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18 **SUPERIOR COURT OF CALIFORNIA**
19 **COUNTY OF CONTRA COSTA**

20 ARMANDO DELAMORA, an individual, on
21 behalf of himself and all others similarly situated,

22 Plaintiff,

23 v.

24 THORPE DESIGN, INC., a California
25 corporation; and DOES 1 through 10, inclusive,

26 Defendants.

Case No.: **C22-00931**

CLASS ACTION AND PAGA
REPRESENTATIVE ACTION

Assigned to
Hon. Charles S. Treat
Dept. 12

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Armando Delamora and Jesus Cardenas (“Plaintiffs”) seek preliminary approval,¹ under Rule 3.769(c) of the California Rules of Court, of a \$750,000 non-reversionary Settlement on behalf of approximately 850 employees of Defendant Thorpe Design, Inc. (“Defendant”) in California between May 4, 2018 and the date this Settlement is preliminary approved by this Court (the “Settlement Class Period”). This is a global settlement which includes this action, as well as *Cardenas v. Thorpe Design, Inc.*, Case No. C22-01545, also pending in this Court. As part of this settlement, Plaintiffs will file a Second Amended Complaint, which consolidates *Delamora* and *Cardenas* into one action for settlement purposes.

This is a cash settlement and all Settlement Class Members who do not opt out will receive a payment, without a requirement to submit a claim form. Due to Defendant’s financial condition, the Gross Settlement Amount will be paid out in two installments of \$375,000. Plaintiffs, non-exempt field employees, allege claims for unpaid wages, including overtime, for time spent working outside of scheduled work hours, and during meal periods to complete required daily tasks, meal and rest break violations, unreimbursed mileage and cell phone expenses, Defendant’s failure to keep records of employees’ hours worked nor records of meal periods, unfair business practices, PAGA, and derivative wage statement and waiting time penalty claims.

This case resolved following mediation before an experienced wage and hour neutral, Mark Rudy, Esq. Plaintiffs argue that Defendant’s maximum potential liability for all his claims, excluding PAGA penalties,² is \$13,095,055.48, or alternatively, \$11,448,477.³ This assumes Plaintiffs would collect meal break premiums for 50% of shifts, a rest break premium for 2 shifts per workweek, Plaintiffs and the class would be compensated for 10 minutes of off the clock work, every day, at an overtime rate, and would recover up to \$150 in reimbursement of business expenses every month.

The \$750,000 Gross Settlement Amount represents **5.72%** (or 6.55%) of Defendant’s maximum potential liability for all of Plaintiffs’ non-PAGA claims, and **8.75%** (or 10.83%) of Plaintiffs’ direct

¹ This memorandum exceeds the 15-page limit set forth in CRC 3.1113, but because it seeks class certification as part of the settlement approval process (which has a 20-page limit), and because Plaintiffs needed additional space to sufficiently present this Settlement for the Court’s approval, before filing this motion, Plaintiffs submitted a stipulation for leave to exceed the page limit.

² The settlement of Plaintiffs’ PAGA penalties is discussed in section IV(A)(3), below.

³ See Plaintiffs’ Kullar analysis in section V(A).

1 unpaid overtime, meal and rest break, and 2802 claims. This is an excellent result, meeting – or exceeding
2 – typical class action settlement recoveries.

3 Plaintiffs seek entry of an order: (1) preliminarily approving the proposed Settlement; (2) ordering
4 Plaintiff to file a Second Amended Complaint, (3) approving the form and content of the proposed Class
5 Notice; (3) directing that Class Notice be given to Settlement Class Members; (4) provisionally certifying
6 the Settlement Class and appointing Plaintiffs Delamora and Cardenas as Class Representatives and
7 Plaintiffs' counsel as Class Counsel; (5) preliminarily approving Settlement administration services to be
8 provided by the Settlement Administrator, and; (6) scheduling a Fairness Hearing.

9 **II. FACTUAL AND PROCEDURAL BACKGROUND**

10 Plaintiff Delamora was employed by Victory Fire Protection, Inc. ("Victory") as a pipefitter
11 between October 2016 and November 2021. Plaintiff Cardenas worked as a journeyman carpenter
12 between April 2020 and February 2022. Defendant Thorpe Design, Inc. acquired Victory in January of
13 2021 and hired all of its employees, including Plaintiffs. Declaration of David R. Markham ("Markham
14 Decl."), ¶3. Delamora's duties included installing fire sprinkler systems in residential homes, as well as
15 performing inspections. Declarations of Armando Delamora ("Delamora Decl."), ¶4. Cardenas' duties
16 included pick up and delivery of raw materials at Defendant's job sites and completion of build and repair
17 projects for Defendant's clients. Jesus Cardenas ("Cardenas Decl."), ¶2. In addition to Plaintiffs,
18 Defendant employed other non-exempt field and office employees, as well as exempt office employees.
19 Markham Decl., ¶3.

20 Plaintiff Delamora filed a complaint against Defendant on May 4, 2022, alleging Defendant failed
21 to pay him and other field employees for all hours worked, and failed to provide meal and rest breaks, or
22 pay premiums for non-compliant breaks, failed to keep accurate payroll records, and failed to reimburse
23 employees for business expenses. Delamora also asserted claims for violation of the UCL, claims for
24 inaccurate wage statements, and untimely paid wages at termination of employment. On July 7, 2022,
25 Delamora amended his complaint to add claims for penalties under PAGA. Markham Decl., ¶4. Plaintiff
26 Cardenas filed his complaint on July 28, 2022, alleging claims on behalf of all non-exempt employees, as
27 well as exempt employees, for unreimbursed business expenses, rest period violations, wage statement
28 violations, waiting-time penalties for wages due to separated employees, unfair business practices under

1 the UCL, and PAGA violations. Declaration of Elliot Siegel (“Siegel Decl.”), ¶27.

2 Plaintiffs’ investigation revealed that field employees would be dispatched to conduct
3 installations, and then could be called away from the jobsite to perform time-sensitive inspections. They
4 were expected to complete each assigned installation and inspection each day but were routinely not
5 allowed to record overtime hours. Markham Decl., ¶6. Thorpe had an overtime pre-approval policy, yet
6 also a policy which required employees to finish their assignments within the day. This created a catch-
7 22 situation, because due to technical difficulties or other unforeseen delays that arise as the inspection
8 or installation is occurring, class members would not know about the need to seek overtime pre-approval
9 ahead of time, thus a pre-approval was impossible to obtain. Thus, class members end up working
10 overtime, off-the-clock. Markham Decl., ¶6.

11 Additionally, Plaintiffs allege that when field employees were called to leave a job site to conduct
12 inspections or respond to other time sensitive situations, it would result in late or interrupted meal
13 periods, or meal periods that would be missed completely. Markham Decl., ¶7. Plaintiffs and class
14 members were not able to record the time that they were called to work during their meal periods. Further,
15 Thorpe’s policy expressly provides that employees must clock out for meal periods, and does not
16 explicitly provide for meal or rest period premium payments. Markham Decl., ¶7. Thus, Defendant
17 appears to have no system to pay any premium payments.

18 Additionally, Plaintiffs allege Defendant failed to maintain records showing the start and end
19 times for each shift, and for meal periods, for at least a part of the class period. Plaintiffs argue that
20 Defendant’s time records which only show the total hours worked by non-exempt employees, and do
21 not record shift and meal break times, are insufficient under the Wage Order. Markham Decl., ¶8.

22 Further, Plaintiffs alleged that Thorpe does not provide for expense reimbursement for non-
23 exempt and exempt employees. Plaintiffs and other class members used their cellphones in the regular
24 course of employment by answering texts and calls from their supervisors while at work or on a break,
25 for purposes of scheduling and re-scheduling future work, being assigned tasks, and general
26 administrative matters, and required the use of various mobile phone applications, but did not pay a
27 reasonable portion of the Class Members’ cellphone related expenses despite requiring the use of the
28 device and/or applications that required a data plan. Markham Decl., ¶9. Additionally, Plaintiffs used

1 their personal vehicles for work purposes. Plaintiffs sometimes had to commute to the various different
2 job sites and travel to up to five inspections per day and were not reimbursed for the mileage incurred
3 using their personal vehicles. *Id.*, ¶9.

4 Plaintiffs further alleged derivative claims, including violation of Labor Code section 226(a) for
5 inaccurate wage statements and Labor Code section 203 for waiting time penalties, and violations of
6 PAGA and UCL under the same predicate factual and legal theories. *Id.*, ¶10.

7 **III. VIGOROUS PROSECUTION OF THIS ACTION**

8 **A. Informal Discovery for Mediation Purposes**

9 Plaintiff Delamora and Defendant met and conferred prior to the initial case management
10 conference, and agreed to attend mediation and stay formal discovery, including depositions, in lieu of
11 an informal exchange of data and information for mediation purposes. Markham Decl., ¶11.

12 In advance of mediation, Defendant produced the applicable policies and handbooks in effect
13 during the class period, and time records and payroll records for a 20% sample of class members,
14 amounting to hundreds of pages of documents and data. Markham Decl., ¶12. Delamora's counsel
15 reviewed the class data and prepared a damages model. *Id.*

16 The parties carefully investigated the claims and facts alleged in this action, and Plaintiff has made
17 a thorough study of the legal principles applicable to the claims asserted against Defendant. As a result
18 of an aggressive investigation of the claims in this action, a careful review of numerous documents, and
19 extensive discovery, the parties had a clear understanding of their respective claims and defenses. *Id.*, ¶13.

20 **B. Settlement Reached after Arms-Length Negotiations with Assistance of** 21 **Experienced Mediator**

22 Plaintiffs retained counsel with extensive experience in prosecuting wage and hour class actions.
23 Markham Decl., ¶¶13, 33-39; Siegel Decl., ¶¶8-19. Defendant was represented by seasoned attorneys at
24 Littler Mendelson, P.C. and Kraeber Law Office. Markham Decl., ¶13. On January 12, 2023, the parties
25 mediated this case before Mark Rudy, Esq., a mediator vastly experienced in wage and hour class actions.
26 Although the parties did not reach settlement at the mediation session, they continued the settlement
27 dialogue and exchanged more information and documents, with the assistance of Mr. Rudy. After several
28 weeks of contentious arms-length negotiations facilitated by the mediator, the parties reached the

1 settlement in principle, and executed a Memorandum of Understanding. Defendant desired a global
2 settlement, which would include both *Delamora* and *Cardenas* actions. Counsel for Delamora and Cardenas
3 agreed to prosecute this case jointly. After additional weeks of negotiations, the parties finalized the terms
4 of the settlement agreement. *Id.*, ¶14. The executed version of the Settlement Agreement is attached as
5 **Exhibit 1** to Markham Declaration.⁴

6 **C. Summary of the Risks to Further Litigation, and to Obtaining and**
7 **Maintaining Class Certification**

8 Although Plaintiffs are confident in their respective positions, they recognize several risks to
9 succeeding on the merits and obtaining certification. Markham Decl., ¶22. First, Defendant provided
10 documents showing that since the COVID pandemic, it has operated in a very difficult economic
11 environment for housing construction, which places heavy restraints on Defendant's ability to pay any
12 judgment or settlement. Thus, should this case proceed, it is likely class members would not see any
13 recovery. Markham Decl., ¶23. Second, regarding Plaintiff Delamora's off-the-clock and overtime claims,
14 Defendant will likely contend that where an employer provides a means to record work time, the employer
15 is entitled to rely on those time records, and is not required to audit other available records to ascertain
16 if any off-the-clock work is occurring. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1051 (2012) ("that
17 employees are clocked out creates a presumption they are doing no work"). Further, although
18 Defendant's policy required overtime pre-approval, it did provide for payment for all hours worked,
19 whether preapproved, or not. Markham Decl., ¶24. In fact, Defendant's timekeeping policy specifically
20 forbids off-the-clock work. *Id.*, ¶24.

21 Third, Defendant will argue that its meal and rest break policy are facially lawful, and class
22 members are advised to notify Thorpe if they are unable to take their breaks. This could diminish
23 Plaintiffs' chances to prevail at certification under *Brinker*, 53 Cal.4th 1004. Markham Decl., ¶25. Further,
24 Defendant will likely argue that most class members work in the field at job sites without supervision,
25 they should not encounter any difficulty taking their meal and rest breaks. Markham Decl., ¶25.

26 Lastly, with respect to Plaintiffs' Labor Code 2802 claim, Thorpe will argue it has an expense
27 reimbursement policy which requires employees to submit documentation to Thorpe of an incurred

28 ⁴ The Settlement Agreement was submitted to the LWDA concurrent to the filing of this motion, and proof of submission is
attached as **Exhibit 2** to Markham Declaration.

expense in a timely manner. Markham Decl., ¶26. Defendant will also argue that it provides reimbursement for mileage driven between job sites and has a form for the employee to request reimbursement and provide notice of the mileage. *Id.*, ¶26. With respect to the Labor Code 2802 claims of exempt employees, Thorpe will likely argue it provided company vehicles for work use with their own fuel and gas cards, as well as cell phones, to some class members. *Id.*, ¶26.

Lastly, with respect to wage statement and untimely wages claims, they are derivative of Plaintiffs' unpaid time and meal and rest break claims, so if Plaintiffs do not prevail on the underlying claims, their derivative claims would also fail. *See Gomez v. Lincare, Inc.*, 173 Cal.App.4th 508, 524-25 (2009). Also, Defendant will likely assert that wages that were not paid cannot form the basis of these derivative claims based on *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018). Markham Decl., ¶27.

IV. SUMMARY OF SETTLEMENT TERMS

A. Settlement Relief

Gross Settlement Amount:	\$750,000. Settlement Agreement, ¶3.17, payable in two installments of \$375,000. <i>Id.</i> , ¶8.1.1.
Deductions from the Gross Settlement Amount:	- Attorneys' fees not to exceed 33.33% of the Gross Settlement Amount (\$250,000); - Out-of-pocket litigation costs not to exceed \$35,000; - Enhancement Awards to Plaintiffs not to exceed \$7,500 each; - PAGA penalties of \$37,500 (of which 75% or \$28,125 will be paid to the LWDA and 25% or \$9,375 to PAGA Employees, who are Settlement Class Members employed at any time from May 2, 2021 through the date of Preliminary Approval); - Administration costs of approximately \$13,000. <i>Id.</i> , §VIII.
Net Settlement Amount:	Approximately \$408,875. <i>See id.</i> , ¶3.22.
Definition of the Settlement Class:	All current and former non-exempt and exempt employees, who have worked in California for Thorpe Design, Inc. or Victory Fire Protection, Inc., at any time from May 4, 2018, through the date of Preliminary Approval, or a sooner date per the procedure agreed by the parties, at Defendant's

	option (“Settlement Class Members”). ⁵ <i>Id.</i> , ¶13.5.
Class Period:	from May 4, 2018 until the preliminary approval (or a sooner date as explained in ¶13.7 of the Settlement Agreement).
The number of Class Members and workweeks worked during the Class Period	850 Settlement Class Members; 67,736 workweeks. <i>Id.</i> , ¶13.2. Over 91% of the workweeks (62,011) are attributable to non-exempt Settlement Class Members.
The average individual settlement payment	The Settlement provides that 95% of the Net Settlement Amount will be allocated to non-exempt employees, based on the fact that this group represents over 91% workweeks, and also on the basis that this group is eligible for overtime and meal and rest break premiums, as well as derivative penalties stemming from these violations, unlike the exempt employees. Thus, without accounting for the number of workweeks worked, the non-exempt class members will receive approximately \$6.26 per workweek, and exempt class members will receive approximately \$3.57 per workweek. Settlement Agreement, ¶18.7; Markham Decl., ¶18.

1. *Settlement Formula and Distribution*

The Net Settlement Amount will be allocated 95% to non-exempt employees, and 5% to exempt employees, to account for the strength of their respective claims. Settlement Agreement, ¶18.7.1. Then, generally, Settlement Class Members who do not opt out of the Settlement will receive their respective Settlement Payments from the Net Settlement Amount based on the number of workweeks they worked during the Class Period, without the need to submit a claim form. Settlement Agreement, ¶18.7.1. Distribution amounts will be calculated and allocated as follows:

$$\frac{\text{Workweeks Worked by Class Member}}{\text{Total Workweeks Worked by all Class Members}} \times \text{Net Settlement Amount} = \text{Class Member's Payment}$$

Id., ¶18.7.1.⁶

Settlement Class Members who do not opt out of the Settlement will release Defendant from all claims that relate to the causes of action asserted in this action— or those that could have been asserted in this action based on the facts alleged in Plaintiffs’ Second Amended Complaint and their PAGA letter.

⁵ Any finding of workweeks during the time frame from May 4, 2018 through Preliminary Approval that exceeds the 67,736 workweek count by more than 15% (77,896) at the option of Defendant, Defendant shall either increase the Gross Settlement Amount or elect to move the end date for the Settlement Class Period to the latest date before the Preliminary Approval that does not exceed 77,896 workweeks. Settlement Agreement, ¶13.2.

⁶ The PAGA Penalty Payment allocated to PAGA Employees will be calculated similarly on a pro rata basis, based on the total amount of workweeks PAGA Employees worked during the PAGA Period. *Id.*, ¶18.7.1.

1 *See id.*, ¶11.1.

2 Settlement checks will be valid and negotiable for 180 days. *Id.*, ¶10.10. After that time, the
3 Parties will seek the Court's approval to donate the funds represented by uncashed checks, plus interest,
4 to California's Unclaimed Property Fund in the name of the intended recipient. *Id.* In no event will any
5 of the funds revert to Defendant. *Id.*, at 8.1.

6 All Settlement Payments are subject to taxation and will be reported to the IRS and state tax
7 authorities. Twenty percent (20%) of each Class Member's Settlement Payment will be allocated as wages,
8 and eighty percent (80%) will be allocated as penalties and interest, with withholding to apply only to the
9 portion allocated to wages. *Id.*, ¶8.8. This allocation is reasonable. *See* section V(B), below. Settlement
10 Class Members shall seek their own tax advice regarding this Agreement. *Id.*

11 **2. Attorneys' Fees and Costs**

12 The parties agreed that, subject to approval by the Court, up to \$250,000 or one-third of the
13 Gross Settlement Amount, may be allocated to attorneys' fees, and up to \$35,000 may be allocated from
14 the Gross Settlement Amount to reimburse Class Counsel for litigation costs and expenses. Settlement
15 Agreement, ¶8.2. Courts in California wage and hour cases, where the common fund is under \$10 million,
16 tend to award attorneys' fees in the 30% - 40% range. *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D.
17 482, 491-92 (E.D. Cal. 2010) (citing to five wage and hour class actions where courts approved fee awards
18 ranging from 30 to 33%). The trial court has discretion to award attorneys' fees based on either the
19 lodestar/multiplier calculation or the percentage-of-recovery method. *Laffitte v. Robert Half International Inc.*, 1
20 Cal.5th 480, 503 (2016). Class Counsel intends to brief the fee application using both methodologies, as
21 cross checks.⁷ Any portion of the requested attorneys' fees and costs that is not awarded to Class Counsel
22 shall be part of the Net Settlement Amount and shall be distributed to Class Members as provided in the
23 Settlement Agreement. *Id.*, ¶8.2.2.

24 **3. PAGA Payment to Labor Workforce Development Agency**

25 The Parties agreed \$37,500 of the Gross Settlement Amount will be allocated for payment under
26 the PAGA. 75% of this amount (\$28,125) will be paid to the LWDA, and 25% (\$9,375) to PAGA

27 ⁷ 88% of the awarded attorneys' fees will be allocated to *Delamora* counsel (of which the Markham Law Firm will receive
28 66.67% of the fee and United Employees Law Group will receive 33.33% of the fee) and 12% will be allocated to *Cardenas*
counsel (of which 80% will be allocated to King & Siegel, and 20% to Barahmand Law Group) Markham Decl., ¶40; Siegel
Decl., ¶7.

1 Employees, who are those Class Members who worked for Defendant from May 2, 2021 and until the
2 preliminary approval. *Id.*, ¶3.1. The PAGA penalties to be paid under this Settlement represent
3 approximately 0.41% of the total potential PAGA penalties for Plaintiffs' direct claims, assuming class
4 members suffered four types of violations in every single pay period (560 initial pay periods times \$100,
5 plus 22,716 subsequent pay periods times \$100, multiplied by 4 penalties for unpaid time, meal breaks
6 and rest breaks, and unreimbursed expenses per pay period = \$9,086,400). Markham Decl., ¶17. The
7 subsequent penalties should be calculated at \$100, not \$200 per pay period because under *Amaral v. Cintas*
8 *Corp. No. 2*, 163 Cal.App.4th 1157 (2008), for a plaintiff to recover \$200 per subsequent violation an
9 employer must have been cited first, which has not occurred in this action. *Id.* at 1207-09; *See also*
10 *Hernandez v. Best Buy Stores, LP*, 2017 WL 2445438, 2 (S.D. Cal. June 6, 2017) (holding, based on *Amaral*,
11 that \$100 penalty per pay period is warranted because "no court, commissioner, or any other authority
12 had held [that] Best Buy misclassified" the general managers."); *see also Trang v. Turbine Engine Components*
13 *Technologies Corp.*, 2012 WL 6618854, *5 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are
14 not subject to heightened penalties for subsequent violations unless and until a court or commissioner
15 notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit Union Local 1309*,
16 *AFL-CIO v. Laidlaw Transit Services, Inc.*, 2009 WL 2448430 at *9 (S.D. Cal. Aug. 10, 2009) (finding that
17 California law imposes the "subsequent violation penalty" only after an employer has been notified by
18 "the court or commissioner" that its conduct violates the Labor Code).

19 Such allocation of the PAGA penalties is within the range of other approved PAGA settlements,
20 as courts frequently approve PAGA awards between 0.2% to 2.2% of the total potential penalties.
21 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of 0.2% of the
22 maximum, or \$5 per pay period); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at *2, 7 (N.D. Cal. Sept.
23 28, 2016) (settlement allocating \$10,000 to PAGA penalties where potential value was over \$5.2 million,
24 resulting in 0.2 percent PAGA recovery approved); *Van Kempen v. Matheson Tri-Gas, Inc.*, 2017 WL
25 3670787, at *10 (N.D. Cal. Aug. 25, 2017) (granting final approval of \$5,000 PAGA penalty from
26 \$370,000 settlement, or 1.4 percent); *Slavkov v. Fast Water Heater Partners I, LP*, 2017 WL 3834873, at *2
27 (N.D. Cal. July 25, 2017) (finding that "\$7,500 PAGA payment is reasonable when measured against the
28 total overall settlement [of \$345,000] and the possible weaknesses in Plaintiffs' case," or 2.2 percent); *see*

1 also *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19 (C.D. Cal. Feb. 16, 2017) (\$10,000 as PAGA
2 penalties found reasonable).

3 **4. Settlement Administration Costs**

4 The parties selected Simpluris, Inc. as the Settlement Administrator in this action. Settlement
5 Agreement, ¶3.3. The costs of the Administrator, estimated at \$13,000, will be deducted from the Gross
6 Settlement Amount. *Id.*, ¶3.4.

7 **5. Class Representatives' Service Awards**

8 Defendant agreed, subject to Court approval, to pay up to \$7,500 from the Gross Settlement
9 Amount to Plaintiff Delamora and up to \$7,500 to Plaintiff Cardenas. This is a payment for their services
10 as Class Representatives. Settlement Agreement, ¶8.5. Any portion of the requested Service Awards not
11 awarded to the Class Representatives shall be part of the Net Settlement Amount, and shall be distributed
12 to Settlement Class Members as provided in this Agreement. *Id.*, ¶8.5.1.

13 **B. Settlement Administration**

14 Within fourteen calendar days after the preliminary approval, Defendant will provide Simpluris
15 with a class list containing Class Members' contact information and sufficient information to determine
16 the total number of workweeks worked within the relevant time periods. Settlement Agreement, ¶9.3.
17 Within ten business days thereafter, Simpluris will send Class Notice to each Settlement Class Member
18 as provided in this Settlement, determine the eligibility for, and the amounts of, any Settlement Payments
19 under the terms of this Agreement, process and distribute Settlement Class Members' payments, and
20 process and mail tax payments to the appropriate state and federal taxing authorities. *Id.*, ¶¶3.4, 9.4.
21 Further, Settlement Class Members will also be able to contact the Settlement Administrator by the
22 telephone or e-mail, or access the settlement website,⁸ if they have any Settlement questions or need
23 assistance. *See* Class Notice, **Ex. A** to the Settlement Agreement. Also, any objections to or opt-outs from
24 the Settlement must be delivered to the Settlement Administrator. Settlement Agreement, ¶¶9.5, 9.6, 9.8.

25 **V. THE SETTLEMENT SATISFIES THE PRELIMINARY APPROVAL CRITERIA**

26 There is a strong judicial preference for pre-trial settlement of complex class actions. *Officers for*
27 *Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The trial judge exercises

28 _____
⁸ The website will contain settlement-related documents, including notice of final judgment. C.R.C., Rule 3.771(b).

1 discretion in deciding whether to grant preliminary approval of a class action settlement and “great weight
2 is accorded to [the] judge’s views.” *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th
3 1135, 1145 (2000).

4 Preliminary approval is the first of three steps of the settlement approval process. Second is the
5 dissemination of a settlement notice to all class members. Third is a final approval hearing, where the
6 evidence concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and
7 class members may be heard regarding the Settlement. *See* Manual for Complex Litigation, Second, ¶30A4
8 (1993). The court does not need to perform a final analysis of the settlement’s fairness to preliminarily
9 approve a proposed settlement. Rather, a more detailed assessment is reserved for the final approval
10 hearing, after class notice has been sent and class members have had the opportunity to object to or opt-
11 out of the settlement. *See* Moore’s Federal Practice, 23.165[3] (3d ed. 2005). Generally, there is an initial
12 presumption of fairness when a proposed settlement, which was negotiated at arms’-length by Class
13 counsel, is presented for court approval. 4 Newberg on Class Actions (4th ed. 2002), ¶11.41, p. 90. In
14 approving a settlement where the class has not yet been certified, the court must first determine that a
15 class exists. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 619-20 (1997) (commonality must be shown
16 at a preliminary approval stage, although not necessarily manageability). Then, the Court should examine
17 the settlement as a whole to determine if it is fair, adequate and reasonable. *Id.*

18 **A. Settlement Amount Calculations – *Kullar* analysis**

19 The settlement amount of \$750,000 derives primarily from Plaintiffs’ unpaid overtime, meal and
20 rest break, and expense reimbursement claims of both exempt and non-exempt employees. Markham
21 Decl., ¶17. Defendant’s records indicate there are 67,736 workweeks worked by all class members, over
22 91.5% of which (62,011) are attributed to non-exempt employees, and the remaining 5,725 workweeks,
23 to exempt employees. *Id.* The average hourly rate for class members is \$21.20. Class Members worked
24 on average 8 hours per shift. Defendant produced a class sample data of pay and time records for 20%
25 of class members during the class period. *Id.* The analysis of this data, and Plaintiff’s investigation of the
26 claims in this action, reveal Defendant’s maximum potential exposure is as follows:

27 Overtime claim: \$1,646,578.08. This is based on Plaintiffs’ claim that Settlement Class Members
28 were not able to complete their work duties during their scheduled shift time, but they were not able to

1 record overtime. Investigation and class members' statements show that they worked on average 10
2 minutes a day off the clock. Markham Decl., ¶17. Thus, Plaintiffs calculate Defendant's exposure for
3 unpaid overtime wages is as follows: \$31.80 average overtime hourly rate * 62,011 workweeks worked by
4 non-exempt employees * 5 shifts * 10 minutes (0.167 hours) off-the-clock work per shift = **\$1,646,578.08.**
5 However, Plaintiff's class data review shows that Thorpe paid almost \$6,500,000 in overtime wages to
6 the class during the class period. Thus, it is highly unlikely that Plaintiff's off-the-clock claim has any
7 value. Where it appears Thorpe has paid substantial overtime on a regular basis, it would be difficult if
8 not impossible for the class to prevail on their unpaid time claim. Markham Decl., ¶17.

9 Meal break claim: \$3,286,583. This is based on Plaintiffs' claim that Defendant did not provide
10 uninterrupted and timely meal breaks, and did not maintain proper time records showing the time and
11 duration of meal breaks for at least a portion of the class period. However, Plaintiffs considered that the
12 majority of non-exempt class members work on job sites without supervision, and that might allow them
13 an opportunity to take a meal period. As such, Plaintiffs calculated the meal break violations on 50% of
14 the shifts, as follows:

15 62,011 workweeks times 2.5 shifts per week, times \$21.20 average rate of pay for meal premium
16 payment = **\$3,286,583.** There is no record of Defendant paying any meal break premiums during the
17 class period, so this amount is not discounted. Markham Decl., ¶17.

18 Rest break claim: \$2,629,266.40. This is based on 2 violations per workweek, based on Plaintiffs'
19 allegation that the press of business prevented non-exempt class members from taking rest breaks, but
20 also considering the counter argument that the majority of non-exempt class members work on job sites
21 without supervision, and that might allow them an opportunity to take a rest period. Thus, Defendant's
22 exposure for unpaid meal premiums is as follows:

23 62,011 workweeks * 2 shifts per workweek * \$21.20 hourly rate of pay for rest break premium
24 payment owed = **\$2,629,266.40.** There is no record of Defendant paying any rest break premiums during
25 the class period, so this amount is not discounted. Markham Decl., ¶17.

26 Unreimbursed expenses: \$1,003,028. Plaintiffs allege non-exempt class members were not
27 reimbursed for mileage costs they incurred when they were required to use their personal vehicles in
28 discharge of their work duties, travelling to multiple locations a day. Plaintiffs further allege that non-

1 exempt and exempt employees were not reimbursed for the expenses they incurred by using their personal
2 cell phones to communicate with supervisors. Plaintiffs estimated that non-exempt class members are
3 entitled to \$150 per month in reimbursement for mileage and cell phone usage, and exempt employees
4 to \$25 per month for cellphone usage, as follows:

5 Non-exempt employees: \$100 times 15,502 months (62,011 workweeks divided by 4) worked by
6 non-exempt employees = **\$1,550,200**. This amount is subject to discount based on the fact Thorpe
7 reimbursed \$582,947 to putative class members for travel-related expenses during the class period,
8 resulting in **\$967,253** in unreimbursed expenses to non-exempt employees.

9 Exempt employees: \$25 times 1,431 months (5,725 workweeks divided by 4) worked by exempt
10 employees = **\$35,775**. The total for exempt and non-exempt employees for this claim is \$1,003,028.

11 Wage statement penalties: \$2,240,000. There are 560 class members and 23,276 pay periods
12 during the applicable limitations period. Defendant's maximum exposure is as follows:

13 • \$50 initial violation *560 employees = \$28,000.
14 • \$100 subsequent violation * 22,716 pay periods (23,276 pay periods - 560) = \$2,271,600, for a
15 total of \$2,299,600. However, this exceeds the \$4,000 cap under 226 (the total is \$4,106 per employee).
16 Thus, applying the \$4,000 cap, Defendant's maximum exposure for section 226 violations is \$2,240,000.
17 Markham Decl., ¶17.

18 Waiting time penalties: \$2,289,600. 450 former employees multiplied by the daily pay rate of
19 \$169.60 (8-hour shift length and \$21.20 average pay rate) times 30 days, for a total of approximately
20 \$2,289,600.

21 Thus, Defendant's potential maximum liability for Plaintiff's direct claims is \$8,565,455.48, or,
22 alternatively, \$6,918,877, without attaching any value to the overtime claim, and an additional \$4,529,600
23 for Plaintiffs' wage statement and waiting time penalties claims, possible only if Plaintiffs prevailed on
24 their underlying claims. Thus, the Gross Settlement Amount of \$750,000 represents **8.75%** of
25 Defendant's maximum potential liability for Plaintiffs' direct claims (or, alternatively, 10.83% without
26 accounting for overtime), and **5.72%** of Defendant's maximum liability for all Plaintiffs' claims (or,
27 alternatively, 6.55% without accounting for overtime). *Id.*, ¶17. This is an excellent result, well within the
28 range of settlements commonly approved by California state and district courts. *Id.* See also section

1 IV(B)(2) below for a detailed explanation.

2 **B. The Proposed Tax Allocation is Reasonable**

3 The tax allocation structure of 20% to wages and 80% to penalties and interest (Settlement
4 Agreement, ¶8.8) is based upon the nature of the claims, with only 34% of Plaintiffs' claims resulting in
5 recovery of unpaid wages. When allocating a portion of recovery to interest, and accounting for the fact
6 that the 2802 reimbursements are not wages, and that the penalties are twice as high as wages in this
7 action, the tax allocation of 80% to penalties and interest and 20% to wages, is reasonable. Markham
8 Decl., ¶20.

9 **C. The Proposed Settlement is Fair, Adequate, and Reasonable**

10 The court must determine whether the settlement is fair, adequate, and reasonable. *See Dunk v.*
11 *Ford Motor Co.*, 48 Cal.App.4th at 1801, *citing Officers for Justice, supra*, 688 F.2d. at 625. The "fair, reasonable
12 and adequate" test stems from Rule 23 of the Federal Rules of Civil Procedure. *Consumer Advocacy Group,*
13 *Inc. v. Kintetsu Enters. of Am.*, 141 Cal.App.4th 46, 61 (2006). In the absence of California law, the court
14 might follow the federal authority. However, California courts have never adopted Rule 23 as "a
15 procedural strait jacket;" to the contrary, trial courts have been urged to be flexible in dealing with class
16 actions. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 240 (2001), *citing Cartt v. Super. Ct.*, 50
17 Cal.App.3d 960, 970, n.16 (1975). Generally, the opinions of counsel should be given considerable weight
18 because of counsel's familiarity with the litigation, and previous experience with cases such as this one.
19 *Officers for Justice, supra*, 688 F.2d at 625. "We note that... settlement [is] the preferred means of dispute
20 resolution...especially in complex class action litigation." *7-Eleven Owners, supra*, 85 Cal.App.4th at 1151.

21 At the preliminary approval stage, the Court considers if:

22 (1) the proposed settlement appears to be the product of serious, informed, noncollusive
23 negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential
24 treatment to class representatives or segments of the class, and (4) falls with the range of
25 possible approval.

26 *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for Complex
27 Litigation, ¶ 30.44 (2d ed.1985)). This Settlement meets all of these criteria.

28 1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations

This Settlement is the result of extensive and hard-fought negotiations. Markham Decl., ¶15.
Plaintiffs' counsel's law firms specialize in wage and hour class action litigation, and Defendant was

1 represented by seasoned attorneys at Littler Mendelson, P.C. and Kraeber Law Office. Markham Decl.,
2 ¶13; Siegel Decl., ¶¶8-19.

3 Class Counsel conducted interviews with Plaintiffs and Settlement Class Members and diligently
4 investigated Class Members' claims. Markham Decl., ¶13; section III(A), *supra*. The parties engaged in discovery
5 and Defendant produced classwide data, including a class sample of time and pay records. Class Counsel
6 reviewed voluminous documents, including Defendant's timekeeping, meal and rest break, and expense
7 reimbursement policies, and analyzed significant data. *Id.*, ¶¶11-13.

8 The vigorous litigation of this case gave both parties a clear view of the strengths and weaknesses
9 of their respective positions. *See Adams v. Inter-Con Sec. Sys., Inc.*, 2007 WL 3225466, at *3 (N.D. Cal. Oct.
10 30, 2007) (preliminarily approving the settlement agreement after finding it was reached through extensive
11 negotiations and plaintiff's counsel's thorough investigation of the claims); *Kullar v. Footlocker*, 168
12 Cal.App.4th 116, 129-130 (2008) (trial court should have sufficient information about the potential value
13 of the case and litigation issues to independently review the reasonableness of the settlement.)

14 Based on their knowledge of this action, Plaintiffs determined that the Settlement would
15 constitute the best outcome for the Class Members. Markham Decl., ¶16. Likewise, Defendant concluded
16 that this action should be settled in the manner and upon the terms and conditions set forth in the
17 Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal
18 proceedings, and the uncertainties of trial and appeals. *Id.*

19 Before this action settled, the parties participated in mediation before a private neutral with
20 extensive experience in mediating wage and hour class actions. Markham Decl., ¶14; section III(B), *supra*.
21 That indicates the settlement was free of collusion. "The assistance of a well-respected mediator with
22 substantial experience in employment litigation...supports approval of the settlement." *Murillo v. Pac.*
23 *Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010); *Dunk*, *supra*, 48 Cal.App.4th at 1802-03.

24 The parties have been cooperative, yet aggressive, and displayed capable and experienced
25 advocacy on both sides. Accordingly, "[t]here is ... every reason to conclude that settlement negotiations
26 were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash.*
27 *Public Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989).

28 2. The Settlement has no "Obvious Deficiencies" and Falls within the Approval Range

1 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of
2 highest hopes.’” *Officers for Justice*, 688 F.2d at 624 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir.
3 1977)). Thus, when evaluating the amount offered in settlement, the Court should consider “the complete
4 package taken as a whole,” and the amount should “not be judged against a hypothetical or speculative
5 measure of what might have been achieved by the negotiators.” *Id.* at 625-28.

6 (i) *The Class Recovery Compares Favorably with Similar Wage and Hour Class Action Settlements*

7 Courts routinely approve class action settlements where the settlement amount is a lower
8 percentage of the claimed amount of damages. In *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611 (N.D.
9 Cal. 2014), the court found a settlement in a wage and hour class action between 9% and 27% of total
10 potential liability to be fair, adequate and reasonable given the uncertainty of continued litigation. *Id.* at
11 623-24; *see also Glass v. UBS Financial Services*, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (approving
12 a settlement of unpaid overtime wages where the settlement amount constituted approximately 25 to 35%
13 of the estimated actual loss to the class); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.
14 2000) (16.67% of potential recovery adequate in light of plaintiff’s risks); *Thomas v. Cognizant Tech. Sols.*
15 *U.S. Corp.*, 2013 WL 12371622, at *6 (C.D. Cal. June 24, 2013) (granting final approval in wage and hour
16 action for settlement between 4.4% and 5% of maximum liability); *Stovall-Gusman v. W.W. Granger, Inc.*,
17 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (approving settlement representing 10% of potential
18 value); *Villegas v. J.P Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012); *In re MyFord*
19 *Touch Consumer Litig.*, 2019 WL 1411510, at *10 (N.D. Cal. Mar. 28, 2019) (6% of valuation). Simply put,
20 “the fact that a proposed settlement may only amount to a fraction of the potential recovery does not
21 mean that [it] should be disapproved.” *7-Eleven Owners, supra*, 85 Cal.App.4th at 1150, citing *Linney v.*
22 *Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

23 Here, the Settlement represents 8.75% (or alternatively, 10.83%) of Defendant’s maximum
24 potential liability for Plaintiff’s direct overtime, break, and expense reimbursement claims, and over 5.7%
25 (or, alternatively 6.55%) of Defendant’s maximum liability for all Plaintiffs’ claims, without any risks,
26 costs, and uncertainty of prolonged litigation. Markham Decl., ¶17. Without accounting for the length of
27 each class member’s employment with Defendant, a non-exempt class member will recover over \$6.26
28 per workweek as a result of this settlement, and an exempt class member will recover \$3.57 per workweek.

1 *Id.*, ¶18. This is an excellent result when considering that Plaintiffs could face difficulties to establish
2 liability and prevail at certification and trial, or recover anything at all based on Thorpe's financial
3 condition, and is well within (or exceeds) the range of approved settlement payments. *See e.g., Villegas v.*
4 *J.P Morgan Chase & Co.*, 2012 WL 5878390, at *2, 6 (N.D. Cal. Nov. 21, 2012) (approving settlement with
5 approximately \$255 settlement payment per class member).

6 (ii) *The Formula of Allocation is Fair and should be Approved*

7 Settlement Class Members will receive a portion of the Gross Settlement Amount based on the
8 number of workweeks they worked for Defendant during the class period. However, to account for the
9 fact that only non-exempt employees are eligible to recover for unpaid time and meal and rest break
10 premiums, 95% of the Settlement Amount will be allocated to that group. Settlement Agreement, ¶8.7.1.
11 This formula is realistic because Settlement Class Members' individual recovery is proportionate to the
12 amount of time they were employed with Defendant, and also proportional to the fact that only non-
13 exempt employees can recover for the majority of the alleged violations. Markham Decl., ¶19. Further,
14 discovery confirmed that non-exempt class members earned relatively the same hourly wage as would be
15 applied to unpaid wages and meal and rest break premium payments. *Id.*, ¶19. Further, derivative
16 inaccurate wage statement and waiting time penalties, if recoverable at all, are contingent on the success
17 of Plaintiffs' primary claims, and therefore, the per workweek distribution represents the fairest and most
18 efficient distribution approach. *Id.*, ¶19.

19 Thus, considering the probability of lengthy litigation in the absence of a settlement, the risk that
20 Plaintiffs and the Settlement Class Members might not have been able to succeed at trial, and the risk
21 that a jury could award damages less than \$750,000, the settlement amount is reasonable. *In re Mego Fin.*
22 *Corp. Sec. Litig.*, 213 F.3d at 458; *Sandoval*, 2010 WL 2486346, at *7.

23 3. The Settlement does not Improperly Grant Preferential Treatment to Class
24 Representatives or Segments of the Class

25 Class Representatives Armando Delamora and Jesus Cardenas will each receive \$7,500 for their
26 time and efforts in representing the Class and in exchange for their general release. Settlement Agreement,
27 ¶8.5. "Incentive awards [for class representatives] are fairly typical in class actions." *Cellphone Termination*
28 *Fee Cases*, 186 Cal.App.4th 1380, 1393 (2010), citing *Rodriguez v. West Publ'g*, 563 F.3d 948, 958 (9th Cir.
2009). California courts agree that a class representative is entitled to such an award. *Cellphone Termination*,

1 *supra*, 186 Cal.App.4th at 1394. “Since without a named plaintiff there can be no class action, such
2 compensation as may be necessary to induce him to participate in the suit could be thought the equivalent
3 of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are
4 reimbursable.” *Clark v. Am. Residential Servs.*, 175 Cal.App.4th 785, 804 (2009), citing *Matter of Cont'l Ill.*
5 *Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

6 Here, the enhancement payments to Plaintiffs are based on the extent of Plaintiffs' participation in
7 this action, and not conditioned upon Plaintiffs' support of the settlement. *Cf. Radcliffe v. Experian Info. Solutions,*
8 *Inc.*, 715 F.3d 1157, 1165 (2013). Throughout this action, Plaintiffs assisted in investigation, participated in
9 multiple call conferences with counsel, and provided and reviewed documents and pleadings. *See*
10 Delamora Decl., ¶¶11-12; Cardenas Decl., ¶9. Further, Mr. Delamora was on standby during mediation.
11 Delamora Decl., ¶11.

12 Courts award incentive awards in, or above, this range. *Ross v. U.S. Bank Nat'l Ass'n*, 2010 WL
13 3833922, at *3 (N.D. Cal. Sept. 29, 2010) (approving an award of \$20,000 to each of four named plaintiffs
14 based on their contributions to litigation and the risk that being a class representative would harm their
15 reputation); *see also Ridgeway v. Wal-Mart Stores Inc.*, 2017 WL 4071293, at *19 (N.D. Cal., Sept. 14, 2017)
16 (\$15,000 incentive awards for each of the named plaintiffs awarded); *Low v. Trump University, LLC*, 246
17 F.Supp.3d 1295, 1316 (S.D. Cal. 2017) (\$15,000 incentive award approved where plaintiffs “devoted
18 significant amounts of time and energy” to the action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862 at *17
19 (\$25,000 for each class representative in wage and hour action). Thus, the proposed service awards are
20 reasonable.

21 4. The Stage of the Proceedings is Sufficiently Advanced to Permit Preliminary Approval of
22 the Settlement

23 “A court is more likely to approve a settlement if most of the discovery is completed because it
24 suggests that the parties arrived at a compromise based on a full understanding of the legal and factual
25 issues surrounding the case.” *Nat'l Rural Telecomms. Corp.*, *supra*, 221 F.R.D. at 527. However, the
26 settlement can be approved even in the absence of any discovery, if other factors are satisfied. *In re TD*
27 *Ameritrade Account Holder Litig.*, 2011 WL 4079226, at *6 (N.D. Cal. Sept. 13, 2011). The bottom line is
28 that “the parties have sufficient information to make an informed decision about the settlement.” *Durham*
v. Cont'l Cent. Credit, Inc., 2011 WL 90253, at *3 (S.D. Cal. Jan. 10, 2011), citing *Linney v. Cellular Alaska*

1 *P'ship*, 151 F.3d at 1239.

2 Here, before settling this action, the parties had a thorough understanding of their respective
3 claims and defenses, as the parties had engaged in significant meet and confer efforts, and informal
4 discovery. *See* section III(A), *supra*; Markham Decl., ¶¶11-13. Before mediation, Class Counsel had
5 investigated class members' claims, examined documents and data, and performed damage calculations.
6 *Id.*, ¶12. At the time the parties engaged in mediation, they knew and understood their respective
7 positions. *Id.*, ¶15. As a result of the work performed in this case, the real value of the class claims was
8 well known, and Class Counsel determined that the Settlement with Defendant is fair, reasonable,
9 adequate, and in the best interest of the Class. *Young v. Polo Retail, LLC*, 2007 WL 951821, at *4 (N.D.
10 Cal. Mar. 28, 2007).

11 **D. The Proposed Class Meets the Qualifications for Certification for Settlement**
12 **Purposes.⁹**

13 In California, to prevail on a motion for class certification, plaintiffs need to show that “the
14 question is one of a common or general interest, of many persons, or...the parties are numerous, and it
15 is impracticable to bring them all before the court.” Cal. Code of Civ. Proc. § 382. The party seeking
16 certification needs to prove that the class is both ascertainable and that there is a well-defined community
17 of interest among class members. *See Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 326 (2004). In
18 *Sav-On Drug Store*, the court adopted a test for “community of interest,” which consists of the following
19 prongs: (1) there are predominant common questions of law or fact; (2) class representatives have claims
20 typical to those of the class; and (3) class representatives can adequately represent the interests of the
21 class. *Id.*

22 **1. An Ascertainable and Numerous Class Exists that can be Determined from Payroll Records**

23 A class is generally considered ascertainable when: (i) under the class definition the members are
24 clearly identifiable, and (ii) the members can be located and notified through a reasonable expenditure of
25 time and money. *See Reyes v. San Diego County Board of Supervisors*, 196 Cal.App.3d 1263, 1274-75 (1987);
26 *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919-20 (2010). Typically, class members are ascertainable
27 when they can be easily identified by reference to official or business records. *Archer v. United Rentals, Inc.*,
195 Cal.App.4th 807, 828 (2011); *Sevidal*, 189 Cal.App.4th at 919.

28 ⁹ Defendant agrees to certify a class for settlement purposes only, and their agreement to do so shall not be construed as an admission of the propriety of class certification outside of the settlement context. Settlement Agreement, at §V.

1 Here, the Class is composed of approximately 850 current and former non-exempt and exempt
2 employees of Defendant in California, who can be identified and located from Defendant's personnel
3 and payroll records. In California, as few as ten (10) or twenty-eight (28) members satisfied numerosity.
4 *Bowles v. Super. Ct.*, 44 Cal.2d 574 (1955); *Hebbard v. Colgrove*, 28 Cal.App.3d 1017, 1030 (1972). Defendant
5 will provide the Settlement Administrator with a database with all Settlement Class Members' names,
6 contact information, and the number of relevant workweeks within fourteen calendar days of preliminary
7 approval, and further steps will be taken to locate the Settlement Class Members for whom the addresses
8 are not current. Settlement Agreement, ¶9.3; *see also* section VI, *infra*. Numerosity is satisfied, and the class
9 is ascertainable.

10 2. Common Issues of Law and Fact Predominate over any Individual Issues

11 "As a general rule if the defendant's liability can be determined by facts common to all members of
12 the class, a class will be certified even if the members must individually prove their damages." *Brinker*,
13 *supra*, 53 Cal.4th at 1022. The court only determines whether or not "the theory of recovery advanced by
14 the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."
15 *Sav-On Drug Stores, supra*, 34 Cal.4th at 327.

16 Here, there are common questions of law and fact that apply to Class Members across the board,
17 because all Class Members were subject to Defendant's timekeeping, meal and rest break, and expense
18 reimbursement policies and practices, and Plaintiffs argue these policies and/or practices were unlawful.
19 Those common questions predominate over any individual inquiries, in that "determination of [their]
20 truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."
21 *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Those questions include: (i) Whether or not
22 Settlement Class Members were paid for all hours worked, including additional time required to complete
23 the required installations and inspections, (ii) Whether or not Class Members were provided with off-
24 duty, uninterrupted meal and rest breaks; (iii) Whether or not Defendant reimbursed Class Members'
25 business expenses; (iv) Whether or not Class Members were provided with all wages due upon separation
26 under Labor Code section 203; (v) Whether or not Class Members were provided with accurate wage
27 statements as required by Labor Code section 226; (vi) Whether or not Defendant engaged in unfair
28 business practices in violation of the UCL. *See also* Delamora Decl., ¶¶8-9; Cardenas Decl., ¶4, attesting

1 that their claims are common to the claims of the absent Class Members.

2 Because several issues are common to all Class Members, a class action is superior to numerous
3 individual actions, and the maintenance of this action as a class action will save judicial resources, and
4 help avoid inconsistent judgments. *See Savon Drugs, supra*, 34 Cal.4th at 326. Class Members' interests are
5 relatively small, so they are unlikely to prosecute separate actions. Plaintiffs' claims arise from their
6 employment with Defendant in California.

7 3. Plaintiffs' Claims are Typical of the Claims of Class Members

8 Typicality does not mean that the interests of representative plaintiffs must be identical to those of
9 the absent class members. *Classen v. Weller*, 145 Cal.App.3d 27, 46 (1983); *Staton v. Boeing Co.*, 327 F.3d
10 938, 957 (9th Cir. 2003). They only need to be "reasonably co-extensive with those of absent class
11 members." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). Further, the representative plaintiff must be
12 a member of the class she seeks to represent. *La Sala v. American Sav. & Loan Assn.*, 5 Cal.3d 864, 875
13 (1971). "Typicality refers to the nature of the claims or defense of the class representative, and not to the
14 specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th
15 Cir. 1992).

16 Here, Plaintiffs' claims arise from the same facts and legal theories as the Class Members' claims.
17 Plaintiffs were employed by Thorpe in California, and subject to the same policies and practices of
18 Defendant with respect to timekeeping, meal and rest breaks, and expense reimbursement. *See also*
19 Delamora Decl., ¶¶8-9 Cardenas Decl., ¶4, attesting that their claims are typical of the claims of the absent
20 Class Members. Thus, typicality is met.

21 4. Plaintiffs and Class Counsel will Adequately Protect the Interests of the Class

22 The adequacy of representation involves two conditions: the named plaintiff must be represented
23 by counsel qualified to prosecute class actions of this type; and the named plaintiff's interests cannot be
24 antagonistic to those of the class. *See McGhee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976).

25 Here, Plaintiffs retained counsel with extensive experience in prosecuting wage and hour class
26 actions. Markham Decl., ¶¶33-39; Siegel Decl., ¶¶8-19; Declaration of Walter L. Haines ("Haines Decl."),
27 ¶3. In addition, Plaintiffs have the same interests as the rest of the Settlement Class, because they have
28 allegedly been injured in substantially the same manner. Delamora Decl., ¶¶8-9; Cardenas Decl., ¶4. Thus,

1 the Court should certify Plaintiffs' class claims for the purposes of this Settlement.

2 **VI. THE PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED**

3 **A. Proposed Notice Plan**

4 Within ten business days following receipt of Class Data from Defendant, the Settlement
5 Administrator will send Class Notice to Settlement Class Members via first class mail. Settlement
6 Agreement, ¶9.4. Before mailing the Notice, the Settlement Administrator will run a check of the
7 Settlement Class Members' addresses against those contained in the USPS's National Change of Address
8 database, and take any other appropriate steps to validate the correctness of the addresses provided by
9 the Defendant. *Id.*, ¶9.3. If the Notice is returned with the forwarding address, the Settlement
10 Administrator will use the forwarding addresses to locate the missing Class Members, and re-mail the
11 Notice to the correct address. *Id.*, ¶9.4.1. If a Notice is returned as non-deliverable with no forwarding
12 address, the Settlement Administrator shall conduct an advanced skip trace to locate the most current
13 address of the person to whom the Notice was addressed, and shall resend the Notice to any updated
14 address within 5 business days. *Id.* Any responses from the Settlement Class Members (*i.e.*, a dispute
15 regarding calculation of workweeks, a Request for Exclusion, or an objection) are due to the Administrator
16 by the Notice Response Deadline, as defined in the Settlement Agreement, or within fifteen (15) days from
17 the date of re-mailing, whichever is later. *Id.*

18 The Class Notice will summarize the terms of the Settlement Agreement, advise the Class
19 Members of their estimated individual settlement payment, and inform Class Members of their right to
20 object to or exclude themselves from the Settlement within forty-five days after the Notice mailing. **Ex.**
21 **A.** Because this is the California-only class, and the mailing will occur only in California, forty-five days
22 to opt out from or object to the Settlement is sufficient. Markham Decl., ¶21. Further, because Class
23 Members worked in California, communicating with customers on daily basis in English, and speaking
24 English was a job requirement, English-only notice is sufficient. *Id.*

25 **B. The Proposed Notice to the Class is Fair and Adequate**

26 The parties agreed on the language of the proposed class notice. *Id.* If the Court concludes after
27 a preliminary evaluation of the settlement that the relief offered and notice provided are fair and adequate,
28 the Court should order that the class notice be provided. Manual for Complex Litig., Second, § 21.632

1 at 321. The threshold requirement regarding the sufficiency of class notice is whether the means
2 proposed for distributing the notice are reasonably calculated to apprise the class of the pendency of the
3 action, the proposed settlement, and the right to opt out of or object to the settlement. *Eisen v. Carlisle*
4 *& Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950);
5 *see also* Cal. Rules of Court, Rule 3.766.

6 Here, the Notice is more than sufficient, because it gives Settlement Class Members, in an easy
7 to understand and clear language: (1) basic information about this action and the Settlement; (2) an
8 estimate of the weeks Settlement Class Members worked during the Class Period, and an explanation
9 how Settlement Class Members can dispute this calculation; (3) an explanation how the payout from the
10 Settlement will be calculated for each Settlement Class Member, and an estimate of a Settlement Class
11 Member's Settlement Payment; (4) an explanation how Settlement Class Members can exercise their right
12 to opt-out from, or object to, the Settlement; (5) an explanation that any claims against the Defendant
13 that could have been litigated in this Action will be released if the Settlement Class Member does not opt
14 out; (6) name of Class Counsel and information regarding attorneys' fees and costs; (7) the date of the
15 Fairness Hearing and an explanation of eligibility to appear at the Fairness Hearing; and (8) the telephone
16 and e-mail number, as well as website address, where Settlement Class Members can obtain additional
17 information. *See* Ex. A (proposed Class Notice).

18 Thus, the Notice plan proposed by the Settlement is fair and adequate, and complies with the
19 California Rules of Court, Rules 3.766 and 3.769(f).

20 VII. CONCLUSION

21 In the judgment of Plaintiffs and Class Counsel, as well as Defendant, the proposed Settlement
22 is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of
23 each party's case. After weighing the substantial, certain and immediate benefits of this Settlement against
24 the uncertainty of further trial and appeal, the parties believe the proposed Settlement is fair, reasonable
25 and adequate. Thus, Plaintiff's motion should, respectfully, be granted.

26 Dated: May 2, 2023

Respectfully submitted,

THE MARKHAM LAW FIRM

/s/ Maggie Realin

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