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

FRANK M. GONZALEZ III, MICHELLE
CARTER, and DARRELL ESPINOZA, as
individuals and on behalf of all others
similarly situated,

Plaintiffs,

vs.

PRIME COMMUNICATIONS OF
CALIFORNIA, LLC, a California limited
liability company; and DOES 1 through 100,

Defendants.

Case No.: BC702262

*[Assigned to for all purposes to the Hon.
Kenneth R. Freeman]*

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

Date: October 18, 2018
Time: 2:00 p.m.
Dept.: SSC-14

Complaint Filed: April 27, 2018
Trial Date: None Set

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PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on October 18, 2018 at 2:00 p.m. in Department 14 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiffs Frank M. Gonzalez III, Michelle Carter, and Darrell Espinoza ("Plaintiffs"), individually and on behalf of a class of similarly situated individuals, will and hereby do move this Court for:

1. Preliminary approval of the proposed class settlement of this lawsuit;
2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

Any person who is or was employed by Defendant Prime Communications of California, LLC in the State of California as a non-exempt employee from December 10, 2011, through April 1, 2018.

3. Preliminary appointment of Plaintiffs Frank M. Gonzalez III, Michelle Carter, and Darrell Espinoza as Class Representatives;
4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Daniel J. Brown of Haines Law Group, APC; Kevin T. Barnes and Gregg Lander of Law Offices of Kevin T. Barnes; and Kyle Nordrehaug of Blumenthal Nordrehaug Bhowmik De Blouw LLP, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit class representative incentive payments to Plaintiffs, Settlement Administration costs, civil penalties payable to the LWDA, and attorneys' fees and costs awards to Class Counsel;
6. Appointment of CPT Group, Inc. as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

This Motion is based on this notice of motion, the attached memorandum of points and authorities, the declarations of Paul K. Haines, Kevin T. Barnes, Kyle Nordrehaug, and Julie Green of CPT Group Inc., and the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time

1 of hearing. Defendant does not intend to oppose this Motion, and given the multiplicity of issues
2 addressed in this Motion, has indicated its approval of Plaintiffs' expressed need to exceed the
3 20-page limit set forth in California Rule of Court 3.764(c)(2). Therefore, Plaintiffs request the
4 Court's consideration of Plaintiffs' memorandum of points and authorities, which is 27 pages in
5 length.

6
7 Dated: August 31, 2018

Respectfully Submitted,
HAINES LAW GROUP, APC

8
9 By:



Paul K. Haines
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Frank M. Gonzalez III, Michelle Carter, and Darrell Espinoza (“Plaintiffs”) brought class and representative action lawsuits on behalf of current and former non-exempt employees of Defendant Prime Communications of California, LLC (hereinafter “Defendant”) for various wage and hour and related violations. Plaintiffs’ primary allegations are that Defendant: (1) failed to authorize and permit all legally-compliant rest periods or make rest period premium payments in lieu thereof; (2) failed to reimburse non-exempt employees for all mileage related expenses; (3) failed to pay for all hours actually worked; (4) failed to provide second meal periods for shifts in excess of 10.0 hours or make premium payments in lieu thereof; (5) failed to properly calculate the regular rate of pay for overtime purposes, thereby causing employees to be underpaid all required overtime wages; and (6) failed to furnish compliant and accurate wage statements. Based on these alleged violations, Plaintiffs also bring derivative claims for Defendant’s alleged failure to pay all final wages upon separation of employment. Additionally, Plaintiffs seek civil penalties under the Private Attorneys General Act of 2004 (“PAGA”).¹

Plaintiffs now respectfully request that this Court preliminarily approve this non-reversionary, common-fund class action settlement,² in which Defendant has agreed to pay Six Hundred Forty-Five Thousand Dollars (\$645,000.00) on behalf of the following Settlement Class:

Any person who is or was employed by Defendant Prime Communications of California, LLC in the State of California as a non-exempt employee from December 10, 2011 through April 1, 2018 (“Class Period”).

The Settlement was only reached after extensive formal and informal discovery and two full days of mediation. In connection with mediation, Defendant produced timekeeping and payroll records for approximately 25% of the putative class for a portion of the Class Period, as well as applicable documents regarding Defendant’s wage and hour policies and other information. After extensive research and analysis, including a detailed analysis of Defendant’s

¹ Plaintiffs’ Class and Representative Action Complaint (“Complaint”) pleads the following causes of action: (1) Minimum Wages Violations; (2) Reporting Time Pay Violations; (3) Failure to Pay All Overtime Wages; (4) Meal Period Violations; (5) Rest Period Violations; (6) Failure to Reimburse Necessary Business Expenses; (7) Wage Statement Violations; (8) Waiting Time Penalties; (9) Unfair Competition; and (10) Civil Penalties Under the PAGA.

² The Joint Stipulation of Class Action Settlement and Release of Claims (“Settlement”) is attached to the Declaration of Paul K. Haines as Exhibit A. The proposed Class Notice and Request for Exclusion Form are attached to the Settlement as Exhibits 1 and 2, respectively. All defined terms in this motion have the same definition as that in the Settlement.

1 potential exposure by Plaintiffs’ retained expert who holds a Ph.D. in economics, the Parties
2 attended a mediation on November 30, 2016, with the Honorable Carl J. West (Ret.), a well-
3 respected wage and hour class action mediator. The Parties were unable to reach an agreement at
4 the mediation but agreed to attend a second day of mediation. The second full-day mediation was
5 held on August 1, 2017 with Jeffrey A. Ross, Esq., another well-respected wage and hour class
6 action mediator. The Parties were not able to reach a settlement agreement at the August 1, 2017
7 mediation; however, the Parties continued settlement discussions and ultimately reached a
8 classwide resolution of all claims.

9 If the Settlement is approved, Defendant will pay a non-reversionary Gross Settlement
10 Amount (“GSA”) of \$645,000.00. After deducting settlement administration costs, Plaintiffs’
11 class representative incentive payments, attorneys’ fees and costs awards, and payment of PAGA
12 penalties to the California Labor and Workforce Development Agency (“LWDA”), the remaining
13 Net Settlement Amount (“NSA”) will be distributed to all Class Members who do not opt-out of
14 the Settlement based on the proportionate number of weeks worked by each Class Member during
15 the Class Period.

16 Significantly, Class Members do not need to file a claim to reap the financial benefits of
17 the Settlement, as all Class Members will automatically receive a payment unless they
18 affirmatively opt-out. There are approximately 1,049 Class Members, and the average payment
19 to participating Class Members is projected to be approximately \$320.78.

20 This proposed Settlement is within the range of possible approval in light of the significant
21 legal and factual obstacles that Plaintiffs faced, the risks and costs of further litigation, and the
22 tangible monetary benefits to be received by Plaintiffs and the Class Members. For the reasons
23 discussed herein, Plaintiffs respectfully request that the Court grant preliminary approval of the
24 Settlement.

25 **II. SUMMARY OF THE LITIGATION**

26 **A. FACTUAL AND PROCEDURAL BACKGROUND**

27 Defendant is the largest privately held AT&T authorized retailer in the United States
28 selling products to individuals and business, with approximately 55 retail locations in California
alone. *See* Declaration of Paul K. Haines (“Haines Decl.”), ¶ 9. Plaintiffs worked for Defendant
as non-exempt employees at Defendant’s California retail locations during the Class Period, and
were subject to Defendant’s wage and hour policies that are at issue in this action. *Id.*

1 On December 10, 2015, Plaintiff Gonzalez filed a class action complaint in Los Angeles
2 County Superior Court, alleging claims for unpaid overtime wages, wage statement violations,
3 waiting time penalties, and unfair competition (“*Gonzalez Action*”). Haines Decl., ¶ 9. On January
4 20, 2016, Plaintiff Gonzalez filed a First Amended Class and Representative Action Complaint
5 which added a cause of action for civil penalties under the PAGA. *Id.* Because Plaintiff Gonzalez
6 previously entered into a binding arbitration agreement with Defendant, on September 19, 2016,
7 Plaintiff Gonzalez voluntarily dismissed his individual and class claims without prejudice. *Id.*

8 On February 24, 2016, Plaintiff Carter filed a representative action complaint in Kern
9 County Superior Court, alleging a single cause of action for civil penalties under the PAGA
10 (“*Carter Action*”). Haines Decl., ¶ 9. On January 4, 2017, the *Carter Action* was transferred to
11 Los Angeles County Superior Court. *Id.*

12 On September 23, 2016, Plaintiff Espinoza filed a class action complaint in San Mateo
13 County Superior Court, alleging claims for unfair competition, unpaid overtime wages, wage
14 statement violations, failure to reimburse necessary business expenses, and waiting time penalties
15 (“*Espinoza Action*”). Haines Decl., ¶ 9. On January 5, 2017, Plaintiff Espinoza filed a First
16 Amended Class and Representative Action Complaint which added a cause of action for civil
17 penalties under the PAGA. *Id.* On February 22, 2017, the court granted Defendant’s Motion to
18 Compel Arbitration and ordered Plaintiff Espinoza’s class claims dismissed, his individual claims
19 compelled to arbitration, and his PAGA cause of action stayed pending arbitration. *Id.* On
20 February 24, 2017, Plaintiff Espinoza filed a demand for arbitration of his individual claims with
21 the American Arbitration Association (“*Espinoza Arbitration*”). *Id.*

22 Because the *Gonzalez Action*, *Carter Action*, and *Espinoza Action*, all alleged claims
23 against Defendant, alleged several overlapping claims, and alleged overlapping liability periods
24 and groups of aggrieved employees, the Parties agreed to mediate all cases in an effort to resolve
25 all lawsuits on a classwide basis. Haines Decl., ¶ 9.

26 As part of the settlement, on April 27, 2018, Plaintiffs filed the instant consolidated class
27 and representative action alleging all causes of action alleged in the *Gonzalez Action*, *Carter*
28 *Action*, and *Espinoza Action*, and Plaintiffs agreed to dismiss the *Gonzalez Action*, *Carter Action*,
and *Espinoza Action*, and seek approval of the classwide settlement in this Court.

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1 **B. PLAINTIFFS' CLAIMS AND DEFENDANT'S DEFENSES**

2 **1. Rest Period Claims**

3 Plaintiffs allege that from at least December 2011 through January 2015, Defendant had
4 a facially invalid rest period policy that failed to authorize or permit a 10-minute rest period for
5 every four hours worked, or major fraction thereof. Haines Decl., ¶ 14. Plaintiffs allege that
6 Defendant's policy was unlawful because it was completely silent as to how many rest periods
7 are authorized, or when rest periods are authorized, and the rest period policy did not authorize a
8 second rest period on shifts of 6.0 hours to 10.0 hours, or a third rest period for shifts in excess of
9 10.0 hours. *Id.*; see *Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1028-31 (discussing the
10 rate at which rest periods must be authorized and permitted). Plaintiffs allege that Defendant
11 revised its rest period policies in January 2015, however, Plaintiffs allege that Defendant's rest
12 period practices remained unlawful because Defendant intentionally understaff its stores so that
13 Plaintiffs and other Class Members could not take all legally authorized rest periods. Haines
14 Decl., ¶ 14. In addition, Plaintiffs allege it was commonplace for Class Members to become
15 engaged with customers, rendering it impossible to take a rest period for every 4-hour period
16 worked, especially in light of Defendant's requirement that Class Members "up-sell" various
AT&T products, which further extended the face-to-face time with potential customers for up to
several hours. *Id.*

17 Defendant contends that it has always maintained and enforced lawful rest period
18 practices, notwithstanding Plaintiffs' alleged deficiency in its written rest period policies. Haines
19 Decl., ¶ 14. Defendant further contends that any failure of Class Members to take rest periods is
20 the result of their own choice. *Id.* Defendant also argues that Plaintiffs' rest period claim is
21 inherently unsuited for class treatment as it requires an inquiry into whether lawful rest periods
22 were authorized and permitted and if not taken, why each Class Member failed to take rest periods
23 on each shift, which would devolve into an unmanageable series of mini-trials. *Id.*

24 **2. Failure to Reimburse Claims**

25 Plaintiffs allege that Class Members were not reimbursed for mileage related expenses.
26 Haines Decl., ¶ 15; see also Labor Code § 2802. Specifically, Plaintiffs allege that Class Members
27 with the title of Assistant Store Manager, Retail Store Manager, and Flagship Store Manager were
28 required to use their personal vehicles to travel between stores for products, attend manager
meetings and make bank deposits. Haines Decl., ¶ 15. However, Plaintiffs allege that Defendant

1 did not reimburse Plaintiffs or the other Class Members for their mileage related expense. *Id.*; see
2 *e.g.*, *See Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 562 (“[I]f an employer
3 requires an employee to travel on company business, the employer must reimburse the employee
4 for the cost of that travel under Section 2802.”); *Wilson v. Kiewit Pacific Co.* (N.D. Cal. Dec. 6,
5 2010) No. C 09-03630 SI, 2010 WL 5059522 at *6-7 (granting certification on claim for failure
6 to reimburse for mileage driven in employees’ personal vehicles, and holding that common issues
7 of fact and law predominated over any individualized issues.).

8 Defendant argues that Class Members were not required to drive their personal vehicles
9 as a necessary part of their job, and that any mileage expense incurred was a result of Class
10 Members’ ordinary commute to and from work and therefore is not compensable. Haines Decl.,
11 ¶ 15. Defendant also argues that this claim is not suitable for class treatment, as it would require
12 individualized determinations as to whether each Class Member incurred a compensable mileage
13 expense, and if so, how much. *Id.*, see *e.g. Ortiz v. CVS Caremark Corporation*, (N.D. Cal. 2013)
14 Case No. C-12-05859 EDL, 2013 WL 6236743, at *12 (denying certification of a mileage
15 reimbursement claim: “[a]ny challenge to Defendants’ mileage reimbursement method would
16 require Plaintiffs to show that the mileage reimbursement was less than class members’ actual
17 expenses. That showing would require myriad answers to individualized questions for each class
18 member...Analysis of actual expenses is not appropriate for class treatment because it would not
19 present issues common to the class.”)

18 **3. Wage Statement Violations**

19 Plaintiffs allege that during the Class Period Defendant issued facially deficient wage
20 statements which failed to list the rate of pay at which non-discretionary pay identified as either
21 “Comm OT,” “Incentive” pay, and “Store Manager B” pay was paid in violation of Labor Code
22 § 226(a)(9). Haines Decl. ¶ 16. Additionally, Plaintiffs allege that due to Defendant’s
23 miscalculation of Class Members’ regular rate of pay, its wage statements failed to list the correct
24 overtime rate of pay. *Id.* Plaintiffs also allege that Defendant has derivative liability for wage
25 statement penalties as a result of its failure to pay all required wages, reimburse necessary
26 business expenditures, and for its failure to pay all meal and rest period premium wages. *Id.*

27 Defendant argues any alleged wage statement violations were not “knowing and
28 intentional,” and Plaintiffs cannot show they or other employees “suffer[ed] injury” due to the
alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of

penalties. Haines Decl., ¶ 16. Defendant further argues that meal and rest period claims cannot support a claim for wage statement penalties. *Id.*; see, e.g., *Jones v. Spherion Staffing LLC* (C.D. Cal. 2012) Case No. LA CV11-06462 JAK (JCx), 2012 WL 3264081, *8-9 (holding wage statement penalties not recoverable for meal and rest period violations).

4. Unpaid Wages Based on Off-the-Clock Work

Plaintiffs allege that Defendant required Class Members with the job title of Retail Store Manager and Flagship Store Manager to perform off-the-clock work, including requiring these Class Members to attend various telephonic conference meetings before the start of their shifts, but Defendant did not allow these Class Members to clock in and record the time spent on telephonic conference meetings as time worked, and as a result, failed to pay for all hours worked. Haines Decl., ¶ 17.

Defendant counters that it does not require any off-the-clock work, that its policy disavows such off-the-clock work, and that there was no reason for Class Members to perform any work off-the-clock, as they are expected to clock-in before starting work and to clock-out only when they have stopped working. Haines Decl., ¶ 17. Defendant also contends this claim is not amenable to class treatment, as it would require individual inquiries to determine which Class Members worked off-the-clock, how often that happened, why it happened, and whether Defendant was aware of the alleged off-the-clock work on each specific shift. Haines Decl., ¶ 17; see, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052 (affirming denial of off-the-clock subclass, “[p]roof of off-the-clock liability would have had to continue in an employee-by-employee fashion, demonstrating who worked off the clock, how long they worked, and whether Brinker knew or should have known their work.”).

5. Second Meal Period Claims

Plaintiffs allege that Defendant failed to provide Class Members with legally-compliant second meal periods on shifts in excess of 10.0 hours. Haines Decl., ¶ 18. Specifically, Plaintiffs allege that from December 2011 through January 2015, Defendant’s meal period policy was deficient in that it did not provide for second meal periods for shifts in excess of 10.0 hours. *Id.* Plaintiffs also allege that even after Defendant changed its meal period policy in approximately January 2015, Defendant still did not provide second meal periods on shifts in excess of 10.0 hours. *Id.*

Defendant contends that it maintained legally compliant written meal period policies

1 throughout the Class Period, notwithstanding Plaintiffs’ alleged deficiency in its written meal
2 period policies, and that under *Brinker* it is only required to “provide” the opportunity to take
3 meal periods, not “ensure” meal periods are taken. Haines Decl., ¶ 18; *see Brinker, supra*, 53
4 Cal.4th at 1038 (rejecting “ensure” standard and holding employers only have to “provide”
5 employees the opportunity to take meal periods). Defendant also asserts that second meal periods
6 may be waived on shifts of 12.0 hours or less per Labor Code § 512. Haines Decl., ¶ 18.
7 Defendant argues that given the fact that it provided all meal periods to Class Members and that
8 second meal periods may be lawfully waived on shifts of more than 10.0 hours but less than 12.0
9 hours per Labor Code §512, Plaintiffs’ meal period claim was not suited for class certification
10 since individual inquiries would be required as to why each specific second meal period was
missed, and whether there was a valid waiver for second meal periods. *Id.*

11 **6. Regular Rate Claims**

12 Plaintiffs allege that they and other Class Members worked in excess of eight hours per
13 workday and/or forty hours per workweek, but were not compensated at one and one-half times
14 their regular rate of pay for such hours, as a result of Defendant’s alleged failure to include non-
15 discretionary pay including “Comm OT,” “Incentive” pay, and “Store Manager B” pay when
16 calculating a Class Members’ regular rate. Haines Decl., ¶ 19. Consequently, Plaintiffs allege that
17 they and other Class Members were underpaid for their overtime hours worked, in violation of
18 California law. *Id.*; *see, e.g., Huntington Memorial Hospital v. Superior Court* (2005) 131
Cal.App.4th 893, 902-903 (discussing regular rate calculation requirements).

19 Defendant contends that this claim is not suitable for class certification because some
20 Class Members received different forms of Incentive Pay, creating substantive differences among
21 Class Members with respect to the Incentive Pay received. Haines Decl., ¶ 19. Defendant argued
22 that even if “Comm OT,” “Incentive” pay, and “Store Manager B” were required to be included
23 in the regular rate of pay, the total amount of underpayment was less than \$5,500 to the entire
24 class, and that the failure to pay was not willful, knowing, or intentional, and therefore, could not
serve as a basis for waiting time or wage statement penalties. *Id.*

25 **7. Claims Under Labor Code § 203 and the PAGA**

26 As a result of the unpaid wages, and unpaid meal and rest period premium wages described
27 above, Plaintiffs allege that Defendant failed to comply with its final pay obligations set out in
28 Labor Code §§ 201-203, and is liable for civil penalties under the PAGA. Haines Decl., ¶¶ 20-

21. Defendant argues that it possesses strong, good faith defenses to Plaintiffs’ underlying claims, thus precluding recovery of waiting time penalties, which are only available for the “willful” failure to pay wages. *Id.*, at ¶ 20; *see also* 8 Cal. Code Regs. § 13520 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203 . . . A ‘good faith’ dispute that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee.”). To the extent Plaintiffs’ waiting time penalty claim is derivative of the unpaid wage claims, Defendant asserts that imposition of the maximum penalties under Labor Code § 203 would be unconstitutional given the disputed nature of the unpaid wages and the minimal underpayment alleged by Class Members. Haines Decl., ¶ 20. Defendant further argues that waiting time are not recoverable at all for alleged meal and rest period violations. *Id.*; *see Ling v. P.F. Chang’s China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (suggesting that waiting time penalties are not recoverable as a result of unpaid meal and rest period premiums).

Finally, since Plaintiffs’ PAGA claim is derivative of the underlying wage claims, Defendant asserts the PAGA claim would fail with those claims. Haines Decl., ¶ 21; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). Defendant also maintains that, given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiffs’ claims. Haines Decl., ¶ 21; *see* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000).

8. Arbitration Agreements

Defendant asserts that nearly all Class Members (including Plaintiffs) signed valid and enforceable arbitration agreements with class action waivers. Haines Decl., ¶ 22. Indeed, Defendant already successfully obtained the dismissal of the class claims and compelled the individual claims to arbitration in the *Espinoza* Action. *Id.* Furthermore, Plaintiff Gonzalez dismissed the class claims and his individual claims without prejudice in the *Gonzalez* Action as a result of the arbitration agreement he entered into with Defendant. *Id.* Setting aside any arguments as to the merits of Plaintiffs’ claims, Defendant contends it would compel Plaintiffs’

claims to individual arbitration, thereby precluding *any* recovery on a class basis. *Id.*

C. DISCOVERY AND MEDIATION

In connection with mediation, Defendant produced time records and payroll data for a sampling of the putative class, as well as its relevant wage and hour policies and other relevant documents and information. Haines Decl., ¶ 10. Plaintiffs hired a labor economist with a Ph.D. in economics to conduct a comprehensive analysis and extrapolation of the payroll data and timekeeping records produced by Defendant to calculate Defendant’s potential exposure for each of Plaintiffs’ claims. *Id.*

On November 30, 2016, the Parties participated in a mediation with the Hon. Carl J. West (Ret.), a well-respected wage and hour mediator. Haines Decl., ¶ 11. The Parties were not able to reach a settlement at the November 30, 2016 mediation, and agreed to attend a second day of mediation. *Id.* On August 1, 2017, the Parties participated in their second full-day mediation, with Jeffrey A. Ross, Esq., another well-respected wage and hour class action mediator. *Id.* During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiffs’ claims, and the legal basis for the claims and defenses. *Id.* The Parties did not reach a settlement at the conclusion of mediation *Id.* During the weeks that followed mediation, the Parties continued settlement discussions with Mr. Ross and ultimately reached a classwide settlement of all claims. *Id.* During the months that followed, the Parties finalized the terms of the Settlement and executed the long-form Settlement Agreement now before the Court. *Id.*

Pursuant to the Settlement Agreement, Plaintiffs dismissed the *Gonzalez* Action, *Carter* Action, and *Espinoza* Action, and filed a consolidated class and representative action in this Court. Haines Decl., ¶ 11.

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves this Settlement, Defendant will pay a Gross Settlement Amount (“GSA”) of \$645,000. *See* Settlement, ¶ 5.1. Significantly, this Settlement is non-reversionary, and no Class Member will have to submit a claim form to receive a Settlement payment. *Id.*, at ¶¶ 5.1, 5.7. Each Class Member will automatically receive a Settlement payment unless he or she affirmatively opts out of the Settlement. *Id.*, at ¶¶ 4.3, 5.1, 5.7. The monetary terms of the Settlement are summarized below:

Gross Settlement Amount (“GSA”):	\$645,000.00
Minus Court-approved attorneys’ fees (1/3 of GSA):	\$215,000.00
Minus Court-approved, verified costs (up to):	\$40,000.00
Minus Court-approved Class Representative incentive payments: (\$5,000.00 each)	\$15,000.00
Minus Settlement Administrator costs:	\$16,000.00
Minus PAGA payment to the LWDA:	\$22,500.00
Net Settlement Amount (“NSA”):	\$336,500.00³

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys’ fees and verified costs, class representative incentive payments to Plaintiffs, Settlement Administration costs, and the PAGA payment to the LWDA, the Settlement requires Defendant to pay a Net Settlement Amount (“NSA”) of at least \$336,500 to all Class Members who do not timely opt out. *See Settlement*, ¶¶ 1.14, 4.2, 4.3. The NSA shall be distributed to all participating Class Members based on each participating Class Member’s number of weeks (rounding up partial weeks) of active employment as a non-exempt employee in California during the Class Period. *See Settlement*, ¶ 5.7.

According to Defendant, there are approximately 1,049 total Class Members. Haines Decl., ¶ 13. Therefore, the average Settlement Payment is projected to be approximately \$320.78. *Id.* Class Members will have 45 days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See Settlement*, ¶ 4.1. Class Members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant included within the Settlement, for the period of December 10, 2011 through April 10, 2018. *See Settlement*, ¶¶ 4.3, 6.1.

2. Attorneys’ Fees, Costs, Incentive Payments, and PAGA Payment

Plaintiffs will separately apply for incentive payments at the time of seeking final approval of the proposed class action settlement in the amount of \$5,000 each (for a total of \$15,000) for their services to the Settlement Class. *See Settlement*, ¶ 5.4. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on

³ Prime Communications will pay the employer’s share of payroll taxes separate and apart from the Gross Settlement Amount. *See Settlement*, ¶ 1.11.

1 behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the
2 action.” *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. As will
3 be fully briefed at the time of final approval, Plaintiffs’ requested incentive payments are intended
4 to recognize the time and effort Plaintiffs expended on behalf of the Settlement Class, including
5 providing substantial factual information and documents to Class Counsel, discussing case
6 strategy and Defendant’s wage and hour practices and policies with Class Counsel, attending
7 multiple in-person and telephonic meetings with Class Counsel to discuss the claims and theories
8 at issue in the litigation, and actively participating in the prosecution of their claims, as well as
9 the significant risks Plaintiffs undertook by agreeing to serve as the named Plaintiffs in this case,
10 and the fact that Plaintiffs have agreed to a general release of all claims subject to a waiver of
Civil Code § 1542. *See* Settlement, ¶ 6.2; Haines Decl., ¶ 25.

11 Class Counsel will also apply for an attorneys’ fees award of one-third of the GSA, which
12 is currently estimated to be \$215,000, and up to \$40,000 in verified costs reimbursement. *See*
13 Settlement, ¶ 5.3. Plaintiffs submit the requested fee is fair compensation for undertaking
14 complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Class
15 Counsel has incurred substantial attorney fees conducting pre-filing investigation, analyzing
16 Plaintiffs’ claims, conducting legal research, drafting discovery requests, reviewing Defendant’s
17 documents and policies, analyzing Class Members’ timekeeping data and payroll records,
18 working with a retained expert to create a comprehensive damages model, preparing for and
19 attending two mediation sessions, negotiating the long-form Settlement Agreement, preparing
20 this Motion, and otherwise litigating the case. Haines Decl., ¶ 24. Class Counsel expect to expend
21 additional attorney time in attending the hearing on this Motion, overseeing the Notice process
22 and fielding questions from Class Members, preparing the final approval papers, and attending
the Final Approval hearing. *Id.*

23 California courts recognize an appropriate method for awarding attorneys’ fees in class
24 actions is to award a percentage of the “common fund” created as a result of a settlement. *See*
25 *e.g., Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 506 (holding “the percentage of fund
26 method survives in California class action cases”). Class Counsel’s request for fees of one-third
27 of the GSA is well within the range of reasonableness, and indeed is considered the typical rate
28 for common fund settlements. Historically, courts have awarded percentage fees in the range of
20% to 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6

(4th Ed. 2013).

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

Additionally, the Parties have agreed to designate \$30,000 of the GSA as PAGA penalties, of which \$22,500 (75%) will be paid to the LWDA, with the remaining \$7,500 (25%) part of the NSA for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 5.6. Plaintiffs submit this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, (N.D. Cal. 2011) Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, (N.D. Cal. 2013) Case No. C11-03609 HRL, 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

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

1 **1. Standard for Preliminary Approval**

2 To make a fairness determination, the Court should consider several factors, including:
3 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
4 litigation, the risk of maintaining class action status through trial, the amount offered in
5 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
6 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
7 “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of
8 the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*
9 (2001) 91 Cal.App.4th 244, 245. As discussed below, the proposed Settlement is fair, adequate,
and reasonable in light of the overall balance of factors in this case.

10 **a. The Strength of Plaintiffs’ Case**

11 Although Plaintiffs steadfastly maintain that their claims are meritorious, Plaintiffs
12 acknowledge that there were substantial risks and uncertainty in proceeding with litigation. As
13 described in section II.B., *supra*, Defendant presented multiple defenses to Plaintiffs’ claims, both
14 on the merits and with respect to class certification. Thus, while Plaintiffs were prepared to litigate
these claims through class certification, and ultimately trial, success was far from certain.

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

16 Although the Parties engaged in significant informal discovery in advance of mediation,
17 the Parties still had significant discovery to complete in formal litigation had the matter not
18 settled. Haines Decl., ¶ 26. This would have required expenditure of substantial time and
19 resources by both Parties that would have very likely spanned several years. *Id.* Furthermore,
20 Defendant maintains that Plaintiffs and Class Members signed valid and binding arbitration
21 agreements during their employment with Defendant, precluding them from proceeding on a
22 classwide basis. *Id.* As stated above, in the *Espinoza* Action, Defendant already successfully
23 moved to dismiss class claims and compel Plaintiff Espinoza’s individual claims to arbitration.
24 *Id.* Similarly, as a result of Plaintiff *Gonzalez* entering into an arbitration agreement with
25 Defendant, he dismissed his individual claims and class claims without prejudice in the *Gonzalez*
26 Action. *Id.* Even if Plaintiffs were to overcome the arbitration agreements and certify the classes,
27 Plaintiffs still had to file for class certification, and faced the prospect of appeals in the wake of
28 a disputed class certification ruling for Plaintiffs and/or adverse summary judgment ruling. *Id.*
Furthermore, if the classes sought to be certified by Plaintiffs were in fact certified, the Parties

1 would incur considerably more attorney fees and costs through a possible decertification motion,
2 trial, and possible appeal. *Id.* Settlement avoids those risks and the accompanying expense. *Id.*

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

4 Plaintiffs had not yet filed their motion for class certification, and as such, the extent to
5 which Plaintiffs' proposed classes were certifiable is somewhat speculative. Absent settlement,
6 there was a risk that there would not be a certified class at the time of trial, especially in light of
7 the fact that Class Members executed arbitration agreements with class action waivers. Thus, this
8 factor, too, supports preliminary approval of the Settlement.

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

10 The Settlement provides a positive recovery for the Settlement Class in the face of
11 disputed claims and binding arbitration agreements. With the assistance of a retained economist
12 with a Ph.D., Plaintiffs conducted an analysis of unpaid wages and penalties due to Defendant's
13 alleged failure to pay for all hours worked, failure to reimburse for mileage related expenses,
14 potential meal and rest period premium wages owing, regular rate miscalculations, wage
15 statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results
16 of Plaintiffs' exposure analysis are discussed below:

17 **Rest Period Violations: \$245,162**

18 Plaintiffs allege that Defendant had a facially invalid rest period policy in effect from
19 December 2011 through January 2015 which failed to authorize a second rest period for shifts of
20 6.0 hours to 10.0 hours, or third rest periods for shifts in excess of 10.0 hours. Haines Decl., ¶ 14.
21 Even after Defendant revised its written rest period policy, Plaintiffs allege Defendant's rest
22 period practices failed to authorize or permit timely rest periods due to work demands and staffing
23 issues. *Id.* Accordingly, Plaintiffs assumed that each shift in excess of 3.5 hours triggered a rest
24 period violation. *Id.* Therefore, Plaintiffs calculated a maximum potential exposure for this claim
25 at \$4,669,757 (391,102 shifts x \$11.94 average premium). *Id.*

26 However, Plaintiffs' theory of liability carried significant risks of non-certification and of
27 not prevailing on the merits, including the fact that Plaintiffs and nearly all Class Members signed
28 arbitration agreements. Haines Decl., ¶ 22. Defendant also contends that it maintained legally-
compliant rest period policies and practices throughout the Class Period and authorized and
permitted all rest periods to Class Members. *Id.* at ¶ 14. Defendant further argues that Plaintiffs'
rest period claim is inherently unsuited for class treatment as there are no records of whether or

not rest periods were taken, therefore requiring an individualized inquiry into why each Class Member failed to take rest periods on each shift, which would devolve into an unmanageable series of mini-trials. *Id.* In light of these defenses, Plaintiffs discounted the maximum amount for this claim by 85% for a risk of non-certification, and an additional 65% for a risk of being unsuccessful on the merits, to arrive at an estimated exposure of \$245,162. *Id.*

Unreimbursed Expenses: \$36,439

Plaintiffs allege that Defendant failed to reimburse for mileage to Assistant Store Managers, Retail Store Managers, and Flagship Store Managers for the use of their personal automobiles for work related purposes during the Class Period. Haines Decl. ¶ 15. Plaintiffs estimate that Assistant Store Managers, Retail Store Managers, and Flagship Store Managers drove 30 miles per week for the approximately 13,348 workweeks worked by Assistant Store Managers, Retail Store Managers, and Flagship Store Managers during the Class Period, and therefore calculates Defendant's maximum exposure for this claim at approximately \$224,246 (400,440 miles unreimbursed x \$0.56 average IRS reimbursement rate per mile of business travel during the Class Period). *Id.*

Significant risks attended to Plaintiffs' unreimbursed expenses claim both on the merits and with respect to class certification, including Defendant's argument that it did not require Assistant Store Managers, Retail Store Managers, and Flagship Store Managers to use their personal vehicles for work purposes, that it was not required to reimburse mileage at the IRS rate, and that this claim would require a series of unmanageable mini-trials to determine which Assistant Store Managers, Retail Store Managers, and Flagship Store Managers, if any, actually incurred unreimbursed mileage expenses and, if so, by how much. Haines Decl., ¶ 15. Therefore, Plaintiffs discounted this claim by 75% for a risk of non-certification, and an additional 35% for risk of being unsuccessful on the merits, to arrive at a total estimated exposure of \$36,439. *Id.*

Wage Statement Violations: \$273,159

Plaintiffs' data analysis reflected that there were approximately 20,506 total wage statements issued during the relevant time period and approximately 544 unique employees during the applicable time period. Haines Decl., ¶ 16. Plaintiffs calculate Defendant's maximum exposure for wage statement violations at \$2,023,400 (544 initial violations x \$50 for initial penalty = \$27,200) + (19,962 subsequent violations x \$100 subsequent violation penalty = \$1,996,200). *Id.*; see also Labor Code § 226(e) (providing for \$50 penalty for "initial" violations).

Based on Defendant's arguments that: (i) no violations occurred, (ii) any alleged violations were not "knowing and intentional" as required by Labor Code § 226(e), (iii) no injury was suffered, (iv) meal and rest period violations cannot serve as a basis for wage statement penalties, and (v) nearly all Class Members signed binding and enforceable arbitration agreements, Plaintiffs discounted the calculated exposure by 70% for a risk of non-certification and an additional 55% for a risk of being unsuccessful on the merits, to arrive at an estimated total of \$273,159. Haines Decl., ¶¶ 16, 22.

Off-the-Clock Work: \$12,906

As stated above, Plaintiffs allege that manager positions were required to perform off-the-clock work, including attending telephonic conference calls prior to clocking in for the start of their scheduled shifts, and other duties. Haines Decl., ¶ 17. Based on Plaintiffs' investigation, Plaintiffs estimate that Flagship Store Managers worked approximately one hour of off-the-clock work per workweek, and that there were approximately 1,735 workweeks worked by Flagship Store Managers at an average hourly rate of \$17.00 during the Class Period, for a total underpayment of \$29,490. *Id.* In addition, Plaintiffs estimate that Retail Store Managers also worked approximately one hour of off-the-clock work per workweek, and that there were approximately 6,638 workweeks worked by Retail Store Managers at an average hourly rate of \$15.00 during the Class Period, for a total underpayment of \$99,570. *Id.* Therefore, Plaintiffs estimated Defendant's maximum exposure for off-the-clock work is approximately \$129,060. *Id.*

As explained above, however, Plaintiffs faced significant risks both as to class certification and the merits, including the arbitration agreements signed by Plaintiffs and the vast majority of Class Members, as well as Defendant's arguments that off-the-clock work was prohibited and was therefore rarely, if ever, performed. Haines Decl., ¶¶ 17, 22. Defendant further argues that there is no reason for employees to perform off-the-clock work; and, that highly individualized inquiries would need to be made, since off-the-clock work, by definition, is not recorded, therefore making class certification very unlikely. *Id.* Accordingly, Plaintiffs discounted the maximum estimated exposure by 75% for a risk of non-certification, and an additional 60% to account for a risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated exposure of \$12,906. *Id.*

Second Meal Period Violations: \$9,535

Plaintiffs' analysis of the timekeeping data showed that during the Class Period there were

1 approximately 6,655 shifts worked in excess of 10.0 hours, for which a compliant second meal
2 period was not provided. Haines Decl., ¶ 18. Plaintiffs calculate Defendant's maximum exposure
3 for second meal period violations at \$79,460 (6,655 shifts with non-compliant second meal
4 periods x \$11.94 premium). *Id.*

5 However, Plaintiffs' theory of liability carried significant risks of both non-certification,
6 and on the merits if Plaintiffs were able to certify this claim, based on, *inter alia*, Defendant's
7 argument that it has maintained compliant written meal period policies throughout the Class
8 Period, and provided all required second meal periods to Class Members. Haines Decl., ¶ 18.
9 Defendant further argued that Class Members voluntarily waived their second meal period on
10 shifts in excess of 10.0 hours but less than 12.0 hours. *Id.*; see Labor Code § 512. If the Court
11 accepted Defendant's wavier argument for shifts less than 12.0 hours in duration, then there were
12 only 176 shifts at issue, as this is the total number of shifts worked over 12.0 hours with a missed
13 second meal period. Haines Decl., ¶ 18. This would reduce Defendant's maximum exposure to
14 approximately \$2,101 (176 shifts with non-compliant second meal periods x \$11.94 premium).
15 *Id.* Defendant further argues that Plaintiffs' meal period claim is inherently unsuited for class
16 treatment as it requires an individualized inquiry into whether any Class Member failed to take a
17 second meal period, and if so, why the Class Member failed to do so. Haines Decl., ¶ 18.
18 Therefore, Plaintiffs discounted the calculated exposure by 70% for a risk of non-certification and
19 an additional 60% for a risk of being unsuccessful on the merits, or having exposure reduced due
20 to Defendant's waiver arguments, to arrive at an estimated total of \$9,535. *Id.*

21 **Regular Rate Violations: \$1,149**

22 Plaintiffs' analysis of the payroll records revealed that Defendant's underpayment in
23 overtime wages owing as a result of the failure to include "CommOT" pay, "Incentive" pay,
24 "Store Manager B" pay when calculating the regular rate of pay to be approximately \$5,475 in
25 unpaid overtime wages. Haines Decl., ¶ 19. As stated above, Defendant vigorously contends
26 that class certification is not appropriate as nearly all Class Members signed arbitration
27 agreements which contained class action waivers. *Id.* at ¶ 12. In light of Defendant's defenses,
28 Plaintiffs discounted the maximum exposure by 70% for a risk of non-certification, and an
additional 30% for a risk of being unsuccessful on the merits, to arrive at an estimated exposure
of \$1,149. *Id.*

Waiting Time Penalties: \$91,450

1 Defendant's records reflect approximately 798 former Class Members who separated
2 from their employment with Defendant within the three-year statute of limitations period
3 applicable to Labor Code § 203. Haines Decl., ¶ 20. Based on an hourly rate of \$11.94, Plaintiffs
4 estimated the average waiting time penalty per former employee to be \$2,865 (\$11.94 x 8 hours
5 per day x 30 days). *Id.* Therefore, Plaintiffs estimated Defendant's maximum exposure for
6 waiting time penalties to be \$2,286,270 (798 former employees x \$2,865). *Id.*

7 Defendant presented several defenses to this claim, most notably their assertion that
8 because they possessed good-faith defenses to the underlying claims, any failure to pay wages
9 was not "willful" as a matter of law. Haines Decl., ¶ 20. To the extent that Plaintiffs' waiting
10 time penalty claim was derivative of their unpaid wage claims, Defendant argues that not all
11 former employees (if any) did, in fact, experience underpayment of wages, and therefore
12 Plaintiffs' exposure was overstated. *Id.* Defendant further contends that waiting time penalties are
13 not recoverable as a matter of law as to Plaintiffs' claims predicated on a failure to provide meal
14 and/or rest periods. *Id.*; see *Ling, supra*, 245 Cal.App.4th at 1261.

15 To account for Defendant's defenses, Plaintiffs discounted the maximum exposure by
16 80% for a risk of non-certification, and an additional 80% for a risk of losing on the merits, and/or
17 not receiving the maximum penalties sought, to arrive at an estimated exposure of \$91,450.
18 Haines Decl., ¶ 20.

19 **PAGA Penalties: \$128,162**

20 Plaintiffs estimated maximum total PAGA exposure at \$2,050,600 for the relevant time
21 period (20,506 violations x \$100 initial penalty). Haines Decl., ¶ 21; *Amaral v. Cintas Corp. No.*
22 *2* (2008) 163 Cal.App.4th 1157, 1207 (finding "initial" violation rate applies until employer is
23 notified that it is violating a Labor Code provision). However, these penalties derive from the
24 underlying wage and hour violations discussed above, which Defendant vigorously disputes. *Id.*;
25 see e.g., *Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining
26 that a PAGA claim's success was determined by the merits of its underlying claims). Defendant
27 also asserts the Court would drastically reduce any award of PAGA penalties as "confiscatory."
28 Haines Decl., ¶ 21; see also *Thurman, supra*, 203 Cal.App.4th at 1135 (affirming reduction of
PAGA penalties); *Fleming, supra*, 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8
million to \$500,000). Therefore, Plaintiffs discounted the maximum figure by 75% for a risk of
losing on the merits, and an additional 75% to account for the possibility of this Court reducing

penalties, to arrive at an estimated exposure of \$128,162. Haines Decl., ¶ 21.

Using these estimated figures for each of the claims described above, Plaintiffs predicted that the potential recovery for the Settlement Class would be approximately \$797,962. Haines Decl., ¶ 22. The proposed settlement of \$645,000 therefore represents approximately 80.8% of the reasonably forecasted recovery for the Settlement Class. *Id.* Preliminary approval is appropriate since the Settlement will provide significant monetary relief to Class Members, which is consistent with what Plaintiffs' counsel believes could have been recovered had the case proceeded through trial.

e. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiffs are represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See* Haines Decl., ¶¶ 2-7; Declaration of Kevin T. Barnes ("Barnes Decl."), ¶¶ 2-7; Declaration of Kyle Nordrehaug ("Nordrehaug Decl."), ¶ 2. Class Counsel conducted an in-depth review of Defendant's policies and timekeeping and payroll records with the assistance of a retained expert with a Ph.D. in economics, and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiffs' case. *See* Haines Decl., ¶ 10. The Settlement was also reached with the assistance of an experienced and respected wage and hour class action mediator. *Id.*, at ¶ 11. This factor strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

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

a. The Settlement Is Within the Range of Possible Approval

The proposed settlement reflects approximately 80.8% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will

1 provide tangible, monetary compensation for hotly disputed claims. Indeed, the percentage of the
2 liability exposure recovered in this case far exceeds percentages routinely approved by courts.
3 *See, e.g., Glass v. UBS Finan. Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL
4 221862, *4 (approving settlement representing 25% to 35% of potential damages); *Dunleavy v.*
5 *Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of
6 potential recovery); *Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.*, (C.D. Cal. 2004) 221 F.R.D.
7 523, 527 (“it is well-settled law that a proposed settlement may be acceptable even though it
8 amounts to only a fraction of the potential recovery that might be available to the Settlement Class
9 members at trial”). Plaintiffs submit that the proposed settlement is within the range of possible
10 approval, such that notice should be provided to the Settlement Class so that they can consider
11 the Settlement. The Court will have the opportunity to again assess the reasonableness of the
12 Settlement after the Settlement Class has had the opportunity to opt-out or object.

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

13 The Settlement resulted from an exchange of substantial information, arm’s-length
14 negotiations by counsel, two full-days of mediation before experienced wage and hour mediators,
15 and additional months of negotiating the long-form settlement agreement. Thus, the Settlement is
16 entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130. As
17 discussed above, Plaintiffs carefully vetted the claims at issue and reviewed extensive
18 timekeeping records and payroll data, and conducted a detailed statistical analysis of the data to
19 arrive at their estimated classwide damages figures. *See Haines Decl.*, ¶¶ 14-23. The Parties
20 attended two full-day mediations, and worked collaboratively in the following months to finalize
21 the Settlement. *Id.* at ¶ 11. Thus, this factor supports preliminary approval.

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

22 Preliminary approval of the Settlement is also warranted because there are no obvious
23 deficiencies. The Settlement will provide substantial monetary relief to Settlement Class
24 Members. The amounts proposed for Class Counsel’s attorneys’ fees and costs, class
25 representative incentive payments, and the PAGA allocation are all reasonable and appropriate
26 based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this
27 factor supports preliminary approval.

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

28 The Settlement Class satisfies the criteria for certification of a settlement class under

California law because: (1) the Settlement Class is so numerous that joinder would be impractical; (2) common questions of law and fact predominate over individual questions such that class certification is the most efficient and desirable way to maintain this litigation; (3) Plaintiffs' claims are typical of the claims of absent Class Members; and (4) Plaintiffs and their counsel will fairly and adequately represent Class Members' interest. *See* Cal. Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed class is defined as any person who is or was employed by Defendant in the State of California as a non-exempt employee during the Class Period. Therefore, Class Members can be identified from Defendant's personnel and employment records. Defense counsel represents that the Settlement Class consists of approximately 1,049 current and former non-exempt employees. *See Haines Decl.*, ¶ 13. It would therefore be impracticable to bring all Class Members before the Court, or for each Class Member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not the merits, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 327. Plaintiffs' claims are predicated on Defendant's alleged failure to pay all hours worked, failure to reimburse mileage related expenses, unlawful meal and rest period policies and practices, regular rate miscalculation, and its deficient wage statements. These types of claims are commonly held to be proper for class certification. *See e.g., Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1371 (certifying class based on uncompensated work time); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 (certifying meal and rest period claims); *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220, 240 (certifying regular rate miscalculation claim).

3. The Claims of the Named Plaintiffs Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191

1 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same
2 goods as the putative class in a consumer class action). Here, Plaintiffs' claims are typical of
3 those held by the members of the proposed Settlement Class. First, Plaintiffs were employed by
4 Defendant during the Class Period as non-exempt employees and were subject to Defendant's
5 wage and hour policies and practices at issue in this case. Second, Plaintiffs assert they were
6 injured by the same challenged policies that allegedly injured the Settlement Class as a whole.
7 For example, Plaintiffs assert that they were underpaid for all hours worked, were not reimbursed
8 for all mileage related expenses, were not provided all meal periods and authorized or permitted
9 to take all rest periods. *Id.* Plaintiffs further assert that they received incomplete and inaccurate
10 wage statements, similar to those received by Class Members, and did not receive all their earned
11 wages at the time of their separation of employment. *Id.* Because Plaintiffs have suffered the same
12 injuries as the other members of the Settlement Class, the typicality requirement is satisfied.

13 **4. Plaintiffs and Class Counsel Will Fairly and Adequately Represent**
14 **the Class**

15 The adequacy requirement examines conflicts of interest between named parties and the
16 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
17 (2007) 155 Cal.App.4th 676, 697. Plaintiffs and their counsel will adequately represent the
18 Settlement Class, as there are no conflicts between Plaintiffs and the proposed Settlement Class,
19 and Plaintiffs possess claims that are in line with those of the Settlement Class. *See McGhee v.*
20 *Bank of America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no
21 indication that Class Counsel were not qualified and the named plaintiff had no interests
22 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
23 and hour class action litigation. *See Haines Decl.*, ¶¶ 2-7; *Barnes Decl.*, ¶¶ 2-7; *Nordrehaug Decl.*,
24 ¶ 2.

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

26 This Court should order distribution to the Settlement Class of the proposed Class Notice
27 by U.S. Mail, postage prepaid, using last known mailing address information provided by
28 Defendant. *See Settlement*, ¶ 3.5. This manner of giving notice is the "best notice practicable"
under the circumstances because it provides "individual notice to all members who can be
identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin* (1976) 417 U.S. 156,
173. Here, Plaintiffs propose that the Settlement be administered by CPT Group Inc. ("CPT"),

1 an experienced class action settlement administrator. *See generally* Declaration of Julie Green
2 (“Green Decl.”) and attached exhibits. Class Members’ addresses will be ascertainable through
3 Defendant’s personnel and payroll records, which Defendant will provide to CPT within twenty
4 (20) days of preliminary approval of the Settlement. *See* Settlement, ¶ 3.3. After receipt of the
5 Class Members’ addresses, CPT will promptly run the addresses through the United States Postal
6 Service Notice of Change of Address database (which provides updated addresses for any
7 individual who has moved in the previous four years and has notified the U.S. Postal Service of a
8 forwarding address) and within 40 days of preliminary approval mail the Class Notices out. *See*
9 Settlement, ¶¶ 3.2, 3.5. To the extent that any Class Notices are returned, CPT will perform a
“skip trace” to track any Class Member’s current mailing address. *Id.*, at ¶ 3.5.

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

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

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

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1 **V. CONCLUSION**

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

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6 Dated: August 31, 2018

Respectfully submitted,
HAINES LAW GROUP, APC

7
8 By:



9 Paul K. Haines
Attorneys for Plaintiffs