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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

MIRIAM MORENO, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

BEACON DAY SCHOOL, INC., a California
Corporation; and DOES 1 through 100,

Defendants.

CASE NO. 30-2022-01296662-CU-OE-CXC

*[Case assigned for all purposes to the Hon.
Lon F. Hurwitz, Dept. CX-103]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA ACTION SETTLEMENT**

Date: September 6, 2024
Time: 1:30 p.m.
Dept.: CX103

Action Filed: December 14, 2022
Trial Date: None Set

1 PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court,
2 on September 6, 2024 at 1:30 p.m., or as soon thereafter as the matter may be heard, in Department
3 CX103 of the Orange County Superior Court, located at 751 W Santa Ana Blvd, Santa Ana,
4 California 92701, Plaintiff Mariam Moreno (“Plaintiff”), individually and on behalf of a class of
5 similarly situated individuals, will and hereby does move this Court for:

6 1. Preliminary approval of the proposed Stipulation of Settlement (“Settlement
7 Agreement”) in this lawsuit;

8 2. Pursuant to Section 382 of the California Code of Civil Procedure, and for settlement
9 purposes only, provisional certification of the Settlement Class, defined as follows:

10 All current and former non-exempt employees who worked for
11 Defendant Beacon Day School, Inc. (“Defendant”) in California
between December 14, 2018 and February 24, 2024 (“Class Period”).

12 3. Preliminary appointment of Plaintiff Mariam Moreno as the Class Representative;

13 4. Preliminary appointment of Paul K. Haines, Fletcher W. Schmidt, and Matthew K.
14 Moen of Haines Law Group, APC as Class Counsel;

15 5. The scheduling of a hearing to consider whether the Settlement Agreement should be
16 finally approved and to award amounts for the Class Representative Enhancement
17 Payment, settlement administration costs, payment to the Labor and Workforce
18 Development Agency for its share of civil penalties under the Private Attorneys
19 General Act, Labor Code section 2698 *et seq.*, and Class Counsel’s attorneys’ fees and
20 costs;

21 6. Appointment of Phoenix Settlement Administrators as the third-party settlement
22 administrator (“Settlement Administrator”); and

23 7. Approval of the proposed Notice of Class and PAGA Action Settlement, Notice of
24 Individual Settlement Payment, and the Request for Exclusion Form (collectively, the
25 “Notice Packet”), and entry of the proposed Order instructing the Notice Packet to be
26 disseminated to the proposed Settlement Class in English only, as provided in the
27 Settlement Agreement.

28 ///

1 This motion is based on this notice of motion, the attached memorandum of points and
2 authorities, the declarations of Paul K. Haines, Fletcher W. Schmidt, Matthew K. Moen, Plaintiff
3 Mariam Moreno, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits
4 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
5 documentary evidence or argument presented at the time of hearing.

6 Given the multiplicity of issues addressed herein, Plaintiff believes there is good cause to
7 exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2). As this Motion is
8 unopposed, Plaintiff respectfully requests that the Court consider Plaintiff's Memorandum of
9 Points and Authorities in its entirety, which is 26 pages in length.

10
11 Dated: June 12, 2024

Respectfully Submitted,
HAINES LAW GROUP, APC

12
13 By: 
14 Matthew K. Moen
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mariam Moreno (“Plaintiff”), individually and on behalf of the proposed
4 Settlement Class, respectfully requests that this Court preliminarily approve the proposed
5 Stipulation of Settlement (“Settlement Agreement” or “Settlement”),¹ entered into by Plaintiff
6 and Defendant Beacon Day School, Inc. (“Defendant”) (collectively, the “Parties”). Plaintiff
7 respectfully requests that this Court preliminarily approve this non-reversionary, \$250,000.00
8 class action settlement on behalf of the following Settlement Class:

9 All current and former non-exempt employees who worked for Defendant in
10 California between December 14, 2018 and February 24, 2024 (“Class Period”).

11 Based upon the data provided by Defendant, there are approximately 450 potential
12 Settlement Class members and approximately 267 PAGA Aggrieved Employees² subject to the
13 Settlement. After Court-approved deductions for Plaintiff’s Class Representative Enhancement
14 Payment, settlement administrator costs, the PAGA Payment to the Labor & Workforce
15 Development Agency (“LWDA”), and attorneys’ fees and costs to Class Counsel, the remaining
16 Net Settlement Amount (“NSA”) is estimated to be no less than \$133,416.67. This results in
17 average Individual Settlement Payments of approximately \$296.48, with the lowest possible
18 estimated Individual Settlement Payment of \$6.07 (in the event a Settlement Class member
19 worked only one workweek during the Class Period) and the highest possible estimated Individual
20 Settlement Payment of \$1,645.24 (in the event a Settlement Class member performed worked in
21 every workweek throughout the Class Period). Plaintiff’s estimated Individual Settlement
22 Payment is approximately \$246.70, excluding any requested enhancement award. Moen Decl., ¶
23 28. Significantly, Settlement Class members do not need to file a claim form in order to receive
24 an Individual Settlement Payment, and all Settlement Class members who do not opt-out will

25 _____
26 ¹ The Settlement Agreement is attached as Exhibit 1 to the Declaration of Matthew K. Moen (“Moen
27 Decl.”), filed concurrently herewith, and the Notice of Class and PAGA Action Settlement, Notice of
28 Individual Settlement Payment, and the Request for Exclusion Form (collectively, the “Notice Packet”) are attached to the Moen Decl. as Exhibit 2.

² Defined as “all current and former non-exempt employees who worked for Defendant in California at any time from December 14, 2021 through February 24, 2024 (the “PAGA Period”)”. See Settlement, ¶ 1.

1 automatically receive their share of the Settlement. This represents a fair and reasonable result
2 for the Settlement Class members, who will be agreeing to a release of only those claims that
3 were actually asserted, or which could have been asserted based on the facts alleged in the
4 operative First Amended Complaint (“FAC”) in the lawsuit.

5 Further, given the tenet that aggrieved employees do not have the ability to opt-out of a
6 representative PAGA claim, all PAGA Aggrieved Employees, regardless of whether they elect to
7 opt out from participating in the class action settlement or not, shall receive a portion of the
8 settlement monies designated as the PAGA Payment payable to the PAGA Aggrieved Employees
9 and shall release their claims for civil penalties under PAGA based on the Labor Code violations
10 that were pled in the operative FAC in the action or Plaintiff’s December 14, 2022 PAGA Notice
11 letter to the LWDA, or which could have been pled in the operative FAC in the action based on
12 the factual allegations therein, that arose during the PAGA Period. *See Robinson v. Southern*
13 *Counties Oil Company* (2020) 53 Cal.App.5th 476, 482 (holding that there is no opt-out
14 mechanism for PAGA claims); *see also* Moen Decl., Exhibit 3 (Plaintiff’s PAGA Notice Letter
15 and submission, and LWDA Confirmation of Receipt). Based on the 25% share of the PAGA
16 civil penalties designated as the PAGA Amount payable to PAGA Aggrieved Employees, the
17 average Individual Settlement Payment from the PAGA Amount is projected to be approximately
18 \$9.36, with the lowest possible estimated Individual Settlement Payment from the PAGA Amount
19 of \$0.30 (in the event a PAGA Aggrieved Employee worked only one workweek during the
20 PAGA Period) and the highest possible estimated Individual Settlement Payment from the PAGA
21 Amount of \$33.80 (in the event a PAGA Aggrieved Employee worked in every workweek
22 throughout the PAGA Period).

23 Prior to reaching this proposed Settlement, Defendant provided Plaintiff with the payroll
24 and timekeeping records for an approximately 10% sampling of the Settlement Class members
25 spanning the full duration of the putative class period, as well as policy documents and key data
26 points. Plaintiff then retained an expert with a Ph.D. in economics to analyze the data and create
27 a class-wide exposure model for the claims at issue. On January 25, 2024, after extensive legal
28 research and analysis, along with Plaintiff’s and her expert’s comprehensive review of the data,

1 the Parties participated in a mediation session with Hon. William McCurine, Jr. (Ret.). At the
2 conclusion of mediation, the Parties reached a class-wide resolution of all claims at issue. Over
3 the following months, the Parties negotiated and executed the long-form Settlement Agreement
4 that is now before this Court for preliminary approval.

5 This proposed Settlement is well within the range of possible approval for the reasons
6 discussed herein, and Plaintiff respectfully requests that the Court grant preliminary approval.

7 **II. SUMMARY OF THE LITIGATION**

8 **A. Factual And Procedural Background**

9 Defendant operates private schools specializing in the education and care of children with
10 autism and related disorders across Southern California. Moen Decl., ¶ 10. Plaintiff was
11 employed by Beacon as a non-exempt “Behavioral Interventionist” from May 9, 2022 to October
12 25, 2022. *Id.*; Declaration of Mariam Moreno (“Moreno Decl.”), ¶ 2. Plaintiff’s primary job
13 duties consisted of supervising and providing special education services to children at
14 Defendant’s school. *Id.* Like all Settlement Class members, Plaintiff was subject to Defendant’s
15 wage and hour policies and practices. Moen Decl., ¶ 10; Moreno Decl., ¶¶ 3-4.

16 On December 14, 2022, Plaintiff filed a class action complaint alleging Defendant failed
17 to: (i) pay all minimum wages owed; (ii) pay all overtime wages owed; (iii) provide all lawful
18 meal periods; (iv) authorize and permit all lawful rest periods; (v) reimburse all necessary
19 business expenses; (vi) issue accurate and itemized wage statements; (vii) timely pay all final
20 wages upon separation; and (viii) comply with California’s Unfair Competition laws. Moen Decl.,
21 ¶ 11. On February 21, 2023, after exhausting her administrative remedies with the LWDA,
22 Plaintiff filed the operative FAC to add a ninth cause of action for civil penalties under PAGA,
23 premised on the same underlying Labor Code violations. *Id.*

24 **B. Plaintiff’s Claims and Defendant’s Defenses**

25 **1. Unlawful Time Rounding Violations**

26 Plaintiff asserts that, throughout the putative class period, Defendant maintained an
27 unlawful rounding practice that resulted in Defendant systematically underpaying Plaintiff and
28 Settlement Class members all earned wages. Moen Decl., ¶ 12; *see also Camp v. Home Depot*

1 *U.S.A., Inc.* (2022) 84 Cal.App.5th 638 (holding that “[I]f an employer...can capture and has
2 captured the exact amount of time an employee has worked during a shift, the employer must pay
3 the employee for all the time worked” (Internal quotations omitted)). Specifically, Plaintiff claims
4 Defendant records Plaintiff’s and Settlement Class members’ clock in and clock out timeclock
5 punches to the minute, but rounds Plaintiff’s and Settlement Class members’ timekeeping entries
6 in an uneven manner to the employees’ detriment, resulting in unpaid minimum and overtime
7 wages. Moen Decl., ¶ 12; *see* Labor Code §§ 510(a), 1197, and 1182.12.

8 In response, Defendant contends that its timekeeping practices are lawful and its rounding
9 practice is neutral and operates in an even-handed way, which Defendant asserts is lawful under
10 the court’s ruling in *See’s Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889. Moen
11 Decl., ¶ 13; *see also AHMC Healthcare, Inc. v. Superior Ct.* (2018) 24 Cal.App.5th 1014, 1027-
12 29 (finding employer’s time-rounding policy lawful where it was neutral “on its face” and “in
13 practice”). Moreover, Defendant contends that Plaintiff could not certify this claim, as it would
14 require individualized inquiries into each employee on a pay period by pay period basis as to
15 whether the employee actually started working after their first punch of the day or instead went
16 to the break room for coffee, socialized with coworkers, or otherwise did not work, and whether
17 the employee was overpaid or underpaid based on Defendant’s rounding practice, resulting in an
18 unmanageable series of mini-trials. Moen Decl., ¶ 13. Finally, because *Camp v. Home Depot*
19 *U.S.A., Inc.* has been granted review by the California Supreme Court, the decision is only
20 persuasive, not binding authority, and Plaintiff faces the risk that the *Camp* holding could be
21 reversed, rendering Plaintiff’s reliance on *Camp* misplaced, and Defendant claims that under
22 *See’s Candy*, its rounding practice will be found neutral and lawful. *Id.*

23 **2. Regular Rate Miscalculation Violations**

24 Plaintiff alleges that Defendant paid Plaintiff and Settlement Class members non-
25 discretionary retention bonuses as an incentive for employees to remain with Defendant for ninety
26 (90) days. Moen Decl., ¶ 14. However, Plaintiff asserts that Defendant failed to include the value
27 of these bonuses when calculating employees’ respective regular rates of pay. *Id.* As a result,
28 Plaintiff alleges that Defendant thereby failed to accurately pay Plaintiff and other non-exempt

employees all overtime wages and meal and rest period premium wages owed. *Id.*; see *Huntington Memorial Hosp. v. Sup. Ct.* (2005) 131 Cal.App.4th 893, 902-03 (“[I]n determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor.”); 29 U.S.C. §§ 207(a)(1) and (e); 29 C.F.R. §778.211(c) (“Bonuses which are announced to employees to induce them to work more steadily or more rapidly ... are regarded as part of the regular rate of pay. Most attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work ... must be included in the regular rate of pay.”).

In response, Defendant argues any bonus payments made were purely discretionary, and therefore are properly excluded from the regular rate of pay. See e.g., *Culley v. Lincare, Inc.*, 236 F.Supp.3d 1184, 1190 (E.D. Cal. 2017); Moen Decl., ¶ 15. As such, Defendant contends that Plaintiff’s claim will fail on the merits. *Id.* Further, Defendant asserts that this claim is unmanageable, as it requires individualized inquiries into whether each bonus payment made by Defendant was discretionary or non-discretionary, and into exactly how much money each employee was owed as a result, resulting in an unmanageable series of mini-trials. *Id.*

3. Meal Period Violations

Plaintiff further asserts that Defendant failed to provide the Settlement Class members with all timely duty-free, uninterrupted 30-minute meal periods to which they were entitled. Moen Decl., ¶ 16; see Labor Code § 512(a); see also *Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1041 (“We conclude that, absent waiver, section 512 requires a first meal period no later than the end of an employee’s fifth hour of work...”); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728-29 (“[The wage order] imposes an affirmative obligation on every employer to authorize and provide legally required meal and rest breaks; if it fails to do so, it has violated the law and is liable.”). Specifically, Plaintiff claims Defendant required Settlement Class members to care for students and otherwise remain on-duty throughout the workday. Moen Decl., ¶ 16. Plaintiff also asserts that Defendant failed to provide all second, duty-free, uninterrupted 30-minute meal periods commencing before the end of the tenth hour of work on days in which the Settlement Class members worked more than 10.0 hours. *Id.* Further, Plaintiff asserts that

1 when Defendant did pay meal period premiums during the relevant time period, these payments
2 were made at the employees' respective base rates of pay, rather than at the regular rate of pay.
3 *Id.*; see also *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 863.

4 In response, Defendant contends it maintained lawful meal period policies/practices
5 throughout the Class Period. Moen Decl., ¶ 17. Defendant also contends that, in the event an
6 employee was not provided a lawful meal period, Defendant pays the employee a meal period
7 premium as required by law. *Id.* In support of this position, Defendant produced timekeeping and
8 payroll records showing that employees receive a meal period premium in each instance in which
9 their timekeeping records do not reflect a lawful meal period being taken. *Id.* Finally, Defendant
10 contends that Plaintiff's meal period claim is not suited for class certification as individual
11 inquiries would be required to assess whether an employee chose to not take an otherwise
12 provided meal period, or whether was an employee ever validly waived a meal period, resulting
13 in an unmanageable series of mini-trials. *Id.*

14 **4. Rest Period Violations**

15 Plaintiff further alleges that Defendant failed to authorize and permit the Settlement Class
16 members to take all lawful rest periods to which they were entitled. Moen Decl., ¶ 18; see Labor
17 Code § 516. As with meal periods, Plaintiff asserts that work demands forced Plaintiff and the
18 Settlement Class members to remain on duty at all times to maintain supervision of their students.
19 Moen Decl., ¶ 18; see *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260
20 (“[D]uring required rest periods, employers must relieve their employees of all duties and
21 relinquish any control over how employees spend their break time.”). Plaintiff also alleges that
22 Defendant failed to pay *any* rest period premiums during the relevant time period as required by
23 Labor Code § 2267.7; an issue which itself is certifiable. Moen Decl., ¶ 18; see also *Safeway, Inc.*
24 *v. Superior Court* (2015) 238 Cal.App.4th 11387.

25 Defendant maintains it authorized and permitted the Settlement Class members to take all
26 lawful rest periods to which they are entitled. Moen Decl., ¶ 19. To support this position,
27 Defendant asserts it maintained a facially lawful written rest period policy that it enforced at all
28 times throughout the putative class period, and designated specific employees as “floaters” who

1 were responsible for relieving the other employees in order for them to take rest periods during
2 the work day. *Id.* Further, Defendant asserts that this claim is unmanageable and not suited for
3 class certification, as it requires individualized inquiries into whether each employee was
4 authorized and permitted to take a lawful rest period and on which days, which Defendant argues
5 Plaintiff will be unable to substantiate with any common, documentary evidence, as rest periods
6 are not required to be recorded, resulting in an unmanageable series of mini-trials. *Id.*

7 **5. Failure to Reimburse Violations**

8 Plaintiff further alleges that Defendant failed to reimburse the Settlement Class members
9 for all necessary business expenses incurred, in violation of Labor Code § 2802. Moen Decl., ¶
10 20; *see* Labor Code § 2802. Specifically, Plaintiff asserts that Defendant required Plaintiff and
11 other non-exempt employees to use their personal cellular phones for work-related purposes,
12 including to clock in and out and to receive daily calls from supervisors to help coordinate the
13 students, but did not reimburse Plaintiff and other non-exempt employees for these necessary
14 business expenses. *Id.*; *see also Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th
15 1137, 1144 (“Thus to be in compliance with section 2802, the employer must pay some reasonable
16 percentage of the employee’s cell phone bill.”).

17 In response, Defendant maintains that Settlement Class members were not required to use
18 their personal cellular phones as part of their job. Moen Decl., ¶ 21. Instead, Defendant asserts
19 that it provided company phones for all employees to use, maintained lawful reimbursement
20 policies/practices throughout the putative class period, and paid employees a cell phone stipend
21 during the COVID-19 pandemic and following remote work period. *Id.* Lastly, Defendant argues
22 this claim is not suitable for class treatment, as it would require individualized inquiries to
23 determine which employees incurred expenses, if any, whether those expenses were reasonable
24 and necessary, and why the employee had used their personal cell phone rather than the company-
25 provided phones without submitting an expense reimbursement request. *Id.*

26 **6. Wage Statement, Waiting Time, and PAGA Penalties**

27 As a result of Defendant’s alleged failure to pay all overtime wages, minimum wages, and
28 meal period and rest period premiums, Plaintiff asserts that Defendant also failed to issue accurate

1 and itemized wage statements and failed to timely pay all final wages at the time of separation.
2 Moen Decl., ¶ 22; *see also* Labor Code §§ 203(a) and 226(a). As a result of these alleged Labor
3 Code violations, Plaintiff also seeks PAGA civil penalties on behalf of all aggrieved employees.
4 Moen Decl., ¶ 22; *see also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213
5 (“As we have explained, they [civil penalties under PAGA] are mandatory, not discretionary.”).

6 In response, Defendant argues that Plaintiff’s underlying claims will fail and, as a result,
7 the derivative wage statement, waiting time, and PAGA claims will also fail. Moen Decl., ¶ 23;
8 *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (“Because the underlying causes
9 of action fail, the derivative UCL and PAGA claims also fail.”). Defendant also maintains that
10 Plaintiff cannot show that the wage statement violations were “knowing and intentional,” or that
11 the putative class members “suffer[ed] injury” as a result of the alleged violations, as required by
12 Labor Code § 226(e) for the imposition of wage statement penalties. Moen Decl., ¶ 23; *see* Labor
13 Code § 226(e)(1). Moreover, Defendant maintains that its good faith defenses to Plaintiff’s
14 underlying claims would preclude the recovery of waiting time penalties, which are only available
15 for the “willful” failure to pay wages, and that this Court would exercise its discretion to
16 substantially reduce any PAGA penalties awarded. Moen Decl., ¶ 23; *see also* 8 Cal. Code Regs.
17 § 13520 (“[A] good faith dispute that any wages are due will preclude imposition of waiting time
18 penalties under Section 203.”); Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt.,*
19 *Inc.* (2012) 203 Cal.App.4th 1112, 1135; *Carrington v. Starbucks Corporation* (2018) 30
20 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of exposure).

21 Finally, Defendant also argued that as a relatively small, family-owned business, it simply
22 does not have the financial resources to satisfy a sizable judgment or settlement and is constrained
23 by cash-flow issues. Moen Decl., ¶ 24. Further, Defendant argued that its business model is not a
24 typical “for profit” operation, but instead was started as a school for children with special needs
25 because of the founder’s personal experience as the parent of a child with special needs, and only
26 was able to stay in business through the COVID-19 pandemic due to government assistance. *Id.*
27 Plaintiff’s counsel ultimately concluded that it would be an uphill battle to collect a judgment that
28 was significantly in excess of the amount offered in settlement. *Id.*

1 **C. Discovery And Mediation**

2 In connection with mediation, Defendant provided Plaintiff with electronic timekeeping
3 and payroll records for an approximately 10% sample of Settlement Class members spanning the
4 entire Class Period, as well as key policy documents and data points. Moen Decl., ¶ 25. Plaintiff
5 then retained an expert with a Ph.D. in economics to analyze the produced data and conducted a
6 comprehensive, class-wide analysis to create a class-wide exposure model for the claims at issue.
7 *Id.* On January 25, 2024, the Parties participated in a mediation session with Honorable William
8 McCurine, Jr. (Ret.), during which the Parties exchanged divergent views on Defendant’s liability
9 and exposure valuations and the likelihood of certification of Plaintiff’s claims. *Id.* At the
10 conclusion of mediation, the Parties reached a tentative settlement. *Id.* Over the following months,
11 the Parties finalized the terms of the proposed Settlement now before the Court. *Id.*

12 **III. THE PROPOSED SETTLEMENT**

13 **A. Essential Terms Of The Settlement**

14 If the Court preliminarily approves this settlement, Defendant will pay a Maximum
15 Settlement Amount (“MSA”) of \$250,000.00. Moen Decl., ¶ 27; Settlement, ¶ 3. This Settlement
16 is non-reversionary, and Settlement Class members will automatically receive their Individual
17 Settlement Payments unless they affirmatively opt-out. Settlement, ¶¶ 3.C; 4. The monetary terms
18 of the Settlement are as follows:

Maximum Settlement Amount:	\$250,000.00
Minus Court-approved attorneys’ fees (1/3):	\$83,333.33
Minus Court-approved attorneys’ costs (up to):	\$12,000.00
Minus Court-approved Enhancement Payment:	\$5,000.00
Minus settlement administrator costs (up to):	\$8,750.00
Minus PAGA Payment to the LWDA:	\$7,500.00
Net Settlement Amount:	\$133,416.67

23 **1. The Settlement Provides for Reasonable Monetary Payments**

24 After deducting amounts for Court-approved attorneys’ fees and costs, Plaintiff’s Class
25 Representative Enhancement Payment, settlement administration costs,³ and the LWDA’s share
26

27 ³ The Parties propose Phoenix Settlement Administrators (“Phoenix”) as the third-party Settlement
28 Administrator. *See* Settlement, ¶ 3.A. At the time of seeking final settlement approval, Plaintiff will request
Court approval of a costs award for the Settlement Administrator, and will submit admissible evidence to
support the request, including Phoenix’s final invoice of fees and expenses, in connection therewith.

1 of PAGA penalties, the Settlement provides for an estimated NSA of no less than \$133,416.67.
2 *See* Settlement, ¶¶ 3.C, 4.A. Individual Settlement Payments will be calculated based on the
3 proportionate number of workweeks worked by each participating Settlement Class member
4 during the Class Period divided by the total number of workweeks worked by all participating
5 Settlement Class members, as well as membership in various subclasses. *Id.*, ¶¶ 4.B.i-iv. Further,
6 the 25% portion of the PAGA civil penalties payable to the PAGA Aggrieved Employees will be
7 paid to all PAGA Aggrieved Employees, regardless of their election to opt-out from participating
8 in the class action portion of the Settlement, based on the proportionate number of workweeks
9 that he or she worked during the PAGA Period, divided by the total number of workweeks worked
10 by all PAGA Aggrieved Employees during the PAGA Period. *Id.*, ¶ 4.B.i.

11 For tax purposes, each Individual Settlement Payment will be allocated as 10% wages
12 (subject to applicable withholdings), and 90% interest and penalties (not subject to withholdings).
13 Settlement, ¶ 4.D. Each PAGA Amount payable to the PAGA Aggrieved Employees shall be
14 allocated as 100% penalties. *Id.* This allocation between taxable and non-taxable amounts is
15 appropriate because the unpaid wages portion of Plaintiff’s exposure analysis only amounts to
16 approximately 10.8% of the total reasonable exposure Defendant faced due to the substantial
17 derivative penalties that stem from these unpaid wages, as well as a portion of Defendant’s
18 maximum reasonable exposure being comprised of non-taxable expense reimbursements. Moen
19 Decl., ¶ 29; *see also* Section IV.A.1.d, *infra*. Further, Defendant will pay the employer’s share of
20 payroll taxes separate and apart from, and in addition to, the MSA. Settlement, ¶ 3.E.

21 Settlement Class members will have 60 calendar days from the date of the initial mailing
22 of the Notice Packet to opt-out or object to the Settlement, thereby providing ample time to review
23 the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 10.D-E. Further, if
24 any Notice Packets are returned as undeliverable, the Settlement Administrator will perform a
25 perform a “skip trace” to obtain an updated mailing address and re-mail Notice Packets to the
26 Settlement Class member within five (5) business days of receiving the returned Notice Packet.
27 *Id.*, ¶ 10.C. Settlement Class members to whom Notice Packets are re-mailed shall have an
28 additional forty-five (45) calendar dates from the date of re-mailing or until the Response

Deadline has expired, whichever is later, to submit a Request for Exclusion, Objection, or dispute. *Id.* Should any individual elect to opt-out from participation, and/or should Plaintiff's requested amounts for an enhancement payment, attorneys' fees and costs, or settlement administration costs identified in the Settlement Agreement not be approved in full or otherwise reduced from the requested amounts, the additional funds will revert back to the NSA for distribution amongst all participating Settlement Class members. *See id.*, § 3.D. Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release all claims against Defendant as detailed in the Settlement. *Id.*, ¶¶ 2.A, 10.D. Finally, should the Court ultimately grant final settlement approval, a notice of the Court's Final Judgment and Order will be posted on the Settlement Administrator's website for the Settlement Class members and PAGA Aggrieved Employees, in compliance with CRC Rule 3.771(b). *See id.*, ¶ 11.D.

Defendant will fund the MSA with the Settlement Administrator within thirty (30) calendar days after the Effective Date.⁴ *See* Settlement, ¶ 3.B. Within ten (10) business days following the full funding of the MSA, the Settlement Administrator will calculate and mail the Individual Settlement Payments to the participating Settlement Class members. *Id.*, ¶ 4.C. Settlement Class members will have 180 days from the date the Individual Settlement Payments are mailed to cash their checks. *Id.*, ¶ 4.E. In the event that there are any uncashed checks remaining after 180 days, any remaining funds will be transferred to the California State Controller's Office to be held pursuant to the Unclaimed Property Law, California Civil Code § 1500 *et seq.*, in the name of the Settlement Class member to whom the check was issued, until such time that they claim their property. *Id.* This distribution method ensures that no portion of the MSA will be "unpaid...unclaimed or abandoned," as required for C.C.P. § 384 to apply, and the Court may approve the proposed distribution method without running afoul of C.C.P. § 384.

2. Attorneys' Fees, Costs, and Plaintiff's Class Representative

Enhancement Payment

At the time of seeking final settlement approval, Plaintiff will apply for a Class

⁴ The "Effective Date" is defined in the Settlement Agreement as the date upon which the Court signs an order granting final approval of the Settlement Agreement. *See* Settlement, ¶ 2.C.

1 Representative Enhancement Payment in the amount of \$5,000 for her service to the Settlement
2 Class and her general release of all claims.⁵ Moen Decl., ¶ 30; *see* Settlement ¶¶ 2.C, 3.C.3, 6.
3 Plaintiff's requested class representative Enhancement Payment is intended to recognize the
4 significant time and effort that she expended on behalf of the Settlement Class, including
5 searching for relevant documents for use in the lawsuit and providing factual information to her
6 attorneys, holding various phone calls with her attorneys to discuss the claims in the lawsuit and
7 Defendant's practices, discussing the status of the case and general case strategy with her
8 attorneys on multiple occasions, providing valuable input to assist her attorneys in preparing for
9 mediation, being available for the full-day mediation that lead to the Settlement, reviewing and
10 providing input regarding the Settlement in this case, and otherwise assisting her attorneys in
11 moving the case towards resolution, the significant risks Plaintiff undertook by serving as the
12 named plaintiff, and the fact that she agreed to a general release of all claims subject to a waiver
13 of Civil Code § 1542. Moen Decl., ¶ 30; Moreno Decl., ¶¶ 5-6; Settlement, ¶ 2.C.

14 When seeking final approval, Class Counsel will also apply for an attorneys' fee award of
15 up to one third of the MSA and up to \$12,000 in reimbursement for actual litigation costs. Moen
16 Decl., ¶ 31; *see* Settlement, ¶ 3.C.4. The requested fee is fair compensation for undertaking
17 complex, risky, expensive, and time-consuming litigation on a contingent fee basis. Moen Decl.,
18 ¶ 31. Class Counsel has incurred substantial attorneys' fees conducting pre-filing investigation,
19 analyzing Plaintiff's claims, conducting legal research and analysis, reviewing class documents
20 and data produced by Defendant, extensively reviewing and evaluating the produced timekeeping
21 and payroll records with the assistance of a retained expert to build a comprehensive damages
22 model, preparing for and attending mediation, negotiating and drafting the Memorandum of
23 Understanding, long-form Settlement Agreement, Notice Packet documents, preparing this
24 motion for preliminary approval, and otherwise litigating the case. *Id.* Class Counsel will also
25 expend future attorney time attending the hearing on this Motion, overseeing the Notice process,
26

27
28 ⁵ In connection with this request, Plaintiff will submit evidence at the time of seeking final settlement
approval regarding the nature of her participation in the action, including specifics of actions taken, time
committed, and risks faced. *See Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.

1 drafting the Final Approval Motion and supporting documents, attending the Final Approval
2 hearing, and completing other tasks, such as fielding questions from Settlement Class members.
3 *Id.* Class Counsel will provide the Court with a lodestar analysis when seeking an award of
4 attorneys' fees, including information about counsel's hourly rates and the time spent on the case.
5 *Id.*; see also *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480. Class Counsel utilized the
6 expert services of Dr. J. Michael DuMond, Ph.D., of Berkeley Research Group to perform all
7 expert analyses for this case, and are providing a copy of Dr. DuMond's expert invoice in support
8 of this motion. Moen Decl., ¶ 31, Exhibit 5. Plaintiff will also provide additional documentation
9 at final approval in support of the request for reimbursement of litigation costs incurred. *Id.*

10 **3. Scope of Release**

11 Participating Settlement Class members who do not submit a valid and timely Request for
12 Exclusion shall release the following claims against the Released Parties, as defined in the
13 Settlement: all claims based on the factual allegations set forth in the operative FAC in the Action
14 or Plaintiff's December 14, 2022 PAGA Notice Letter to the LWDA, or which could have been
15 pled in the operative FAC in the Action based on the factual allegations therein, that arose during
16 the Class Period, including: (i) failure to pay all minimum wages; (ii) failure to pay all overtime
17 wages; (iii) failure to provide all lawful meal periods; (iv) failure to authorize and permit all lawful
18 rest periods; (v) failure to reimburse necessary business expenses; (vi) failure to issue accurate
19 itemized wage statements; (vii) failure to timely pay all final wages due upon separation from
20 employment; and (viii) all claims for unfair business practices that could have been premised on
21 the facts, claims, causes of action or legal theories of relief pled in the operative FAC in the Action
22 ("Released Claims"). See Settlement, ¶ 2.A. Further, all PAGA Aggrieved Employees shall be
23 deemed to have released and discharged Defendant from all PAGA claims that are based on the
24 Labor Code violations pled in the operative FAC in the Action or Plaintiff's December 14, 2022
25 PAGA Notice Letter to the LWDA, or which could have been pled in the operative FAC in the
26 Action based on the factual allegations therein, that arose during the PAGA Period. *Id.*, ¶ 2.B.

27 **IV. ARGUMENT**

28 **A. Preliminary Approval Is Warranted**

California Rule of Court 3.769 conditions the settlement of a class action on court

1 approval, which is generally evaluated under the federal standards applicable under Rule 23 of
2 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208
3 Cal.App.4th 322, 337 (stating that Rule 3.769 requires the trial court to determine “that the
4 settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir.
5 1998) 150 F.3d 1011, 1026 (stating that Rule 23(e) requires the trial court to determine “whether
6 a proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the
7 preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor*
8 *ERISA Litigation* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in evaluating a proposed
9 settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product
10 of fraud or collusion between the negotiating parties. *See e.g., Hanlon, supra*, 150 F.3d at 1027.
11 There is an initial presumption of fairness when the settlement agreement was negotiated at arm’s
12 length by class counsel. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

13 **1. Standard for Preliminary Approval**

14 The Court should consider the following factors when making a fairness determination:
15 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
16 litigation, the risk of maintaining class action status through trial, the amount offered in
17 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
18 experience and views of counsel.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.
19 “[T]he court is free to engage in a balancing and weighing of factors depending on the
20 circumstances of each case.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.
21 The proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors.

22 **a. The Strength of Plaintiff’s Case**

23 Class Counsel carefully vetted the claims at issue, reviewed Settlement Class member data
24 spanning the entire Class Period and all relevant policy documents, retained an expert with a
25 Ph.D. in economics to assist in analyzing the data, and created a comprehensive damages model
26 for Defendant’s liability. Moen Decl., ¶ 32. Although Plaintiff steadfastly maintains that her
27 claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in
28 proceeding with class certification and trial. As explained in detail in Section II.B., *supra*,

1 Defendant presented numerous defenses to Plaintiff's claims, both on the merits and with respect
2 to class certification. Although she was prepared to litigate these claims through class certification
3 and ultimately through trial, it was far from certain that Plaintiff would be able to recover a greater
4 amount should this matter proceed through trial. Thus, this factor supports preliminary approval.

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

6 Although the Parties engaged in substantial informal discovery and information exchange
7 prior to mediation, the Parties had agreed to refrain from engaging in formal written and
8 deposition discovery until after exhausting their settlement efforts at mediation. Moen Decl., ¶
9 33. Absent settlement, the Parties will be required to expend substantial time and resources
10 conducting extensive formal written and deposition discovery. *Id.* Moreover, Plaintiff has not yet
11 filed for class certification, and thus, absent settlement, the Parties would face the prospect of
12 appeals in the wake of a disputed class certification ruling and/or an adverse summary judgment
13 ruling. *Id.* Even if Plaintiff succeeded in certifying one or more classes, the Parties would incur
14 considerably more attorneys' fees and costs through a possible decertification motion, trial, and
15 possible appeal. *Id.* This Settlement avoids these considerable costs, risks, and the accompanying
16 burden of continued litigation on the Court. Thus, this factor supports preliminary approval.

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

18 At the time of the proposed Settlement, Plaintiff had not filed her motion for class
19 certification. Moen Decl., ¶ 34. Had the Court certified any claims, Plaintiff anticipated that
20 Defendant would seek decertification. *Id.* There was also a risk that Defendant would engage in
21 a *Pick-up-Stix* campaign that could either affect Plaintiff's ability to maintain the numerosity
22 required to proceed as a class action, or significantly reduce the size of the putative class for a
23 fraction of what Settlement Class members are receiving through this Settlement. *Id.*; *see*
24 *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796. Therefore, absent the Settlement,
25 there was a serious risk that Plaintiff would be unable to move forward on a class-wide basis. *Id.*
26 Thus, this factor supports preliminary approval.

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

28 This proposed Settlement provides a fair and reasonable recovery for the Settlement Class

1 in the face of disputed claims. After analyzing Defendant's produced data, Class Counsel
2 conducted a class-wide exposure analysis, forecasting the total expected recovery as follows:

3 Unlawful Time Rounding Violations: \$4,797

4 Plaintiff's data analysis of Defendant's timekeeping and payroll data revealed that
5 Defendant's rounding practice resulted in the Settlement Class members being underpaid for an
6 aggregate of 485.23 recorded hours of work during the putative class period. Moen Decl., ¶ 35.
7 Therefore, Plaintiff calculated Defendant's maximum potential exposure on this claim at \$13,324
8 (485.23 unpaid hours * \$13.73 average minimum wage * 2 liquidated damages). *Id.*

9 Defendant argues that its timekeeping practice was neutral, both on its face and in
10 practice, and that such a policy is lawful under *See's Candy*. Moen Decl., ¶ 36. Moreover, because
11 *Camp v. Home Depot* has been granted review by the California Supreme Court, there is tangible
12 risk that *Camp* will be overturned, rendering Plaintiff's damages analysis substantially overstated.
13 *Id.* Plaintiff therefore discounted the maximum potential exposure by 40% for the risk of non-
14 certification and 40% for the risk of being unsuccessful on the merits, to arrive at an estimated
15 exposure of \$4,797. *Id.*

16 Regular Rate Miscalculation Violations: \$5,701

17 Plaintiff's data analysis determined that Settlement Class members were underpaid
18 approximately \$14,619 as a result of Defendant's failure to properly include the value of non-
19 discretionary retention bonus payments when calculating the employees' respective regular rates
20 of pay for overtime purposes. Moen Decl., ¶ 37.

21 Defendant, however, argues that the bonuses in question were discretionary, and therefore
22 did not need to be included in the regular rate of pay. Moen Decl., ¶ 38. Defendant also argues
23 that this claim is unmanageable, as it requires individualized inquiries into whether each bonus
24 payment was discretionary or non-discretionary and how much money each employee was
25 purportedly owed as a result of Defendant's alleged regular rate violation. *Id.* Based on these
26 defenses, Plaintiff discounted the maximum exposure by 40% for the risk of non-certification,
27 and by an additionally 35% for the risk of losing on the merits or failing to recover the full amount
28 sought, to arrive at an estimated exposure of approximately \$5,701. *Id.*

1 Meal Period Violations: \$2,452

2 Plaintiff's data analysis determined that Settlement Class members were paid a total of
3 47,556 meal period premium payments during the Class Period, all of which were at the
4 employee's base rate of pay. Moen Decl., ¶ 39. Plaintiff asserts that all meal period premiums
5 received during the same time period in which non-discretionary incentive pay was earned were
6 underpaid due to Defendant's failure to incorporate the value of non-discretionary incentive pay
7 when calculating the employees' regular rates of pay. *Id.* Thus, Plaintiff calculated Defendant's
8 liability on this claim at \$6,287 as a result of underpaying the meal period premiums. *Id.*

9 Defendant asserts, however, that it maintained a lawful meal period policy/practice at all
10 times during the Class Period and that all bonus payments made to putative class members were
11 purely discretionary in nature, and therefore were properly excluded from Defendant's regular
12 rate calculations. Moen Decl., ¶ 40. Given these defenses, Plaintiff discounted the maximum
13 exposure by 40% for the risk of non-certification, and by an additional 35% for risk of losing on
14 the merits, to arrive at an estimated exposure of \$2,452. *Id.*

15 Rest Period Violations: \$25,105

16 Plaintiff's data analysis revealed that non-exempt employees worked an aggregate total
17 of 86,497 shifts in excess of 3.5 hours during the Class Period. Moen Decl., ¶ 41. Plaintiff
18 estimates a rest period violation occurred on approximately 40% of work shifts in excess of 3.5
19 hours. *Id.* Thus, Plaintiff calculated Defendant's maximum potential exposure on this claim at
20 \$627,622 (86,497 shifts over 3.5 hours * 40% violation * \$18.14 approximate avg. premium). *Id.*

21 But as noted above, Defendant argues it has always authorized and permitted duty-free
22 rest periods in accordance with California law, including maintaining lawful written rest period
23 policies and providing a "floater" as coverage so employees could be relieved of all duty to take
24 all duty-free rest periods to which they were entitled. Moen Decl., ¶ 42. Therefore, Defendant
25 asserts that Plaintiff's assumption that a rest period violation occurred in 40% of all work days in
26 excess of 3.5 during the Class Period is severely overstated and individualized to Plaintiff. *Id.*
27 Further, Defendant asserts that this claim is not amenable to class certification given the
28 individual inquiries required to determine whether each employee was authorized and permitted

1 to take a lawful rest period and on which days, particularly given that rest periods were not
2 recorded. *Id.* Given these defenses, Plaintiff discounted the maximum exposure by 80% for the
3 risk of non-certification, and by an additional 80% for risk of losing on the merits, to arrive at an
4 estimated exposure of \$25,105. *Id.*

5 Failure to Reimburse Violations: \$27,974

6 Plaintiff's data analysis determined that Settlement Class members worked an aggregate
7 total of approximately 4,521 months during the Class Period excluding the time period in which
8 Defendant paid employees a cell phone stipend due to the COVID-19 pandemic. Moen Decl., ¶
9 43. Using a conservative estimate of \$25 per month reimbursement for personal cellular phone
10 use, Plaintiff calculates Defendant's maximum exposure for this claim at approximately \$113,025
11 (\$25 per month * 4,521 work-months with no stipend). *Id.*

12 As noted above, Defendant maintains that Settlement Class members were not required to
13 use their personal cellular phones as part of their job. Moen Decl., ¶ 44. Instead, Defendant asserts
14 that it provided company phones for all employees to use, and further argues that any expenses
15 incurred by Settlement Class members were minimal, given the wide availability of low-cost
16 cellular phone plans. *Id.* Defendant further argues that this claim would require individual
17 inquiries into whether Settlement Class members actually used their personal cellular phones for
18 work purposes, how much expense they incurred, whether they submitted a request for
19 reimbursement, and the reasonableness of that expense, thus precluding class certification. *Id.*
20 Thus, Plaintiff discounted the estimated maximum amount by 55% for risk of non-certification,
21 and by an additional 45% to account for risk of losing on the merits and/or failure to recover the
22 maximal amount sought, to arrive at an estimated exposure of approximately \$27,974. *Id.*

23 Wage Statement Penalties: \$103,744

24 According to the key data points provided by Defendant, approximately 267 Settlement
25 Class members are eligible for wage statement penalties, and a total of 8,433 wage statements
26 were issued during the relevant period. Moen Decl., ¶ 45. Plaintiff calculated Defendant's
27 maximum possible wage statement exposure as approximately \$829,950 ((267 initial violations
28 * \$50 per pay period) + (8,166 subsequent pay periods * \$100 per pay period)). *Id.* However,

1 Defendant raised numerous defenses, including that the alleged violations, if any, were not
2 “knowing and intentional,” and that Plaintiff could not show that the Settlement Class members
3 “suffer[ed] injury” as a result of any alleged violations. *Id.* Defendant further argued that
4 Plaintiff’s underlying claims would fail, and, therefore, her wholly derivative wage statement
5 claim would also fail. *Id.* Finally, Defendant argued that Plaintiff’s damages were substantially
6 overstated, as Plaintiff attributed a wage statement penalty to every pay period during the relevant
7 time period, despite the fact that the underlying “unpaid wage” violations arguably did not occur
8 in every pay period, e.g., employees only received a single 90-day retention bonus once during
9 their entire employment which is the basis for Plaintiff’s regular rate and underpaid meal period
10 premiums claims. *Id.* Therefore, Plaintiff discounted the maximum exposure by 50% for the risk
11 of non-certification of the underlying claims and 75% for a risk of being unsuccessful on the
12 merits, including failing to prove the violations were “knowing and intentional,” that the
13 Settlement Class members “suffer[ed] injury,” for an estimated recovery of \$103,744. *Id.*

14 **Waiting Time Penalties: \$170,420**

15 Based on data provided by Defendant, approximately 261 Settlement Class members
16 separated their employment during the relevant period applicable to this claim. Moen Decl., ¶ 46.
17 As a result of Defendant’s allegedly unlawful rounding practice, Plaintiff asserts that each of these
18 employees was owed wages that were not paid at the time of their separation. *Id.* Plaintiff
19 therefore calculated Defendant’s maximum exposure of \$1,136,133 (261 former employees *
20 average waiting time penalty of \$4,353 (\$18.14 approximate average hourly rate * 8 hours * 30
21 days)). *Id.* Defendant maintains that waiting time penalties are not appropriate because Plaintiff’s
22 claims fail on the merits, and given their good-faith defenses, Plaintiff cannot show that any
23 failure by Defendant to pay all final wages was willful. *Id.* Finally, Defendant argued that
24 Plaintiff’s damages were substantially overstated, as Plaintiff attributed a waiting time penalty to
25 every employee who separated their employment during the relevant time period, which could be
26 ultimately inaccurate if the California Supreme Court overturns the holding in *Camp* and
27 Plaintiff’s rounding claim becomes dependent on the standard outlined in *See’s Candy*. *Id.*
28 Plaintiff discounted this claim by 50% for the risk of non-certification and by an additional 70%

1 for risk of being unsuccessful on the merits, overstating damages, or failing to establish
2 willfulness, for an estimated recovery of \$170,420. *Id.*

3 **PAGA Penalties: \$10,541**

4 Plaintiff alleges that PAGA civil penalties would be recoverable for each pay period in
5 which she could prove an underlying Labor Code violation. Moen Decl., ¶ 47. According to
6 Plaintiff's data analysis, the Settlement Class members worked a combined total of 8,433 pay
7 periods during the PAGA liability period in which at least one of Plaintiff's alleged Labor Code
8 violations occurred. *Id.* Plaintiff therefore calculates Defendant's maximum PAGA exposure at
9 \$843,300 (8,433 pay periods * \$100 per violation). *Id.*; *see also Amaral, supra*, 163 Cal.App.4th
10 at 1207 (finding "initial" violation rate applies until employer is notified that it is violating a
11 Labor Code provision). However, these penalties are exclusively derivative of the underlying
12 violations that Defendant vigorously disputes, both as to certification and the merits. Moen Decl.,
13 ¶ 47; *see also Green v. Lawrence Service Co.*, 2013 WL 3907506, *5, fn. 5 (C.D. Cal. 2013)
14 (explaining that a PAGA claim's success was determined by the merits of its underlying claims).
15 Plaintiff also recognizes that the Court has discretion to substantially reduce any award of PAGA
16 penalties. Moen Decl., ¶ 47; *see also* Labor Code § 2699(e)(2); *Thurman, supra*, 203 Cal.App.4th
17 at 1135; *Taduran v. James R. Glidewell*, Case No. 30-2017-00934037-CU-OE-CXC, Orange
18 County Superior Court, Honorable William Claster presiding (reducing PAGA penalties by
19 96.12%). Plaintiff discounted the maximum figure by 75% for the risk that she would not prevail
20 on the underlying claims and/or that the damages were overstated, and by an additional 95% for
21 risk of the Court reducing penalties, for an estimated exposure of \$10,541. Moen Decl., ¶ 47.

22 Using these estimated figures, Plaintiff estimated that the potential reasonable recovery
23 for the Settlement Class would be approximately \$350,733. Moen Decl., ¶ 48. Thus, the proposed
24 recovery to the Settlement Class of \$250,000.00 represents approximately 71.28% of Plaintiff's
25 reasonably forecasted class-wide recovery, which is within the range approved by courts as being
26 fair, reasonable and adequate, especially in light of Defendant's limited financial resources and
27 cash-flow constraints, while also avoiding further expense and risk of proceeding towards class
28 certification and trial. *Id.*; *see, e.g., Altamirano v. Shaw Industries, Inc.*, 2015 WL 4512372, *9

(N.D. Cal. 2015) (“Although 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval...”); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement of “roughly one-sixth of the potential recovery”); *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”) (internal quotations omitted). Preliminary approval is appropriate since the Settlement will provide tangible monetary relief to the Settlement Class members without the uncertainty, delay, and additional expense of further litigation.

e. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, 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. Moen Decl., ¶¶ 2-7; Declaration of Paul K. Haines (“Haines Decl.”), ¶¶ 2-11; and Declaration of Fletcher W. Schmidt (“Schmidt Decl.”), ¶¶ 2-9. 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. Moen Decl., ¶¶ 25, 35-47. It was only after the completion of this work that the Parties attended mediation and ultimately reached a class-wide settlement of all claims at issue. *Id.* Thus, this factor strongly supports preliminary approval.

2. The Preliminary Approval Standard is Met

At this stage, the Court can grant preliminary approval of the Settlement and direct that the Class 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).

1 **a. The Settlement is Within the Range of Possible Approval**

2 The proposed Settlement reflects a fair and reasonable recovery for the Settlement Class
3 members in light of the significant risks of litigation. The proposed Settlement will provide
4 compensation for contested claims, while only releasing the claims actually at issue in this
5 litigation. Further, the average payment of \$296.48 is in line with the average payments achieved
6 in other wage and hour class action settlements that have been approved.⁶ Thus, the proposed
7 Settlement is within the range of possible approval such that notice should be provided to the
8 Settlement Class members. The Court will have the opportunity to again assess the reasonableness
9 of the Settlement after the Settlement Class members have the opportunity to opt-out or object.

10 **b. The Settlement Resulted from Serious, Informed and Non-Collusive**
11 **Negotiations**

12 This proposed Settlement is entitled to an initial presumption of fairness as it is the result
13 of the exchange of pertinent information, including all relevant policies, employee timekeeping
14 and payroll records, and key data points which were analyzed by Plaintiff and her expert; arm's-
15 length negotiations by counsel; mediation before an experienced wage and hour class action
16 mediator; and additional negotiations until the terms of the long-form Settlement were agreed
17 upon and finalized. Moen Decl., ¶ 25; *see also Kullar, supra*, 168 Cal.App.4th at 130. Thus, this
18 factor supports preliminary approval.

19 **c. The Settlement is Devoid of Obvious Deficiencies**

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

25 _____
26 ⁶ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,
27 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case
28 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 . . . Plaintiff also notes
several similar actions where the gross recoveries per class member were less than \$90...").

1 **B. The Court Should Certify The Settlement Class for Settlement Purposes**

2 The proposed Settlement Class satisfies the criteria for certification of a settlement class
3 under California law because: (1) the individuals in the Settlement Class are so numerous that
4 joinder would be impractical; (2) common questions of law and fact predominate over individual
5 questions such that class certification is the most efficient and desirable way to maintain this
6 litigation; (3) Plaintiff's claims are typical of the claims of the absent Settlement Class members;
7 and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the
8 absent Settlement Class members. *See* Cal. Code Civ. Proc. § 382.

9 **1. The Proposed Class is Ascertainable and Numerous**

10 A class is "ascertainable" where the members "may be readily identified without
11 unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target*
12 *Corp.* (2010) 189 Cal.App.4th 905, 919 (alterations in original). Here, the proposed Settlement
13 Class is defined as all current and former non-exempt employees who worked for Defendant in
14 California at any time during the Class Period. *See* Settlement, ¶ 1. Settlement Class members
15 can be easily identified using Defendant's employment and payroll records. Moen Decl., ¶ 28.
16 Defendant represents that the Settlement Class consists of approximately 450 individuals,
17 rendering it impracticable to bring all Settlement Class members before the Court. *Id.* Thus, the
18 proposed Settlement Class satisfies numerosity. *See Collins v. Rocha* (1972) 7 Cal.3d 232, 234.

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

20 The focus in a certification dispute is not on the merits of the case, but rather on what
21 types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug*
22 *Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327. Here, Plaintiff's claims are predicated
23 on Defendant's alleged failures to pay all minimum and overtime wages owed, pay all meal and
24 rest period premiums, reimburse all necessary business expenses, furnish accurate itemized wage
25 statements, and pay all final wages owed upon separation. These types of claims are commonly
26 held to be proper for class certification. *See, e.g., Brinker, supra*, 53 Cal.4th at 1032-34 ("The
27 theory of liability—that Brinker has a uniform policy, and that that policy...allegedly violates the
28 law—is by its nature a common question eminently suited for class treatment.").

1 **3. The Claims of the Named Plaintiff are Typical**

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
4 Cal.App.3d 1341, 1347. Here, like other Settlement Class members, Plaintiff was employed by
5 Defendant as a non-exempt employee in California and was subject to Defendant’s allegedly
6 unlawful wage and hour policies/practices during the Class Period. Moreno Decl., ¶¶ 2-4. Plaintiff
7 was therefore impacted by the same challenged policies that allegedly injured the Settlement Class
8 as a whole and was subject to the same defenses forwarded by Defendant as to the Settlement
9 Class, and is therefore typical.

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

11 The adequacy of representation requirement examines conflicts of interest between named
12 parties and the class(es) they seek to represent. *See Capitol People First v. Department of*
13 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will
14 adequately represent the Settlement Class members as there are no conflicts between the named
15 Plaintiff and the Settlement Class members she seeks to represent, and Plaintiff possesses claims
16 that are in line with those of the Settlement Class members. *See McGhee v. Bank of America*
17 (1976) 60 Cal.App.3d 442, 450 (finding adequacy satisfied where there was no indication that the
18 plaintiff’s counsel were not qualified and the plaintiff had no interests antagonistic to those of the
19 class). Class Counsel also has extensive experience in wage and hour class action litigation. *See*
20 *Moen Decl.*, ¶¶ 2-7; *Haines Decl.*, ¶¶ 2-11; *Schmidt Decl.*, ¶¶ 2-9.

21 **C. The Court Should Order Distribution Of The Proposed Class Notice**

22 This Court should order distribution of the proposed Class Notice to the Settlement Class
23 members in English only⁷ by first class mail, postage prepaid, using the last known mailing
24 address information provided by Defendant. This manner of giving notice is the “best notice
25 practicable” under the circumstances because it provides “individual notice to all members who
26 can be identified through reasonable effort.” *See Eisen v. Carlisle and Jacquelin* (1974) 417 U.S.

27 _____
28 ⁷ Based on the nature of Defendants’ business whereby English is necessary in the classroom setting where
Settlement Class members work, no language translations are necessary. *See Settlement*, ¶ 7.

1 156, 173. The Parties propose that the settlement be administered by Phoenix, an experienced
2 class action settlement administrator. *See* Declaration of Jodey Lawrence. Settlement Class
3 members' addresses will be ascertainable through Defendant's personnel records, and Defendant
4 will provide all Settlement Class members' names, last known mailing addresses, phone numbers,
5 social security numbers, and workweek data to Phoenix within fourteen (14) calendar days after
6 of the Court preliminarily approves the Settlement. *See* Settlement, ¶ 10.A. Phoenix will run the
7 Settlement Class members' addresses through the National Change of Address database and/or
8 conduct skip traces⁸ to obtain current address information. *Id.*, ¶ 10.B-C.

9 The content of the proposed Notice Packet satisfies California Rule of Court 3.766(d)
10 because it advises the Settlement Class members of the nature of the claims, basic contentions
11 and denials of the Parties, the key terms of the Settlement, the uniform 60-day deadline to opt-out
12 or object to the Settlement and the procedures by which to do so, explains the recovery formula
13 and expected recovery amount for each Settlement Class member and advises Settlement Class
14 members of the dispute resolution process detailed in the Settlement Agreement, and advises them
15 that they will be bound by the terms of the Settlement if they do not request exclusion. *See* Moen
16 Decl., Exhibit 2. The proposed Notice Packet will also notify the Settlement Class of the Final
17 Approval Hearing date, provide Class Counsel's contact information, provide the URL to a
18 website maintained by the settlement administrator to which the most important documents in the
19 case will be posted (including the operative FAC, the Settlement Agreement, Notice Packet,
20 Preliminary Approval Order, and the Court's Judgment and Final Approval Order, *see* Settlement
21 ¶ 7), provide the URL for the Court's website for persons who wish to review the Court's docket
22 in the case (as well as an explanation for navigating the Court's website to reach the case docket),
23 and advise Settlement Class members that they may enter an appearance through counsel if they
24 so wish. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most
25 reliable and cost-effective method of reaching Settlement Class members. Additionally, because
26

27
28 ⁸ The Settlement Agreement also requires the settlement administrator to conduct skip traces on returned
Notice Packets and also on any returned checks following final disbursement of the Settlement funds. *See*
Settlement, ¶¶ 4.E, 10.C.

1 the proposed Settlement includes settlement of Plaintiff's representative PAGA claim, notice of
2 the Settlement has been submitted to the LWDA. *See id.*, ¶ 49, Exhibit 4 (LWDA Settlement
3 Submission); Proof of Service.

4 **D. The Court Should Set A Final Approval Hearing**

5 Finally, this Court should set a hearing for final approval of the Settlement on a date
6 appropriately scheduled to follow the deadline by which Settlement Class members must file
7 objections to the Settlement or opt-out. *See* California Rule of Court 3.769; Settlement ¶ 18
8 (confirming the Court's continuing jurisdiction pursuant to CRC Rule 3.769(h) and CCP § 664.6).

9 **V. CONCLUSION**

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

13
14 Dated: June 12, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

15
16 By: 
17 Matthew K. Moen
18 Attorneys for Plaintiff
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