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

DAMONTAE LEVINGSTON, KEVIN
PEARSON, MARK GUTIERREZ, and
PAUL RODRIGUEZ, as individuals and
on behalf of all others similarly situated,

Plaintiffs,

v.

COMMERCE DISTRIBUTION
COMPANY LLC., a California Limited
Liability Company; SMART & FINAL
LOGISTICS LLC, a Delaware limited
liability company; SMART & FINAL
STORES, LLC, a California limited
liability company, and SMART & FINAL
LLC, a Delaware limited liability company
and DOES 1 through 50, inclusive,

Defendants.

CASE NO. 22STCV05730

*[Case assigned for all purposes to the Hon.
Randolph M. Hammock, Dept. 49]*

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

Date: April 5, 2023
Time: 8:30 a.m.
Dept.: 49

Action Filed: February 15, 2022
Trial Date: None Set

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PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on April 5, 2023, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 49 of the Los Angeles County Superior Court, located at 111 North Hill Street, Los Angeles, CA 90012, Plaintiffs Damontae Levingston, Kevin Pearson, Mark Gutierrez, and Paul Rodriguez (“Plaintiffs”), individually and on behalf of a class of similarly situated individuals, will and hereby do move this Court for:

1. Preliminary approval of the proposed Stipulation of Settlement (“Settlement Agreement”) in this lawsuit;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the Settlement Class, defined as follows:

All current and former non-exempt employees of Defendants Smart & Final Logistics, LLC, Commerce Distribution Company, LLC, and Smart & Final Stores, LLC (collectively “Defendants”) who worked for Defendants in California at any time from February 2, 2018, through February 7, 2023 (the “Class Period”).

3. Preliminary appointment of Plaintiffs Damontae Levingston, Kevin Pearson, Mark Gutierrez, and Paul Rodriguez as the Class Representatives;
4. Preliminary appointment of Diversity Law Group, P.C., Polaris Law Group, Law Offices of Choi & Associates, Haines Law Group, APC, Blumenthal Nordrehaug Bhowmik De Blouw, LLP, Zakay Law Group, APLC, and JCL Law Firm, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement Agreement should be finally approved and to award amounts for the Class Representative Service Awards, settlement administration costs, payment to the Labor and Workforce Development Agency for its share of civil penalties under the Private Attorneys General Act, Labor Code section 2698 *et seq.*, and attorneys’ fees and costs to Plaintiffs’ counsel;
6. Appointment of ILYM Group, Inc. as the third-party settlement administrator; and
7. Approval of the proposed Notice of Class Action Settlement and Notice of Settlement Award (collectively, the “Notice Packet”), and entry of the proposed Order instructing

1 the Notice Packet to be disseminated to the proposed Settlement Class in English and
2 Spanish, as provided in the Settlement Agreement.

3 This motion is based on this notice of motion, the attached memorandum of points and
4 authorities, the declarations of Matthew K. Moen, Larry W. Lee, Christine S. Lee, Edward W.
5 Choi, Kyle Nordrehaug, Shani O. Zakay, Jean-Claude Lapuyade, Damontae Levingston, Kevin
6 Pearson, Mark Gutierrez, Paul Rodriguez, and Sean Hartranft of ILYM Group, Inc., and the
7 exhibits attached thereto, the pleadings and other papers filed in this action, and on any further
8 oral or documentary evidence or argument presented at the time of hearing.

9 Given the multiplicity of issues addressed herein, Plaintiffs' memorandum of points and
10 authorities necessitates exceeding the 20-page limit set forth in California Rule of Court
11 3.764(c)(2). As this Motion is unopposed, Plaintiffs respectfully request that the Court consider
12 the entire Motion, which is 26 pages in length.

13
14 Dated: March 8, 2023

Respectfully Submitted,
HAINES LAW GROUP, APC

15
16 By:



Matthew K. Moen
Attorneys for Plaintiffs

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Damontae Levingston, Kevin Pearson, Mark Gutierrez, and Paul Rodriguez
4 (collectively, “Plaintiffs”), individually and on behalf of the proposed Settlement Class,
5 respectfully request that this Court preliminarily approve the proposed Stipulation of Settlement
6 (“Settlement Agreement” or “Settlement”),¹ entered into by Plaintiffs and Defendants Smart &
7 Final Logistics, LLC, Commerce Distribution Company, LLC, and Smart & Final Stores, LLC
8 (collectively “Defendants”) (Plaintiffs and Defendants are referred to collectively herein as the
9 “Parties”). The operative Second Amended Complaint (“SAC”) alleges Defendants: (i) failed to
10 pay all overtime wages owed; (ii) failed to pay all minimum wages; (iii) failed to provide all
11 lawful meal periods; (iv) failed to authorize and permit all lawful rest periods; (v) failed to
12 reimburse all necessary business expenses; (vi) failed to issue accurate itemized wage statements;
13 (vii) failed to timely pay all final wages upon separation; (viii) failed to comply with California’s
14 Unfair Competition laws; (ix) failed to pay all sick pay wages owed; and (x) are liable for civil
15 penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.* (“PAGA”).

16 Plaintiffs respectfully request that this Court preliminarily approve this non-reversionary,
17 \$5,000,000 class action settlement on behalf of the following Settlement Class:

18 All current and former non-exempt employees of Defendants who worked for
19 Defendants in California at any time from February 2, 2018, through February 7,
20 2023 (the “Class Period”).

21 Based upon the data provided by Defendants, there are approximately 32,423 potential
22 Settlement Class members. After Court-approved deductions for Plaintiffs’ service awards,
23 claims administrator costs, the PAGA payment to the Labor & Workforce Development Agency
24 (“LWDA”), and attorneys’ fees and costs to Plaintiffs’ counsel, the remaining Net Settlement
25 Amount (“NSA”) is estimated to be no less than \$3,053,333.33. Significantly, Settlement Class

26
27 ¹ The Settlement Agreement is attached as Exhibit 1 to the Declaration of Matthew K. Moen (“Moen
28 Decl.”), filed concurrently herewith, and the Notice of Class Action Settlement (the “Class Notice”) and
Notice of Settlement Award (collectively, the “Notice Packet”) are attached to the Moen Decl. as Exhibit
2.

1 members do not need to file a claim form in order to receive an Individual Settlement Award, and
2 all Settlement Class members who do not opt-out will automatically receive their share of the
3 Settlement. This represents a fair and reasonable result for Settlement Class members, who will
4 be agreeing to a release of only those claims that were actually asserted, or which could have been
5 asserted based on the facts alleged in the operative SAC in the lawsuit.

6 Further, given the tenet that aggrieved employees do not have the ability to opt-out of a
7 representative PAGA claim, all PAGA aggrieved employees, regardless of whether they elect to
8 opt out from participating in the class action settlement or not, shall receive a portion of the
9 settlement monies designated as the PAGA Amount payable to the aggrieved employees and shall
10 release their claims for civil penalties under PAGA based on the Labor Code violations that were
11 pled in the operative SAC in the action or Plaintiffs' Notice letters to the LWDA dated February
12 2, 2022, February 14, 2022, and July 20, 2022, or which could have been pled in the operative
13 SAC in the action based on the factual allegations therein, that arose between February 2, 2021
14 and February 7, 2023 (the "PAGA Period"). *See Robinson v. Southern Counties Oil Company*
15 (2020) 53 Cal.App.5th 476, 482 (holding that there is no opt-out mechanism for PAGA claims
16 and "nonparty employees as well as the government are bound by the judgment in an action
17 brought under [PAGA]."); *see also* Moen Decl., Exhibits 3-6 (Plaintiffs' PAGA Notice Letters).

18 On November 7, 2022, the Parties attended mediation with Jeffrey Ross, Esq., an
19 experienced and well-respected wage and hour mediator, who made a mediator's proposal for a
20 class-wide resolution of all claims at issue that was accepted on behalf of the Parties and the
21 Settlement Class members. Before attending mediation, Defendants provided Plaintiffs with
22 timekeeping and payroll data for a random sampling of approximately 10% of the Settlement
23 Class members, consisting of electronic timekeeping and payroll records, key policy documents,
24 and workweek data spanning the entire Class Period. Plaintiffs then retained an expert with a
25 Ph.D. in economics to analyze the data and create a class-wide exposure model for the claims at
26 issue. After the Parties accepted the mediator's proposal, the Parties negotiated and executed the
27 long-form Settlement Agreement that is now before this Court for preliminary approval. This
28 proposed Settlement is well within the range of possible approval in light of the significant legal

1 and factual obstacles that Plaintiffs faced, the risks and costs of further litigation, and the
2 monetary benefit to the Settlement Class members. For the reasons discussed herein, Plaintiffs
3 respectfully request that the Court grant preliminary approval of the Settlement.

4 **II. SUMMARY OF THE LITIGATION**

5 **A. Factual And Procedural Background**

6 Defendants are related entities comprised of “Smart & Final” retail stores and warehouse
7 facilities that provide inventory and shipments to the retail stores. Moen Decl., ¶ 12. Defendants
8 operate food supply warehouses in Riverside and Commerce, California, as well as various retail
9 store locations throughout California. *Id.*

10 Plaintiff Levingston worked for Defendant Commerce Distribution Company, LLC as a
11 non-exempt warehouse employee from approximately January 31, 2022 to February 4, 2022. *See*
12 Moen Decl., ¶ 13; *see also* Declaration of Damontae Levingston (“Levingston Decl.”), ¶ 2.
13 Plaintiff Pearson worked for Defendant Smart & Final Logistics, LLC as a non-exempt warehouse
14 employee from approximately August 2007 to August 2021. Moen Decl., ¶ 13; Declaration of
15 Kevin Pearson (“Pearson Decl.”), ¶ 2. Plaintiff Pearson’s job duties consisted primarily of filling
16 pallets with inventory in Defendants’ cold storage warehouse, which were then shipped to
17 Defendants’ retail stores. *Id.* Plaintiff Rodriguez has been employed by Defendant Commerce
18 Distribution Company, LLC as non-exempt warehouse employee since 1996. Moen Decl., ¶ 13.
19 Plaintiff Gutierrez was employed by Defendant Smart & Final Stores, LLC as a non-exempt
20 employee from approximately December 2019 to March 28, 2022. Moen Decl., ¶ 13; Declaration
21 of Mark Gutierrez (“Gutierrez Decl.”), ¶ 3.

22 Plaintiffs, like the Settlement Class members, were employed by Defendants as non-
23 exempt employees during the Class Period and were subject to Defendants’ allegedly unlawful
24 wage and hour policies and practices. Moen Decl., ¶ 14.

25 On February 15, 2022, Plaintiff Levingston initiated the instant action against Defendant
26 Commerce Distribution Company LLC, alleging a single class action cause of action for wage
27 statement violations under Labor Code § 226. Moen Decl., ¶ 15; Declaration of Edward W. Choi
28 (“Choi Decl.”), ¶ 2. On February 14, 2022, Plaintiff Levingston sent written notice to Defendants
and the LWDA of Defendant Commerce Distribution Company LLC’s violations of Labor Code

§ 226 and his intent to seek civil penalties under PAGA. Moen Decl., ¶ 15. On May 5, 2022, Plaintiff Levingston filed his First Amended Complaint, dismissing his class action allegations and adding a cause of action for civil penalties under PAGA, premised on the same underlying Labor Code violation. *Id.*

On February 2, 2022, Plaintiff Pearson initiated a class action complaint against Defendant Smart & Final Logistics LLC in Los Angeles County Superior Court, case number 22STCV04115, that was subsequently removed to the United States District Court, Central District of California, case number 2:22-cv-02513-FLA-E, alleging that Defendant Smart & Final Logistics LLC failed to: (i) pay all overtime wages owed; (ii) provide all lawful meal periods; (ii) authorize and permit all lawful rest periods; (iv) issue accurate and itemized wage statements; and (v) timely pay all final wages upon separation; and (vii) comply with California's Unfair Competition laws. Moen Decl., ¶ 16. On February 2, 2022, Plaintiff Pearson also provided notice to Defendant via certified mail and to the LWDA via its website of Defendant Smart & Final Logistics LLC's alleged violations and his intent to seek civil penalties under PAGA. *Id.* On April 11, 2022, after exhausting his administrative remedies with the LWDA, Plaintiff Pearson filed his First Amended Complaint, adding a cause of action for civil penalties under PAGA, premised on the same underlying Labor Code violations. *Id.* On May 20, 2022, Plaintiff Pearson filed his Second Amended Complaint, rectifying Defendants' perceived deficiencies with Plaintiff Pearson's First Amended Complaint. *Id.*

On March 30, 2022, Plaintiff Rodriguez filed a class action complaint against Defendants Commerce Distribution Company, LLC, Smart & Final Stores LLC, and Smart & Final LLC in Los Angeles County Superior Court, case number 22STCV18277, which was subsequently removed to the United States District Court, Central District of California, Case No. 5:22-cv-00780, alleging that Defendants Commerce Distribution Company, LLC, Smart & Final Stores LLC, and Smart & Final LLC: (i) failed to comply with California's Unfair Competition laws; (ii) failed to pay all minimum wages; (iii) failed to pay all overtime wages owed; (iv) failed to provide all meal periods; (v) failed to authorize and permit all rest periods; (vi) failed to furnish accurate itemized wage statements; (vii) failed to pay all final wages upon separation of

1 employment; (viii) failed to reimburse all necessary business expenses; and (ix) are liable for
2 unlawful deductions. Moen Decl., ¶ 17. On March 30, 2022, Plaintiff Rodriguez also provided
3 notice to Defendants Commerce Distribution Company, LLC, Smart & Final Stores LLC, and
4 Smart & Final LLC and to the LWDA of the specific provisions of the Labor Code alleged to
5 have been violated and his intent to seek civil penalties under PAGA. *Id.* On June 3, 2022,
6 Plaintiff Rodriguez filed a second, representative action lawsuit against Defendants Commerce
7 Distribution Company, LLC, Smart & Final Stores LLC, and Smart & Final LLC in Los Angeles
8 County Superior Court, case number 22STCV18277, alleging a single cause of action for civil
9 penalties under PAGA premised upon the same underlying Labor Code violations. *Id.*

10 On July 20, 2022, Plaintiff Gutierrez provided notice to Defendant Smart & Final Stores
11 LLC and to the LWDA of Defendant Smart & Final Stores LLC's alleged Labor Code violations
12 and his intent to seek civil penalties under PAGA. Moen Decl., ¶ 18. On August 4, 2022, Plaintiff
13 Gutierrez filed a class action complaint in Los Angeles County Superior Court, case number
14 22STCV25180, alleging that Defendant Smart & Final Stores LLC failed to: (i) comply with
15 California's Unfair Competition laws; (ii) pay all minimum wages; (iii) pay all overtime wages
16 owed; (iv) provide all meal periods; (v) authorize and permit all rest periods; (vi) furnish accurate
17 itemized wage statements; (vii) reimburse necessary business expenses; (viii) pay all final wages
18 upon separation of employment; (ix) reimburse all necessary business expenses; and (x) pay all
19 sick pay wages. Moen Decl., ¶ 18; Declaration of Kyle R. Nordrehaug ("Nordrehaug Decl."), ¶
20 7. On October 12, 2022, Plaintiff Gutierrez filed a second, representative action complaint against
21 Defendant Smart & Final Stores LLC in Los Angeles County Superior Court, case number
22 22STCV33312, alleging a single cause of action for civil penalties under PAGA premised upon
23 the same underlying Labor Code violations. *Id.*

24 As a material term of the Settlement reached during the Parties' November 7, 2022
25 mediation, on January 31, 2023, Plaintiffs filed the operative SAC in the instant action,
26 consolidating all legal and factual allegations and causes of action alleged in Plaintiffs' respective
27 actions, naming Defendants Smart & Final Logistics, LLC and Smart & Final Stores, LLC as
28 additional named defendants in the instant action, and naming Plaintiff Pearson, Plaintiff

Rodriguez, and Plaintiff Gutierrez as additional named plaintiffs in the instant action. Moen Decl., ¶ 19.

B. Plaintiffs' Claims and Defendants' Defenses

1. Overtime Wage Violations

Plaintiffs assert that Defendants paid the Settlement Class members non-discretionary incentive pay, but failed to correctly include the value of the incentive pay when calculating the employees' respective regular rates of pay, which resulted in Defendants underpaying Plaintiffs and the Settlement Class members for all overtime wages owed throughout the Class Period. Moen Decl., ¶ 20; *see* Lab. Code § 510(a); *see* *Huntington Memorial Hosp. v. Sup. Ct.* (2005) 131 Cal.App.4th 893, 902-03 (“[I]n determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor.”); *see also* 29 C.F.R. §778.211(c) (“Bonuses which are announced to employees to induce them to work more steadily or more rapidly ... are regarded as part of the regular rate of pay. Most attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work ... must be included in the regular rate of pay.”).

In response, Defendants assert that they accurately compensated their employees for all overtime wages owed through the use of overtime true-up payments. Moen Decl., ¶ 21. As such, Defendants contend that Plaintiffs' claim would fail on the merits. *Id.* Further, Defendants assert that this claim is unmanageable, as it requires individualized inquiries into whether each incentive payment made by Defendants was discretionary or non-discretionary, and whether each employee who received an overtime true-up payment was accurately compensated for all overtime wages owed, resulting in an unmanageable series of mini-trials. *Id.*

2. Minimum Wage Violations

Plaintiffs assert that Defendants maintained an unlawful rounding practice that was not even handed over time, resulting in Defendants systematically underpaying Plaintiffs and other non-exempt employees all wages earned. Moen Decl., ¶ 22; *see* *See's Candy Shops, Inc. v. Sup. Ct.*, 210 Cal.App.4th 889, 901 (holding rounding policies are only lawful if they are consistently applied and, on average, favor neither overpayment nor underpayment of wages); *Camp v. Home Depot U.S.A., Inc.* (2022) 84 Cal.App.5th 638 (“[I]f an employer...can capture and has captured

1 the exact amount of time an employee has worked during a shift, the employer must pay the
2 employee for all the time worked.”). Further, Plaintiffs allege that Defendants required employees
3 to perform work duties while off-the-clock during their meal periods, responding to work-related
4 communications on their days off, and undergoing mandatory drug testing and temperature
5 checks/symptom questionnaires for COVID-19 screenings prior to clocking in for the workday,
6 resulting in additional unpaid minimum wages. Moen Decl., ¶ 22; *see* Wage Order 7, §§ 3(A)(1),
7 4(A); Labor Code §§ 510(a), 1197 and 1182.12 (establishing the right of employees to be paid
8 minimum wages for all hours “subject to the control of an employer, [including] all the time the
9 employee is suffered or permitted to work, whether or not required to do so.”).

10 In response, Defendants maintain they accurately record all time worked by their non-
11 exempt employees and have properly paid all wages owed for all hours worked. Moen Decl., ¶
12 23. Defendants argue they do not permit Plaintiffs and other non-exempt employees to conduct
13 off-the-clock work and assert that Plaintiffs are unable to provide any class-wide evidence of
14 such an off-the-clock policy/practice. *Id.* Defendants further dispute that they utilized a rounding
15 policy or practice, and provided substantial timekeeping data to support the position that
16 employee timeclock punches were not rounded. *Id.* As a result, Defendants contend this claim is
17 not amenable to class certification as individualized inquiries would be required to determine
18 whether each employee performed off-the-clock work and when, whether Defendants were
19 aware that such work was being performed, and on a pay period by pay period basis whether any
20 employee’s timekeeping and payroll records reflect an underpayment of wages, resulting in an
21 unmanageable series of mini-trials. *Id.*

22 **3. Meal Period Violations**

23 Plaintiffs assert that Defendants failed to provide the Settlement Class members with all
24 timely duty-free, uninterrupted 30-minute meal periods to which they were entitled. Moen Decl.,
25 ¶ 24; *see* Labor Code § 512(a); *see also Brinker v. Superior Court*, (2012) 53 Cal.4th 1004, 1041
26 (“We conclude that, absent waiver, section 512 requires a first meal period no later than the end
27 of an employee’s fifth hour of work…”). Further, Plaintiffs assert that Defendants paid meal
28 period premiums at the employees’ base rates of pay, rather than at their respective regular rates

1 of pay in violation of Labor Code section 226.7, due to Defendants failure to properly incorporate
2 the value of Incentive Pay when calculating the employees’ respective regular rates of pay. Moen
3 Decl., ¶ 24; *see* Labor Code § 226.7(c); *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th
4 858, 878 (“[W]e hold that the term “regular rate of compensation” in section 226.7(c) has the
5 same meaning as “regular rate of pay” in section 510(a) and encompasses not only hourly wages
6 but all nondiscretionary payments for work performed by the employee.”).

7 In response, Defendants contend they maintained lawful meal period policies/practices
8 throughout the Class Period. Moen Decl., ¶ 25. In support of this position, Defendants produced
9 facially compliant written policies prior to mediation that Defendants contend were applicable to
10 the Class Members throughout the Class Period, and argued during mediation that the produced
11 data reflected a 98% compliance rate for first meal periods and 96% compliance rate for second
12 meal periods. *Id.* Additionally, Defendants argue that under *Brinker*, they are only required to
13 “provide” the opportunity to take meal periods, not “ensure” meal periods are timely taken, which
14 Defendants contend they have always done. *Id.*; *see Brinker, supra*, 53 Cal.4th at 1038 (rejecting
15 “ensure” standard). Therefore, Defendants assert that if employees did not take timely meal
16 periods, this was solely the result of employee choice and not reflective of Defendants’ policies
17 and practices. Moen Decl., ¶ 25. Defendants further contend that they properly paid all meal
18 period premiums at the correct regular rate of pay during the Class Period. *Id.* Finally, Defendants
19 contend that Plaintiffs’ meal period claim is not suited for class certification as individual
20 inquiries would be required to assess the reasons why an employee recorded a non-compliant
21 meal period on any given day and whether it was the result of employee choice, resulting in an
22 unmanageable series of mini-trials. *Id.*

23 **4. Rest Period Violations**

24 Plaintiffs further allege that Defendants failed to authorize and permit Settlement Class
25 members to take all lawful rest periods to which they were entitled. Moen Decl., ¶ 26; *see* Labor
26 Code § 516. Additionally, Plaintiffs assert that prior to September 2019, Defendants maintained
27 a facially unlawful rest period policy/practice that required Plaintiffs and other non-exempt
28 employees to remain on Defendants’ premises during all rest periods, in violation of California

1 law. Moen Decl., ¶ 26; *see Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260
2 (“[D]uring required rest periods, employers must relieve their employees of all duties and
3 relinquish any control over how employees spend their break time.”). Plaintiffs also allege that
4 Defendants failed to pay rest period premiums for each rest period violation at the Settlement
5 Class members’ regular rate of pay. Moen Decl., ¶ 26; *see* Labor Code § 226.7(c); *see also Ferra,*
6 *supra*, 11 Cal.5th at 878.

7 Defendants maintain they authorize and permit their non-exempt employees to take all
8 lawful rest periods to which they are entitled. Moen Decl., ¶ 27. Defendants argue they maintained
9 lawful rest period policies throughout the Class Period, and that employees were at all times
10 permitted to leave the company premises during rest periods. *Id.* Further, Defendants produced a
11 facially lawful rest period policy that Defendants contend was applicable to all Settlement Class
12 members throughout the Class Period. *Id.* Therefore, Defendants assert that if employees did not
13 take all lawful rest periods, this was solely the result of employee choice and not reflective of
14 Defendants’ policies and practices. *Id.* Further, Defendants assert that this claim is unmanageable,
15 as it requires individualized inquiries into whether each employee was authorized and permitted
16 to take a lawful rest period and on which days, which Defendants argue Plaintiffs will be unable
17 to substantiate with any common, documentary evidence, as rest periods are not required to be
18 recorded. *Id.*

19 **5. Failure to Reimburse Violations**

20 Plaintiffs further allege that Defendants failed to reimburse the Settlement Class members
21 for all necessary business expenses incurred, in violation of Labor Code section 2802. Moen
22 Decl., ¶ 28; *see* Labor Code § 2802. Specifically, Plaintiffs assert that Defendants required
23 Plaintiffs and other non-exempt employees to use their personal cell phones to communicate with
24 supervisors for work-related purposes, but did not reimburse Plaintiffs and other non-exempt
25 employees for a reasonable portion of their monthly cell phone bills. *Id.*; *see Cochran v. Schwan’s*
26 *Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 (“If an employee is required to make
27 work-related calls on a personal cell phone, then he or she is incurring an expense for purposes
28 of section 2802.”).

1 In response, Defendants argue they maintain a policy to reimburse all reasonable and
2 necessary business expenditures and that, to the extent that any expenses were not reimbursed, it
3 was the result of Defendants' employees failing to submit expense reimbursement requests. Moen
4 Decl., ¶ 29. Further, Defendants emphasized that due to the nature of the Settlement Class
5 members' work duties, Settlement Class members do not need to communicate through their
6 cellular phones, as their supervisors, managers, and coworkers are onsite, and no further
7 communication with the employees is necessary once they clock out after their shifts. *Id.*
8 Defendants also argue that any expenses incurred by the Settlement Class members were minimal
9 given the wide availability of low-cost cellular phone plans. *Id.* Defendants also maintain that
10 this claim would require a series of mini-trials to determine which employees incurred expenses,
11 whether those expenses were reasonable and necessary, and why the employee had not previously
12 submitted an expense reimbursement request. *Id.*

13 **6. Sick Pay Wage Violations**

14 Plaintiffs further assert that Defendants failed to properly incorporate the value of
15 Incentive Pay when calculating the regular rate of pay for purposes of paying sick pay wages, as
16 mandated by Labor Code § 246(l)(1). Moen Decl., ¶ 30; *see* Labor Code § 246(l)(1) ("Paid sick
17 time for nonexempt employees shall be calculated in the same manner as the ***regular rate of***
18 ***pay...***)(emphasis added). Rather, Plaintiffs allege that Defendants paid all sick pay wages at the
19 employees' base rates of pay, even when the employee earned Incentive Pay in the corresponding
20 time period. Moen Decl., ¶ 30.

21 Defendants assert that they properly incorporated the value of all non-discretionary
22 Incentive Pay into the regular rate of pay calculations throughout the Class Period. Moen Decl.,
23 ¶ 31. As such, Defendants contend that Plaintiffs' claims would fail on the merits. *Id.* Further,
24 Defendants assert that this claim is unmanageable, as it requires individualized inquiries into each
25 employee's bonus receipt criteria, resulting in an unmanageable series of mini-trials. *Id.*

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1 **7. Wage Statement, Waiting Time, and PAGA Penalties**

2 As a result of Defendants’ failure to pay all overtime wages, minimum wages, meal and
3 rest period premiums, and sick pay owed, Plaintiffs assert that Defendants also failed to issue
4 accurate itemized wage statements and failed to timely pay all final wages at the time of
5 separation. Moen Decl., ¶ 32; *see also* Labor Code §§ 203(a) and 226(a). Further, Plaintiffs
6 contend that Defendants issued facially non-compliant wage statements in violation of Labor
7 Code § 226(a), which failed to include all applicable hourly rates in effect during the pay period,
8 the corresponding number of hours worked at each hourly rate, and the total hours worked during
9 the pay period. *Id.*; *see* Labor Code § 226(a). As a result of these alleged Labor Code violations,
10 Plaintiffs also seek PAGA civil penalties on behalf of all aggrieved employees. Moen Decl., ¶ 32;
11 *see also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213 (“As we have
12 explained, they [civil penalties under PAGA] are mandatory, not discretionary.”).

13 In response, Defendants argue that Plaintiffs’ underlying claims will fail and, as a result,
14 the derivative wage statement, waiting time, and PAGA claims will also fail. Moen Decl., ¶ 33;
15 *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (“Because the underlying causes
16 of action fail, the derivative UCL and PAGA claims also fail.”). Defendants also maintain that
17 Plaintiffs cannot show that the wage statement violations were “knowing and intentional,” or that
18 the putative class members “suffer[ed] injury” as a result of the alleged violations, as required by
19 Labor Code § 226(e) for the imposition of wage statement penalties. Moen Decl., ¶ 33; *see* Labor
20 Code § 226(e)(1). Moreover, Defendants maintain that their good faith defenses to Plaintiffs’
21 underlying claims would preclude the recovery of waiting time penalties, which are only available
22 for the “willful” failure to pay wages, and that this Court would exercise its discretion to
23 substantially reduce any PAGA penalties awarded. Moen Decl., ¶ 33; *see also* 8 Cal. Code Regs.
24 § 13520 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time
25 penalties under Section 203.”); Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt.,*
26 *Inc.* (2012) 203 Cal.App.4th 1112, 1135; *Carrington v. Starbucks Corporation* (2018) 30
27 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of exposure).

28 ///

1 Finally, Defendants assert that all of Plaintiffs’ claims will fail prior to class certification
2 due to the existence of arbitration agreements potentially applicable to the vast majority, if not
3 all, of putative class members that includes a waiver of representative and/or collective action
4 litigation. Moen Decl., ¶ 34. Further, Defendants argue that Plaintiffs’ PAGA claims could be
5 compelled to individual arbitration as a result of the United States Supreme Court’s ruling in
6 *Viking River Cruises Inc. v. Moriana. Id.*; see *Viking River Cruises Inc. v. Moriana*, 142 S. Ct.
7 1906 (2022).

8 **C. Discovery And Mediation**

9 In connection with mediation, Defendants provided Plaintiffs with electronic timekeeping
10 and payroll records for approximately 10% of the Settlement Class members (encompassing
11 complete records for approximately 550 putative class members), key policy documents, and
12 workweek data spanning the entire Class Period. Moen Decl., ¶ 35. Plaintiffs then retained an
13 expert with a Ph.D. in economics to analyze the produced data and create a class-wide exposure
14 model for the claims at issue. *Id.* On November 7, 2022, the Parties participated in a mediation
15 session with Jeffrey Ross, Esq., an experienced and well-respected wage and hour class action
16 mediator. *Id.* During the mediation, the Parties exchanged divergent views on Defendants’
17 liability and exposure valuations, their legal positions, and the likelihood of certification of
18 Plaintiffs’ claims. *Id.* At the conclusion of mediation, Mr. Ross made a mediator’s proposal that
19 the Parties ultimately accepted. *Id.* Over the following months, the Parties finalized the terms of
20 the proposed Settlement now before the Court for preliminary approval. *Id.*

21 **III. THE PROPOSED SETTLEMENT**

22 **A. Essential Terms Of The Settlement**

23 If the Court preliminarily approves this settlement, Defendants will pay a Gross
24 Settlement Amount (“GSA”) of \$5,000,000.00. Moen Decl., ¶ 37; Settlement, ¶ 4. This Settlement
25 is non-reversionary, and Settlement Class members will automatically receive their Individual
26 Settlement Award unless they affirmatively opt-out. Settlement, ¶¶ 4.C, 5. The monetary terms
27 of the Settlement are as follows:

Gross Settlement Amount:	\$5,000,000.00
Minus Court-approved attorneys’ fees (1/3):	\$1,666,666.67
Minus Court-approved attorneys’ costs (up to):	\$75,000.00

Minus Court-approved Service Awards:	\$10,000.00 each
Minus settlement administrator costs (up to):	\$90,000.00
Minus PAGA payment to the LWDA:	\$75,000.00
Net Settlement Amount:	\$3,053,333.33

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for Court-approved attorneys' fees and costs, Plaintiffs' Class Representative Service Awards, settlement administration costs, and the LWDA's share of PAGA penalties, the Settlement provides for an estimated Net Settlement Amount ("NSA") of no less than \$3,053,333.33. *See* Settlement, ¶¶ 4.C, 5.A. Individual Settlement Awards will be calculated based on the proportionate number of eligible workweeks worked by each participating Settlement Class member during the Class Period divided by the total number of eligible workweeks worked by all participating Settlement Class members. *Id.*, ¶ 5.A.i. Further, 25% of the PAGA payment will be paid to all PAGA aggrieved employees, regardless of their election to opt-out from participating in the Settlement, based on the proportionate number of workweeks worked by the PAGA aggrieved employee during the PAGA Period (February 2, 2021 through February 7, 2023) divided by the total number of workweeks worked by all PAGA aggrieved employees during the PAGA Period. *Id.*, ¶¶ 5.A.ii, 2.B.

Defendants' records indicate that there are approximately 32,423 Settlement Class members who worked approximately 2,750,000 workweeks. Moen Decl., ¶ 37. Settlement Class members will have 45 calendar days from the date of the initial mailing of the Notice Packet to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶ 10.C. Those Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendants as detailed in the Settlement. *Id.*, ¶¶ 2, 10.C-E.

2. Attorneys' Fees, Costs, and Plaintiffs' Service Awards

At the time of seeking final settlement approval, Plaintiffs will apply for Class Representative Service Awards in the amount of \$10,000 each for their service to the Settlement Class and their respective general release of all claims. Moen Decl., ¶ 38; *see* Settlement ¶¶ 3, 7. Plaintiffs' requests for their respective service awards are intended to recognize the significant time and effort that they expended on behalf of the Settlement Class. Plaintiffs' efforts include

1 gathering relevant documents for use in the lawsuit, reviewing important documents filed in the
2 case, holding various phone calls with their attorneys to discuss the claims in the lawsuit and
3 Defendants’ practices, assisting their attorneys in preparing for mediation, and assisting their
4 attorneys in moving the case towards resolution. Moen Decl., ¶ 38; Settlement, ¶ 3; Pearson Decl.,
5 ¶¶ 5-6; Gutierrez Decl., ¶¶ 6, 11; Livingston Decl., ¶ 7.; Declaration of Paul Rodriguez
6 (“Rodriguez Decl.”), ¶ 7. Further, the Plaintiffs have undertaken significant risks by serving as
7 named plaintiffs and are providing Defendants with a general release of all claims subject to a
8 waiver of Civil Code § 1542. Moen Decl., ¶ 38; Settlement, ¶ 3.

9 Plaintiffs’ counsel will also apply for an attorneys’ fee award of up to one third of the
10 GSA (currently estimated at \$1,666,666.67), and up to \$75,000 in reimbursement for actual
11 litigation costs. Moen Decl., ¶ 39; *see* Settlement, ¶¶ 4.C.iv, 6. Plaintiffs submit that the requested
12 fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation
13 on a purely contingent fee basis. Moen Decl., ¶ 39. Plaintiffs’ counsel has incurred substantial
14 attorneys’ fees conducting pre-filing investigation, analyzing Plaintiffs’ claims, conducting legal
15 research and analysis, reviewing class documents and data produced by Defendants, extensively
16 reviewing and evaluating the produced timekeeping and payroll records with the assistance of a
17 retained expert to build a comprehensive damages model, preparing for and attending mediation,
18 negotiating and drafting the Settlement Agreement and Notice Packet documents, preparing this
19 motion for preliminary approval, and otherwise litigating the case. Moen Decl., ¶ 39; *see also*
20 *generally* Nordrehaug Decl.; Choi Decl. Plaintiffs’ counsel will also expend future attorney time
21 attending the hearing on this Motion, overseeing the Notice process, drafting the Final Approval
22 Motion and supporting documents, attending the Final Approval hearing, and completing other
23 tasks, such as fielding questions from Settlement Class members. *Id.*

24 Both California and federal courts have recognized that an appropriate method for
25 awarding attorneys’ fees in class actions is to award a percentage of the “common fund” created
26 as a result of the settlement. *See Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 506;
27 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. Historically, courts have
28 awarded percentage fees in the range of 20% to 50%. *See* 4 Newberg on Class Actions § 14.6 (4th

1 Ed. 2013). Plaintiffs’ counsel submit that the request for attorneys’ fees is reasonable when
2 viewed as an overall percentage of the Settlement in light of the risks and work undertaken, the
3 positive results obtained for the class, and the efficiency with which the Parties have conducted
4 the litigation. Plaintiffs’ counsel will seek an award of attorneys’ fees when seeking final
5 approval.

6 **IV. ARGUMENT**

7 **A. Preliminary Approval Is Warranted**

8 California Rule of Court 3.769 conditions the settlement of a class action on court
9 approval, which is generally evaluated under the federal standards applicable under Rule 23 of
10 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
11 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the
12 settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* 150 F.3d
13 1011, 1026 (9th Cir. 1998) (stating that Rule 23(e) requires the trial court to determine “whether
14 a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the
15 preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor*
16 *ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role in evaluating a proposed
17 settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product
18 of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150 F.3d at 1027.
19 There is an initial presumption of fairness when the settlement agreement was negotiated at arm’s
20 length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

21 **1. Standard for Preliminary Approval**

22 The Court should consider the following factors when making a fairness determination:
23 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
24 litigation, the risk of maintaining class action status through trial, the amount offered in
25 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
26 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
27 “[T]he court is free to engage in a balancing and weighing of factors depending on the
28 circumstances of each case.” *Wershba, supra*, 91 Cal.App.4th at 245. As discussed below, the

1 proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors.

2 **a. The Strength of Plaintiffs' Case**

3 Plaintiffs' counsel carefully vetted the claims at issue, reviewed a representative sampling
4 of Settlement Class member data and all relevant policy documents, and created a comprehensive
5 damages model for Defendants' liability. Moen Decl., ¶ 40. Although Plaintiffs steadfastly
6 maintain that their claims are meritorious, Plaintiffs acknowledge that there are substantial risks
7 and uncertainty in proceeding with class certification and trial. As explained in detail in Section
8 II.B., *supra*, Defendants presented numerous defenses to Plaintiffs' claims, both on the merits and
9 with respect to class certification. Although Plaintiffs were prepared to litigate these claims
10 through class certification and ultimately through trial, it was far from certain that Plaintiffs would
11 be able to recover a greater amount should this matter proceed through trial. Thus, this factor
12 supports preliminary approval.

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

14 Although the Parties engaged in substantial informal discovery and information exchange
15 prior to mediation, the Parties had agreed to refrain from engaging in formal written and
16 deposition discovery until after exhausting their settlement efforts at mediation. Moen Decl., ¶
17 40. Absent settlement, the Parties will be required to expend substantial time and resources
18 conducting extensive formal written and deposition discovery. *Id.* Moreover, Plaintiffs had not
19 yet filed for class certification, and thus, absent settlement, the Parties would face the prospect of
20 appeals in the wake of a disputed class certification ruling and/or an adverse summary judgment
21 ruling. *Id.* Even if Plaintiffs succeeded in certifying one or more classes, the Parties would incur
22 considerably more attorneys' fees and costs through a possible decertification motion, trial, and
23 possible appeal. *Id.* This Settlement avoids these considerable costs, risks, and the accompanying
24 burden of continued litigation on the Court. Thus, this factor supports preliminary approval.

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

26 At the time of the proposed Settlement, Plaintiffs had not filed their motion for class
27 certification. Moen Decl., ¶ 41. Had the Court certified any claims, Plaintiffs anticipated that
28 Defendants would seek decertification. *Id.* There was also a risk that Defendants would move to

1 compel arbitration for the non-exempt employees who signed arbitration agreements and/or
2 engage in a *Pick-up-Stix* campaign to significantly reduce the size of the putative class for a
3 fraction of what Settlement Class members are receiving through this Settlement. *Id.*; see
4 *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796. Therefore, absent the Settlement,
5 there was a serious risk that Plaintiffs would be unable to move forward on a class-wide basis, or
6 that a significantly smaller class would exist than that which is currently before this Court for
7 approval. Moen Decl., ¶ 41. Thus, this factor supports preliminary approval.

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

9 This proposed Settlement provides a fair and reasonable recovery for the Settlement Class
10 in the face of disputed claims. After analyzing Defendants' produced data, Class Counsel
11 conducted a class-wide exposure analysis, forecasting the total expected recovery as follows:

12 First, Plaintiffs data analysis determined that appropriately 40% of all pay periods during
13 the Class Period contained an underpayment of overtime wages as a result of Defendants' regular
14 rate of pay miscalculation. Moen Decl., ¶ 42. Plaintiffs' data analysis further determined that the
15 average underpayment was approximately \$2.50 per pay period. *Id.* As noted above, Defendants
16 maintain that they accurately paid true-up payments to Plaintiffs and other non-exempt employees
17 at all times throughout the Class Period, and thus Plaintiffs' damages calculations were severely
18 overstated as they failed to account for this offset. *Id.* Plaintiffs therefore discounted the potential
19 maximum by 50% for risk of non-certification, and an additional 65% for risk of losing on merits.
20 *Id.*

21 Second, Plaintiffs' data analysis revealed approximately 1,117,545 workweeks in which
22 Defendants required Plaintiffs and the Settlement Class members to submit to mandatory pre-
23 shift COVID-19 temperature screenings, with an average of \$1.96 of minimum wages owed per
24 workweek for this off-the-clock work. Moen Decl., ¶ 43. Defendants, however, maintain they
25 have accurately recorded and compensated their employees for all their time worked, and argue
26 that Plaintiffs' minimum wage claim cannot be certified given the lack of common evidence for
27 this non-recorded time. *Id.* Given these defenses, Plaintiffs discounted the maximum exposure by
28 65% for the risk of non-certification, and by an additional 35% for risk of losing on the merits.*Id.*

1 Third, Plaintiffs' expert's data analysis revealed an approximately 98% first meal period
2 compliance rate and a 96% second meal period compliance rate. Moen Decl., ¶ 44. Moreover,
3 Plaintiffs' data analysis determined that Defendants began correctly calculating the regular rate
4 of pay for purposes of meal period premiums by approximately the end of 2020. *Id.* Plaintiffs'
5 expert's data analysis further revealed that Defendants paid meal period premiums at the base rate
6 of pay in approximately 25,947 pay periods during the Class Period, and when they did, the
7 premiums were underpaid by an average of \$2.50 each. *Id.* Defendants asserted, however, that
8 they maintained a lawful meal period policy/practice at all times during the Class Period, as
9 evidenced by the extremely high meal period compliance rates, and that any failure by an
10 employee to take a lawful meal period was the result of employee choice rather than company
11 policy, requiring individual inquiries into the reasons why each non-compliant meal period was
12 missed on any given day. *Id.* Given these defenses, Plaintiffs discounted the maximum exposure
13 by 35% for the risk of non-certification, and by an additional 35% for risk of losing on the merits.
14 *Id.*

15
16 Fourth, Plaintiffs' expert's data analysis revealed that the Settlement Class members
17 worked an aggregate of approximately 36,164 shifts in excess of 3.5 hours (i.e. a shifts for which
18 at least one rest period must be authorized and permitted) prior to September 30, 2019 when
19 Defendants discontinued their allegedly unlawful on-premises rest period policy. Moen Decl., ¶
20 45. Notably, Plaintiffs' expert's data analysis did not find any rest period premium payments
21 made during the Class Period. *Id.*

22 Defendants contend they authorized and permitted employees to take all lawful rest
23 periods throughout the Class Period, and that if Settlement Class members stayed on the premises
24 during rest periods, it was purely their choice. Moen Decl., ¶ 46. Defendants further argue that
25 Plaintiffs' rest period claim is inherently unsuited for class treatment as it would require
26 individualized inquiries to determine whether a certain rest period was authorized and permitted
27 on a given shift, particularly since rest periods were not recorded and there was no other common
28 evidence of when rest periods were taken. *Id.* Therefore, Plaintiffs discounted Defendants'

1 maximum exposure by 65% for risk of non-certification, and by an additional 35% for risk of
2 being unsuccessful on the merits. *Id.*

3 Fifth, Plaintiffs allege that Defendants required Settlement Class members to use their
4 personal cellular phones for work purposes on certain occasions, including contacting managers
5 and/or supervisors. Moen Decl., ¶ 47. Plaintiffs extensively researched and analyzed the market
6 rates for cellular phones and cellular calling and data plans, including reviewing JD Power and
7 Consumer Reports analyses of cellular phone plan rates from all major service providers. *Id.* As
8 a result, Plaintiffs determined that a reasonable monthly cell phone bill during the relevant time
9 period was approximately \$50-\$70. *Id.*; see also *Cochran, supra*, 228 Cal.App.4th at 1144
10 (“Thus, to be in compliance with section 2802, the employer must pay some reasonable
11 percentage of the employee’s cell phone bill.”). Plaintiffs further estimated that Defendants
12 required the Settlement Class members to use their personal cell phones for work purposes, on
13 average, approximately once per month during the 1,266,211 pay periods at issue during the Class
14 Period. *Id.*

15 Defendants maintain Plaintiffs’ reimbursement allegations fail on their merits, as
16 Defendants assert they never required their employees to use their personal cellular phones for
17 any work-related purposes, thus Plaintiffs’ damages calculation for this claim is grossly
18 overstated. Moen Decl., ¶ 48. Further, Defendants contend this claim is not certifiable since it
19 would require a series of mini-trials to determine whether any of the Settlement Class members
20 used their personal cellular phones for work related purposes and the extent of that use. *Id.*
21 Therefore, Plaintiffs discounted the maximum potential exposure by 65% for the risk of non-
22 certification and 75% for the risk of being unsuccessful on the merits. *Id.*

23 Sixth, according to Plaintiffs’ data analysis, approximately 457,691 wage statements were
24 issued during the relevant one-year statute of limitations period applicable to this claim. Moen
25 Decl., ¶ 49. Plaintiffs further found that only 36.7% of wage statements during the liability period
26 for this claim contained a potential wage statement violation, and approximately 7,219 Settlement
27 Class members were potentially eligible for wage statement penalties. *Id.* Defendants raise
28 numerous defenses to this claim, including that the alleged violations, if any, were not “knowing

1 and intentional,” and that Plaintiffs could not show that the Settlement Class members “suffer[ed]
2 injury” as a result of any alleged violations. *Id.*; see also *Maldonado v. Epsilon Plastics, Inc.*,
3 (2018) 22 Cal.App.5th 1308, 1336-37. Therefore, Plaintiffs discounted the maximum exposure
4 by 70% for the risk of non-certification of the underlying claims and 75% for a risk of being
5 unsuccessful on the merits, including failing to prove the violations were “knowing and
6 intentional,” that the Class Members “suffer[ed] injury,” or that any derivative wage statement
7 penalties were recoverable at all in light of the holding in *Maldonado*. Moen Decl., ¶ 49.

8 Seventh, Plaintiffs’ data analysis found that approximately 8,638 Settlement Class
9 members separated their employment during the relevant time period and were eligible for
10 waiting time penalties. Moen Decl., ¶ 50. Defendants maintain that waiting time penalties are not
11 appropriate because Plaintiffs’ claims fail on the merits, and given their good-faith defenses,
12 Plaintiffs cannot show that any failure by Defendants to pay all final wages was willful under 8
13 Cal. Code Regs. § 13520. *Id.* Thus, Plaintiffs discounted this claim by 75% for the risk of non-
14 certification and by an additional 75% for risk of being unsuccessful on the merits or failing to
15 establish willfulness. *Id.*

16 Eighth, Plaintiffs allege that PAGA civil penalties would be recoverable for each pay
17 period in which they could prove an underlying Labor Code violation. Moen Decl., ¶ 51.
18 According to Plaintiffs’ data analysis, the Settlement Class members worked a combined total of
19 457,691 pay periods during the PAGA liability period in which at least one of Plaintiffs’ alleged
20 Labor Code violations occurred. *Id.*; see also *Amaral, supra*, 163 Cal.App.4th at 1207 (finding
21 “initial” violation rate applies until employer is notified that it is violating a Labor Code
22 provision). However, these penalties are almost exclusively derivative of the underlying
23 violations that Defendants vigorously dispute, both as to certification and the merits. Moen Decl.,
24 ¶ 51; see also *Green v. Lawrence Service Co.*, 2013 WL 3907506, *5, fn. 5 (C.D. Cal. 2013)
25 (explaining that a PAGA claim’s success was determined by the merits of its underlying claims).
26 Plaintiffs also recognize that the Court has discretion to substantially reduce any award of PAGA
27 penalties. Moen Decl., ¶ 51; see also Labor Code § 2699(e)(2); *Thurman, supra*, 203 Cal.App.4th
28 at 1135; *Fleming v. Covidien Inc.*, Case No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047,

*4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiffs discounted the maximum figure by 35% for the risk of losing on the merits of all underlying claims and by 90% for the likely possibility that this Court would reduce the PAGA penalties awarded. Moen Decl., ¶ 51.

Finally, Defendants assert that all of Plaintiffs' claims will fail prior to class certification due to the existence of arbitration agreements potentially applicable to the vast majority of, if not all, putative class members that include a waiver of representative and/or collective action litigation, and further argue that Plaintiffs' PAGA claims could be compelled to individual arbitration as a result of *Viking River Cruises Inc. v. Moriana*. Moen Decl., ¶ 52. In light of these serious challenges to class certification, Plaintiffs discounted the maximum potential exposure of all claims at issue by an additional 25%. *Id.*

Using these estimated figures, Plaintiffs estimated that the potential reasonable recovery for the Settlement Class would be approximately \$6,427,218. Moen Decl., ¶ 53. Thus, the proposed recovery to the Settlement Class of \$5,000,000 represents approximately 77.79% of Plaintiffs' reasonably forecasted class-wide recovery, which is well within the range approved by courts as being fair, reasonable and adequate, while also avoiding further expense and risk of proceeding towards class certification and trial. *Id.*; see, e.g., *Altamirano v. Shaw Industries, Inc.*, 2015 WL 4512372, *9 (N.D. Cal. 2015) ("Although 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval..."); *Dunleavy v. Nadler* 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement of "roughly one-sixth of the potential recovery"); *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (internal quotations omitted). Preliminary approval is appropriate since the Settlement will provide tangible monetary relief to the Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

1 **e. The Experience and Views of Plaintiffs' Counsel**

2 “Parties represented by competent counsel are better positioned than courts to
3 produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific*
4 *Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiffs are represented
5 by competent and experienced counsel who possesses extensive experience litigating wage and
6 hour class actions from both the plaintiff and defense side, and who have been appointed as class
7 counsel in numerous cases alleging similar claims. *See* Moen Decl. ¶¶ 2-10; *see also* Declaration
8 of Larry W. Lee (“L.W. Lee Decl.”), ¶¶ 3-6; Declaration of Christine S. Lee (“C.S. Lee Decl.”),
9 ¶¶ 2-4; Choi Decl., ¶¶ 12-13; Nordrehaug Decl., ¶¶ 3-5; Declaration of Shani O. Zakay (“Zakay
10 Decl.”), ¶ 3; Declaration of Jean-Claude Lapuyade (“Lapuyade Decl.”), ¶¶ 3-4. Plaintiffs’ counsel
11 conducted an extensive review and analysis of Defendants’ produced timekeeping and payroll
12 records and drew on their extensive experience in similar cases to assess the strengths and
13 weaknesses of Plaintiffs’ case. *Id.* It was only after the completion of this work that the Parties
14 attended mediation and ultimately accepted a mediator’s proposal for a class-wide settlement of
15 all claims at issue. Moen Decl., ¶ 39. Thus, this factor strongly supports preliminary approval of
16 the Settlement.

17 **2. The Preliminary Approval Standard is Met**

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

23 **a. The Settlement is Within the Range of Possible Approval**

24 The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class
25 members in light of the significant risks of litigation. Further, the average payment exceeds the
26 average payments achieved in other wage and hour class action settlements that have been
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1 approved.² Thus, the proposed Settlement is within the range of possible approval such that notice
2 should be provided to the Settlement Class members to consider the Settlement. The Court will
3 have the opportunity to again assess the reasonableness of the Settlement after the Settlement
4 Class members have had the opportunity to opt-out or object.

5 **b. The Settlement Resulted from Serious, Informed and Non-Collusive**
6 **Negotiations**

7 This proposed Settlement is entitled to an initial presumption of fairness as it is the result
8 of the exchange of pertinent information, including all relevant policies, employee timekeeping
9 and payroll records, and key data points which were analyzed by Plaintiffs and their retained
10 expert with a Ph.D. in economics; arm's-length negotiations by counsel; mediation before an
11 experienced wage and hour class action mediator that resulted in a mediator's proposal; and
12 additional negotiations until the terms of the long-form Settlement were agreed upon and
13 finalized. Moen Decl., ¶ 35; *see also Kullar, supra*, 168 Cal.App.4th at 130. Thus, this factor
14 supports preliminary approval.

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

16 The Settlement will provide tangible monetary relief to the Settlement Class members.
17 Moreover, the amounts proposed for Plaintiffs' service awards, settlement administration costs,
18 attorneys' fees and costs to Plaintiffs' counsel, and the LWDA's portion of PAGA civil penalties
19 are all reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this
20 final factor supports preliminary approval.

21 **B. The Court Should Certify The Settlement Class**

22 The proposed Settlement Class satisfies the criteria for certification of a settlement class
23 under California law because: (1) the individuals in the Settlement Class are so numerous that
24 joinder would be impractical; (2) common questions of law and fact predominate over individual
25 questions such that class certification is the most efficient and desirable way to maintain this
26 litigation; (3) Plaintiffs' claims are typical of the claims of the absent Settlement Class members;

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² See e.g., *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90).

1 and (4) Plaintiffs and Plaintiffs’ counsel will fairly and adequately represent the interests of the
2 absent Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

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

4 A class is “ascertainable” where the members “may be readily identified without
5 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
6 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement
7 Class is defined as all current and former non-exempt employees who worked for Defendants in
8 California at any time between February 2, 2018 through February 7, 2023. *See* Settlement, ¶ 1.
9 Settlement Class members can be easily identified using Defendants’ employment and payroll
10 records. Moen Decl., ¶ 37. Defendants represent that the Settlement Class consists of
11 approximately 32,423 individuals, rendering it impracticable to bring all Settlement Class
12 members before the Court. *Id.* Thus, the proposed Settlement Class satisfies numerosity. *See*
13 *Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

15 The focus in a certification dispute is not on the merits of the case, but rather on what
16 types of questions, “common or individual,” are likely to arise in the action. *See Sav-On Drug*
17 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiffs’ claims are predicated
18 on Defendants’ alleged failures to pay all minimum and overtime wages, meal and rest period
19 premiums and sick pay wages, reimburse all necessary business expenses, furnish accurate
20 itemized wage statements, and pay all final wages owed upon separation of employment. These
21 types of claims are commonly held to be proper for class certification. *See, e.g., Brinker, supra*, 53
22 Cal.4th at 1032-34 (“The theory of liability—that Brinker has a uniform policy, and that that
23 policy...allegedly violates the law—is by its nature a common question eminently suited for class
24 treatment.”).

25 **3. The Claims of the Named Plaintiffs are Typical**

26 The typicality requirement is satisfied where class representatives have claims that are
27 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
28 Cal.App.3d 1341, 1347. Here, like other Settlement Class members, Plaintiffs were employed by
Defendants as non-exempt employees in California and were subject to Defendants’ allegedly

1 unlawful wage and hour policies/practices during the Class Period. Pearson Decl., ¶¶ 2-3;
2 Livingston Decl., ¶ 2; Gutierrez Decl., ¶ 3; Rodriguez Decl., ¶¶ 6-8. Plaintiffs were therefore
3 impacted by the same challenged policies that allegedly injured the Settlement Class as a whole
4 and were subject to the same defenses forwarded by Defendants as to the Settlement Class, and
5 are therefore typical.

6 **4. Plaintiffs and Class Counsel are Adequate to Represent the Class**

7 The adequacy of representation requirement examines conflicts of interest between named
8 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
9 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiffs and their counsel will
10 adequately represent the Settlement Class as there are no conflicts between the named Plaintiffs
11 and the Settlement Class they seek to represent, and Plaintiffs possess claims that are in line with
12 those of the Settlement Class members. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d
13 442, 450 (finding adequacy satisfied where there was no indication that the plaintiff's counsel
14 were not qualified and the named plaintiff had no interests antagonistic to those of the proposed
15 class). Class Counsel also has extensive experience in wage and hour class action litigation. *See*
16 *Moen Decl.*, ¶¶ 2-10; *L.W. Lee Decl.*, ¶¶ 3-6; *C.S. Lee Decl.*, ¶¶ 2-4; *Choi Decl.*, ¶¶ 12-13;
17 *Nordrehaug Decl.*, ¶¶ 3-5; *Zakay Decl.*, ¶ 3; *Lapuyade Decl.*, ¶¶ 3-4.

18 **C. The Court Should Order Distribution Of The Proposed Class Notice**

19 This Court should order distribution of the proposed Class Notice in both English and
20 Spanish to the Settlement Class members by first class mail, postage prepaid, using the last known
21 mailing address information provided by Defendants. This manner of giving notice is the “best
22 notice practicable” under the circumstances because it provides “individual notice to all members
23 who can be identified through reasonable effort.” *See Eisen v. Carlisle and Jacquelin* 417 U.S.
24 156, 173 (1974). The Parties propose that the settlement be administered by ILYM Group, Inc.
25 (“ILYM”), an experienced class action settlement administrator. *See Declaration of Sean*
26 *Hartranft*. Settlement Class members’ addresses will be ascertainable through Defendants’
27 personnel records, and Defendants will provide all Settlement Class members’ names, last known
28 addresses, phone numbers, social security numbers, dates of employment, and workweek data to

1 ILYM within thirty (30) days after of the Court signs an order preliminarily approving the
2 Settlement. *See* Settlement, ¶ 10.A. ILYM will run the Settlement Class members' addresses
3 through the National Change of Address database and/or conduct skip traces to obtain current
4 address information. *Id.*, ¶ 10.B.

5 The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d)
6 because it advises the Settlement Class members of the nature of the claims, basic contentions
7 and denials of the Parties, the key terms of the Settlement, the uniform 45-day deadline to opt-out
8 or object to the Settlement and the procedures by which to do so, explains the recovery formula
9 and expected recovery amount for each Settlement Class member, and advises them that they will
10 be bound by the terms of the Settlement if they do not request exclusion. *See* Moen Decl., Exhibit
11 2. The proposed Class Notice will also notify the Settlement Class of the Final Approval Hearing
12 date, provide the contact information of Plaintiffs' counsel, and advise Settlement Class members
13 that they may enter an appearance through counsel if they so wish. *Id.* This manner of giving
14 notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method
15 of reaching Settlement Class members. Additionally, because the proposed Settlement includes
16 settlement of Plaintiffs' representative PAGA claim, notice of the Settlement has been submitted
17 to the LWDA. *See id.* at ¶ 55, Exhibit 7; Proof of Service.

18 **D. The Court Should Set A Final Approval Hearing**

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

22 **V. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily
24 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
25 [Proposed] Order submitted concurrently herewith.

26 Dated: March 8, 2023

Respectfully submitted,
HAINES LAW GROUP, APC

27 By: 
28 Matthew K. Moen
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