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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ARMANDO GARCIA-AVILA, as an individual and on behalf of all others similarly situated, Plaintiff, v. ORANGE COUNTY ERECTORS, INC., a California Corporation; and DOES 1 through 100, Defendants.	Case No.: 30-2022-01284202-CU-OE-CXC [*Assigned for all purposes to the Honorable Melissa R. McCormick, Dept. CX104*] **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: August 15, 2024 Time: 2:00 p.m. Dept.: CX104 Reservation No.: 74261857 Complaint Filed: October 5, 2022 Trial Date: None Set

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on August 15, 2024, at 2:00 p.m. in Department CX104 of the above-entitled Court, located at 751 West Santa Ana Boulevard, Santa Ana, California 92701, Plaintiffs Armando Garcia-Avila and Roberto Rincon Lopez ("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:

   > All current and former non-exempt employees who are not governed by a collective bargaining agreement and who worked for Defendant Orange County Erectors, Inc. in California from October 5, 2018 until the date of preliminary approval ("Class Period").

3. Preliminary appointment of Plaintiffs Armando Garcia-Avila and Roberto Rincon Lopez as Class Representatives;
4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Joel M. Gordon of Haines Law Group, APC, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit Class Representative Enhancement Payments to Plaintiffs, civil penalties payable to the LWDA, settlement administration costs, and attorneys' fees and costs to Class Counsel;
6. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator for mailing notices;
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.

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This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the supporting declarations of Paul K. Haines, Sean M. Blakely, Joel M. Gordon, Plaintiffs Armando Garcia-Avila and Roberto Rincon Lopez, and Jodey Lawrence of Phoenix Settlement Administrators, 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: April 3, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: Sean Blakely

Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Armando Garcia-Avila and Roberto Rincon Lopez (hereinafter "Plaintiffs") brought this class and representative action for various wage and hour violations on behalf of current and former non-exempt employees who are not governed by a collective bargaining agreement and who worked for Defendant Orange County Erectors, Inc. ("Orange County Erectors") in California from October 5, 2018 until the date of preliminary approval (the "Class Period"). Plaintiffs' primary allegations are that Orange County Erectors failed to: (1) provide all required meal periods, (2) authorize and permit all required rest periods, (3) pay all wages owed due to its allegedly unlawful timekeeping policies/practices, and (4) pay all overtime wages due to its alleged regular rate miscalculations. Based on these alleged wage and hour violations, Plaintiffs also brought derivative claims for alleged waiting time penalties, Orange County Erectors' alleged failure to issue accurate and compliant wage statements, and for civil penalties under the Private Attorneys General Act ("PAGA").[1]

Plaintiffs now respectfully request that this Court preliminarily approve this <u>non-reversionary</u>, common-fund class action settlement,[2] in which Orange County Erectors has agreed to pay Seven Hundred Fifty Thousand Dollars and Zero Cents ($750,000.00) to the following Settlement Class:

> All current and former non-exempt employees who are not governed by a collective bargaining agreement and who worked for Defendant Orange County Erectors, Inc. in California from October 5, 2018 until the date of preliminary approval ("Class Period").

If the Settlement is approved, Orange County Erectors will pay a non-reversionary Gross

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[1] Plaintiff's operative Second Amended Class and Representative Action Complaint pleads the following causes of action: (1) minimum wage violations; (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) wage statement penalties; (6) waiting time penalties: (7) unfair competition; and (8) civil penalties under the PAGA.

[2] The Stipulation of Settlement ("Settlement") is attached to the Declaration of Sean M. Blakely Decl. ("Blakely Decl.") as **Exhibit A**. The proposed Class Notice, Notice of Estimated Settlement Award, and Request for Exclusion Form are attached to the Settlement as **Exhibits 1, 2**, **and 3**, respectively. All defined terms in this motion have the same definition as that in the Settlement.

Settlement Amount of $750,000.00. After deducting administration costs, Plaintiffs' requested Class Representative Enhancement Payments, the amount designated as PAGA civil penalties, and requested attorneys' fees and costs, the Net Settlement Amount ("NSA") of approximately $406,000.00 will be distributed to all Settlement Class members who do not opt-out of the Settlement based on the proportionate number of workweeks worked by each Settlement Class member during the Class Period. Former employees eligible for waiting time penalties and employees with standing for wage statement and PAGA civil penalties will also receive additional consideration for their release of these penalty claims.

Significantly, Settlement Class members do not need to file a claim to reap the financial benefits of the Settlement, as all Settlement Class members will automatically receive a payment unless they affirmatively opt-out. There are approximately 165 Settlement Class members, and the **average payment to participating Settlement Class members is projected to be approximately $2,460.61**, an excellent result for Settlement Class members.

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

II. SUMMARY OF THE LITIGATION

A. THE PARTIES AND BRIEF PROCEDURAL HISTORY

In operation since 1975, Orange County Erectors is in the business of fabricating and erecting structural and miscellaneous steel buildings. *See* Declaration of Sean M. Blakely ("Blakely Decl."), ¶ 8. Orange County Erectors operates out of a three-acre property located in Anaheim, California, where it fabricates steel for various contractors. *Id*. Orange County Erectors employs welders, other fabrication shop employees, and office staff employees at its Anaheim facility, where Plaintiff Garcia-Avila worked as a non-exempt "welder" from approximately January 2021 until approximately July 29, 2022. *See* Declaration of Armando Garcia-Avila in Support of Approval of Class Action Settlement ("Garcia-Avila Decl."), ¶ 2. Plaintiff Rincon

Lopez was employed as a "shop helper" and "painter" from approximately June 2014 until approximately April 2023. *See* Declaration of Roberto Rincon Lopez in Support of Approval of Class Action Settlement ("Rincon Lopez Decl."), ¶ 2.

On October 5, 2022, Plaintiff Garcia-Avila filed a Class Action Complaint against Orange County Erectors in Orange County Superior Court, alleging causes of actions for: (1) minimum wage violations; (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) wage statement penalties; (6) waiting time penalties; and (7) unfair competition in violation of California Business & Professions Code § 17200 *et seq*. Blakely Decl., ¶ 9. That same day, Plaintiff Garcia-Avila sent his PAGA notice letter to the LWDA. *Id.*; **Exhibit B**. Subsequently, on December 12, 2022, Plaintiff Garcia-Avila filed a First Amended Class and Representative Action Complaint ("FAC") adding a cause of action for civil penalties under the Private Attorneys' General Act of 2004, Labor Code Section 2698, *et seq*. *Id*. As part of the Settlement, the Parties stipulated to the filing of Plaintiffs' Second Amended Class and Representative Action Complaint ("SAC"), which added Plaintiff Rincon Lopez as named representative and certain factual allegations reflecting Plaintiff Rincon Lopez's employment. *Id.*, ¶ 10. The operative SAC was filed on November 29, 2023. *Id*.

B. <u>PLAINTIFFS' CLAIMS AND ORANGE COUNTY ERECTORS' DEFENSES</u>

1. <u>Meal Period Claims</u>

Plaintiffs allege that Orange County Erectors failed to provide compliant first meal periods to its non-exempt employees due to its scheduling meal periods after the fifth hour of work. Blakely Decl., ¶ 15. Specifically, Plaintiffs allege that although its non-exempt shop employees started their shifts at 6:00 a.m., Orange County Erectors scheduled their meal periods from 12:00 p.m. – 12:30 p.m., which is after the completion of five hours of work. *Id*. Plaintiffs also allege that Orange County Erectors did not record its employees' meal periods from the beginning of the Class Period through approximately June 2020. *Id.* During this time period, Plaintiffs allege that Orange County Erectors automatically deducted thirty (30) minutes each workday for a purported compliant first meal period. *Id*. Finally, although employees often worked more than 10.0 hours in a workday, Plaintiffs contend that Orange County Erectors failed to provide second meal periods. *Id*., at ¶ 16.

Orange County Erectors counters that it has maintained compliant written meal period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. Blakely Decl., ¶ 15. Orange County Erectors also contends that under *Brinker*, it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken. *Id.*; *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting "ensure" standard and holding employers only have to "provide" employees the opportunity to take meal periods). Orange County Erectors also maintains that any short, missed, or late first meal periods were the result of lawful employee waiver or choice, thereby precluding liability. Blakely Decl., ¶ 15. With respect to second meal periods, Orange County Erectors argues that employees may waive second meal periods on shifts of more than 10.0 hours but less than 12.0 hours, under Labor Code § 512(a), so that they do not need to stay at work for an extra unpaid 30 minutes, and that employees regularly did so. Blakely Decl., ¶ 16. Lastly, Orange County Erectors argues that individualized inquiries will be required to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, thereby making class certification of this claim unlikely. *Id*., at ¶¶ 15-16.

2. <u>Rest Period Claims</u>

Plaintiffs allege that Orange County Erectors failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 17. Specifically, Plaintiffs allege that on Friday shifts, Plaintiffs were provided one single combined 20-minute rest period at approximately 10:00 a.m. and were not authorized and permitted a second rest period in the afternoon after their meal period. *Id*.; s*ee Rodriguez v. E.M.E., Inc*., 246 Cal.App.4th 1027 (2016) ("[A] departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule."). Plaintiffs further contend that employees were not provided with a third rest period when they worked shifts in excess of 10.0 hours. Blakely Decl., ¶ 17.

Orange County Erectors argues that it has always maintained and enforced lawful rest period policies/practices during the Class Period, and has, in fact, authorized and permitted all required rest periods to Settlement Class members. Blakely Decl., ¶ 17. Additionally, Orange County Erectors maintains that any failure to take a rest period was the result of employee choice, rather than any policy or practice of Orange County Erectors. *Id*. With respect to the Friday shifts, Orange County Erectors argues that its departure from the preferred rest period schedule was lawful because Settlement Class members overwhelmingly preferred to take one 20-minute rest period in the morning to be able to eat breakfast. *Id; see e.g., Rodriguez, supra*, 246 Cal.App.4th at 1041-42 (combined rest period practice was "popular among employees because it gave them an opportunity to eat their main meal, which occurred in the morning, and secure a better rest."). Orange County Erectors also asserts this claim is not amenable to class treatment as individualized inquiries would be required to determine which employees failed to take a rest period, and the reasons why. Blakely Decl., ¶ 17. These manageability concerns are especially present with respect to rest period claims, Orange County Erectors argues, given that rest periods are not recorded. *Id*.

3. Unpaid Wages Due to Unlawful Rounding

Plaintiffs allege that Orange County Erectors utilized a timekeeping system that systematically underpaid wages to Settlement Class members. Blakely Decl., ¶ 18. Plaintiffs allege that Orange County Erectors required Plaintiffs and other non-exempt employees to clock in and out using a system that records hours worked to the minute; however, Orange County Erectors only compensated employees for their scheduled hours of work, rather than for all hours on the clock. *Id*.

Orange County Erectors counters that its timekeeping policies/practices complied with California law and that it has always properly compensated Settlement Class members for all hours worked throughout the Class Period. Blakely Decl., ¶ 18. Orange County Erectors contends that it utilized an even-handed timekeeping system that, on balance, resulted in employees being paid for all hours actually worked. *Id*. Moreover, Orange County Erectors contends that although Settlement Class members may have clocked-in prior to their scheduled start time, it was not possible for Settlement Class members to perform any compensable work prior to the scheduled start of shift. *Id*. Finally, Orange County Erectors asserts that Plaintiffs would be unable to certify this claim since its timekeeping policies/practices are facially neutral and individualized inquiries would be necessary as to whether employees were in fact underpaid, or potentially overpaid, for each workday in question (including whether they were actually working when they were clocked in), resulting in an unmanageable series of mini-trials. *Id*.

4. <u>Regular Rate Miscalculations</u>

Plaintiffs allege that Orange County Erectors failed to pay all overtime wages owed by not including the value of all non-discretionary production bonuses into the "regular rate" of pay. Blakely Decl., ¶ 19; *see* Labor Code § 510(a) (requiring overtime to be paid at "one and one-half times the regular rate of pay"); Wage Order 4, § 3 ("[E]mployees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's <u>regular rate of pay</u> for all hours worked over 40 hours in the workweek.") (emphasis added). During the Class Period, Plaintiffs allege that they and other non-exempt employees received non-discretionary production bonuses at least twice per year, which Plaintiffs allege were not included in the regular rate of pay when calculating overtime wages. Blakely Decl., ¶ 19.

However, Orange County Erectors argues that it properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class members. Blakely Decl., ¶ 19. Orange County Erectors contends that the bonuses at issue are discretionary, as they are ostensibly "not guaranteed," and therefore do not need to be included in the regular rate of pay for overtime purposes. *Id*. Orange County Erectors further argues that Settlement Class members received different types of bonuses throughout the Class Period, creating substantive differences among the Settlement Class members with respect to the incentives received, making class certification unlikely. *Id.*

5. <u>Wage Statement Violations</u>

Plaintiffs allege that as a result of the unpaid minimum and overtime wages, as well as the unpaid meal and rest period premium wages described above, Orange County Erectors is liable for wage statement penalties. Blakely Decl., ¶ 20. Orange County Erectors argues any alleged wage statement violations were not "knowing and intentional," and Plaintiffs cannot show that 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. *Id*. Further, Orange County Erectors contends its wage statements always accurately reflected hours worked and amounts paid as well as all other required information, precluding liability for wage statement penalties under *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (agreeing with employer's "commonsense position that the pay stubs were accurate in that they correctly reflected the hours worked and the pay received…The purpose of section 226 is to *document* the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages.") (Italics in original). Blakely Decl., ¶ 20.

6. Waiting Time Penalties

As a further result of the unpaid wages and unpaid meal and rest period premium wages described above, Plaintiffs allege that Orange County Erectors failed to comply with its final pay obligations set forth in Labor Code §§ 201-203. Blakely Decl., ¶ 21. Orange County Erectors 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.*; 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."). Orange County Erectors further asserts that Plaintiffs' waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. Blakely Decl., ¶ 21.

7. PAGA Civil Penalties

As a result of the foregoing Labor Code violations, Plaintiffs allege that Orange County Erectors is liable for civil penalties under the PAGA. Blakely Decl., ¶ 22. Since Plaintiffs' PAGA claim is derivative of Plaintiffs' underlying wage claims, Orange County Erectors asserts the PAGA claim would fail with those claims. *Id.*; *see Price v. Starbucks Corp*. 192 Cal.App.4th

1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). Orange County Erectors further maintains that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Orange County Erectors liable for any of Plaintiffs' claims. Blakely Decl., ¶ 22; *see* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc*. 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc*., Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

8. Arbitration Agreements

Orange County Erectors also argues that approximately 86 Settlement Class members signed valid and enforceable arbitration agreements with class action waivers. Blakely Decl., ¶ 14. Setting aside any arguments as to the merits of Plaintiffs' claims, Orange County Erectors contends that absent settlement, Plaintiffs' proposed classes could be potentially narrowed due to the existence of arbitration agreements with class action waivers. *Id.*

C. DISCOVERY AND MEDIATION

In connection with mediation, Orange County Erectors produced timekeeping and payroll data for forty (40) randomly selected non-exempt employees (approximately 24% of all putative class members), including actual time-punches, which enabled Plaintiffs to conduct an unpaid wage analysis. Blakely Decl., ¶ 10. In addition, Orange County Erectors produced employee handbooks and various written meal and rest policies, as well as relevant data points such as the number of putative class members and the number of aggregate workweeks worked during the Class Period. *Id.* Plaintiffs hired a labor economist with a Ph.D. in economics to assist Plaintiffs in analyzing and extrapolating the data produced to calculate Orange County Erectors' potential exposure for each of Plaintiffs' claims at issue. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiffs' claims, the chances of certification of Plaintiffs' claims, and Orange County Erectors' potential defenses. *Id.*

On September 5, 2023, the Parties participated in a full-day mediation with Marc J. Feder, Esq., a highly experienced wage and hour class action mediator. Blakely Decl., ¶ 11. 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 mediation; however, the Parties continued their discussions with Mr. Feder over the following weeks. *Id*. Mr. Feder issued a mediator's proposal for a class-wide settlement, which was ultimately accepted by all Parties. *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*.

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Orange County Erectors will pay a Gross Settlement Amount of $750,000.00. *See* Settlement, ¶ 3. Significantly, this Settlement is non-reversionary, and no Settlement Class member will have to submit a claim form to receive Settlement Award. *Id*., at ¶¶ 3-4. Each Settlement Class member will automatically receive a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id*. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount:	$750,000.00
• Minus Court-approved attorneys' fees:	$250,000.00
• Minus Court-approved verified costs (up to):	$30,000.00
• Minus Court-approved Enhancement Payments:	$15,000.00
• Minus amount set aside as PAGA penalties:	$40,000.00
• Minus estimated Settlement Administration costs:	$9,000.00
Net Settlement Amount ("NSA"):	$406,000.00
• PLUS 25% "PAGA Amount" to Settlement Class:	$10,000.00
Total Amount Paid to Settlement Class members:	**$416,000.00**

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys' fees and costs, the Class Representative Enhancement Payments to Plaintiffs, the amount designated as PAGA civil penalties, and Settlement Administrator's fees and expenses, the Settlement requires Orange County Erectors to pay a Net Settlement Amount ("NSA") of at least $406,000.00 to all

Settlement Class members who do not timely opt out. *See* Settlement, ¶ 4(A). The NSA shall be distributed to participating Settlement Class members as follows: Ninety percent (90%) of the NSA shall be distributed to each participating Settlement Class member based on their proportionate number of workweeks worked during the Class Period. *See* Settlement, ¶ 4(B)(i) Five percent (5%) of the NSA shall be designated as the "Waiting Time Amount" and distributed as equal, pro-rata shares to each participating Settlement Class member whose employment with Orange County Erectors ended at any time from October 5, 2019 to the date of preliminary approval. *Id*., at ¶ 4(B)(ii). Five percent (5%) of the NSA shall be designated the "Wage Statement Amount" and distributed to each Settlement Class member who worked for Orange County Erectors from October 5, 2019 to the date of preliminary approval based on their proportionate number of workweeks worked from October 5, 2021 to the date of preliminary approval. *Id*., at ¶ 4(B)(iii). Additionally, Ten Thousand Dollars ($10,000.00) of the Gross Settlement Amount has been designated as the "PAGA Amount," and shall be distributed to those Aggrieved Employees (including those who submit a valid and timely Request for Exclusion from the class action settlement) who worked for Orange County Erectors at any time from October 5, 2021 through the date of preliminary approval ("PAGA Period") proportionally based on the number of workweeks worked during the PAGA Period. Settlement, ¶¶ 2(B); 4(B)(iv).

Based on information from Orange County Erectors, there are approximately 165 Settlement Class members. Blakely Decl., ¶ 13. Therefore, the average Settlement Award from the NSA is projected to be approximately $2,460.61. *Id*. There are approximately 100 Aggrieved Employees who worked during the PAGA Period. *Id*. Therefore, the average payment from the PAGA Amount is estimated to be approximately $100.00. *Id*. Settlement Class members will have sixty (60) calendar days from the mailing of the Notice Packets to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 9(C)-(D). Settlement Class members who do not opt out of the Settlement will be bound by its terms and will release all claims against Orange County Erectors included within the Settlement. *See Id*., at ¶ 2(A).

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2. **Attorneys' Fees and Costs, Enhancement Payments, and PAGA Payment**

Plaintiffs will apply for Class Representative Enhancement Payments at the time of seeking final approval of the proposed class action settlement in the amount of $7,500 to each Plaintiff, for their service to the Settlement Class. *See* Settlement, ¶¶ 3(C)(3), 6; Blakely Decl., ¶ 26. "[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,* 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at the time of final approval, Plaintiffs' requested Enhancement Payments are intended to recognize the time and effort Plaintiffs expended on behalf of the Settlement Class, including providing substantial factual information and documents to Class Counsel, discussing the claims and theories at issue in the litigation, actively participating in the prosecution of Plaintiffs' claims, as well as the significant risks Plaintiffs undertook by agreeing to serve as the named plaintiffs in this case, and the fact that Plaintiffs agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement, ¶¶ 2(C), 6; Blakely Decl., ¶ 26; *see also* Garcia-Avila and Rincon Lopez Decls., ¶¶ 4-6.

Class Counsel will also apply for an attorneys' fees award of one-third of the Gross Settlement Amount, which is currently estimated to be $250,000.00, and up to $30,000.00 in verified costs reimbursement. *See* Settlement, ¶¶ 3(C)(4), 5; Blakely Decl., ¶ 25. Plaintiffs submit the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Blakely Decl., ¶ 25. Class Counsel has incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiffs' claims, conducting legal research, conducting extensive informal discovery, analyzing Settlement Class members' timekeeping and payroll records and other data and documents with the help of a retained expert, creating a comprehensive damages model, preparing for and attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing this Motion, and otherwise litigating the case. *Id*. Class Counsel expect to expend additional attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding questions from Settlement Class members, preparing the final approval papers, and attending the Final Approval hearing. *Id*.

California courts recognize an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of a settlement. *See e.g., Laffitte v. Robert Half Int'l, Inc.,* 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund method survives in California class action cases"). Class Counsel's request for fees of one-third of the Gross Settlement Amount is well within the range of reasonableness, and indeed is considered the typical rate 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 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 costs upon seeking final approval.

Additionally, the Parties have agreed to designate $40,000.00 of the Gross Settlement Amount as PAGA civil penalties, of which $30,000.00 (75%) will be paid to the LWDA, with the remaining $10,000.00 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 3(C)(5). Plaintiffs submit this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of $7,500 to LWDA out of $6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of $7,500 to LWDA out of $1.25 million common-fund settlement).

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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*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires trial court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (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.*, 516 F.3d 1095, 1101 (9th Cir. 2008). 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.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: "the strength of Plaintiffs' 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.,* 48 Cal.App.4th 1794, 1801 (1996). "The list of factors is not exclusive, and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th at 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. The Strength of Plaintiffs' Case

Although Plaintiffs steadfastly maintain that their claims are meritorious, they also acknowledge that there were substantial risks and uncertainty in proceeding with litigation. As described above, Orange County Erectors presented multiple defenses to Plaintiffs' claims, both 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.

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

Although the Parties engaged in significant informal discovery prior to mediation, the Parties still had significant formal discovery to complete had the matter not settled. Blakely Decl., ¶ 24. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id*. Even if Plaintiffs were to certify the classes, the Parties would incur considerably more attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Id*. This Settlement avoids those risks and the accompanying expense. *Id*.

c. Risk of Maintaining Class Action Status

Absent settlement, there is a risk that the class would not be certified prior to trial, or, if it were certified, a risk that the class definition would be narrowed and the value of the case diminished accordingly. This would potentially be accomplished either due to a narrowing of the class definition in a Court order on a contested motion for class certification, or through settlement agreements entered into by Orange County Erectors with individual class members by way of *Pick-up-Stix* type settlement agreements[3], and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick-up-Stix* process. Thus, this factor, too, supports preliminary approval of the settlement.

d. Settlement Amount Is Realistic Valuation of Claims

The Settlement provides a positive recovery for the Settlement Class in the face of hotly disputed claims. With the assistance of a retained economist with a Ph.D. in economics, Plaintiffs

[3] In *Chindarah v.Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may enter into pre-certification settlement agreements with individual putative class members in which the putative class members release claims for past unpaid wages and penalties in exchange for consideration. The Court further held that such settlements could preclude those individual employees from recovery in class action litigation against the employer for the same wage claims.

conducted an analysis of underpaid wages due to Orange County Erectors' alleged unlawful timekeeping policies/practices, potential meal and rest period premium payments owing, regular rate miscalculations, wage statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results of Plaintiffs' exposure analysis is discussed below:

<u>First Meal Period Violations</u>: $355,539

As indicated above, from the beginning of the Class Period through June 2020, Orange County Erectors did not record employee meal periods and instead automatically deducted 30 minutes each workday from employees' daily hours worked. Blakely Decl., ¶ 15. During this time period, Plaintiffs' analysis revealed there were approximately 26,162 shifts in excess of 6.0 hours. *Id*. Due to Orange County Erectors' scheduling policies/practices, Plaintiffs assumed a meal period violation on each of these 26,162 auto-deduct shifts. *Id*. After June 2020, when Orange County Erectors began to record employee meal periods, Plaintiffs' analysis revealed approximately 40,653 non-compliant first meal periods. *Id*. Therefore, Plaintiffs estimate there was a total of approximately 66,815 non-compliant first meal periods during the Class Period. *Id*. Plaintiffs further calculated that the average hourly rate of pay for Settlement Class members during the Class Period at approximately $21.50. *Id*. Therefore, Plaintiffs estimated total maximum damages for first meal period violations at approximately $1,436,523 (66,815 non-compliant first meal periods * $21.50 average meal period premium). *Id*.

However, as noted above, Orange County Erectors argues that more than half of the Settlement Class members signed arbitration agreements with class action waivers. Blakely Decl., ¶ 14. Orange County Erectors also argues that it maintained compliant meal period practices throughout the Class Period and under *Brinker* it is only required to provide employees the opportunity to take meal periods, not ensure that they are taken. Blakely Decl., ¶ 15; *see Brinker, supra*, 53 Cal.4th at 1034 (rejecting "ensure" standard). Furthermore, Orange County Erectors argues that Plaintiffs' meal period claim is not suited for class treatment, as individual inquiries would be needed as to which employees took non-compliant meal periods or missed meal periods, how many meal periods were non-compliant or missed, and why a particular employee did not a take compliant meal period on a particular shift. Blakely Decl., ¶ 15. Based on these defenses, Plaintiffs discounted the maximum amount by 45% for risk of non-certification and an additional 55% for risk of losing on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of approximately $355,539. *Id*.

<u>Second Meal Period Violations</u>: $86,495

Plaintiffs' analysis and extrapolation of the timekeeping data showed that during the Class Period there were approximately 25,543 shifts worked in excess of 10.0 hours that did not reflect a compliant second meal period. Blakely Decl., ¶ 16. Therefore, Plaintiffs calculate Orange County Erectors' maximum exposure for second meal period violations at approximately $549,175 (25,543 non-compliant second meal periods * $21.50 average meal period premium). *Id*.

Orange County Erectors argues that Plaintiffs' theory of liability carried significant risks, based on Orange County Erectors' arguments that they provided employees the opportunity for second meal periods and that Settlement Class members voluntarily waived their second meal period on shifts in excess of 10.0 hours but less than 12.0 hours, as they are entitled to do under Labor Code § 512(a). Blakely Decl., ¶ 16. Orange County Erectors further argue that Plaintiffs' second meal period exposure is grossly inflated as Plaintiffs already seek a meal period premium for first meal period violations on the majority of all shifts, and Plaintiffs cannot recover more than one meal period premium for each workday. *Id.; see United Parcel Service, Inc. v. Superior Court*, 196 Cal.App.4th 57, 70 (2011) ("[E]mployees in this case may recover up to two additional hours of pay on a single work day for meal period and rest period violations – one for failure to provide a meal period and another for failure to provide a rest period"). In addition, as with first meal periods, Orange County Erectors argues this claim would not be certified as requiring individualized inquiries into both the merits and damages. Blakely Decl., ¶ 16. In light of these risks, Plaintiffs discounted the maximum amount that the class could potentially recover for second meal periods by 55% for a risk of non-certification, and an additional 65% for a risk of losing on the merits, or having exposure reduced due to Orange County Erectors' waiver argument, to arrive at an estimated exposure amount of approximately $86,495. *Id*.

<u>Rest Period Violations</u>: $125,490

As indicated above, Plaintiffs allege that on Friday shifts, Plaintiffs and other Settlement Class members were given one single, 20-minute rest period and not authorized or permitted a second rest period. Blakely Decl., ¶ 17. Plaintiffs further allege that employees were not authorized and permitted a third rest period when they worked shifts in excess of 10.0 hours. *Id*. Based on Plaintiff's expert's analysis of Orange County Erectors' timekeeping records, Plaintiffs estimate there were approximately 16,122 shifts in excess of 6.0 hours worked on Fridays during the Class Period. *Id*. Plaintiffs' analysis further revealed there were approximately 25,569 shifts in excess of 10.0 hours, entitling employees to a third rest period. *Id*. Therefore, Plaintiffs contend there are 41,691 rest period violations during the Class Period. *Id*. Accordingly, Plaintiffs calculate Orange County Erectors' maximum potential exposure for rest period violations at approximately $896,357 (41,691 rest period violations * $21.50 average rest period premium). *Id*.

Orange County Erectors contends that Plaintiffs and Settlement Class members were provided the opportunity for rest periods and that is maintained compliant rest period policies/practices throughout the Class Period. Blakely Decl., ¶ 17. In addition to noting that more than half of the Settlement Class members signed arbitration agreements, Orange County Erectors further argues that Plaintiffs' rest period claim is not amenable to class treatment, since individual inquiries would be required to determine which employees failed to take rest periods, how many rest periods they failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift. *Id*. These manageability concerns are especially present with respect to rest period claims, Orange County Erectors argues, given that rest periods are not recorded. *Id*. Given these defenses, Plaintiffs discounted this maximum amount by 60% for risk of non-certification and an additional 65% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately $125,490. *Id*.

<u>Unpaid Wages Due to Unlawful Timekeeping Policies/Practices</u>: $30,388

Plaintiffs allege that Orange County Erectors utilized a timekeeping system that systematically underpaid wages. Blakely Decl., ¶ 18. Plaintiffs' analysis and extrapolation of the timekeeping and payroll data reveals that Orange County Erectors underpaid employees by approximately 3,769 hours during the Class Period. *Id*. Therefore, and treating these unpaid wages as potential overtime wages, Plaintiffs estimate Orange County Erectors' potential exposure at approximately $121,550 in unpaid wages (3,769 unpaid hrs * $32.25/hr avg. overtime rate). *Id*.

However, Orange County Erectors argues that its timekeeping policies/practices complied with California law and that it compensated Settlement Class members for all hours actually worked. Blakely Decl., ¶ 18. Orange County Erectors also asserts that Plaintiffs would be unable to certify this claim since its timekeeping policies/practices are facially neutral and individualized inquiries would be necessary as to whether employees were in fact underpaid for each workday in question (including whether they were actually working when they were clocked in), resulting in an unmanageable series of mini-trials. *Id*. Given these defenses, Plaintiffs discounted this maximum amount by 50% for risk of non-certification and an additional 50% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately $30,388. *Id*.

<u>Regular Rate Miscalculations</u>: $69,943

Plaintiffs allege that they and other non-exempt employees received non-discretionary production bonuses at least twice per year, which were not included in the regular rate of pay when calculating overtime wages. Blakely Decl., ¶ 19. Based Plaintiffs' review and extrapolation of the payroll records, Plaintiffs estimate the total underpayment of overtime wages due to the alleged regular rate calculations to be approximately $233,144. *Id.*

However, in addition to noting the arbitration agreements signed by more than half of Settlement Class members, Orange County Erectors contends that the bonuses at issue are discretionary, as they are ostensibly "not guaranteed." Blakely Decl., ¶ 19. Orange County Erectors further argues that Settlement Class members received different types of bonuses throughout the Class Period, creating substantive differences among the Settlement Class members with respect to the incentives received, making class certification unlikely. *Id.* Orange County Erectors also notes that more than half of the Settlement Class members signed agreements to have their claims arbitrated. *Id.* In light of these defenses, Plaintiffs discounted the maximum exposure by 40% for the risk of non-certification, and an additional 50% for risk of losing on the merits, and/or not receiving the maximum amount sought, to arrive at an estimated exposure of approximately $69,943. *Id*.

Wage Statement Penalties: $80,000

Plaintiffs allege that Orange County Erectors faces derivative wage statement liability as a result of its failure to pay all wages as well as its failure to pay all meal and rest period premium wages. Blakely Decl., ¶ 20. Those penalties are calculated as $50 for each "initial" violation and $100 for each "subsequent" violation, with a maximum of $4,000 per employee. *Id.; see* Labor Code § 226(e). Utilizing the "initial" and "subsequent" violation rates resulted in a number greater than the $4,000 cap per employee. Blakely Decl., ¶ 20. Plaintiffs, therefore, calculated potential wage statement exposure at approximately $400,000 (100 employees * $4,000 maximum penalty). *Id.*; *see also* Labor Code § 226(e). *Id*.

In light of Orange County Erectors' arguments that no violations occurred, that employees suffered no "injury," that any alleged violations were not "knowing and intentional," that the wage statements always accurately reflected hours worked and amounts paid to employees, as well as the risks associated with Plaintiffs' underlying claims discussed above, and the fact that more than half of the Settlement Class members signed arbitration agreements with class action waivers, Plaintiffs discounted the maximum exposure by 50% for risk of non-certification, and by an additional 60% for risk of being unsuccessful on the merits, for an estimated realistic exposure of approximately $80,000. Blakely Decl., ¶ 20.

Waiting Time Penalties: $61,920

Orange County Erectors' records reflected approximately 60 former Settlement Class members who were eligible for waiting time penalties. Blakely Decl., ¶ 21. Based on an hourly rate of $21.50, Plaintiffs estimated the average waiting time penalty per former employee to be $5,160 ($21.50 * 8 hours per day * 30 days). *Id*. Therefore, Plaintiffs calculated Orange County Erectors' maximum exposure for potential waiting time penalties to be approximately $309,600 (60 separated employees * $5,160 average waiting time penalty). *Id*.

Orange County Erectors presented several defenses to this claim, most notably its assertion that because it possessed good-faith defenses to the underlying claims, any failure to pay wages was not "willful" as a matter of law. Blakely Decl., ¶ 21. Orange County Erectors further asserts Plaintiffs' waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. *Id*. Moreover, because the waiting time claim is derivative of Plaintiffs' underlying wage claims, Plaintiffs would need to overcome these defenses, both as to class certification and on the merits, as to their underlying claims. *Id*. To account for these defenses, Plaintiffs discounted the maximum exposure by 50% for the risk of non-certification, and an additional 60% for risk of losing on the merits, and/or not receiving the maximum penalties sought, to arrive at an estimated exposure of approximately $61,920. *Id*.

<u>PAGA Penalties</u>: $44,634

Plaintiffs estimated a maximum total PAGA exposure at approximately $743,900 (7,439 "initial" violations * $100 "initial" penalty). Blakely Decl., ¶ 22; *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from the underlying wage and hour violations discussed above, which Orange County Erectors vigorously disputes. *Id*.; *see e.g.*, *Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its underlying claims). Orange County Erectors also asserts the Court would drastically reduce any award of PAGA penalties as "confiscatory." Blakely Decl., ¶ 22; *see also Thurman v. Bayshore Transit Mgmt., Inc*., 203 Cal.App.4th 1112, 1135 (2012) (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). Therefore, Plaintiffs discounted the maximum figure by 70% for risk of losing on the merits and/or not recovering a PAGA penalty for each and every pay period, and an additional 80% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately $44,634. *Id*.

Using these estimated figures for each of the claims described above, Plaintiffs predicted that the potential recovery for the Settlement Class would be approximately $854,409. Blakely Decl., ¶ 23. The proposed Settlement of $750,000 therefore represents approximately 87.8% of the reasonably forecasted recovery for the Settlement Class. *Id*. Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Settlement Class, 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* 47 F.3d 373, 378 (9th Cir. 1995). 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* Blakely Decl., ¶¶ 2-6; *see also* Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; Declaration of Joel M. Gordon ("Gordon Decl."), ¶¶ 2-4. With the assistance of a retained expert, Class Counsel conducted an in-depth review of Orange County Erectors' timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiffs' case. The Settlement was also reached with the assistance of an experienced and respected wage-and-hour class action mediator. 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 87.8% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Settlement Class members at trial"). Further, the average Settlement Award of approximately **$2,460.61** significantly exceeds average payments achieved in other wage and hour class action settlements.[4] Thus, Plaintiffs submit that the proposed settlement is within the range of possible approval, such that notice should be provided to the Settlement Class members so that they can consider the Settlement. 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. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and

[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 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net recovery of approximately $90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619 (Sacramento County Super. Ct.) (average net recovery of approximately $80); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery of approximately $65); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006) (average net recovery of approximately $35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net recovery of approximately $20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008) (wage and hour class action settlement approved where average recovery was approximately $60); *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 *Williams v. Centerplate, Inc.*, Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428 (S.D. Cal. Aug. 26, 2013) (average recovery of approximately $108).

additional months of negotiating the long-form settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar*, *supra*, 168 Cal.App.4th at 130. As discussed above, Plaintiffs carefully vetted the claims at issue and reviewed extensive timekeeping and payroll data and conducted a detailed statistical analysis of the data with the help of a retained expert to arrive at their estimated classwide damages figures. *See* Blakely Decl., ¶¶ 15-23. Thus, this factor supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the Settlement is also warranted because there are no obvious deficiencies. The Settlement will provide substantial monetary relief to Settlement Class members. The amounts proposed for Class Counsel's attorneys' fees and costs, LWDA payment, and Plaintiffs' Class Representative Enhancement Payments are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

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 Settlement Class members; and (4) Plaintiffs and their counsel will fairly and adequately represent Settlement 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.* 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is defined as all current and former non-exempt employees in California who are not governed by a collective bargaining agreement and who worked for Orange County Erectors during the Class Period. *See* Settlement, ¶ 1. Therefore, Settlement Class members can be identified from Orange

County Erectors' personnel and employment records. Based on information provided by Orange County Erectors, the Settlement Class consists of approximately 165 current and former non-exempt employees. *See* Blakely Decl., ¶ 13. It would therefore be impracticable to bring all Settlement Class members before the Court, or for each Settlement Class member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (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)* 34 Cal.4th 319, 327 (2004). Plaintiffs' claims are predicated on, among other issues, Orange County Erectors' uniform timekeeping policies and/or practices, and meal and rest period policies and/or practices. These types of claims are commonly held to be proper for class certification. *See e.g.*, *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

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.* 191 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the same goods as the putative class in a consumer class action). Here, Plaintiffs' claims are typical of those held by the Settlement Class members. First, Orange County Erectors employed Plaintiffs, who were not governed by a collective bargaining agreement, as non-exempt employees during the Class Period, and Plaintiffs were subject to Orange County Erectors' wage and hour policies at issue in this case. *See* Garcia-Avila and Rincon Lopez Decls., ¶ 2. Second, Plaintiffs were injured by the same challenged policies/practices that allegedly injured the Settlement Class as a whole. For example, Plaintiffs assert that they were deprived of all wages and contend that they were deprived of all legally compliant meal and rest periods. *See generally*, *Id*. Plaintiffs further assert that they did not receive accurate and compliant wage statements and did not receive all wages at the time of separation of employment. *See Id*. Because Plaintiffs have suffered the same injuries as the other members of the Settlement Class, the typicality requirement is satisfied.

4. Plaintiffs and Class Counsel Will Fairly and Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services* 155 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the Settlement Class, as there are no conflicts between Plaintiffs and the proposed Settlement Class, and Plaintiffs possess claims that are in line with those of the Settlement Class. *See McGhee v. Bank of America* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation. *See* Haines Decl., ¶¶ 2-8; Blakely Decl., ¶¶ 2-6; Gordon Decl., ¶¶ 2-6.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE

This Court should order distribution to the Settlement Class of the proposed Class Notice, Notice of Estimated Settlement Award, and Request for Exclusion Form (the "Notice Packet") by U.S. Mail, postage prepaid, in English and Spanish, using last known mailing address information provided by Orange County Erectors. *See* Settlement, ¶ 9. 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* 417 U.S. 156, 173 (1974). Here, the Parties have agreed that the Settlement be administered by Phoenix Settlement Administrators ("Phoenix"), an experienced class action settlement administrator. *See generally* Declaration of Jodey Lawrence ("Lawrence Decl.") and attached exhibits. Settlement Class members' addresses will be ascertainable through Orange County Erectors' personnel and payroll records, which Orange County Erectors will provide to Phoenix within ten (10) business days of preliminary approval of the Settlement. *See* Settlement, ¶ 9(A).

Within ten (10) business days from receipt of this information, the Settlement Administrator will run the names of all Settlement Class members through the National Change of Address ("NCOA") database to determine any updated addresses for Settlement Class members, and mail a Notice Packet to each Settlement Class Member in English and Spanish at his or her last known address. *See* Settlement, ¶ 9(B). To the extent that any notices are returned, Phoenix will perform a "skip trace" to track any Settlement Class member's current mailing address. *Id.*, at ¶ 9(F).

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims, basic contentions and denials of the parties and the key terms of the Settlement, the 60-day deadline to opt-out or object to the Settlement and the procedures 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* Blakely Decl., Exhs. 1, 2, and 3 to Exh. A; Settlement, ¶¶ 9(C)-(D). The proposed Class Notice will also notify Settlement Class members of the final approval hearing date, provide the Settlement Class with 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

Finally, 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.

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V. CONCLUSION

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

Dated: April 3, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________
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