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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MARIO ALVARADO, an individual and on behalf of all others similarly situated, Plaintiff, vs. RED POINTE ROOFING, L.P., a California Limited Partnership; and DOES 1 through 100, Defendants.	CASE NO. 30-2022-01286100-CU-OE-CXC [*Case assigned for all purposes to the Hon. Melissa R. McCormick, Dept. CX104*] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Reservation: 74224946 Date: May 30, 2024 Time: 2:00 p.m. Dept.: CX104 Action Filed: October 12, 2022 Trial Date: None Set

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on May 30, 2024 at 2:00 p.m., or as soon thereafter as the matter may be heard, in Department CX104 of the Orange County Superior Court, located at 751 W Santa Ana Blvd, Santa Ana, California 92701, Plaintiff Mario Alvarado ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed Stipulation of Settlement ("Settlement Agreement") in this lawsuit;
2. Pursuant to California Code of Civil Procedure § 382, provisional certification of the Settlement Class, defined as follows:

   All current and former non-exempt employees of Defendant Red Pointe Roofing, L.P. in California who worked at any time between October 12, 2018, and the date of preliminary approval (the "Class Period").
3. Preliminary appointment of Plaintiff Mario Alvarado as the Class Representative;
4. Preliminary appointment of Paul K. Haines, Fletcher W. Schmidt, and Andrew J. Rowbotham of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement Agreement should be finally approved and to award amounts for the Class Representative Enhancement Payment, settlement administration costs, payment to the Labor and Workforce Development Agency for its share of civil penalties under the Private Attorneys General Act, Labor Code § 2698 *et seq.*, and Class Counsel's attorneys' fees and costs;
6. Appointment of CPT Group, Inc. as the third-party settlement administrator; and
7. Approval of the proposed Notice of Class Action Settlement and Notice of Settlement Award (collectively, the "Notice Packet"), and entry of the proposed Order instructing the Notice Packet to be disseminated to the proposed Settlement Class in English and Spanish, 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 Fletcher W. Schmidt, Paul K. Haines, Andrew J. Rowbotham, Plaintiff Mario Alvarado, 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 of hearing.

Dated: February 8, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________
Fletcher W. Schmidt
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Mario Alvarado ("Plaintiff"), individually and on behalf of all current and former non-exempt employees of Defendant Red Pointe Roofing, L.P. in California who worked at any time between October 12, 2018, and the date of preliminary approval (the "Class Period"), respectfully requests that this Court preliminarily approve the Stipulation of Settlement ("Settlement Agreement" or "Settlement"),[1] entered into by Plaintiff and Defendant Red Pointe Roofing, L.P. ("Defendant") (Plaintiff and Defendant are referred to collectively herein as the "Parties").

This non-reversionary $650,000.00 class action settlement benefits approximately 289 potential Settlement Class members. After Court-approved deductions for the Class Representative Enhancement Payment, settlement administrator costs, the Private Attorneys General Act ("PAGA") payment to the Labor & Workforce Development Agency ("LWDA"), and attorneys' fees and costs to Class Counsel, the remaining Net Settlement Amount ("NSA") is estimated to be $358,333.33.[2] This results in average Individual Settlement Payments of approximately $1,239.91, with the lowest possible estimated Individual Settlement Payment of $15.58 and the highest estimated Individual Settlement Payment of $4,580.43. Additionally, PAGA Members will receive average PAGA payments of approximately $86.20, with the lowest possible estimated PAGA payment of $1.46 and the highest estimated PAGA payment of $201.26.

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[1] The Settlement Agreement is attached as Exhibit 1 to the Declaration of Fletcher W. Schmidt, ("Schmidt Decl."), filed concurrently herewith, and the Notice of Class Action Settlement and Notice of Settlement Award (collectively, the "Notice Packet") are attached to the Schmidt Decl. as Exhibit 2.

[2] The Settlement also includes a release of PAGA claims on behalf of all current and former non-exempt employees of Defendant in California who worked at any time between October 12, 2021, and the date of preliminary approval (the "PAGA Period"). Settlement, § 2. These individuals ("PAGA Members"), regardless of whether they opt out from the Settlement, will receive their share of funds set aside for PAGA civil penalties and will release their claims for civil penalties under PAGA based on the Labor Code violations pled in Plaintiff's operative complaint and Plaintiff's letter to the LWDA, submitted on October 13, 2022. *Id.*, § 3.B. A copy of Plaintiff's pre-filing LWDA letter is attached as Exhibit 3 to the Schmidt Decl. A copy of the LWDA's confirmation of receipt of this Motion and the Settlement Agreement is attached as Exhibit 4 to the Schmidt Decl.

Settlement Class members do not need to file a claim form in order to receive an Individual Settlement Payment, and all Settlement Class members who do not opt-out will automatically receive their share of the Settlement. This Settlement represents a fair and reasonable result for Settlement Class members, who will only release claims that were actually asserted, or which could have been asserted based on the facts alleged in Plaintiff's operative First Amended Complaint ("FAC").

This proposed Settlement is well within the range of possible approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the monetary benefit to the Settlement Class members. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. Factual And Procedural Background

Defendant is a Southern California commercial roofing provider, specializing in roof construction and repair. Schmidt Decl., ¶ 9. Plaintiff was employed by Defendant as a non-exempt "Roofer" from approximately October 4, 2021, to July 31, 2022. *Id*.; Declaration of Mario Alvarado ("Alvarado Decl."), ¶ 2. Plaintiff's job duties included repairing roof leaks as well as installing roof tile and shingles. Schmidt Decl., ¶ 9. Like all Settlement Class members, Plaintiff was subject to Defendant's wage and hour policies and practices. Schmidt Decl., ¶ 9.

On October 12, 2022, Plaintiff filed the initial Complaint in this action, alleging Defendant failed to: (i) pay all minimum wages owed; (ii) pay all overtime wages owed; (iii) provide all lawful meal periods; (iv) authorize and permit all lawful rest periods; (v) reimburse necessary business expenses; (vi) issue accurate and itemized wage statements; (vii) timely pay all final wages upon separation; and (viii) comply with California's Unfair Competition laws. Schmidt Decl., ¶ 10. On December 19, 2022, Plaintiff filed the operative FAC, adding a cause of action for civil penalties under PAGA, premised on the underlying Labor Code violations contained in the FAC. *Id*.

In anticipation of mediation, Defendant provided Plaintiff with handwritten timekeeping records and corresponding payroll records for 31% of the months in the relevant time period, as well as handbooks in effect during the relevant time period. Plaintiff's counsel then conducted a comprehensive, class-wide analysis of the data to estimate Defendant's maximum potential exposure on all claims at issue. On September 5, 2023, after extensive legal research and analysis, along with Plaintiff's comprehensive review of the data, the Parties participated in a mediation session with Steven G. Mehta, Esq., who helped the Parties reach a class-wide resolution of all claims at issue. Over the following months, the Parties negotiated and executed the long-form Settlement Agreement that is now before this Court for preliminary approval.

B. <u>Plaintiff's Claims and Defendant's Defenses</u>

Plaintiff asserts that, as a result of Defendant's written policies and uniform practices, Defendant failed to maintain accurate records of the hours actually worked by Settlement Class members, resulting in unpaid minimum and overtime wages throughout the Class Period. Schmidt Decl., ¶ 12. Specifically, Plaintiff alleges that Defendant required employees to report for work at least 30 minutes prior to the start of their shift to attend daily safety audits, prepare their workspace, and don their protective gear. *Id*. Despite requiring Plaintiff and other non-exempt employees to perform work outside of their scheduled shift times, Defendant failed to compensate employees for this work. *See* Wage Order 16, §§ 3, 4; Labor Code §§ 510(a), 1197 and 1182.12 (establishing the right of employees to be paid minimum wages for all hours "subject to the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not required to do so.")

Defendant maintains it has properly paid all minimum and overtime wages for all hours worked by the Settlement Class members. Schmidt Decl., ¶ 13. Defendant further argues it did not direct employees to work off-the-clock. *Id.* To the extent that any work was performed prior to the scheduled shift, Defendant contends this time was "de minimis." *See Troester v. Starbucks Corp.*, (2018) 5 Cal.5th 829, 835. Defendant asserts that this claim is not suitable for class treatment, as it requires individualized inquiries into exactly how much time each employee purportedly worked off-the-clock each day, resulting in an unmanageable series of mini-trials. Schmidt Decl., ¶ 13.

Plaintiff asserts that Defendant failed to provide Settlement Class members with all legally compliant meal periods to which they were entitled. Schmidt Decl., ¶ 14. With respect to first meal periods, Plaintiff alleges employees were regularly not provided meals until after the fifth hour of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049 (holding that employers must provide a 30-minute uninterrupted meal period prior to the end of the fifth hour of work to employees who work a shift in excess of 5.0 hours). With respect to second meal periods, putative class member timekeeping and payroll records reflect a majority of shifts in excess of 10.0 hours were not provided a second meal period. Schmidt Decl., ¶ 14. Additionally, Plaintiff alleges that Defendant failed to pay any meal period premiums for missed or non-compliant meal periods. *Id.*

Defendant maintains that employees were provided all legally compliant meal periods and that any missed or non-compliant meal periods were the result of employee choice, not Defendant's policy. *See Brinker, supra*, 53 Cal.4th at 1040 (holding that where employees were "provided" the opportunity to take compliant breaks, whether they took a break or not was immaterial). Further, Defendant asserts that Plaintiff and other non-exempt employees were not required to perform unpaid work before their shifts, therefore the majority of its time records accurately reflect timely first meal periods. Schmidt Decl., ¶ 15. Defendant also contends that employees waived their second meal periods on shifts in excess of 10.0 hours. *Id.* Defendant further argues that Plaintiff's meal period claims are unmanageable, since individual inquiries would be required to assess whether meal periods were waived, and the reasons why a particular employee recorded a non-compliant meal period or missed a meal period on a particular shift. *Id.*

Plaintiff alleges that Defendant failed to authorize and permit employees to take all lawful rest periods to which they were entitled. *See Brinker, supra*, 53 Cal.4th at 1029 ("Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on"). Specifically, Plaintiff alleges that Defendant rarely, if ever, failed to authorize and permit rest periods during the workday. Schmidt Decl., ¶ 16. Rather, Defendant's foremen discouraged employees from leaving their work area as it would require them to descend and reascend roofs multiple times. *Id*. On occasions when lawful rest periods were not authorized and permitted, Defendant failed to pay rest period premiums as required by Labor Code § 226.7. *Id*.

Defendant argues it maintains a facially compliant written rest period policy, and that it has always authorized and permitted rest periods in compliance with that policy. Schmidt Decl., ¶ 17. Defendant also argues this claim is not amenable to class treatment, as individual inquiries would be required to determine whether each employee was authorized to take rest periods on each particular shift, resulting in an unmanageable series of mini-trials. *Id*. This manageability concern is especially present for the rest period claim as rest periods are not recorded. *Id*.

Plaintiff alleges that Defendant failed to reimburse the employees for all necessary business expenses incurred. *See* Labor Code § 2802 ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."). Specifically, Plaintiff asserts that Defendant required employees to use their personal cell phones to communicate with supervisors and navigate to job sites during their workday. Schmidt Decl., ¶ 18. However, Defendant did not reimburse employees for a reasonable portion of their monthly cell phone bills. *See Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 ("If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of section 2802.")

Defendant argues that it maintains a policy to reimburse all reasonable and necessary business expenditures and that, to the extent that any expenses were not reimbursed, they were not reasonably incurred. Schmidt Decl., ¶ 19. Defendant also maintains that this claim faces similar obstacles towards certification as Plaintiff's other claims, particularly that it would require a series of mini-trials to determine which employees were actually required to use their cell phone for business purposes and in which pay periods such expenses were allegedly incurred. *Id.*

As a result of Defendant's failure to pay all overtime wages, minimum wages, and meal period and rest period premiums, Plaintiff contends that Defendant is liable for derivate wage statement violations, waiting time penalties and civil penalties under the PAGA. Schmidt Decl.,

¶ 20. Defendant argues that the alleged wage statement violations were not "knowing and intentional," and that Plaintiff could not show he "suffer[ed] injury," as required by Labor Code § 226(e) for imposition of penalties. *See Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, 1201. Defendant further contends that it possesses strong, good faith defense to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties (which are only available for the "willful" failure to pay wages). *See* 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.") 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 Plaintiff's underlying claims. Schmidt Decl., ¶ 20.

III. <u>THE PROPOSED SETTLEMENT</u>

A. <u>Essential Terms Of The Settlement</u>

Should the Court preliminarily approve this settlement, Defendant will pay a Maximum Settlement Amount of $650,000.00. Settlement § 4. This Settlement is non-reversionary and Settlement Class members will automatically receive their Individual Settlement Payment unless they affirmatively opt-out of the Settlement. *Id*., §§ 3.A., 4.C. PAGA Members will automatically receive their share of the PAGA civil penalties, and will not have the ability to opt-out. *Id.*, § 3.B. Defendant will fund the entire Maximum Settlement Amount within 30 days of the date of the Court's signing an order granting final approval of the Settlement, assuming no objections or appeals, or by September 5, 2024, whichever date is later (the "Effective Date"). *Id*., § 4.B.

The proposed deductions from the Maximum Settlement Amount are itemized below:

Maximum Settlement Amount:	**$650,000.00**
Minus Court-approved attorneys' fees (1/3):	$216,666.67
Minus Court-approved attorneys' costs (up to):	$20,000.00
Minus Court-approved Enhancement Payment:	$7,500.00
Minus settlement administrator costs (up to):	$10,000.00
Minus PAGA payment to the LWDA:	$37,500.00
Net Settlement Amount:	**$358,333.33**

1. <u>The Settlement Provides for Reasonable Monetary Payments</u>

After deducting amounts for court-approved attorneys' fees and costs, Class Representative Enhancement Payment, costs of settlement administration, and the LWDA's share of PAGA civil penalties, the remaining Net Settlement Amount of approximately $358,333.33 will be distributed to the Settlement Class members. Settlement, §§ 4.C., 5.A.

Defendant's records indicate that there are approximately 289 potential Settlement Class members who worked approximately 23,000 workweeks during the Class Period. Schmidt Decl., ¶ 21. Based on the proposed allocations of the Net Settlement Amount, participating Settlement Class members will receive, on average, a payment of approximately $1,239.91.[3] *Id.* Settlement Class members will have 60 calendar days from the mailing of the Notice Packet to opt-out or object to the Settlement, thereby providing ample time to review the Notice Packet without unduly delaying the Settlement. Settlement, § 9.D. Those individuals who do not opt-out of the Settlement will be bound by its terms and will release any and all claims that were asserted or could have been asserted based on the facts alleged in this action or Plaintiff s letter to the LWDA dated October 13, 2022. *Id.*, § 3.A.

2. <u>Attorneys' Fees, Costs, and Plaintiff's Enhancement Payment</u>

Should the Court grant preliminary approval of this Settlement, Plaintiff will apply for an Enhancement Payment of up to $7,500.00. *See* Settlement §§ 4.C.3, 6. "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff's Enhancement Payment is intended to recognize the significant benefits conferred upon the Settlement Class due to the time and effort that Plaintiff expended on their behalf, including gathering relevant documents for use in the lawsuit, providing factual information to his attorneys, identifying potential witnesses who also worked for Defendant and experienced the

[3] There are also approximately 145 PAGA Members who worked during the PAGA Period. The average share of PAGA civil penalties to PAGA Members is approximately $86.20.

same alleged Labor Code violations, and making himself available to his attorneys the entire day of mediation. Alvarado Decl., ¶ 6. Plaintiff's Enhancement Payment is also requested due to the significant risks that Plaintiff undertook by agreeing to serve as the named Plaintiff in this case, as well as the fact that Plaintiff agreed to a general release of all claims subject to a waiver of California Civil Code § 1542. Settlement, § 3.C.

Class Counsel will also apply for an attorneys' fee award of $216,666.67 (one-third of the Maximum Settlement Amount) and up to $20,000.00 in verified costs. *See* Settlement §§ 4.C.4. Plaintiff submits that the requested fee is fair compensation for the undertaking of complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel incurred substantial attorneys' fees conducting the pre-filing investigation, analyzing Plaintiff's claims, conducting legal research and analysis into those claims, reviewing data and documents produced by Defendant, building a comprehensive damages model, preparing for and attending mediation, preparing and revising the long-form Settlement Agreement, preparing this Motion for Preliminary Approval, and otherwise litigating the case. Schmidt Decl., ¶ 22. Class Counsel will also expend future attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding questions from Settlement Class members, drafting the Final Approval Motion along with supporting documents, and attending the final approval hearing, among other tasks. *Id.* Should the Court grant preliminary approval of this Settlement, Class Counsel will seek an award of attorneys' fees and verified litigation costs at the time of seeking final approval of the Settlement.

Both California and federal courts have recognized that an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ("the percentage of fund method survives in California class action cases…"); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 (recognizing both the "percentage of recovery" and "lodestar/multiplier" methods). 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) ("No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.")

IV. ARGUMENT

A. Preliminary Approval Is Warranted

California Rule of Court 3.769 conditions the 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 (stating that Rule 3.769 requires the 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 (stating that 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. *In re Syncor ERISA Litigation* (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 and is not the product of fraud or collusion between the negotiating parties. *See e.g.*, *Hanlon*, *supra*, 150 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was negotiated at arm's length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba*, *supra*, 91 Cal.App.4th at 245. As discussed herein, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. **The Strength of Plaintiff's Case**

Class Counsel carefully vetted the claims at issue, conducted a detailed analysis of Defendant's pre-mediation production to create a comprehensive damages model for Defendant's classwide liability. Schmidt Decl., ¶ 11. Although Plaintiff steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that there are substantial risks and uncertainty in proceeding with class certification and trial. As explained in detail in Section II.B., *supra*, Defendant presented numerous defenses to Plaintiff's claims, both on the merits and with respect to class certification. Although Plaintiff was prepared to litigate these claims through class certification and trial, given the amount offered in the Settlement, Plaintiff predicted that it was unlikely that further litigation would result in a more beneficial result for the Settlement Class members.

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

The Parties engaged in a significant informal exchange of documents and data prior to mediation. Schmidt Decl., ¶ 11. However, absent the Settlement, the Parties would need to expend substantial time and resources to engage in formal written and deposition discovery and prepare this case for class certification and trial. This Settlement avoids the considerable attorneys' fees and costs associated with conducting formal discovery, moving for class certification, filing for summary judgment or adjudication, and ultimately, participating in trial. The Settlement also limits the risks and the accompanying burden of continued litigation on the Court.

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

Prior to reaching the Settlement, Plaintiff had not yet filed his motion for class certification. Considering Defendant's arguments and defenses against certification, there was a legitimate risk that the Court may deny certification of one or more of Plaintiff's claims, preventing the matter from continuing on a classwide basis as to those claims. Thus, this factor supports preliminary approval of the Settlement.

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

This proposed Settlement provides a fair and reasonable recovery for the Settlement Class in the face of disputed claims. After analyzing Defendant's produced data, Class Counsel conducted a class-wide exposure analysis, forecasting the total expected recovery as follows:

<u>Unpaid Wages - Off-the-Clock Violations</u>: **$136,735**

Plaintiff alleges that Defendant failed to pay employees for all hours worked as a result of its practice of requiring employees to arrive at least 30 minutes before their scheduled start time to prepare their work area and complete safety audits. Schmidt Decl., ¶ 23. Plaintiff estimates that employees spent at least 2 hours each workweek performing these uncompensated pre-shift tasks. *Id.* Using the data provided by Defendant, Plaintiff determined that employees earned an average hourly rate of $23.78 during the Class Period. *Id.* Plaintiff therefore calculated Defendant's potential exposure for off-the-clock violations at $1,093,880 (2 hours x 23,000 workweeks x $23.78 average hourly rate). *Id.* Defendant maintains that it has always expressly prohibited off the clock work and properly paid Settlement Class members for all time worked. Schmidt Decl., ¶ 23. Defendant further asserts that this claim is not amenable to class certification as individualized inquiries would be required to determine which employees performed off-the-clock work on a particular shift, how much time was spent working, and whether Defendant was aware that such work was being performed. *Id.* Given these potential defenses, Plaintiff discounted Defendant's maximum exposure by 75% for the risk of non-certification and 50% for the risk of being unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure of $136,735. *Id.*

<u>Meal Period Violations</u>: **$165,200**

Plaintiff contends that Defendant failed to provide legally-compliant meal periods resulting in meal periods that were late (commencing after the fifth hour of work), and/or short (less than 30 minutes), or not provided at all. Schmidt Decl. ¶ 24. Plaintiff also alleges that Defendant routinely failed to provide second meal periods on shifts over 10.0 hours. *Id*. Defendant's timekeeping records produced for mediation reflect 21,715 first meal period violations and 6,073 second meal period violations (without an accompanying first violation). Plaintiff therefore calculated Defendant's potential exposure for meal period violations at $660,799 (21,715 first meal violations + 6,073 second meal violations x $23.78 average hourly rate). Defendant maintains that it provided all legally compliant meal periods to employees and that any missed or non-compliant meal periods were the result of employee choice, not Defendant's policy. *See Brinker, supra*, 53 Cal.4th at 1040 (holding that where employees were "provided" the opportunity to take compliant breaks, whether they took a break or not was immaterial). Defendant also contends that employees mutually waived second meal periods on shifts over 10 hours. Schmidt Decl. ¶ 24. Lastly, Defendant argues Plaintiff's meal period claim is not suited for class certification, since individualized inquiries will be required to determine why each meal period was late, short, or missed, and whether there was a valid waiver, thereby precluding class certification of this claim. *Id*. Given these potential defenses, Plaintiff discounted Defendant's maximum exposure by 50% for the risk of non-certification and 50% for the risk of being unsuccessful on the merits or obtaining reduced damages, to arrive at an estimated exposure of $165,200. *Id*.

<u>Rest Period Violations</u>: **$102,181**

Plaintiff alleges that Defendant routinely failed to authorize and permit 10-minute rest periods for every 4 hours worked, or major fraction thereof. Schmidt Decl. ¶ 25. Plaintiff's review of the timekeeping data reveals that there were 113,439 shifts worked in excess of 3.5 hours during the Class Period. *Id.* Plaintiff then determined he would likely be able to prove that employees were not authorized to take at least three, uninterrupted 10-minute rest periods per workweek (68,751 total violations). *Id.* Plaintiff therefore calculated Defendant's potential exposure for rest periods as $1,634,899 (68,751 rest period violations x $23.78 average premium). *Id.* Defendant argues it maintains a facially compliant written rest period policy, and that it has always authorized and permitted rest periods in compliance with that policy. Schmidt Decl. ¶ 25. Defendant also argues this claim is not amenable to class treatment, as individual inquiries would be required to determine whether each employee was in fact authorized and permitted all rest periods based on their schedule, resulting in an unmanageable series of mini-trials. *Id*. Additionally, since rest periods are not recorded this claim faces additional hurdles due to the lack of common evidence in Defendant's records. *Id.* Based on these defenses, Plaintiff discounted Defendant's maximum exposure by 75% for risk of non-certification and 75% for risk of being unsuccessful on the merits, to arrive at an estimated exposure of $102,181. *Id*.

Failure to Reimburse Violations: **$66,351**

Plaintiff alleges that Defendant failed to reimburse employees for the use of their personal cell phones to communicate with supervisors and to navigate to various jobsites throughout the workday. Schmidt Decl. ¶ 26. Plaintiff calculates Defendant is responsible for $50.00 per month as a reasonable percentage of their respective monthly phone bills. *Id*. Therefore, Plaintiff calculates Defendant total exposure for violations of unreimbursed business expenses as $265,405 (23,000 workweeks ÷ 4.333 weeks per month x $50 monthly cell phone expense). *Id*. Defendant argues that it maintained a lawful reimbursement policy throughout the Class Period, and that Plaintiff's damages calculations are substantially overstated given the wide availability of low-cost cellular phone plans. Schmidt Decl. ¶ 26. Defendant also maintains that this claim would require a series of mini-trials to determine which employees were actually required to use their personal cell phones in any given pay period and whether that expense was reasonable. *Id*. Plaintiff therefore discounted the maximum exposure by 50% for the risk of non-certification and by an additional 50% for risk of losing on the merits, to arrive at an estimated exposure of $66,351. *Id*.

Wage Statement Violations: **$145,000**

As a result of the above violations, Plaintiff alleges that Defendant issued inaccurate wage statements to employees during the Class Period. Schmidt Decl., ¶ 27. Based on the data provided by Defendant, 145 employees received 8,509 wage statements during the 1-year time period associated with wage statement penalties. *Id.* Plaintiff therefore calculated Defendant's maximum wage statement exposure at $580,000 (145 employees x $4,000 maximum violation per employee). *Id*. Defendant contends that employees could not show they "suffer[ed] injury" as a result of these violations, as required by Labor Code § 226(e). *Id.*, ¶ 27. Considering this argument as well as the potential inability to prove that the violations were "knowing and intentional," Plaintiff discounted the value of this claim by 50% for the risk of non-certification of the underlying claims and discounted 50% for a risk of being unsuccessful on the merits, for an estimated exposure of $145,000. *Id*.

Waiting Time Penalties: **$69,557**

Based on the data provided by Defendant for mediation, 195 employees separated their employment with Defendant during the 3-year time period associated with waiting time penalties. Schmidt Decl. ¶ 28. Plaintiff therefore calculated Defendant's maximum waiting time penalty exposure at $1,112,904 (195 former employees x $23.78 average hourly rate x 8 hours per day x 30 days). *Id*. Defendant contends it attempted to pay its employees all final wages owed in good faith upon their separation, therefore precluding a finding of wilfulness which is necessary to obtain waiting time penalties under 8 Cal. Code Regs. § 13520. Schmidt Decl. ¶ 28. Additionally, because this claim is entirely derivative of Plaintiff's underlying wage claims, Defendant contends the waiting time penalty claim will fail with those claims. *Id.* Plaintiff discounted the value of this claim by 75% for the risk of non-certification of the underlying claims and 75% for a risk of being unsuccessful on the merits (including a failure to establish wilfulness), for an estimated recovery on this claim of $69,557. *Id*.

PAGA Penalties: **$127,635**

Assuming that Plaintiff could prove at least one underlying Labor Code violation in each pay period within the PAGA Period, Plaintiff calculates Defendant's maximum PAGA exposure at $850,900 (8,509 pay periods x $100 per violation). *See Amaral, supra,* 163 Cal.App.4th at 1207 (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derived from the underlying wage and hour violations discussed above, which Defendant disputes. *See e.g.*, *Green v. Lawrence Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's success was determined by the merits of its underlying claims). Plaintiff also recognizes that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. *See Carrington v. Starbucks Corp*. (2018) 30 Cal.App.5th 504, 529 (affirming reduction of PAGA penalties to $5 per initial violation); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) Case No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047 at *4 (reducing PAGA penalties from $2.8 million to $500,000); *Kennedy v. Arm Strong Towing Services, Inc.*, 2017 WL 9486773, at *3 (Cal.Super.) (reducing PAGA penalties to $1,000 per aggrieved employee – a reduction in excess of 70% from the maximum civil penalty). Plaintiff discounted the maximum figure by 85% to account for the likelihood of this Court reducing penalties due to manageability concerns and a potential determination that a higher award would be unjust, oppressive, or confiscatory, to arrive at an estimated exposure of $127,635. Schmidt Decl., ¶ 29.

Using these estimated figures for each of the claims described above, Plaintiff projects a potential recovery for the Settlement Class members of approximately $812,659. Schmidt Decl., ¶ 30. The Maximum Settlement Amount of $650,000.00 represents approximately 79.98% of Plaintiff's projected potential recovery, while avoiding the further expense and risk of proceeding towards class certification and trial. *Id*. Considering the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce civil penalties, the proposed Settlement falls well within the realm of being fair, reasonable, and adequate. *See e.g.*, *Altamirano v. Shaw Industries, Inc*, (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement, stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims."). Preliminary approval is appropriate since the Settlement will provide significant monetary relief to Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

e. <u>The Experience and Views of Counsel</u>

"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, Plaintiff is represented by competent and experienced counsel who possesses extensive experience litigating wage and hour class actions from both the plaintiff and defense side, and who have been appointed as class counsel in numerous cases alleging similar claims. Schmidt Decl., ¶¶ 2-6.; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; and Declaration of Andrew J. Rowbotham ("Rowbotham Decl."), ¶¶ 2-5. Class Counsel conducted an extensive review and analysis of Defendant's produced timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. Schmidt Decl., ¶¶ 4-5, 11. It was only after the completion of this work that the Parties attended mediation and ultimately accepted a mediator's proposal for a class-wide settlement of all claims at issue. *Id*. Thus, this factor strongly supports preliminary approval of the Settlement.

2. <u>The Preliminary Approval Standard is Met</u>

At this stage, the Court can grant preliminary approval of the Settlement and direct that the Notice Packet 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. <u>Settlement is Within the Range of Possible Approval</u>

The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class members in light of the significant risks of litigation. The proposed Settlement will provide compensation for contested claims, while only releasing the claims actually at issue in this litigation. Further, the average payment of $1,239.91 greatly exceeds the average payments achieved in other wage and hour class action settlements.[4] Thus, the proposed Settlement is within the range of possible approval such that notice should be provided to the Settlement Class members. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Settlement Class members have had the opportunity to opt-out or object.

b. <u>Settlement Resulted from Informed and Non-Collusive Negotiations</u>

This proposed Settlement is entitled to an initial presumption of fairness as it is the result of the exchange of pertinent information, including all relevant policies, employee timekeeping and payroll records, and key data points which were analyzed by Plaintiff's counsel; arm's-length negotiations by counsel; mediation before an experienced wage and hour class action mediator;

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[4] *See e.g.*, *Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately $105); *Ressler v. Federated Department Stores, Inc*., Case No. BC335018 (L.A. County Super. Ct. Jan. 2, 2009) (average net recovery of approximately $90); and *Schiller v. David's Bridal, Inc*., Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *17 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately 198.70 . . . [T]his is a substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than $90 . . . [T]he Court finds that the results achieved are good").

and additional negotiations until the terms of the long-form Settlement were agreed upon and finalized. Schmidt Decl., ¶ 11; *see also Kullar*, *supra*, 168 Cal.App.4th at 130. Thus, this factor supports preliminary approval.

c. Settlement is Devoid of Obvious Deficiencies

The Settlement will provide tangible monetary relief to the Settlement Class members. Moreover, the amounts proposed for Plaintiff's Enhancement Payment, settlement administration costs, attorneys' fees and costs to Class Counsel, and the LWDA's portion of PAGA civil penalties are all reasonable and appropriate. Because the Settlement is devoid of obvious deficiencies, this final factor supports preliminary approval.

B. The Court Should Certify The Settlement Class

The proposed Settlement Class satisfies the criteria for certification of a settlement class under California law because: (1) the individuals in the Settlement Class are 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) Plaintiff's claims are typical of the claims of the absent Settlement Class members; and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the absent Settlement Class members. *See* Cal. Code 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, 919 (alterations in original). Here, the proposed Settlement Class is defined as all current and former non-exempt employees who worked for Defendant in California at any time between October 12, 2018, and the date of preliminary approval. Settlement, § 1. Settlement Class members can be easily identified using Defendant' employment and payroll records. Schmidt Decl., ¶ 21. Defendant represents that the Settlement Class consists of approximately 289 individuals, rendering it impracticable to bring all Settlement Class members before the Court. *Id.* Thus, the proposed Settlement Class satisfies numerosity. *See Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

The focus in a certification dispute is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff's claims are predicated on uniform company policies, principally revolving around Defendant's timekeeping, meal and rest period, and expense reimbursement policies and practices. These types of claims are commonly held to be proper for class certification. *See, e.g., Brinker, supra,*53 Cal.4th at 1032-34 ("The theory of liability—that Brinker has a uniform policy, and that that policy…allegedly violates the law—is by its nature a common question eminently suited for class treatment.").

3. **The Claims of the Named Plaintiff 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 Cal.App.3d 1341, 1347. Here, like other Settlement Class members, Plaintiff was employed by Defendant as a non-exempt employee in California and was subject to Defendant's allegedly unlawful wage and hour policies/practices during the Class Period. Alvarado Decl., ¶¶ 2-4. Specifically, Plaintiff attests that he was required to arrive at the jobsite each day at least 30 minute before his shift to prepare his tools and organize his work area. *Id.* Additionally, Plaintiff contends that he regularly did not receive a meal period until after the fifth hour of work, and that meal periods he was provided were regularly interrupted. *Id.* Plaintiff was also not able to take any rest periods during the workday. *Id.* Finally, Plaintiff was regularly contacted by his supervisors on his personal cell phone to discuss project changes. *Id.* Plaintiff was therefore impacted by the same challenged policies that allegedly injured the Settlement Class as a whole and was subject to the same defenses forwarded by Defendant as to the Settlement Class, and is therefore typical.

4. **Plaintiff and Class Counsel are Adequate to Represent the Class**

The adequacy of representation requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will adequately represent the Settlement Class as there are no conflicts between the named Plaintiff and the Settlement Class he seeks to represent, and Plaintiff possesses claims that are in line with those of the Settlement Class members. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy satisfied where there was no indication that the plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also has extensive experience in wage and hour class action litigation. *See* Schmidt Decl., ¶¶ 2-6; Haines Decl., ¶¶ 2-8; Rowbotham Decl., ¶¶ 2-5.

C. <u>The Court Should Order Distribution Of The Proposed Notice Packet</u>

This Court should order distribution of the proposed Notice Packet in both English and Spanish to the Settlement Class members by first class mail, postage prepaid, using the last known mailing address information provided by Defendant. 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 and Jacquelin* (1974) 417 U.S. 156, 173.

Plaintiff proposes that the settlement be administered by CPT Group, Inc. ("CPT"), an experienced class action settlement administrator. *See generally* Declaration of Julie Green. Settlement Class members' addresses will be ascertainable through Defendant's personnel and payroll records, which Defendant will provide to CPT within 10 business days after preliminary approval. Settlement, § 9.A. Prior to mailing the Notice Packets, CPT will search for updated addresses using the National Change of Address database ("NCOA"). *Id.*, 9.B. To the extent that any notices are returned, CPT will search for a more current address for the Settlement Class member and re-mail the Notice Packet to the Settlement Class member. *Id*.

The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d) because it advises putative Settlement Class members of the nature of the claims, basic contentions and denials of the parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out or object to the Settlement and the procedure by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Settlement Agreement; Exhibit 2 (Notice Packet). The proposed Notice Packet will also notify Settlement

Class members of the final approval hearing date and provide the Settlement Class contact information for Class Counsel and advise Settlement Class members that they may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members.

D. The Court Should Set A Final Approval Hearing

This Court should set a hearing for final approval of the Settlement on a date appropriately scheduled to follow the deadline by which Settlement Class members must file objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

V. CONCLUSION

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

Dated: February 8, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________

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