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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

RICHARD EVANS, individually, and on
behalf of other members of the public similarly
situated, and on behalf of other aggrieved
employees pursuant to the California Private
Attorney General Act;

Plaintiff,

v.

MY PAINT STOP, LLC., dba CREATIVE
PAINT, a California Limited Liability
Company; and DOES 1 through 25, inclusive.

Defendants.

Case No.: MSC21-01812

Honorable Edward G. Weil

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION AND PAGA SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date:
Time:
Dept.: 39

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on _____, 2022 at _____ a.m./p.m.
3 in Department 39 of the above-captioned Court located at the Wakefield Taylor Courthouse, 725 Court
4 Street, Martinez, California 94553, pursuant to California Code of Civil Procedure section 382, Rule
5 3.769 of the California Rules of Court, and California Labor Code section 2699(l), Plaintiff Richard
6 Evans ("Plaintiff") will and hereby does move the Court for an Order granting preliminary approval
7 of the proposed class action and Labor Code Private Attorneys General Act of 2004, California Labor
8 Code sections 2698, et seq. ("PAGA") settlement between Plaintiff and Defendant My Paint Stop,
9 LLC., dba Creative Paint ("Defendant").

10 Plaintiff requests that the Court enter an Order:

11 1. Preliminarily approving the Joint Stipulation of Class Action and PAGA Settlement
12 ("Settlement" or "Settlement Agreement") attached as Exhibit A to the Declaration of Jonathan M.
13 Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA
14 Settlement;

15 2. Certifying the Class for Settlement purposes;

16 3. Appointing Plaintiff Richard Evans as the Class Representative for Settlement
17 purposes;

18 4. Appointing Jonathan M. Genish of Blackstone Law, APC as Class Counsel for
19 Settlement purposes;

20 5. Approving the proposed Notice of Class Action Settlement attached as Exhibit 1 to the
21 Settlement Agreement ("Class Notice") to be mailed to the Class;

22 6. Approving the opt-out and objection procedures provided in the Settlement Agreement
23 and set forth in the Class Notice;

24 7. For each Class Member, directing Defendant to furnish their full names, last known
25 home addresses, last known telephone numbers, social security numbers, start and end dates of
26 employment, total workweeks worked during the Class Period, total workweeks worked during the
27 PAGA Period, and any other information the Settlement Administrator may reasonably need to
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1 administer this Settlement, to the Settlement Administrator within thirty (30) calendar days after the
2 Court grants preliminary approval of the Settlement;

3 8. Approving the proposed deadlines for the settlement administration process; and

4 9. Setting a Final Approval Hearing.

5 Pursuant to California Labor Code section 2699(1)(2), a copy of the proposed Settlement, as
6 well as information regarding the preliminary approval hearing on this matter, were submitted to the
7 California Labor and Workforce Development Agency via online submission on September 9, 2022.
8 (Genish Decl. ¶ 11, Exh. B).

9 This motion is based upon this notice, the attached memorandum of points and authorities, the
10 Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class
11 Action and PAGA Settlement, the Declaration of Richard Evans in Support of Plaintiff's Motion for
12 Preliminary Approval of Class Action and PAGA Settlement, the pleadings and other records on file
13 with the Court in this matter, and any other further evidence or argument that the Court may properly
14 receive at or before the hearing.

15 Respectfully submitted,

16 Dated: September 9, 2022

BLACKSTONE LAW, APC

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18 By: _____
19 Jonathan M. Genish
20 Attorney for Plaintiff Richard Evans
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Richard Evans (“Plaintiff”) hereby seeks preliminary approval of a Joint Stipulation of Class Action and PAGA settlement (“Settlement” or “Settlement Agreement”) on behalf of all current and former hourly-paid, non-exempt employees employed by Defendant My Paint Stop, LLC., dba Creative Paint (“Defendant”) (Plaintiff and Defendant are referred to collectively herein as the “Parties”) in the state of California from August 30, 2017 to May 11, 2022. (Declaration of Jonathan M. Genish in Support of Plaintiff’s Motion for Preliminary Approval of Class Action and PAGA Settlement [“Genish Decl.”], Exh. A). The Settlement terms are outlined as follows:

- Settlement Class Members: Approximately 108 individuals.
- Gross Settlement Amount: Six Hundred Thousand Dollars and Zero Cents (\$600,000.00), exclusive of employer-side payroll taxes. Defendant will pay one-half (1/2) of the Gross Settlement Amount (Three Hundred Thousand Dollars and Zero Cents) within thirty (30) days of the date the Court grants final approval of the Settlement, and the second half (1/2) of the Gross Settlement Amount (Three Hundred Thousand Dollars and Zero Cents) within six months of the date that the Court grants final approval.
- Settlement Administration Costs: Not to exceed Seven Thousand Dollars and Zero Cents (\$7,000.00).
- Class Representative Enhancement Award: Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00).
- PAGA Members: Approximately 59 aggrieved employees.
- PAGA Penalty Amount: Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00), 75% of which will be paid to the California Labor and Workforce Development Agency (“LWDA”) and the remaining 25% to be paid to the PAGA Members.
- Requested Attorneys’ Fees and Costs: Attorneys’ fees of Two Hundred Thousand Dollars and Zero Cents (\$200,000.00) (thirty-three percent of the Gross Settlement Amount) plus actual litigation costs and expenses not to exceed Thirty Thousand Dollars and Zero Cents (\$30,000.00).

- Estimated Net Settlement Fund: Net Settlement Amount of Three Hundred and Thirty Thousand Five Hundred Dollars and Zero Cents (\$330,500.00) to be distributed to Participating Class Members.
- Average Estimated Individual Settlement Payment, including the 25% of the PAGA Penalty Amount allocated for PAGA Members: \$3,118.06.

As set forth herein, the Settlement is the product of informed discovery, arms-length negotiations, and provides a fair, adequate, and reasonable recovery for the Class. Plaintiff therefore respectfully requests that the Court grant preliminary approval of the proposed Settlement, conditionally certify the Class, approve the proposed Class Notice, and set a hearing date for final settlement approval, among other requested relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant My Paint Stop, LLC dba Creative Paint (“Defendant”) is a chain of paint and hardware stores in Northern California. My Paint Stop, LLC was established in 2006, and now has 12 locations serving San Francisco, San Jose, San Leandro, Livermore, Danville, and Pleasant Hill.

Plaintiff Richard Evans (“Plaintiff”) worked for Defendant from October 2015 to April 2021, first as a Sales Representative and then as a non-exempt Store Manager, at its Danville location. During his employment, Plaintiff was responsible for selling paint to individual buyers as well as businesses, delivering paint, conducting inventory, cleaning, stocking, merchandising, and so forth. (Declaration of Richard Evans in Support of Plaintiff’s Motion for Preliminary Approval of Class Action and PAGA Settlement [“Evans Decl.”] ¶ 3).

On July 7, 2021, Plaintiff provided notice to the LWDA and to Defendant of his intent to seek civil penalties pursuant to the Private Attorneys General Act, Labor Code section 2698, *et seq.* (“PAGA”). (Genish Decl., ¶ 7). On August 30, 2021, Plaintiff filed a class and representative action against Defendant in the Contra Costa Superior Court. Plaintiff alleged eight causes of action for: (1) Failure to Pay Overtime Wages (Cal. Lab. Code §§ 510 and 1198); (2) Failure to Pay Minimum Wages (Cal. Lab. Code §§ 1194, 1197, and 1197.1); (3) Failure to Provide Meal Periods (Cal. Lab. Code §§ 226.7 and 512(a)); (4) Failure to Provide Rest Periods (Cal. Lab. Code § 226.7); (5) Failure to Provide Accurate Itemized Wage Statements (Cal. Lab. Code § 226(a)); (6) Failure to Timely Pay Wages Upon Termination (Cal. Lab. Code §§ 201, 202, 203); (7) Unfair Competition (Cal. Bus. & Prof. Code

1 §§17200, et seq.); and (8) Violation of PAGA (Cal. Lab. Code §§ 2698, et seq.). Plaintiff seeks to
2 represent a class of all current and former non-exempt and/or hourly-paid employees who worked for
3 Defendant in the State of California at any time during the period from August 30, 2017 to May 11,
4 2022. (Genish Decl., ¶ 7.)

5 The Parties met and conferred with respect to the potential resolution of this action by means
6 of a private mediation and agreed to exchange informal discovery as part of that process. (Genish
7 Decl., ¶ 8). Pursuant to this agreement to mediate, Defendant produced a random sampling of
8 employees' time and pay records, along with Defendant's Associate Handbook containing policies
9 relevant to the alleged claims in this matter, and Plaintiff's personnel file, amounting to thousands of
10 pages of Class data. (Genish Decl., ¶ 8).

11 After a thorough investigation and analysis of these documents and data, the Parties attended
12 a formal mediation on May 11, 2022 with the Honorable Paul Ramirez (Ret.), a neutral and respected
13 mediator with extensive experience in complex wage and hour matters. (Genish Decl., ¶ 9). At the
14 mediation, the Parties engaged in intensive settlement discussions during which they debated their
15 respective positions and exchanged views regarding the strengths and weaknesses of the alleged
16 claims. (Genish Decl., ¶ 9). After a full day of mediation, and with the help of the mediator, the
17 Parties were able to reach an agreement to resolve this dispute on a class and representative basis, and
18 shortly thereafter executed a memorandum of understanding memorializing the key settlement terms.
19 (Genish Decl., ¶ 9). Following mediation, the Parties worked diligently to negotiate and memorialize
20 the terms in a long form settlement agreement. (Genish Decl., ¶ 9). On June 13, 2022, after additional
21 discussions and revisions to the agreement, the Settlement Agreement was fully executed. (Genish
22 Decl., ¶ 9).

23 Now, following substantial investigation and extensive settlement negotiations, Plaintiff seeks
24 preliminary approval of the proposed settlement, which will resolve all class and representative claims
25 alleged in the Complaint. (Genish Decl., ¶ 10, Exh. A).

26 In accordance with Labor Code sections 2699 et. seq., Plaintiff's counsel provided notice of
27 the proposed settlement to the LWDA on September 9, 2022. (Genish Decl., ¶ 11, Exh. B).

28 ///

III. THE SETTLEMENT TERMS

A. Class Definition

For purposes of settlement only, the Parties have agreed that the Class shall be defined as “All current and former non-exempt and/or hourly-paid employees who worked for Defendant in the State of California at any time during the Class Period.” (“Settlement Class” or “Settlement Class Members”). (Genish Decl., ¶ 12; Settlement Agreement, ¶ 34). The Class Period and release of claims begins on August 30, 2017 and ends on May 11, 2022. (Genish Decl., ¶ 12; Settlement Agreement, ¶ 6). It is estimated that there are 108 Settlement Class Members. (Genish Decl., ¶ 12).

B. Amount of Settlement

The Parties have agreed to settle the Class and PAGA claims at issue in the Complaint for a non-reversionary Gross Settlement Amount of Six Hundred Thousand Dollars and Zero Cents (\$600,000.00), exclusive of any employer-side payroll taxes. (Genish Decl., ¶ 13; Settlement Agreement ¶ 14).

C. Allocation and Funding of the Gross Settlement Amount

The Gross Settlement Amount is a common fund and therefore includes all requested costs, fees, and other allocations. As stated above, the Gross Settlement Amount includes: (1) Class Counsel’s fees in the amount of thirty-three percent (33%) of the Gross Settlement Amount, equaling Two Hundred Thousand Dollars and Zero Cents (\$200,000.00); (2) Class Counsel’s actual litigation costs, not to exceed Thirty Thousand Dollars and Zero Cents (\$30,000.00); (3) Settlement Administration Costs, capped at Seven Thousand Dollars and Zero Cents (\$7,000.00); (4) Class Representative Incentive Payment in the amount of Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) to Plaintiff; and (5) PAGA Penalty Amount of Twenty Five Thousand Dollars and Zero Cents (\$25,000.00). (Genish Decl., ¶ 14; Settlement Agreement ¶¶ 14, 32, 44-46). After the above-estimated amounts are deducted from the Gross Settlement Amount, approximately 108 Settlement Class Members will share in a Net Settlement Fund of approximately Three Hundred and Thirty Thousand Five Hundred Dollars and Zero Cents (\$330,500.00) (Genish Decl., ¶ 14).

The Net Settlement Fund will be distributed and paid to Participating Class Members on a pro-rata basis based on the number of workweeks worked during the Class Period. (Genish Decl., ¶ 15; Settlement Agreement ¶ 50). This will provide Participating Class Members with an average estimated

1 payment of \$3,060.19. (Genish Decl., ¶ 15). The actual payments to Participating Class Members will
2 vary based on the actual weeks worked by Participating Class Members and shall be confirmed by the
3 Settlement Administrator in advance of the final approval hearing. (Genish Decl., ¶ 15). Employees
4 who worked during the PAGA Period shall receive a share of the 25% portion of the PAGA Penalty
5 Amount designated for distribution to PAGA Members. (Genish Decl., ¶ 15, Settlement Agreement
6 ¶ 50). These payments will be distributed on a pro rata basis based on the number of workweeks
7 worked during the PAGA Period. (Genish Decl., ¶ 15; Settlement Agreement ¶ 50.)

8 Payments to Participating Class Members will be allocated as 20% wages, and 80% interest
9 and penalties. (Genish Decl., ¶ 16; Settlement Agreement ¶ 49). The employee share of any applicable
10 payroll taxes on wages will be deducted from the wage portion of each Participating Class Member's
11 Individual Settlement Payment. (Genish Decl., ¶ 16; Settlement Agreement ¶ 49). Employer-side
12 payroll taxes shall be paid by Defendant separately from and in addition to the Gross Settlement
Amount. (Genish Decl., ¶ 16; Settlement Agreement ¶ 41).

13 The Settlement Agreement is a non-reversionary and a non-claims made settlement. (Genish
14 Decl. ¶ 17; Settlement Agreement ¶ 14). All money from the Net Settlement Fund will be distributed
15 to Participating Class Members. (Genish Decl., ¶ 17; Settlement Agreement ¶ 14). No money will
16 revert to Defendant. (Genish Decl., ¶ 17; Settlement Agreement ¶ 14). Any Individual Settlement
17 Payment checks remaining uncashed after 180 days will be transferred to the California State
18 Controller's Office and held in a trust for such Participating Class Members and PAGA Members.
19 (Genish Decl., ¶ 17; Settlement Agreement, ¶ 51). As such, no "unpaid residue" under California
20 Code of Civil Procedure section 384 will result from the Settlement. (Genish Decl., ¶ 17; Settlement
21 Agreement ¶ 51).

22 **D. Release of Wage and Hour Claims**

23 Upon the funding of the Gross Settlement Amount and all applicable employer-side payroll
24 taxes by Defendant, each and every Participating Class Member, including Plaintiff, on behalf of
25 themselves, their heirs, spouses, executors, administrators, attorneys, agents, and assigns, shall be
26 deemed to have fully, finally and forever released, settled, compromised, relinquished and discharged
27 any and all of the Released Parties of and from any and all Settled Claims, and shall be permanently
28 barred and enjoined from the institution or prosecution of any and all Settled Claims against the

Released Parties, except as to such rights or claims as may be created by the Settlement, subject to the continuing jurisdiction of the Court. (Genish Decl., ¶ 18; Settlement Agreement ¶ 63).

IV. STANDARD OF REVIEW FOR PRELIMINARY APPROVAL

The settlement of a class action requires court approval. (*See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794 (1996).) “In general, questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-35 (2001) (*disapproved on other grounds*).)

The review and approval of a proposed class action settlement involves a two-step process. (*See* California Rules of Court (“Cal. Rules of Court”), Rule 3.769(c).) First, counsel submit the proposed terms of the settlement and the Court makes a preliminary assessment of whether the settlement appears to be sufficiently within the range of a fair settlement to justify providing notice of the proposed settlement to class members. After notice is provided to the class, the Court must conduct a second inquiry into whether the proposed settlement is fair, reasonable, and adequate. (*Id.*)

The initial evaluation of the settlement at the preliminary approval step “is not a fairness hearing.” (*Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980).) Rather, the limited purpose of this initial inquiry is to determine, at a threshold level, only whether the proposed settlement is within the range of possible approval and, as a result, “whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.” A presumption of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 723 (2006).)

Preliminary approval does not require a court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to object or exclude themselves from the settlement. (*See* Cal. Rules of Court, Rule 3.769(g).) In

1 considering a potential class settlement, the court need not reach any ultimate conclusions on the issues
2 of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits.
3 (*See Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982).)

4 **V. THE SETTLEMENT IS PRESUMED FAIR**

5 **A. The Settlement Was Reached as a Result of Arm's-Length Bargaining**

6 California courts recognize that “a presumption of fairness exists where . . . [a] settlement is
7 reached through arm's-length bargaining.” (*Wershba*, 91 Cal.App.4th at 245; *see also Clark v. Am.*
8 *Residential Servs. LLC*, 175 Cal.App.4th 785, 799 (2009).) Here, the Parties' settlement negotiations
9 were at all times made at arm's-length and were adversarial. (Genish Decl., ¶ 19). The Settlement
10 was reached following a full day of mediation with a highly respected mediator with substantial
11 experience mediating wage and hour cases. (Genish Decl., ¶ 19). Moreover, Plaintiff engaged in
12 additional negotiations in order to finalize the long-form agreement presently before the Court.
13 (Genish Decl., ¶ 19). At all times, Plaintiff was willing and prepared to litigate this matter through
14 class certification and trial if the Parties had been unable to reach a favorable resolution. (Genish
15 Decl., ¶ 19).

16 **B. Sufficient Investigation and Discovery by Experienced Class Counsel**

17 Courts typically assess the status of discovery in determining whether a class action settlement
18 agreement is fair, reasonable, and adequate. (*Dunk*, 48 Cal.App.4th at 1801.) In preparation for
19 mediation, Defendant produced a random sampling of Settlement Class Members' time and pay
20 records; Defendant's employee handbooks and relevant wage and hour policies and procedures;
21 information regarding the number of putative class members; the total workweeks and pay periods
22 worked by the Settlement Class Members; and the rates of pay for each Class Member. (Genish Decl.,
23 ¶ 20). This allowed Plaintiff's counsel to conduct an informed assessment and analysis of the potential
24 class-wide damages. (Genish Decl., ¶ 20). The Parties extensively briefed issues regarding class
25 certification and liability and provided their analyses to the mediator who helped the Parties debate
26 the strengths and weakness of their respective positions. (Genish Decl., ¶ 20). Additionally,
27 settlement negotiations were conducted by highly capable and experienced counsel. Class Counsel
28 are respected members of the California State Bar with strong records of vigorous and effective

1 advocacy and are experienced in handling complex wage and hour class action litigation. (Genish
2 Decl., ¶¶ 3-7). Accordingly, Class Counsel had sufficient information and experience to act
3 intelligently in negotiating the Settlement.

4 **C. The Settlement is Fair and Reasonable in Light of the Parties' Respective Legal Positions**
5 **and Recovery Risks**

6 A settlement is not judged against what might have been recovered had a plaintiff prevailed at
7 trial, nor does the settlement have to obtain 100% of the damages sought to be fair and reasonable.
8 (*Wershba*, 91 Cal.App.4th at 246, 250.) In evaluating the reasonableness of a settlement, a trial court
9 must consider “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of
10 further litigation, the risk of maintaining class action status through trial, the amount offered in
11 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
12 views of counsel, the presence of a governmental participant, and the reaction of the class members to
13 the proposed settlement.” (*Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008).)

14 Here, the reasonableness of the Settlement is underscored by the fact that Defendant has legal
15 and factual grounds for defending the action. Based upon Class Counsel’s experience litigating similar
16 complex matters, Plaintiff reasonably expected a vigorous and lengthy defense to both class
17 certification and the merits of the action absent a settlement. (Genish Decl., ¶¶ 3, 20-21).

18 **1. Class Counsel’s Analysis of the Maximum Available Liability and Damages**

19 Prior to mediation, Class Counsel analyzed a sampling of time and payroll records provided
20 by Defendant and other relevant documents and discovery. (Genish Decl., ¶ 22). Based on the
21 discovery provided, Class Counsel estimated with respect to the class claims, with all claims
22 adjudicated in favor of the Class, that Defendant faced a maximum potential liability of \$2,689,753.27.
23 (Genish Decl., ¶ 22). This estimate is based off an estimated potential maximum liability for the
24 primary claims at issue as follows: \$636,721.47 for meal period violations, \$707,656.96 for rest period
25 violations, \$481,635.00 for unpaid wages, waiting time penalties of \$429,676.80, and wage statement
26 penalties of \$178,450.00. (Genish Decl., ¶ 22). Plaintiff further estimated that Defendant faced an
27 additional exposure of \$283,200.00 in potential (unstacked) PAGA penalties (calculated based on
28 2,832 aggregate pay periods during the PAGA Period x \$100). (Genish Decl., ¶ 22).

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2. Class Counsel's Risk-Based Analysis and Risk-Based Adjustments

While Plaintiff believes that Defendant faced significant exposure, substantial barriers to a recovery existed. Defendant contended that Plaintiff's claims are not suitable for class certification because individual issues and affirmative defenses would predominate should this case go to trial. (See *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 35-36 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551(2011).) While Plaintiff and Class Counsel disagree with Defendant's predictions, they also recognize that there is a significant risk that the Court may deny class certification. (Genish Decl., ¶ 23); see also, *Findings of the Study of California Class Action Litigation*, 2000-2006, available online at the following: <http://www.courts.ca.gov/documents/class-action-lit-study.pdf> [finding that only 21.4% of all class actions were certified either as part of a settlement or as part of a contested certification motion].)

For example, a large portion of Defendant's overall liability lies in Plaintiff's unpaid wages claim based on unpaid overtime and failure to pay overtime at the correct regular rate of pay. Plaintiff asserted that Defendant's overtime policy was facially unlawful because it states that overtime is only paid for all hours worked over 40 in one week's time. However, Plaintiff's analysis of Defendant's time and payroll records revealed that although liability may have been strong, the total amount of unpaid wages to the 108 Settlement Class Members at issue was not high. First, there appeared to be only \$23,986.00 in unpaid overtime wages. More significantly, there were so few pay periods where a bonus was earned and overtime was worked, that the underpayment due to the improperly calculated regular rate was barely over \$1,000. (Genish Decl., ¶ 24).

Plaintiff's claim for unpaid wages based on off-the-clock work faced other challenges. Defendant required employees to be ready to work at the start of their shift, but denied employees the ability to clock in more than 5 minutes before the start of their shift. Notwithstanding, employees had to arrive for their shift early enough to put on their apron, affix their name badge to their clothing, locate a headset, make sure it worked, sanitize it and put it on before clocking in for their shift. In addition, Plaintiff asserted that Defendant required employees to respond to phone calls and test messages on substantive topics such as client orders and project status when they were not at work. However, this claim lacked documentation to assess damages and likely would have required

1 testimonial evidence to be obtained and presented from (ostensibly) each individual employee.
2 (Genish Decl., ¶ 25).

3 Next, Plaintiff's meal period claims faced challenges. Generally, these claims have been
4 increasingly difficult to certify in recent years and Defendant contended its practices were lawful. (*See*
5 *Brinker*, 53 Cal.4th at 1034-35.) Plaintiff's theory of liability for meal period violations was based on
6 allegations that Defendant's policy was unlawful because it informed employees only of the right to
7 take a meal break if they worked a shift of "more than six hours." Plaintiff further alleged that
8 Defendant had failed to implement policies and practices that allowed Settlement Class Members to
9 take meal breaks in the manner required under California law. (*See Bradley v. Networkers Int'l, LLC*,
10 211 Cal.App.4th 1129 (2012) [holding that "the lack of a meal/rest break policy and uniform failure
11 to authorize such breaks are matters of common proof."].) Yet, Plaintiff's analysis of the data
12 Defendant produced appeared to reflect a much lower violation rate than anticipated – yielding
13 potential damages of approximately one-third of the estimated maximum damage analysis. Defendant
14 also argued that its practices at all times during the class period were lawful and that the rate of
15 purported meal period violations reflected in the data would still require an individualized inquiry that
16 would prohibit a class from being certified. Class Counsel disagreed with this assessment but had to
17 consider the risk that the Court would find validity in an individualized proof defense to certification
18 of Plaintiff's meal period claim. (Genish Decl., ¶ 26).

19 Plaintiff's rest period allegations were based on a similar allegation of a facially unlawful
20 written policy (based on the policy's failure to set forth an accurate timing requirement with respect
21 to rest periods) and Defendant's failure in practice to provide employees with timely, full, and
22 uninterrupted rest periods. As with the meal period allegations, Defendant contended that it provided
23 rest breaks and relieved Settlement Class Members of all duties as required under California law.
24 However, this claim was complicated by the fact that Defendant instructed employees to clock in and
25 out for rest periods. The records curiously reflected a fair amount of unlawful rest periods, but still
26 yielded nowhere near the amount of estimated maximum damages. Further, the uncertainty of the
27 records and rest period violations, raised legitimate concerns over whether Plaintiff would be able to
28 certify this claim or prove substantial damages with requisite certainty. (Genish Decl., ¶ 27).

1 Class Counsel also recognized that, even if Plaintiff prevailed at class certification, proving the
2 amount of wages due to Settlement Class Members would be an expensive, time-consuming, and
3 uncertain proposition. In order to prove liability and damages, Class Counsel would need to request
4 and analyze thousands of additional documents, obtain the Settlement Class Members' contact
5 information, contact them and obtain their declarations at great expense. Obtaining the cooperation of
6 current employees would also be difficult, given the likely reluctance to aid prosecution of a lawsuit
7 against a current employer. On the other hand, Defendant would likely be able to obtain the
8 cooperation of its employees. Moreover, even if Plaintiff prevailed at class certification and trial,
9 possible appeals would substantially delay any recovery by the Class. (Genish Decl., ¶ 28).

10 Therefore, taking into account the risk of not obtaining class certification, as well as the merits-
11 based risk factors, Plaintiff reduced Defendant's estimated liability by about 70%. This resulted an
12 adjusted estimated liability of \$806,925.90. (Genish Decl., ¶ 29).

13 Class Counsel also separately contemplated the risks of proceeding with the PAGA action and
14 potential liability Defendant could face from this claim. First, Class Counsel recognized that the
15 PAGA claims would be subject to the same defenses and risks as Plaintiff's underlying wage claims.
16 (Genish Decl., ¶ 39); *see, Elliot v. Spherion Pac. Work, LLC*, 572 F.Supp.2d 1169, 1181-82 (C.D. Cal.
17 2008) ["Plaintiff's claim under [PAGA] is wholly dependent upon her other claims. Because
18 Plaintiff's other claims fail as a matter of law, so does her PAGA claim"].) Moreover, although
19 California case law clearly states that PAGA actions need not satisfy class action requirements, Class
20 Counsel remained mindful of the fact that some courts have nevertheless held that PAGA claims must
21 meet a threshold "manageability" requirement. (*See, e.g., Wesson v. Staples the Office Superstore,*
22 *LLC*, 68 Cal.App.5th 746 (2021).) Class Counsel also anticipated that even if successful on the merits
23 at trial, the imposition of cumulative civil penalties based on the alleged wage and hour violations
24 could be considered unjust, arbitrary and oppressive, or confiscatory, and that Defendant would argue
25 that it made a good faith attempt to comply with its legal obligations warranting a reduction in
26 penalties. (Genish Decl., ¶ 30).¹ Class Counsel also anticipates Defendant would argue that it made a

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28 ¹ See, e.g., *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1131 (2012) (imposition of both
statutory and civil penalties for same conduct is impermissible double recovery) (disapproved on other grounds); *Aguirre*
v. Genesis Logistics, 2013 WL 10936035, at *3 (C.D. Cal. 2013) ("duplicative effect" of penalties is a factor in favor of
"reducing ...the PAGA penalty"); *Smith v. Lux Retail North America, Inc.*, 2013 WL 2932243, at *3 (N.D. Cal. June 13,

1 good faith attempt to comply with its legal obligations, and that the violations per pay period were
2 low, warranting an additional reduction in civil penalties. (Genish Decl., ¶ 30). Finally, Class Counsel
3 was also mindful of the fact that PAGA is fundamentally not intended to be compensatory in nature
4 but is instead intended to facilitate enforcement of California’s labor laws by financing state activities
5 and educating and deterring non-compliance. (Genish Decl., ¶ 30).

6 Therefore, after considering this multitude of factors, Plaintiff and Class Counsel concluded
7 that it was in the best interest of the State of California and the Aggrieved Employees to enter into the
8 Settlement, and to allocate Twenty-Five Thousand Dollars (\$25,000.00) of the Settlement towards the
9 PAGA claims, which represents approximately 7.4% of the Gross Settlement Amount. This percentage
10 of the settlement is well-within the range of wage and hour settlements regularly approved in both
11 state and federal court for cases that include both a class and PAGA action. Typically, such hybrid
12 cases allocate only 1% of the gross settlement value to resolve PAGA claims, and, indeed, settlements
13 allocations as little as 0.22% of the gross settlement amount have been approved as reasonable by
14 courts. (Genish Decl., ¶ 31). Moreover, the overall relief obtained by the Settlement is significant,
15 not only from a monetary perspective, but also because it fulfills the public policy objectives of
16 PAGA—to promote enforcement of California’s labor laws, provide funds to the state, and deter future
17 non-compliance by the employer. (Genish Decl., ¶ 31).

18 In light of the Parties’ respective legal positions and the risks of continued litigation, the Gross
19 Settlement Amount for resolution of the class and PAGA claims, is fair, adequate, and reasonable.
20 (Genish Decl., ¶ 32).

21 VI. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

22 Code of Civil Procedure Section 382 provides that three basic requirements must be met in
23 order to sustain any class action: (1) there must be an ascertainable class; (2) there must be a well-
24 defined community of interest in the question of law or fact affecting the parties to be represented; and
25

26 2013) (declining to stack penalties based on the same conduct); *Castillo v. ADT, LLC*, 2017 WL 363108, at *4 (E.D. Cal.
27 Jan. 25, 2017); *Sanchez v. McDonalds Restaurants of California, Inc.*, 2017 WL 4620746 (LA Super. Ct. July 6, 2017)
(declining to stack penalties arising out of the same conduct); *Fleming v. Covidien, Inc.*, 2011 WL 756304718, at *4
28 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 80%); *Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030 (N.D. Cal. 2016)
(indicating that a substantial reduction is warranted where good faith dispute exists in legal obligations); *Carrington v.*
Starbucks Corp., 30 Cal.App.5th 504, 529 (2018) (approving reduction in penalties from \$50 per pay period to \$5 per
pay period based on good faith attempts to comply with obligations and minimal violations).

(3) certification will provide substantial benefits to litigants and the courts, i.e., proceeding as a class action is superior to other methods. (*See Dunk*, 48 Cal.App.4th at 1806.) Plaintiff contends that this action, which is based upon Defendant's wage and hour policies and practices, satisfies the class certification requirements under California Code of Civil Procedure section 382. Defendant denies Plaintiff's allegations, but for purposes of this Settlement only, Defendant has stipulated to certification of the proposed class action.

A. An Ascertainable Class Exists Which is So Numerous That Joinder of All Members is Impracticable

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying the class members. (*See Miller v. Woods*, 148 Cal.App.3d 862, 873 (1983).) In this case, all three considerations strongly favor class certification. Here, the Settlement Class is defined as "All current and former non-exempt and/or hourly-paid employees who worked for Defendant in the State of California at any time during the Class Period." (Genish Decl., ¶ 12; Settlement Agreement, ¶ 34). This provides a clear and definite scope for the proposed class.

Next, the class is sufficiently numerous. There is no magic number that satisfies the numerosity requirement. Courts have certified classes with as few as ten or twenty-eight class members. (*Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981); *Bowles v. Superior Court*, 44 Cal. 2d 574 (1995); *Hebbard v. Colgrove*, 28 Cal.App.3d 1017, 1030 (1972).) Here, the estimated Class size of 122 individuals meets the numerosity requirement.

Finally, the question of whether class members are easily identifiable turns on whether a plaintiff can establish "the existence of an ascertainable class." (*Daar v. Yellow Cab Co.*, 67 Cal.2d 695 at 706 (1967).) The existence of an ascertainable class in this case can be established through Defendant's payroll records, and the class definition is sufficiently specific to enable the parties, potential Settlement Class Members and the Court to determine the parameters of the Settlement Class. (*See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.App.3d 605, 617 (1987).)

B. The Class Shares a Well-Defined Community of Interest

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class

1 representatives who can adequately represent the class. (*Dunk*, 48 Cal.App.4th at 1806.) Here, all
2 three requirements are easily satisfied.

3 The commonality criterion requires the existence of common question of law or fact and is
4 generally established with the issues of predominance and typicality. (*See Daar*, 67 Cal.2d 695, 706.)
5 What is required is that a common question of fact or law exist which predominates over issues unique
6 to individual plaintiffs. The existence of individual issues or facts—generally present in any case
7 arising from employment—is not a bar to class certification as long as they do not render class
8 litigation unmanageable or predominate over the common issues. (*See B.W.I. Custom Kitchen v.*
9 *Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1354 (1987).)

10 Here, Plaintiff's claims present common issues of law and fact that predominate and warrant
11 class certification. Plaintiff alleges that Defendant denied compliant meal and rest periods to
12 employees, required employees to perform work off-the-clock, and failed to fully compensate
13 employees for all time actually worked. These policies and practices meant that Defendant allegedly
14 failed to pay minimum and overtime wages, and other related claims. Plaintiff alleges that Defendant's
15 policies and practices were uniform as to all Settlement Class Members. Thus, class treatment is
16 appropriate.

17 To satisfy the typicality requirement, California law does not require that Plaintiff's claims be
18 identical to the other class members. Rather, the test of typicality for a class representative is whether
19 other members have the same or similar injury, whether the action is based on conduct which is not
20 unique to the named plaintiff, and whether other class members have been injured by the same course
21 of conduct. (*See Seastrom v. Neways, Inc.*, 149 Cal.App.4th 1496, 1502 (2007).) The typicality
22 requirement for a class representative refers to the nature of the claim or defense of the representative,
23 and not to the specific facts from which it arose or the relief sought. (*See id.*)

24 Here, Plaintiff alleges that his claims are similar to that of the other Settlement Class Members
25 and that Plaintiff's claims arise out of the same alleged course of conduct giving rise to the claims of
26 the other Settlement Class Members. Because Plaintiff's claims are based upon the same alleged
27 conduct and business practices as those of Settlement Class Members, the typicality requirement has
28 been satisfied.

1 Finally, the question of adequacy of representation “depends on whether the plaintiff’s attorney
2 qualifies to conduct the proposed litigation in the plaintiff’s interest or not antagonistic to the interests
3 of the class.” (*McGee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976).) Here, these considerations
4 are satisfied. Class Counsel are well-regarded and accomplished lawyers who are qualified and
5 experienced in employment-related, class-action litigation. (Genish Decl., ¶¶ 3-7). Plaintiff will
6 vigorously, adequately and fairly represent the interests of the class. Plaintiff has at all times
7 throughout the course of the litigation considered the interests of the class and understood that he must
8 take steps to adequately represent the class and their interests. (Evans Decl. ¶ 4-8). Because Plaintiff’s
9 claims are typical of other Settlement Class Members and are not based on unique circumstances, there
10 is no antagonism between the interests of Plaintiff and the Class.

11 **C. A Class Action is Superior to a Multiplicity of Litigation**

12 Under the circumstances, proceeding as a class action is a superior means of resolving this
13 dispute, as the class members and the court will derive substantial benefits. Class certification would
14 serve as the only means to deter and redress the alleged violations. (*See Linder v. Thrifty Oil Co.*, 23
15 Cal.4th 429, 434 (2000) [relevant considerations include the probability that each class member will
16 come forward to prove his or her separate claim and whether the class approach would actually serve
17 to deter and redress the alleged wrongdoing].) Further, individual actions arising out of the same
18 operative facts would unduly burden the courts and could result in inconsistent results. Therefore,
19 class action proceedings are superior to individual litigation.

20 **VII. THE REQUESTED INCENTIVE PAYMENT IS REASONABLE**

21 Plaintiffs in class action lawsuits are eligible for reasonable incentive payments as
22 compensation “for the expense or risk they have incurred in conferring a benefit on other members of
23 the class.” (*Munoz v. BCI Coca-Cola Bottling Co.*, 186 Cal.App.4th 399, 412 (2010).) Courts
24 routinely grant approval of class action settlement agreements containing enhancements for the class
25 representative, which are necessary to provide incentive to represent the class and are appropriate
26 given the benefit the class representatives help to bring about for the class. (*See In re Online DVD*
27 *Rental*, 779 F.3d 934, 947-948 (9th Cir. 2014) [approving incentive award 417 times larger than
28 individual payments where incentive award made up a mere .17% of the settlement]; *Gaudin v. Saxon*

1 *Mortgage Servs., Inc.*, 2015 WL 7454183, at *10 (N.D. Cal. Nov. 23, 2015) [finding service award of
2 \$15,000 to be “fair and reasonable”].)

3 Plaintiff initiated this litigation on behalf of his former co-workers who will now be entitled to
4 receive payment from the Settlement. Plaintiff invested substantial time and effort into litigation
5 including his own research, reviewing documents, contacting other putative class members to obtain
6 their participation in the action, and extensive discussions with Class Counsel. (Evans Decl. ¶¶ 4-9).
7 Further, the requested amount is also reasonable given the average award and the benefit gained by
8 other Settlement Class Members. For these reasons, Plaintiff requests that an incentive payment of
9 \$7,500.00 to Plaintiff be preliminarily approved by the Court. (Genish Decl., ¶ 33; Evans Decl., ¶ 10).

10 **VIII. THE REQUESTED ATTORNEYS’ FEES AND COSTS ARE REASONABLE**

11 Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their decisions
12 will “not be disturbed on appeal absent a manifest abuse of discretion.” (*Lealao v. Beneficial Cal,*
13 *Inc.*, 82 Cal.App.4th 19, 41 (2000).) California law provides that attorney fee awards should be
14 equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred.
15 (*Id.* at 47.) In cases where class members present claims against a common fund and the defendant
16 agrees to a percentage of the fund as part of the settlement, use of the percentage method is appropriate.
17 (*Id.* at 32.)

18 Here, the requested attorneys’ fees of \$200,000.00, which is thirty-three percent of the common
19 fund, are disclosed to Settlement Class Members in the proposed Class Notice. (Genish Decl., Exhibit
20 A, Settlement Agreement, Exh. 1 thereto). The requested fee was freely negotiated, is common in the
21 legal marketplace, and is not opposed by Defendant. The Motion for Final Approval will elaborate on
22 the nature of the legal services provided and will also support Class Counsel’s request for the
23 reimbursement of litigation costs not to exceed \$30,000.00. (Genish Decl., ¶ 34). All costs and fees
24 that are not ultimately approved by the Court shall instead be included in the Net Settlement Fund and
25 distributed to Participating Class Members. (Settlement Agreement, ¶ 34).

26 **IX. THE CLASS NOTICE AND THE OPT-OUT AND OBJECTION PROCESS** 27 **MEET DUE PROCESS REQUIREMENTS**

28 The Parties have jointly drafted a Class Notice which will be delivered to the Settlement Class

1 Members. (Genish Decl., ¶ 35; *See also*, Settlement Agreement, Exh. 1). The Class Notice will include
2 information regarding the nature of the lawsuit, a summary of the terms of the Settlement, the Class
3 definition, information on how to object and opt-out, and the date of the Final Approval Hearing.
4 (Genish Decl., ¶ 35; Settlement Agreement, ¶ 55(e)). It will list each Settlement Class Member's total
5 Workweeks and the estimated Individual Settlement Payment to be paid to the Settlement Class
6 Members. (Genish Decl., ¶ 35; Settlement Agreement, ¶ 55(e)). The Class Notice shall be provided
7 to Settlement Class Members in both English and Spanish. (Genish Decl., ¶ 35; Settlement
8 Agreement, ¶ 55(a)).

9 No later than fourteen (14) calendar days after the Court grants preliminary approval of the
10 Settlement, Defendant will provide the a list to the Settlement Administrator containing the following
11 information for each Settlement Class Member: full name, last known home address, last known
12 telephone number, social security number, start and end dates of active employment as a non-exempt
13 employee of Defendant in the State of California, total Workweeks during the Class Period, total
14 workweeks worked during the PAGA Period, and any other information required by the Settlement
15 Administrator in order to effectuate the terms of the Settlement ("Class List"). (Genish Decl., ¶ 36;
16 Settlement Agreement, ¶ 4). The Settlement Administrator shall perform any searches necessary to
17 confirm Settlement Class Members' addresses, and within seven (7) calendar days of receiving the
18 Class List from Defendant, the Settlement Administrator shall mail the Class Notice to all Settlement
19 Class Members via first class mail. (Settlement Agreement, 55(d), (f)). The Parties have agreed to use
20 Simpluris as the Settlement Administrator. (Genish Decl., ¶ 36; Settlement Agreement, ¶ 33).

21 In determining whether to approve a settlement of a class action, a trial court has virtually
22 complete discretion as to the manner of giving notice to class members, and review on appeal is
23 governed by the abuse of discretion standard. (*See In re Cellphone Fee Termination Cases*, 186
24 Cal.App.4th 1380 (2010).) Here, Class Counsel is not aware of an alternative method of providing
25 notice to the Class which would result in a higher likelihood of actual notice. (Genish Decl., ¶ 37).
26 The original source of the mailing addresses is from Settlement Class Members, who provided the
27 information to Defendant in the normal course of business. (Genish Decl., ¶ 37). As a fail-safe,
28 additional searches will be performed on any notice returned as non-deliverable. (Genish Decl., ¶ 37,

Settlement Agreement, ¶ 55(f)). The Settlement Administrator will report any and all opt outs, objections, and disputes. (Settlement Agreement, ¶ 59).

Any Settlement Class Members who wish to object to the approval of this Settlement shall provide a signed and dated written statement stating the specific reason for the objection as well as their full name, address, telephone number, and the last 4 digits of their social security number or employee identification number. (Genish Decl., ¶ 38; Settlement Agreement, ¶ 56). Objections must be mailed to the Settlement Administrator within sixty (60) calendar days following the initial mailing of the Class Notice. (Genish Decl., ¶ 38; Settlement Agreement, ¶ 29). The Response Deadline will be extended fifteen (15) calendar days for any Settlement Class Member who is re-mailed a Class Notice by the Settlement Administrator in accordance with the notice procedure described in Section IV of the Settlement Agreement, unless that fifteenth (15th) day falls on a Sunday or a Federal holiday, in which case the deadline will be extended to the next day on which the United States Postal service is open. Settlement Class Members may also appear and object at the final approval hearing, regardless of whether they have submitted a written objection. (Genish Decl., ¶ 38; Settlement Agreement, ¶ 56).

Any Settlement Class Members who wish to be excluded from the Settlement must mail the Settlement Administrator a signed and dated written request for exclusion including their name, address, telephone number, and the last 4 digits of their social security number. The request for exclusion must be postmarked no later than 60 days after mailing of the Class Notice. (Genish Decl., ¶ 39; Settlement Agreement, ¶¶ 29, 57).

X. NOTICE TO THE LWDA

In accordance with Labor Code sections 2699 et. seq., Plaintiff's counsel provided notice of the proposed settlement to the LWDA on September 9, 2022. (Genish Decl., ¶ 11, Exh. B).

XI. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Preliminary Approval and the relief requested herein.

Dated: September 9, 2022

BLACKSTONE LAW, APC

By:


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Attorney for Plaintiff Richard Evans