

1 KEVIN R. ALLEN, SBN 237994
2 **ALLEN ATTORNEY GROUP, PC**
3 2121 North California Avenue, Suite 290
4 Walnut Creek, California 94596
5 Tel. (925) 695-4913
6 Fax (925) 334-7477
7 kevin@allenattorneygroup.com

8 NICOLAS ORIHUELA (SBN # 221898)
9 **ORIHUELA LAW FIRM, PC**
10 8221 3rd St., Suite 403
11 Downey, CA 90241
12 Tel.(323) 965-2103
13 Fax (323) 965-2146
14 no@orihuelalaw.com

15 Attorneys for Representative Plaintiff
16 and the Putative Class

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**
19 **(UNLIMITED JURISDICTION)**

20 MARCO GUTIERREZ, on behalf of himself
21 and all others similarly situated;

22 Plaintiff,

23 v.

24 DEL WEST ENGINEERING, INC., a
25 California corporation, and DOES 1 through
26 50, inclusive;

27 Defendants.

Case No. 21STCV45477

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: November 29, 2022

Time: 10:00 a.m.

Judge: Hon. Yvette M. Palazuelos

Dept.: 9

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INTRODUCTION

Representative Plaintiff Marco Gutierrez (“Plaintiff”), by and through the instant unopposed Motion, requests this Court enter an Order:

1. Preliminarily approving the Parties’ Class Action and PAGA Settlement Agreement and Release (the “Settlement”);¹
2. Granting Conditional Certification of the Settlement Class;
3. Appointing Class Counsel, Class Representative and Settlement Administrator;
4. Scheduling a Final Approval Hearing; and,
5. Approving the Notice of Proposed Class Action Settlement and Final Approval Hearing Date.

For purposes of settlement Plaintiff seeks to represent a putative Class of individuals who worked for Defendant Del West Engineering, Inc. as a nonexempt employee, in one of 18 factory job positions, in California (“Class Members”)² between December 14, 2017 and June 26, 2022 (“Class Period”³).

In his operative First Amended Complaint, Plaintiff alleges Defendant failed to properly compensate Class Members for all hours worked (including overtime premiums), provide timely meal or rest periods, pay all due wages on separation of employment, provide accurate itemized wage statements, and that Defendant committed unfair business practices under California law.

Through this lawsuit, Plaintiff seeks damages for unpaid wages (including overtime), meal and rest period violations, and derivative penalties including inaccurate wage statement penalties, late payment penalties, and penalties under the Private Attorneys General Act (“PAGA”). Plaintiff also sought associated interest, as well as attorneys’ fees and costs.

The present settlement requires Defendant to pay, on a **non-reversionary** basis, Five Hundred and Fifteen Thousand Dollars (\$515,000.00) that will be used to pay settlement awards to more than 172 class members, attorney’s fees and costs, settlement administration costs, a service

¹ See **Exhibit “1”** [Class Action and PAGA Settlement Agreement and Release] (the “Settlement”). All numerical exhibits cited herein are attached to the accompanying Declaration of Kevin R. Allen in Support of the instant Motion (“Allen Decl.”). All alphanumeric exhibits cited herein are attached to the Settlement.

² See Settlement, § 1.3 and **Exhibit “A”** [List of Job Titles].

³ Settlement, § 1.9.

award to the named Plaintiff, and to pay the Labor and Workforce Development Agency (“LWDA”) under PAGA. This is referred to the Settlement as the “Maximum Settlement Amount.” Settlement § 1.22.

Due to economic conditions Defendant is being permitted to fund the Settlement in two equal installments approximately six months apart, with the first one due within seven days of the Effective Date of the Settlement. All distributions/payments will be issued in two rounds, with each to take place within 14 days of the installment being funded.

In exchange for this settlement payment, Defendant will be provided a limited release of the causes of action alleged in the Complaint or that could have been asserted based on the facts alleged in the Complaint and/or the Plaintiff’s Notice to the LWDA.⁴ The named Plaintiff, Marco Gutierrez, will provide a broader general release to the Defendant.

Viewed in relation to the risks and uncertainty judgment due to the economic conditions, the proposed Settlement falls well within the range of reasonableness and is worthy of preliminary approval and conditional class certification.

I. BACKGROUND

A. PARTIES AND COUNSEL⁵

Defendant Del West Engineering, Inc. (“Defendant” or “Del West”) is “a multi-national manufacturing corporation specializing in the production of high-end components for racing, aerospace, watches and other industries.”⁶ Its website represents that it employs more than “150 people at factories in Valencia, California and Roche, Switzerland.”

Defendant is represented by Leslie Abbott of Paul Hastings LLP.

Plaintiff Marco Gutierrez was employed by Defendant as a nonexempt laborer at its Valencia, California facility from 1992 to September 2019.

Kevin R. Allen of Allen Attorney Group, PC and Nicolas Orihuela of Orihuela Law Firm, P.C. represent Plaintiff and the putative class.

⁴ Settlement, §§ 1.32 [defining “Released Class Claims”] and 1.33 [“Released PAGA Claims”]

⁵ Allen Decl., ¶¶ 4-7.

⁶ See <https://delwestengineering.com/contactus.html> [last visited September 30, 2022].

1 **B. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS⁷**

2 On December 14 2021, Plaintiff Marco Gutierrez filed his class action complaint in the Los
3 Angeles County Superior Court alleging the following causes of action: (1) Failure to Pay All
4 Wages Owed (Violation of California Wage Orders and Labor Code §§ 510, 1194, 1197); (2)
5 Failure to Provide Meal Periods and Rest Breaks or Pay Meal and Rest Break Premiums
6 (California Labor Code §§ 226.7 and 512); (3) Failure to Pay Wages on Separation of Employment
7 (California Labor Code §§ 203, 2926, 2927); (4) Failure to Provide Accurate Itemized Wage
8 Statements (California Labor Code § 226); and (5) Unfair Business Practices (California Business
9 & Professions Code §§ 17200-17208).⁸

10 On January 13, 2022, the Court deemed the case as complex and stayed the case including
11 formal discovery and Defendant's deadline to respond to the complaint. Prior to the Initial Status
12 Conference, the Parties met and conferred to discuss, amongst other topics, whether or not the case
13 was appropriate for early class mediation and the scope of the informal data exchange that would
14 need to precede the session.

15 The Parties ultimately agreed on the scope of a robust pre-mediation data exchange and
16 scheduled mediation with mediator Dennis Moss. As part of the pre-mediation data exchange
17 Plaintiff and his counsel received class metrics and employment records including Plaintiff's
18 personnel file, punch data and payroll data; Documents relating to the adoption of Defendant's
19 Alternate Workweek Schedule including copies of the notices and documents filed with the DLSE;
20 Punch detail report for a sampling of one-third of the putative class for the period of December 14,
21 2017 through March 5, 2022; and, a Payroll summary report for a sampling of one-third of the
22 putative class for the period of December 14, 2017 through March 5, 2022.

23 The Parties attended the full day mediation session with Dennis Moss on April 21, 2022.
24 They were unable to resolve the matter at the session but Mr. Moss continued to work with the
25 Parties' counsel after the session. The Parties were ultimately able, with the help of a mediator's
26 proposal and several weeks of additional discussions, to execute the Class Action and PAGA

27
28 ⁷ Allen Decl., ¶¶ 8-11.

⁸ A PAGA claim was added later. Plaintiff served a PAGA notice on the LWDA on May 3, 2022. On August 18, 2022 Plaintiff filed a First Amended Complaint to officially add the PAGA claim to the pleading.

1 Settlement Agreement and Release that is being submitted to the Court for approval herein. *See*
2 **Exhibit “1.”**

3 **C. RELEVANT FACTUAL BACKGROUND⁹**

4 Plaintiff Marco Gutierrez was employed by Defendant as a nonexempt laborer at its
5 Valencia, California facility from 1992 to September 2019. During the Class Period of December
6 17, 2017 through the present, Defendant employed over 172 nonexempt employees (including the
7 named Plaintiff) at its Valencia factories in California.¹⁰

8 Plaintiff contends that Defendant did not provide lawful meal periods to the factory
9 employees. Most of the meal periods were clocked out late.

10 Plaintiff contends that Defendant rounded time punches to the nearest quarter or half hour.

11 Most factory employees purported to work a 4/10 alternate workweek schedule (“AWS”).
12 According to the Alternate Workweek Elections Database, maintained by the California
13 Department of Industrial Relations (“DIR”), Del West purports to have conducted an election on
14 April 3, 2009 in which a “4/10 Work Week” was adopted for “All hourly employees” at two
15 locations in California.

16 In this lawsuit Plaintiff alleged that the AWS was invalid either because of defects in its
17 adoption or because employees deviated from the adopted shifts so frequently that the AWS could
18 not be deemed a “regular and reoccurring” shift.

19 Plaintiff contended with the provision of lawful meal and rest breaks to the Class Members.
20 There was a particular issue with *late* meal periods and the provision of additional breaks for
21 employees who worked ten hours or more.

22 The AWS exasperated the meal and rest break issues. To the extent AWS employees
23 worked even a few minutes beyond their ten-hour shift,¹¹ it would give rise to Class Members’
24 entitlement to a third rest break and second meal period.

25
26
27 ⁹ Allen Decl., ¶¶ 12-17

¹⁰ These factory employees held one (or more) of the eighteen job titles listed in **Exhibit “A”** to the Settlement.

28 ¹¹ There was evidence that time punches were rounded to the nearest quarter or half hour. Rounding is permitted
but only if done in a neutral manner which does not result in a loss of wages to the employees. *See See’s Candy Shops,*
Inc. v. Sup. Court (2012) 210 Cal. App. 4th 889.

1 **II. SUMMARY OF SETTLEMENT**

2
3 The proposed Settlement is within the range of reasonableness and in the best interest of the
4 class members in light of all facts and circumstances, including the risk of significant delay and
5 Defendant’ substantive and procedural defenses. Allen Decl., ¶ 18.

6 **A. THE SETTLEMENT CLASS**

7 The Settlement proposes conditional certification of a class of all current and former
8 individuals who have been employed by Del West Engineering, Inc. as a non-exempt employee in
9 one of eighteen job titles (listed in Exhibit A to the Settlement) within the State of California at any
10 time during the Class Period. Settlement, ¶ 1.3 and Exhibit “A.”

11 The Class Period is defined as the period from December 14, 2017 through and including
12 June 26, 2022. Settlement, ¶ 1.9.¹² There are at least 172 such Class Members who worked over
13 18,515 workweeks during the Class Period.¹³

14 **B. THE SETTLEMENT TERMS**

15 Defendant is required to fully fund and pay a **non-reversionary** \$515,000.00 – referred to
16 as the “Maximum Settlement Amount” - in two equal installments as follows: (1) Defendant will
17 fund the first installment on the earlier of December 31, 2022 or seven (7) days after the Effective
18 Date of the Settlement; and (2) Defendant will fund the second installment on the earlier of July 1,
19 2023 or six (6) months after the date the first installment was funded (“Installment Funding
20 Schedule”). Settlement, ¶ 3.10. Defendant will pay employer’s payroll tax burden in addition to,
21 and separately from the Maximum Settlement Amount. Settlement, ¶¶ 1.22, 2.7.

22 All payments and disbursements from the Maximum Settlement Amount required by the
23 Settlement will be issued in two equal payments, with the first half issued within 14 days of the

24
25 ¹² The class definition excludes “employees who Defendant laid off in September 2019 as part of Defendant’s
26 reduction in force and who received separation pay in exchange for a general release of claims” except to the extent
27 “they were rehired after the severance and performed work during the Class Period that was not otherwise released by
28 the severance agreement.” Settlement, ¶ 1.3.

¹³ Allen Decl. ¶21. The actual class size will exceed 172 as Class Period includes an additional four months of
class members, i.e., through June 26, 2022. Defendant represented that there were 18,515 Compensable Weeks during
the Class Period through March 22, 2022. Settlement ¶ 3.16. If the total number of Compensable Weeks exceeds this
figure by fifteen (15%) (i.e., 21,292 Compensable Weeks) then the Plaintiff may void the Agreement unless Defendant
agrees to a proportional increase in the Maximum Settlement Amount. *Id.*

1 first installment payment being received and the second half issued within 14 days of the second
2 and final installment being received. *See* Settlement, ¶ 3.11.

3 The settlement fund will be used to pay a modest incentive award to the named Plaintiff for
4 his service to the Class (up to \$7,500); Plaintiff’ attorneys’ fees (up to 35% of the Maximum
5 Settlement Amount, i.e., \$180,250) and actual litigation costs (up to \$8,500); a PAGA payment to
6 the California Labor and Workforce Development Agency (75% of \$30,000, i.e., \$20,000); and
7 actual administration expenses to Phoenix Class Action Administration Solutions (\$9,500 flat fee).
8 *Settlement*, ¶¶ 1.34-1.35. The amount remaining from the Maximum Settlement Amount after
9 paying for these items, referred to as the Net Settlement Amount, will be distributed in its entirety
10 to participating Class Members. *Id.*, ¶¶ 1.6, 1.8, 1.11, 1.21, 1.23, 1.26 *et seq.*

11 Each Class Member’s individual Settlement Payment amount will be calculated *pro rata*
12 based upon each Class Members’ individual number of workweeks worked during the Class Period
13 relative to the workweeks worked by all participating Class Members. Settlement, ¶ 3.12.2.

14 Class Members will also be eligible to receive a pro rata portion of the amount allocated to
15 PAGA (“PAGA Settlement Payment”¹⁴) based on the number of workweeks worked during the
16 period covered by the PAGA claims, i.e., December 14, 2020 through June 26, 2022, inclusive.
17 Settlement, ¶¶ 1.27.

18 Class Members do not need to submit a claim form or do anything else in order to receive
19 their Settlement Payment or PAGA Payment. Class Members who do not wish to receive their
20 Settlement Payment and wish to retain their claims may submit a Request for Exclusion. *See*
21 Settlement, ¶ 3.6. Class Members cannot opt out of the receiving the PAGA payment or the release
22 of PAGA claims set forth in the Settlement. *Id.*

23 Inevitably, some Class Members will not cash their Settlement Payment or PAGA Payment
24 checks. Checks not cashed within 180 days of mailing will be voided. The funds from voided
25 checks in the first distribution shall be reissued and sent to the same Settlement Class Member
26 alongside or in addition to their second check (i.e., after the second installment payment).
27 Settlement, ¶ 3.9. Funds from uncashed checks sent in the second distribution shall be turned over

28

14 *See* Settlement, ¶ 3.10.2.

1 to the California State Controllers Unclaimed Property Fund to be held in the name of the
2 individual for whom the funds were designated. *Id.*

3 For tax purposes, one-third (33 1/3%) of each Class Member's Settlement Payment shall be
4 treated as wages (and reported on a W-2 Form) and two-thirds (66 2/3 %) shall be treated as
5 interest/penalties/non-wage damages (reported on a 1099-MISC Form). Settlement, ¶ 3.12.3. The
6 Settlement Administrator shall deduct employee side payroll taxes from the portion of the
7 settlement check allocated to wages. *Id.* Employer's payroll taxes are to be paid in addition to and
8 the Maximum Settlement Amount. *Id.*

9 The Settlement provides that the Court shall retain jurisdiction over the matter following
10 final approval to enforce the settlement terms. Settlement, ¶ 3.20.

11 **C. THE RELEASE**

12 Assuming the Settlement is approved and fully funded,¹⁵ Defendant will receive a limited
13 and narrow release of claims. Class Members who do not opt out will release Defendant Del
14 West¹⁶ from "any and all wage-and-hour individual and class claims, rights, demands, liabilities,
15 and/or causes of action of every nature and description, arising from or related to any and all
16 claims during the Class Period that were asserted or could have been asserted based on the facts
17 alleged in the Complaint, including, without limitation, statutory, constitutional, contractual, and/or
18 common law claims for wages, damages, unpaid costs, penalties, liquidated damages, punitive
19 damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief." Settlement,
20 ¶¶ 1.32. All PAGA Members shall, even if they opt out, release Defendant from "any and all
21 individual and representative PAGA claims for civil penalties, attorneys' fees, and costs during the
22 PAGA Period under California Labor Code section 2698, *et seq.* and any applicable IWC Wage
23 Order that were or could have been asserted based on the facts alleged in the Complaint and
24 Plaintiff's notice to the LWDA." Settlement, ¶ 1.33. The named Plaintiff is also providing a
25 broader General Release of all known and unknown claims with an express waiver Civil Code

26 ¹⁵ Settlement ¶ 3.1.1.

27 ¹⁶ "Released Parties" is defined as Del West Engineering, Inc., and all of its current and former parents,
28 subsidiaries, predecessors and successors, and affiliated entities, and each of their respective officers, directors,
owners, employees, partners, shareholders, agents, attorneys, insurers, and assigns, and each of them. Settlement
¶ 1.34.

Section 1542. Settlement, 3.1.2.¹⁷

D. PROPOSED SCHEDULE AND SEQUENCE OF EVENTS¹⁸

The Settlement provides for a comprehensive notice program to ensure Class Members are informed of the proposed terms of settlement and allowed the opportunity to opt out or object to the settlement. The Parties propose Phoenix Class Action Administration Solutions to be appointed as the Settlement Administrator for this settlement.¹⁹

Within fourteen (14) calendar days of preliminary approval Defendant will provide Phoenix with a password-protected, Microsoft Excel spreadsheet which includes each Class and PAGA Member's: (a) full name; (b) last known address; (c) last known telephone number; (d) Social Security number; (e) start date of employment and/or assignment at Defendant; (f) end date of employment and/or assignment at Defendant; and (g) Compensable Weeks (as defined below in Paragraph 1.14); and (h) Compensable Pay Periods (as defined in Paragraph 1.13). Settlement, ¶¶ 1.7; 3.2.1.

Prior to mailing the Notice, the Settlement Administrator will use the National Change of Address (NCOA) database to update Class Member addresses and ensure notices have the best chance of reaching each Class Member. Settlement, ¶ 3.3.3.

Within fourteen (14) days of receiving the Class List, the Settlement Administrator will send each member, via First Class United States Mail, the Notice of Settlement in both Spanish and English.²⁰ See Settlement, ¶ 3.3.1 *et seq.* The Notice was drafted in plain English so as to clearly explain the recipients' options, how their settlement payment will be calculated, as well as what claims they are giving up if they do not opt-out. The Notice informs Class Members and PAGA Members how they can dispute the information which is being used to calculate their individual settlement awards. See Exhibit "A" [Notice] to Settlement at p. 5 ("Defendant's records shall be

¹⁷ The named Plaintiff also had an individual complaint for wrongful termination and discrimination which was pending in the Los Angeles County Superior Court under case number 21STCV18645. It resolved on an individual/confidential basis in March 2022 which was prior to the negotiations in this lawsuit. Allen Decl., ¶ 28.

¹⁸ A chart reflecting the dates for performance of events under the Settlement is included in Allen Decl. See Allen Decl., ¶ 50.

¹⁹ Phoenix has ample experience administering class action settlements similar to this one. See **Exhibit "2" [Declaration of Jodey Lawrence]**. Class Counsel has used them on prior cases and finds them to be honest, suitable and trustworthy. Allen Decl., ¶ 41.

²⁰ The proposed class notice is attached to the Settlement as **Exhibit "A."**

1 presumed correct, unless evidence to the contrary is timely submitted to the Settlement
2 Administrator.”)

3 Class Members will have 60 days to request exclusion or object in writing. *Settlement*, ¶
4 1.36 [defining “Response Deadline”]. The Notice states that a Class Member or their representative
5 may appear at the final approval hearing even if they do not file an objection. *See* Exhibit “A” to
6 Settlement at p. 9 (“**Any Class Member, or person purporting to object on behalf of any Class**
7 **Member, may be received or considered by the Court at the Final Approval Hearing,**
8 **regardless of whether a written notice of objection is filed or delivered to the**
9 **Parties.**”)(emphasis in original).

10 If any Notice is returned as undeliverable prior to the Response Deadline, the Settlement
11 Administrator will promptly mail to any forwarding address affixed to the envelope or, if none,
12 shall run a skip trace to locate a new address before remailing the Notice. *Settlement*, ¶ 3.3.5.

13 **III. CLASS ACTION SETTLEMENT APPROVAL PROCEDURE**

14 A class action may not be dismissed, compromised or settled without Court approval. Civil
15 Code section 1781(f); California Rules of Court [hereinafter C.R.C.] Rule 3.769(a). This
16 requirement is intended to prevent fraud, collusion, and/or unfairness to the class. *Dunk v. Ford*
17 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01. The decision to approve or reject a proposed
18 settlement is committed to the Court’s sound discretion. Therefore, judicial review is “limited to a
19 determination whether the record shows ‘a clear abuse of discretion.’” *Wershba v. Apple*
20 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35. In general, courts have discretion to determine
21 whether a settlement is within the range of reasonableness, whether notice to the class is adequate,
22 whether class certification is proper, and whether the attorney fee award is proper. *Id.*; *see also*,
23 *Dunk, supra*, 48 Cal.App.4th at 1802. “Commonly accepted procedure calls for (1) preliminary
24 approval of the proposed settlement at an informal hearing, (2) notice to class members of the
25 proposed settlement and of their rights with respect thereto, and (3) a formal hearing on the
26 fairness of the proposed settlement, where class members voice their support for or objection to the
27 settlement, also known as a final approval hearing or “final fairness” hearing.” *Manual for*
28 *Complex Litigation, Fourth*, § 21.63, 447, 447-50 (4th ed. 2004) [hereinafter “MCL”].

1 With this Motion, Plaintiff request the Court take the first step in the approval process and
2 grant preliminary approval of the proposed Settlement. A preliminary evaluation of the proposed
3 Settlement aims to determine whether it is within the “range of reasonableness,” and whether
4 sending the Class Notice containing Settlement terms and scheduling a formal fairness hearing
5 would be worthwhile. 4 *Newberg on Class Actions* § 11:25.

6 Plaintiff further request the Court provisionally certify the proposed Class. Provisional class
7 certification is appropriate at the preliminary approval stage where the proposed settlement class
8 meets certification requirements but has not previously been certified by the Court. 4 *Newberg* §
9 11:22.1.

10 If this Court grants preliminary approval of the Settlement and conditionally certifies the
11 class, “its order must include the time, date, and place of the final approval hearing; the notice to
12 be given to the class; and any other matters deemed necessary for the proper conduct of a
13 settlement hearing.” C.R.C. Rule 3.769(e). The Proposed Order accompanying this Motion
14 considers these requirements and includes the requisite language.

15 **IV. SUMMARY OF PLAINTIFF’S SUBSTANTIVE CLAIMS AND THEORIES OF**
16 **LIABILITY**

17 Plaintiff’s First Amended Complaint alleges Defendant’s common wage and hour policies,
18 including meal and rest period policies, gave rise to unpaid wages and meal and rest break
19 premiums, inaccurate wage statements, and various penalties under the Labor Code.

20 **A. FAILURE TO PAY ALL WAGES OWED**

21 Labor Code section 1194(a), in pertinent part, provides: “Notwithstanding any agreement to
22 work for a lesser wage, any employee receiving less than the legal minimum wage or the legal
23 overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid
24 balance of the full amount of this minimum wage or overtime compensation, including interest
25 thereon, reasonable attorney’s fees, and costs of suit.”

26 Labor Code Section 510, in pertinent part, provides: “Any work in excess of eight hours in
27 one workday and any work in excess of 40 hours in any one workweek [...] shall be compensated
28 at the rate of no less than one and one-half times the regular rate of pay for any employee[.]”

1 Labor Code Section 510 indicates that it is not applicable to the payment of overtime
2 compensation to an employee working pursuant to an alternate workweek schedule adopted
3 pursuant to Labor Code Section 511 which sets forth very specific legal requirements for how a
4 valid alternate workweek schedule can be proposed, adopted and implemented. For example,
5 subsection (a) requires that any alternate workweek be a “regularly scheduled” work period and only
6 allows up to 10 hours per day within a 40-hour workweek without the payment of overtime. Cal.
7 Lab. Code § 511. Further, it requires adoption through a secret ballot election and approval by at
8 least two-thirds of the affected employees in a readily identifiable work unit. *Id.*

9 Plaintiff alleged that Defendant’s alternative workweek election was invalid due to
10 deficiencies in its adoption and/or implementation²¹ and, therefore, that Class Members were
11 entitled to, but not paid, daily overtime wages when they worked in excess of eight hours in a day.

12 Plaintiff also alleges Defendant failed to compensate Class Members for all hours worked,
13 including overtime premiums, due to Defendant’s alleged rounding of time punches and its alleged
14 policy of automatically deducting thirty minutes for meal periods regardless of their actual duration
15 and its policy of rounding.

16 **B. MEAL AND REST BREAK VIOLATIONS**

17 Employers must relieve non-exempt employees of all duty during a 30-minute meal period
18 for each work-day of at least five hours, and must provide the employee a second meal period for
19 each work-day of 10 hours or more. Labor Code Section 512. “If an employer fails to provide an
20 employee a meal period ... the employer shall pay the employee one additional hour of pay at the
21 employee's regular rate of compensation for each work day that the meal ... period is not
22 provided.” Labor Code Section 226.7. Plaintiff allege Defendants did not provide timely off-duty
23 meal periods and failed to pay Class Members an additional hour pay as required by law.

24 “Every employer shall authorize and permit all employees to take rest periods, which
25 insofar as practicable shall be in the middle of each work period. The authorized rest period time
26 shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four
27

28 ²¹ One such theory was that the AWS was not being worked on a regularly reoccurring basis and that this
invalidated the AWS election.

(4) hours or major fraction thereof.” California Code of Regulations, Title 8 Section 11050, section 12(A). “If an employer fails to provide an employee a ... rest period ... the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the ... rest period is not provided.” Labor Code Section 226.7.

Plaintiff's First Amended Complaint alleges that Defendant did not provide legally compliant off-duty meal or rest breaks. Plaintiff alleges that meal period started after the fifth hour of work and, due to rounding and interruptions, did not last a continuous thirty minutes of uninterrupted time.

C. INACCURATE WAGE STATEMENT PENALTIES

Plaintiff contends Defendants failed to provide accurate wage statements which itemized the correct rates of pay, gross wages earned, hours worked, net wages earned, or the appropriate deductions, as required under Labor Code Section 226. Each violation renders an employer liable for the greater of actual damages or \$50 for the initial pay period in which the violation occurred, and \$100 per employee for each subsequent violation, up to \$4,000 per employee.

D. WAITING TIME PENALTIES

Labor Code Section 203 provides that any severed employee who is not timely paid for their earned wages upon termination is entitled to “waiting time” penalties. Bad faith and/or intent to defraud the employee of wages is not required in order for waiting time penalties to be assessed. *Barnhill v. Saunders* (1981) 125 Cal.App.3d 1. Instead, an employer's violation of this law is “willful” if “the employer intentionally failed or refused to perform an act which was required to be done.” *Id.* at 7. Penalty wages accrue based on the employee's daily wage for each day that they are due for a maximum of 30 working days, including on non-workdays. *Mamika v. Barca* (1998) 68 Cal. App. 4th 487, 493. Under *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, waiting time penalties should be imposed for failure to pay overtime compensation.

Plaintiff contends Defendant failed to pay Class Members all wages owed in a timely manner at the conclusion of their employment. As a result, Plaintiff alleges Defendant is liable for waiting time penalties.

1 **E. PREJUDGMENT INTEREST ON WAGES**

2 Labor Code Section 218.6 provides for an award of interest on all due and unpaid wages at
3 the interest rate specified in Civil Code section 3289(b). Civil Code section 3289(b) was amended,
4 effective January 1, 2001, to mandate a 10 percent rate of interest. Said interest accrues on a pay-
5 period basis and is computed from the date on which the wage comes due. *See Olso v. Cory* (1983)
6 35 Cal.3d 390, 402; *Espinoza v. Classic Pizza* (2003) 114 Cal. App. 4th 968, 975. Under *Espinoza*,
7 interest accrues from the day the wages were due. Therefore, prejudgment interest is computed
8 from the date on which each wage payment was due, but not fully paid, following each pay period
9 during the Class Period.

10 **F. PAGA PENALTIES**

11 The Private Attorneys General Act of 2004 (the “PAGA”), Labor Code Section 2698, *et*
12 *seq.*, provides employees with a private right of action against an employer in order to collect
13 penalties on behalf of the state’s Labor and Workforce Development Agency (“LWDA”). PAGA
14 requires 75% of any penalties collected be paid to the LWDA, with the remaining 25% distributed
15 to the aggrieved employees. Labor Code section 2699(i). PAGA provides for attorneys’ fees and
16 costs to the employee who successfully brings the suit. *See Id.*, section 2699(g). PAGA claims,
17 however, are subject to a one-year statute of limitations. Code of Civil Procedure section 340(a).
18 PAGA penalties are calculated differently depending on the predicate violation. If the Labor Code
19 provision underlying the PAGA claim already provides for a civil penalty then an employee can
20 seek to collect that penalty on behalf of other aggrieved employees. *See Id.*, section 2699(a).
21 Where the underlying Labor Code section does not already provide a civil penalty, the PAGA
22 penalty is equal to one-hundred dollars per employee per pay period for the initial violation and
23 two-hundred dollars for each employee per pay period for each subsequent violation. *See id.*
24 section 2699(f)(1)-(2).

25 Plaintiff’s First Amended Complaint alleges Defendant is liable for PAGA penalties to
26 Class Members for the causes of action alleged in the operative Complaint including unpaid wages
27 and failure to provide proper meal and rest periods.
28

1 **V. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE UNDER CCP**
2 **SECTION 382**

3 Plaintiff seeks provisional certification of the proposed Class pursuant to California Code
4 of Civil Procedure Section 382. Plaintiff's substantive claims arise from Defendant's failure to
5 comply with multiple provisions of the Labor Code and the applicable IWC Wage Order. *See*
6 Complaint, *generally*. Defendant has agreed not to oppose provisional class certification for
7 settlement purposes only. *See* Settlement, ¶¶ 2.2, 3.3.1.

8 The Settlement proposes conditional certification of all current and former individuals who
9 have been employed by Del West Engineering, Inc. as a non-exempt employee in holding one of
10 eighteen job titles within the State of California at any time during the Class Period. Settlement, ¶
11 1.3 and Exhibit A [List of Job Titles].²² The Class Period is defined as December 14, 2017 through
12 and including June 26, 2022. *Id.* ¶ 1.9.

13 “As a general rule, California courts are not bound by the federal rules of procedure but
14 may look to them and to the federal cases interpreting them for guidance or where California
15 precedent is lacking.” *Wershba*, 91 Cal.App.4th at 239-40. Thus, California trial courts may adopt
16 federal procedures and standards to the extent that California law is silent on matters relating to
17 provisional class certification and settlement approval. *Vasquez v. Superior Court* (1971) 4 Cal.3d
18 800, 820-21; *see also La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 872
19 (internal citations omitted) (“trial courts, in the absence of controlling California authority, utilize
20 the class action procedures of the federal rules”). When the class has not been certified prior to the
21 settlement agreement – as here – parties may stipulate that a class be conditionally (or
22 “provisionally”) certified for settlement purposes only. *County of Suffolk v. Long Island Lighting*
23 *Co.* (E.D.N.Y. 1989) 710 F.Supp. 1422, 1425 (“The proposed settlement may also include a
24 provision that conditions settlement of the suit on certification by the court of a class for settlement
25 purposes.”); *see also Hernandez v. Vitamin Shoppe Industries Inc.* (2009) 174 Cal.App.4th 1441,
26 1457 (“The Court unquestionably [has] the authority to conditionally certify a class for settlement

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28 ²² The Class does not include former employees who Defendant laid off in September 2019 as part of
Defendant's reduction in force and who received separation pay in exchange for a general release of claims, except to
the extent they were rehired and performed work post severance. Settlement, ¶ 1.3.

purposes.”).

Courts apply the traditional certification prerequisites to determine whether it grants conditional certification. *See Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 620. Class actions are appropriate whenever “the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court” *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (internal citations omitted). The provisional class must be ascertainable and sufficiently numerous, have a well-defined community of interest, and substantial benefits must result from certification, making proceeding as a class superior to the alternatives. *Id.* (citing Cal. Code Civ. Proc. § 382; *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459). “The ‘community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’” *Brinker*, 53 Cal.4th. at 1021.

Thus, provisional class certification is appropriate where: (1) the proposed class is numerous yet ascertainable; (2) common issues of law or fact predominate; (3) the claims of the proposed class representative(s) are typical of the class; (4) the proposed class representative(s) will adequately represent the class; and (5) the class action mechanism is the superior means of resolving the litigation.

A. The Proposed Class is Ascertainable and Sufficiently Numerous

There are at least 172 persons in the proposed Class. Allen Decl., ¶ 30. This satisfies the numerosity requirement. *See Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934. The class is ascertainable as the pre-mediation data exchange required Defendant to identify and collect data regarding its members by reference to records kept in the ordinary course of business.

B. Common Issues of Law and Fact Predominate

“The predominance requirement presents an ‘ultimate question’ of whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so

1 numerous or substantial that the maintenance of a class action would be advantageous to the
2 judicial process and to the litigants.” *Brinker*, 53 Cal.4th at 1021. “The answer hinges on ‘whether
3 the theory of recovery advanced by the proponents of certification [sic] is, as an analytical matter,
4 likely to prove amenable to class treatment.” *Brinker*, 53 Cal.4th at 1021 (citing *Sav-on Drug*
5 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327).

6 A court must examine the complaint’s allegations and supporting declarations...and
7 consider whether the legal and factual issues they present are such that their
8 resolution in a single class proceeding is both desirable and feasible ... “[I]f the
9 defendant's liability can be determined by facts common to all members of the class,
10 a class will be certified even if the members must individually prove their
11 damages.”

12 *Brinker*, 53 Cal.4th at 1021-22 (citing *Hicks* 89 Cal.App.4th at 916).

13 Plaintiff has alleged Defendant applied certain uniform policies to members of the proposed
14 Class in violation of wage and hour laws. The primary questions in the case – such as whether
15 Defendant’s alternate workweek election was valid and whether timely meal periods were
16 permitted - are common ones applicable to all Class Members. Plaintiff also contends Defendant
17 had uniform formal policies and procedures pertaining to the calculation and payment of wages,
18 scheduling, meal and rest periods, the issuance of wage statements, and final pay at termination.

19 These types of wage and hour claims are “of the sort routinely, and properly, found suitable
20 for class treatment.” *Brinker*, 53 Cal.4th at 1033. *See, e.g., Jaimez v. Daihatsu USA, Inc.* (2010) 181
21 Cal.App.4th 1286, 1299-1305; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 9 Cal.App.4th 1524,
22 1533-38; *Bufl v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205–08.

23 **C. Plaintiff’s Claims are Typical of the Claims of the Class**

24 A class representative’s claims need only be “significantly similar” to other members, not
25 “identical.” *See B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1247;
26 *Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4th 467, 473. A “typical” claim arises from
27 the same events, practices, or courses of conduct that give rise to the claims of other class
28 members, and is based on the same legal theories. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46;
see also City of San Diego v. Haas (2012) 207 Cal.App.4th 472, 501 (“Typicality is present when
the named class representative's interest in the action is significantly similar to that of the other

1 class members.”).

2 Here, Plaintiff’s claims are based on the same allegedly violative policies, procedures and
3 conduct by Defendant, i.e., failure to pay all wages owed including overtime and meal and rest
4 period premiums. Because Plaintiff’s claims are based on the same conduct, they share the same
5 legal theories as proposed Settlement Class Members and seek the same types of damages for
6 unpaid wages, meal and rest period premium pay, inaccurate wage statement penalties, waiting
7 time penalties, and penalties under PAGA.

8 **D. The Class Will be Adequately Represented by Plaintiff and Class Counsel**

9 To be “adequate,” a Class Representative must have counsel “qualified to conduct the
10 proposed litigation” and there must be no disabling conflict of interest. *McGhee v. Bank of Am.*
11 (1976) 60 Cal.App.3d 442, 450. “[O]nly a conflict that goes to the very subject matter of the
12 litigation will defeat a party’s claims of representative status.” *Richmond v. Dart Industries, Inc.*
13 (1981) 29 Cal.3d 462, 470. This case meets both requirements. There are no known disabling
14 conflicts and Plaintiff’s counsel are experienced in wage and hour class action litigation and are
15 able and willing to prosecute this case and protect the interests of the class.²³

16 **E. A Class Action is the Superior Method of Adjudication**

17 Class actions play an important role in enforcing California’s wage and hour laws.²⁴ “It
18 would be neither efficient nor fair to anyone, including Defendants, to force multiple trials to hear
19 the same evidence and decide the same issues.” *Sav-on*, 34 Cal.4th at 340 (citing *Boggs v. Divested*
20 *Atomic Corp.* (S.D. Ohio 1991) 141 F.R.D. 58, 67). Class certification is a superior means of
21 adjudicating employment claims where “[d]oing so would further judicial economy by avoiding
22 repetitious suits, would unify what would otherwise be a series of small claims so as to enhance the
23 class members’ access to redress, and would put to rest any current employee concerns about
24 retaliation.” *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1308. Here, the only
25 available enforcement alternative to a class action would be potentially dozens of trials, each
26 covering the same factual grounds and legal issues. As such, class-wide adjudication (which, in

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28 ²³ See Allen Decl., ¶ 47; Orihuela Decl., ¶¶ 2-7.

²⁴ See *Gentry v. Superior Court* (2007) 42 Cal.4th 443 [summarizing the policy considerations favoring class action usage].

light of this Settlement, will provide prompt and significant relief) is the superior means by which to effectively redress these claims.

VI. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. THE SETTLEMENT SHOULD BE PRESUMED FAIR

At final approval, the Court will be permitted to presume that the Settlement is fair where (1) the settlement is reached through arm's-length bargaining, (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently, (3) counsel is experienced in similar litigation, and (4) the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802; *see also Wershba*, 91 Cal.App.4th at 245.

The Settlement is clearly a product of arms' length negotiations (*i.e.*, the first factor). The Parties attended the full day mediation session with Dennis Moss on April 21, 2022. They were unable to resolve the matter at the session but Mr. Moss continued to work with the Parties' counsel after the session. It wasn't until May 19, 2022 that the Parties were ultimately able, with the help of a mediator's proposal and multiple discussions, to execute the Class Action and PAGA Settlement Agreement and Release.

Plaintiff conducted sufficient investigation (*i.e.*, the second factor). As part of the Parties' pre-mediation data exchange Plaintiff's counsel obtained evidence necessary to evaluate Defendants' exposure for the alleged illegal employment practices. This production included class metrics and employment records including Plaintiff's personnel file, punch data and payroll data; Documents relating to the adoption of Defendant's Alternate Workweek Schedule including copies of the notices and documents filed with the DLSE; Punch detail report for a sampling of one-third of the putative class for the period of December 14, 2017 through March 5, 2022; and, a Payroll summary report for a sampling of one-third of the putative class for the period of December 14, 2017 through March 5, 2022. The extent of the informal discovery and independent investigation permits the Court to find that all parties were sufficiently informed. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150; *see also Dunk*, 48 Cal.App.4th at 1802.

1 This case also satisfies the third factor of the presumption of fairness as Class Counsel has
2 significant experience in the prosecution of wage and hour class actions. Allen Decl., ¶¶ 42-46;
3 Orihuela Decl. ¶ 4. This experience allowed Class Counsel to tailor their informal discovery and
4 investigation properly and to accurately assess Defendant's exposure.

5 The fourth factor (*i.e.*, number of objectors and opt-outs) can only be addressed after the
6 Class Notice has been sent out and each class member is afforded the opportunity to request
7 exclusion or file an objection. However, the three factors that are possible to review at this time
8 strongly suggest that the Settlement meets the presumption of fairness. Thus, the record before this
9 Court affords ample grounds upon which to conclude that the legal presumption of fairness will
10 apply to the Settlement.

11 **B. THE SETTLEMENT IS WITHIN THE RANGE OF**
12 **REASONABLENESS**

13 In determining whether the Settlement is within the "range of reasonableness" the Court
14 must consider several factors including: (1) the strengths of plaintiff's case, (2) the risks, expenses,
15 complexity, and likely duration of further litigation, (3) the risk of maintaining class action status
16 throughout trial, (4) the Settlement amount, (5) the extent of completed discovery, (6) the stage of
17 the proceedings, (7) counsel's experience and views of the Settlement, and (8) the reaction of the
18 class members to the Settlement. *Alberto v. GMRJ Inc.* (E.D.Cal. 2008) 252 F.R.D. 652, 664-65
19 (quoting *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026); *see also* 5 James Wm.
20 Moore, *et al.*, *Moore's Federal Practice*, § 23.85(3) (3d ed. 1997) 23.353-4. "It is the settlement
21 taken as a whole, rather than the individual component parts, that must be examined for overall
22 fairness." *Hanlon*, 150 F.3d at 1026 (citing *Officers for Justice v. Civ. Serv. Comm'n of SF* (9th Cir.
23 1982) 688 F.2d 615, 682).

24 "[T]he court bears the ultimate responsibility to ensure the reasonableness of the settlement
25 terms. Although many factors must be considered in making this determination, and the court is
26 not required to decide the ultimate merits of the class members' claims before approving a
27 proposed settlement, an informed evaluation cannot be made without an understanding of the
28 amount that is in controversy and the realistic range of outcomes of the litigation." *Kullar v. Foot*

1 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 120.

2 Class Counsel has satisfied the so called “*Kullar* standard” through providing the Court
3 with a detailed evaluation of the realistic ranges of outcomes in this lawsuit. Allen Decl., ¶¶ 29-37
4 Class Counsel weighed the ranges of recovery against the risks associated with not settling the
5 case.

6 When weighed against these risks, the Settlement’s ability to secure a sizeable guaranteed
7 money payment to Class Members for a limited release of wage and hour claims strongly supports
8 approval. *Id.* Based on the totality of the circumstances, Class Counsel believes that the settlement
9 is a fair, adequate, and reasonable resolution of Plaintiff’s claims on behalf of the Settlement Class.
10 Allen Decl., ¶ 29; Orihuela Decl., ¶¶ 8-9.

11 **C. THE CLASS-WIDE RELEASE IS APPROPRIATELY LIMITED**

12 The released claims share a reasonable nexus with the alleged violations in both substance
13 and time. “Any attempt to include in a class settlement terms which are outside the scope of the
14 operative complaint should be closely scrutinized by the trial court to determine if the plaintiff
15 genuinely contests those issues and adequately represents the class.” *Trotsky v. Los Angeles Fed.*
16 *Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 148.

17 Here, the class-wide release is anchored in the operative complaint and narrowly tailored in
18 scope, both in terms of the governed claims and time period. *See* infra Section II.C [“Release”]; *see*
19 *also* Settlement, ¶¶ 132, 1.33, 1.34, 3.1.

20 **D. PLAINTIFF’ ATTORNEYS’ FEES AND COSTS ARE** 21 **REASONABLE**

22 This Court has discretion to approve an appropriate fee award. Moreover, public policy
23 promotes approval of reasonable fee requests since “[t]he function of an award of attorney’s fees is
24 to encourage the bringing of meritorious ... claims which might otherwise be abandoned because of
25 the financial imperatives surrounding the hiring of competent counsel.” *City of Riverside v. Rivera*
26 (1986) 477 U.S. 561, 578 (internal quotation marks and citations omitted). In this Settlement,
27 Defendants agreed to pay Class Counsel reasonable attorneys’ fees in the amount of up to 35% of
28

1 the Maximum Settlement Amount for work performed for the class. Settlement, ¶ 1.8.

2 The California Supreme Court has affirmed the propriety of awarding class counsel fees as
3 a percent of a settlement fund the firm creates for the benefit of the class. *Lafitte v. Robert Half*
4 *International, Inc.* (2016) 1 Cal.5th 480, 573: “[T]he court may determine the amount of a
5 reasonable fee by choosing an appropriate percentage of the fund created. The recognized
6 advantages of the percentage method-including relative ease of calculation, alignment of incentives
7 between counsel and the class, a better approximation of market conditions in a contingency case,
8 and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily
9 prolonging the litigation.” *Id.*

10 *Lafitte* is just one of the more recent in a long line of judicial authority supporting the use of
11 the “common fund” method of determining fees. The common fund doctrine refers to the trial
12 courts’ equitable power to award attorneys’ fees and costs when a litigant proceeding in a
13 representative capacity secures a substantial benefit for a group. *See also Serrano v. Priest* (1977)
14 20 Cal.3d 35, 38; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1435-36. The U.S.
15 Supreme Court has specifically endorsed using a percentage of the fund method in paradigmatic
16 common fund cases such as this one. *Blum v. Stenson* (1984) 465 U.S. 886, 900 n.16 (“ . . . under
17 the “common fund doctrine,” . . . a reasonable (attorneys’) fee is based on a percentage of the fund
18 bestowed on the class . . .”). Similarly, the California Supreme Court previously upheld the
19 propriety of employing the “common fund” doctrine to class actions where representative Plaintiff
20 have secured a monetary settlement or judgment for the class. *Serrano*, 20 Cal.3d at 35-40.

21 The Court is not requested to approve the fee award until final approval, when it has the
22 benefit of seeing how the class responds to the requested amount and additional briefing and
23 evidence on the subject. At final approval, Class Counsel believes the Court will find that the
24 requested amount is warranted in light of the results obtained for the class as well as the amount of
25 work performed by class counsel, the costs invested, the size of the settlement, as well as the future
26 commitment of time Class Counsel will be required to invest to ensure that the Settlement terms
27 are fulfilled and that Class Members have their questions about the settlement answered in a timely
28 manner.

1 The Settlement also provides for Plaintiff's counsel's reimbursement for up to \$8,500 of
2 their actual costs expended in this litigation. Settlement, ¶ 1.6. Class Counsel will provide evidence
3 to support its requested costs prior to Final Approval.

4 **E. NAMED PLAINTIFF SEEKS REASONABLE ENHANCEMENT**
5 **AWARDS**

6 The Settlement also provides for modest enhancement award to the representative Plaintiff
7 of up to \$7,500. Settlement, ¶ 3.13. Enhancement awards, or service payments, to representative
8 Plaintiff in class action settlements compensate them for their "efforts in bringing the lawsuit." *Bell*
9 *v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726. "Since without a named plaintiff there
10 can be no class action, such compensation as may be necessary to induce him to participate in the
11 suit." *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804. "[T]he
12 rationale for making enhancement or incentive awards to named Plaintiff is that they should be
13 compensated for the expense or risk they have incurred in conferring a benefit on other members of
14 the class." *Id.* at 806. "An incentive award is appropriate 'if it is necessary to induce an individual
15 to participate in the suit.'" *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394
quoting, *Clark, supra*, at 804.

16 "Criteria courts may consider in determining whether to make an incentive award include:
17 (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the
18 notoriety and personal difficulties encountered by the class representative; (3) the amount of time
19 and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal
20 benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Id.*
quoting, *Van Vranken v. Ad. Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299.

21 Class Counsel will provide a detailed declaration from the class representative addressing
22 the above elements at Final Approval. For purposes of preliminary approval, Class Counsel notes
23 that the class representative was very actively engaged in this lawsuit, assisted in Plaintiff's
24 investigation, and participated in all aspects of the mediation and settlement negotiations. If the
25 case had not settled, Plaintiff could potentially have been responsible for litigation costs, which can
26 be quite significant in a class/PAGA case such as this one. Class Counsel believes that such factors
27 help support the requested enhancement award. Allen Decl., ¶ 23.

1 **VII. THE CLASS NOTICE PROGRAM IS CONSTITUTIONALLY SOUND**

2 The Court may fashion an appropriate notice program. *See* Civil Code Section 1781; *Cartt*
3 *v. Superior Court* (1975) 50 Cal.App.3d 960, 970-74; Civil Code Section 1781. At a minimum, the
4 notice should inform the class members of the date for the Final Approval Hearing, explain the
5 proposed settlement, and outline procedures for filing a written objection and/or making a personal
6 appearance at the hearing. C.R.C. Rule 3.769(f).

7 The proposed Notice (which is attached to the Settlement as **Exhibit “B”**) provides
8 information on the meaning and nature of the Settlement, the key terms and provisions of the
9 Settlement, the manner in which payments to class members will be calculated, Plaintiff’s
10 counsel’s application for reimbursement of costs and attorneys’ fees, the Representative Plaintiff’s
11 incentive awards, the date, time and place of the final approval/fairness hearing, the procedures and
12 deadlines for requesting exclusion from and/or objecting to the Settlement, and counsel’s contact
13 information. It will be sent in both Spanish and English.

14 In addition, with a class of over 172 persons, it is likely that some Class Members may be
15 difficult to locate. Accordingly, the Settlement Administrator will diligently apply standard
16 methods (e.g., NCOA search, skip trace techniques) to determine class members’ current
17 addresses. Settlement, ¶¶ 3.3.4; 3.3.5.

18 Prior to the Final Approval Hearing, Plaintiff will file a motion for final approval of the
19 Settlement and an application for attorneys’ fees and costs and the Representative Plaintiff’s
20 enhancement award. Class Counsel also will file a declaration from the Settlement Administrator
21 showing its efforts to mail the Class Notice, process class members’ disputes of their workweeks as
22 shown in Defendant’s records, as well as any requests for exclusions.

23 **VIII. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE**

24 The final step in the settlement approval process is a Final Fairness Hearing, at which the
25 Court may hear all evidence and arguments necessary to evaluate the Settlement. Proponents of the
26 Settlement may explain the terms and conditions of the Settlement and offer argument in support
27 of or in opposition to the Settlement. Plaintiff requests this Court set a date for a Final Approval
28 Hearing at a time convenient for the Court and consistent with the class notice provisions in the

1 Settlement.²⁵

2 **IX. CONCLUSION**

3 For all of the foregoing reasons, Plaintiff respectfully requests this Court enter an order
4 granting Plaintiff's motion for preliminary approval of the Settlement, conditionally certifying the
5 proposed settlement Class, appointing Class Counsel and Plaintiff as the Class Representatives and
6 Phoenix as Settlement Administrator, approving the Class Notice and setting a date for the Final
7 Approval Hearing.

8 Dated: October 3, 2022

ALLEN ATTORNEY GROUP P.C.

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10 By:



11 KEVIN R. ALLEN

12 Attorneys for Representative Plaintiff and the Plaintiff
13 Class
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28 ²⁵ Plaintiff's counsel estimates that the earliest the Final Approval Hearing could take place is approximately
124 days after preliminary approval. *See* Chart entitled "Dates of Performance Under Settlement."