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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DANIEL A. MUNOZ, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

S&W ROOF TEAR-OFF CORPORATION, a
California corporation; and DOES 1 through
100,

Defendants.

Case No.: 37-2022-00005924-CU-OE-CTL

*[Assigned for all purposes to Hon. Matthew
C. Braner in Dept. C-60]*

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

Date: September 1, 2023
Time: 9:00 a.m.
Dept.: C-60

Complaint Filed: February 15, 2022
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 September 1, 2023, at 9:00 a.m. in Department C-60 of the above-entitled Court, located at 330 West Broadway, San Diego, California 92101, Plaintiff Daniel A. Munoz (“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 employed by Defendant S&W Roof Tear-Off Corporation in California at any time from February 15, 2018 through the date of preliminary approval of this Settlement (the “Class Period”).
3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Paul K. Haines and Sean M. Blakely of Haines Law Group, APC, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit Class Representative Enhancement Payment 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; and
7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

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1 This Motion is based on this Notice of Motion, the attached Memorandum of Points and
2 Authorities, the supporting declarations of Paul K. Haines, Sean M. Blakely, Plaintiff Daniel A.
3 Munoz, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached
4 thereto, the pleadings, and other papers filed in this Action, and on any further oral or
5 documentary evidence or argument presented at the time of the hearing.

6
7 Respectfully submitted,

8 Dated: July 28, 2023

HAINES LAW GROUP, APC

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10 By: 
11 Paul K. Haines
12 Sean M. Blakely
13 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Daniel A. Munoz (hereinafter “Plaintiff”) brought this class and representative
4 action for various wage and hour violations on behalf of current and former non-exempt
5 employees of Defendant S&W Roof Tear-Off Corporation (“Defendant”) who worked for
6 Defendant in California between February 15, 2018 through the date of preliminary approval of
7 this Settlement (“Class Period”). Plaintiff’s primary allegations are that Defendant: (1) failed to
8 pay all wages for all hours worked due to its allegedly unlawful timekeeping policies/practices;
9 (2) failed to provide all legally required meal periods; and (3) failed to authorize and permit all
10 legally required rest periods. As a result of these alleged violations, Plaintiff also brought
11 derivative claims for Defendant’s alleged failure to pay all final wages owed, failure to issue
12 accurate and compliant wage statements, and for civil penalties under the Private Attorneys’
13 General Act (“PAGA”).¹

14 Plaintiff now respectfully requests that this Court preliminarily approve this non-
15 reversionary, common-fund class action settlement,² in which Defendant has agreed to pay Two
16 Hundred Seventy-Five Thousand Dollars and Zero Cents (\$275,000.00) to the following
17 Settlement Class:

18 All current and former non-exempt employees employed by Defendant
19 S&W Roof Tear-Off Corporation in California at any time from February
20 15, 2018 through the date of preliminary approval of this Settlement (the
21 “Class Period”).

22 ¹ On February 15, 2022, Plaintiff submitted a PAGA letter to the Labor & Workforce
23 Development Agency (“LWDA”). Plaintiff’s PAGA letter is attached to the Declaration of Sean
24 M. Blakely as **Exhibit B**. Plaintiff’s operative First Amended Class and Representative Action
25 Complaint (“FAC”) pleads the following causes of action: (1) minimum wage violations; (2)
26 failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) waiting
time penalties; (6) wage statement violations; (7) unfair competition; and (8) civil penalties under
the PAGA.

27 ² The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Sean M. Blakely
28 as **Exhibit A**. The proposed Class Notice and Notice of Estimated Individual Settlement Payment
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 If the Settlement is approved, Defendant will pay a non-reversionary Maximum
2 Settlement Amount (“MSA”) of \$275,000.00. After deducting administration costs, Plaintiff’s
3 requested Class Representative Enhancement Payment, the amount designated as PAGA civil
4 penalties, and requested attorneys’ fees and costs, the Net Settlement Amount (“NSA”) of
5 approximately \$123,833.34 will be distributed to all Settlement Class members who do not opt-
6 out of the Settlement based on the proportionate number of workweeks worked by each
7 Settlement Class member during the Class Period.

8 Significantly, Settlement Class members do not need to file a claim to reap the financial
9 benefits of the Settlement, as all Settlement Class members will automatically receive a payment
10 unless they affirmatively opt-out. There are approximately 321 Settlement Class members, and
11 the average payment to participating Settlement Class members is projected to be approximately
12 \$385.77.

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

18 **II. SUMMARY OF THE LITIGATION**

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

20 Defendant is a construction company that specializes in roof removal services for
21 commercial and residential properties throughout Southern California. *See* Declaration of Sean
22 M. Blakely (“Blakely Decl.”), ¶ 8. Plaintiff worked for Defendant as a non-exempt employee
23 from approximately 2010 until approximately September 14, 2021. *See* Declaration of Daniel A.
24 Munoz In Support of Approval of Class Action Settlement (“Munoz Decl.”), ¶ 2.

25 On February 15, 2022, Plaintiff filed a Class Action Complaint in San Diego County
26 Superior Court, alleging the following causes of action against Defendant: (i) minimum wage
27 violations; (ii) failure to pay all overtime wages; (iii) meal period violations; (iv) rest period
28 violations; (v) failure to pay all final wages due upon separation of employment; (vi) failure to

1 issue accurate, itemized wage statements; and (vii) unfair competition in violation of California
2 Business & Professions Code § 17200 *et seq.* Blakely Decl., ¶ 9. On April 22, 2022, Plaintiff filed
3 the operative First Amended Class and Representative Action Complaint (“FAC”) adding a cause
4 of action for civil penalties under the Private Attorneys General Act of 2004, Labor Code Section
5 2698, *et seq. Id.*

6 **B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES**

7 **1. Unpaid Wages Due to Defendant’s Unlawful Timekeeping**
8 **Policies/Practices**

9 Plaintiff alleges that Defendant’s timekeeping policies/practices fail to compensate
10 Settlement Class members for all hours worked. Blakely Decl., ¶ 14. Specifically, Plaintiff alleges
11 that Defendant’s supervisors/foremen would record his and other non-exempt employees’ hours,
12 and prohibited Plaintiff and other non-exempt employees from accurately recording their own
13 hours worked. *Id.* Additionally, Plaintiff contends that Defendant has a practice/policy of only
14 compensating Plaintiff and other non-exempt employees for their scheduled hours of work, as
15 opposed to all hours actually worked, resulting in unpaid wages. *Id.* Plaintiff alleges that
16 Defendant’s timekeeping policies/practices resulted in a systematic underpayment of wages to
17 putative class members. *See Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 324 (2005)
18 (“California’s labor statutes reflect a strong public policy in favor of full payment of wages for
19 all hours worked.”).

20 Defendant disputes Plaintiff’s allegations and contends that its timekeeping
21 policies/practices complied with California law and that it paid employees for all hours worked.
22 Blakely Decl., ¶ 14. Defendant also argued that its GPS and other tracking data located on
23 company trucks and cell phones showed that employees were often overpaid. *Id.* Defendant also
24 argues that any unpaid time could have only amounted to a few minutes per day, at most, and was
25 thus *de minimis*. *Id.* While Plaintiff point to *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018),
26 where the California Supreme Court held California’s labor laws generally do not recognize a *de*
27 *minimis* defense; Defendant argues that *Troester* should be limited to its facts. (“[W]e decide only
28 whether the *de minimis* rule is applicable to the facts of this case as described by the Ninth

Circuit.” *Troester*, 5 Cal.5th at 829.). Further, Defendant argues that it is not possible for Settlement Class members to perform compensable work prior to the scheduled start of shift or after the scheduled end of shift. Blakely Decl., ¶ 14. Defendant further contends that Settlement Class members did not work off-the-clock and that Defendant’s policies specifically disavow such off-the-clock work. *Id.* Finally, Defendant asserts that Plaintiff’s unpaid claim amounts to an “off-the-clock” claim, which is not appropriate for class treatment. *Id.*; *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1052 (2012) (affirming denial of off-the-clock subclass, “[p]roof of off-the-clock liability would have had to continue in an employee-by-employee fashion, demonstrating who worked off the clock, how long they worked, and whether Brinker knew or should have known their work.”).

2. Meal Period Claims

Plaintiff alleges Defendant failed to provide legally compliant first meal periods such that first meal periods were regularly short and often commenced after the completion of the fifth hour of work, and were occasionally not provided at all. Blakely Decl., ¶ 15. Plaintiff further alleges that Settlement Class members were not provided with second meal periods when they worked shifts in excess of 10.0 hours in a workday. *Id.*, at ¶ 16.

Defendant counters it has maintained compliant written meal period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. Blakely Decl., ¶ 15. Defendant further contends that it always provides employees the opportunity to take meal periods and is not required to *ensure* they are taken. *Id.*; *see Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1034 (2012) (rejecting “ensure” standard). Thus, Defendant argues that any non-compliant meal periods resulted from lawful employee waiver or choice, rather than any policy and/or practice of Defendant. Blakely Decl., ¶ 15. Defendant further argues that employees signed weekly attestations confirming that they received all off-duty meal periods. *Id.* Defendant also asserts that many employees choose to waive their second meal periods on shifts over 10.0 hours and under 12.0 hours, as they may do under Labor Code § 512(a), so that they do not need to stay at work for an extra unpaid 30 minutes. *Id.*, ¶ 16. Finally, Defendant maintains Plaintiff’s meal period claim is not suited for class certification since individual inquiries would be needed

1 to assess which employees if any, took non-compliant or missed meal periods, how many meal
2 periods were non-compliant or missed, the reasons why a particular employee did not take a meal
3 period on a particular shift, and for second meal periods, whether they waived the meal period.
4 *Id.*, ¶¶ 15-16.

5 **3. Rest Period Claims**

6 Plaintiff alleges that Defendant failed to authorize and permit all legally compliant off-
7 duty rest periods. Blakely Decl., ¶ 17. Specifically, Plaintiff alleges that he and other Settlement
8 Class members were frequently prevented from taking rest periods, or were interrupted during
9 rest periods, as a result of work demands. *Id.* Additionally, Plaintiff alleges that Defendant failed
10 to authorize and permit Plaintiff and other non-exempt employees a second or third rest period
11 during shifts in excess of 6.0 hours or 10.0 hours. *Id.*

12 However, Defendant argues that it has always maintained and enforced lawful rest period
13 practices during the Class Period, and has, in fact, authorized and permitted all required rest
14 periods to Settlement Class members. Blakely Decl., ¶ 17. Additionally, Defendant maintains that
15 any failure to take a rest period was the result of employee choice. *Id.* As with Plaintiff's meal
16 period claim, Defendant argues that employees signed weekly attestations confirming they
17 received all required rest periods *Id.* Defendant also asserts this claim is not amenable to class
18 treatment as individualized inquiries would be required to determine which employees failed to
19 take a rest period, and the reasons why. *Id.* Defendant also contends that manageability concerns
20 are especially present with respect to rest period claims, since rest periods are not recorded. *Id.*

21 **4. Waiting Time Penalties**

22 As a result of the unpaid wages and unpaid meal and rest period premium wages described
23 above, Plaintiff alleges that Defendant failed to comply with its final pay obligations set forth in
24 Labor Code §§ 201-203. Blakely Decl., ¶ 18. Defendant argues that it possesses strong, good faith
25 defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties,
26 which are only available for the "willful" failure to pay wages. *Id.*; see also 8 Cal. Code Regs. §
27 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time
28 penalties under Section 203 . . . A 'good faith' dispute that any wages are due occurs when an

1 employer presents a defense, based in law or fact which, if successful, would preclude any
2 recovery on the part of the employee.”). Defendant further asserts that Plaintiff’s waiting time
3 penalty exposure was grossly inflated as not every former employee experienced the alleged
4 Labor Code violations. Blakely Decl., ¶ 18.

5 **5. Wage Statement Claims**

6 As a further result of the unpaid wages and unpaid meal and rest period premium wages
7 described above, Plaintiff alleges that Defendant is liable for wage statement penalties. Blakely
8 Decl., ¶ 19. Defendant argues any alleged wage statement violations were not “knowing and
9 intentional,” and Plaintiff cannot show he or other employees “suffer[ed] injury” due to the
10 alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of
11 penalties. *Id.* Further, Defendant contends its wage statements always accurately reflected hours
12 worked and amounts paid as well as all other required information, precluding liability for wage
13 statement penalties under *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37
14 (2018) (agreeing with employer’s “commonsense position that the pay stubs were accurate in that
15 they correctly reflected the hours worked and the pay received...The purpose of section 226 is to
16 document the paid wages to ensure the employee is fully informed regarding the calculation of
17 those wages.”) (Italics in original). Blakely Decl., ¶ 19.

18 **6. PAGA Civil Penalties**

19 As a result of the foregoing Labor Code violations, Plaintiff alleges that Defendant is
20 liable for civil penalties under the PAGA. Blakely Decl., ¶ 20. Since Plaintiff’s PAGA claim is
21 derivative of Plaintiff’s underlying wage claims, Defendant asserts the PAGA claim would fail
22 with those claims. *Id.*; see *Price v. Starbucks Corp.* 192 Cal.App.4th 1136, 1147 (2011) (“Because
23 the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). Defendant
24 further maintains that, given its good faith defenses, this Court would exercise its discretion to
25 substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff’s
26 claims. Blakely Decl., ¶ 20; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt.*,
27 *Inc.* 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v.*
28 *Covidien Inc.*, Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011)

(reducing PAGA penalties by over 82% in part because employer “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, Defendant produced its written wage and hour policies as well as timekeeping and payroll records for a sampling of putative class members, as well as a class list, which included putative class members’ first paycheck date and last paycheck date. Blakely Decl., ¶ 10. Plaintiff hired a labor economist with a Ph.D. in economics to assist Plaintiff in conducting a comprehensive analysis and extrapolation of the payroll and timekeeping data produced by Defendant to create a detailed exposure analysis for all claims at issue. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiff’s claims, the chances of certification of Plaintiff’s claims, and Defendant’s potential defenses. *Id.* Prior to mediation, Defendant also raised its financial condition and turned over its financial records to Plaintiff. *Id.* Plaintiff hired a forensic accountant, Keith D. Messerschmidt, who has consulted or provided expert testimony in dozens of litigation and insurance matters, to assist Plaintiff in evaluating Defendant’s financial condition. *Id.*

On March 3, 2023, the Parties participated in a full-day mediation with Hon. Joan M. Lewis (Ret.), a well-respected wage and hour class action mediator. Blakely Decl., ¶ 11. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff’s claims, the legal basis for the claims and defenses, as well as Defendant’s financial condition. *Id.* At the conclusion of mediation, Judge Lewis issued a mediator’s proposal for a class-wide settlement, which was ultimately accepted by the Parties.³ *Id.* In the months that followed, the Parties negotiated and finalized the long-form Settlement Agreement now before the court. *Id.*

³ Mr. Messerschmidt opines that Defendant could not reasonably afford to pay more than the Maximum Settlement Amount without dramatically impacting its business operations. Should the Court wish to review a declaration from Mr. Messerschmidt attesting to these facts and Defendant’s financial condition, this declaration could either be filed *in camera* or filed under seal, at the Court’s request.

1 **III. THE PROPOSED SETTLEMENT**

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

3 If the Court preliminarily approves the Settlement, Defendant will pay a Maximum
4 Settlement Amount (“MSA”) of \$275,000.00. *See* Settlement, ¶ 3. Significantly, this Settlement
5 is non-reversionary, and no Settlement Class member will have to submit a claim form to receive
6 a Settlement Payment. *Id.*, at ¶¶ 3-4. Each Settlement Class member will automatically receive a
7 Settlement Payment unless they affirmatively opt out of the Settlement. *Id.* The monetary terms
8 of the Settlement are summarized below:

9

• Maximum Settlement Amount (“MSA”):	\$275,000.00
• Minus Court-approved attorneys’ fees:	\$91,666.66
• Minus Court-approved verified costs (up to):	\$20,000.00
• Minus Court-approved Enhancement Payment:	\$7,500.00
• Minus amount set aside as PAGA penalties:	\$20,000.00
• <u>Minus estimated settlement administration costs:</u>	<u>\$12,000.00</u>
Net Settlement Amount (“NSA”):	\$123,833.34
• PLUS 25% “PAGA Payment” to Settlement Class:	\$5,000.00
Total Amount Paid to Settlement Class members:	\$128,833.34

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

16 After deducting amounts for the Court-approved attorneys’ fees and costs, Class
17 Representative Enhancement Payment to Plaintiff, the amount designated as PAGA civil
18 penalties, and settlement administration costs, the Settlement requires Defendant to pay a Net
19 Settlement Amount (“NSA”) of at least \$123,833.34 to all Settlement Class members who do not
20 timely opt-out. *See* Settlement, ¶¶ 3-4. The NSA shall be distributed to each participating
21 Settlement Class member based on their proportionate number of workweeks worked during the
22 Class Period. Settlement, ¶ 4(B)(i). Additionally, Five Thousand Dollars and Zero Cents
23 (\$5,000.00) of the Maximum Settlement Amount has been designated as the “PAGA Amount”
24 and shall be distributed to Aggrieved Employees (including those who submit a valid and timely
25 Request for Exclusion from the class action settlement) who were employed during the PAGA
26 Period (i.e., February 15, 2021 through the date of preliminary approval of the Settlement)
27 proportionally based on the number of Workweeks worked during that time period. Settlement,
28 ¶¶ 4(B)(ii).

1 According to Defendant, there are approximately 321 Settlement Class members. Blakely
2 Decl., ¶ 13. Therefore, the average Individual Settlement Payment from the NSA is projected to
3 be approximately \$385.77. *Id.* There are approximately 192 Aggrieved Employees who worked
4 during the PAGA Period. *Id.* Therefore, each Aggrieved Employee will receive an average of
5 approximately \$26.04 from the PAGA Amount. *Id.* Settlement Class members will have forty-
6 five (45) calendar days from the mailing of the Notice Packets to opt-out or object to the
7 Settlement, thereby providing ample time to review the Class Notice without unduly delaying the
8 Settlement. *See* Settlement, ¶¶ 9(C)-(D). Those Settlement Class members who do not opt out of
9 the Settlement will be bound by its terms and will release all claims against Defendant included
10 within the Settlement. *See Id.*, at ¶ 2(A).

11 **2. Attorneys' Fees and Costs, Enhancement Payment, and PAGA Payment**

12 Plaintiff will apply for Class Representative Enhancement Payment at the time of seeking
13 final approval of the proposed class action settlement in the amount of \$7,500.00 for his service
14 to the Settlement Class. *See* Settlement, ¶¶ 3(C)(3), 6; Blakely Decl., ¶ 24. “[I]ncentive awards
15 are fairly typical in class action cases . . . and are intended to compensate class representatives for
16 work done on behalf of the class [and] to make up for financial or reputational risk undertaken in
17 bringing the action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94
18 (2010). As will be fully briefed at the time of final approval, Plaintiff’s requested Enhancement
19 Payment is intended to recognize the time and effort Plaintiff expended on behalf of the
20 Settlement Class, including providing substantial factual information and documents to Class
21 Counsel, discussing the claims and theories at issue in the litigation, actively participating in the
22 prosecution of his claims, as well as the significant risks Plaintiff undertook by agreeing to serve
23 as the named Plaintiff in this case, and the fact that Plaintiff agreed to a general release of all
24 claims subject to a waiver of Civil Code § 1542. *See* Settlement, ¶¶ 2(C), 6; Blakely Decl., ¶ 24;
25 *see also* Munoz Decl.

26 Class Counsel will also apply for an attorneys’ fees award of one-third of the Maximum
27 Settlement Amount, which is currently estimated to be \$91,666.66, and up to \$20,000.00 in
28 verified costs reimbursement. *See* Settlement, ¶ 3(C)(4); 5; Blakely Decl., ¶ 23. Plaintiff submits

1 the requested fee is fair compensation for undertaking complex, risky, expensive, and time-
2 consuming litigation on a purely contingent fee basis. Blakely Decl., ¶ 23. Class Counsel has
3 incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's
4 claims, conducting legal research, conducting extensive informal discovery, working with his
5 retained expert to analyze Settlement Class members' timekeeping and payroll records, creating
6 a comprehensive damages model, interviewing Settlement Class members, preparing for and
7 attending mediation, reviewing and analyzing Defendant's financial condition, negotiating and
8 preparing the long-form Settlement Agreement, preparing this Motion, and otherwise litigating
9 the case. *Id.* Class Counsel expects to expend additional attorney time in attending the hearing on
10 this Motion, overseeing the Notice process and fielding questions from Settlement Class
11 members, preparing the final approval papers, and attending the Final Approval hearing. *Id.*

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

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

25 Additionally, the parties have agreed to designate \$20,000.00 of the Maximum Settlement
26 Amount as PAGA civil penalties, of which \$15,000.00 (75%) will be paid to the LWDA, with
27 the remaining \$5,000.00 (25%) for distribution to the Aggrieved Employees, as the PAGA
28 requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 3(C)(5).

Plaintiff submits this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions 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*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (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 Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See e.g., Hanlon*, supra, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by class counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: “the strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). “The list of factors is not exclusive, and the court is free to engage in a balancing and weighing

1 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
2 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and
3 reasonable in light of the overall balance of factors in this case.

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

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

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

12 Although the parties engaged in significant informal discovery prior to mediation, the
13 parties still had significant formal discovery to complete had the matter not been settled. Blakely
14 Decl., ¶ 22. This would have required the expenditure of substantial time and resources by both
15 parties that would have very likely spanned several years. *Id.* Even if Plaintiff was to certify the
16 classes, the parties would incur considerably more attorneys’ fees and costs through a possible
17 decertification motion, trial, and possible appeal. *Id.* This Settlement avoids those risks and the
18 accompanying expenses. *Id.*

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

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

members by way of *Pick-up-Stix* type settlement agreements⁴), 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. Plaintiff conducted a detailed analysis of underpaid wages due to Defendant'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:

Unpaid Wages Due to Unlawful Timekeeping Policies/Practices: \$35,041

Plaintiff alleges that Defendant failed to compensate Settlement Class members for all hours worked as a result of its timekeeping policies/practices. Blakely Decl., ¶ 14. Based on Plaintiff's experiences and interviews with Settlement Class members, Plaintiff contends Settlement Class members were underpaid by approximately fifteen (15) minutes per shift *Id.* Because Settlement Class members generally worked shifts of at least 8.0 hours, Plaintiff contends the underpaid wages should be paid at an overtime rate of pay. *Id.* Therefore, Plaintiff estimated Defendant's maximum exposure for this claim at approximately \$400,471 (15 minutes per shift * \$20.36 average hourly rate * 1.5 overtime rate * 52,452 shifts). *Id.*

However, as noted above, Defendant argues that it maintained compliant timekeeping policies, compensated Settlement Class members for all hours worked, and expressly prohibited off-the-clock work. Blakely Decl., ¶ 14. Defendant also asserts that Plaintiff would be unable to certify this off-the-clock claim. *Id.* Based on these defenses, Plaintiff discounted the estimated maximum amount by 75% for the risk of non-certification and by an additional 65% to account

⁴ 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 for the risk of losing on the merits or failure to recover the maximum amount sought to arrive at
2 an estimated exposure of approximately \$35,041. *Id.*

3 **First Meal Period Violations: \$98,115**

4 Plaintiff alleges that Defendant failed to provide timely 30-minute meal periods before
5 the conclusion of the fifth hour of work due to work demands. Blakely Decl., ¶ 15. Based on
6 Plaintiff's analysis and extrapolation of the timekeeping records, Plaintiff estimates there were
7 approximately 39,339 non-compliant first meal periods during the Class Period. *Id.* In addition,
8 based on data provided by Defendant, Settlement Class members' average hourly rate of pay
9 during the Class Period was \$20.36. *Id.* Therefore, Plaintiff calculated Defendant's maximum
10 exposure on this claim at approximately \$800,942 (39,339 non-compliant first meal periods *
11 \$20.36 average meal period premium). *Id.*

12 However, as noted above, Defendant contends that it provided compliant meal periods to
13 Settlement Class members throughout the Class Period. Blakely Decl., ¶ 15. Defendant also
14 asserts that under *Brinker* it is only required to "provide" the opportunity to take meal periods,
15 not "ensure" meal periods are taken, and that, as described above, it has always done so, and any
16 non-complaint first meal periods were the result of employee waiver or choice. *Id.*; *see also*
17 *Brinker, supra*, 53 Cal.4th at 1038 (rejecting "ensure" standard and holding employers only have
18 to "provide" employees the opportunity to take meal periods). Finally, Defendant maintains that
19 the first meal period claim is not suited for class certification, since individual inquiries would be
20 needed to assess which employees took non-compliant meal periods or missed meal periods, how
21 many meal periods were non-compliant or missed, and the reasons why a particular employee did
22 not take a compliant meal period on a particular shift. Blakely Decl., ¶ 15. In light of these
23 defenses and arguments, Plaintiff discounted Defendant's maximum exposure by 65% for the risk
24 of non-certification, and an additional 65% to account for Defendant's defenses on the merits or
25 failure to recover the full amount sought, to arrive at an estimated total of approximately \$98,115.
26 *Id.*

27 **Second Meal Period Violations: \$13,348**

28 Based on the data produced by Defendant, Plaintiff estimates there were approximately

5,245 shifts worked in excess of 10.0 hours which did not reflect a legally compliant second meal period. Blakely Decl., ¶ 16. Plaintiff therefore calculated Defendant's maximum exposure for second meal period violations at approximately \$106,788 (5,245 non-compliant second meal periods * \$20.36 average meal period premium). *Id.*

However, Plaintiff's theory of liability carried significant risks of both non-certification and on the merits if Plaintiff was able to certify this claim, based on, *inter alia*, Defendant's argument that it has maintained compliant written meal period policies throughout the Class Period, and that Settlement Class members voluntarily waived their second meal period on shifts in excess of 10.0 hours but less than 12.0 hours per Labor Code § 512. Blakely Decl., ¶ 16. As with Plaintiff's first meal period claim, Defendant argues that individualized inquiries would preclude class certification for this claim as well. *Id.* In light of these risks, Plaintiff discounted the maximum amount that the class could potentially recover by 50% for the risk of non-certification and an additional 75% for the risk of losing on the merits, or having exposure reduced due to Defendant's waiver arguments, to arrive at estimated exposure of \$13,348. *Id.*

Rest Period Violations: \$66,745

Based on Plaintiff's review of Defendant's timekeeping records, Plaintiff estimates that there were approximately 52,452 shifts in excess of 3.5 hours, entitling employees to at least one rest period. Blakely Decl., ¶ 17. Therefore, assuming a rest period violation for every shift during the Class Period, Plaintiff calculated Defendant's maximum exposure on this claim at approximately \$1,067,922 (52,452 rest period violations * \$20.36 average rest period premium). *Id.*

However, as stated above, Defendant contends that it maintained legally compliant rest period policies/practices throughout the Class Period, and in fact, authorized and permitted all rest periods to Settlement Class members. Blakely Decl., ¶ 17. Defendant also asserts that this claim is not amenable to class treatment as individualized inquiries would be required to determine which employees failed to take a rest period, and the reasons why. *Id.* Defendant further maintains that manageability concerns are especially present with respect to Plaintiff's rest period claim, given that rest periods are not recorded. *Id.* In light of these defenses, Plaintiff discounted

1 Defendant's maximum exposure by 75% to account for the risk of non-certification, and an
2 additional 75% to account for Defendant's defenses on the merits, to arrive at an estimated
3 exposure of approximately \$66,745. *Id.*

4 Waiting Time Penalties: \$73,901

5 Defendant's records reflected approximately 242 former Settlement Class members who
6 are eligible for waiting time penalties. Blakely Decl., ¶ 18. Based on an hourly rate of \$20.36,
7 Plaintiff estimated the average waiting time penalty per former employee to be approximately
8 \$4,886 (\$20.36 * 8 hours per day * 30 days). *Id.* Therefore, Plaintiff calculated Defendant's
9 maximum exposure for potential waiting time penalties to be approximately \$1,182,412 (242
10 former employees * \$4,886 average penalty). *Id.*

11 Defendant presented several defenses to this claim, most notably their assertion that
12 because they possessed good-faith defenses to the underlying claims, any failure to pay wages
13 was not "willful" as a matter of law. Blakely Decl., ¶ 18. Defendant further asserts that Plaintiff's
14 waiting time penalty exposure was grossly inflated as not every former employee experienced the
15 alleged Labor Code violations. *Id.* Moreover, because the waiting time claim is derivative of
16 Plaintiff's underlying wage claims, Plaintiff would need to overcome Defendant's defenses, both
17 as to class certification and on the merits, as to his underlying claims. *Id.* To account for
18 Defendant's defenses, Plaintiff discounted the maximum exposure by 75% for the risk of non-
19 certification and an additional 75% for the risk of losing on the merits and/or not receiving the
20 maximum penalties sought, to arrive at an estimated exposure of approximately \$73,901. *Id.*

21 Wage Statement Penalties: \$23,531

22 Plaintiff alleges that Defendant is liable for wage statement penalties as a result of the
23 unpaid wages and unpaid meal and rest period premiums. Blakely Decl., ¶ 19. Those penalties
24 are calculated as \$50 for each "initial" violation and \$100 for each "subsequent" violation, with
25 a maximum of \$4,000 per employee. *See* Labor Code § 226(e). *Id.* Plaintiff's analysis reflected
26 that there were approximately 192 unique employees and approximately 3,861 pay periods
27 worked during the liability period applicable to Plaintiff's wage statement claim. *Id.* Plaintiff,
28 therefore, calculated Defendant's potential wage statement exposure at approximately \$376,500

1 ([192 “initial” violations * \$50] + [3,669 “subsequent” violations * \$100]). *Id.*; *see also* Labor
2 Code § 226(e).

3 In light of Defendant’s arguments that no violations occurred, that employees suffered no
4 “injury,” that any alleged violations were not “knowing and intentional,” that the wage statements
5 always accurately reflected hours worked and amounts paid to employees, as well as risks
6 associated with Plaintiff’s underlying claims discussed above, Plaintiff discounted the maximum
7 exposure by 75% for risk of non-certification, and by an additional 75% for risk of being
8 unsuccessful on the merits, for an estimated realistic exposure of approximately \$23,531. Blakely
9 Decl., ¶ 19.

10 **PAGA Penalties: \$24,131**

11 Plaintiff estimated a maximum total PAGA exposure of approximately \$386,100 (3,861
12 pay periods * \$100 “initial” penalty). Blakely Decl., ¶ 20; *Amaral v. Cintas Corp. No. 2*, 163
13 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified
14 that it is violating a Labor Code provision). However, these penalties derive from the underlying
15 wage and hour violations discussed above, which Defendant disputes vigorously. Blakely Decl.,
16 ¶ 20; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013)
17 (explaining that a PAGA claim’s success was determined by the merits of its underlying claims).
18 Defendant also asserts that the Court would drastically reduce any award of PAGA penalties as
19 “confiscatory.” Blakely Decl., ¶ 20; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203
20 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien*
21 *Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing
22 PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum
23 figure by 75% for the risk of losing on the merits and/or not recovering a PAGA penalty for each
24 and every pay period, and an additional 75% to account for the possibility of this Court reducing
25 penalties to arrive at an estimated exposure of approximately \$24,131. Blakely Decl., ¶ 20.

26 Using these estimated figures for each of the claims described above, Plaintiff predicted
27 that the potential recovery for the Settlement Class would be approximately \$334,812. Blakely
28 Decl., ¶ 21. The proposed Settlement of \$275,000.00 represents approximately 82.1% of the

1 reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is appropriate
2 since the Settlement will provide significant monetary relief to the Settlement Class, which is
3 consistent with what Plaintiff’s counsel believes could have been recovered had the case
4 proceeded through trial. *Id.*

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

6 “Parties represented by competent counsel are better positioned than courts to produce a
7 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
8 *Enterprises Securities Litigation* 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented
9 by competent, experienced counsel who possess extensive experience prosecuting and defending
10 wage-and-hour class actions and who have been appointed as class counsel in numerous cases
11 alleging similar claims. *See* Blakely Decl., ¶¶ 2-6; *see also* Declaration of Paul K. Haines (“Haines
12 Decl.”), ¶¶ 2-8. Class Counsel conducted an in-depth review of Defendant’s timekeeping and
13 payroll records and drew on their extensive experience in similar cases to assess the strengths and
14 weaknesses of Plaintiff’s case. *See* Blakely Decl., ¶¶ 14-21. The Settlement was also reached with
15 the assistance of an experienced and respected wage-and-hour class action mediator. *Id.*, at ¶ 11.
16 This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168
17 Cal.App.4th at 130.

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

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

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

25 The proposed Settlement reflects approximately 82.1% of the estimated recovery the
26 Settlement Class could reasonably expect in light of the significant litigation risks and will
27 provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the
28 percentage of the liability exposure recovered in this case far exceeds percentages routinely

1 approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL
2 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential
3 damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
4 representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV,*
5 *Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("it is well-settled law that a proposed settlement may
6 be acceptable even though it amounts to only a fraction of the potential recovery that might be
7 available to the Settlement Class members at trial"). Further, the average Settlement Payment of
8 approximately \$385.77 is in line with average payments achieved in other wage and hour class
9 action settlements.⁵ Thus, Plaintiff submits that the proposed settlement is within the range of
10 possible approval, such that notice should be provided to the Settlement Class members so that
11 they can consider the Settlement. The Court will have the opportunity to again assess the
12 reasonableness of the Settlement after the Settlement Class members have had the opportunity to
13 opt-out or object.

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

15 The Settlement resulted from an exchange of substantial information, arm's-length
16 negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and
17

18 ⁵ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct.
19 May 9, 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department*
20 *Stores, Inc.*, Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net
21 recovery of approximately \$90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619
22 (Sacramento County Super. Ct.) (average net recovery of approximately \$80); *Doty v. Costco*
23 *Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery
24 of approximately \$65); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange
25 County Super. Ct. Jan. 20, 2006) (average net recovery of approximately \$35); *Gomez v. Amadeus*
26 *Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net
27 recovery of approximately \$20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-
28 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 additional months of negotiating the long-form settlement agreement. Thus, the Settlement is
2 entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130. As
3 discussed above, Plaintiff carefully vetted the claims at issue, reviewed extensive timekeeping
4 and payroll data, reviewed and analyzed Defendant’s financial condition, and conducted a
5 detailed statistical analysis of the data to arrive at his estimated class-wide damages figures. *See*
6 *Blakely Decl.*, ¶¶ 14-21. Thus, this factor supports preliminary approval.

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

8 Preliminary approval of the Settlement is also warranted because there are no obvious
9 deficiencies. The Settlement will provide substantial monetary relief to Settlement Class
10 members. The amounts proposed for Class Counsel’s attorneys’ fees and costs, LWDA payment,
11 and Plaintiff’s Class Representative Enhancement Payment, are all reasonable and appropriate
12 based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this
13 factor supports preliminary approval.

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

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

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

23 A class is “ascertainable” where the members “may be readily identified without
24 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
25 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
26 defined as all current and former non-exempt employees employed by Defendant in California
27 during the Class Period. Therefore, Settlement Class members can be identified from Defendant’s
28 personnel and employment records. Defendant represents that the Settlement Class consists of

1 approximately 321 current and former non-exempt employees. *See* Blakely Decl., ¶ 13. It would
2 therefore be impracticable to bring all Settlement Class members before the Court or for each
3 Settlement Class member to bring an individual lawsuit. Thus, the proposed Settlement Class
4 satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class
5 representing 10 beneficiaries of a trust sufficiently numerous).

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

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

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

15 The typicality requirement is satisfied where class representatives have claims that are
16 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191
17 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
18 same goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical
19 of those held by the Settlement Class members. First, Defendant employed Plaintiff as non-
20 exempt employees during the Class Period, and Plaintiff was subject to Defendant’s wage and
21 hour policies at issue in this case. *See* Munoz Decl., ¶ 2. Second, Plaintiff was injured by the same
22 challenged policies/practices that allegedly injured the Settlement Class as a whole. For example,
23 Plaintiff asserts that he was deprived of all wages and contends that he was deprived of all legally
24 compliant meal and rest periods. Plaintiff further asserts that he did not receive accurate and
25 compliant wage statements and did not receive all wages at the time of separation of employment.
26 *See generally*, Munoz Decl. Because Plaintiff has suffered the same injuries as the other members
27 of the Settlement Class, the typicality requirement is satisfied.

28 ///

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

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

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

13 This Court should order distribution to the Settlement Class of the proposed Class Notice
14 by U.S. Mail, in English and Spanish, postage prepaid, using the last known mailing address
15 information provided by Defendant. *See Settlement*, ¶ 9. This manner of giving notice is the “best
16 notice practicable” under the circumstances because it provides “individual notice to all members
17 who can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* 417 U.S. 156,
18 173 (1974). Here, the Parties have agreed that the Settlement be administered by Phoenix
19 Settlement Administrators (“Phoenix”), an experienced class action settlement administrator. *See*
20 *generally* Declaration of Jodey Lawrence (“Lawrence Decl.”) and attached exhibits. Settlement
21 Class members’ addresses will be ascertainable through Defendant’s personnel and payroll
22 records, which Defendant will provide to Phoenix within ten (10) business days of preliminary
23 approval of the Settlement. *See Settlement*, ¶ 9(A). Within ten (10) business days of receipt of the
24 Settlement Class members’ addresses, Phoenix will run the addresses through the National
25 Change of Address (“NCOA”) database (which provides updated addresses for any individual
26 who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding
27 address) and mail the Class Notice to all Settlement Class members. *See Settlement*, ¶ 9(B). To
28 the extent that any notices are returned, Phoenix will perform a “skip trace” to track any

Settlement Class member's current mailing address. *Id.*, at ¶ 9(F).

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims, basic contentions and denials of the parties, and the key terms of the Settlement, the 45-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Blakely 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.

V. CONCLUSION

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

Dated: July 28, 2023

Respectfully submitted,
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