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

DANNY MARSANO, individually, and on
behalf of other members of the general public
similarly situated, and as an aggrieved
employee pursuant to the Private Attorneys
General Act ("PAGA"),

Plaintiff,

vs.

H AND H DRUG STORES, INC., a
California corporation; and DOES 1 through
10, inclusive,

Defendants.

Case No.: 22STCV17192

*[Assigned for all purposes to the Hon. Laura A.
Seigle, Dept. 17]*

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

Date: October 21, 2024
Time: 9:00 a.m.
Dept.: 17

Complaint Filed: November 30, 2021
Trial Date: None Set

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

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on October 21, 2024, at 9:00 a.m. in Department 17 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, CA 90012, Plaintiffs Danny Marsano and Cindy Garcia (“Plaintiffs”), individually and on behalf of a class of similarly situated individuals, will and hereby do 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 non-exempt employees employed by Defendant H and H Drug Stores, Inc. in the State of California at any time from November 30, 2017 through July 19, 2024 (“Class Period”).
3. Preliminary appointment of Plaintiffs Danny Marsano and Cindy Garcia as Class Representatives;
4. Preliminary appointment of Raul Perez, Robert Drexler, and Jonathan Lee of Capstone Law APC, and Paul K. Haines, Sean M. Blakely, and Joel Gordon 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 Class Representative Service Payments to Plaintiffs, civil penalties payable to the Labor & Workforce Development Agency (“LWDA”), settlement administration 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. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the supporting declarations of Raul Perez, Paul K. Haines, Sean M. Blakely, Joel M.
3 Gordon, Plaintiffs Danny Marsano and Cindy Garcia, and Jodey Lawrence of Phoenix Settlement
4 Administrators, and the exhibits attached thereto, the pleadings and other papers filed in this
5 action, and on any further oral or documentary evidence or argument presented at the time of
6 hearing.

7
8
9 Dated: July 15, 2024

Respectfully submitted,
CAPSTONE LAW APC
HAINES LAW GROUP, APC

10
11 By: 
12 Raul Perez
13 Robert Drexler
14 Jonathan Lee
15 Paul K. Haines
16 Sean M. Blakely
17 Attorneys for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Danny Marsano and Cindy Garcia (hereinafter “Plaintiffs”) brought this class
4 and representative action for various wage and hour violations on behalf of current and former
5 non-exempt employees who worked for Defendant H and H Drug Stores, Inc. (“H&H”) in the
6 State of California from November 30, 2017 through July 19, 2024 (the “Class Period”).
7 Plaintiffs’ primary allegations are that H&H failed to: (1) provide all required meal periods, (2)
8 authorize and permit all required rest periods, (3) pay all wages, including minimum and overtime
9 wages, due to its alleged regular rate miscalculations and for alleged off-the-clock work, and (4)
10 failed to reimburse for business expenditures. Based on these alleged wage and hour violations,
11 Plaintiffs also brought derivative claims for alleged waiting time penalties, the alleged failure to
12 issue accurate and compliant wage statements, the alleged failure to timely pay wages during
13 employment, and for civil penalties under the Private Attorneys General Act (“PAGA”).¹

14 Plaintiffs now respectfully request that this Court preliminarily approve this non-
15 reversionary, common-fund class action settlement,² in which H&H has agreed to pay One
16 Million Nine Hundred Fifty Thousand Dollars and Zero Cents (\$1,950,000.00) to the following
17 Settlement Class:

18 All non-exempt employees employed by Defendant H and H Drug Stores,
19 Inc. in the State of California at any time from November 30, 2017 through
20 July 19, 2024 (“Class Period”).

21 If the Settlement is approved, H&H will pay a non-reversionary Gross Settlement Amount

22 ¹ Plaintiffs’ operative Second Amended Class and Representative Action Complaint pleads the
23 following causes of action: (1) unpaid overtime; (2) unpaid minimum wages; (3) failure to provide
24 meal periods; (4) failure to authorize and permit rest periods; (5) non-compliant wage statements
25 and failure to maintain payroll records; (6) wages not timely paid upon termination; (7) failure to
26 timely pay wages during employment; (8) unreimbursed business expenses; (9) civil penalties for
27 violations of the PAGA; (10) unlawful business practices; and (11) unfair business practices.

28 ² The Class Action and PAGA Settlement Agreement and Class Notice (“Settlement”) is attached
to the Declaration of Sean M. Blakely (“Blakely Decl.”) as **Exhibit A**. The proposed Class Notice
is attached to the Settlement as **Exhibit 1**. All defined terms in this motion have the same
definition as that in the Settlement. The Parties utilized the model Class Action and PAGA
Settlement Agreement and Class Notice found on Los Angeles Superior Court’s website.

1 of \$1,950,000.00. After deducting administration costs, Plaintiffs’ requested Class Representative
2 Service Payments, the amount designated as PAGA civil penalties, and requested attorneys’ fees
3 and costs, the Net Settlement Amount (“NSA”) of approximately \$1,172,500.00 will be
4 distributed to all Settlement Class Members who do not opt-out of the Settlement based on the
5 proportionate number of workweeks worked by each Settlement Class Member during the Class
6 Period.

7 Significantly, Settlement Class Members do not need to file a claim to reap the financial
8 benefits of the Settlement, as all Settlement Class members will automatically receive a payment
9 unless they affirmatively opt-out. There are approximately 850 Settlement Class Members, and
10 the average payment to participating Settlement Class members is projected to be approximately
11 \$1,379.41, an excellent result for Settlement Class Members.

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

17 **II. SUMMARY OF THE LITIGATION**

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

19 Founded in 1977, H&H is a provider of durable medical equipment and supplies. *See*
20 Declaration of Sean M. Blakely (“Blakely Decl.”), ¶ 8. H&H delivers home medical equipment,
21 including wheelchairs, oxygen tanks, respiratory equipment, and other medical equipment, to
22 patients across Southern California. *Id.* During the Class Period, H&H has operated locations in
23 San Bernardino, Glendale, La Crescenta, Fresno and Stockton. *Id.* Plaintiff Marsano worked for
24 H&H as a non-exempt Delivery Technician from November 2017 until approximately May 2021.
25 *See* Declaration of Danny Marsano in Support of Approval of Class Action Settlement (“Marsano
26 Decl.”), ¶ 2. Plaintiff Garcia worked for H&H as a non-exempt employee in distribution, sales,
27 customer service and dispatch from 2013 until approximately August 2020. *See* Declaration of
28 Cindy Garcia in Support of Approval of Class Action Settlement (“Garcia Decl.”), ¶ 2.

On November 30, 2021, Plaintiff Marsano filed a Class Action Complaint against H&H in San Bernardino Superior Court, alleging causes of actions for: (1) unpaid overtime; (2) unpaid minimum wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) non-compliant wage statements and failure to maintain payroll records; (6) failure to pay all wages due upon separation of employment; (7) failure to timely pay wages during employment; (8) failure to reimburse business expenses; (9) unlawful business practices under Business and Professions Code §§ 17200, *et seq.*; and (10) unfair business practices under Business and Professions Code §§ 17200, *et seq.* Blakely Decl., ¶ 9. On December 8, 2021, Plaintiff Marsano sent his PAGA notice letter to the LWDA. *Id.*, **Exhibit B** (LWDA Letter). On or about May 25, 2022, pursuant to stipulation by the Parties, this matter was transferred to Los Angeles Superior Court. *Id.* On August 29, 2023, Plaintiff Marsano filed a First Amended Class Action Complaint and Enforcement Action under the Private Attorneys General Act, adding a cause of action for civil penalties under the Private Attorneys’ General Act of 2004, Labor Code Section 2698, *et seq.* *Id.*

On September 15, 2022, Plaintiff Garcia filed a Class Action Complaint against H&H in San Bernardino Superior Court, alleging causes of actions for: (1) meal period violations; (2) rest period violations; (3) failure to reimburse necessary business expenses; (4) minimum wage violations; (5) failure to pay all overtime wages; (6) waiting time penalties; and (7) unfair competition in violation of California Business & Professions Code § 17200 *et seq.* Blakely Decl., ¶ 9. As part of the Settlement, the Parties stipulated to the filing of Plaintiffs’ operative Second Amended Class and Representative Action Complaint (“SAC”) in this Action, which added Plaintiff Garcia as named representative and certain factual allegations reflecting Plaintiff Garcia’s employment. *Id.* The operative SAC was filed on April 16, 2024. *Id.*

B. PLAINTIFFS’ CLAIMS AND H AND H’S DEFENSES

1. Meal Period Claims

Plaintiffs allege that H&H failed to provide compliant first meal periods to its non-exempt employees, such that first meal periods were often provided after the completion of five hours of work and were occasionally not provided at all due to work demands imposed by H&H. Blakely

Decl., ¶ 14. Plaintiffs also allege that H&H’s written meal period policies for a portion of the Class Period were deficient and did not contain explicit language regarding the timing of meal periods. *Id.* Plaintiffs further allege that Settlement Class Members were not always provided with second meal periods when they worked shifts in excess of 10.0 hours. *Id.*, at ¶ 15.

H&H counters that it has maintained compliant written meal period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. Blakely Decl., ¶ 14. H&H also contends that under *Brinker*, it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken, and that it has always done so. *Id.*; see *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting “ensure” standard and holding employers only have to “provide” employees the opportunity to take meal periods). H&H also maintains that any short, missed, or late first meal periods were the result of lawful employee waiver or choice and not due to any policy of practice of H&H, thereby precluding liability. Blakely Decl., ¶ 14. H&H argues that that Plaintiffs’ meal period claims are not amenable to class treatment due to Settlement Class Members’ varying job titles, departments, positions and duties, and that individualized inquiries will be required to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, thereby making class certification of this claim unlikely. *Id.* With respect to second meal periods, H&H argues that Settlement Class Members voluntarily waived their second meal periods on shifts over 10.0 hours but less than 12.0 hours as they are entitled to do under Labor Code § 512 so that they did not need to stay at work for an extra unpaid 30 minutes. *Id.*, at ¶ 15.

2. Rest Period Claims

Plaintiffs allege that H&H failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 16. Specifically, Plaintiffs allege that due to H&H’s strict delivery schedules and workload, there was not always time for employees to take compliant off-duty rest periods. *Id.* Plaintiffs further contend that employees were not provided with a third rest period when they worked shifts in excess of 10.0 hours. *Id.*

H&H argues that it has always maintained and enforced lawful rest period policies/practices during the Class Period, and has, in fact, authorized and permitted all required

1 rest periods to Settlement Class members. Blakely Decl., ¶ 16. Additionally, H&H maintains that
2 any failure to take a rest period was the result of employee choice, rather than any policy or
3 practice of H&H. *Id.* H&H also asserts this claim is not amenable to class treatment as
4 individualized inquiries would be required to determine which employees failed to take a rest
5 period, and the reasons why. *Id.* These manageability concerns are especially present with respect
6 to rest period claims, H&H argues, given that rest periods are not recorded. *Id.*

7 **3. Regular Rate Miscalculations**

8 Plaintiffs allege that H&H failed to pay all overtime wages owed by not including the
9 value of all “On Call” and “Beeper” pay (when Delivery Technicians were assigned to be on call
10 but were not actually called in) into the “regular rate” of pay. Blakely Decl., ¶ 17; *see* Labor Code
11 § 510(a) (requiring overtime to be paid at “one and one-half times the regular rate of pay”); Wage
12 Order 4, § 3 (“[E]mployees shall not be employed more than eight (8) hours in any workday or
13 more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times
14 such employee’s regular rate of pay for all hours worked over 40 hours in the workweek”) (emphasis added).

15
16 However, H&H argues that it properly included all forms of remuneration when
17 calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class
18 Members. Blakely Decl., ¶ 17. H&H further argues that Settlement Class Members received
19 different types of pay throughout the Class Period depending on their job positions, creating
20 substantive differences among the Settlement Class Members with respect to the incentives
21 received, making class certification unlikely. *Id.*

22 **4. Unreimbursed Business Expenditures**

23 Plaintiffs allege that H&H required Settlement Class Members to use their personal
24 cellular phones for business purposes, including to communicate with co-workers and
25 supervisors. Blakely Decl., ¶ 18. Despite requiring Plaintiffs and Settlement Class Members to
26 incur these expenses on a daily basis, Plaintiffs allege that H&H failed to reimburse Settlement
27 Class Members for these necessary business expenses, in violation of Labor Code § 2802(a) (“An
28 employer shall indemnify his or her employee for all necessary expenditures or losses incurred

1 by the employee in direct consequence of the discharge of his or her duties”) *Id.*; *see also Cochran*
2 *v. Schwan’s Home Service, Inc.*, 228 Cal. App. 4th 1137 (2014) (holding employer must
3 reimburse use of personal cell phone, even where employee already has “unlimited” plan).

4 H&H argues that Settlement Class Members who worked within company offices were
5 prohibited from using their personal cellular phones as part of their job duties and employees who
6 worked as drivers were provided company-issued cell phones or had radios and were not
7 authorized to use personal cell phones. Blakely Decl., ¶ 18. H&H further argues that this claim
8 would require individual inquiries into whether Settlement Class Members actually used their
9 personal cellular phones for work purposes, how much expense they incurred, whether they
10 submitted a request for reimbursement, and the reasonableness of that expense, thus precluding
11 class certification. *Id.*; *see also, e.g., Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568
12 (2007) (“In calculating the reimbursement amount due under section 2802, the employer may
13 consider not only the actual expenses that the employee incurred, but also whether each of those
14 expenses was ‘necessary,’ which in turn depends on the reasonableness of the employee’s
15 choices”).

16 **5. Unpaid Wages Due to “On-Call” Policy**

17 Plaintiffs contend that H&H underpaid Settlement Class Members employed as Delivery
18 Technicians due to H&H’s allegedly unlawful on-call policies/practices, whereby H&H required
19 Delivery Technicians to be on-call 24 hours per day for one week per month to respond to after-
20 hours “emergency” deliveries or pickups. Blakely Decl., ¶ 19. Plaintiffs allege that H&H only
21 paid a flat rate of \$120.00 per week for “on-call” time, but that this amount did not compensate
22 Delivery Technicians for all of the time they spent driving to the office to pick up equipment for
23 on-call deliveries or for the time that the employees spent on standby waiting for a possible call.
24 *Id.*

25 H&H counters that it fully compensated Delivery Technicians for this time with not only
26 the \$125 on-call rate, but also a \$35 payment per on-call delivery, which covers all of the
27 compensable time for which Delivery Technicians were eligible. Blakely Decl., ¶ 19. H&H
28 further asserts that Plaintiffs would be unable to certify this class given the individualized

1 inquiries as to whether Settlement Class Members were in fact not paid for all compensable time
2 “worked” while on call. *Id.*

3 **6. Wage Statement Violations**

4 Plaintiffs allege that as a result of the unpaid minimum and overtime wages, as well as the
5 unpaid meal and rest period premium wages described above, H&H is liable for wage statement
6 penalties. Blakely Decl., ¶ 20. H&H argues any alleged wage statement violations were not
7 “knowing and intentional,” and Plaintiffs cannot show that they or other employees “suffer[ed]
8 injury” due to the alleged wage statement violations, as required by Labor Code § 226(e) for the
9 imposition of penalties. *Id.* Further, H&H contends its wage statements always accurately
10 reflected hours worked and amounts paid as well as all other required information, precluding
11 liability for wage statement penalties under *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th
12 1308, 1336-37 (2018) (agreeing with employer’s “commonsense position that the pay stubs were
13 accurate in that they correctly reflected the hours worked and the pay received...The purpose of
14 section 226 is to *document the paid wages* to ensure the employee is fully informed regarding the
15 calculation of those wages.”) (*Italics in original*). Blakely Decl., ¶ 20.

16 **7. Waiting Time Penalties**

17 As a further result of the unpaid wages and unpaid meal and rest period premium wages
18 described above, Plaintiffs allege that H&H failed to comply with its final pay obligations set
19 forth in Labor Code §§ 201-203. Blakely Decl., ¶ 21. H&H argues that it possesses strong, good-
20 faith defenses to Plaintiffs’ underlying claims, thus precluding recovery of waiting time penalties,
21 which are only available for the “willful” failure to pay wages. *Id.*; see also 8 Cal. Code Regs. §
22 13520 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time
23 penalties under Section 203 . . . A ‘good faith’ dispute that any wages are due occurs when an
24 employer presents a defense, based in law or fact which, if successful, would preclude any
25 recovery on the part of the employee”). H&H further asserts that Plaintiffs’ waiting time penalty
26 exposure was grossly inflated as not every former employee experienced the alleged Labor Code
27 violations. Blakely Decl., ¶ 21.

28 ///

1 **8. PAGA Civil Penalties**

2 As a result of the foregoing Labor Code violations, Plaintiffs allege that H&H is liable for
3 civil penalties under the PAGA. Blakely Decl., ¶ 22. Since Plaintiffs’ PAGA claim is derivative
4 of Plaintiffs’ underlying wage claims, H&H asserts the PAGA claim would fail with those claims.
5 *Id.*; see *Price v. Starbucks Corp.* 192 Cal. App. 4th 1136, 1147 (2011) (“Because the underlying
6 causes of action fail, the derivative UCL and PAGA claims also fail”). H&H further maintains
7 that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce
8 any PAGA penalties if it were to find H&H liable for any of Plaintiffs’ claims. Blakely Decl., ¶
9 22; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal. App. 4th
10 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*, Case No.
11 ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA
12 penalties by over 82% in part because employer “not aware” of violations); *Carrington v.*
13 *Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per
14 pay period where employer made “good faith attempts” to comply with the law).

15 **C. DISCOVERY AND MEDIATION**

16 Prior to settlement, the Parties engaged in extensive formal discovery, including written
17 discovery propounded and responded to by both Parties in this Action and the *Garcia* Action.
18 Blakely Decl., ¶ 10. In connection with mediation, H&H produced timekeeping and payroll data
19 for all putative class members. *Id.* H&H also produced its employee handbook utilized during the
20 Class Period as well as other written policies/procedures. *Id.* In addition, H&H produced a detailed
21 Class List which contained hire and termination (if applicable) dates as well as rates of pay for
22 each putative class member. *Id.* Plaintiffs hired a labor economist with a Ph.D. in economics to
23 analyze the data produced to assist in calculating H&H’s potential exposure for each of Plaintiffs’
24 claims at issue. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiffs’
25 claims, the chances of certification of Plaintiffs’ claims, and H&H’s potential defenses. *Id.*

26 On January 12, 2024, the Parties participated in a full-day mediation with Louis Marlin,
27 Esq., a highly experienced wage and hour class action mediator. Blakely Decl., ¶ 11. During
28 mediation, the Parties vigorously debated their opposing legal positions, the likelihood of

certification of Plaintiffs' claims, and the legal basis for the claims and defenses. *Id.* The Parties did not reach a settlement at mediation; however, the Parties continued their negotiations over the following weeks with Mr. Marlin's assistance and eventually reached a global class and PAGA settlement. *Id.* During the months that followed, the Parties finalized the terms of the Settlement and executed the long-form Settlement Agreement now before the Court. *Id.*

III. THE PROPOSED SETTLEMENT

A. PRINCIPAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, H&H will pay a Gross Settlement Amount of \$1,950,000.00. *See* Settlement, ¶¶ 1.2, 3.1. Significantly, this Settlement is non-reversionary, and no Settlement Class Member will have to submit a claim form to receive Individual Class Payment. *Id.*, at ¶ 3.1. Each Settlement Class Member will automatically receive an Individual Class Payment unless he or she affirmatively opts out of the Settlement. *Id.* The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount:	\$1,950,000.00
• Minus Court-approved attorneys' fees:	\$650,000.00
• Minus Court-approved verified costs (up to):	\$50,000.00
• Minus Court-approved Service Payments:	\$15,000.00
• Minus amount set aside as PAGA penalties:	\$50,000.00
• <u>Minus estimated Settlement Administration costs:</u>	<u>\$12,500.00</u>
Net Settlement Amount ("NSA"):	\$1,172,500.00
• PLUS 25% "Individual PAGA Payments" to Aggrieved Employees:	\$12,500.00
Total Amount To Be Paid to Class Members/Aggrieved Employees:	<u>\$1,185,000.00</u>

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys' fees and costs, the Class Representative Service Payments to Plaintiffs, the amount designated as PAGA civil penalties, and Settlement Administrator's fees and expenses, the Settlement requires H&H to pay a Net Settlement Amount ("NSA") of at least \$1,172,500.00 to all Settlement Class Members who do not timely opt out. *See* Settlement, ¶ 1.25. The NSA shall be distributed to participating Settlement Class Members based on their proportionate number of workweeks worked during the Class Period. *See* Settlement, ¶ 3.2.4. Additionally, Twelve Thousand Five Hundred Dollars (\$12,500.00) of the Gross Settlement Amount has been designated as the "PAGA Penalties," and

1 shall be distributed to those Aggrieved Employees (including those who submit a valid and timely
2 opt-out from the class action settlement) who worked for H&H at any time from June 25, 2022
3 through July 19 (“PAGA Period”) proportionally based on the number of PAGA Pay Periods
4 worked during the PAGA Period. Settlement, ¶¶ 1.27, 1.27.7, 3.2.5.1.

5 Based on information from H&H, there are approximately 850 Settlement Class
6 members. Blakely Decl., ¶ 13. Therefore, the average Settlement Award from the NSA is
7 projected to be approximately \$1,379.41. *Id.* There are approximately 540 Aggrieved Employees
8 who worked during the PAGA Period, which runs from June 25, 2022 through July 19, 2024. *Id.*
9 Therefore, the average Individual PAGA Payment is estimated to be approximately \$23.15. *Id.*
10 Settlement Class Members will have forty-five (45) calendar days from the mailing of the Notice
11 Packets to opt-out of the Settlement, thereby providing ample time to review the Class Notice
12 without unduly delaying the Settlement. *See* Settlement, ¶ 7.5.1.³ Settlement Class Members who
13 do not opt out of the Settlement will be bound by its terms and will release all claims against
14 H&H included within the Settlement. *See Id.*, at ¶ 5.2.

15 2. Attorneys’ Fees and Costs, Service Payments, and PAGA Payment

16 Plaintiffs will apply for Class Representative Service Payments at the time of seeking final
17 approval of the proposed class action settlement in the amount of \$7,500 to each Plaintiff, for a
18 total of \$15,000.00, for their service to the Settlement Class. *See* Settlement, ¶ 3.2.1; Blakely
19 Decl., ¶ 26. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to
20 compensate class representatives for work done on behalf of the class [and] to make up for
21 financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination*
22 *Cases*, 186 Cal. App. 4th 1380, 1393-94 (2010). As will be fully briefed at the time of final
23 approval, Plaintiffs’ requested Service Payments are intended to recognize the time and effort
24 Plaintiffs expended on behalf of the Settlement Class, including providing substantial factual
25 information and documents to Class Counsel, discussing the claims and theories at issue in the
26 litigation, actively participating in the prosecution of Plaintiffs’ claims, responding to written
27

28 ³ Settlement Class Members will have thirty (30) days from the mailing of Class Notice to submit
a written objection to the Settlement. *See* Settlement ¶ 7.6.2.

1 discovery, as well as the significant risks Plaintiffs undertook by agreeing to serve as the named
2 plaintiffs in this case, and the fact that Plaintiffs agreed to a general release of all claims subject
3 to a waiver of Civil Code § 1542. *See* Settlement, ¶ 5.1.1; *see also* Marsano Decl., ¶¶ 4-13; Garcia
4 Decl., ¶¶ 4-6; Blakely Decl., ¶ 26.

5 Class Counsel will also apply for an attorneys’ fees award of one-third of the Gross
6 Settlement Amount, which is currently estimated to be \$650,000.00, and up to \$50,000.00 in
7 verified costs reimbursement. *See* Settlement, ¶ 3.2.2; Blakely Decl., ¶ 25. Plaintiffs submit the
8 requested fee is fair compensation for undertaking complex, risky, expensive, and time-
9 consuming litigation on a purely contingent fee basis. Blakely Decl., ¶ 25. Class Counsel has
10 incurred substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiffs’
11 claims, conducting legal research, propounding and responding to formal discovery requests,
12 conducting extensive informal discovery related to mediation, analyzing Settlement Class
13 members’ timekeeping and payroll records and other data and documents with the help of a
14 retained expert, creating a comprehensive damages model, preparing for and attending mediation,
15 negotiating and preparing the long-form Settlement Agreement, preparing this Motion, and
16 otherwise litigating the case. *Id.* Class Counsel expect to expend additional attorney time in
17 attending the hearing on this Motion, overseeing the Notice process and fielding questions from
18 Settlement Class members, preparing the final approval papers, and attending the Final Approval
19 hearing. *Id.*

20 California courts recognize an appropriate method for awarding attorneys’ fees in class
21 actions is to award a percentage of the “common fund” created as a result of a settlement. *See*
22 *e.g., Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding “the percentage of fund
23 method survives in California class action cases”). Class Counsel’s request for fees of one-third
24 of the Gross Settlement Amount is well within the range of reasonableness, and indeed is
25 considered the typical rate for common fund settlements. Historically, courts have awarded
26 percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4
27 Newberg on Class Actions § 14.6 (4th Ed. 2013).

28 Class Counsel submit their request for attorneys’ fees is reasonable when viewed as an

1 overall percentage of the Settlement and in light of the substantial risks and significant work
2 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
3 Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees
4 and verified costs upon seeking final approval.

5 Additionally, the Parties have agreed to designate \$50,000.00 of the Gross Settlement
6 Amount as PAGA civil penalties, of which \$37,500.00 (75%) will be paid to the LWDA, with
7 the remaining \$12,500.00 (25%) for distribution to the Settlement Class, as the PAGA requires
8 such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 3.2.5. Plaintiffs submit
9 this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo*
10 *Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving
11 PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v.*
12 *Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving
13 PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

14 **IV. ARGUMENT**

15 **A. PRELIMINARY APPROVAL IS WARRANTED**

16 California Rule of Court 3.769 conditions settlement of a class action on court approval,
17 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
18 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
19 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
20 adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule
21 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair,
22 adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly
23 in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
24 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the
25 agreement taken as a whole is fair. *See e.g., Hanlon*, supra, 150 F.3d at 1027. There is an initial
26 presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by class
27 counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g.,*
28 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1 **1. Standard for Preliminary Approval**

2 To make a fairness determination, the Court should consider several factors, including:
3 “the strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further
4 litigation, the risk of maintaining class action status through trial, the amount offered in
5 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
6 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
7 “The list of factors is not exclusive, and the court is free to engage in a balancing and weighing
8 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
9 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and
10 reasonable in light of the overall balance of factors in this case.

11 **a. The Strength of Plaintiffs’ Case**

12 Although Plaintiffs steadfastly maintain that their claims are meritorious, they also
13 acknowledge that there were substantial risks and uncertainty in proceeding with litigation. As
14 described above, H&H presented multiple defenses to Plaintiffs’ claims, both on the merits and
15 with respect to class certification. Thus, while Plaintiffs were prepared to litigate these claims
16 through class certification, and ultimately trial, success was far from certain.

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

18 Although the Parties engaged in significant formal and informal discovery prior to
19 mediation, the Parties still had significant formal discovery to complete had the matter not settled.
20 Blakely Decl., ¶ 24. This would have required expenditure of substantial time and resources by
21 both Parties that would have very likely spanned several years. *Id.* Even if Plaintiffs were to
22 certify the classes, the Parties would incur considerably more attorneys’ fees and costs through a
23 possible decertification motion, trial, and possible appeal. *Id.* This Settlement avoids those risks
24 and the accompanying expense. *Id.*

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

26 Absent settlement, there is a risk that the class would not be certified prior to trial, or, if it
27 were certified, a risk that the class definition would be narrowed and the value of the case
28 diminished accordingly. This would potentially be accomplished either due to a narrowing of the

1 class definition in a Court order on a contested motion for class certification, or through settlement
2 agreements entered into by H&H with individual class members by way of *Pick-up-Stix* type
3 settlement agreements⁴, and the expected recovery could be significantly reduced, given the
4 settlement amounts that are typically offered through the *Pick-up-Stix* process. Thus, this factor,
5 too, supports preliminary approval of the settlement.

6 **d. Settlement Amount Is Realistic Valuation of Claims**

7 The Settlement provides a positive recovery for the Settlement Class in the face of hotly
8 disputed claims. With the assistance of a retained economist with a Ph.D. in economics, Plaintiffs
9 conducted an analysis of underpaid wages due to H&H's alleged meal and rest period premium
10 payments owing, regular rate miscalculations, wage statement penalties, waiting time penalties,
11 and PAGA civil penalties. A summary of the results of Plaintiffs' exposure analysis is discussed
12 below:

13 **First Meal Period Violations: \$1,220,441**

14 Plaintiffs' analysis of H&H's timekeeping records reflected there were potentially
15 approximately 223,893 non-compliant first meal periods. Blakely Decl., ¶ 14. Plaintiffs contend
16 that this figure includes approximately 51,698 shifts over 6.0 hours where they allege that H&H
17 automatically deducted 30 minutes for a purported meal period ("auto-deduct" shifts). *Id.*
18 Plaintiffs further calculated that the average hourly rate of pay for Settlement Class Members
19 during the Class Period at approximately \$18.17. *Id.* Therefore, Plaintiffs estimated total
20 maximum damages for first meal period violations at approximately \$4,068,136 (223,893 non-
21 compliant first meal periods * \$18.17 average meal period premium). *Id.*

22 However, as noted above, H&H argues that it maintained compliant meal period
23 policies/practices throughout the Class Period, did not employ an auto-deduct policy, and under
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 *Brinker* it is only required to provide employees the opportunity to take meal periods, not ensure
2 that they are taken. Blakely Decl., ¶ 14; *see Brinker, supra*, 53 Cal.4th at 1034 (rejecting “ensure”
3 standard). Furthermore, H&H argues that Plaintiffs’ meal period claim is not suited for class
4 treatment due to Settlement Class Members’ varying job titles, departments, positions and duties,
5 and that individual inquiries would be needed as to which employees took non-compliant meal
6 periods or missed meal periods, how many meal periods were non-compliant or missed, and why
7 a particular employee did not a take compliant meal period on a particular shift. Blakely Decl., ¶
8 14. Based on these defenses, Plaintiffs discounted the maximum amount by 40% for risk of non-
9 certification and an additional 50% for risk of losing on the merits or failing to recover the full
10 amount sought, to arrive at an estimated exposure of approximately \$1,220,441. *Id.*

11 Second Meal Period Violations: \$10,290

12 Plaintiffs’ analysis of the timekeeping data showed that during the Class Period there were
13 approximately 5,034 shifts worked in excess of 10.0 hours that did not reflect a compliant second
14 meal period. Blakely Decl., ¶ 15. Therefore, Plaintiffs calculated H&H’s maximum exposure for
15 second meal period violations at approximately \$91,468 (5,034 non-compliant second meal
16 periods * \$18.17 average meal period premium). *Id.*

17 H&H argues that Plaintiffs’ theory of liability carried significant risks, based on H&H’s
18 arguments that they provided employees the opportunity for second meal periods and that
19 Settlement Class Members voluntarily waived their second meal period on shifts in excess of 10.0
20 hours but less than 12.0 hours, as they are entitled to do under Labor Code § 512(a). Blakely
21 Decl., ¶¶ 14-15. H&H further argue that Plaintiffs’ second meal period exposure is grossly
22 inflated as Plaintiffs already seek a meal period premium for first meal period violations on many
23 shifts, and Plaintiffs cannot recover more than one meal period premium for each workday. *Id.*;
24 *see United Parcel Service, Inc. v. Superior Court*, 196 Cal.App.4th 57, 70 (2011) (“[E]mployees
25 in this case may recover up to two additional hours of pay on a single work day for meal period
26 and rest period violations – one for failure to provide a meal period and another for failure to
27 provide a rest period”). In addition, as with first meal periods, H&H argues this claim would not
28 be certified as requiring individualized inquiries into both the merits and damages. Blakely Decl.,

¶ 15. In light of these risks, Plaintiffs discounted the maximum amount that the class could potentially recover for second meal periods by 55% for a risk of non-certification, and an additional 75% for a risk of losing on the merits, or having exposure reduced due to H&H's waiver argument, to arrive at an estimated exposure amount of approximately \$10,290. *Id.*

Rest Period Violations: \$527,093

As indicated above, Plaintiffs allege that H&H failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 16. Based on Plaintiffs' expert's analysis of H&H's timekeeping records, Plaintiffs estimate there were approximately 464,144 shifts in excess of 3.5 hours during the Class Period. *Id.* Accordingly, Plaintiffs calculate H&H's maximum potential exposure for rest period violations at approximately \$8,433,496 (464,144 rest period violations * \$18.17 average rest period premium). *Id.*

H&H contends that Plaintiffs and Settlement Class members were authorize and permitted the opportunity for rest periods and that it maintained compliant rest period policies/practices throughout the Class Period. Blakely Decl., ¶ 16. H&H further argues that Plaintiffs' rest period claim is not amenable to class treatment, since individual inquiries would be required to determine which employees failed to take rest periods, how many rest periods they failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift. *Id.* These manageability concerns are especially present with respect to rest period claims, H&H argues, given that rest periods are not recorded. *Id.* Given these defenses, Plaintiffs discounted this maximum amount by 75% for risk of non-certification and an additional 75% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately \$527,093. *Id.*

Regular Rate Miscalculations: \$28,885

Plaintiffs allege that they and other non-exempt employees received "On Call" and "Beeper" pay, and other payments, which were not included in the regular rate of pay when calculating overtime wages. Blakely Decl., ¶ 17. As a result, Plaintiffs allege H&H failed to pay all overtime wages to its non-exempt employees. *Id.* Based Plaintiffs' review of the payroll records, Plaintiffs estimate the total underpayment of overtime wages due to the alleged regular

1 rate miscalculations to be approximately \$80,798. *Id.*

2 However, H&H contends that it properly calculated the regular rate of pay for its non-
3 exempt employees and paid all overtime wages owed. Blakely Decl., ¶ 17. H&H further argues
4 that Settlement Class Members received different types of pay throughout the Class Period
5 depending on their job positions, creating substantive differences among the Settlement Class
6 Members with respect to the incentives received, making class certification unlikely. *Id.* In light
7 of these defenses, Plaintiffs discounted the maximum exposure by 35% for the risk of non-
8 certification, and an additional 45% for risk of losing on the merits, and/or not receiving the
9 maximum penalties sought, to arrive at an estimated exposure of approximately \$28,885. *Id.*

10 Unreimbursed Business Expenditures: \$55,058

11 Plaintiffs allege that H&H required Settlement Class Members to communicate with their
12 co-workers and supervisors but did not reimburse them for any cellular phone expenses. Blakely
13 Decl., ¶ 18. Settlement Class Members worked approximately 22,941 aggregate months during
14 the Class Period. *Id.* Using a conservative estimate of \$20 per month in reasonable work-related
15 personal cell phone use, Plaintiffs calculate H&H's liability for unreimbursed business expenses
16 at approximately \$458,820 (\$20/month * 22,941 aggregate months). *Id.*

17 He and H argues that it had a written policy prohibiting employees from using personal
18 cell phones at work and did not require its driver employees to use their personal cell phones in
19 connection with their job duties, and that any expenses incurred by Settlement Class members
20 were extremely minimal, given the wide availability of low-cost cellular phone plans. Blakely
21 Decl., ¶ 18. H&H further contends that this claim would require individual inquiries into whether
22 Settlement Class members actually used their personal cellular phones for work purposes, how
23 much expense they incurred, whether they submitted a request for reimbursement, and the
24 reasonableness of that expense, thus precluding class certification. *Id.* Based on these defenses,
25 Plaintiffs discounted this maximum amount by 60% for risk of non-certification and an additional
26 70% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought,
27 to arrive at an estimated realistic exposure of approximately \$55,058. *Id.*

28 ///

1 Unpaid Wages Due to “On-Call” Policy: \$48,600

2 Plaintiffs argue that H&H underpaid Settlement Class Members employed as Delivery
3 Technicians due to H&H’s allegedly unlawful on-call policies/practices, which required Delivery
4 Technicians to be on-call for deliveries 24 hours per day, one week per month. Blakely Decl., ¶
5 19. Delivery Technicians worked approximately 9,362 aggregate weeks during the Class Period,
6 or 2,160 aggregate months, with one on-call week per month, during the Class Period. *Id.* Using
7 a conservative estimate of \$100 of unpaid time per month on-call for each Delivery Technician,
8 Plaintiffs calculate H&H’s liability for unpaid wages due to this policy at approximately \$216,000
9 (\$100/month * 2,160 aggregate months). *Id.*

10 H&H counters that it fully compensated Delivery Technicians for this time with not only
11 the \$125 per week on-call rate, but also a \$35 payment per on-call delivery, which covers all of
12 the compensable time for which Delivery Technicians were eligible. Blakely Decl., ¶ 19. H&H
13 further asserts that Plaintiffs would be unable to certify this class given the individualized
14 inquiries as to what constitutes compensable time “worked” during the on-call period and whether
15 Settlement Class Members were in fact paid for that time. *Id.* Based on these defenses, Plaintiffs
16 discounted this maximum amount by 50% for risk of non-certification and an additional 55% for
17 a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive
18 at an estimated realistic exposure of approximately \$48,600. *Id.*

19 Wage Statement Penalties: \$189,000

20 Plaintiffs allege that H&H faces derivative wage statement liability as a result of its failure
21 to pay all wages as well as its failure to pay all meal and rest period premium wages. Blakely
22 Decl., ¶ 20. Those penalties are calculated as \$50 for each “initial” violation and \$100 for each
23 “subsequent” violation, with a maximum of \$4,000 per employee. *Id.*; see Labor Code § 226(e).
24 Utilizing the “initial” and “subsequent” violation rates resulted in a number greater than the
25 \$4,000 cap per employee. Blakely Decl., ¶ 20. Plaintiffs, therefore, calculated potential wage
26 statement exposure at approximately \$2,160,000 (540 employees * \$4,000 maximum penalty).
27 *Id.*; see also Labor Code § 226(e). *Id.*

28 In light of H&H’s arguments that no violations occurred, that employees suffered no

1 “injury,” that any alleged violations were not “knowing and intentional,” that the wage statements
2 always accurately reflected hours worked and amounts paid to employees, as well as the risks
3 associated with Plaintiffs’ underlying claims discussed above, Plaintiffs discounted the maximum
4 exposure by 65% for risk of non-certification, and by an additional 75% for risk of being
5 unsuccessful on the merits, for an estimated realistic exposure of approximately \$189,000.
6 Blakely Decl., ¶ 20.

7 Waiting Time Penalties: \$128,977

8 H&H’s records reflected approximately 338 former Settlement Class members who were
9 eligible for waiting time penalties. Blakely Decl., ¶ 21. Based on an hourly rate of \$18.17,
10 Plaintiffs estimated the average waiting time penalty per former employee to be \$4,361 (\$18.17
11 * 8 hours per day * 30 days). *Id.* Therefore, Plaintiffs calculated H&H’s maximum exposure for
12 potential waiting time penalties to be approximately \$1,474,018 (338 separated employees *
13 \$4,361 average waiting time penalty). *Id.*

14 H&H presented several defenses to this claim, most notably its assertion that because it
15 possessed good-faith defenses to the underlying claims, any failure to pay wages was not “willful”
16 as a matter of law. Blakely Decl., ¶ 21. H&H further asserts Plaintiffs’ waiting time penalty
17 exposure was grossly inflated as not every former employee experienced the alleged Labor Code
18 violations. *Id.* Moreover, because the waiting time claim is derivative of Plaintiffs’ underlying
19 wage claims, Plaintiffs would need to overcome these defenses, both as to class certification and
20 on the merits, as to their underlying claims. *Id.* To account for these defenses, Plaintiffs
21 discounted the maximum exposure by 65% for the risk of non-certification, and an additional
22 75% for risk of losing on the merits, and/or not receiving the maximum penalties sought, to arrive
23 at an estimated exposure of approximately \$128,977. *Id.*

24 PAGA Penalties: \$84,288

25 Plaintiffs estimated a maximum total PAGA exposure at approximately \$2,809,600
26 (28,096 “initial” violations * \$100 “initial” penalty). Blakely Decl., ¶ 22; *Amaral v. Cintas Corp.*
27 *No. 2, 163 Cal.App.4th 1157, 1207 (2008)* (finding “initial” violation rate applies until employer
28 is notified that it is violating a Labor Code provision). However, these penalties derive from the

underlying wage and hour violations discussed above, which H&H vigorously disputes. *Id.*; see e.g., *Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of its underlying claims). H&H also asserts the Court would drastically reduce any award of PAGA penalties as “confiscatory.” Blakely Decl., ¶ 22; see also *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiffs discounted the maximum figure by 80% for risk of losing on the merits and/or not recovering a PAGA penalty for each and every pay period, and an additional 85% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately \$84,288. Blakely Decl., ¶ 22.

Using these estimated figures for each of the claims described above, Plaintiffs predicted that the potential recovery for the Settlement Class would be approximately \$2,292,632. Blakely Decl., ¶ 23. The proposed Settlement of \$1,950,000 therefore represents approximately 85% of the reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Settlement Class, which is consistent with what Plaintiffs’ counsel believes could have been recovered had the case proceeded through trial.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiffs are represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class actions, and who have been appointed as class counsel in numerous cases alleging similar claims. See Blakely Decl., ¶¶ 2-6; see also Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 2-8; Declaration of Joel M. Gordon (“Gordon Decl.”), ¶¶ 2-3; and Declaration of Raul Perez (“Perez Decl.”), ¶¶ 5-13. With the assistance of a retained expert, Class Counsel conducted an in-depth review of H&H’s timekeeping and payroll records and drew on their extensive

1 experience in similar cases to assess the strengths and weaknesses of Plaintiffs' case. *See* Blakely
2 Decl., ¶¶ 14-23. The Settlement was also reached with the assistance of an experienced and
3 respected wage-and-hour class action mediator. This factor strongly supports preliminary
4 approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

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

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

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

12 The proposed settlement reflects approximately 85% of the estimated recovery the
13 Settlement Class could reasonably expect in light of the significant litigation risks, and will
14 provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the
15 percentage of the liability exposure recovered in this case far exceeds percentages routinely
16 approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL
17 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential
18 damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
19 representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV,*
20 *Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("it is well-settled law that a proposed settlement may
21 be acceptable even though it amounts to only a fraction of the potential recovery that might be
22 available to the Settlement Class members at trial"). Further, the average Individual Class
23 Payment of approximately \$1,379.41 exceeds average payments achieved in other wage and hour
24 class action settlements.⁵ Thus, Plaintiffs submit that the proposed settlement is within the range

25
26 ⁵ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct.
27 May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department*
28 *Stores, Inc.*, Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net
recovery of approximately \$90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619
(Sacramento County Super. Ct.) (average net recovery of approximately \$80); *Doty v. Costco*

of possible approval, such that notice should be provided to the Settlement Class Members so that they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Settlement Class Members have had the opportunity to opt-out or object.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and additional months of negotiating the long-form settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal. App. 4th at 130. As discussed above, Plaintiffs carefully vetted the claims at issue and reviewed extensive timekeeping and payroll data and conducted a detailed statistical analysis of the data with the help of a retained expert to arrive at their estimated classwide damages figures. *See Blakely Decl.*, ¶¶ 14-23. Thus, this factor supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the Settlement is also warranted because there are no obvious deficiencies. The Settlement will provide substantial monetary relief to Settlement Class members. The amounts proposed for Class Counsel's attorneys' fees and costs, LWDA payment, and Plaintiffs' Class Representative Service Payments are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor

Wholesale Corp., Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery of approximately \$65); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006) (average net recovery of approximately \$35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net recovery of approximately \$20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008) (wage and hour class action settlement approved where average recovery was approximately \$60); *Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 at *17 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately \$198.70...[T]his is a substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than \$90...[T]he Court finds that the results achieved are good"); and *Williams v. Centerplate, Inc.*, Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428 (S.D. Cal. Aug. 26, 2013) (average recovery of approximately \$108).

1 supports preliminary approval.

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

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

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

11 A class is “ascertainable” where the members “may be readily identified without
12 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
13 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
14 defined as all current and former non-exempt employees in California who worked for H&H
15 during the Class Period. *See* Settlement, ¶¶ 1.5, 1.10.1. Therefore, Settlement Class Members can
16 be identified from H&H’s personnel and employment records. Based on information provided by
17 H&H, the Settlement Class consists of approximately 850 current and former non-exempt
18 employees. Blakely Decl., ¶ 13 It would therefore be impracticable to bring all Settlement Class
19 members before the Court, or for each Settlement Class Member to bring an individual lawsuit.
20 The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44
21 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

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

23 The focus in a certification dispute is not the merits, but rather on what types of questions,
24 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
25 *Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiffs’ claims are predicated on, among other
26 issues, H&H’s uniform meal and rest period policies and/or practices. These types of claims are
27 commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network*
28 *Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

1 **3. The Claims of the Named Plaintiffs Are Typical**

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191
4 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
5 same goods as the putative class in a consumer class action). Here, Plaintiffs' claims are typical
6 of those held by the Settlement Class Members. First, H&H employed Plaintiffs as non-exempt
7 employees during the Class Period, and Plaintiffs were subject to H&H's wage and hour policies
8 at issue in this case. *See* Marsano and Garcia Decls., ¶ 2. Second, Plaintiffs were injured by the
9 same challenged policies/practices that allegedly injured the Settlement Class as a whole. For
10 example, Plaintiffs assert that they were deprived of all wages and contend that they were deprived
11 of all legally compliant meal and rest periods. *See generally, Id.* Plaintiffs further assert that they
12 did not receive accurate and compliant wage statements and did not receive all wages at the time
13 of separation of employment. *See Id.* Because Plaintiffs have suffered the same injuries as the
14 other members of the Settlement Class, the typicality requirement is satisfied.

15 **4. Plaintiffs and Class Counsel Will Fairly and Adequately Represent the**
16 **Class**

17 The adequacy requirement examines conflicts of interest between named parties and the
18 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
19 155 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the
20 Settlement Class, as there are no conflicts between Plaintiffs and the proposed Settlement Class,
21 and Plaintiffs possess claims that are in line with those of the Settlement Class. *See McGhee v.*
22 *Bank of America* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
23 indication that Class Counsel were not qualified and the named plaintiff had no interests
24 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
25 and hour class action litigation. *See* Haines Decl., ¶¶ 2-8; Blakely Decl., ¶¶ 2-6; Perez Decl., ¶¶
26 5-13.

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

28 This Court should order distribution to the Settlement Class of the proposed Class Notice

1 via first-class U.S. Mail, postage prepaid, in English and Spanish, using last known mailing
2 address information provided by H&H. *See* Settlement, ¶ 7.4. This manner of giving notice is the
3 “best notice practicable” under the circumstances because it provides “individual notice to all
4 members who can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* 417
5 U.S. 156, 173 (1974). Here, the Parties have agreed that the Settlement be administered by
6 Phoenix Settlement Administrators (“Phoenix”), an experienced class action settlement
7 administrator. *See generally* Declaration of Jodey Lawrence (“Lawrence Decl.”) and attached
8 exhibits. Settlement Class Members’ addresses will be ascertainable through H&H’s personnel
9 and payroll records, which H&H will provide to Phoenix within fifteen (15) calendar days of
10 preliminary approval of the Settlement. *See* Settlement, ¶ 4.1. Within fourteen (14) business days
11 from receipt of this information, the Settlement Administrator will run the names of all Settlement
12 Class members through the National Change of Address (“NCOA”) database to determine any
13 updated addresses for Settlement Class members, and mail a Class Notice to each Settlement
14 Class Member in English and Spanish at his or her last known address. *See* Settlement, ¶¶ 7.4.2,
15 7.4.3. Not later than three (3) business days after the Administrator’s receipt of any Class Notice
16 returned by the USPS as undelivered, Phoenix shall re-mail the Class Notice using any forwarding
17 address provided by the USPS. *Id.*, at ¶ 7.4.3. If the USPS does not provide a forwarding address,
18 Phoenix shall conduct a Class Member Address Search, and re-mail the Class Notice to the most
19 current address obtained. *Id.*

20 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d)
21 because it advises Settlement Class members of the nature of the claims, basic contentions and
22 denials of the parties and the key terms of the Settlement, the 45-day deadline to opt-out or object
23 to the Settlement and the procedures by which to do so, explains the recovery formula and
24 expected recovery amount for each Settlement Class member, and advises them that they will be
25 bound by the terms of the Settlement if they do not opt-out. *See* Blakely Decl., Exh. A. The
26 proposed Class Notice will also notify Settlement Class Members of the final approval hearing
27 date, provide the Settlement Class with contact information for Class Counsel, and advise
28 Settlement Class Members that they may enter an appearance through counsel if they wish to. *Id.*

1 This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and
2 cost-effective method of reaching Settlement Class Members.

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

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

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily
9 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
10 Proposed Order submitted concurrently herewith.

11
12 Respectfully submitted,

13 Dated: July 15, 2024

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14
15
16 By:



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