

COPY

JAMES HAWKINS APLC

James R. Hawkins (SBN 192925)
Christina M. Lucio (SBN 253677)
9880 Research Drive, Suite 200
Irvine, California 92618
Telephone: (949) 387-7200
Facsimile: (949) 387-6676
Email: James@jameshawkinsaplc.com
Email: Christina@jameshawkinsaplc.com

HAINES LAW GROUP, APC

Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Sean M. Blakely (SBN 264384)
sblakely@haineslawgroup.com
Alexandra R. McIntosh (SBN 320904)
amcintosh@haineslawgroup.com
2155 Campus Drive, Suite 180
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355

Attorneys for Plaintiff

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 19 2022

Paola Iniguez
BY: PAOLA INIGUEZ, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

DAVIS ALLEN, and on behalf of all others
similarly situated,

Plaintiff,

vs.

CREATIVE STONE MFG. INC., dba
CORONADO STONE PRODUCTS, INC., a
California Corporation; and DOES 1-10,
inclusive,

Defendants.

Case No.: CIVSB2201498

Assigned For All Purposes To:
Judge: Hon. David Cohn
Dept.: S26

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

Date: December 13, 2022
Time: 10:00 a.m.
Dept.: S-26

Action Filed: June 29, 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 December 13, 2022, at 10:00 a.m. in Department S-26 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Davis Allen (“Plaintiff”) individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

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

All current and former non-exempt employees of Defendant Creative Stone Mfg., Inc. employed in the State of California between April 6, 2016, through June 22, 2021 (the “Class Period”).
3. Preliminary appointment of Plaintiff Davis Allen as Class Representative;
4. Preliminary appointment of James Hawkins APLC and 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 Award to Plaintiff, civil penalties payable to the 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. An order granting Plaintiff’s unopposed request to file a Second Amended Class and Representative Action Complaint adding a cause of action for unlawful deductions from earned wages; and
8. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the declarations of James R. Hawkins, Paul K. Haines, Plaintiff Davis Allen, and

1 Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached thereto, the
2 pleadings and other papers filed in this action, and on any further oral or documentary evidence
3 or argument presented at the time of hearing. Defendant does not intend to oppose this Motion,
4 and given the multiplicity of issues addressed in this Motion, has indicated its approval of
5 Plaintiff's expressed need to exceed the 20-page limit set forth in California Rule of Court
6 3.764(c)(2). Therefore, the parties jointly request the Court's consideration of Plaintiff's
7 memorandum of points and authorities, which is 25 pages in length.

8
9 Respectfully submitted,

10 Dated: August 19, 2022

JAMES HAWKINS APLC
HAINES LAW GROUP, APC

11
12 By:



13 James R. Hawkins
14 Christina M. Lucio
15 Paul K. Haines
16 Sean M. Blakely
17 Attorneys for Plaintiff
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. THE PARTIES AND BRIEF PROCEDURAL HISTORY	2
B. PLAINTIFF’S CLAIMS AND CREATIVE STONE’S DEFENSES.....	3
1. Meal Period Claims.....	3
2. Failure to Pay All Wages Due to Unlawful Rounding	4
3. Rest Period Claims.....	5
4. Claims Under Labor Code §§ 203 and 226	6
5. PAGA Civil Penalties	6
C. DISCOVERY AND MEDIATION.....	7
III. THE PROPOSED SETTLEMENT.....	9
A. ESSENTIAL TERMS OF THE SETTLEMENT	9
1. The Settlement Provides for Reasonable Monetary Payments	9
2. Attorneys’ Fees and Costs, Service Awards, and PAGA Payment	10
IV. ARGUMENT.....	12
A. PRELIMINARY APPROVAL IS WARRANTED	12
1. Standard for Preliminary Approval.....	12
a. The Strength of Plaintiff’s Case.....	13
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	13
c. Risk of Maintaining Class Action Status	13
d. Amount Offered in Settlement Given Realistic Value of Claims.....	14
e. The Experience and Views of Counsel	19
2. The Preliminary Approval Standard Is Met.....	19
a. The Settlement Is Within the Range of Possible Approval.....	20
b. The Settlement Resulted from Serious, Informed Negotiations	21
c. The Settlement Is Devoid of Obvious Deficiencies	21
B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.....	21

1	1. The Proposed Class Is Ascertainable and Numerous	22
2	2. Common Issues of Law and Fact Predominate.....	22
3	3. The Claims of the Named Plaintiff Are Typical.....	22
4	4. Plaintiff and Class Counsel Will Fairly and Adequately Represent	
5	the Class	23
6	C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE	23
7	D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	24
8	V. CONCLUSION.....	25

TABLE OF AUTHORITIES

Federal Cases

<i>Dunleavy v. Nadler</i> , 213 F.3d 454 (9th Cir. 2000)	20
<i>Eisen v. Carlisle & Jacquelin</i> 417 U.S. 156 (1974).....	23
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	12
<i>In re Pacific Enterprises Securities Litigation</i> 47 F.3d 373 (9th Cir. 1995)	19
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008)	12
<i>Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004).....	20

State Cases

<i>AHMC Healthcare, Inc. v. Sup. Ct.</i> , 24 Cal.App.5th 1014 (2018)	4
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008)	17, 18
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> 191 Cal.App.3d 1341 (1987)	22
<i>Benton v. Telecom Network Specialists, Inc.</i> ,220 Cal.App.4th 701 (2013).....	22
<i>Bowles v. Sup. Ct.</i> , 44 Cal.2d 574 (1955)	22
<i>Brinker Rest. Corp. v. Sup. Ct.</i> , 53 Cal.4th 1004 (2012)	4
<i>Candy Shops, Inc. v. Sup. Ct.</i> , 210 Cal.App.4th 889 (2012).....	4
<i>Capital People First v. State Dept. of Developmental Services</i> 155 Cal.App.4th 676 (2007)	23
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018)	7
<i>Chindarah v.Pick Up Stix, Inc.</i> , 171 Cal.App.4th 796 (2009)	14
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	13
<i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....	10
<i>Kao v. Joy Holiday</i> , 12 Cal.App.5th 947 (2017)	6
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....	12, 19, 21
<i>Laffitte v. Robert Half Int’l, Inc.</i> , 1 Cal.5th 480 (2016).....	11
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018)	6
<i>McGhee v. Bank of America</i> 60 Cal.App.3d 442 (1976)	23
<i>Price v. Starbucks Corp.</i> 192 Cal.App.4th 1136 (2011).....	6

<i>Rodriguez v. E.M.E., Inc.</i> , 246 Cal.App.4th 1027 (2016).....	5
<i>Sav-On Drug Store, Inc. v. Superior Court (Rocher)</i> 34 Cal.4th 319 (2004).....	22
<i>Sevidal v. Target Corp.</i> 189 Cal.App.4th 905 (2010).....	22
<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> 203 Cal.App.4th 1112 (2012).....	7, 18
<i>Troester v. Starbucks Corp.</i> , 5 Cal.5th 829 (2018).....	4
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 145 (2001).....	13

Federal Statutes and Rules

Federal Rule of Civil Procedure 23	12
Federal Rule of Civil Procedure 23(e)	12

State Statutes and Rules

8 Cal. Code Regs. § 13520.....	6
Code Civ. Proc. § 382	1, 21
C.R.C 3.766(d).....	24
C.R.C 3.766(e)	24
C.R.C 3.769.....	12, 24
Civ. Code § 1542	10
Lab. Code § 226(e)	6, 17
Lab. Code § 2699(e)(2).....	7
Lab. Code § 2699(i)	12

Unpublished Cases

<i>Bercea v. AE Retail West</i>	
Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012)	20
<i>Chu v. Wells Fargo Investments, LLC</i>	
Case No. C 05-4526 MHP, 2011 WL 672645 (N.D. Cal. 2011).....	12
<i>Doty v. Costco Wholesale Corp.</i>	

1	Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007)	20
2	<i>Fleming v. Covidien Inc.</i>	
3	Case No. ED CV10-01487 RGK (OPX), 2011 WL 7563047 (C.D. Cal. 2011).....	7, 18
4	<i>Glass v. UBS Finan. Servs.</i>	
5	Case No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. 2007).....	20
6	<i>Gomez v. Amadeus Salon, Inc.</i>	
7	Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010)	20
8	<i>Green v. Lawrence Service Co.</i>	
9	2013 WL 3907506 (C.D. Cal. 2013).....	18
10	<i>Lazarin v. Pro Unlimited, Inc.</i>	
11	Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013).....	12
12	<i>Lim v. Victoria’s Secret Stores, Inc.</i>	
13	Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006).....	20
14	<i>Palencia v. 99 Cents Only Stores</i>	
15	Case No. 34-2010-00079619 (Sacramento County Super. Ct.).....	20
16	<i>Ressler v. Federated Department Stores, Inc.</i>	
17	Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009).....	20
18	<i>Schiller v. David’s Bridal, Inc.</i>	
19	Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 (E.D. Cal. June 11, 2012).....	20
20	<i>Sorenson v. PetSmart, Inc.</i>	
21	Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008)	20
22	<i>Williams v. Centerplate, Inc.</i>	
23	Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC	
24	2013 WL 4525428 (S.D. Cal. Aug. 26, 2013)	20
25	<u>Other Sources</u>	
26	4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013)	20
27	4 Newberg on Class Actions § 14.6 (4th Ed. 2013).....	11
28	Manual for Complex Litigation § 30.41(3rd Ed. 1995).....	20

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Davis Allen (hereinafter “Plaintiff”) brought this class and representative action
4 for various wage and hour violations on behalf of current and former non-exempt employees of
5 Defendant Creative Stone Mfg., Inc. (“Creative Stone”) who were employed in the State of
6 California between April 6, 2016, through June 22, 2021 (the “Class Period”). Plaintiff’s primary
7 allegations are that Creative Stone: (1) failed to provide legally-compliant first and second meal
8 periods; (2) failed to authorize and permit all legally required rest periods; and (3) failed to pay
9 all wages due to Creative Stone’s unlawful timekeeping policies/practices. As a result of these
10 alleged violations, Plaintiff also brought derivative claims for Creative Stone’s alleged failure to
11 pay all final wages owed, failure to issue accurate and compliant wage statements, and for civil
12 penalties under the Private Attorneys General Act (“PAGA”).¹

13 Plaintiff now respectfully requests that this Court preliminarily approve this non-
14 reversionary, common-fund class action settlement,² in which Creative Stone has agreed to pay
15 Two Million Eight Hundred Fifty Thousand Dollars and Zero Cents (\$2,850,000.00) to the
16 following Settlement Class:

17 All current and former non-exempt employees of Defendant Creative
18 Stone Mfg., Inc. employed in the State of California between April 6, 2016,
through June 22, 2021 (the “Class Period”).

19 If the Settlement is approved, Creative Stone will pay a non-reversionary Maximum
20

21 ¹ Plaintiff’s proposed Second Amended Class and Representative Action Complaint (“SAC”) alleges the following causes of action: (1) Failure to Pay Wages, Including Minimum Wages and
22 Overtime; (2) Failure to Provide Meal Periods as Required; (3) Failure to Provide Rest Periods
23 as Required; (4) Failure to Pay Timely Wages; (5) Failure to Provide Accurate Itemized Wage
24 Statements; (6) Failure to Maintain Accurate Payroll Records; (7) Violation of Business &
25 Professions Code § 17200, *et seq.*; (8) Penalties Under the Private Attorney Generals Act, Labor
26 Code § 2698 *et seq.*; and (9) Unlawful Deductions From Earned Wages. Plaintiff’s proposed SAC
is attached to the Declaration of Paul K. Haines as **Exhibit B**.

27 ² The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Paul K. Haines as
28 **Exhibit A**. The proposed Class Notice and Notice of Estimated Settlement Award are attached to
the Settlement as Exhibits 1 and 2, respectively. All defined terms in this motion have the same
definition as that in the Settlement.

1 Settlement Amount of \$2,850,000.00. After deducting administration costs, Plaintiff's requested
2 Class Representative Service Award, the amount designated as PAGA civil penalties, and
3 requested attorneys' fees and costs, the Net Settlement Fund ("NSF") of approximately
4 \$1,722,500 will be distributed to all Settlement Class members who do not opt-out of the
5 Settlement based on the proportionate number of workweeks worked by each Settlement Class
6 member during the Class Period. Former employees with standing for waiting time penalties, and
7 employees with standing for wage statement and PAGA penalties will also receive additional
8 consideration for their release of these penalty claims.

9 Significantly, Settlement Class members do not need to file a claim to reap the financial
10 benefits of the Settlement, as all Settlement Class members will automatically receive a payment
11 unless they affirmatively opt-out. There are approximately 2,808 Settlement Class members, and
12 the average payment to participating Settlement Class members is projected to be approximately
13 \$613.43.

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

19 **II. SUMMARY OF THE LITIGATION**

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

21 Creative Stone is a manufacturer of stone veneer, thin brick, and other stone products, and
22 has operated facilities in Fontana, Lodi and Perris, California during the Class Period. *See*
23 Declaration of Paul K. Haines ("Haines Decl."), ¶ 10. Plaintiff was employed by Creative Stone
24 as a non-exempt maintenance welder from approximately November 2018 through September
25 2019. *See* Declaration of Davis Allen In Support of Motion for Preliminary Approval ("Allen
26 Decl."), ¶ 2.

27 On June 29, 2021, Plaintiff filed his Class Action Complaint in Riverside County Superior
28 Court, alleging causes of actions for: (i) failure to pay all wages; (ii) failure to provide meal

1 periods; (iii) failure to provide rest periods; (iv) failure to pay timely wages; (v) failure to provide
2 accurate itemized wage statements; and (vi) unfair competition in violation of California Business
3 & Professions Code § 17200 *et seq.* Haines Decl., ¶ 11. On or about February 17, 2022, this action
4 was transferred from Riverside Superior Court to this Court. *Id.* Thereafter, Plaintiff filed the
5 First Amended Class and Representative Action Complaint (“FAC”) which added causes of
6 action for Failure to Maintain Accurate Payroll Records and Penalties Under the Private Attorney
7 Generals Act (“PAGA”). *Id.* As part of this Motion and pursuant to the Settlement, Plaintiff
8 respectfully requests that the Court approve the filing of a Second Amended Class and
9 Representative Action Complaint adding a cause of action for Unlawful Deductions From Earned
10 Wages. *Id.*

11 **B. PLAINTIFF’S CLAIMS AND CREATIVE STONE’S DEFENSES**

12 **1. Meal Period Claims**

13 Plaintiff alleges Creative Stone failed to provide legally-compliant first meal periods
14 such that first meal periods were regularly late and/or less than 30-minutes. Haines Decl., ¶ 12.
15 Specifically, Plaintiff alleges that while Settlement Class members clock in and out for their work
16 shifts by using a timecard, Settlement Class members did not clock out/in for their meal periods,
17 rather, Creative Stone automatically deducted 30 minutes for a purported meal period from their
18 daily hours worked, irrespective of whether a compliant, timely 30-minute meal period was
19 actually taken. *Id.* Plaintiff alleges that due to work demands imposed by Creative Stone and
20 business operations, Settlement Class members were routinely provided with late and/or short
21 first meal periods. *Id.* Plaintiff further alleges that Settlement Class members were not provided
22 with second meal periods when they worked shifts in excess of 10.0 hours in a workday. *Id.*, at
23 ¶ 13.

24 Creative Stone counters it has maintained compliant written meal period policies
25 throughout the Class Period. Haines Decl., ¶ 12. Creative Stone also produced “Meal Period Sign-
26 In Sheets” showing Plaintiff and other non-exempt employees were required to record their meal
27 periods each workday on written time sheets, and which demonstrate that Settlement Class
28 members regularly took compliant meal periods. *Id.* Creative Stone further contends that it always

1 provided employees the opportunity to take meal periods and is not required to ensure they are
2 taken. *Id.*; see *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1034 (2012) (rejecting “ensure”
3 standard). Thus, Creative Stone argues any missed or short meal periods were the result of lawful
4 employee choice, rather than any policy and/or practice of Creative Stone. Haines Decl., ¶ 12. As
5 for second meal periods, Creative Stone asserts many employees choose to waive their second
6 meal periods, as they may do under Labor Code § 512(a), so that they do not need to stay at work
7 for an extra unpaid 30 minutes. *Id.*, at ¶ 13. Finally, Creative Stone maintains Plaintiff’s meal
8 period claim is not suited for class certification, since individual inquiries would be needed to
9 assess which employees, if any, took non-compliant or missed meal periods, how many meal
10 periods were non-compliant or missed, the reasons why a particular employee did not take a meal
11 period on a particular shift, and (for second meals) whether they waived the meal period. *Id.*, at
12 ¶¶ 12-13.

13 2. Failure to Pay All Wages Due to Unlawful Rounding

14 Plaintiff alleges that Creative Stone pays its employees in quarter-hour increments, and
15 that its time-rounding policy/practice has resulted in a systemic underpayment of minimum and
16 overtime wages to Settlement Class members. Haines Decl., ¶ 14. Creative Stone counters that it
17 utilizes a neutral time-rounding mechanism that results, over time, in employees being paid for
18 all hours worked. *Id.*; see also, *See’s Candy Shops, Inc. v. Sup. Ct.*, 210 Cal.App.4th 889, 901
19 (2012) (rounding policy lawful if employer “applies a consistent rounding policy that, on average,
20 favors neither overpayment nor underpayment.”); *AHMC Healthcare, Inc. v. Sup. Ct.*, 24
21 Cal.App.5th 1014, 1027-28 (2018) (finding rounding policy lawful where policy was “neutral on
22 its face” and resulted in employees being overpaid). Creative Stone also argues that any unpaid
23 time could have only amounted to a few minutes per day, at most, and was thus *de minimis*.
24 Haines Decl., ¶ 14. While Plaintiff points to *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018),
25 where the California Supreme Court held California’s labor laws generally do not recognize a *de*
26 *minimis* defense, Creative Stone argues *Troester* should be limited to its facts. (“[W]e decide only
27 whether the *de minimis* rule is applicable to the facts of this case as described by the Ninth
28 Circuit.” *Troester*, 5 Cal.5th at 829.). Finally, Creative Stone asserts that Plaintiff would be

1 unable to certify this claim since its rounding policy is facially neutral and some employees were
2 overpaid due to rounding, and individualized inquiries would be necessary as to whether
3 employees were in fact underpaid or overpaid for each workday in question (including whether
4 they were actually working when they were clocked in), resulting in an unmanageable series of
5 mini-trials. Haines Decl., ¶ 14.

6 **3. Rest Period Claims**

7 Plaintiff further alleges that Creative Stone failed to authorize and permit all legally-
8 compliant off-duty rest periods. Haines Decl., ¶ 15. Specifically, Plaintiff alleges that Creative
9 Stone only authorized and permitted a single 20-minute combined rest period in the morning, and
10 failed to authorize and permit a second rest period in the afternoon during shifts of at least eight
11 (8) hours. *Id.*; see also, *Rodriguez v. E.M.E., Inc.*, 246 Cal.App.4th 1027 (2016) (“[A] departure
12 from the preferred schedule is permissible only when the departure (1) will not unduly affect
13 employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the
14 employer by implementing the preferred schedule.”). Plaintiff further alleges that Creative Stone
15 failed to authorize and permit a third rest period when employees worked shifts in excess of 10.0
16 hours. Haines Decl., ¶ 15.

17 Creative Stone counters that it has maintained compliant written rest period policies and
18 has always authorized and permitted employees a 10-minute rest period for each 4 hours worked,
19 or major fraction thereof, as required under the Wage Order, and that any failure to take rest
20 periods was as a result of employee choice, rather than any Creative Stone policy and/or practice.
21 Haines Decl., ¶ 15. With respect to Plaintiff’s allegation that Creative Stone only provided one
22 20-minute combined rest period during the morning of an 8-hour shift, Creative Stone produced
23 its written rest period policies which provide for a morning rest period of 20 minutes, followed
24 by an afternoon rest period of 10 minutes. *Id.* Creative Stone further argues that Plaintiff’s rest
25 period claim is not amenable to class treatment, since individual inquiries would be required to
26 determine which employees failed to take rest periods, how many rest periods they failed to take,
27 and the reasons why each employee failed to take rest period(s) on a particular shift. *Id.* These
28 manageability concerns are especially present with respect to rest period claims, Creative Stone

argues, given that rest periods are not recorded. *Id.*

4. Claims Under Labor Code §§ 203 and 226

As a result of its alleged failure to pay all wages and all meal and rest period premiums, Plaintiff asserts Creative Stone failed to comply with its final payment obligations set forth in Labor Code § 203, and failed to issue accurate and compliant wage statements in violation of Labor Code § 226. Haines Decl., ¶¶ 16-17.

Creative Stone asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, precluding the imposition of waiting time penalties. Haines Decl., ¶ 16; *see also* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting time penalties). Moreover, because the waiting time claim is derivative of Plaintiff’s underlying wage claims, Plaintiff would need to overcome Creative Stone’s defenses, both as to class certification and on the merits, as to his underlying claims. Haines Decl., ¶ 16. Creative Stone further asserts Plaintiff’s waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. *Id.* Creative Stone further contends any alleged wage statement violations could not be shown to be “knowing and intentional” given its good-faith defenses, and that Plaintiff cannot show he or other employees “suffer[ed] injury,” as required by Labor Code § 226(e) for the imposition of penalties. Haines Decl., ¶ 17. Creative Stone further argues that wage statements always accurately reflected hours worked and amounts paid to employees. *Id.*; *see Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (agreeing with employer’s “commonsense position that the pay stubs were accurate in that they correctly reflected the hours worked and the pay received).

5. PAGA Civil Penalties

As a result of the foregoing Labor Code violations, Plaintiff alleges that Creative Stone is liable for civil penalties under the PAGA. Haines Decl., ¶ 18. Since Plaintiff’s PAGA claim is derivative of Plaintiff’s underlying wage claims, Creative Stone asserts the PAGA claim would fail with those claims. *Id.*; *see Price v. Starbucks Corp.* 192 Cal.App.4th 1136, 1147 (2011)

1 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
2 Creative Stone further maintains that, given its good faith defenses, this Court would exercise its
3 discretion to substantially reduce any PAGA penalties if it were to find Creative Stone liable for
4 any of Plaintiff’s claims. Haines Decl., ¶ 18; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore*
5 *Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties);
6 *Fleming v. Covidien Inc.*, Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D.
7 Cal. 2011) (reducing PAGA penalties by over 82% in part because employer “not aware” of
8 violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA
9 civil penalty of just \$5 per pay period where employer made “good faith attempts” to comply with
10 the law).

11 **C. DISCOVERY AND MEDIATION**

12 On August 20, 2020, Plaintiff Victor Negrete filed a Class Action Complaint against
13 Creative Stone in San Bernardino County Superior Court, Case No. CIVDS2018095, alleging
14 causes of actions for: (i) failure to pay all overtime wages; (ii) minimum wage violations; (iii)
15 meal period violations; (iv) rest period violations; (v) unlawful deductions from earned wages;
16 (vi) wage statement violations; and (vii) unfair competition in violation of California Business &
17 Professions Code § 17200 *et seq.* (the “Negrete Action”). Haines Decl., ¶ 20. On October 27,
18 2020, Plaintiff Negrete filed a First Amended Class and Representative Action Complaint, adding
19 causes of action for waiting time penalties pursuant to Labor Code §§ 201-203 and for civil
20 penalties under the PAGA. *Id.*

21 Thereafter, the Parties in the *Negrete* Action agreed to attend a private mediation. Haines
22 Decl., ¶ 20. In connection with this mediation, the Parties in the *Negrete* Action engaged in
23 extensive informal discovery. Creative Stone produced timekeeping and payroll records for a
24 sampling of putative class members, including actual time punches and rounded time punches,
25 which allowed Plaintiff Negrete’s Counsel to conduct a rounding analysis. *Id.* Creative Stone
26 also produced a sampling of putative class member “Meal Period Sign-In Sheets” as well as its
27 relevant written wage and hour policies, and data regarding the number of putative class members,
28 number of workweeks worked, and other relevant data and information. *Id.* Plaintiff’s Counsel

1 in the *Negrete* Action hired a labor economist with a Ph.D. in economics to analyze and
2 extrapolate the data produced by Creative Stone to calculate Creative Stone’s potential exposure
3 for each of Plaintiff Negrete’s claims. *Id.* Creative Stone represents that it also hired a labor
4 economist to perform a similar analysis and extrapolation of the relevant data. *Id.*

5 On April 6, 2021, the Parties in the *Negrete* Action participated in a full-day mediation
6 with Steven G. Mehta, Esq., a well-respected wage, and hour class action mediator. Haines Decl.,
7 ¶ 21. During mediation in the *Negrete* Action, the parties vigorously debated their opposing legal
8 positions, the likelihood of certification of Plaintiff’s claims, and the legal basis for the claims
9 and defenses. *Id.* At the conclusion of mediation, Mr. Mehta issued a mediator’s proposal for a
10 classwide settlement, which was ultimately accepted by both sides in the days following
11 mediation. *Id.*

12 During the months that followed the mediation in the *Negrete* Action, counsel for Plaintiff
13 Negrete experienced great difficulties communicating with Plaintiff Negrete regarding the
14 tentative settlement and his pending case against Creative Stone, which culminated in Plaintiff
15 Negrete terminating the attorney-client relationship with his counsel. Haines Decl., ¶ 21. On June
16 14, 2022, Counsel for Plaintiff Negrete filed a Motion to Be Relieved as Counsel, and on July 13,
17 2022, the Court granted Counsel’s Motion to Be Relieved as Counsel. *Id.*

18 After Counsel for Plaintiff Negrete was informed of this instant Action, which was filed
19 in June 2021, Counsel for Plaintiff Negrete shared the informal discovery exchanged in the
20 *Negrete* Action, the exposure analysis conducted in connection with the April 2021 mediation, as
21 well as the mediation brief exchanged in the *Negrete* Action, with Plaintiff Allen and his Counsel.
22 Haines Decl., ¶ 22; Declaration of James R. Hawkins (“Hawkins Decl.”), ¶¶ 7, 9. After reviewing
23 the informal discovery, exposure analysis, and the tentative terms of the proposed classwide
24 settlement, Plaintiff Allen and his Counsel agreed that the proposed Settlement reached in the
25 *Negrete* Action was fair, adequate, and reasonable and in the best interests of the putative class
26 and indicated its willingness to move forward with the proposed classwide settlement. *Id.*
27 Thereafter, the Parties in this Action negotiated the finer points of the Settlement, and executed
28 the long-form Settlement now before the Court. Haines Decl., ¶ 22.

1 **III. THE PROPOSED SETTLEMENT**

2 **A. ESSENTIAL TERMS OF THE SETTLEMENT**

3 If the Court preliminarily approves the Settlement, Creative Stone will pay a Maximum
4 Settlement Amount (“MSA”) of \$2,850,000.00. *See* Settlement, ¶ 4. Significantly, this Settlement
5 is non-reversionary, and no Settlement Class member will have to submit a claim form to receive
6 an Individual Settlement Payment. *Id.*, at ¶¶ 4-5. Each Settlement Class member will
7 automatically receive an Individual Settlement Payment unless he or she affirmatively opts out
8 of the Settlement. *Id.* The monetary terms of the Settlement are summarized below:

9

• Maximum Settlement Amount (“MSA”):	\$2,850,000.00
• Minus Court-approved attorneys’ fees:	\$950,000.00
• Minus Court-approved verified costs (up to):	\$30,000.00
• Minus Court-approved Service Award:	\$7,500.00
• Minus amount set aside as PAGA penalties:	\$100,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$40,000.00</u>
Net Settlement Fund (“NSF”):	\$1,722,500
• PLUS 25% “PAGA Amount” to Settlement Class:	\$25,000.00
Total Amount Paid to Settlement Class members:	\$1,747,500.00

10
11
12
13
14

15 **1. The Settlement Provides for Reasonable Monetary Payments**

16 After deducting amounts for the Court-approved attorneys’ fees and costs, Class
17 Representative Service Award to Plaintiff, the amount designated as PAGA civil penalties, and
18 settlement administration costs, the Settlement requires Creative Stone to pay a Net Settlement
19 Fund (“NSF”) of at least \$1,722,500 to all Settlement Class members who do not timely opt out.
20 *See* Settlement, ¶ 5. Seventy-five percent (75%) of the NSF shall be distributed to all participating
21 Settlement Class members based on each participating Settlement Class member’s proportionate
22 number of workweeks worked during the Class Period. *See* Settlement, ¶ 5(B)(i). Fifteen percent
23 (15%) of the NSF shall be designated as the “Waiting Time Amount” and shall be allocated in
24 equal amounts to all participating Settlement Class members who separated their employment
25 from Creative Stone at any time from April 6, 2017 through June 22, 2021. Settlement, ¶ 5(B)(ii).
26 Ten percent (10%) of the NSF shall be designated as the “Wage Statement Amount” and will be
27 paid proportionally based on the number of workweeks worked from April 6, 2019 through June
28 22, 2021 (“Wage Statement Period”). Settlement, ¶ 5(B)(iii). Additionally, Twenty-Five

1 Thousand Dollars (\$25,000.00) of the Maximum Settlement Amount has been designated as the
2 “PAGA Amount,” and shall be distributed to Settlement Class members (including those who
3 submit a valid and timely Request for Exclusion from the class action settlement) proportionally
4 based on the number of workweeks worked during the time period from August 20, 2019 through
5 June 22, 2021. Settlement, ¶ 5(B)(iv).

6 According to Creative Stone, there are approximately 2,808 Settlement Class members.
7 Haines Decl., ¶ 24. Therefore, the average Individual Settlement Payment is projected to be
8 approximately \$613.43. *Id.* Settlement Class members will have forty-five (45) calendar days
9 from the mailing of the Notice Packets to opt-out or object to the Settlement, thereby providing
10 ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement,
11 ¶¶ 10(C), (E). Those Settlement Class members who do not opt-out of the Settlement will be
12 bound by its terms and will release all claims against Creative Stone included within the
13 Settlement. *See Id.*, at ¶ 2(A).

14 **2. Attorneys’ Fees and Costs, Service Award, and PAGA Payment**

15 Plaintiff will apply for Class Representative Service Award at the time of seeking final
16 approval of the proposed class action settlement in the amount of \$7,500, for his service to the
17 Settlement Class. *See* Settlement, ¶¶ 4(C)(3), 7; Haines Decl., ¶ 25. “[I]ncentive awards are fairly
18 typical in class action cases . . . and are intended to compensate class representatives for work
19 done on behalf of the class [and] to make up for financial or reputational risk undertaken in
20 bringing the action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94
21 (2010). As will be fully briefed at the time of final approval, Plaintiff’s requested Service Award
22 is intended to recognize the time and effort Plaintiff expended on behalf of the Settlement Class,
23 including providing substantial factual information and documents to Class Counsel, discussing
24 the claims and theories at issue in the litigation, actively participating in the prosecution of his
25 claims, as well as the significant risks Plaintiff undertook by agreeing to serve as the named
26 plaintiff in this case, and the fact that Plaintiff agreed to a general release of all claims subject to
27 a waiver of Civil Code § 1542. *See* Settlement, ¶ 7; Haines Decl., ¶ 25; *see also* Allen Decl.

28 Class Counsel will also apply for an attorneys’ fees award of one-third of the Maximum

1 Settlement Amount, which is currently estimated to be \$950,000.00, and up to \$30,000.00 in
2 verified costs reimbursement. *See* Settlement, ¶ 6; Haines Decl., ¶ 24. Plaintiff submits the
3 requested fee is fair compensation for undertaking complex, risky, expensive, and time-
4 consuming litigation on a purely contingent fee basis. *Id.* Class Counsel has incurred substantial
5 attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal
6 research, conducting extensive informal discovery, interviewing Settlement Class members
7 regarding their work experiences at Creative Stone, analyzing Settlement Class members’
8 timekeeping and payroll records, creating a comprehensive damages model, preparing for and
9 attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing
10 this Motion, and otherwise litigating the case. *Id.* Class Counsel expect to expend additional
11 attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding
12 questions from Settlement Class members, preparing the final approval papers, and attending the
13 Final Approval hearing. *Id.*

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

22 Class Counsel submit their request for attorneys’ fees is reasonable when viewed as an
23 overall percentage of the Settlement and in light of the substantial risks and significant work
24 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
25 Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys’ fees
26 and verified costs upon seeking final approval.

27 Additionally, the parties have agreed to designate \$100,000.00 of the Maximum
28 Settlement Amount as PAGA civil penalties, of which \$75,000.00 (75%) will be paid to the

1 LWDA, with the remaining \$25,000.00 (25%) for distribution to the Settlement Class, as the
2 PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 4(C)(5).
3 Plaintiff submits this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g.,*
4 *Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D.
5 Cal. 2011) (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund
6 settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D.
7 Cal. 2013) (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund
8 settlement).

9 **IV. ARGUMENT**

10 **A. PRELIMINARY APPROVAL IS WARRANTED**

11 California Rule of Court 3.769 conditions settlement of a class action on court approval,
12 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
13 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
14 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
15 adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
16 (Rule 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally
17 fair, adequate, and reasonable”). Settlement is the preferred means of dispute resolution,
18 particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101
19 (9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that
20 the agreement taken as a whole is fair. *See e.g., Hanlon*, supra, 150 F.3d at 1027. There is an
21 initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by
22 class counsel and with the assistance of an experienced wage and hour class action mediator. *See*
23 *e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

24 **1. Standard for Preliminary Approval**

25 To make a fairness determination, the Court should consider several factors, including:
26 “the strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further
27 litigation, the risk of maintaining class action status through trial, the amount offered in
28 settlement, the extent of discovery completed and the stage of the proceedings, [and] the

1 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
2 “The list of factors is not exclusive, and the court is free to engage in a balancing and weighing
3 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
4 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and
5 reasonable in light of the overall balance of factors in this case.

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

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

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

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

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

22 Plaintiff has not yet filed his motion for class certification, and as such, the extent to which
23 Plaintiff’s proposed classes were certifiable is somewhat speculative. Absent settlement, there
24 was a risk that there would not be a certified class at the time of trial, or if there were, it would
25 consist of a significantly smaller group of employees than the proposed Settlement Class (either
26 due to a narrowing of the class definition in a Court order on a contested motion for class
27 certification, or through settlement agreements entered into by Creative Stone with individual
28

class members by way of *Pick-up-Stix* type settlement agreements³), and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick-up-Stix* process. Thus, this factor, too, supports preliminary approval of the settlement.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a positive recovery for the Settlement Class in the face of disputed claims. With the assistance of a retained economist with a Ph.D. in economics, counsel for Plaintiff conducted an analysis of underpaid wages due to Creative Stone’s alleged unlawful timekeeping policies/practices, potential meal and rest period premium payments owing, wage statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results of Plaintiff’s exposure analysis are discussed below:

First Meal Period Violations: \$1,358,746

Based on Plaintiff’s review and extrapolation of Creative Stone’s “Meal Period Sign-In Sheets,” there were approximately 125,121 shifts with a “late” meal period (commencing after the end of the fifth hour of work), and approximately 96,247 shifts evidencing a “short” meal period (less than 30 full minutes). Haines Decl., ¶ 12. Plaintiff further calculated that the average rate of pay for putative class members during the Class Period at approximately \$13.49. *Id.* Therefore, Plaintiff estimated total maximum damages for first meal period violations at approximately \$2,986,254 (221,368 first meal period violations * \$13.49 premium). *Id.*

As noted above, however, Creative Stone maintains its written meal period policies comply with California law and 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. Haines Decl., ¶ 12. Creative Stone further maintains Plaintiff’s meal period claim is not suited for class treatment, as individual inquiries would be needed as to which employees took non-compliant

³ In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may enter into pre-certification settlement agreements with individual putative class 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 meal periods or missed meal periods, how many meal periods were non-compliant or missed, and
2 why a particular employee did not take compliant meal period on a particular shift. *Id.* Based
3 on these defenses, Plaintiff discounted the maximum amount by 30% for risk of non-certification
4 and an additional 35% for risk of losing on the merits or failing to recover the full amount sought,
5 to arrive at an estimated exposure of approximately \$1,358,746. *Id.*

6 Second Meal Period Violations: \$194,525

7 Plaintiff's analysis and extrapolation of the timekeeping data showed that during the Class
8 Period there were approximately 31,692 shifts worked in excess of 10.0 hours that did not reflect
9 a compliant second meal period. Haines Decl., ¶ 13. Therefore, Plaintiff calculates Creative
10 Stone's maximum exposure for second meal period violations at approximately \$427,525 (31,692
11 second meal period violations * \$13.49 premium). *Id.*

12 However, Plaintiff's theory of liability carried significant risks, based on Creative Stone's
13 arguments that it has always provided employees the opportunity for second meal periods and
14 that Settlement Class members voluntarily waived their second meal period on shifts in excess of
15 10.0 hours but less than 12.0 hours. Haines Decl., ¶ 13. In addition, as with first meal periods,
16 Creative Stone argued this claim would not be certified as requiring individualized inquiries into
17 both the merits and damages. *Id.* In light of these risks, Plaintiff discounted the maximum amount
18 that the class could potentially recover for second meal periods by 30% for a risk of non-
19 certification, and an additional 35% for a risk of losing on the merits, or having exposure reduced
20 due to Creative Stone's waiver argument, to arrive at an estimated exposure amount of
21 approximately \$194,525. *Id.*

22 Unpaid Wages Due to Rounding: \$132,014

23 Plaintiff alleges that Creative Stone pays its employees in quarter-hour increments, and
24 that employees were underpaid as a result. Haines Decl., ¶ 14. Based on Plaintiff's expert's
25 analysis and extrapolation of Creative Stone's time and payroll records, Plaintiff estimated that
26 Creative Stone's timekeeping policies/practices resulted in approximately 12,571 hours in unpaid
27 wages over the Class Period. *Id.* The average minimum wage during the Class Period was
28 approximately \$11.54. *Id.* Therefore, Plaintiff estimates Creative Stone's maximum exposure

1 for this claim at approximately \$290,139 (12,571 hours * \$11.54 min. wage * 2 [liquidated
2 damages per Labor Code § 1194.2]). *Id.*

3 As noted above, Creative Stone argues that its timekeeping system is even-handed and
4 facially neutral, and compensated employees for all hours worked. Haines Decl., ¶ 14. Creative
5 Stone further argues that just because an employee is clocked in does not mean they are working.
6 *Id.* Creative Stone also asserts that Plaintiff would be unable to certify this claim given the
7 individualized inquiry as to whether employees were in fact underpaid, or potentially overpaid,
8 for each workday in question. *Id.* Based on these defenses, Plaintiff discounted the estimated
9 maximum amount by 30% for risk of non-certification, and by an additional 35% to account for
10 risk of losing on the merits or failure to recover the maximal amount sought, to arrive at an
11 estimated exposure of approximately \$132,014. *Id.*

12 Rest Period Violations: \$209,488

13 As indicated above, Plaintiff alleges that Creative Stone only provided non-exempt
14 employees who worked shifts of at least eight (8) hours to take one 20-minute combined rest
15 period in the morning. Haines Decl., ¶ 15. However, Creative Stone produced its written rest
16 period policies during the Class Period which provided for one 20-minute rest period in the
17 morning, and an additional 10-minute rest period in the afternoon. *Id.* Therefore, Plaintiff focused
18 his rest period analysis on shifts over 10.0 hours, in which Plaintiff argued that Creative Stone
19 failed to authorize and permit a third rest period. *Id.* Based on Plaintiff's analysis and
20 extrapolation of Creative Stone's timekeeping records, Plaintiff estimated there were
21 approximately 31,692 shifts over 10.0 hours during the Class Period. *Id.* Therefore, Plaintiff
22 estimated Creative Stone's maximum potential exposure for rest period violations at
23 approximately \$427,525 (31,692 rest period violations * \$13.49 premium). *Id.*

24 However, Creative Stone contends it has maintained compliant written rest period policies
25 throughout the Class Period, and that it has always authorized and permitted employees at least
26 10-minute rest periods for each 4 hours worked, or major fraction thereof, including authorizing
27 and permitting a third rest period during shifts in excess of 10.0 hours. Haines Decl., ¶ 15. Creative
28 Stone further argues that Plaintiff's 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 regarding rest periods, Creative Stone contends, since rest periods are not recorded. *Id.* Given these defenses, Plaintiff discounted this maximum amount by 30% for risk of non-certification and an additional 30% 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 \$209,488. *Id.*

Wage Statement Penalties: \$374,680

Plaintiff's analysis reflected that there were approximately 970 unique employees and approximately 37,468 pay periods worked during the liability period applicable to Plaintiff's wage statement claim. Haines Decl., ¶ 17. In calculating Creative Stone's exposure, Plaintiff gave Creative Stone the benefit of assuming that Plaintiff could only obtain the "initial" wage statement violation rate of \$50 per pay period, for a total of approximately \$1,873,400 (37,468 pay periods * \$50 "initial" penalty) in potential penalties. *Id.*; see also Labor Code § 226(e) (providing for \$50 penalty for "initial" violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (finding "initial" violation rate applies for civil penalties until employer has been notified it is violating the Labor Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2004) (citing *Amaral* and applying "initial" \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim).

But given Creative Stone's arguments that no violations occurred, that employees suffered no "injury," that any alleged violations were not "knowing and intentional," that the wage statements always accurately reflected hours worked and amounts paid to employees, as well as risks associated with Plaintiff's underlying claims discussed above, Plaintiff discounted the maximum exposure by 50% for risk of non-certification, and by an additional 60% for risk of being unsuccessful on the merits, for an estimated realistic exposure of approximately \$374,680. Haines Decl., ¶ 17.

Waiting Time Penalties: \$467,827

Creative Stone's records reflected approximately 1,927 former Settlement Class members

1 who separated from their employment with Creative Stone and are therefore eligible for waiting
2 time penalties. Haines Decl., ¶ 16. Based on an hourly rate of \$13.49, Plaintiff estimated the
3 average waiting time penalty per former employee to be \$3,237 ($\$13.49 \times 8 \text{ hours per day} \times 30$
4 days). *Id.* Therefore, Plaintiff calculated Creative Stone’s maximum exposure for potential
5 waiting time penalties to be approximately \$6,237,699 ($1,927 \text{ former employees} \times \$3,237 \text{ average}$
6 penalty). *Id.*

7 Creative Stone presented several defenses to this claim, most notably their assertion that
8 because they possessed good-faith defenses to the underlying claims, any failure to pay wages
9 was not “willful” as a matter of law. Haines Decl., ¶ 16. Creative Stone further asserts Plaintiff’s
10 waiting time penalty exposure was grossly inflated as not every former employee experienced the
11 alleged Labor Code violations. *Id.* Moreover, because the waiting time claim is derivative of
12 Plaintiff’s underlying wage claims, Plaintiff would need to overcome Creative Stone’s defenses,
13 both as to class certification and on the merits, as to his underlying claims. *Id.* To account for
14 Creative Stone’s defenses, Plaintiff discounted the maximum exposure by 50% for the risk of
15 non-certification, and an additional 85% for risk of losing on the merits, and/or not receiving the
16 maximum penalties sought, to arrive at an estimated exposure of approximately \$467,827. *Id.*

17 PAGA Penalties: \$299,744

18 Plaintiff estimated a maximum total PAGA exposure at \$3,746,800 ($37,468 \text{ pay periods}$
19 $\times \$100 \text{ “initial” penalty}$). Haines Decl., ¶ 18; *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th
20 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified that it is
21 violating a Labor Code provision). However, these penalties derive from the underlying wage and
22 hour violations discussed above, which Creative Stone vigorously disputes. Haines Decl., ¶ 18;
23 *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining
24 that a PAGA claim’s success was determined by the merits of its underlying claims). Creative
25 Stone also asserts the Court would drastically reduce any award of PAGA penalties as
26 “confiscatory.” Haines Decl., ¶ 18; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203
27 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien*
28 *Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing

1 PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum
2 figure by 60% for risk of losing on the merits and/or not recovering a PAGA penalty for every
3 pay period, and an additional 80% to account for the possibility of this Court reducing penalties,
4 to arrive at an estimated exposure of approximately \$299,744. Haines Decl., ¶ 18.

5 Using these estimated figures for each of the claims described above, Plaintiff predicted
6 that the potential recovery for the Settlement Class would be approximately \$3,037,024. Haines
7 Decl., ¶ 19. The proposed settlement of \$2,850,000 therefore represents approximately 93.8% of
8 the reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is
9 appropriate since the Settlement will provide significant monetary relief to the Settlement Class,
10 which is consistent with what Plaintiff’s counsel believes could have been recovered had the case
11 proceeded through trial.

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

13 “Parties represented by competent counsel are better positioned than courts to produce a
14 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
15 *Enterprises Securities Litigation* 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented
16 by competent, experienced counsel who possess extensive experience prosecuting and defending
17 wage-and-hour class actions, and who have been appointed as class counsel in numerous cases
18 alleging similar claims. *See* Haines Decl., ¶¶ 3-7; Hawkins Decl., ¶¶ 10-12. With the assistance
19 of a retained expert, Class Counsel conducted an in-depth review of Creative Stone’s timekeeping
20 and payroll records, and drew on their extensive experience in similar cases to assess the strengths
21 and weaknesses of Plaintiff’s case. *See* Haines Decl., ¶¶ 21. The Settlement was also reached
22 with the assistance of an experienced and respected wage-and-hour class action mediator. *Id.* This
23 factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168
24 Cal.App.4th at 130.

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

26 At this stage, the Court can grant preliminary approval of the settlement and direct that
27 notice be given if the proposed settlement: (1) falls within the range of possible approval; (2)
28 appears to be the product of serious, informed and non-collusive negotiations; and (3) has no

obvious deficiencies. See Manual for Complex Litigation § 30.41(3rd Ed. 1995); 4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

The proposed settlement reflects approximately 93.8% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. See, e.g., *Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Settlement Class members at trial”). Further, the average Individual Settlement Payment of approximately \$613.43 is in line with average payments achieved in other wage and hour class action settlements.⁴ Thus, Plaintiff submits that the proposed settlement is within the

⁴ See e.g., *Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department 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 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 range of possible approval, such that notice should be provided to the Settlement Class members
2 so that they can consider the Settlement. The Court will have the opportunity to again assess the
3 reasonableness of the Settlement after the Settlement Class members have had the opportunity to
4 opt-out or object.

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

6 The Settlement resulted from an exchange of substantial information, arm's-length
7 negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and
8 additional months of negotiating the long-form settlement agreement. Thus, the Settlement is
9 entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130. As
10 discussed above, Plaintiff carefully vetted the claims at issue and reviewed extensive timekeeping
11 and payroll data, and conducted a detailed statistical analysis of the data to arrive at his estimated
12 classwide damages figures. *See Haines Decl.*, ¶¶ 12-19. Thus, this factor supports preliminary
13 approval.

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

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

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

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

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

2 A class is “ascertainable” where the members “may be readily identified without
3 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
4 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
5 defined as all current and former non-exempt employees employed by Creative Stone in
6 California during the Class Period. Therefore, Settlement Class members can be identified from
7 Creative Stone’s personnel and employment records. Creative Stone represents that the
8 Settlement Class consists of approximately 2,808 current and former non-exempt employees. *See*
9 *Haines Decl.*, ¶ 23. It would therefore be impracticable to bring all Settlement Class members
10 before the Court, or for each Settlement Class member to bring an individual lawsuit. The
11 proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d
12 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

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

14 The focus in a certification dispute is not the merits, but rather on what types of questions,
15 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior*
16 *Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated on, among other
17 issues, Creative Stone’s timekeeping policies and/or practices, and meal and rest period policies
18 and/or practices. These types of claims are commonly held to be proper for class certification.
19 *See e.g., Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013)
20 (certifying meal and rest period claims).

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

22 The typicality requirement is satisfied where class representatives have claims that are
23 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191
24 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
25 same goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical
26 of those held by the Settlement Class members. First, Creative Stone employed Plaintiff as a non-
27 exempt employee during the Class Period, and Plaintiff was subject to Creative Stone’s wage and
28 hour policies at issue in this case. *See Allen Decl.*, ¶ 2. Second, Plaintiff was injured by the same

1 challenged policies/practices that allegedly injured the Settlement Class as a whole. For example,
2 Plaintiff asserts that he was deprived of all wages and contends that he was deprived of all legally–
3 compliant meal and rest periods. Plaintiff further asserts that he did not receive accurate and
4 compliant wage statements, and did not receive all wages at the time of separation of employment.
5 *See generally*, Allen Decl. Because Plaintiff has suffered the same injuries as the other members
6 of the Settlement Class, the typicality requirement is satisfied.

7 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
8 **Class**

9 The adequacy requirement examines conflicts of interest between named parties and the
10 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
11 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the
12 Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class,
13 and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v.*
14 *Bank of America* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
15 indication that Class Counsel were not qualified and the named plaintiff had no interests
16 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
17 and hour class action litigation. *See Haines Decl.*, ¶¶ 2-7; *Hawkins Decl.*, ¶¶ 10-12.

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

19 This Court should order distribution to the Settlement Class of the proposed Class Notice
20 and Notice of Estimated Settlement Award by U.S. Mail, postage prepaid, using last known
21 mailing address information provided by Creative Stone. *See Settlement*, ¶ 10. This manner of
22 giving notice is the “best notice practicable” under the circumstances because it provides
23 “individual notice to all members who can be identified through reasonable effort.” *See Eisen v.*
24 *Carlisle & Jacquelin* 417 U.S. 156, 173 (1974). Here, the Parties have agreed that the Settlement
25 be administered by Phoenix Settlement Administrators (“Phoenix”), an experienced class action
26 settlement administrator. *See generally* Declaration of Jodey Lawrence (“Lawrence Decl.”) and
27 attached exhibits. Settlement Class members’ addresses will be ascertainable through Creative
28 Stone’s personnel and payroll records, which Creative Stone will provide to Phoenix within ten

(10) business days of preliminary approval of the Settlement. *See* Settlement, ¶ 10(A). Within ten (10) business days of receipt of the Settlement Class members’ addresses, Phoenix will run the addresses through the National Change of Address Database (which provides updated addresses for any individual who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding address) and mail the Class Notice to all Settlement Class members. *See* Settlement, ¶ 10(B). To the extent that any notices are returned, Phoenix will perform a “skip trace” to track any Settlement Class member’s current mailing address. *Id.*, at ¶ 10(H).

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims, basic contentions and denials of the parties and the key terms of the Settlement, the 45-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Haines Decl., Exhs. 1, 2 to Exh. A. The proposed Class Notice will also notify Settlement Class members of the final approval hearing date and provides the Settlement Class contact information for Class Counsel, and advises Settlement Class members that they may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members.

D. THE COURT SHOULD SET A FINAL APPROVAL HEARING

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

///

///

///

///

///

1 **V. CONCLUSION**

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

5
6
7 Dated: August 19, 2022

Respectfully submitted,
JAMES HAWKINS APLC
HAINES LAW GROUP, APC

8
9 By:



James R. Hawkins
Christina M. Lucio
Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiff