

David Mara, Esq., (SBN 230498)
Matthew Crawford, Esq., (SBN 310230)
MARA LAW FIRM, PC
2650 Camino Del Rio North, Suite 302
San Diego, CA 92108
Telephone: 619.234.2833
Facsimile: 619.234.4048

Attorneys for Plaintiff GERARDO DIAZ,
on behalf of himself, all others similarly
situated, and on behalf of the general public.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

GERARDO DIAZ, on behalf of himself, all
others similarly situated, and on behalf of the
general public,

Plaintiffs,

v.

CMC AMERICA, LLC; and DOES 1
through 100,

Defendant.

Case No.: 37-2022-00019716-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: January 26, 2024

Time: 9:00 a.m.

Dept.: C-73

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL/PROCEDURAL BACKGROUND.....	2
III.	LITIGATION HISTORY/PARTIES CONTENTIONS	2
a.	Discovery and Investigation.....	2
b.	The Parties’ Staunchly Conflicting Positions.....	3
i.	Unpaid Wages	3
ii.	Meal and Rest Periods	4
iii.	Reimbursement.....	5
c.	The Parties Agreed to Engage in Settlement Discussions.....	6
d.	The Terms of the Proposed Settlement	6
i.	Deductions From the Settlement	6
ii.	Calculation of the Settlement Payments to Participating Class Members	7
iii.	Notice to the Class.....	8
iv.	Distribution of Funds.....	8
v.	Release of Claims	9
IV.	ARGUMENT	11
a.	Class Action Settlements are Subject to Court Review and Approval Under the California Rules of Court	11
b.	The Settlement is Fair, Reasonable, and Adequate	11
i.	The Settlement was Reached as a Result of Arm’s Length Negotiations	12
ii.	The Settlement is the Result of Thorough Investigation and Discovery.....	12
iii.	Counsel for Both Parties are Experienced in Similar Litigation	12
iv.	The Proposed Settlement is a Reasonable Compromise of Claims.....	13

1	1. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiffs’ Case and	
2	the Risks and Costs of Further Litigation.....	13
3	2. Exposure and the Risks for Each Claim	14
4	A. Unpaid Wages / Overtime.....	14
5	B. Meal and Rest Periods	15
6	C. Reimbursement	16
7	D. PAGA.....	17
8	3. The Settlement Amount of \$150,000 is Reasonable.....	18
9	c. Provisional Class Certification Should be Granted	19
10	i. The Proposed Settlement Class is Ascertainable	20
11	ii. The Proposed Settlement Class is Sufficiently Numerous	20
12	iii. The Commonality Requirement is Met	21
13	iv. The Typicality Requirement is Met.....	22
14	v. The Adequacy Requirement is Met.....	22
15	vi. Notice to Class Members Complies with California Rule of Court 3.769(f).....	23
16	V. CONCLUSION	23
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases

Aguilar v. Cintas Corp. No. 2

(2006) 144 Cal. App. 4th 121..... 14

Alberts v. Aurora Behavioral Health Care

(2015) 241 Cal.App.4th 388..... 16

Augustus v. ABM Security Services, Inc.

(2016) 2 Cal.5th 257..... 4

Avila v. Cold Spring Granite Co.

(E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 ... 18

Bell v. Farmers Ins. Exch.

(2004) 115 Cal. App. 4th 715..... 10

Bono Enterprises, Inc. v. Bradshaw

(1995) 32 Cal. App. 4th 968..... 3

Bowles v. Superior Court

(1995) 44 Cal.2d 574..... 20, 21

Boyd v. Bechtel Corp.

(N.D. Cal. 1979) 485 F. Supp. 610 12

Brinker Restaurant Corp. v. Superior Court

(2012) 53 Cal. 4th 1004..... 3, 12

Classen v. Weller

(1983) 145 Cal.App.3d 27..... 22

Dunbar v. Albertson's Inc.

(2006) 141 Cal. App. 4th 1422..... 14

Dunk v. Ford Motor Co.

(1996) 48 Cal.App.4th 1794..... 11, 13, 20

Gay v. Waiters' & Dairy Lunchmen's Union

(N.D. Cal. 1980) 489 F. Supp. 282 20

1	<i>Gentry v. Superior Court</i>	
2	(2007) 42 Cal.4th 443.....	21
3	<i>Ghazaryan v. Diva Limousine, Ltd.</i>	
4	(2008) 169 Cal.App.4th 1524.....	21
5	<i>Glob. Minerals & Metals Corp. v. Superior Court</i>	
6	(2013) 113 Cal.App.4th 836.....	20
7	<i>Green v. Obledo</i>	
8	(1981) 29 Cal.3d 126.....	11
9	<i>Hanlon v. Chrysler Corp.</i>	
10	(9th Cir. 1998) 150 F.3d 1011.....	19, 21, 22
11	<i>Harris v. Superior Court</i>	
12	(2007) 154 Cal. App. 4th 164.....	14
13	<i>Hebbard v. Colgrove</i>	
14	(1972) 28 Cal.App.3d 1017.....	21
15	<i>Henderson v. Ready to Roll Transportation, Inc.</i>	
16	(2014) 228 Cal.App.4th 1213.....	20
17	<i>In re Beef Industry Antitrust Litigation</i>	
18	(5th Cir. 1979) 607 F. 2d 167.....	11
19	<i>In re Cellphone Fee Termination Cases</i>	
20	(2010) 186 Cal. App. 4th 1380.....	10
21	<i>Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n</i>	
22	(1981) 452 U.S. 905	11
23	<i>Iskanian v. CLS Transp. Los Angeles, LLC</i>	
24	(2014) 59 Cal.4th 348.....	21
25	<i>Jaimez v. Daiohs USA, Inc.</i>	
26	(2010) 181 Cal.App.4th 1286.....	16
27	<i>Kullar v. Foot Locker Retail, Inc.</i>	
28	(2008) 168 Cal.App.4th 116.....	13

1	<i>Linder v. Thrifty Oil Co.</i>	
2	(2003) 23 Cal.4th 429.....	22
3	<i>McGhee v. Bank of America</i>	
4	(1976) 70 Cal.App.3d 442.....	22
5	<i>Mendiola v. CPS Security Solutions, Inc.</i>	
6	(2015) 60 Cal. 4th 833.....	3
7	<i>Morillion v. Royal Packing Co.</i>	
8	(2000) 22 Cal. 4th 575.....	3, 4
9	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i>	
10	(2010) 186 Cal.App.4th 399.....	13
11	<i>Officers for Justice v. Civil Serv. Comm’n</i>	
12	(9th Cir. 1982) 688 F.2d 615.....	19
13	<i>Rebney v. Wells Fargo Bank</i>	
14	(1990) 220 Cal.App.3d 1117.....	19
15	<i>Romero v. Producers Dairy Foods</i>	
16	(E.D. Cal. 2006) 235 F.R.D. 474.....	21
17	<i>Rose v City of Hayward</i>	
18	(1981) 126 Cal.App.3d 926.....	20
19	<i>Sav-On v. Superior Court</i>	
20	(2004) 34 Cal.4th 319.....	14, 21
21	<i>Sevidal v. Target Corp.</i>	
22	(2010) 189 Cal.App.4th 905.....	20
23	<i>Tech-Bilt v. Woodward-Clyde & Associates</i>	
24	(1985) 38 Cal.3d 488.....	13
25	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
26	(2012) 203 Cal. App. 4th 1112.....	17
27	<i>Troester v. Starbucks Corp.</i>	
28	(2018) 5 Cal. 5th 829.....	3

1	<i>Vasquez v. Superior Court</i>	
2	(1971) 4 Cal.3d 800.....	11
3	<i>Walsh v. IKON Solutions, Inc.</i>	
4	(2007) 148 Cal. App. 4th 1440.....	14
5	<i>Wehner v. Syntex Corp.</i>	
6	(N.D. Cal. 1987) 117 F.R.D. 641	22
7	<i>Wershba v. Apple Computers, Inc.</i>	
8	(2001) 91 Cal.App.4th 2.....	19, 20
9	Statutes	
10	California Civil Procedure Code § 382.....	12, 22
11	California Labor Code § 2699(e)(2)	20
12	California Labor Code § 2699, subdivision (e)(2).....	19
13	California Labor Code § 2802	6
14	California Labor Code § 2802(a).....	6
15	California Labor Code §§ 1194.2	20
16	California Labor Code §§ 203	20
17	California Labor Code §§ 226	20
18	California Labor Code §§ 558(a).....	20
19	Code of Civil Procedure § 877.6,.....	14
20	Federal Rule 23	11, 22
21	Federal Rule of Civil Procedure 23(a)	22
22	Wage Order 1-2001, Subd. 2(K).....	3
23	Other Authorities	
24	<i>Newberg on Class Actions</i> , 4th ed. § 3:15, p.335	22
25		
26		
27		
28		

I. INTRODUCTION

Plaintiff Gerardo Diaz (“Plaintiff”), on behalf of himself and the approximately 25-member putative class, respectfully request that this Court preliminarily approve the Joint Stipulation and Settlement Agreement¹ (“Settlement Agreement”) entered into between Plaintiff and Defendant CMC America, LLC (“Defendant”) (Plaintiff and Defendant are collectively referred to as the “Parties”). The Parties’ Settlement Agreement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary \$150,000 Gross Settlement Amount (“GSA”). The proposed class is comprised of hourly, non-exempt technicians, repairmen, mechanical technicians, machinery technicians, machinery repairmen, or similar job designations and titles, and all other similarly situated non-exempt, hourly employees who worked for Defendant during the Class Period (“Class Members”). The Class Period is the time period beginning on May 24, 2018 through January 17, 2023.

It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this proposed settlement of \$150,000 – **which is estimated to pay class members an average settlement share of approximately \$3,000**² – is well within the range of reasonableness. Moreover, the proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed settlement. The Settlement Agreement was the product of non-collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate to all. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms of the Settlement Agreement; (2)

¹ The Settlement Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

² \$75,000 NSA / 25 class members = \$3,000 average payout per Class Member.

1 provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4)
2 appointment of Mara Law Firm, PC as Class Counsel; (5) approval of the Parties' proposed notice of
3 class action settlement³ (referred to herein as the "Class Notice" or "Notice") and method of notifying
4 the Class about the settlement; and (6) set a hearing date for final approval.

5 **II. FACTUAL/PROCEDURAL BACKGROUND**

6 Defendant provides machinery install, maintenance, and repair services to its customers in the
7 State of California. In order to carry out its business, Defendant employs hourly employees, like
8 Plaintiff and Class Members. Mara Dec. ¶ 9.

9 On May 24, 2022, Plaintiff sent notice to the LWDA of his intent to pursue various wage and
10 hour claims against Defendant on behalf of similarly situated aggrieved employees. Shortly thereafter,
11 Plaintiff filed a putative class action complaint against Defendant in the San Diego County Superior
12 Court, alleging causes of action for: 1) Failure to Pay All Straight Time Wages; 2) Failure to Pay
13 Overtime; 3) Failure to Provide Meal Periods; 4) Failure to Authorize and Permit Rest Periods; 5)
14 Failure to Provide Accurate Itemized Wage Statements; 6) Failure to Pay all Wages Due at the Time
15 of Termination; 7) Failure to Reimburse Business Expenses; and 8) Violation of Unfair Competition
16 Law. The complaint was later amended to add an additional cause of action for Violations of the
17 Private Attorneys General Act of 2004 ("PAGA") on or around November 22, 2022. Mara Dec. ¶ 10.

18 Defendant denies the allegations of the action in its entirety, deny any liability or wrongdoing
19 of any kind associated with the claims alleged in this action, and further deny that, for any purpose
20 other than settling this action, this matter is appropriate for class treatment. Defendant further contends
21 that they have complied with all applicable California laws, the California Labor Code, the applicable
22 California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this
23 matter were to be litigated further, they would have strong defenses to oppose class certification and
24 succeed on the merits of Plaintiffs' causes of action. Mara Dec. ¶ 11.

25 **III. LITIGATION HISTORY/PARTIES CONTENTIONS**

26 **a. Discovery and Investigation**

27 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that
28

³ The Class Notice is attached to the Settlement Agreement as **Exhibit A**.

1 were needed to evaluate the case. These documents included requests for time and wage records for
2 the Class, employee handbooks, policies, and practices in place during the class period, as well as data
3 surrounding the number of current and former employees. Mara Dec. ¶ 12.

4 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
5 production of hundreds of documents and hundreds of lines of data, including Defendant's employee
6 handbooks, policies, and practices, and a sampling of wage and time records for Plaintiff and Class
7 Members. Using the time and wage records for the Class provided and the data surrounding the number
8 of current and former employees, Plaintiff was able to establish a potential exposure model to utilize
9 for the purposes of settlement negotiations. Mara Dec. ¶ 13.

10 **b. The Parties' Staunchly Conflicting Positions**

11 **i. Unpaid Wages**

12 Based upon the discovery conducted, Plaintiff contends – and Defendant denies – that
13 Defendant failed to pay all wages owed to Class Members. Employees must be paid for all “hours
14 worked,” as that phrase is defined in the Wage Orders and interpreted by California courts. Hours
15 worked is defined as “the time during which an employee is subject to the control of an employer, and
16 includes all the time the employee is suffered or permitted to work, whether or not required to do so.”
17 Wage Order 1-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833
18 (2015).

19 Under this standard, “it is only necessary that the worker be subject to the control of the
20 employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575,
21 584 (2000). The *Morillion* Court reasoned that an employee is under the employer's control and
22 entitled to compensation when the employer “‘directs, commands or restrains’ an employee.”
23 *Morillion*, 22 Cal. 4th at 583 (*quoting Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975
24 (1995)). The California Supreme Court further found that “[a]n employer that requires its employees
25 to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the
26 obligation to compensate the employee for that time by invoking the de minimis doctrine.” *Troester*
27 *v. Starbucks Corp.*, 5 Cal. 5th 829, 847 (2018). Off-the-clock claims are governed by a known or
28 should have known standard. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,

1 1051 (“liability is contingent on proof [the employer] knew or should have known off-the-clock work
2 was occurring”) (citing *Morillion*, 22 Cal. 4th at 585).

3 Here, Plaintiff contends that Defendant requires Class Members to wait in line and go through
4 mandatory security checks when they enter and exit the work facility while off the clock and not being
5 paid. As a result, Plaintiff asserts that Defendant underpays workers every shift by failing to
6 compensate workers for the time spent going through these security checks. Plaintiff alleges that these
7 mandatory security checks and the lines that precede them take approximately five minutes total to go
8 through when arriving and leaving for any given shift. Mara Dec. ¶ 14.

9 Defendant argues that Class Members are not subject to any security checks on their way into
10 the facilities, and simply pass through security without being impeded whatsoever. When exiting the
11 facility, Class Members are only stopped by security if they are carrying a non-clear bag, and this
12 completely non-invasive security check takes only a matter of seconds, not minutes. As such,
13 Defendant contends that we would have to ask every Class Member what their experience was
14 regarding security checks, raising a predominance of individualized issues. Mara Dec. ¶ 15.

15 **ii. Meal and Rest Periods**

16 Plaintiff contends that Defendant fails to provide Class Members with lawful meal and rest
17 periods. The California Supreme Court succinctly described the mandate to provide meal periods:
18 “Employers must afford employees uninterrupted half-hour periods in which they are relieved of any
19 duty or employer control and are free to come and go as they please.” *Brinker Rest. Corp. v. Superior*
20 *Court* (2012) 53 Cal.4th 1004, 1037 (“*Brinker*”). In *Augustus v. ABM Security Services, Inc.* (2016) 2
21 Cal.5th 257, 260 (“*Augustus*”), the California Supreme Court ruled that these standards applicable to
22 providing meal periods were equally applicable in the context for the mandate of 10 minute rest
23 periods. Failure to provide a lawful meal or rest period shall result in the employer paying “the
24 employee one additional hour of pay at the employee’s regular rate of compensation for each workday
25 that the meal or rest period is not provided.” Cal. Lab. Code § 226.7(c)

26 Plaintiffs contend that Defendants fail to permit employees to leave the premises for meal and
27 rest periods and use the time effectively for his or her own purposes free from employer control. As
28 no one other than Class Members are capable of servicing the machinery at their respective work

1 location, Class Members were essentially on call to take care of the machines during meal and rest
2 periods, and therefore could not leave the work premises. Employees are thereby – as a matter of
3 policy and practice – prevented from using all their break time free of employer control for off-
4 premises pursuits. For this reason, Defendants do not relinquish all control over employees during
5 their meal and rest periods in violation of California law. Mara Dec. ¶ 16.

6 Defendant disputes these claims and contends that Class Members are all provided compliant
7 meal and rest periods. First, Defendant points out that its written meal and rest periods policies are
8 facially compliant and that they relieve Class Members of all work duties and responsibilities during
9 meal and rest periods. Second, Defendant argues that Plaintiff will be unable to demonstrate any sort
10 of practice that prevents Class Members from leaving the premises despite the presence of the lawful
11 written policies. Defendant claims it has spoken to numerous Class Members who say they were able
12 to leave the work premises during meal and rest periods, which both refutes Plaintiff's claim and
13 creates individualized issues that would predominate and any trial, rendering it unmanageable. Based
14 on the foregoing, Defendant contends that Plaintiff's meal and rest period claims cannot be certified
15 and will not succeed on the merits. Mara Dec. ¶ 17.

16 **iii. Reimbursement**

17 Plaintiffs further contend that Defendant fails to reimburse Class Members for business
18 expenses. Under Labor Code § 2802, Plaintiff argues that Defendant is required to reimburse Plaintiff
19 and Class Members for a portion of their personal cell phone bills. Labor Code § 2802(a) reads:

20 An employer shall indemnify his or her employee for all necessary expenditures or
21 losses incurred by the employee in direct consequence of the discharge of his or her
22 duties, or of his or her obedience to the directions of the employer, even though
23 unlawful, unless the employee, at the time of obeying the directions, believed them to
24 be unlawful.

25 Plaintiff contends that the primary method of communication Defendant uses to contact Plaintiff and
26 Class Members throughout the day is their personal cell phones, and that Defendant is liable for a
27 reasonable percentage of their cell phone bills under § 2802. Mara Dec. ¶ 18.

28 Defendant contends that it never has required Plaintiff or other Class Members to use their
personal cell phone for business purposes. Defendant claims that it provides Class Members with
company issued laptop at their respective workstations that it expects Class Members to use to

1 communicate with Defendant as needed throughout the workday. Defendant further contends that it
2 expects Class Members to use the company laptops when communicating with their supervisors and
3 that any use of a Class Members' personal cell phone for these communications was solely that Class
4 Members' choice, and that Defendant never mandated or required the use of personal cell phones for
5 business purposes. Mara Dec. ¶ 19.

6 As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiff's
7 claims.

8 **c. The Parties Agreed to Engage in Settlement Discussions**

9 The Parties agreed to engage in settlement discussions. Based on these discussions and the
10 informal discovery conducted, the Parties were ultimately able to reach an agreement on the key terms
11 of the settlement on or around September 11, 2023. Since then, the Parties have met and conferred
12 regarding all the terms of the settlement and finalized their agreement in the Parties' Settlement
13 Agreement. The Parties seek preliminary approval of the Settlement Agreement in the instant motion.
14 Mara Dec. ¶ 20; **Exhibit 1**.

15 **d. The Terms of the Proposed Settlement**

16 Under the terms of the proposed settlement, Defendant will create a settlement fund of
17 \$150,000.

18 **i. Deductions From the Settlement**

19 The Parties have agreed (subject to and contingent upon the Court's approval) that this action
20 be settled and compromised for the non-reversionary total sum of \$150,000, which includes, subject
21 to Court approval: (a) attorneys' fees of up to \$50,000 (one-third of the GSA) to compensate Class
22 Counsel for work already performed and all work remaining to be performed in documenting the
23 settlement, administrating the settlement, and securing Court approval; (b) litigation expenses
24 estimated not to exceed, \$5,000;⁴ (c) an enhancement payment to the named class representative,
25 Gerardo Diaz, in a sum not to exceed \$10,000 in consideration for agreeing to a general release of his
26 claims against Defendant which is broader than that of other class members, and in recognition of their
27

28 ⁴ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the
amount of actual expenses incurred during the litigation of this case. Should the actual expenses exceed
\$5,000, Plaintiff will only seek reimbursement of costs up to \$5,000.

1 efforts in prosecuting their actions; (d) claims administration fees and expenses to Apex Class Action
2 LLC (hereinafter “Apex”), estimated not to exceed approximately \$5,000;⁵ and (e) PAGA payment of
3 \$5,000 allocated to Plaintiff’s PAGA claims.

4 **ii. Calculation of the Settlement Payments to Participating Class Members**

5 After all Court-approved deductions from the GSA, it is estimated that \$75,000 (“Net
6 Settlement Amount” or “NSA”), less all applicable employee payroll taxes⁶, will be distributed to each
7 Participating Class Member.⁷ Subject to the terms and conditions of the settlement, the Settlement
8 Administrator will calculate and issue Individual Class Settlement Shares based on the following
9 formula:

10 Each Participating Class Member will receive a proportionate share of the Net
11 Settlement Amount that is equal to (i) the number of weeks he or she worked for
12 Defendant, based on the Class Data provided by Defendant, divided by (ii) the total
13 number of weeks worked by all Participating Class Members based on the same Class
14 Data, which is then multiplied by the Net Settlement Amount. One day worked in a
15 given week will be credited as a work week for purposes of this calculation. Therefore,
the value of each Class Member’s Individual Settlement Share ties directly to the
amount of weeks that he or she worked. **Exhibit 1** attached to the Mara Dec. at Section
III (57)(a)(i).

16 Furthermore, the Settlement allocates \$5,000 in consideration for the settlement of Plaintiff’s
17 PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who
18 performed work for Defendant from May 24, 2021 through January 17, 2023 (“PAGA Period”) are
19 also deemed “Aggrieved Employees” and able to recover their share of the civil penalties under the
20 settlement. 75% of this \$5,000, or \$3,750, will be paid to the LWDA, while the remaining 25%, or
21 \$1,250, will be distributed to the Aggrieved Employees. The Settlement Administrator will calculate
22 and issue Individual PAGA Settlement Shares based on workweeks, just as with the class payments,
23 but only for the PAGA Period of May 24, 2021 through January 17, 2023. **Exhibit 1** attached to the

24 ⁵ Apex will present to the Court a declaration in conjunction with the final approval motion outlining
25 the costs of the settlement administration process. If the settlement administration costs are lower than
26 the amount allocated in the Settlement Agreement, the difference will be added to the Net Settlement
Amount for distribution to Participating Class Members.

27 ⁶ The employer’s share of payroll taxes due on the portion of the Individual Settlement Payments that
is allocated to wages shall be paid by Defendant separately and in addition to the GSA. **Exhibit 1**
28 attached to the Mara Dec. at Section I (19).

⁷ Participating Class Members are Class Members who do not submit a valid and timely request to
exclude themselves from this Settlement. **Exhibit 1** attached to the Mara Dec. at Section I (34).

1 Mara Dec. at Section III (58)(a)(i).

2 The precise number of compensable weeks worked per class member will not be known until
3 the administrator tabulates them, following preliminary approval. Under no circumstances will any
4 portion of the \$150,000 settlement revert to Defendant and one hundred percent (100%) of the NSA
5 is available for Class Members to claim.

6 The Individual Class Settlement Shares will be divided into a “wage portion” to compensate
7 Participating Class Members for alleged unpaid wages and a “non-wage portion” to compensate
8 Participating Class Members for alleged interest and penalties. Participating Class Members’
9 individual settlement shares will be apportioned as follows: one-third wages, one-third interest, and
10 one-third penalties. The Individual PAGA Settlement Shares will be apportioned as one-hundred
11 percent (100%) penalties.

12 **iii. Notice to the Class**

13 Upon entry of the order of the Court granting preliminary approval of this Agreement,
14 Defendant shall provide the Settlement Administrator with an electronic database containing the name
15 and last known address, telephone number, social security number, and the number of workweeks of
16 each Class Member within ten (10) business days for purposes of mailing the Notice of Class Action
17 Settlement to the Class. Upon receipt of the class data, the Settlement Administrator will perform a
18 search based on the National Change of Address Database to update and correct any known or
19 identifiable address changes. Within ten (10) business days of receipt of the class data, the Settlement
20 Administrator shall mail copies of the Notice of Class Action Settlement to all Class Members via
21 regular First-Class U.S. Mail. Class Members shall have thirty (30) days after the Class Notices are
22 mailed to respond by submitting a challenge to the number of workweeks attributed to them,
23 submitting an objection, or requesting to be excluded from the Settlement Agreement.

24 **iv. Distribution of Funds**

25 No later than ten (10) business days after the Effective Final Settlement Date⁸, Defendant shall
26

27 ⁸ “Effective Final Settlement Date” of the Settlement means when the final approval of the settlement
28 can no longer be appealed, or, if there are no objectors and no plaintiffs in intervention at the time the
court grants final approval of the settlement, the date the court enters judgment granting final approval
of the settlement.

1 provide the GSA to the Settlement Administrator to fund the Settlement and the employer's share of
2 payroll taxes due on the portion of the Individual Settlement Payments that is allocated to wages. Not
3 later than ten (10) business days after receiving the funds from Defendant, the Settlement
4 Administrator shall disburse: (1) the Individual Settlement Shares to each Class Member and
5 Aggrieved Employee; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys'
6 fees and costs, as approved by the Court; (3) the Enhance Payment paid to the Class Representative,
7 as approved by the Court; (4) the Administration Costs, as approved by the Court; and (5) the PAGA
8 Payment to the LWDA and to Aggrieved Employees, as approved by the Court.

9 Class Members must cash or deposit their Individual Settlement Payment checks within one
10 hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not
11 redeemed or deposited within one hundred and eighty (180) calendar days after mailing, the Settlement
12 Administrator will transmit the funds to the State of California Controller's Office under the
13 Unclaimed Property Statutes in the name of the Class Member.

14 v. Release of Claims

15 As of the Effective Final Settlement Date, the Class Representative and the Class Members
16 will release the Released Class Claims:

17 Any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs,
18 expenses, attorney's fees, damages, action or causes of action of whatever kind or
19 nature, whether known or unknown, contingent or accrued, that are alleged or could
20 have been alleged based upon a reasonable interpretation of the facts alleged in the First
21 Amended Complaint against Defendant, including, but not limited to, 1) Failure to Pay
22 All Straight Time Wages; 2) Failure to Pay Overtime; 3) Failure to Provide Meal
23 Periods; 4) Failure to Authorize and Permit Rest Periods; 5) Failure to Provide Accurate
24 Itemized Wage Statements; 6) Failure to Pay all Wages Due at the Time of
25 Termination; 7) Failure to Reimburse Business Expenses; and 8) Violation of Unfair
26 Competition Law. **Exhibit 1** attached to the Mara Dec. at Section I (37).

27 As of the Effective Final Settlement Date, the Class Representative and the Aggrieved
28 Employees will release the Released PAGA Claims:

Any and all claims for civil penalties under the California Labor Code and the Private
Attorneys General Act predicated upon the Labor Code violations asserted, as well as
any potential penalties, interest or attorneys' fees associated with those violations under
California law, to the extent such claims are predicated on claims made or that could
have been made based on the facts and circumstances alleged in the First Amended
Complaint and Plaintiff's notice to the LWDA, including, but not limited to, 1) Failure

1 to Pay All Straight Time Wages; 2) Failure to Pay Overtime; 3) Failure to Provide Meal
2 Periods; 4) Failure to Authorize and Permit Rest Periods; 5) Failure to Provide Accurate
3 Itemized Wage Statements; 6) Failure to Pay all Wages Due at the Time of
4 Termination; 7) Failure to Reimburse Business Expenses; and 8) Failure to Pay Wages
Twice Per Month. **Exhibit 1** attached to the Mara Dec. at Section I (38).

5 In addition, Plaintiff agreed to a general release of his claims against Defendant. *See Exhibit*
6 **1** attached to the Mara Dec. at Section III (64). At final approval, Class Counsel will seek approval of
7 this Enhancement Payment to the named Plaintiff in the sum of \$10,000. As will be detailed at final
8 approval, the requested enhancement is reasonable in light of the broad general release Plaintiff is
giving to Defendant in exchange for the \$10,000 payment.

9 In addition, this payment is further supported by the fact that plaintiffs are often subjected to
10 the stigma associated with bringing these types of lawsuits. In this age of technology, employers
11 engage in thorough background checks on their employees. As these case filings are all public record,
12 a simple “Google” search is all it would take for Plaintiff’s name to appear associated with these
13 pending lawsuits against their former employers. This could be a significant factor in any employer’s
14 decision to hire Plaintiff in the future.

15 Plaintiff took it upon himself to delay recovery of his individual wage and hour claims by
16 proceeding with class and representative actions, with a full understanding of the risks involved.
17 Plaintiff was fully aware that class action and representative litigation would cause Defendant to incur
18 hefty costs throughout the litigation, and that if he was unsuccessful in these cases, may be liable for
19 some, or even all, of these costs. Despite this knowledge, Plaintiff pushed forward with the litigation;
20 he was always readily available by phone and fully participated every step of the way throughout the
21 entirety of this process.

22 Courts routinely approve service payments, or incentive awards, to compensate named
23 plaintiffs for the services they provide and the risks they incur during class litigation. *See In re*
24 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; see also *Bell v. Farmers Ins.*
25 *Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives);
26 Manual § 21.62 n.971 (noting that service payments are warranted). Based on the foregoing, the
27 \$10,000 payment to the named Class Representative is fair, appropriate and justified as part of the
28 overall settlement.

1 **IV. ARGUMENT**

2 **a. Class Action Settlements are Subject to Court Review and Approval Under the**
3 **California Rules of Court**

4 Rule 3.769 requires court approval for class action settlements.⁹ “Before final approval, the
5 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,
6 Rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class
7 settlements:

8 (a) A settlement or compromise of an entire class action, or a cause of action in a
9 class action, or as to a party, requires the approval of the court after hearing.

10 (c) Any party to a settlement agreement may serve and file a written notice of
11 motion for preliminary approval of the settlement. The settlement agreement
12 and proposed notice to class members must be filed with the motion, and the
13 proposed order must be lodged with the motion.

14 Courts act within their discretion in approving settlements that are fair, not collusive, and take into
15 account “all the normal perils of litigation as well as the additional uncertainties inherent in complex
16 class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den.
17 sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

18 **b. The Settlement is Fair, Reasonable, and Adequate**

19 In deciding whether to approve a proposed class action settlement under Code of Civil
20 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.”
21 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is
22 **presumed** fair under the following circumstances: (1) the parties reached settlement after arms-length
23 negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act
24 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
25 small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements – with
26 the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation
27 – bearing on the fairness of the proposed settlement are present here and the Court’s grant of

28 ⁹ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23
and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971)
4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the
Parties cite Federal Rule 23 and federal case law in addition to California law.

preliminary approval is therefore requested.

i. The Settlement was Reached as a Result of Arm’s Length Negotiations

The Settlement was reached as a result of arm’s-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. Counsel for the Parties conducted extensive arm’s length settlement negotiations until the settlement was reached. The terms of the Settlement are memorialized in the Settlement Agreement which is attached to the Declaration of David Mara, Esq. as **Exhibit 1**.

ii. The Settlement is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to support the settlement. The settlement was only possible following discovery and evaluation of Defendant’s policies and procedures, as well as the data produced for the putative class, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. This litigation has reached the stage where “the Parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

iii. Counsel for Both Parties are Experienced in Similar Litigation

Both Plaintiff’s Counsel and Defendant’s Counsel are particularly experienced in wage and hour employment law and class actions. Plaintiff’s Counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Plaintiff’s Counsel has prosecuted numerous wage and hour class action cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8. Indeed, Mara Law Firm, PC was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This experience instructed Plaintiff’s Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement. Defendant’s Counsel has extensive experience

1 representing companies and regularly deals with wage and hour litigation matters. Accordingly, both
2 Parties' Counsel are experienced in wage and hour employment law and class actions.¹⁰

3 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

4 An understanding of the amount in controversy is an important factor into whether the
5 settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of the
6 claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168
7 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
8 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs
9 on the merits, balanced against the amount offered in settlement." *Id.*

10 In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to "decide
11 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
12 attorneys." *Kullar, supra*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit
13 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
14 provided there is a record which allows "an understanding of the amount that is in controversy and the
15 realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently, "as the
16 court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the
17 court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness."
18 *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38
19 Cal.3d 488, 499-500. As the following subsections show, the Parties' investigation and discovery
20 revealed plenty of reasons to discount claims and agree to this settlement.

21 **1. The Settlement is Fair and Reasonable Based on the Strengths of**
22 **Plaintiffs' Case and the Risks and Costs of Further Litigation**

23 The proposed settlement was only possible following significant discovery, an evaluation of
24 Defendant's relevant policies and procedures, and Plaintiff's independent investigation. This
25 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The
26 discovery conducted resulted in Plaintiff's central theories of liability, which are predicated on
27 Plaintiff's claims that Defendant failed to pay hourly employees for all time worked, failed to provide

28 ¹⁰ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Class
Notice has been provided to the class and they have had an opportunity to respond. This information
will be provided to the Court in conjunction with the final approval motion.

1 meal and rest periods, and failed to reimburse them for business expenses. As explained above,
2 Defendant maintains that the discovery produced demonstrates that it would succeed at both class
3 certification and on the merits.

4 Although, Plaintiff believes this case is suitable for certification on the claimed bases that there
5 are company-wide policies and practices that Plaintiff contends violate California law and uniformly
6 affect the class members, Defendant's counter-arguments and affirmative defenses raise uncertainties
7 with respect to both class certification and success on the merits. As the California Supreme Court
8 ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the
9 trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with
10 respect to certification of wage and hour claims.¹¹ While remaining confident in the strengths of their
11 claims, all of these factors led Plaintiff to discount the following maximum potential damage claims.

12 **2. Exposure and the Risks for Each Claim**

13 In addition to being able to discover the strengths and vulnerabilities associated with Plaintiff's
14 claims, Defendant provided Plaintiff with information and data points which Plaintiff used to establish
15 a representative damage model, as explained below. Mara Dec. ¶ 21.

16 **A. Unpaid Wages / Overtime**

17 Plaintiff contends that Defendant has failed to pay Class Members for all hours worked.
18 Defendant required Class Members to submit themselves to security checks before they were able to
19 clock in for the day and after they had clocked out at the end of their shifts. Plaintiff alleges that Class
20 Members spent about five (5) minutes of time each shift on all of these tasks. All of these tasks were
21 done off-the-clock and were uncompensated. As Class Members work more than eight (8) hours on
22 average per shifts, this unpaid time would be compensated at the overtime rate. Mara Dec. ¶ 22.

23 Accordingly, Defendant's **maximum** exposure under Plaintiffs' unpaid wages claim is **\$22,781**
24 (Approximately 5,548 total shifts during the Class Period x 5 minutes of unpaid time x \$49.275

25 ¹¹ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class
26 claiming misclassification and ordering summary adjudication in favor of employees), *review granted*,
27 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON*
28 *Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming
misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of
certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of
certification).

1 average overtime rate = \$22,781). Mara Dec. ¶ 23.

2 Further, if Plaintiff were to prevail on their unpaid wages claim, he may also be entitled to
3 waiting time penalties. Plaintiff calculates the potential *maximum* exposure under the waiting time
4 penalties cause of action as **\$70,956** (9 former employee Class Members during the three-year
5 statutory period x 30 days x 8 hours x \$32.85 average hourly rate = \$70,956). Mara Dec. ¶ 24.

6 Additionally, if Plaintiff were to prevail on his unpaid wages claim, he may also be entitled to
7 wage statement penalties. Plaintiffs calculate the potential *maximum* exposure under the wage
8 statement cause of action as **\$33,500** for 16 Class Members during the statutory period over 343 pay
9 periods. [(16 initial pay periods x \$50 initial penalty) + (327 subsequent pay periods x \$100 subsequent
10 penalties = \$33,500). Mara Dec. ¶ 25.

11 Plaintiff had to discount the maximum exposure of these claims to account for the viability of
12 Defendant's counter arguments. As discussed above, Defendant argues that beyond the limited
13 accusations of Plaintiff, there is no evidence that Class Members were subject to any form of security
14 search upon entering their assigned facilities, nor is there evidence of security searches upon leaving
15 the facility lasting longer than a meager few seconds. Defendant also contends that individualized
16 issues would predominate because we would have to ask every Class Member what their experience
17 was regarding security checks. As Plaintiff's claims for waiting time and wage statement penalties are
18 derivative of his wage claims, Defendant argues that it would not be liable for these either. Should the
19 Court agree with Defendant's arguments, Plaintiff's and class members would be entitled to no
20 recovery under these causes of action. Mara Dec. ¶ 26.

21 **B. Meal and Rest Periods**

22 In addition, Plaintiff alleges that Defendant has failed to provide Class Members with lawful
23 meal and rest periods. Plaintiff argues that Class Members were essentially on call to take care of the
24 customer's machines during meal and rest periods at all times, and therefore could not leave the work
25 premises. Accordingly, Defendant's *maximum* exposure under Plaintiff's rest period claim is
26 **\$182,251** (Approximately 5,548 total shifts during the Class Period x \$32.85 average hourly rate =
27 \$182,251). Mara Dec. ¶ 27.

28 The damages under the meal period claim is actually limited to the Plaintiff himself, for a

1 maximum exposure of **\$4,861** (148 shifts x \$32.85 average hourly rate = \$4,861). While Plaintiff and
2 Class Members were undoubtedly all subject to Defendant’s uniformly unlawful policies and practices
3 requiring Class Members to remain on the premises during meal periods, review of the records
4 provided by Defendant indicates Class Members are paid a meal period premium each shift. Through
5 an apparent clerical error, Plaintiff did **not** receive these premiums along with the other Class
6 Members.¹² This additional exposure attributable only to Plaintiff serves as further justification for
7 Plaintiff’s enhancement payment. Mara Dec. ¶ 28.

8 **C. Reimbursement**

9 Further, Plaintiff claims that Defendant has required Plaintiff and Class Members to incur
10 business expenses during their employment without receiving any reimbursement from Defendant.
11 Specifically, Plaintiff contends that Class Members are required to use their personal cell phones to
12 communicate with Defendant during the workday. If Plaintiff were to prevail on his reimbursement
13 cause of action, Class Members would be entitled to reimbursement for a reasonable percentage of
14 their costs associated with their personal cell phones. Therefore, the **maximum potential exposure**
15 under this theory of liability would be **\$18,200** (Approximately 56 months during the relevant time
16 period x \$25, or 25% of a \$100 monthly phone bill x 13 Class Members employed at any given time
17 = \$18,200). Mara Dec. ¶ 29.

18 Plaintiff’s reimbursement claim is also subject to risks of obtaining certification and on the
19 merits. Defendant asserts that its policies and practices mandate that Class Members communicate
20 with Defendant throughout the workday via their company laptops, not their personal cell phones.
21 Further, Defendant points out that because each Class Member would have to testify as to the extent
22 of their use of their personal cell phone and their understanding of company policy surrounding these
23 issues, class certification would be denied for lack of predominance. Mara Dec. ¶ 30.

24
25
26 ¹² The fact that Defendant paid Class Members meal period premiums has no bearing on Plaintiff’s
27 ability to certify his meal period claim. The fact that some employees may have been paid premiums
28 “is an issue that goes to damages” and “is not a proper basis on which to deny certification.” *Alberts*
v. Aurora Behavioral Health Care (2015) 241 Cal.App.4th 388, 408. “The fact that individual
[workers] may have different damages does not require denial of class certification.” *Jaimez v. Daihatsu*
USA, Inc. (2010) 181 Cal.App.4th 1286, 1301.

1 **D. PAGA**

2 Plaintiff is also seeking PAGA penalties. PAGA allows the private enforcement of certain
3 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
4 provides for a standard penalty amount where a civil penalty is not otherwise specified by statute:

5 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay
6 period for the initial violation and two hundred dollars (\$200) for each aggrieved
7 employee per pay period for each subsequent violation.

8 Plaintiff alleges that Defendant has four (4) core violations –failure to pay all time worked, failure to
9 provide meal periods, failure to provide rest periods, and failure to reimburse business expenses – of
10 the Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA
11 violations goes back one year. With approximately 343 pay periods in the statutory period, Plaintiff
12 calculated Defendant’s potential maximum exposure for these core claims under PAGA as follows:

13
$$\$100 \times 4 \text{ PAGA violations} \times 343 \text{ pay periods} = \mathbf{\$137,200}$$

14 Mara Dec. ¶ 31.

15 Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s non-PAGA
16 claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that “[i]n any action by an
17 aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court
18 may award a lesser amount than the maximum penalty amount specified by this part if, based on the
19 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
20 arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*
21 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum
22 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the
23 maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112,
24 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its
25 obligations to comply with the law seriously. *Id.* Defendant maintains that if the case were to continue
26 in litigation, they would be able to show that they took their obligations to comply with the law
27 seriously. As such, if Plaintiffs were able to prevail on the merits of their PAGA claims, it is likely
28 that the Court would reduce the maximum penalty allowed.

In addition, as the PAGA violations asserted by Plaintiff are predicated on the same unlawful

1 conduct that Plaintiff bases his other claims, Plaintiff's PAGA claims are subject to the same risks on
2 the merits as Plaintiff's class claims. If Plaintiff is ultimately unable to prevail on any one of his class
3 claims, his recovery under the PAGA as to that violation would also fail. The likelihood of the Court
4 reducing the PAGA damages awarded to Plaintiff and the aggrieved employees – assuming liability
5 is proven as to each of Plaintiff's claims – is also higher in this case where these same individuals will
6 also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold*
7 *Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist.
8 LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially duplicative of penalties
9 granted by the underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§
10 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award
11 PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA
12 penalties are highly uncertain.”).

13 Furthermore, Defendant argues that Plaintiff cannot be permitted to recover **any** penalties for
14 any purported failures to provide meal periods for anyone other than himself, as Defendant has already
15 paid its employees meal period premiums for every shift they work. Plaintiff disagrees, pointing to the
16 California Supreme Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th
17 73. The *Kim* Court clarified that “civil penalties recovered on the state's behalf are intended to
18 remediate present violations and deter future ones, *not* to redress employees injuries.” *Kim*, 9 Cal.5th
19 at 87. Therefore, Plaintiff contends that while Defendant may have “redressed employee injuries” for
20 the meal period claims, PAGA penalties can still be assessed to remedy “present violations and deter
21 future ones.”

22 **3. The Settlement Amount of \$150,000 is Reasonable**

23 Not taking into account any of their defenses or arguments, Defendant's total exposure if
24 Plaintiff was successful in his core claims would be approximately \$228,093 [\$22,781 (unpaid wages
25 exposure) + \$182,251 (rest period exposure) + \$4,861 (meal period exposure) + \$18,200
26 (reimbursement exposure) = \$228,093]. If Plaintiff is successful in his unpaid wage claims, he may
27 also be entitled to damages for waiting time and wage statement penalties in the amount of \$70,956
28 and \$33,500, respectively. If all of Plaintiff's core claims are successful, they may also be entitled to
PAGA penalties in the maximum amount of \$137,200. *Mara Dec.* ¶ 32.

1 Based upon the risks just discussed, Plaintiff had to discount the maximum potential exposure.
2 Plaintiff also had to consider that, should the Court agree with his theories and grant certification as
3 to each of the claims, he may not be awarded the full exposure at trial. Plaintiff also had to consider
4 that the Court could agree with Defendant's arguments. If his unpaid wage claims failed, the claims
5 for waiting time and wage statement penalties would also fail. The claims for PAGA penalties would
6 similarly be reduced. All of these factors led Plaintiff to reduce the realistic potential exposure in order
7 to gain a definite monetary recovery for the class.

8 In light of the risks Plaintiff's claims faced, Plaintiff and their Counsel believe that the
9 settlement amount of \$150,000 – **with an average settlement share amount estimated at \$3,000** –
10 is a reasonable and fair settlement amount. *Mara Dec.* ¶ 33.

11 A settlement is not judged **solely** against what might have been recovered, had the plaintiffs
12 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and
13 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*
14 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; "Compromise is inherent and necessary in the
15 settlement process...even if the relief afforded by the proposed settlement is substantially narrower
16 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because
17 the public interest may indeed be served by a voluntary settlement in which each side gives ground in
18 the interest of avoiding litigation." *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n*
19 (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement amounting to only a
20 fraction of the potential recovery does not...render the settlement inadequate or unfair").

21 **c. Provisional Class Certification Should be Granted**

22 Under California law, a class action is appropriate when the class is ascertainable and there is
23 "a well-defined community of interest in the questions of law and fact involved affecting the parties
24 to be represented." Cal. Civ. P. Code § 382. State law requirements under California Code of Civil
25 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of
26 Civil Procedure: numerosity, typicality of the class representatives' claims, adequacy of
27 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*
28 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court

1 must certify a class for settlement purposes if a class has not already been certified, “it is well
2 established that trial courts should use different standards to determine the propriety of a settlement
3 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used
4 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,
5 859 citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

6 Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of these
7 elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38.
8 Plaintiff seeks approval of the following Class for settlement purposes only: All hourly, non-exempt
9 technicians, repairmen, mechanical technicians, machinery technicians, machinery repairmen, or
10 similar job designations and titles, and all other similarly situated non-exempt, hourly employees of
11 Defendant from May 24, 2018 through January 17, 2023.

12 **i. The Proposed Settlement Class is Ascertainable**

13 Plaintiff contends that the proposed Settlement Class is ascertainable because of all of the class
14 members have worked for Defendant and have been identified through Defendant’s own records, such
15 as employee and payroll files. *See Rose v City of Hayward* (1981) 126 Cal.App.3d 926,932 (finding
16 that “Class Members are ‘ascertainable’ where they may be readily identified without unreasonable
17 expense or time by reference to official records.”); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th
18 905, 919 (“[c]lass members are ‘ascertainable’ where they may be readily identified without
19 unreasonable expense or time by reference to official [or business] records.”). Thus, the
20 ascertainability requirement is met.

21 **ii. The Proposed Settlement Class is Sufficiently Numerous**

22 The numerosity requirement is met if the class is so large that joinder of all members would be
23 impracticable. *Gay v. Waiters’ & Dairy Lunchmen’s Union* (N.D. Cal. 1980) 489 F. Supp. 282, *aff’d*
24 (9th Cir. 1982) 694 F.2d 531. “There is no set number required to maintain a class action, and the
25 statutory test is whether a class is so numerous that ‘it is impracticable to bring them all before the
26 court.’” *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1223
27 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior Court* (1995)
28 44 Cal.2d 574 (upholding a class of ten members). “The numerosity requirement is more readily met

1 when a class contains employees suing their present employer . . . This is because class members may
2 be unwilling to sue their employer individually out of fear of retaliation.” *Romero v. Producers Dairy*
3 *Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the California Supreme Court, “fear of
4 retaliation for individual suits against an employer is a justification for class certification in the arena
5 of employment litigation, even when it is otherwise questionable that the numerosity requirements
6 were satisfied . . . It needs no argument to show that fear of economic retaliation might often operate
7 to induce aggrieved employees quietly to accept substandard conditions.” *Gentry v. Superior Court*
8 (2007) 42 Cal.4th 443, 460 (citation omitted), overruled on other grounds in *Iskanian v. CLS Transp.*
9 *Los Angeles, LLC* (2014) 59 Cal.4th 348.

10 Here, Defendant’s records show that the proposed Settlement Class has approximately twenty-
11 five (25) members. Plaintiff contends that joinder of all Class Members is impracticable and, therefore,
12 a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030
13 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as
14 28 is acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v.*
15 *Superior Court* (1995) 44 Cal.2d 574. Accordingly, the Class that is comprised of approximately
16 twenty-five (25) members is sufficient to satisfy the numerosity requirement.

17 **iii. The Commonality Requirement is Met**

18 The commonality requirement is met if there are questions of law and fact common to the class.
19 *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual
20 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
21 within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to
22 individually establish eligibility and damages does not mean individual fact questions predominate.’”
23 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there
24 is a predominant common legal question regarding how an employer’s policies impact its employees.
25 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal
26 question remains the overall impact of Diva’s policies on its drives.”). Whether Plaintiff is likely to
27 prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially
28 a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v.*

1 *Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

2 Here, Plaintiff contends that the proposed Class Members' claims all stem from the same
3 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff
4 seeks the same legal remedies under state law on behalf of themselves and all Class Members. As
5 liability as to all Class Members is predicated on the same policies and practices, which Plaintiff
6 alleges violates California law, the commonality requirement has been satisfied.

7 **iv. The Typicality Requirement is Met**

8 The typicality requirement is met if the claims of the named representative are typical of those
9 of the class, though, "they need not be substantially identical." *Hanlon, supra*, 150 F.3d at 1020;
10 *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that their claims are typical of
11 the Class Members' claims because they arise from the same factual basis and are based on the same
12 legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.* (N.D. Cal. 1987)
13 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and practices. Plaintiff
14 alleges that Defendant's policies applied to all Class Members. Factual differences may exist between
15 Plaintiff's and the Class Members so long as the claims arise from the same events or course of conduct
16 and are based on the same legal theories. *Hanlon, supra*, 150 F. 3d at 1020; *see also Wehner, supra*,
17 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. § 3:15, p.335 (When it is alleged that the same
18 unlawful conduct was directed at or affected both the named plaintiff and the class sought to be
19 represented, the typicality requirement is usually met irrespective of varying fact patterns which
20 underlie individual claims.) As such, the typicality requirement is satisfied.

21 **v. The Adequacy Requirement is Met**

22 The adequacy requirement is met if Plaintiff has no interests adverse to the interests of the
23 proposed Class Members and is committed to vigorously prosecuting the case on behalf of the class.
24 *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51.
25 Plaintiff contends those standards are met here. Plaintiff does not have any conflicts of interest with
26 the Class. He has been and continues to be committed to vigorously prosecuting this case. If any Class
27 Member wishes to opt-out of the Settlement, he or she may do so. Therefore, there is no conflict of
28 interest between Plaintiff and the Class Members.

1 **vi. Notice to Class Members Complies with California Rule of Court 3.769(f)**

2 California Rule of Court 3.769(f), provides:

3 If the court has certified the action as a class action, notice of the final approval hearing
4 must be given to class members in the manner specified by the court. The notice must
5 contain an explanation of the proposed settlement and procedures for class members to
6 follow in filing written objections to it and in arranging to appear at the settlement
7 hearing and state any objections to the proposed settlement.

8 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises
9 the class of their rights to participate in the settlement, how to and when to object to or request
10 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
11 proposed Class Notice is attached as **Exhibit A** to the Settlement Agreement.

12 **V. CONCLUSION**

13 Plaintiff respectfully submits that the proposed settlement is in the best interests of the class
14 and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted
15 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
16 should be preliminarily approved by the Court, the class should be conditionally certified for purposes
17 of settlement only, and the Notice of Class Action Settlement should be approved.

18 Respectfully Submitted,

19 **MARA LAW FIRM, PC**

20 Date: January 3, 2024

21 Signed: 

22 David Mara, Esq.
23 Matthew Crawford, Esq.
24 Attorneys for Plaintiff