one-third wages, one-third penalties, and one-third interest. Settlement, § 4(F). Lastly,
18 O.W. Lee share of employer-side payroll taxes will be paid by O.W. Lee separate, and in addition
19 to, the GSA. *Id.*, § 3(E).

20 **2. Attorneys' Fees and Costs, Enhancement Award, and LWDA Payment**

21 Plaintiff will apply for a Class Representative Enhancement Award at the time of seeking
22 final approval of the proposed class action settlement in the amount of \$7,500.00 for his services
23

24 ³ Following O.W. Lee's representation of its financial position, O.W. Lee turned over its financial
25 records to Plaintiff. Haines Decl., ¶ 14. Plaintiff retained a forensic accountant, Keith D.
26 Messerschmidt, who has consulted or provided expert testimony in dozens of litigation and
27 insurance matters. *Id.* Mr. Messerschmidt opines that O.W. Lee could not reasonably afford to
28 pay more than the GSA and that the requested payment schedule was necessary for O.W. Lee to
remain in business and not dramatically impact its operations. *Id.* Should the Court wish to review
a declaration from Mr. Messerschmidt attesting to these facts and O.W. Lee's financial condition,
this declaration could either be filed in *camera* or filed under seal, at the Court's request. *Id.*

1 to the Settlement Class. *See* Settlement, §§ 3(D)(3), 6. “[I]ncentive awards are fairly typical in
2 class action cases . . . and are intended to compensate class representatives for work done on
3 behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the
4 action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will
5 be fully briefed at the time of final approval, Plaintiff’s requested enhancement award is intended
6 to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
7 providing substantial factual information and documents to Plaintiff’s counsel, attending multiple
8 meetings with Plaintiff’s counsel to discuss the claims and theories at issue in the litigation,
9 actively participating in the prosecution of his claims, as well as the significant risks Plaintiff
10 undertook by agreeing to serve as the named plaintiff in this case, and the fact that Plaintiff agreed
11 to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement, § 2(B).

12 Plaintiff’s counsel will also apply for an attorneys’ fees award of one-third of the Gross
13 Settlement Amount, which is currently estimated to be \$166,666.67, and up to \$25,000.00 in
14 verified costs reimbursement. *See* Settlement, §§ 3(D)(4), 5; Haines Decl., ¶ 25. Plaintiff’s
15 counsel submits that the requested fee is fair compensation for undertaking complex, risky,
16 expensive, and time-consuming litigation on a purely contingent fee basis. Haines Decl., ¶ 25.
17 Plaintiff’s counsel has incurred substantial attorneys’ fees conducting pre-filing investigation,
18 analyzing Plaintiff’s claims, conducting legal research, engaging in informal discovery analyzing
19 employee timekeeping and payroll records and other data and documents with the help of a
20 retained expert, preparing for and attending mediation, negotiating and preparing the Settlement
21 Agreement, preparing this Motion, and otherwise litigating the case. *Id.* Plaintiff’s counsel will
22 also spend additional attorney time in attending the hearing on this Motion, overseeing the Notice
23 process and fielding questions from Settlement Class members, preparing the Final Approval
24 papers, and attending the Final Approval hearing. *Id.*

25 California courts recognize an appropriate method for awarding attorneys’ fees in class
26 actions is to award a percentage of the “common fund” created as a result of a settlement. *See*
27 *e.g., Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding “the percentage of fund
28 method survives in California class action cases”). Plaintiff’s counsel’s request for fees of one-

1 third of the Gross Settlement Amount is well within the range of reasonableness, and indeed is
2 considered the typical rate for common fund settlements. Historically, courts have awarded
3 percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4
4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

5 Plaintiff's counsel submits that their request for attorneys' fees is reasonable when viewed
6 as an overall percentage of the Settlement and in light of the substantial risks and significant work
7 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
8 Should the Court grant preliminary approval, Plaintiff's counsel will seek an award of attorneys'
9 fees and verified costs upon seeking final approval.

10 Additionally, the Parties have agreed to designate \$20,000.00 of the GSA as PAGA civil
11 penalties, of which \$15,000.00 (75%) will be paid to the LWDA, with the remaining \$5,000.00
12 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated
13 per Labor Code § 2699(i). *See* Settlement, § 3(D)(5). Plaintiff submits that this allocation to the
14 LWDA for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*,
15 Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment
16 of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*,
17 Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of
18 \$7,500 to LWDA out of \$1.25 million common-fund settlement).

19 **IV. ARGUMENT**

20 **A. PRELIMINARY APPROVAL IS WARRANTED**

21 California Rule of Court 3.769 conditions settlement of a class action on court approval,
22 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
23 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
24 (2012) (Rule 3.769 requires trial court to determine "that the settlement is fair, reasonable and
25 adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
26 (Rule 23(e) requires the trial court to determine "whether a proposed settlement is fundamentally
27 fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution,
28 particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101

(9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by Plaintiff’s counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g. Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: “the strength of Plaintiff’s 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, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. The Strength of Plaintiff’s Case

Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described above in section II.B., *supra*, O.W. Lee presented multiple defenses to Plaintiff’s claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

Although the Parties engaged in significant informal discovery in advance of mediation, the Parties still had substantial discovery to complete in formal litigation had the matter not settled. Haines Decl., ¶ 26. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id.* Even if Plaintiff were to certify the classes, the Parties would incur considerably more attorneys’ fees and costs

1 through a possible decertification motion, trial, and possible appeal. *Id.* This Settlement avoids
2 those risks and the accompanying expense. *Id.*

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

4 Plaintiff had not yet filed his motion for class certification, and as such, the extent to which
5 Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there
6 was a risk that there would not be a certified class at the time of trial, or if there were, it would
7 consist of a significantly smaller group of employees than the proposed Settlement Class (either
8 due to a narrowing of the class definition in a Court order on a contested motion for class
9 certification, or through settlement agreements entered into by O.W. Lee with individual class
10 members by way of *Pick-Up-Stix* type settlement agreements⁴) and the expected recovery could
11 be significantly reduced, given the settlement amounts that are typically offered through the *Pick-*
12 *Up-Stix* process. Thus, this factor, too, supports preliminary approval of the Settlement.

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

14 The Settlement provides fair and reasonable monetary recovery for Settlement Class
15 members concerning heavily disputed claims where the law is in a state of frequent change. Based
16 on a review of the data produced by O.W. Lee in connection with mediation, Plaintiff conducted
17 the following exposure analyses:

18 **First Meal Period Violations: \$69,476**

19 Plaintiff alleges that O.W. Lee failed to provide legally-compliant first meal periods.
20 Haines Decl., ¶ 17. Specifically, throughout the Class Period, Plaintiff alleges that first meal
21 periods were at times not provided until after the completion of five hours of work due to work
22 demands. *Id.* Plaintiff further contends that meal periods were at times short (i.e., less than 30
23 minutes). *Id.* Based on Plaintiff's analysis and extrapolation of employee timekeeping records
24

25 _____
26 ⁴ In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an
27 employer may enter into pre-certification settlement agreements with individual putative class
28 members in which the putative class members release claims for past unpaid wages and penalties
in exchange for consideration. The Court further held that such settlements could preclude those
individual employees from recovery in class action litigation against the employer for the same
wage claims.

1 produced by O.W. Lee, there were approximately 30,236 instances of non-compliant first meal
2 periods reflected in the data. *Id.* Plaintiff’s analysis also revealed that O.W. Lee paid
3 approximately \$824 in meal period premiums during the Class Period. *Id.* In addition, based on
4 the data provided by O.W. Lee, Settlement Class members’ average hourly rate of pay during the
5 Class Period was approximately \$16.44 per hour. *Id.* Therefore, assuming each late, short, and/or
6 missed meal period reflected in the timekeeping records would result in a violation, Plaintiff
7 calculated O.W. Lee’s maximum exposure on this claim at approximately \$496,256 ((30,236 first
8 meal period violations * \$16.44 average premium) - \$824). *Id.*

9 However, as noted above, O.W. Lee contends that it maintained compliant written meal
10 period policies throughout the Class Period, and provided legally-compliant meal periods in line
11 with those policies. Haines Decl., ¶ 17. O.W. Lee also argues that under *Brinker*, it was only
12 required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken.
13 *Id.* O.W. Lee also argues that any short, missed, or late first meal period was the result of lawful
14 employee waiver or choice, thereby precluding liability. *Id.* Lastly, O.W. Lee argues
15 individualized inquiries would be needed to determine why each meal period was taken late or
16 short or missed by each employee, making certification of the meal period claim unlikely. *Id.* In
17 light of these defenses and arguments, Plaintiff discounted O.W. Lee’s maximum exposure by
18 60% for the risk of non-certification, and an additional 65% to account for O.W. Lee’s defenses
19 on the merits, to arrive at an estimated total of approximately \$69,476. *Id.*

20 Second Meal Period Violations: \$59,962

21 Plaintiff also alleges that O.W. Lee failed to provide legally-compliant second meal
22 periods during shifts in excess of 10.0 hours. Haines Decl., ¶ 18. Based on Plaintiff’s review of
23 employee timekeeping data, approximately 45,591 shifts during the Class Period reflected a
24 potential second meal period violation. *Id.* Thus, Plaintiff calculated O.W. Lee’s maximum
25 exposure on this claim at approximately \$749,516 (45,591 second meal period violations * \$16.44
26 average premium). *Id.*

27 However, O.W. Lee argues that it has maintained compliant meal period practices
28 throughout the Class Period, that under *Brinker* it is only required to “provide” the opportunity to

1 take second meal periods, and that any missed second meal periods were the result of lawful
2 employee waiver or choice. Haines Decl., ¶ 18. O.W. Lee also contends that Settlement Class
3 members voluntarily waived their second meal periods on shifts in excess of 10.0 hours but less
4 than 12.0 hours, as they are entitled to do pursuant to Labor Code § 512. *Id.* If the Court accepted
5 O.W. Lee's waiver argument for shifts less than 12.0 hours in duration, then there were only
6 approximately 86 shifts at issue, as this is the estimated number of shifts worked over 12.0 hours.
7 *Id.* This would significantly reduce O.W. Lee's maximum exposure as only shifts in excess of
8 12.0 hours would be at issue, thereby reducing O.W. Lee's potential liability for second meal
9 period violations to \$1,414 (86 second meal period violations * \$16.44 average premium). *Id.*
10 O.W. Lee also contends that class certification would not be proper as individualized inquiries
11 will be required to determine why each second meal period was missed, and whether there was a
12 valid waiver. *Id.* In light of these arguments and defenses, Plaintiff discounted the maximum
13 amount that the class could potentially recover for second meal periods by 60% for a risk of non-
14 certification, and an additional 80% for a risk of losing on the merits, or having exposure reduced
15 due to O.W. Lee's waiver arguments, to arrive at an estimated exposure amount of approximately
16 \$59,962. *Id.*

17 **Rest Period Violations: \$220,107**

18 Plaintiff alleges that O.W. Lee failed to authorize and permit off-duty rest periods, because
19 O.W. Lee required him and other employees to remain on company premises during rest periods.
20 Haines Decl., ¶ 19. Plaintiff's analysis of O.W. Lee's timekeeping data revealed that there were
21 approximately 133,885 shifts in excess of 3.5 hours with potential non-compliant rest periods. *Id.*
22 Therefore, Plaintiff calculated O.W. Lee's maximum exposure on this claim at approximately
23 \$2,201,069 (133,885 shifts * \$16.44 average premium). *Id.*

24 But as noted above, O.W. Lee argues that it always maintained and enforced lawful rest
25 period practices during the Class Period; that it did not, in fact, require employees to remain on
26 premises during rest periods; that employees would attest that they left the premises during rest
27 periods; and that even if O.W. Lee did require employees to remain on premises during rest
28 periods, this would not violate California law under *Augustus*. *Id.* Finally, O.W. Lee further argues

1 that individual inquiries would be required to determine whether each employee was in fact
2 allowed to leave the premises during each rest period on each shift, resulting in a series of
3 unmanageable mini-trials. *Id.* In light of these defenses, Plaintiff discounted the maximum
4 amount by 60% for risk of non-certification and an additional 75% for risk of being unsuccessful
5 on the merits or failure to recover the full amount sought, to arrive at an estimated realistic
6 exposure of \$220,107. *Id.*

7 **Unpaid Wages due to Rounding: \$119,371**

8 Plaintiff argues that O.W. Lee maintained an unlawful policy/practice of rounding
9 timekeeping entries, resulting in unpaid wages to Settlement Class members. Haines Decl., ¶ 20.
10 Based on Plaintiff's review of employee timekeeping records, Plaintiff contends that O.W. Lee's
11 rounding practices resulted in approximately 20,147 net hours of unpaid wages. *Id.* Based upon
12 the weighted average minimum wage during the Class Period of \$11.85, Plaintiff estimates that
13 O.W. Lee's maximum exposure for this claim is approximately \$477,483 (20,147 hrs. * \$11.85
14 min. wage * 2 (liquidated damages per Labor Code § 1194.2). *Id.*

15 But as noted above, O.W. Lee raised several defenses to this claim, including its argument
16 that it utilized an even-handed timekeeping system that, on balance, resulted in employees being
17 paid for all hours actually worked; that some employees were overpaid as a result of its rounding
18 practice; that employees did not perform any work before the scheduled start of their shifts; and
19 that Plaintiff would be unable to certify this claim given the individualized inquiries as to whether
20 employees were in fact underpaid, or overpaid for each workday in question. Haines Decl., ¶ 20.
21 Based on these defenses, Plaintiff discounted the maximum exposure by 50% to account for the
22 risk of non-certification, and an additional 50% to account for O.W. Lee's defenses on the merits,
23 to arrive at an estimated exposure of approximately \$119,371. *Id.*

24 **Wage Statement Violations: \$38,150**

25 Plaintiff alleges that O.W. Lee is liable for wage statement penalties as a result of its
26 failure to pay all wages owed and failure to pay all meal and rest period premiums. Haines Decl.,
27 ¶ 21. Plaintiff's expert analysis reflected that there were approximately 5,450 unique pay periods
28 worked by Settlement Class members within the one-year liability window under Labor Code §

226. *Id.* In calculating O.W. Lee’s exposure, Plaintiff assumed he could recover the “initial” \$50 penalty under Section 226(e) for each violation, for a total of \$272,500 (5,450 pay periods * \$50 “initial” penalty) in potential penalties. *Id.*; see *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified it violated Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying “initial” \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim).

However, given O.W. Lee’s arguments that no violations occurred, that Settlement Class members suffered no “injury,” that any violations were not “knowing and intentional,” as well as risks associated with Plaintiff’s underlying claims discussed above, Plaintiff discounted the maximum exposure by 60% for risk of non-certification, and by an additional 65% for risks on the merits, for an estimated realistic exposure of \$38,150. Haines Decl., ¶ 21.

Waiting Time Penalties: \$79,532

There are 144 former Settlement Class members who worked for O.W. Lee since October 12, 2017 and are therefore eligible for waiting time penalties. Haines Decl., ¶ 22. Plaintiff estimated an average waiting time penalty of \$3,945 (\$16.44/hr * 8 hrs * 30 days), and calculated O.W. Lee’s maximum waiting time penalty exposure at approximately \$568,080 (144 separated employees * \$3,945 average waiting time penalty). *Id.*

However, O.W. Lee asserts it has strong, good-faith defenses to Plaintiff’s underlying claims and thus, even if Plaintiff were able to recover on his underlying claims, he would not be able to recover waiting time penalties. Haines Decl., ¶ 22. Moreover, Plaintiff would need to overcome O.W. Lee’s defenses, both as to class certification and as to the merits, to their underlying claims. *Id.* Based on these defenses, Plaintiff discounted O.W. Lee’s maximum exposure by 60% for risk of non-certification and by an additional 65% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated total of \$79,532. *Id.*

PAGA Penalties: \$40,875

Plaintiff estimated a maximum total PAGA exposure of \$545,000 for the relevant time

1 period (5,450 violations * \$100 “initial” penalty). Haines Decl., ¶ 23; *Amaral v. Cintas Corp.* No.
2 2, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is
3 notified that it is violating a Labor Code provision). However, these penalties derive from the
4 underlying wage and hour violations discussed above, which O.W. Lee vigorously disputes.
5 Haines Decl., ¶ 23; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal.
6 2013) (explaining that a PAGA claim’s success was determined by the merits of its underlying
7 claims). O.W. Lee also asserts the Court would drastically reduce any award of PAGA penalties
8 as “confiscatory.” Haines Decl., ¶ 23; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203
9 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien*
10 *Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing
11 PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum
12 figure by 70% for risk of losing on the merits and/or not recovering a PAGA penalty in each and
13 every pay period, and an additional 75% to account for the possibility of this Court reducing
14 penalties, to arrive at an estimated exposure of \$40,875. Haines Decl., ¶ 23.

15 Using these estimated figures for each of the claims described above, Plaintiff predicted
16 that the potential recovery for the Settlement Class would be approximately \$627,473. Haines
17 Decl., ¶ 24. The proposed settlement of \$500,000 therefore represents approximately 79.7% of
18 the reasonably forecasted recovery for the Settlement Class. *Id.* Particularly in light of O.W. Lee’s
19 financial condition, the Settlement amount is substantial, and preliminary approval is appropriate.
20 *Id.*

21 **e. The Experience and Views of Counsel**

22 “Parties represented by competent counsel are better positioned than courts to produce a
23 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Sec.*
24 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff is represented by competent counsel with
25 extensive experience litigating wage and hour class actions from both the plaintiff and defense
26 side and have been appointed Plaintiff’s counsel in numerous cases with similar claims. Haines
27 Decl., ¶¶ 3-8.

28 ///

1 **2. The Preliminary Approval Standard Is Met**

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

7 **a. The Settlement Is Within the Range of Possible Approval**

8 The proposed settlement reflects approximately 79.7% of the estimated recovery the
9 Settlement Class could reasonably expect in light of the significant litigation, and will provide
10 tangible, substantial monetary compensation for hotly disputed claims. Plaintiff submits that the
11 proposed Settlement is within the range of possible approval, such that notice should be provided
12 to the Settlement Class so that they may consider the Settlement. The Court will have the
13 opportunity to again assess the reasonableness of the Settlement after the Settlement Class has
14 had the opportunity to opt-out or object.

15 **b. The Settlement Resulted from Serious, Informed Negotiations**

16 The Settlement resulted from an exchange of substantial information, arm's-length
17 negotiations by counsel during the mediation, and additional months of negotiating the long-form
18 settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See*
19 *Kullar, supra*, 168 Cal.App.4th at 130. As discussed above, Plaintiff carefully vetted the claims
20 at issue, reviewed extensive data, and conducted a detailed analysis of the data to arrive at the
21 estimated class-wide damages figures. *See* Haines Decl., ¶¶ 13, 17-24. Thus, this factor supports
22 preliminary approval.

23 **c. The Settlement Is Devoid of Obvious Deficiencies**

24 Preliminary approval of the Settlement is warranted because there are no obvious
25 deficiencies. The Settlement will provide substantial monetary relief to the Settlement Class, and
26 the amounts proposed for attorneys' fees, costs, settlement administration costs, and enhancement
27 award are all reasonable and appropriate based on the facts of this case. Thus, this factor supports
28 preliminary approval.

1 **B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

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

9 **1. The Proposed Class Is Ascertainable and Numerous**

10 A class is "ascertainable" where the members "may be readily identified without
11 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
12 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
13 defined as all of O.W. Lee's current and former non-exempt employees who performed work for
14 O.W. Lee in California at any time from October 12, 2016 to March 1, 2021 ("Class Period"),
15 and who did not previously sign a severance agreement with O.W. Lee. *See* Settlement, § 1.
16 Therefore, Settlement Class members can be identified from O.W. Lee's personnel and
17 employment records. O.W. Lee represents that the Settlement Class consists of approximately
18 144 current and former non-exempt employees. *Id.*; Haines Decl., ¶ 16. It would therefore be
19 impracticable to bring all Settlement Class members before the Court, or for each Settlement
20 Class member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies
21 numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10
22 beneficiaries of a trust sufficiently numerous).

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

24 The focus in a certification dispute is not the merits, but rather on what types of questions,
25 "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
26 *Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on, among other
27 issues, O.W. Lee's uniform meal and rest period policies/practices. These types of claims are
28 commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network*

1 *Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

2 **3. The Claims of the Named Plaintiff Are Typical**

3 The typicality requirement is satisfied where a class representative's claims are typical of
4 those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191 Cal.App.3d 1341,
5 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the same goods as the
6 putative class in a consumer class action). Here, Plaintiff's claims are typical of those held by the
7 Settlement Class members. Plaintiff was employed by O.W. Lee as a non-exempt employee
8 during the Class Period, was subject to O.W. Lee's wage and hour policies at issue in this case,
9 and was injured by the same challenged policies/practices that allegedly injured the Settlement
10 Class as a whole. See Declaration of Epigmenio Rivas Herrera ("Herrera Decl."), ¶¶ 2-4. Thus,
11 typicality is satisfied.

12 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
13 **Class**

14 The adequacy requirement examines conflicts of interest between named parties and the
15 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155
16 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement
17 Class, as there are no known conflicts between Plaintiff and the Settlement Class, and Plaintiff's
18 counsel has significant relevant experience. Haines Decl., ¶¶ 3-8, 28.

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

20 This Court should order distribution to the Settlement Class of the proposed Class Notice
21 by U.S. Mail, postage prepaid, using last known mailing address information provided by O.W.
22 Lee. See Settlement, § 9. This manner of giving notice is the "best notice practicable" under the
23 circumstances because it provides "individual notice to all members who can be identified
24 through reasonable effort." See *Eisen v. Carlisle & Jacquelin* 417 U.S. 156, 173 (1974). Here,
25 Plaintiff proposes that the Settlement be administered by Phoenix Settlement Administrators
26 ("Phoenix"), an experienced class action settlement administrator. See Declaration of Jodey
27 Lawrence ("Lawrence Decl.") and attached exhibits. Settlement Class members' addresses will
28 be ascertainable through O.W. Lee's records, which O.W. Lee will provide to Phoenix within ten

(10) Court days after entry of an order preliminarily approving this Settlement. *See* Settlement, § 9(A). Within ten (10) Court days of receipt of the Settlement Class members’ addresses, Phoenix will run the addresses through the National Change of Address (“NCOA”) database (which provides updated addresses for any individual who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding address) and mail the Class Notice to all Settlement Class members. *See* Settlement, § 9(B). To the extent that any notices are returned, Phoenix will perform a “skip trace” to track any Settlement Class member’s current mailing address. *Id.*, at § 9(F).

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d), because it advises Settlement Class members of the nature of the claims, basic contentions and denials of the parties and the key terms of the Settlement, the 45-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Haines Decl., Exhs. A, B to Exh. 1. The proposed Class Notice also notifies Settlement Class members of the final approval hearing date and provides the Settlement Class contact information for Plaintiff’s counsel, and advises Settlement Class members that they may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members.

D. THE COURT SHOULD SET A FINAL APPROVAL HEARING

Finally, this Court should set a hearing for Final Approval of the Settlement on a date appropriately scheduled to follow the deadline by which Settlement Class members must file objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

///

///

///

///

///

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that this Court preliminarily
3 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
4 Proposed Order submitted concurrently herewith.

5
6 Respectfully submitted,

7 Dated: December 1, 2022

HAINES LAW GROUP, APC

8
9 By:



10 Paul K. Haines
11 Attorneys for Plaintiff
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28