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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GERARDO SANCHEZ, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

DUTTON HOME SERVICES, LLC, a
California corporation; and DOES 1
through 100,

Defendants.

CASE NO. 22STCV01834

*[Case assigned for all purposes to the Hon.
Maren E. Nelson, Dept. 17]*

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

Date: May 22, 2023
Time: 9:00 a.m.
Dept.: 17

Action Filed: January 14, 2022

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on May 22, 2023 at 9:00 a.m. in Department SSC17 of the above-entitled Court, located at 312 N Spring St, Los Angeles, California 90012, Plaintiff Gerardo Sanchez, individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

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

Settlement Class – all current and former non-exempt employees of Defendant Dutton Home Services, LLC and/or its predecessor, Dutton Plumbing, Inc., in California who worked at any time between January 14, 2018, and November 22, 2022 (the “Class Period”).

3. Preliminary appointment of Gerardo Sanchez as Class Representative;
4. Preliminary appointment of Fletcher W. Schmidt, Paul K. Haines, Andrew J. Rowbotham, and Susan J. Perez of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award amounts for the Class Representative service payment, Settlement Administrator costs, payment to the LWDA for its 75% share of PAGA penalties, as well as attorneys’ fees and costs to Class Counsel;
6. Appointment of CPT Group, Inc. as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and entry of the proposed Order instructing the Class Notice to be disseminated to the proposed Settlement Class as provided in the Settlement.

1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the declarations of Fletcher W. Schmidt, Paul K. Haines, Andrew J. Rowbotham,
3 Susan J. Perez, Gerardo Sanchez, Julie Green, and the exhibits attached thereto, the pleadings and
4 other papers filed in this action, and on any further oral or documentary evidence or argument
5 presented at the time of hearing.

6
7 Dated: January 25, 2023

Respectfully Submitted,
HAINES LAW GROUP, APC

8
9 By: _____


Fletcher W. Schmidt
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Gerardo Sanchez (“Plaintiff”) filed this putative class action (the “Lawsuit”) on
4 behalf of all current and former non-exempt employees of Defendant Dutton Home Services, LLC
5 (“Defendant”) and/or its predecessor, Dutton Plumbing, Inc., in California who worked at any
6 time between January 14, 2018, and November 22, 2022 (the “Class Period”). Plaintiff and
7 Defendant will be referred to collectively herein as the “Parties.”

8 Through this Motion, Plaintiff respectfully requests that this Court preliminarily approve
9 this non-reversionary class action settlement (“Settlement”),¹ which will fully resolve the
10 Lawsuit.² Based upon the data received from Defendant, there are approximately 275 potential
11 Settlement Class members who worked approximately 15,205 combined workweeks during the
12 Class Period. There are approximately 148 PAGA Group Members. Defendant will pay a Gross
13 Settlement Amount (“GSA”) of \$450,000.00. This represents a significant result for Settlement
14 Class members who will be agreeing to a release of only those claims that were actually asserted,
15 or which could have been asserted based on the same set of operative facts alleged in the Lawsuit.
16 After deductions for Plaintiff’s service award, settlement administrator costs, the LWDA Private
17 Attorneys General Act (“PAGA”) Payment, and attorneys’ fees and costs to Class Counsel, the
18 remaining amount (the “Net Settlement Amount”) of approximately \$218,750.00 will be
19 distributed to the Settlement Class. Significantly, Class Members do not need to file a claim form
20 in order to receive their share of the Settlement, and all Class Members who do not opt-out will

21 _____
22 ¹ The Class Action and PAGA Settlement Agreement (“Settlement Agreement”) (based off of this Court’s
23 model agreement of the same name) is attached to the Declaration of Fletcher W. Schmidt as Exhibit 1
24 and the Notice of Proposed Class Action Settlement (“Class Notice”) is attached as Exhibit A to the
Settlement Agreement.

25 ² The Settlement also includes a release of PAGA civil penalties on behalf of all current and former non-
26 exempt employees of Defendant in California who worked at any time between January 14, 2021, and
27 November 22, 2022 (the PAGA Period”). These individuals are referred to herein as “PAGA Group
28 Members.” *See* Settlement § 1.4. The PAGA Group Members’ release includes all claims, demands, rights,
liabilities and causes of action under the PAGA, premised on the facts, claims, causes of action or legal
theories pled in the operative complaint in the Lawsuit (or Plaintiff’s letter to the LWDA dated January
14, 2022), or which could have been alleged based on the factual allegations therein, that arose during the
PAGA Period. *Id.*, § 6.3; *see also* Schmidt Decl., Exhibit 2 (Plaintiff’s LWDA Letter).

1 automatically receive an Individual Settlement Payment. The highest Individual Settlement
2 Payment is estimated to be \$3,639.84 and the average payment is estimated to be \$795.45.

3 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with timekeeping
4 and payroll data for a representative sample of the putative class, which Plaintiff's counsel and
5 his retained expert used to construct a comprehensive damages model. Defendant also produced
6 the employee handbook and other relevant policies in effect during the Class Period. After
7 extensive legal research and analysis along with a comprehensive review of the data performed
8 by Plaintiff and his expert, the Parties participated in a mediation session with Louis Marlin, Esq.,
9 a respected wage and hour class action mediator, and were able to reach a class-wide settlement
10 at the conclusion of mediation. Over the following months, the Parties finalized and executed the
11 long-form Settlement Agreement that is now before this Court for preliminary approval.

12 This proposed Settlement is well within the range of possible approval in light of the
13 significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation,
14 and the substantial monetary benefits to the Settlement Class. For the reasons discussed herein,
15 Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

16 **II. SUMMARY OF THE LITIGATION**

17 Defendant operates a plumbing repair service in Los Angeles, California. Declaration of
18 Fletcher W. Schmidt ("Schmidt Decl."), ¶ 8. Plaintiff was employed by Defendant as a non-
19 exempt "Plumber" from approximately February 18, 2019, to approximately March 12, 2021. *Id.*
20 Plaintiff's primary job duties consisted of traveling to client homes to conduct repairs,
21 installations, and maintenance on residential plumbing. *Id.* Like all Settlement Class members,
22 Plaintiff was subject to Defendant's wage and hour policies and practices. *Id.*

23 On January 14, 2022, Plaintiff filed the initial Complaint in this action, alleging Defendant
24 failed to: (i) pay all overtime wages; (ii) pay all minimum wages; (iii) provide all meal periods;
25 (iv) authorize and permit all rest periods; (v) reimburse all necessary business expenses;
26 (vi) provide accurate, itemized wage statements; (vii) timely pay all final wages upon separation
27 of employment; and (viii) comply with California's Unfair Competition law. Schmidt Decl. ¶ 9.
28 On March 21, 2022, Plaintiff filed the operative First Amended Complaint ("FAC"), adding a

1 cause of action for civil penalties under PAGA. *Id.* These theories of liability along with
2 Defendant's defenses are discussed below.³

3 **A. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

4 Plaintiff alleges that Defendant's timekeeping policies and/or practices resulted in an
5 underpayment of wages, in that Class Members were required to perform work off-the-clock work.
6 Schmidt Decl. ¶ 11. Specifically, Plaintiff alleges that Defendant encouraged Plaintiff and other
7 employees to delay, shorten, or forego their meal periods in order to maintain a busy schedule of
8 client appointments. *Id.* Because Defendant did not account for meal periods on the schedule,
9 Plaintiff and other employees were expected to clock out for a meal period prior to the end of the
10 fifth hour of work but continue working. *Id.* Employees were instructed to either eat their lunch
11 in their vehicle on the way to appointments or delay the meal period until later in the day. *Id.*
12 Defendant's practice of requiring employees to clock out for meal periods but continue working
13 led to Plaintiff and other employees not being paid for all hours actually worked. *See Kaanaana*
14 *v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 799 (2018) ("The right to be free from
15 employer control for a 30-minute meal period, and the right to be paid for time worked during that
16 meal period, are distinct rights with distinct remedies. The remedy for an employer violation of
17 the former right is the hour of premium pay provided under Section 226.7. The remedy for the
18 latter is payment of wages for time worked...")

19 Defendant contends that it expressly prohibited off-the-clock work and always
20 compensated employees for all hours worked. Schmidt Decl., ¶ 12. To the extent that employees
21 clocked out for a meal period and did not actually use the time as provided, Defendant contends
22

23
24 ³ Plaintiff's complaint includes claims for underpaid overtime wages due to a miscalculation of the regular
25 rate of pay and a failure to reimburse necessary cell phone expenses. Schmidt Decl. ¶ 10. Through
26 Plaintiff's pre-mediation investigation and with additional documents and information provided by
27 Defendant's counsel, Plaintiff has determined that these claims add only nominal settlement value to the
28 case. *Id.* Specifically, Defendant produced evidence showing that, throughout the Class Period,
Defendant's payroll system automatically adjusted employees' overtime rate to include a bonus that was
earned in the pay period that overtime was worked. *Id.* Defendant also made true up payments for overtime
worked in prior pay periods that the bonus was earned. *Id.* Additionally, Defendant confirmed that
employees are provided an iPad and company cell phone for use on the job. *Id.*; *see also* Declaration of
Gerardo Sanchez ("Sanchez Decl."), ¶ 2.

1 that it did not have actual knowledge of such work and could not reasonably be expected to have
2 known of such activity. *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 853 (“The standard
3 for what is compensable worktime in California is relatively broad and includes all time for which
4 the employer knew or should have known that the employee was working on the employer's
5 behalf.”) Defendant also asserts that this claim is not amenable to class certification as
6 individualized inquiries would be required to determine whether each employee performed off-
7 the-clock work on a particular shift, and whether Defendant was aware that such work was being
8 performed. Schmidt Decl., ¶ 12.

9 In addition to the time spent working through meal periods, Plaintiff contends that
10 Defendant is also liable for meal period premium wages due to its failure to provide uninterrupted,
11 30-minute meal periods commencing before the end of the fifth hour of work. *See Kaanaana,*
12 *supra*, 29 Cal.App.5th at 799. Plaintiff also alleges Defendant failed to provide second meal
13 periods on shifts over 10.0 hours. Schmidt Decl., ¶ 13. As discussed above, Plaintiff and other
14 employees were not provided meal periods throughout their shift due to the busy schedule driving
15 to customer homes. *Id.* Instead, Plaintiff and other employees were expected to eat lunch while
16 driving to the next location or delay their meal period until later in the shift (if they were able).
17 *Id.*

18 Defendant argues it maintains a legally-compliant meal period policy, that it has always
19 provided meal periods consistent with that policy, and that it is only required to “provide” the
20 opportunity to take meal periods, not “ensure” meal periods are taken. *Brinker Restaurant Corp.*
21 *v. Superior Court*, 54 Cal.4th 1004, 1038 (2012) (rejecting “ensure” standard and holding
22 employers only have to “provide” employees the opportunity to take meal periods). Defendant
23 further maintains that any meal period violations reflected in timekeeping records were the result
24 of employee choice, not Defendant’s policies, thereby precluding liability. Schmidt Decl. ¶ 14.
25 Defendant further contends that employees validly waived second meal periods on shifts over 10
26 hours. *Id.* Defendant also argues individualized inquiries will be required to determine why meal
27 periods are late, short, or missed, whether there was a valid waiver, and whether a premium was
28 paid on each such shift, thereby precluding class certification of this claim. *Id.*

1 Plaintiff alleges Defendant failed to authorize and permit rest periods throughout the
2 workday due to the busy schedule of client appointments that did not include time for 10-minute
3 rest periods. Schmidt Decl. ¶ 15. Plaintiff contends that Defendant encouraged employees to
4 finish each job as quickly as possible and immediately begin traveling to the next location. *Id.*
5 Plaintiff maintains that Defendant’s practice violates California law, which requires employers to
6 authorize and permit rest periods for every four hours worked, or major fraction thereof. *See*
7 *Brinker, supra*, 53 Cal.4th at 1029 (“Employees are entitled to 10 minutes’ rest for shifts from
8 three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10
9 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on”).

10 Defendant argues it maintains a facially compliant written rest period policy, and that it
11 has always authorized and permitted rest periods in compliance with that policy. Schmidt Decl.
12 ¶ 16. Defendant also argues this claim is not amenable to class treatment, as individual inquiries
13 would be required to determine whether the employee was authorized to take rest periods on each
14 particular shift based on their schedule, resulting in an unmanageable series of mini-trials. *Id.*
15 This manageability concern is especially present for the rest period claim as rest periods are not
16 recorded. *Id.*

17 As a result of these alleged substantive violations, Plaintiff contends that Defendant is
18 liable for derivate wage statement violations, waiting time penalties and civil penalties under the
19 PAGA. Schmidt Decl., ¶ 17. Defendant argues that the alleged wage statement violations were
20 not “knowing and intentional,” and that Plaintiff could not show he “suffer[ed] injury,” as
21 required by Labor Code § 226(e) for imposition of penalties. *See Amaral v. Cintas Corp.*
22 (2008) 163 Cal. App. 4th 1157, 1201. Defendant further contends that it possesses strong, good
23 faith defense to Plaintiff’s underlying claims, thus precluding recovery of waiting time penalties
24 (which are only available for the “willful” failure to pay wages). *See* 8 Cal. Code Regs. § 13520
25 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties
26 under Section 203...A good-faith dispute that any wages are due occurs when an employer
27 presents a defense, based in law or fact which, if successful, would preclude any recovery on the
28 part of the employee.”) Defendant also maintains that, given its good-faith defenses, this Court

1 would exercise its discretion to substantially reduce any PAGA penalties if it were to find
2 Defendant liable for any of Plaintiff's underlying claims. *Id.*

3 **B. DISCOVERY AND MEDIATION**

4 In connection with mediation, Defendant provided Plaintiff with timekeeping and payroll
5 data for 1/3 of the putative class who worked during the Class Period. Schmidt Decl., ¶ 22.
6 Defendant also provided the employee handbook and other relevant policies in effect during the
7 Class Period. *Id.* Plaintiff, with the help of his expert who holds a Ph.D. in economics, conducted
8 an analysis of this data and created a comprehensive damages model to calculate the likely
9 exposure that Defendant faced on each claim. *Id.*

10 On August 24, 2022, the Parties participated in a mediation with Louis Marlin, Esq., a
11 highly respected wage and hour class action mediator. Schmidt Decl., ¶ 23. During mediation, the
12 Parties exchanged divergent views on Defendant's liability and exposure valuations, their legal
13 positions, and the likelihood of certification of Plaintiff's claims. *Id.* With the help of Mr. Marlin,
14 the Parties ultimately reached a class-wide settlement at the conclusion of mediation. *Id.* Over the
15 following months, the Parties negotiated and executed the Settlement now before the Court for
16 preliminary approval. *Id.*⁴

17 **III. THE PROPOSED SETTLEMENT**

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

19 If the Court preliminarily approves this settlement, Defendant will pay a Gross Settlement
20 Amount of \$450,000.00. See Settlement § 3.1. This Settlement is non-reversionary and
21 Settlement Class members will automatically receive their Individual Settlement Payment unless
22 they affirmatively opt-out of the Settlement. *Id.*

23 Defendant will fund the GSA within 30 days of the Effective Date – which means the date
24 by which all of the following have occurred: (a) the Court enters a Judgment on its Order Granting
25 Final Approval of the Settlement; and (b) the Judgement becomes “Final”, meaning the last of
26 the following dates, as applicable: (1) if no Settlement Class member objects to the Settlement,
27 _____

28 ⁴ Plaintiff provided the LWDA with the Settlement Agreement along with all moving papers associated
with this Motion. See Schmidt Decl.; Exhibit 3 (LWDA Submission Confirmation)

the day the Court enters Judgment; and (2) if one or more Settlement Class members objects to the Settlement, the day after the deadline for filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the day after the appellate court affirms the Judgment without material modification and issues a remittitur. *See* Settlement §§ 1.18, 4.3.

The monetary terms of the Settlement are further broken down as follows:

<u>Gross Settlement Amount:</u>	<u>\$450,000.00</u>
Minus attorneys' fees (one-third):	\$150,000.00
Minus attorneys' costs (up to):	\$ 30,000.00
Minus Class Representative service payment:	\$ 5,000.00
Minus LWDA PAGA Payment:	\$ 37,500.00
<u>Minus Settlement Administrator Costs:</u>	<u>\$ 8,750.00</u>
Net Settlement Amount:	\$218,750.00

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for court-approved attorneys' fees and costs, class representative service payment, costs of settlement administration, and the LWDA PAGA Payment, the remaining Net Settlement Amount of approximately \$218,750.00 will be distributed to the Settlement Class members. *See* Settlement §§ 1.28, 3.2.

Defendant's records indicate that there are approximately 275 Settlement Class members who worked during the Class Period. Schmidt Decl., ¶ 24. Based on the allocations of the Net Settlement Amount, participating employees will receive, on average, a payment of approximately \$795.45. *Id.* Settlement Class members will have 60 calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement § 8.5.1. Those individuals who do not opt-out of the Settlement will be bound by its terms and will release any and all claims that were asserted or could have been asserted based on the facts alleged in the Lawsuit or Plaintiff's letter to the LWDA dated January 14, 2022. *Id.*, § 6.2

2. Attorneys' Fees, Costs, and Class Representative Service Payment

As part of the Settlement, Plaintiff will apply for a service payment at the time of seeking final approval of the Settlement in the total amount of \$5,000.00 for his service to the Settlement Class and his general release of all claims (known or unknown) against Defendant. *See* Settlement

1 §§ 3.2.1, 6.1.1. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to
2 compensate class representatives for work done on behalf of the class [and] to make up for
3 financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination*
4 *Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff’s requested service payment is intended
5 to recognize the significant benefits conferred upon the Settlement Class due to the time and effort
6 that Plaintiff expended on behalf of the Settlement Class. Some of the activities Plaintiff
7 completed in order to help procedure the Settlement include providing factual information and
8 documents to his attorneys, identifying potential witnesses, and participating in multiple meetings
9 with his attorneys to discuss the claims and theories at issue in the litigation. Schmidt Decl., ¶ 25.
10 Additionally, Plaintiff undertook significant risks by agreeing to serve as the named plaintiff in
11 this case (as potential employers can now search his name and determine he has previously sued
12 an employer), as well as the fact that Plaintiff agreed to a general release of all claims subject to
13 a waiver of California Civil Code § 1542. Sanchez Decl., ¶ 4.

14 Class Counsel will also apply for an attorneys’ fee award of \$150,000.00 (one-third of the
15 GSA), and up to \$30,000.00 in verified costs. *See* Settlement, § 3.2.2; Schmidt Decl., ¶ 26.
16 Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,
17 expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred
18 substantial attorneys’ fees conducting pre-filing investigation, retaining an expert and analyzing
19 Plaintiff’s claims, conducting legal research and analysis, reviewing documents and data
20 produced by Defendant, propounding written discovery, building a comprehensive damages
21 model, preparing for and attending mediation, negotiating and preparing the long-form Settlement
22 Agreement, preparing this motion for preliminary approval, and otherwise litigating the case.
23 Schmidt Decl., ¶ 26. Class Counsel will also expend future attorney time in attending the hearing
24 on this Motion, overseeing the Notice process, drafting the final approval motion and supporting
25 documents, and attending the final approval hearing, among other tasks. *Id.*

26 Both California and federal courts have recognized that an appropriate method for
27 awarding attorneys’ fees in class actions is to award a percentage of the “common fund” created
28 as a result of the settlement. *See Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480, 506 (“the

percentage of fund method survives in California class action cases...”); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the “percentage of recovery” and “lodestar/multiplier” methods). Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class Actions* § 14.6 (4th Ed. 2013) (“No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.”).

Class Counsel submits that the request for attorneys’ fees is reasonable when viewed as an overall percentage of the settlement (one-third) in light of the substantial risks and the significant work undertaken, the extremely positive results obtained for the class, and the efficiency with which the Parties conducted the litigation. Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys’ fees and verified litigation costs at the time of seeking final approval of the Settlement.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

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

1 negotiated at arm's length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168
2 Cal.App.4th 116, 130.

3 **1. Standard for Preliminary Approval**

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

13 **a. The Strength of Plaintiff's Case**

14 Class Counsel, with the help of a retainer expert who holds a Ph.D. in economics, carefully
15 vetted the claims at issue, reviewed a significant number of timekeeping and payroll records as
16 well as relevant policy documents, and conducted a detailed analysis of that data to create a
17 comprehensive damages model for Defendant's liability. *See Schmidt Decl.*, ¶¶ 22-23. Although
18 Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there
19 were substantial risks and uncertainty in proceeding with class certification and trial. As explained
20 in detail in Section II.A., *supra*, Defendant presented numerous defenses to Plaintiff's claims,
21 both on the merits and with respect to class certification. Although Plaintiff was prepared to
22 litigate these claims through class certification and, ultimately, through trial, given the amount
23 offered in settlement, Plaintiff predicted that it was unlikely that further litigation would result in
24 a substantially more beneficial result for the Settlement Class. Thus, this factor supports
25 preliminary approval of the Settlement.

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

27 Although Plaintiff has propounded written discovery, neither party has formally
28 responded to discovery as of this date, the Settlement was reached after a significant informal

1 exchange of timekeeping and payroll records and other relevant information for mediation
2 purposes. *See* Schmidt Decl., ¶ 22. Absent settlement, the Parties would need to spend substantial
3 time and resources to complete formal written and deposition discovery and prepare the case for
4 class certification, summary judgment or adjudication, and trial. *Id.* This Settlement avoids the
5 considerable attorneys' fees and costs associated with conducting formal discovery, moving for
6 class certification and summary judgment or adjudication, and ultimately, trial, as well as the risks
7 and the accompanying burden of continued litigation on the Court.

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

9 Prior to reaching the Settlement, Plaintiff had not yet filed his motion for class
10 certification. Considering Defendant's arguments and defenses against certification, there was a
11 legitimate risk that the Court may deny certification of one or more of Plaintiff's claims,
12 preventing the matter from continuing on a classwide basis. Thus, this factor supports preliminary
13 approval of the Settlement.

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

15 This proposed Settlement provides a fair and reasonable monetary recovery for the
16 Settlement Class in the face of disputed claims. After analyzing the data provided by Defendant
17 prior to mediation, Plaintiff prepared a class-wide exposure analysis and forecasted the Settlement
18 Class expected recovery for each claim as follows:

19 **Unpaid Wages: \$58,387**

20 Plaintiff alleges that Defendant failed to pay employees for all hours worked as a result of
21 its practice of requiring employees to clock out for meal periods that were not in fact provided.
22 *See* Schmidt Decl., ¶ 11. Plaintiff estimates that employees were not paid for at least two, 30-
23 minute meal periods each workweek (resulting in 1 hour of unpaid work per week). *Id.* Using the
24 data provided by Defendant, Plaintiff's expert determined that employees earned an average
25 hourly rate of \$20.48 during the Class Period. *Id.* Assuming each of these unpaid hours are
26 overtime hours, Plaintiff determined Defendant's potential exposure for unpaid wages as
27 \$467,098 (15,205 workweeks x 1 unpaid hour per week x \$30.72 avg overtime. rate). *Id.*
28 However, as stated above, Defendant contends that it maintained lawful timekeeping policies

1 and/or practices, expressly prohibited off-the-clock work, and compensated employees for all
2 hours actually worked. *Id.*, ¶ 12. Defendant also asserts that this claim is not amenable to class
3 certification as individualized inquiries would be required to determine whether each employee
4 performed off-the-clock work on a particular shift, and whether Defendant was aware that such
5 work was being performed. *Id.* Given these potential defenses, Plaintiff discounted Defendant's
6 maximum exposure by 75% for the risk of non-certification and 50% for the risk of being
7 unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure of
8 \$58,387. *Id.*, ¶ 11.

9 **Meal Period Violations: \$172,814**

10 Plaintiff contends that Defendant failed to provide legally-compliant meal periods
11 resulting in meal periods that were late (commencing after the fifth hour of work), and/or short
12 (less than 30 minutes), or not provided at all. *See* Schmidt Decl. ¶ 13. Plaintiff also alleges that
13 Defendant failed to provide second meal periods on shifts over 10.0 hours. *Id.* Based on Plaintiff's
14 expert's analysis of Defendant's records, and giving credit for meal period premiums already
15 paid, Plaintiff calculated Defendant's potential exposure for meal periods at \$691,255 (27,287
16 first meal violations + 7,899 second meal violations (without a first violation) x \$20.48 average
17 meal premium – \$29,354 meal premiums already paid). *Id.* However, Defendant maintains that it
18 provided all legally compliant meal periods to employees and that any missed or non-compliant
19 meal periods were the result of employee choice, not Defendant's policy. *See Brinker, supra*, 53
20 Cal.4th at 1040 (holding that where employees were "provided" the opportunity to take compliant
21 breaks, whether they took a break or not was immaterial). Defendant also contends that employees
22 waived second meal periods on shifts over 10 hours. *See* Schmidt Decl., ¶ 14. Lastly, Defendant
23 also argues Plaintiff's meal period claim is not suited for class certification, since individualized
24 inquiries will be required to determine why each meal period was late, short, or missed, whether
25 there was a valid waiver, and whether a premium was paid on each such shift, thereby precluding
26 class certification of this claim. *Id.* Given these potential defenses, Plaintiff discounted
27 Defendant's maximum exposure by 50% for the risk of non-certification and 50% for the risk of
28 being unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure

of \$172,814. *Id.*, ¶ 13.

Rest Period Violations: \$68,171

Plaintiff alleges that Defendant regularly failed to authorize and permit 10-minute rest periods for every 4 hours worked, or major fraction thereof. *See* Schmidt Decl., ¶ 15. Plaintiff's expert's review of the payroll data reveals that there were 66,646 shifts worked in excess of 3.5 hours, 63,812 shifts worked in excess of 6.0 hours, and 18,886 shifts worked in excess of 10.0 hours. *Id.* Given the second meal period compliance rate (approximately 6%), Plaintiff determined he will be able to prove that employees were not authorized to take at least three, uninterrupted 10-minute rest periods when working shifts in excess of 10.0 hours at the same violation rate of second meals. *Id.* Plaintiff therefore calculated Defendant's potential exposure for rest periods at \$363,578 (18,886 shifts x 94% violation rate x \$20.48 average premium). *Id.* However, Defendant argues it maintains a facially compliant written rest period policy, and that it has always authorized and permitted rest periods in compliance with that policy. *Id.*, ¶ 16. Defendant also argues this claim is not amenable to class treatment, as individual inquiries would be required to determine whether each employee was in fact authorized and permitted all rest periods based on their schedule, resulting in an unmanageable series of mini-trials. *Id.* Additionally, since rest periods are not recorded this claim faces additional hurdles due to the lack of common evidence in Defendant's records. *Id.* Based on these defenses, Plaintiff discounted Defendant's maximum exposure by 75% for risk of non-certification and 25% for risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$68,171. *Id.*, ¶ 15.

Wage Statement Violations: \$116,100

Based on the data provided by Defendant for mediation, 148 employees received 4,718 wage statements during the 1-year time period associated with wage statement penalties. Schmidt Decl., ¶ 18. Plaintiff therefore calculated Defendant's maximum wage statement exposure at \$464,400 (148 "initial" violations x \$50 + 4,570 "subsequent" violations x \$100). *Id.* Defendant contends that employees could not show they "suffer[ed] injury" as a result of these violations, as required by Labor Code § 226(e). *Id.*, ¶ 17. Considering this argument as well as the potential inability to prove that the violations were "knowing and intentional," Plaintiff discounted the

1 value of this claim by 50% for the risk of non-certification of the underlying claims and
2 discounted 50% for a risk of being unsuccessful on the merits, for an estimated exposure of
3 \$116,100. *Id.*, ¶ 18.

4 **Waiting Time Penalties: \$95,228**

5 Based on the data provided by Defendant for mediation, 155 employees separated their
6 employment with Defendant during the 3-year time period associated with waiting time penalties.
7 Schmidt Decl., ¶ 19. Plaintiff therefore calculated Defendant's maximum waiting time penalty
8 exposure at \$761,825 (155 former employees x \$20.48 average hourly rate x 8 hours per day x
9 30 days). *Id.* Defendant contends it attempted to pay its employees all final wages owed in good
10 faith upon their separation, therefore precluding a finding of wilfulness which is necessary to
11 obtain waiting time penalties under 8 Cal. Code Regs. § 13520. *Id.*, ¶ 17. Additionally, because
12 this claim is entirely derivative of Plaintiff's underlying wage claims, Defendant contends the
13 waiting time penalty claim will fail with those claims. *Id.* Plaintiff discounted the value of this
14 claim by 50% for the risk of non-certification of the underlying claims, and 75% for a risk of
15 being unsuccessful on the merits (including a failure to establish wilfulness), for an estimated
16 recovery on this claim of \$95,228. *Id.*, ¶ 19.

17 **PAGA Penalties: \$29,488**

18 Assuming that Plaintiff could prove at least one underlying Labor Code violation in each
19 pay period within the PAGA Period, Plaintiff calculates Defendant's maximum PAGA exposure
20 at \$471,800 (4,718 pay periods at \$100 per violation). *See Amaral, supra*, 163 Cal.App.4th at
21 1207 (finding "initial" violation rate applies until employer is notified that it is violating a Labor
22 Code provision). However, these penalties derived from the underlying wage and hour violations
23 discussed above, which Defendant disputes. *See e.g., Green v. Lawrence Service Co.* (C.D. Cal.
24 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's success was determined by
25 the merits of its underlying claims). Plaintiff also recognizes that the Court has discretion to
26 reduce any award of PAGA penalties where it views them as duplicative. *See Carrington v.*
27 *Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming reduction of PAGA penalties to \$5
28 per initial violation); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) Case No. ED CV 10-

01487 RGK (OPx), 2011 WL 7563047 at *4 (reducing PAGA penalties from \$2.8 million to \$500,000); *Kennedy v. Arm Strong Towing Services, Inc.*, 2017 WL 9486773, at *3 (Cal.Super.) (reducing PAGA penalties to \$1,000 per aggrieved employee – a reduction in excess of 70% from the maximum civil penalty). Plaintiff discounted the maximum figure by 75% for the risk of being unable to proceed on a representative basis due to manageability concerns and an additional 75% to account for the likelihood of this Court reducing penalties, to arrive at an estimated exposure of \$29,488. Schmidt Decl., ¶ 20.

Using these estimated figures for each of the claims described above, Plaintiff predicts that a projected potential recovery for the Settlement Class would be approximately \$540,188.00. Schmidt Decl., ¶ 21. The Gross Settlement Amount of \$450,000.00 represents approximately 83.3% of Plaintiff's projected potential recovery, while avoiding the further expense and risk of proceeding towards class certification and trial. *Id.* Considering the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce civil penalties, the proposed Settlement falls well within the realm of being fair, reasonable, and adequate. *See e.g., Altamirano v. Shaw Industries, Inc.*, (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement, stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims."). Preliminary approval is appropriate since the Settlement will provide significant monetary relief to Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

e. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions from both the plaintiff and defense side and have been appointed as class counsel in numerous cases alleging similar claims. *See* Schmidt Decl., ¶¶ 2-6. Class Counsel, with the help of their retained expert, conducted an extensive review of Defendant's records produced for

mediation as well as relevant policies in effect during the Class Period. *Id.*, ¶ 22. Class Counsel also drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.* The Settlement was also reached with the input and assistance of Louis Marlin, Esq., an experienced and highly respected neutral wage and hour class action mediator. *Id.*, ¶ 23. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard is Met

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

a. The Settlement is Within the Range of Possible Approval

The proposed Settlement reflects an excellent recovery for the Settlement Class members in light of the significant risks of litigation. The proposed Settlement will provide substantial compensation for contested claims and derivative penalties, and the estimated average payment of \$795.45 exceeds the average payment achieved in other wage and hour class action settlements.⁵ Thus, Plaintiff submits that the proposed Settlement is within the range of possible approval, such that notice should be provided to the Settlement Class members so 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.

⁵ *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 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90); and *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").

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

3 This proposed Settlement is entitled to an initial presumption of fairness (*see Kullar,*
4 *supra*, 168 Cal.App.4th at 130) as it is the result of the exchange of substantial information,
5 including timekeeping and payroll data which was analyzed by Plaintiff's counsel and an expert
6 with a Ph.D. in economics, arm's length negotiations by counsel; mediation before an experienced
7 wage and hour class action mediator; and additional months of negotiating and finalizing the
8 terms of the long-form Settlement Agreement. *See* Schmidt Decl., ¶¶ 22-23. Thus, the proposed
9 settlement is entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at
10 130.

11 **c. The Settlement is Devoid of Obvious Deficiencies**

12 The Settlement will provide substantial monetary relief to Settlement Class members.
13 Moreover, the amounts proposed for Plaintiff's service payment, settlement administration costs,
14 attorneys' fees and costs to Class Counsel, and the PAGA payment to the LWDA are all
15 reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this final
16 factor supports preliminary approval.

17 **B. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT**
18 **CLASS**

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

26 **1. The Proposed Class is Ascertainable and Numerous**

27 A class is "ascertainable" where the members "may be readily identified without
28 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
Corp. (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement

1 Class is defined as all current and former non-exempt employees of Defendant and/or its
2 predecessor, Dutton Plumbing, Inc., in California who worked at any time during the Class
3 Period. According to Defendant’s records, the Settlement Class consists of approximately 275
4 individuals, rendering it impracticable to gather all the Settlement Class members and bring them
5 before the Court. *See* Schmidt Decl., ¶ 24. Thus, the proposed Settlement Class satisfies the
6 numerosity requirement.

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

8 The focus in a certification dispute is not on the merits of the case, but rather on what
9 types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug*
10 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff’s claims are predicated
11 on uniform company policies, principally revolving around Defendant’s overtime and minimum
12 wage policies and practices, meal and rest period policies and practices, as well as expense
13 reimbursement policies. These types of claims are commonly held to be proper for class
14 certification. *See, e.g., Brinker, supra*, 53 Cal.4th at 1032-34 (“The theory of liability—that
15 Brinker has a uniform policy, and that that policy...allegedly violates the law—is by its nature a
16 common question eminently suited for class treatment.”); *Bradley v. Networkers Int’l, LLC*
17 (2012) 211 Cal.App.4th 1129, 1150 (certifying meal and rest period claims); *Bluford, supra*, 216
18 Cal.App.4th at 871 (reversing denial for certification of rest period claim).

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

20 The typicality requirement is satisfied where class representatives have claims that are
21 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
22 Cal.App.3d 1341, 1347. Here, Plaintiff’s claims are typical of those held by the members of the
23 proposed Settlement Class. Like other Settlement Class members, Plaintiff was employed by
24 Defendant in California during the Class Period. Sanchez Decl., ¶ 2. Plaintiff was required to
25 clock out for a meal period when one was not actually provided and was thus not provided a full
26 30-minute meal periods and was not compensated for such work. *Id.* Plaintiff was also not
27 authorized and permitted to take any rest periods during his shift. *Id.* Plaintiff was therefore
28 impacted by the same challenged policies that allegedly injured the Settlement Class as a whole

1 and were subject to the same defenses forwarded by Defendant as to the Settlement Class and is
2 therefore typical.

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

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

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

17 This Court should order distribution of the proposed Class Notice to the Settlement Class
18 by first class mail, postage prepaid, using the last known mailing address information provided
19 by Defendant This manner of giving notice is the “best notice practicable” under the
20 circumstances because it provides “individual notice to all members who can be identified through
21 reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Here, Plaintiff
22 proposes that the settlement be administered by CPT Group, Inc. (“CPT”), an experienced class
23 action settlement administrator. *See generally* Declaration of Julie Green. Settlement Class
24 members’ addresses will be ascertainable through Defendant’s personnel and payroll records,
25 which Defendant will provide to CPT within ten (10) business days after preliminary approval.
26 *See Settlement § 4.2.* Prior to mailing the Class Notice packets, CPT will search for updated
27 addresses using the National Change of Address database (“NCOA”). *Id.*, § 4.4.2. To the extent
28 that any notices are returned, CPT will search for a more current address for the Class Member

1 and re-mail the Class Notice Packet to the Class Member. *Id.* The content of the proposed Class
2 Notice satisfies California Rule of Court 3.766(d) because it advises putative Settlement Class
3 members of the nature of the claims, basic contentions and denials of the parties, the key terms of
4 the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the
5 procedure by which to do so, explains the recovery formula and expected recovery amount for
6 each Settlement Class Member, and advises them that they will be bound by the terms of the
7 Settlement if they do not opt-out. *See* Settlement Agreement; Exhibit A (Class Notice). The
8 proposed Class Notice will also notify Settlement Class members of the final approval hearing
9 date and provide the Settlement Class contact information for Class Counsel and advise
10 Settlement Class members that they may enter an appearance through counsel if they wish to. *Id.*
11 This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and
12 cost-effective method of reaching Settlement Class members.

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

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

17 **V. CONCLUSION**

18 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
19 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
20 proposed order submitted concurrently herewith.

21
22 Dated: January 25, 2023

Respectfully submitted,
HAINES LAW GROUP, APC

23
24 By:



25 Fletcher W. Schmidt
26 Attorneys for Plaintiff
27
28