

HAINES LAW GROUP, APC

Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Sean M. Blakely (SBN 264384)
sblakely@haineslawgroup.com
Joel M. Gordon (SBN 280721)
jgordon@haineslawgoup.com
2155 Campus Drive, Suite 180
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

ANGEL VASQUEZ MONTES, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

L & L NURSERY SUPPLY INC., a California
corporation; and DOES 1 through 100,

Defendants.

Case No.: CIVSB2214477

*[Assigned for all purposes to the
Honorable Joseph T. Ortiz, Dept. S-17]*

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

Date: August 19, 2024
Time: 1:30 p.m.
Dept.: S-17

Action Filed: July 11, 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 August 19, 2024, at 1:30 p.m. in Department S-17 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Angel Vasquez Montes (“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 hourly employees who worked for L&L Nursery Supply and/or BFG Supply, Inc. within the State of California at any time during the period from July 11, 2018 to May 24, 2024 (the “Class Period”).
3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Joel M. Gordon of Haines Law Group, APC, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit Class Representative Enhancement Award to Plaintiff, civil penalties payable to the Labor & Workforce Development Agency (“LWDA”), settlement administration costs, and attorneys’ fees and costs to Class Counsel;
6. Appointment of ILYM Group, Inc. 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.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the declarations of Paul K. Haines, Sean M. Blakely, Joel M. Gordon, Plaintiff Angel Vasquez Montes, and Anthony Rogers of ILYM Group, Inc., and the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time of hearing. Defendant does not intend to oppose this Motion and given the multiplicity of issues addressed in this Motion, has indicated its approval

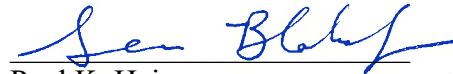
1 of Plaintiff's expressed need to exceed the 20-page limit set forth in California Rule of Court
2 3.764(c)(2). Therefore, the parties jointly request the Court's consideration of Plaintiff's
3 memorandum of points and authorities, which is 25 pages in length.

4
5 Respectfully submitted,

6 Dated: July 26, 2024

HAINES LAW GROUP, APC

7
8 By:



Paul K. Haines

Sean M. Blakely

Joel M. Gordon

Attorneys for Plaintiff

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. THE PARTIES AND BRIEF PROCEDURAL HISTORY	2
B. PLAINTIFF’S CLAIMS AND L&L’S DEFENSES	3
1. Meal Period Claims.....	3
2. Rest Period Claims.....	4
3. Unpaid Wages Due to Unlawful Timekeeping Policies/Practices.....	4
4. Regular Rate Miscalculations	5
5. Unpaid Wages Due to COVID Temperature Screenings	6
6. Wage Statement Violations.....	6
7. Waiting Time Penalties.....	7
8. PAGA Civil Penalties	7
C. DISCOVERY AND MEDIATION.....	8
III. THE PROPOSED SETTLEMENT.....	8
A. ESSENTIAL TERMS OF THE SETTLEMENT	8
1. The Settlement Provides for Reasonable Monetary Payments	9
2. Attorneys’ Fees and Costs, Enhancement Award, and PAGA Payment	10
IV. ARGUMENT.....	12
A. PRELIMINARY APPROVAL IS WARRANTED	12
1. Standard for Preliminary Approval.....	12
a. The Strength of Plaintiff’s Case.....	12
b. Risk, Expense, Complexity, and Duration of Further Litigation.....	13
c. Risk of Maintaining Class Action Status	13
d. Amount Offered in Settlement Given Realistic Value of Claims.....	13
e. The Experience and Views of Counsel	20
2. The Preliminary Approval Standard Is Met.....	20

1	a. The Settlement Is Within the Range of Possible Approval.....	21
2	b. The Settlement Resulted from Serious, Informed Negotiations	22
3	c. The Settlement Is Devoid of Obvious Deficiencies.....	22
4	B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.....	22
5	1. The Proposed Class Is Ascertainable and Numerous	23
6	2. Common Issues of Law and Fact Predominate.....	23
7	3. The Claims of the Named Plaintiff Are Typical	23
8	4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the	
9	Class	24
10	C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE	24
11	D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	25
12	V. CONCLUSION.....	26

TABLE OF AUTHORITIES

Federal Cases

<i>Dunleavy v. Nadler</i> , 213 F.3d 454 (9th Cir. 2000)	21
<i>Eisen v. Carlisle & Jacquelin</i> 417 U.S. 156 (1974).....	24
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	12
<i>In re Pacific Enterprises Securities Litigation</i> 47 F.3d 373 (9th Cir. 1995)	20
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008)	12
<i>Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004).....	21

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008)	19
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> 191 Cal.App.3d 1341 (1987)	23
<i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013).....	23
<i>Bowles v. Sup. Ct.</i> , 44 Cal.2d 574 (1955)	23
<i>Brinker Restaurant Corporation v. Superior Court</i> , 53 Cal.4th 1004 (2012)	3, 14
<i>Capital People First v. State Dept. of Developmental Services</i> 155 Cal.App.4th 676 (2007)	24
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018).....	7
<i>Chindarah v. Pick Up Stix, Inc.</i> , 171 Cal.App.4th 796 (2009)	13
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	12
<i>Huntington Memorial Hospital v. Superior Court</i> , 131 Cal.App.4th 893 (2005)	5
<i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....	10
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....	12, 20, 22
<i>Laffitte v. Robert Half Int'l, Inc.</i> , 1 Cal.5th 480 (2016).....	11
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018)	6
<i>McGhee v. Bank of America</i> 60 Cal.App.3d 442 (1976)	24
<i>Price v. Starbucks Corp.</i> 192 Cal.App.4th 1136 (2011).....	7
<i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4th 322 (2012).....	12
<i>Sav-On Drug Store, Inc. v. Superior Court (Rocher)</i> 34 Cal.4th 319 (2004).....	23

1	<i>Sevidal v. Target Corp.</i> 189 Cal.App.4th 905 (2010).....	23
2	<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> 203 Cal.App.4th 1112 (2012).....	7, 19
3	<i>United Parcel Service, Inc. v. Superior Court</i> , 196 Cal.App.4th 57 (2011).....	15
4	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001).....	12
5		
6	<u>Federal Statutes and Rules</u>	
7	29 C.F.R. § 778.200(a)(1).....	5, 17
8	29 C.F.R. § 778.211	5, 17
9		
10	<u>State Statutes and Rules</u>	
11	Cal. Civ. Proc. § 382.....	22
12	8 Cal. Code Regs. § 13520.....	7
13	Labor Code § 226(e)	18
14	Labor Code § 510(a)	5
15	Labor Code § 2699(e)(2)	7
16	California Rule of Court 3.769	25
17		
18	<u>Unpublished Cases</u>	
19	<i>Bercea v. AE Retail West</i>	
20	Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012)	21
21	<i>Chu v. Wells Fargo Investments, LLC</i>	
22	Case No. C 05-4526 MHP, 2011 WL 672645 (N.D. Cal. 2011).....	11
23	<i>Doty v. Costco Wholesale Corp.</i>	
24	Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007)	21
25	<i>Fleming v. Covidien Inc.</i>	
26	Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047 (C.D. Cal. 2011)	7, 19
27	<i>Glass v. UBS Finan. Servs.</i>	
28	Case No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. 2007).....	21

1	<i>Gomez v. Amadeus Salon, Inc.</i>	
2	Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010)	21
3	<i>Green v. Lawrence Service Co.</i>	
4	2013 WL 3907506 (C.D. Cal. 2013).....	19
5	<i>Lazarin v. Pro Unlimited, Inc.</i>	
6	Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013).....	11
7	<i>Lim v. Victoria's Secret Stores, Inc.</i>	
8	Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006).....	21
9	<i>Palencia v. 99 Cents Only Stores</i>	
10	Case No. 34-2010-00079619 (Sacramento County Super. Ct.).....	21
11	<i>Ressler v. Federated Department Stores, Inc.</i>	
12	Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009).....	21
13	<i>Schiller v. David's Bridal, Inc.</i>	
14	Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 (E.D. Cal. June 11, 2012).....	21
15	<i>Sorenson v. PetSmart, Inc.</i>	
16	Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008)	21
17	<i>Williams v. Centerplate, Inc.</i>	
18	Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC	
19	2013 WL 4525428 (S.D. Cal. Aug. 26, 2013)	21

Other Sources

22	Manual for Complex Litigation § 30.41(3rd Ed. 1995).....	20
23	4 Newberg on Class Actions § 11:24-25 (4th Ed. 2013)	20
24	4 Newberg on Class Actions § 14.6 (4th Ed. 2013).....	11

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiff Angel Vasquez Montes (hereinafter “Plaintiff”) brought this class and
4 representative action for various wage and hour violations on behalf of current and former hourly
5 employees who worked for Defendant L&L Nursery Supply and/or BFG Supply, Inc. (“L&L”) within the State of California at any time during the period from July 11, 2018 to May 24, 2024
6 (the “Class Period”). Plaintiff’s primary allegations are that L&L: (1) failed to provide all legally
7 compliant first and second meal periods; (2) failed to authorize and permit all legally required
8 rest periods; and (3) failed to pay all minimum and overtime wages by virtue of its unlawful
9 timekeeping policies/practices, regular rate miscalculations, and COVID temperature screening
10 policy. As a result of these alleged violations, Plaintiff brought derivative claims for L&L’s
11 alleged failure to pay all final wages owed, failure to issue accurate and compliant wage
12 statements, and for civil penalties under the Private Attorneys 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 L&L has agreed to pay Four
16 Hundred Sixty-Seven Thousand Five Hundred and Zero Cents (\$467,500.00) to the following
17 Settlement Class:

18 All current and former hourly employees who worked for L&L Nursery
19 Supply and/or BFG Supply, Inc. within the State of California at any time
20 during the period from July 11, 2018 to May 24, 2024 (the “Class Period”).

21 If the Settlement is approved, L&L will pay a non-reversionary Gross Settlement Fund of
22 \$467,500.00. After deducting administration costs, Plaintiff’s requested Class Representative

23 ¹ Plaintiff’s operative First Amended Class and Representative Action Complaint (“FAC”) alleges
24 the following causes of action: (1) Minimum Wage Violations; (2) Failure to Pay All Overtime
25 Wages; (3) Meal Period Violations; (4) Rest Period Violations; (5) Waiting Time Penalties; (6)
26 Wage Statement Violations; (7) Violation of Business & Professions Code § 17200, *et seq.*; and
(8) Civil Penalties Under the Private Attorneys Generals Act, Labor Code § 2698 *et seq.*

27 ² The Joint Stipulation of Settlement and Release to Settle Class and PAGA Action (“Settlement”)
28 is attached to the Declaration of Sean M. Blakely as **Exhibit A**. The proposed Class Notice is
attached to the Settlement as **Exhibit 1**. All defined terms in this motion have the same definition
as that in the Settlement.

Enhancement Award, the amount designated as PAGA civil penalties, and requested attorneys' fees and costs, the Net Settlement Amount ("NSA") of approximately \$233,666.67 will be distributed to all Settlement Class Members who do not opt-out of the Settlement based on the proportionate number of workweeks worked by each Settlement Class member during the Class Period.

Significantly, Settlement Class Members do not need to file a claim to reap the financial benefits of the Settlement, as all Settlement Class Members will automatically receive a payment unless they affirmatively opt-out. There are approximately 115 Settlement Class Members, and the average payment to participating Settlement Class Members is projected to be approximately **\$2,031.88**.

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

II. SUMMARY OF THE LITIGATION

A. THE PARTIES AND BRIEF PROCEDURAL HISTORY

L&L has been in operation since 1953, distributing home and garden products throughout the west coast. *See* Declaration of Sean M. Blakely ("Blakely Decl."), ¶ 8. In the lead up to mediation, Plaintiff learned that L&L was acquired by Ohio-based BFG Supply Co. ("BFG") in approximately March 2021. *Id.* Plaintiff worked as a non-exempt "Order Puller" at L&L's San Bernardino distribution center from approximately February 2016 until approximately October 2021. *See* Declaration of Plaintiff Angel Vasquez Montes In Support of Approval of Class Action Settlement ("Montes Decl."), ¶ 2.

On April 21, 2022, Plaintiff sent his PAGA notice letter to the LWDA, which is attached to the Blakely Decl. as **Exhibit B** (April 21, 2022 LWDA Letter). On July 11, 2022, Plaintiff filed a Complaint in San Bernardino County Superior Court, alleging causes of actions for: (1) failure to pay wages; (2) failure to pay overtime compensation; (3) failure to provide meal periods; (4)

1 failure to provide itemized wage and hour statements; (5) unfair competition in violation of
2 California Business & Professions Code § 17200 *et seq.*; and (6) Civil Penalties Under the Private
3 Attorneys Generals Act, Labor Code § 2698 *et seq.* Blakely Decl., ¶ 9. On December 30, 2022,
4 Plaintiff filed his First Amended Class Action Complaint (“FAC”), adding class allegations and
5 adding causes of action for rest period violations and waiting time penalties. *Id.*, ¶ 9. On January
6 4, 2023, Plaintiff submitted an amended PAGA notice letter to the LWDA, which is attached to
7 the Blakely Decl. as **Exhibit C** (January 4, 2023 LWDA letter).

8 **B. PLAINTIFF’S CLAIMS AND L&L’S DEFENSES**

9 **1. Meal Period Claims**

10 Plaintiff alleges that L&L failed to provide legally compliant first meal periods such that
11 first meal periods were regularly late and/or less than 30 minutes. Blakely Decl., ¶ 14.
12 Specifically, Plaintiff claims that in order to comply with L&L’s timekeeping policies, employees
13 regularly clocked in a few minutes before their scheduled start time, and because first meal
14 periods were scheduled to start exactly at the 5-hour mark, first meal periods were consistently
15 late. *Id.* Plaintiff further alleges that L&L failed to provide for second meal periods when non-
16 exempt worked shifts in excess of 10.0 hours in a workday. *Id.*, ¶ 15.

17 L&L counters that it maintained compliant written meal period policies throughout the
18 Class Period and provided compliant meal periods in line with those policies. Blakely Decl., ¶ 14.
19 L&L further contends that it always provided employees the opportunity to take meal periods and
20 is not required to ensure they are taken. *Id.*; see *Brinker Restaurant Corporation v. Superior*
21 *Court*, 53 Cal.4th 1004, 1034 (2012) (rejecting “ensure” standard). Thus, L&L argues, any non-
22 compliant meal periods were the result of lawful employee choice, rather than any policy and/or
23 practice of L&L. Blakely Decl., ¶ 14. L&L further argues that the overwhelming majority of first
24 meal period violations were *de minimis* as first meal periods were only late by 5-10 minutes. *Id.*
25 As for second meal periods, L&L asserts many employees choose to waive their second meal
26 periods on shifts over 10.0 hours but less than 12.0 hours, as they may do under Labor Code §
27 512(a), so that they do not need to stay at work for an extra unpaid 30 minutes. *Id.*, ¶ 15. Finally,
28 L&L maintains Plaintiff’s meal period claim is not suited for class certification, since individual

inquiries would be needed to assess which employees, if any, took non-compliant or missed meal periods, how many meal periods were non-compliant or missed, the reasons why a particular employee did not take a meal period on a particular shift, and (for second meals) whether they waived the meal period. *Id.*, at ¶¶ 14-15.

2. Rest Period Claims

Plaintiff alleges that L&L failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 16. Specifically, Plaintiff contends that L&L's written rest period policies were deficient in failing to inform employees of their right to a third rest period when they work in excess of 10.0 hours, or that a second rest period should be provided on shifts of 6.01 – 7.99 in duration. *Id.* Plaintiff also contends that he and other non-exempt employees were often interrupted during their rest periods and required to work through their off-duty rest periods. *Id.*

L&L contends that it has maintained and enforced compliant written rest period policies/practices and has always authorized and permitted employees a 10-minute rest period for each 4 hours worked, or major fraction thereof, as required under the Wage Order, and that any failure to take rest periods was a result of employee choice rather than any L&L policy and/or practice. Blakely Decl., ¶ 16. L&L further argues that Plaintiff's rest period claim is not amenable to class treatment, since individual inquiries would be required to determine which employees failed to take rest periods, how many rest periods they failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift. *Id.* These manageability concerns are especially present with respect to rest period claims, L&L argues, given that rest periods are not, and need not, be recorded. *Id.*

3. Unpaid Wages Due to Unlawful Timekeeping Policies/Practices

Plaintiff alleges that L&L utilized a timekeeping policy/practice that resulted in a systematic underpayment of wages through a process of unlawful rounding of hours worked. Blakely Decl., ¶ 17. Specifically, Plaintiff alleges that for a portion of the Class Period, L&L required Plaintiff and putative class members to clock in and out using a system that records hours worked to the minute; however, L&L unlawfully rounded employee timekeeping entries to

employees' detriment. *Id.*

L&L counters that its timekeeping policies/practice complied with California law and that it has always properly compensated Settlement Class Members for all hours worked throughout the Class Period. Blakely Decl., ¶ 17. L&L argues that no pre-shift work was actually being performed, and therefore, any rounded time is not compensable. *Id.* L&L further argues that it ended its rounding policies/practices in January 2022, thereby cutting off any liability for this claim. *Id.* Finally, L&L asserts that Plaintiff would be unable to certify this claim since its timekeeping policies/practices are facially neutral and individualized inquiries would be necessary as to whether employees were in fact underpaid for each workday in question, resulting in an unmanageable series of mini-trials. *Id.*

4. Regular Rate Miscalculations

Plaintiff alleges that L&L failed to pay Settlement Class Members all overtime wages owed as a result of its failure to include the value of all non-discretionary COVID-19 attendance bonuses into the "regular rate" of pay. Blakely Decl., ¶ 18; *See* Labor Code § 510(a) (requiring overtime to be paid at "one and one-half times the regular rate of pay"); *see, e.g., Huntington Memorial Hospital v. Superior Court*, 131 Cal.App.4th 893, 902-903 (2005) (discussing regular rate calculation requirements).

L&L argues that it properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class Members. Blakely Decl., ¶ 18. L&L contends the vast majority of additional payments at issue are discretionary bonuses and thus need not be included in the regular rate. *Id.*; *see also* 29 C.F.R. § 778.211 (discretionary bonuses need not be included in regular rate); 29 C.F.R. § 778.200(a)(1) (excluding from regular rate "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency"). L&L further argues that Settlement Class Members received different types of bonuses throughout the Class Period, creating substantive differences among the Settlement Class Members with respect to the incentives received, making class certification unlikely. Blakely Decl., ¶ 18.

1 **5. Unpaid Wages Due to COVID Temperature Screenings**

2 Plaintiff alleges that following the outbreak of COVID-19, L&L implemented a policy of
3 requiring its employees to undergo off-the-clock temperature checks. Blakely Decl., ¶ 19.
4 Plaintiff alleges that the approximate ten minutes Settlement Class Members were required to
5 arrive for temperature checks, prior to their scheduled start times and clocking in for their shift,
6 constituted “hours worked,” and must be compensated. *Id.*

7 In response, L&L maintains that it accurately recorded all time worked by its non-exempt
8 employees and has properly paid all wages owed for all hours worked. Blakely Decl., ¶ 19. L&L
9 further argues that temperature checks resulted in little, if any, off-the-clock time. *Id.* L&L also
10 points out that mandatory temperature checks ended in December 2020, thereby cutting off
11 liability for this claim. *Id.* Further, L&L asserts individualized inquiries would be required into
12 whether any employee underwent a COVID-19 related temperature check while off-the-clock on
13 any given day, making class certification unlikely, which is especially true as any off-the-clock
14 time was not recorded. *Id.*

15 **6. Wage Statement Violations**

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

20.

7. Waiting Time Penalties

As a further result of the unpaid wages and unpaid meal and rest period premium wages described above, Plaintiff alleges that L&L failed to comply with its final pay obligations set forth in Labor Code §§ 201-203. Blakely Decl., ¶ 21. Because the waiting time claim is derivative of Plaintiff's underlying wage claims, L&L argues that Plaintiff would need to overcome its defenses as to class certification and as to the merits. *Id.* L&L further argues that it possesses strong, good-faith defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id.*; see *also* 8 Cal. Code Regs. § 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203 . . . A 'good faith' dispute that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee").

8. PAGA Civil Penalties

As a result of the foregoing Labor Code violations, Plaintiff alleges that L&L is liable for civil penalties under the PAGA. Blakely Decl., ¶ 22. Since Plaintiff's PAGA claim is derivative of Plaintiff's underlying wage claims, L&L asserts the PAGA claim would fail with those claims. *Id.*; see *Price v. Starbucks Corp.* 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail"). L&L further maintains that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find L&L liable for any of Plaintiff's claims. Blakely Decl., ¶ 22; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. 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).

///

1 **C. DISCOVERY AND MEDIATION**

2 In connection with mediation, the Parties engaged in extensive informal discovery.
3 Blakely Decl., ¶ 10. L&L produced an approximately 19% sampling of timekeeping and payroll
4 records for the putative class, as well as its relevant wage and hour written policies/procedures,
5 and relevant data points such as the number of putative class members, the number of aggregate
6 workweeks during the Class Period, and the total number of pay periods worked during the PAGA
7 Period. *Id.* Plaintiff’s counsel conducted a comprehensive analysis and extrapolation of the data
8 produced by L&L to calculate L&L’s potential exposure for each of Plaintiff’s claims at issue.
9 *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiff’s claims, the
10 chances of certification of Plaintiff’s claims, and L&L’s potential defenses. *Id.*

11 On January 29, 2024, the Parties participated in a full-day mediation with the Honorable
12 Amy D. Hogue (Ret.), a well-respected wage and hour class action mediator. Blakely Decl., ¶ 11.
13 During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of
14 certification of Plaintiff’s claims, and the legal basis for the claims and defenses. *Id.* At the
15 conclusion of the mediation, Judge Hogue issued a mediator’s proposal for a class-wide
16 settlement, which was ultimately accepted by both sides. *Id.* During the months that followed, the
17 parties finalized the terms of the Settlement and executed the long-form Settlement Agreement
18 now before the Court. *Id.*

19 **III. THE PROPOSED SETTLEMENT**

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

21 If the Court preliminarily approves the Settlement, L&L will pay a Gross Settlement Fund
22 of \$467,500.00. *See* Settlement, § 3.06(a). Significantly, this Settlement is non-reversionary, and
23 no Settlement Class member will have to submit a claim form to receive an Individual Settlement
24 Payment. *Id.*, at § 3.04(a). Each Settlement Class Member who does not request exclusion will
25 automatically receive an Individual Settlement Payment. *Id.* The monetary terms of the
26 Settlement are summarized below:

- | | |
|--|--------------|
| 27 • Gross Settlement Fund: | \$467,500.00 |
| 28 • Minus Court-approved attorneys’ fees: | \$155,833.33 |
| • Minus Court-approved verified costs (up to): | \$30,000.00 |

• Minus Court-approved Enhancement Award:	\$10,000.00
• Minus amount set aside as PAGA penalties:	\$30,000.00
• <u>Minus estimated Settlement Administration costs:</u>	<u>\$8,000.00</u>
Net Settlement Amount (“NSA”):	\$233,666.67
• PLUS 25% “PAGA Amount” to PAGA Group Members:	\$7,500.00
Total Amount Paid to Class members:	\$241,166.67

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys’ fees and costs, the Class Representative Enhancement Award to Plaintiff, the amount designated as PAGA civil penalties, and Settlement Administrator’s fees and expenses, the Settlement requires L&L to pay a Net Settlement Amount (“NSA”) of at least \$233,666.67 to all Settlement Class Members who do not timely opt out (i.e., “Verified Class Members”). *See* Settlement, § 3.06(e). The NSA shall be allocated among Verified Class Members who worked during the Class Period, as follows: each participating Verified Class Member shall receive a proportionate settlement share of the NSA based upon the proportionate number of workweeks he/she worked as a non-exempt employee during the Class Period. *Id.* Additionally, Seven Thousand Five Hundred Dollars (\$7,500.00) of the Gross Settlement Fund has been designated as the PAGA civil penalties and shall be distributed to those Settlement Class Members (including those who submit a valid and timely Request for Exclusion from the class action settlement) who worked from April 21, 2021 to May 24, 2024 (“PAGA Period”) (these employees are referred to as “PAGA Group Members”) proportionally based on the number of pay periods worked during the PAGA Period. Settlement, §§ I.(aa)-(cc); 3.06(g).

Based on information from L&L, Plaintiff understands that there are approximately 115 Settlement Class Members. Blakely Decl., ¶ 13. Therefore, the average Individual Settlement Payment is projected to be approximately \$2,031.88. *Id.* There are approximately 48 PAGA Group Members who worked during the PAGA Period. *Id.* Therefore, the average Individual PAGA Payment is estimated to be approximately \$156.25. Settlement Class Members will have forty-five (45) calendar days from the mailing of the Notice Packets to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, § 3.04(b). Settlement Class Members who do not opt-out of the

1 Settlement will be bound by its terms and will release all claims against L&L included within the
2 Settlement.

3 **2. Attorneys' Fees and Costs, Enhancement Award, and PAGA**

4 **Payment**

5 Plaintiff will apply for a Class Representative Enhancement Award at the time of seeking
6 final approval of the proposed class action settlement in the amount of \$10,000, for his service to
7 the Settlement Class. *See* Settlement, § 3.06(c). “[I]ncentive awards are fairly typical in class
8 action cases . . . and are intended to compensate class representatives for work done on behalf of
9 the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In*
10 *re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully
11 briefed at the time of final approval, Plaintiff’s requested Enhancement Award is intended to
12 recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including
13 providing substantial factual information and documents to Class Counsel, discussing the claims
14 and theories at issue in the litigation, actively participating in the prosecution of his claims, as
15 well as the significant risks Plaintiff undertook by agreeing to serve as the named plaintiff in this
16 case, and the fact that Plaintiff agreed to a general release of all claims subject to a waiver of Civil
17 Code § 1542. *See* Settlement, § 3.06(c); Blakely Decl., ¶ 26; *see also* Montes Decl., ¶¶ 4-5.

18 Class Counsel will also apply for an attorneys’ fees award of one-third of the Gross
19 Settlement Fund, which is currently estimated to be \$155,833.33, and up to \$30,000.00 in verified
20 costs reimbursement. *See* Settlement, ¶ 3.06(b); Blakely Decl., ¶ 25. Plaintiff submits the
21 requested fee is fair compensation for undertaking complex, risky, expensive, and time-
22 consuming litigation on a purely contingent fee basis. *Id.* Class Counsel has incurred substantial
23 attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal
24 research, conducting extensive informal discovery, analyzing Settlement Class Members’
25 timekeeping and payroll records and other data and documents, creating a comprehensive
26 damages model, preparing for and attending mediation, negotiating and preparing the long-form
27 Settlement Agreement, preparing this Motion, and otherwise litigating the case. *Id.* Class Counsel
28 expect to expend additional attorney time in attending the hearing on this Motion, overseeing the

1 Notice process and fielding questions from Settlement Class Members, preparing the final
2 approval papers, and attending the Final Approval hearing. *Id.*

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

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

16 Additionally, the parties have agreed to designate \$30,000.00 of the Gross Settlement
17 Fund as PAGA civil penalties, of which \$22,500.00 (75%) will be paid to the LWDA, with the
18 remaining \$7,500.00 (25%) for distribution to the Settlement Class, as the PAGA requires such
19 penalties to be allocated per Labor Code § 2699(i). *See* Settlement, §§ I.cc; 3.06(f). Plaintiff
20 submits this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v.*
21 *Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal.
22 2011) (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund
23 settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D.
24 Cal. 2013) (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund
25 settlement).

26 ///

27 ///

28 ///

1 **IV. ARGUMENT**

2 **A. PRELIMINARY APPROVAL IS WARRANTED**

3 California Rule of Court 3.769 conditions settlement of a class action on court approval,
4 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
5 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337
6 (2012) (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
7 adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule
8 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair,
9 adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly
10 in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
11 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the
12 agreement taken as a whole is fair. *See e.g., Hanlon*, supra, 150 F.3d at 1027. There is an initial
13 presumption of fairness where, as here, the Settlement was negotiated at arm’s-length by class
14 counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g.,*
15 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

16 **1. Standard for Preliminary Approval**

17 To make a fairness determination, the Court should consider several factors, including:
18 “the strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further
19 litigation, the risk of maintaining class action status through trial, the amount offered in
20 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
21 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
22 “The list of factors is not exclusive, and the court is free to engage in a balancing and weighing
23 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
24 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and
25 reasonable in light of the overall balance of factors in this case.

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

27 Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff
28 acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As

described above in section II.B., *supra*, L&L presented multiple defenses to Plaintiff's claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

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

c. Risk of Maintaining Class Action Status

Plaintiff has not yet filed his motion for class certification, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk that there would not be a certified class at the time of trial, or if there were, it would consist of a significantly smaller group of employees than the proposed Settlement Class (either due to a narrowing of the class definition in a Court order on a contested motion for class certification, or through settlement agreements entered into by L&L with individual class members by way of *Pick-up-Stix* type settlement agreements³), and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick-up-Stix* process. Thus, this factor, too, supports preliminary approval of the settlement.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a positive recovery for the Settlement Class in the face of hotly

³ In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may enter into pre-certification settlement agreements with individual putative class members in which the putative class members release claims for past unpaid wages and penalties in exchange for consideration. The Court further held that such settlements could preclude those individual employees from recovery in class action litigation against the employer for the same wage claims.

1 disputed claims. Plaintiff conducted an analysis of L&L's potential meal and rest period premium
2 payments owing, unpaid wages due to its unlawful timekeeping policies/practices, alleged regular
3 rate miscalculations, wage statement penalties, waiting time penalties, and PAGA civil penalties.

4 A summary of the results of Plaintiff's exposure analysis are discussed below:

5 First Meal Period Violations: \$132,669

6 Based on Plaintiff's analysis of L&L's timekeeping records, Plaintiff estimated that
7 approximately 25,013 shifts over 6.0 hours contained a non-compliant first meal period. Blakely
8 Decl., ¶ 14. Plaintiff further calculated that the average hourly rate of pay for Settlement Class
9 Members during the Class Period at approximately \$17.68. *Id.* Accordingly, Plaintiff calculated
10 L&L's maximum exposure for first meal periods at \$442,230 (25,013 non-compliant first meal
11 periods * \$17.68 average premium). *Id.*

12 However, as noted above, L&L argues that it maintained compliant written meal period
13 policies throughout the Class Period and provided compliant meal periods in line with those
14 policies. Blakely Decl., ¶ 14. L&L further contends that under *Brinker* it always provided
15 employees the opportunity to take meal periods and is not required to ensure they are taken. *Id.*;
16 *see Brinker, supra*, 53 Cal.4th at 1034 (rejecting "ensure" standard). L&L further argues that the
17 overwhelming majority of first meal period violations were *de minimis* as first meal periods were
18 only late by 5-10 minutes. Blakely Decl., ¶ 14. Finally, L&L maintains Plaintiff's meal period
19 claim is not suited for class certification, since individual inquiries would be needed to assess
20 which employees, if any, took non-compliant or missed meal periods, how many meal periods
21 were non-compliant or missed, the reasons why a particular employee did not take a meal period
22 on a particular shift. *Id.* Based on these defenses, Plaintiff discounted the maximum amount by
23 40% for risk of non-certification and an additional 50% for risk of losing on the merits or failing
24 to recover the full amount sought, to arrive at an estimated exposure of approximately \$132,669.
25 *Id.*

26 Second Meal Period Violations: \$132,035

27 Plaintiff's analysis of the timekeeping data showed that during the Class Period there were
28 approximately 30,174 shifts worked in excess of 10.0 hours that did not reflect a compliant second

meal period. Blakely Decl., ¶ 15. Therefore, Plaintiff calculated L&L's maximum exposure for second meal period violations at approximately \$533,476 (30,174 non-compliant second meal periods * \$17.68 average premium). *Id.*

L&L argues that Plaintiff's theory of liability carried significant risks, based on L&L's arguments that it provided employees the opportunity for second meal periods 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, as they are entitled to do under Labor Code § 512(a). Blakely Decl., ¶ 15. L&L further argue that Plaintiff's second meal period exposure is grossly inflated as Plaintiff already seeks a meal period premium for first meal period violations on many shifts, and Plaintiff cannot recover more than one meal period premium for each workday. *Id.*; see *United Parcel Service, Inc. v. Superior Court*, 196 Cal.App.4th 57, 70 (2011) ("[E]mployees in this case may recover up to two additional hours of pay on a single work day for meal period and rest period violations – one for failure to provide a meal period and another for failure to provide a rest period"). In addition, as with first meal periods, L&L argues this claim would not be certified as requiring individualized inquiries into both the merits and damages. Blakely Decl., ¶ 15. In light of these risks, Plaintiff discounted the maximum amount that the class could potentially recover for second meal periods by 45% for a risk of non-certification, and an additional 55% for a risk of losing on the merits, or having exposure reduced due to L&L's waiver argument, to arrive at an estimated exposure amount of approximately \$132,035. *Id.*

Rest Period Violations: \$147,410

As indicated above, Plaintiff alleges that L&L failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 16. Based on Plaintiff's analysis of L&L's timekeeping records, Plaintiff estimates there were approximately 59,555 shifts in excess of 3.5 hours during the Class Period. *Id.* Accordingly, Plaintiff calculates L&L's maximum potential exposure for rest period violations at approximately \$1,052,932 (59,555 rest period violations * \$17.68 average rest period premium). *Id.*

L&L contends that Plaintiff and Settlement Class Members were authorize and permitted the opportunity for rest periods and that it maintained compliant rest period policies/practices

1 throughout the Class Period. Blakely Decl., ¶ 16. L&L further argues that Plaintiff's rest period
2 claim is not amenable to class treatment, since individual inquiries would be required to determine
3 which employees failed to take rest periods, how many rest periods they failed to take, and the
4 reasons why each employee failed to take rest period(s) on a particular shift. *Id.* These
5 manageability concerns are especially present with respect to rest period claims, L&L argues,
6 given that rest periods are not recorded. *Id.* Given these defenses, Plaintiff discounted this
7 maximum amount by 60% for risk of non-certification and an additional 65% for a risk of being
8 unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated
9 realistic exposure of approximately \$147,410. *Id.*

10 Unpaid Wages Due to Unlawful Timekeeping Policies/Practices: \$10,683

11 Based on Plaintiff's analysis and extrapolation of L&L's timekeeping and payroll record,
12 L&L's timekeeping policies and/or practices resulted in an underpayment of approximately 2,238
13 hours to Plaintiff and other Settlement Class Members. Blakely Decl., ¶ 17. Because employees
14 generally worked shifts of at least 8.0 hours, Plaintiff contends that these unpaid wages should be
15 paid at an overtime rate of pay. *Id.* Accordingly, Plaintiff estimates the maximum potential
16 exposure for unpaid wages due to unlawful timekeeping at approximately \$59,352 (2,238 unpaid
17 hours * \$26.52 average overtime rate). *Id.*

18 However, as stated above, L&L counters that its timekeeping policies/practice complied
19 with California law and that it has always properly compensated Settlement Class Members for
20 all hours worked throughout the Class Period. Blakely Decl., ¶ 17. L&L argues that no pre-shift
21 work was actually being performed, and therefore, any rounded time is not compensable. *Id.*
22 Finally, L&L asserts that Plaintiff would be unable to certify this claim since its timekeeping
23 policies/practices are facially neutral and individualized inquiries would be necessary as to
24 whether employees were in fact underpaid for each workday in question, resulting in an
25 unmanageable series of mini-trials. *Id.* In light of these defenses, Plaintiff discounted this
26 maximum amount by 55% for risk of non-certification and an additional 60% for a risk of being
27 unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated
28 realistic exposure of approximately \$10,683. *Id.*

1 Regular Rate Miscalculations: \$5,670

2 Plaintiff alleges that L&L failed to pay all overtime wages owed to Plaintiff and other
3 employees by failing to include the value of all non-discretionary COVID pay into the “regular
4 rate” of pay. Blakely Decl., ¶ 18. Based Plaintiff’s review of the payroll records, Plaintiff
5 estimates the total underpayment of overtime wages due to the alleged regular rate
6 miscalculations to be approximately \$8,338. *Id.*

7 However, as stated above, L&L argues that it properly included all forms of remuneration
8 when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement
9 Class Members. Blakely Decl., ¶ 18. L&L contends the vast majority of additional payments at
10 issue are discretionary bonuses and thus need not be included in the regular rate. *Id.*; *see also* 29
11 C.F.R. § 778.211 (discretionary bonuses need not be included in regular rate); 29 C.F.R. §
12 778.200(a)(1) (excluding from regular rate “sums paid as gifts; payments in the nature of gifts
13 made at Christmas time or on other special occasions, as a reward for service, the amounts of
14 which are not measured by or dependent on hours worked, production, or efficiency”). L&L
15 further argues that Settlement Class Members received different types of bonuses throughout the
16 Class Period, creating substantive differences among the Settlement Class Members with respect
17 to the incentives received, making class certification unlikely. Blakely Decl., ¶ 18. In light of
18 these defenses, Plaintiff discounted the maximum amount by 15% for risk of non-certification
19 and an additional 20% for a risk of being unsuccessful on the merits or of failing to recover the
20 full amount sought, to arrive at an estimated realistic exposure of approximately \$5,670. *Id.*

21 Unpaid Wages Due to COVID Temperature Screenings: \$9,134

22 Using a conservative 10-minutes per shift estimate, Plaintiff calculated that L&L’s failure
23 to pay for time spent undergoing temperature checks from approximately May 2020 through
24 December 2020 resulted in 1,148 hours of unpaid overtime wages (6,890 shifts * 10 minutes /
25 60). Blakely Decl., ¶ 19. Thus, Plaintiff calculated that L&L maximum potential exposure for
26 unpaid wages due to COVID temperature screenings is approximately \$30,445 (1,148 hours *
27 \$26.52 average overtime rate). *Id.*

28 As stated above, L&L maintains it accurately recorded all time worked by its non-exempt

employees and has properly paid all wages owed for all hours worked, that temperature checks occurred near the time clocks and entrances and resulted in little, if any, off-the-clock time, that mandatory temperature checks ended in December 2020, thereby cutting off liability for this claim, and that individualized inquiries would be required into whether any employee underwent a COVID-19 related temperature check while off-the-clock on any given day, making class certification unlikely. Blakely Decl., ¶ 19. Based on these defenses, Plaintiff discounted this maximum amount by 40% for risk of non-certification and an additional 50% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately \$9,134. *Id.*

Wage Statement Penalties: \$26,880

Plaintiff's analysis reflected that there were approximately 48 unique employees and approximately 2,746 pay periods worked during the liability period applicable to Plaintiff's wage statement claim. Blakely Decl., ¶ 20. Those penalties are calculated as \$50 for each "initial" violation and \$100 for each "subsequent" violation, with a maximum of \$4,000 per employee. *See* Labor Code § 226(e). *Id.* Plaintiff calculated L&L's potential wage statement exposure using the maximum of \$4,000 per employee at approximately \$192,000 (48 Employees * \$4,000 max. penalty). *Id.*; *see also* Labor Code § 226(e).

In light of L&L's arguments that no violations occurred, that employees suffered no "injury," that any alleged violations were not "knowing and intentional," that the wage statements always accurately reflected hours worked and amounts paid to employees, and that not every employee would be entitled to the maximum penalties of \$4,000, as well as risks associated with Plaintiff's underlying claims discussed above, Plaintiff discounted the maximum exposure by 60% for risk of non-certification, and by an additional 65% for risk of being unsuccessful on the merits, for an estimated realistic exposure of approximately \$26,880. Blakely Decl., ¶ 20.

Waiting Time Penalties: \$36,235

L&L's records reflected approximately 61 former Settlement Class Members separated from their employment with L&L and are therefore eligible for waiting time penalties. Blakely Decl., ¶ 21. Based on an hourly rate of \$17.68, Plaintiff estimated the average waiting time penalty

per former employee to be \$4,243 (\$17.68 * 8 hours per day * 30 days). *Id.* Therefore, Plaintiff calculated L&L's maximum exposure for potential waiting time penalties to be approximately \$258,823 (61 former employees * \$4,243 average penalty). *Id.*

L&L presented several defenses to this claim, most notably their assertion that because they possessed good-faith defenses to the underlying claims, any failure to pay wages was not "willful" as a matter of law. Blakely Decl., ¶ 21. L&L further asserts Plaintiff's waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. *Id.* Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome L&L's defenses, both as to class certification and on the merits, as to his underlying claims. *Id.* To account for L&L's defenses, Plaintiff discounted the maximum exposure by 60% for the risk of non-certification, and an additional 65% for risk of losing on the merits, and/or not receiving the maximum penalties sought, to arrive at an estimated exposure of approximately \$36,235. *Id.*

PAGA Penalties: \$32,952

Plaintiff estimated a maximum total PAGA exposure at approximately \$274,600 (2,746 pay periods * \$100 "initial" penalty). Blakely Decl., ¶ 22.; *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from the underlying wage and hour violations discussed above, which L&L vigorously disputes. Blakely Decl., ¶ 22.; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its underlying claims). L&L also asserts the Court would drastically reduce any award of PAGA penalties as "confiscatory." Blakely Decl., ¶ 22.; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum figure by 60% for risk of losing on the merits and/or not recovering a PAGA penalty for every pay period, and an additional 70% to account for the possibility of this Court reducing penalties, to arrive at an

1 estimated exposure of approximately \$32,952. Blakely Decl., ¶ 22.

2 Using these estimated figures for each of the claims described above, Plaintiff predicted
3 that the potential recovery for the Settlement Class would be approximately \$533,668. Blakely
4 Decl., ¶ 23. The proposed Settlement of \$467,500 therefore represents approximately 87.6% of
5 the reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is
6 appropriate since the Settlement will provide significant monetary relief to the Settlement Class,
7 which is consistent with what Plaintiff’s counsel believes could have been recovered had the case
8 proceeded through trial.

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

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

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

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

28 ///

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

2 The proposed settlement reflects approximately 87.6% of the estimated recovery the
3 Settlement Class could reasonably expect in light of the significant litigation risks, and will
4 provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the
5 percentage of the liability exposure recovered in this case far exceeds percentages routinely
6 approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL
7 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential
8 damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement
9 representing about one-sixth of potential recovery); *Nat’l Rural Telecomm. Coop. v. DirecTV,*
10 *Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“it is well-settled law that a proposed settlement may
11 be acceptable even though it amounts to only a fraction of the potential recovery that might be
12 available to the Settlement Class members at trial”). Further, the average Individual Settlement
13 Payment of approximately \$2,031.88 significantly exceeds average payments achieved in other
14 wage and hour class action settlements.⁴ Thus, Plaintiff submits that the proposed settlement is
15 within the range of possible approval, such that notice should be provided to the Settlement Class
16 Members so that they can consider the Settlement. The Court will have the opportunity to again
17

18 ⁴ *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 assess the reasonableness of the Settlement after the Settlement Class Members have had the
2 opportunity to opt-out or object.

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

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

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

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

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

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

27 ///

28 ///

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

2 A class is “ascertainable” where the members “may be readily identified without
3 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
4 *Corp.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is
5 defined as all current and former hourly employees who worked for L&L in California at any
6 time during the Class Period. *See Settlement*, § I. (e). Therefore, Settlement Class Members can
7 be identified from L&L’s personnel and employment records. Based on information provided by
8 L&L, Plaintiff understands that the Settlement Class consists of approximately 115 current and
9 former non-exempt employees. *See Blakely Decl.*, ¶ 13. It would therefore be impracticable to
10 bring all Settlement Class Members before the Court, or for each Settlement Class Member to
11 bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See,*
12 *e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a
13 trust sufficiently numerous).

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

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

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

23 The typicality requirement is satisfied where class representatives have claims that are
24 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* 191
25 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the
26 same goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical
27 of those held by the Settlement Class Members. First, L&L employed Plaintiff as an hourly
28 employee in the State of California during the Class Period, and Plaintiff was subject to L&L’s

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

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

10 The adequacy requirement examines conflicts of interest between named parties and the
11 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
12 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the
13 Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class,
14 and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v.*
15 *Bank of America* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no
16 indication that Class Counsel were not qualified and the named plaintiff had no interests
17 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
18 and hour class action litigation. *See* Blakely Decl., ¶¶ 2-6; Haines Decl., ¶¶ 3-8.

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

20 This Court should order distribution to the Settlement Class of the proposed Class Notice,
21 in English and Spanish, by U.S. Mail, postage prepaid, using last known mailing address
22 information provided by L&L. *See* Settlement, ¶ 3.02. This manner of giving notice is the “best
23 notice practicable” under the circumstances because it provides “individual notice to all members
24 who can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin* 417 U.S. 156,
25 173 (1974). Here, the Parties have agreed that the Settlement be administered by ILYM Group,
26 Inc. (“ILYM”), an experienced class action settlement administrator. *See generally* Declaration
27 of Anthony Rogers (“Rogers Decl.”) and attached exhibits. Settlement Class Members’ addresses
28 will be ascertainable through L&L’s personnel and payroll records, which L&L will provide to

1 ILYM within twenty-one (21) days of preliminary approval of the Settlement. *See* Settlement, ¶
2 3.03. Within ten (10) business days from receipt of this information, the Settlement Administrator
3 will run the names of all Settlement Class Members through the National Change of Address
4 (“NCOA”) database to determine any updated addresses for Settlement Class members and mail
5 a Notice Packet to each Settlement Class Member at his or her last known address. *Id.* To the
6 extent that any notices are returned, ILYM will perform a “skip trace” to track any Settlement
7 Class Member’s current mailing address. *Id.*

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

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

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

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

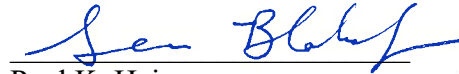
1 **V. CONCLUSION**

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

5
6 Dated: July 26, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

7
8 By:



Paul K. Haines
Sean M. Blakely
Joel M. Gordon
Attorney for Plaintiff