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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

LEONEL LUNA, as an individual and on behalf
of all others similarly situated,

Plaintiff,

vs.

DEMCON CONCRETE CONTRACTORS,
INC., a California corporation; D AND D
CONCRETE CONSTRUCTION, INC., a
California corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No. 37-2023-00004126-CU-OE-CTL

*[Assigned for all purposes to Hon. Carolyn Caietti,
Dept. C-70]*

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

Date: April 26, 2024
Time: 10:30 a.m.
Dept.: C-70

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

2 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on April
3 26, 2024 at 10:30 a.m. in Department C-70 of the above-entitled Court, located at 330 West Broadway,
4 San Diego, CA 92101, Plaintiff Leonel Luna (“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 class settlement of this lawsuit;
7 2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification
8 of the following Settlement Class defined as follows:

9 All current and former non-exempt, hourly employees of Defendants Demcon
10 Concrete Contractors, Inc. and D and D Concrete Construction, Inc. who worked
11 at any time in California during the Class Period. For purposes of the Settlement,
12 the “Class Period” shall mean the time period of January 30, 2019 through
December 17, 2023.

- 13 3. Preliminary appointment of Plaintiff Leonel Luna as Class Representative;
14 4. Preliminary appointment of Scott M. Lidman, Elizabeth Nguyen, and Milan Moore of
15 Lidman Law, APC and Paul K. Haines of Haines Law Group, APC as Class Counsel;
16 5. The scheduling of a hearing to consider whether the Settlement should be finally approved
17 and to permit a service award to Plaintiff, Settlement Administration costs, civil penalties
18 payable to the California Labor Workforce Development Agency, and attorneys’ fees and
19 costs to Class Counsel;
20 6. Appointment of Phoenix Settlement Administrators as the third-party Settlement
21 Administrator for mailing notices; and
22 7. Approval of the proposed Notice of Pendency of Class Action and Proposed Settlement and
23 an order that it be disseminated to the proposed Settlement Class Members as provided in
24 the Settlement Agreement.

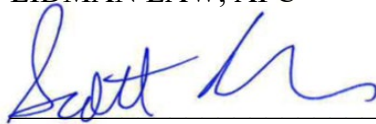
25 This Motion is based on this notice of motion, the memorandum of points and authorities, the
26 declarations of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, Paul K. Haines, Plaintiff Leonel
27 Luna, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached thereto, the
28

1 pleadings and other papers filed in this action, and on any further oral or documentary evidence or
2 argument presented at the time of hearing.

3
4 Dated: November 27, 2023

Respectfully submitted,
LIDMAN LAW, APC

5
6 By:



Scott M. Lidman
Attorney for Plaintiff
LEONEL LUNA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Leonel Luna (“Plaintiff”) brought this class and representative action against Defendants
4 Demcon Concrete Contractors, Inc. and D and D Concrete Construction, Inc. (hereinafter “Defendants”)
5 alleging that Defendants: (1) failed to pay all overtime wages owed; (2) failed to pay all minimum wages
6 owed; (3) failed to provide all legally required meal periods; (4) failed to authorize and permit all legally
7 required rest periods; (5) failed to provide accurate, itemized wage statements; (6) failed to indemnify all
8 necessary business expenses; (7) failed to pay all wages upon termination; (8) engaged in unlawful
9 business practices; and (9) is liable for civil penalties under the Labor Code Private Attorneys General
10 Act of 2004 (“PAGA”).

11 Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary,
12 class action settlement,¹ in which Defendants have agreed to pay One Million One Hundred Thousand
13 Dollars and Zero Cents (\$1,100,000.00) on behalf of the following Settlement Class:

14 All current and former non-exempt, hourly employees of Defendants Demcon
15 Concrete Contractors, Inc. and D and D Concrete Construction, Inc. who worked
16 at any time in California during the Class Period. For purposes of the Settlement,
the “Class Period” shall mean the time period of January 30, 2019 through
December 17, 2023.

17 Significantly, Settlement Class members do not need to file a claim to benefit from the Settlement
18 because all Settlement Class members will automatically receive a payment unless they affirmatively opt-
19 out. After deducting administration costs, Plaintiff’s service award, attorneys’ fees and costs, employer’s
20 side of payroll taxes, and payment of PAGA civil penalties payable to the LWDA, the remaining Net
21 Settlement Amount (“NSA”) of approximately \$650,833.33 will be distributed to all Settlement Class
22 members who do not opt-out of the Settlement. There are approximately 440 Settlement Class members,
23 rendering the average payment to participating Settlement Class members to be approximately **\$1,479.17**.

24 The Settlement was reached only after the parties mediated the action with Michael Ludwig, a
25 well-respected wage and hour class action mediator, and also included Defendants’ production of various
26

27 ¹ The Stipulation of Settlement (“Settlement”) is attached to the Declaration of Scott M. Lidman as Exhibit 1. The proposed
28 Notice of Pendency of Class Action and Proposed Settlement is attached to the Settlement as Exhibit A. All defined terms in
this motion have the same definitions as used in the Settlement.

documents and information concerning its financial condition, including tax returns and supporting schedules. This proposed Settlement is well-within the range of possible approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, Defendants' financial condition and ability to pay a class-wide settlement.

II. SUMMARY OF THE LITIGATION

A. THE PARTIES, PROCEDURAL HISTORY, DISCOVERY, AND ARMS-LENGTH NEGOTIATIONS

1. The Parties

Defendants manufacture concrete and pour, build, and design concrete structures. *See* Declaration of Scott M. Lidman ("Lidman Decl."), ¶ 10. Plaintiff, a former non-exempt employee, was employed by Defendants from approximately 1997 through approximately July 7, 2022. *See* Declaration of Leonel Luna ("Luna Decl."), ¶ 2. During his employment, Plaintiff poured concrete at the various locations of Defendants' customers. *Id.*

2. Procedural History

On January 30, 2023, Plaintiff filed a putative class action complaint against Defendants in San Diego County Superior Court. Lidman Decl., ¶ 10. On April 6, 2023, Plaintiff filed a First Amended Class and Representative Action Complaint adding a cause of action for civil penalties under the Labor Code Private Attorneys General Act ("PAGA").

3. Discovery

After agreeing to participate in an early mediation, Defendants informally produced a sampling of timekeeping and payroll data for the putative class, as well as relevant data points, including without limitation, the number of workweeks and pay periods at issue and total class size. Lidman Decl., ¶ 11. Defendants also confirmed that they did not maintain any written wage and hour policies and practices during the relevant time period. After the detailed review of the time and payroll records produced by Defendants, Class Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff's claims and Defendants' defenses thereto, if a settlement could not be reached.

4. Arms-Length Negotiations

On September 28, 2023, after extensive research and analysis, mediation was held with Michael

1 Ludwig, a well-respected wage and hour class action mediator. Lidman Decl., ¶ 12. During mediation,
2 the parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's
3 claims, the legal basis for the claims and defenses, and Defendants' financial condition and ability to pay
4 a class-wide settlement. *Id.* Ultimately, the Parties were able to reach a class-wide settlement at
5 mediation. *Id.*

6 **III. ARGUMENT**

7 **A. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES**

8 California Rule of Court 3.769 conditions settlement of a class action on court approval, which is
9 generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of Civil
10 Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322 requires trial court to
11 determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler*
12 *Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 requires the trial court to determine "whether a proposed
13 settlement is fundamentally fair, adequate, and reasonable"). As further explained below, the Settlement
14 Class satisfies the criteria for certification of a settlement class under California law because: (1) the
15 Settlement Class is so numerous that joinder would be impractical; (2) common questions of law and fact
16 predominate over individual questions such that class certification is the most efficient and desirable way
17 to maintain this litigation; (3) Plaintiff's claims are typical of the claims of absent Settlement Class
18 members; and (4) Plaintiff and his counsel will fairly and adequately represent Settlement Class members'
19 interest. *See* Cal. Civ. Proc. § 382.

20 **1. Numerosity is Satisfied.**

21 Here, the proposed Settlement Class consists of approximately 440 members, and is therefore
22 sufficiently numerous as to make joinder impracticable. *See* Lidman Decl., ¶ 15; *See, e.g., Bowles v. Sup.*
23 *Ct.* (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently numerous).
24 Thus, numerosity is satisfied. Further, a class is "ascertainable" where the members "may be readily
25 identified without unreasonable expense or time by reference to official [or business] records." *See*
26 *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed
27 Settlement Class is defined as "current and former non-exempt, hourly employees of Defendants Demcon
28 Concrete Contractors, Inc. and D and D Concrete Construction, Inc. who worked at any time in California

1 during the Class Period. For purposes of the Settlement, the “Class Period” shall mean the time period of
2 January 30, 2019 through December 17, 2023.” Lidman Decl., ¶ 14.

3 **2. Commonality is Satisfied.**

4 The focus in a certification dispute is not the merits, but rather on what types of questions,
5 “common or individual,” are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior Court*
6 *(Rocher)* (2004) 34 Cal.4th 319, 327. Here, Settlement Class members’ claims arise from Defendants’
7 common, uniform policies and practices that applied to Settlement Class members during the class period.
8 Lidman Decl., ¶ 16. Specifically, Plaintiff alleged that Defendants’ common and uniform policies and
9 practices resulted in the following violations: (1) failure to pay all overtime wages owed; (2) failure to
10 pay all minimum wages owed; (3) failure to provide all legally required meal periods; (4) failure to
11 authorize and permit all legally required rest periods; (5) failure to provide accurate, itemized wage
12 statements; (6) failure to indemnify all necessary business expenses; (7) failure to pay all wages upon
13 termination; (8) unlawful business practices; and (9) liability for civil penalties under the PAGA. As a
14 result of the common and uniform policies and practices that applied to all Settlement Class members,
15 their claims involve common questions of law and fact, including but not limited to:

- 16 1. Whether Defendants properly paid all minimum wages owed;
- 17 2. Whether Defendants properly paid all overtime wages owed;
- 18 3. Whether Defendants provided all legally compliant meal periods;
- 19 4. Whether Defendants authorized and permitted all legally required rest periods;
- 20 5. Whether Defendants failed to furnish accurate, itemized wage statements;
- 21 6. Whether Defendants indemnified non-exempt employees of all necessary business
22 expenses;
- 23 7. Whether Defendants paid all wages upon separation of employment; and
- 24 8. Whether Defendants’ conduct constituted unlawful and/or unfair business practices.

25 These alleged practices result in common questions as to the affected Settlement Class members.
26 *See e.g., Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726.

27 **3. Typicality is Satisfied.**

28 The typicality requirement is satisfied where class representatives have claims that are typical of
those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341,

1 1347 (finding typicality satisfied where named Plaintiff purchased the same goods as the putative class
2 in a consumer class action).

3 Here, Plaintiff's claims are typical of those held by the members of the proposed Settlement Class.
4 First, Plaintiff was employed by Defendants during the Class Period as a non-exempt employee and was
5 subject to Defendants' wage and hour policies at issue in this case. *See* Luna Decl., ¶ 2. Second, Plaintiff
6 was allegedly injured by the same challenged policies that allegedly injured the Settlement Class as a
7 whole. For example, Plaintiff asserts that he was not paid for all minimum and overtime hours worked,
8 was not provided all meal periods, was not authorized and permitted all rest periods, received inaccurate
9 itemized wage statements, similar to those received by the Settlement Class members, was not reimbursed
10 for all necessary business expenses, and was not paid all wages upon his separation of employment with
11 Defendants. *Id.* Given that Defendants' policies and practices applied to all non-exempt employees,
12 Settlement Class members possess a similar interest and have suffered similar alleged injuries as Plaintiff.
Accordingly, typicality is satisfied.

13 **4. Adequacy is Satisfied.**

14 The adequacy requirement examines conflicts of interest between named parties and the class(es)
15 they seek to represent. *Capital People First v. State Dept. of Developmental Services* 155 (2007)
16 Cal.App.4th 676, 697. Here, there are no apparent conflicts of interest between Plaintiff and the
17 Settlement Class he seeks to represent. Indeed, Plaintiff's interests are aligned with those of the Settlement
18 Class members, as they all seek monetary relief under the same facts and legal theories. Additionally,
19 Class Counsel does not have any conflict of interest with the Settlement Class. *See McGhee v. Bank of*
20 *America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class
21 Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed
22 class).

23 Further, Class Counsel also have extensive experience in wage and hour class action litigation and
24 have vigorously litigated this case. *See* Lidman Decl., ¶¶2-8; Declaration of Elizabeth Nguyen ("Nguyen
25 Decl."), ¶¶ 2-8; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; Declaration of Milan Moore
26 ("Moore Decl."), ¶¶ 2-4.

1 **B. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
2 **PROPOSED CLASS ACTION SETTLEMENT BECAUSE IT IS FAIR,**
3 **ADEQUATE, AND REASONABLE**

4 Settlement is the preferred means of dispute resolution, particularly in complex class action
5 litigation. *See In re Syncor ERISA Litig.* (9th Cir. 2008) 516 F.3d 1095, 1101. The Court’s role in
6 evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. *See*
7 *e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the
8 Settlement agreement was negotiated at arm’s-length by class counsel and with the assistance of an
9 experienced wage and hour class action mediator and additional months of direct settlement negotiations.
10 *See e.g. Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

11 **1. The Preliminary Approval Standard is Met**

12 To make a fairness determination, the Court should consider several factors, including: “the
13 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk
14 of maintaining class action status through trial, the amount offered in settlement, the extent of discovery
15 completed and the stage of the proceedings, [and] the experience and views of counsel.” *Dunk v. Ford*
16 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and the court is free to
17 engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba*
18 *v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 230, 245. As discussed below, the proposed Settlement
19 is fair, adequate, and reasonable in light of the balance of factors in this case.

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

21 Although Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges that there were
22 substantial risks and uncertainty in proceeding with litigation, especially in light of Defendant’s financial
23 condition. As described below, Defendants presented multiple defenses to Plaintiff’s claims, both on the
24 merits and class certification. Thus, while Plaintiff was prepared to litigate these claims through
25 certification, and ultimately trial, success was far from certain.

26 **b. Risk, Expenses, Complexity, and Duration of Further Litigation**

27 Although the parties engaged in informal discovery throughout this action, the parties still had
28 significant discovery to complete in formal litigation had the matter not settled. *Lidman Decl.*, ¶ 36.
 Moreover, Plaintiff still had to file for class certification, and faced the prospect of appeals in the wake of
 a disputed class certification ruling for Plaintiff and/or an adverse summary judgment ruling. *Id.* Even if

the classes sought to be certified by Plaintiff were in fact certified, 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. Thus, this factor supports preliminary approval.

c. Risk of Maintaining Class Action Status

Plaintiff had not yet filed his motion for class certification and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk that there would not be a certified class at the time of trial.

d. Overview of the Settlement Agreement

If the Court approves this Settlement, Defendants will pay a Gross Settlement Amount ("GSA") of \$1,100,00.00. Lidman Decl., ¶¶ 13, Exh. 1 (Settlement, ¶ 4). Significantly, this Settlement is **non-reversionary**, and no Settlement Class member will have to submit a claim form to receive a Settlement Award. *Id.* (Settlement at ¶ 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 ("GSA"):	\$1,100,000.00
Minus Court-approved attorneys' fees (1/3 of GSA):	\$366,666.67
Minus Court-approved, verified costs (up to \$25,000.00):	\$25,000.00
Minus Court-approved Class Representative Service Award:	\$10,000.00
Minus Settlement Administration Costs:	\$10,000.00
Minus PAGA payment to the LWDA:	\$37,500.00
Net Settlement Amount ("NSA"):	\$650,833.33

The Gross Settlement Amount (and employer-side taxes separate from the Gross Settlement Amount) shall be deposited by Defendants into a qualified settlement fund set up by the Settlement Administrator for the benefit of participating Settlement Class Members. Defendants shall fund the Gross Settlement Payment within the latter of: (i) eighteen (18) months after the Parties execute this Agreement; or (ii) thirty (30) days after the Effective Date." *See* Settlement, ¶ 4.B.²

² This Settlement shall become effective on the "Effective Date" which is defined as the latter of: (a) the Court's final approval of the settlement if no objections by or on behalf of Class Members have been filed; (b) the time for appeal has expired if an objection has been filed and no appeal has been filed or withdrawn; or (c) the final resolution of any appeal that has been filed. *See* Settlement, ¶ 4.C.

1 After deducting amounts for the Court-approved attorneys' fees and verified costs, Service Award
2 to Plaintiff, Settlement Administrator costs, and the PAGA payment to the LWDA, the Settlement requires
3 Defendants to pay a Net Settlement Amount ("NSA") of at least \$650,833.33 to all Settlement Class
4 members who do not timely opt out. Lidman Decl., ¶ 13, Exh. 2.

5 According to Defendants there are approximately 440 total Settlement Class members. Lidman
6 Decl., ¶ 14. Each Settlement Class members will be based on the following formula:

7 The Net Settlement Amount, not including the PAGA Amount payable to PAGA Employees, shall
8 be allocated to Settlement Class Members who worked during the Class Period, as follows: each
9 participating Settlement Class member shall receive a proportionate settlement share based upon the
10 number of Actual Workweeks worked during the Class Period, the numerator of which is the Settlement
11 Class member's total Actual Workweeks worked during the Class Period, and the denominator of which
12 is the total Actual Workweeks worked by all Settlement Class Members who worked during the Class
13 Period. Settlement, ¶ 6.B.

14 Thus, the average Individual Settlement Award (assuming all Settlement Class members worked
15 the same length of time) is projected to be approximately **\$1,479.17**. Lidman Decl., ¶ 14. Those
16 Settlement Class members who do not opt-out of the Settlement will be bound by its terms and will release
17 all claims against Defendants included within the Settlement, for the period of January 30, 2019 through
18 December 17, 2023. See Settlement, ¶ 3.B.

19 Additionally, Twelve Thousand Five Hundred Dollars and Zero Cents
20 (\$12,500.00) of the Gross Settlement Amount has been designated as the "PAGA Amount". Each
21 participating Settlement Class member who was employed by Defendants at any time during the PAGA
22 Period shall receive a portion of the PAGA Amount proportionate to the number of any periods that he or
23 she worked during the PAGA Period, and which will be calculated by multiplying the PAGA Amount by
24 a fraction, the numerator of which is the PAGA Employee's number of pay periods worked during this
25 time period, and the denominator of which is the total number of pay periods worked by all PAGA
26 Employees during the PAGA Period.

27 According to Defendants there are approximately 123 total PAGA Employees. Lidman Decl., ¶
28 14. Thus, the average PAGA payment is projected to be approximately **\$101.63**. Lidman Decl., ¶ 14.

1 **e. The Parties Engaged in Fair and Honest Negotiations.**

2 This Settlement was a result of serious, informed, non-collusive negotiations with the assistance
3 of a mediator. In connection with mediation, Defendants produced a sampling of timekeeping and payroll
4 data. Plaintiff conducted an analysis of the timekeeping and payroll data produced by Defendants, from
5 which Class Counsel analyzed the potential exposure for Plaintiff's claims. After the detailed review of
6 the timekeeping and payroll records produced by Defendants, Class Counsel drew on their extensive
7 experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. *Id.* This discovery
8 allowed the Parties to assess the merits and value of Plaintiff's claims and Defendants' defenses thereto,
9 if a settlement could not be reached. *Id.* On September 28, 2023, the Parties participated in full-day
10 mediation with Michael Ludwig, a respected wage and hour class action mediator. Lidman Decl., ¶¶ 11-
11 12. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of
12 certification of Plaintiff's claims, Defendants' financial condition, as well as the legal basis for the claims
13 and defenses. The Parties ultimately agreed in principle on a class-wide resolution. Lidman Decl., ¶ 13,
14 Exhibit 2.

15 Thus, the proposed Settlement is entitled to an initial presumption of fairness as it is the result of
16 factual investigation and data analysis; the exchange of substantial information and class data, including
17 timekeeping and payroll records; arm's length negotiations by counsel; and mediation before an
18 experienced wage and hour class action mediator. *See* Lidman Decl., ¶¶ 10-12; *See Kullar, supra*, 168
19 Cal.App.4th at 130. The Parties attended mediation, then worked collaboratively in the following weeks
20 to finalize the Settlement. *Id.* Thus, this factor supports preliminary approval. Further, there are no
21 deficiencies in the Settlement. The Settlement does not grant preferential treatment to the class
22 representative or segments of the class and is within the range of possible approval, as discussed in detail
23 below. The Settlement will provide monetary relief to Settlement Class members. The amounts proposed
24 for Class Counsel's attorneys' fees and costs, and service awards are all reasonable and appropriate based
25 on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this factor supports
26 preliminary approval.

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

28 The Settlement provides a fair and reasonable monetary recovery for the Settlement Class in the
face of disputed claims. Plaintiff's analysis of the maximum and realistic expected recoveries for each of

1 the theories of liability pled is set forth below:

2 Unpaid Wages Claim: Plaintiff alleges that he and Settlement Class members were not fully
3 compensated for all of their time worked. Lidman Decl., ¶ 17. Specifically, Plaintiff alleges Defendants
4 would keep track of his hours and the hours of the other non-exempt employees, and would unlawfully
5 shave their work time and/or round their work time such that they would not be fully paid for all time
6 worked. *Id.* Plaintiff also alleges that this time shaving and/or rounding practice utilized by Defendants
7 was not-even handed over time and would almost exclusively round and shave in Defendants' favor such
8 that the employees were routinely underpaid for their time worked. *Id.* Plaintiff estimates he and other
9 non-exempt employees were underpaid approximately 1.0 hours per workweek as a result of Defendants'
10 timekeeping policies and practices. *Id.* Accordingly, Plaintiff calculated Defendants' maximum exposure
11 for unpaid wages at \$536,096 (21,648 workweeks x 1 hour underpaid/week x 13.90 average minimum
12 wage = \$268,048 + Liquidated Damages of \$268,048). *Id.*

13 Defendants contend that they compensated Settlement Class members for all of their time worked
14 and. Lidman Decl., ¶ 18. Defendants also contend that their rounding practices were lawful, and any
15 unpaid time was *de minimis* and therefore non-compensable. *Id.* Defendants further assert that Plaintiff
16 would be unable to certify this class given the individualized inquiries that would be required, and also
17 that Defendants rounding mechanism was, according to it, allegedly facially neutral. Lidman Decl., ¶ 18.
18 In light of these defenses, Plaintiff discounted the maximum exposure by 35% for the risk of non-
19 certification, and an additional 40% to account for Defendants' defenses on the merits, to arrive at an
20 estimated exposure of \$209,077.44. *Id.*

21 Meal Period Claim: Plaintiff alleges that he and Settlement Class members were not provided with
22 all legally-required off-duty first meal periods beginning before the end of the fifth hour of work. Lidman
23 Decl., ¶ 19. Specifically, Plaintiff alleges Defendants had a policy and practice of not keeping track of
24 Plaintiff's actual time worked. *Id.* Plaintiff also alleges that Defendants failed to maintain any written meal
25 period policy and failed to pay any meal period premiums during the relevant time period. Further, due to
26 his job duties, Plaintiff alleges he was often prevented from taking meal periods that commenced before
27 the end of the 5th hour of work and/or which were at least 30 minutes in length. *Id.* Moreover, from the
28 records produced by Defendants, Defendants required their leads/foremen to record first meal periods of
exactly 30-minutes in duration occurring four hours into their shifts into their time sheets even when a

1 timely meal period was not always provided. *Id.* Accordingly, Plaintiff estimates there was at least one
2 meal period violation during every shift over 6 hours during the relevant time period. *Id.* Therefore,
3 Plaintiff calculated Defendants' maximum exposure for the alleged meal period violations at
4 approximately \$3,752,683 (19,824 workweeks x 5 meal period violations/week x \$37.86 average hourly
5 rate). *Id.*

6 Defendants counter that they have always provided non-exempt employees with an opportunity to
7 take legally compliant meal periods, and any non-compliant meal periods reflected in employee
8 timekeeping records, if any, were solely the result of employee choice, rather than any policy or practice
9 of Defendant. Lidman Decl., ¶ 20. Defendants point out that under *Brinker Restaurant Corp. v. Superior*
10 *Court* (2012) 53 Cal. 4th 1004, they are only required to "provide" the opportunity to take meal periods,
11 not "ensure" meal periods are taken, and that they have always done so. *Brinker, supra*, 53 Cal.4th at 1038
12 (rejecting "ensure" standard). Finally, Defendants contend that Plaintiff's meal period claim is not suited
13 for class certification since individual inquiries would be required to assess which employees took non-
14 compliant meal periods, how many meal periods were non-compliant or missed, and the reasons why a
15 particular employee took a non-compliant meal period or missed a meal period during a particular shift.
16 Lidman Decl., ¶ 20. Accordingly, Plaintiff discounted the maximum exposure by 45% for the risk of non-
17 certification, and an additional 55% to account for Defendants' defenses on the merits to arrive at an
18 estimated exposure of \$928,789.04. *Id.*

19 Rest Period Claim: Plaintiff alleges that he and Settlement Class members were also not authorized
20 and permitted to take all required rest periods due to Defendants' rest period policies and practices that fail
21 to authorize and permit all rest periods for every four hours worked, *or major fraction thereof*. Lidman
22 Decl., ¶ 21. Specifically, Plaintiff alleges that as a result of the work demands imposed by Defendants, he
23 was prevented from taking his rest periods. *Id.* Further, Defendants failed to maintain any written rest
24 period policy and failed to pay any rest period premiums during the relevant time period. *Id.* From the
25 records produced by Defendants, 100% of the shifts worked were in excess of 3.5 hours. *Id.* Accordingly,
26 Plaintiff calculated Defendants' maximum exposure for rest period violations at \$3,752,683 (19,824
27 workweeks x 5 meal period violations/week x \$37.86 average hourly rate). *Id.*

28 Defendants contend they have always maintained and enforced lawful rest period policies and
practices, and that Settlement Class Members were authorized and permitted to take all off-duty rest

1 periods in compliance with California law. Lidman Decl., ¶ 22. Defendants argue that Plaintiff's rest
2 period claim is inherently unsuited for class treatment because the claim requires an individualized inquiry
3 into whether each Settlement Class Member was in fact authorized and permitted to take a compliant rest
4 period, which would devolve into an unmanageable series of mini-trials. *Id.* Accordingly, Plaintiff
5 discounted the maximum exposure by 55% for the risk of non-certification, and an additional 45% to
6 account for Defendants' defenses on the merits to arrive at an estimated exposure of \$928,789.04. *Id.*

7 Unreimbursed Business Expenses Claim: Plaintiff alleges that failed to reimburse him and
8 Settlement Class members for necessary business expenditures, including the use of their personal cellular
9 phone for work activities, as required under Labor Code section 2802 and by *Cochran v. Schwan's Home*
10 *Service, Inc.* (2014) 228 Cal.App.4th 1137. Lidman Decl., ¶ 23. Plaintiff contends that Defendants
11 required Plaintiff to use his personal cellular phone to communicate with supervisors and customers. *Id.*
12 Plaintiff estimates that, on average, Settlement Class members should have been reimbursed
13 approximately \$30 per month. *Id.* Accordingly, Plaintiff calculates Defendants' maximum exposure for
14 this claim at approximately \$739,200 (440 employees x 56 months x \$30/month). *Id.*

15 Defendants contend that they provided employees did not have to use their personal cellular
16 phones and would only do so at their own volition. Lidman Decl., ¶ 24. Defendants also argue that this
17 claim is not suitable for class treatment because it would require individualized determinations as to
18 whether each employee used a personal cellular phone, how often, and how much of that use was a
19 reasonable percentage of their individual monthly expenses. *Id.* Accordingly, Plaintiff discounted the
20 maximum exposure by 50% for the risk of non-certification, and an additional 55% to account for
21 Defendants' defenses on the merits, to arrive at an estimated exposure of \$166,320. *Id.*

22 Wage Statements Claim: Plaintiff further alleges that Defendants issued inaccurate wage
23 statements in violation of Labor Code section 226 as a result of the alleged unpaid wages and meal and
24 rest period premium wages described above. Lidman Decl., ¶ 25. Specifically, Plaintiff contends that this
25 conduct violated Labor Code section 226(a) because the wage statements issued to Settlement Class
26 Members did not include all hours worked and the rate at which they were being paid. *Id.* Plaintiff's data
27 analysis reflected that there were approximately 8,647 wage statements issued during the relevant time
28 period. *Id.* Therefore, Plaintiff calculated Defendants' maximum exposure for wage statement violations

1 at approximately \$842,700 (\$50 initial violation rate x 440) + (\$100 subsequent violation rate x 8,207).
2 *Id.*

3 Defendants argue that their alleged wage statement violations could not be shown to be “knowing
4 and intentional,” and that Plaintiff cannot show that he or any other employee “suffer[ed] injury” as a result
5 of the alleged wage statement violations, as required by Lab. Code § 226(e) for imposition of penalties.
6 Lidman Decl., ¶ 26. As such, Plaintiff discounted the calculated exposure by 60% for a risk of non-
7 certification and an additional 40% for a risk of being unsuccessful on the merits, to arrive at an estimated
8 total of \$202,248.00. *Id.*

9 Waiting Time Penalties: Plaintiff alleges that Defendants are also liable for waiting time penalties
10 under Labor Code section 203 as a result of its failure to pay all wages. Lidman Decl., ¶ 27. Based on the
11 data provided by Defendants, there were approximately 348 Settlement Class members who have separated
12 their employment with Defendants during the relevant time period who could be entitled to waiting time
13 penalties. *Id.* Therefore, Plaintiff calculated Defendants’ maximum exposure for waiting time penalties
14 at approximately \$3,162,067 (\$37.86 average hourly rate x 8 hours x 30 days x 348 formers). *Id.*

15 Defendants assert they have strong defenses to the waiting time claim because there exist good-
16 faith disputes as to Plaintiff’s underlying claims, precluding imposition of penalties. Lidman Decl., ¶ 28.
17 *See also* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition
18 of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that “good faith
19 dispute” over whether employee was exempt precluded imposition of waiting time penalties over contested
20 wages owed). Accordingly, Plaintiff discounted the maximum exposure by 40% for the risk of non-
21 certification, and an additional 55% to account for Defendants’ defenses on the merits, to arrive at an
22 estimated exposure of \$853,758.09. *Id.*

23 PAGA Civil Penalties: Plaintiff also seeks civil penalties under the PAGA as a result of the
24 foregoing alleged Labor Code violations. Lidman Decl., ¶ 29. Plaintiff calculated Defendants’ maximum
25 exposure at \$864,700 (8,647 pay periods x \$100 initial violation rate). *Id.*; *see Amaral v. Cintas Corp. No.*
26 *2* (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate applies until employer is notified that
27 it is violating a Labor Code provision).

28 Defendants argue that Plaintiff’s PAGA claim will fail for the same reasons that his underlying
claims will fail. Lidman Decl., ¶ 30; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147

1 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
2 Defendants also maintain that, given their good faith defenses and their financial condition, this Court
3 would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendants
4 liable for any of Plaintiff’s claims. *See* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.*
5 (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*
6 (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA
7 penalties from \$2.8 million to \$500,000). *Id.* Therefore, Plaintiff discounted the maximum exposure
8 figure by 50% for a risk of being unsuccessful on the merits, and an additional 55% to account for the
9 possibility of this Court reducing penalties, to arrive at an estimated exposure of \$194,557.50. *Id.*

10 **g. The Settlement Is Within the Range of Possible Approval**

11 Using these estimated figures for each of the claims described above, Plaintiff predicted the
12 realistic total recovery for the Settlement Class would be approximately \$3,483,539.12. Lidman Decl., ¶
13 31. The proposed settlement of \$1,100,000.00 therefore represents approximately 32% of the reasonably
14 forecasted recovery for the Settlement Class. *Id.* Further, in light of Defendants’ financial condition,
15 Class Counsel believed that this is a fair settlement, including allowing for the settlement to be funded 18
16 months from the execution of the Settlement Agreement, which will be in April 2025. Preliminary
17 approval is appropriate as the settlement will provide tangible monetary relief to Settlement Class
18 members, and will still provide an average recovery to Settlement Class members of nearly \$1,500.00
19 which is good result.

20 The proposed settlement reflects approximately 32% of the estimated recovery the Settlement
21 Class could reasonably expect in light of the significant litigation risks, and will provide tangible
22 monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure
23 recovered in this case exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan.*
24 *Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement
25 representing 25% to 35% of potential damages).³ Thus, Plaintiff submits that the proposed settlement is
26 within the range of possible approval, such that notice should be provided to the Settlement Class so that

27 ³ *See also Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of potential
28 recovery); *Nat’l Rural Telecomm. Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (settlement may be acceptable
even though it amounts to only a fraction of the potential recovery).

1 they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness
2 of the Settlement after the Settlement Class has had the opportunity to opt-out or object.

3 **h. The Experience and Views of Counsel**

4 “Parties represented by competent counsel are better positioned than courts to produce a
5 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises*
6 *Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent,
7 experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class
8 actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See*
9 *Lidman Decl.*, ¶¶ 2-8; *Nguyen Decl.*, ¶¶ 2-8; *Haines Decl.*, ¶¶ 2-8. The Settlement was also reached with
10 the assistance of an experienced and respected wage and hour class action mediator. *Id.* This factor
11 strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

12 **i. Attorneys’ Fees and Costs**

13 California courts recognize an appropriate method for awarding attorneys’ fees in class actions is
14 to award a percentage of the “common fund” created as a result of a settlement. *See e.g., Laffitte v. Robert*
15 *Half Int’l, Inc.* (2016) 1 Cal.5th 480, 506 (holding “the percentage of fund method survives in California
16 class action cases”). Class Counsel’s request for fees of one-third of the GSA is well within the range of
17 reasonableness, and indeed is considered the typical rate for common fund settlements. Historically,
18 courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the
19 case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

20 Here, Class Counsel will also apply for an attorneys’ fees award of one-third of the GSA, which
21 is currently estimated to be \$366,666.67, and up to \$25,000.00 in verified costs reimbursement. *See*
22 *Settlement*, ¶ 7; *Lidman Decl.*, ¶ 32. Plaintiff submits the requested fee is fair compensation for
23 undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis.
24 *Id.* Further, Plaintiff has provided written approval of the split of attorneys’ fees in this action. *Lidman*
25 *Decl.*, ¶ 33. Class Counsel has incurred substantial attorney fees conducting pre-filing investigation,
26 analyzing Plaintiff’s claims, conducting legal research, analyzing Settlement Class members’ timekeeping
27 data and payroll records, preparing for and attending mediation, reviewing Defendants’ financial records,
28 negotiating and revising the long-form Settlement, preparing this Motion, and otherwise litigating the
case. *Lidman Decl.*, ¶ 32. Class Counsel expect to expend additional attorney time in attending the

1 hearing on this Motion, overseeing the Notice process and fielding questions from Settlement Class
2 members, preparing the final approval papers and attending the Final Approval hearing. *Id.* Class Counsel
3 submits that the request for attorneys’ fees is reasonable when viewed as an overall percentage of the
4 settlement in light of the substantial risks, significant work undertaken, the extremely positive results
5 obtained for the class, and the efficiency with which the Parties conducted the litigation. Should the Court
6 grant preliminary approval, Class Counsel will seek an award of attorneys’ fees and verified litigation
7 costs at the time of seeking final approval of the Settlement, which will include a lodestar analysis.

8 **j. Administration Costs**

9 Phoenix Settlement Administrators’ fees and expenses are estimated not to exceed \$10,000.00.
10 *See* Declaration of Jodey Lawrence in support of Plaintiff’s Motion for Preliminary Approval filed
11 concurrently herewith (“Lawrence Decl.”). This request is reasonable in light of the proposed class size
12 of approximately 440 Settlement Class members and the costs and expenses associated with administering
13 the notices in both English and Spanish and distributing the awards.

14 **k. Class Representative Service Award**

15 “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class
16 representatives for work done on behalf of the class [and] to make up for financial or reputational risk
17 undertaken in bringing the action.” *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380,
18 1393-94. Here, as part of the Settlement, Plaintiff will separately apply for a service award at the time of
19 seeking final approval of the proposed class action settlement in the amount of \$10,000.00 for his services
20 to the Settlement Class. Lidman Decl., ¶ 34; Settlement, ¶ 8; Luna Decl., ¶¶ 3-8. As will be fully briefed
21 at the time of final approval, Plaintiff’s requested service award is intended to recognize the time and
22 effort Plaintiff expended on behalf of the Settlement Class, including providing substantial factual
23 information and documents to Class Counsel, attending multiple meetings with Class Counsel to discuss
24 the claims and theories at issue in the litigation, as well as the significant risks Plaintiff undertook by
25 agreeing to serve as the named plaintiff in this case. *See* Lidman Decl., ¶ 34; Garcia Decl., ¶¶ 3-11;
26 Settlement ¶ 8. Plaintiff also agreed to a general and 1542 release. *Id.*

27 **l. PAGA Penalty**

28 The parties have agreed to a PAGA award of \$50,000.00 and in accordance with California Labor
Code section 2699(i), the LWDA will receive 75% of the amount attributable to PAGA penalties – or

1 \$7,500.00. Settlement ¶ 3.C.5. This \$37,500.00 represents roughly 3.41% of the \$1,100,000.00 Gross
2 Settlement Amount and is in line with the zero to two percent range for PAGA claims approved by Courts.⁴

3 **m. Payroll Taxes**

4 Defendants' payroll taxes shall be paid separately and apart from the Gross Settlement Amount.
5 Settlement ¶ 4.E.

6 **n. Uncashed Funds**

7 The Settlement provides that Settlement Class members with 180 days from the date the
8 Settlement Administrator mails the checks and any funds remaining after 180 days will be delivered to
9 the California State Controller's Office – Unclaimed Property Fund in the name of the Settlement Class
10 member. Settlement ¶ 6.E. As all settlement funds will be distributed to the Settlement Class members,
11 there will be no residue and it is unnecessary to designate *cy pres* recipients.

12 **C. SETTLEMENT IS DEVOID OF OBVIOUS DEFICIENCIES**

13 Preliminary approval of the Settlement is also warranted because there are no obvious deficiencies.
14 The Settlement will provide monetary relief to Participating Settlement Class members. The amounts
15 proposed for Class Counsel's attorneys' fees and costs, and service award are all reasonable and
16 appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this
factor supports preliminary approval.

17 **D. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED NOTICE
18 TO SETTLEMENT CLASS MEMBERS**

19 Before the final approval hearing, the Court requires adequate notice of the settlement be given
20 to all class members. This Court should order distribution to the Settlement Class of the proposed Notice
21 of Pendency of Class Action and Proposed Settlement ("Class Notice") by first-class regular U.S. Mail
22 in English and Spanish, postage prepaid, using last known mailing address information provided by
23 Defendants. *See* Settlement, ¶ 11, Exh. A. This manner of giving notice is the "best notice practicable"
24 under the circumstances because it provides "individual notice to all members who can be identified
25 through reasonable effort." *See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173. Settlement

26 ⁴ *See, e.g., In re M.L. Stern Overtime Litig.*, No. CV 07-0118 BTM (JMAx), 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009)
27 (approving PAGA settlement of 2 percent, or \$20,000); *Hopson v. Hanesbrands, Inc.*, No. CV 08-0844 EDL, 2008 WL
28 3385452, at *1 (S.D. Cal. Apr. 13, 2009) (approving a PAGA settlement of 0.3 percent, or \$1,500); *Nordstrom Comm'n Cases*,
186 Cal. App. 4th 576, 589 (2010) (approving settlement of wage and hour class action claims and PAGA claims under which
no money was allocated to the PAGA claims).

1 Class members' addresses will be ascertainable through Defendants' personnel and payroll records,
2 which Defendants will provide to Phoenix Settlement Administrators ("PSA") within ten (10) days of
3 preliminary approval of the Settlement. *See* Settlement ¶ 11.A. Within ten (10) business days of receipt
4 of the Settlement Class members' addresses, PSA will run the addresses through the United States Postal
5 Service Notice of Change of Address database and mail the notices to Settlement Class members. *See*
6 Settlement ¶ 11.B. To the extent that any notices are returned, PSA will perform a "skip trace" to track
7 any Class Member's current mailing address. *See* Settlement ¶ 11.F.

8 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it
9 advises Settlement Class members of the nature of the claims and the key terms of the Settlement, the
10 60-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the
11 recovery formula and expected recovery amount for each Settlement Class member, provides them the
12 opportunity to contest their total workweeks included in the notice, and advises them that they will be
13 bound by the terms of the Settlement if they do not opt-out. *See* Lidman Decl., Exh. 2 (Settlement, Exh.
14 A). The proposed Class Notice will also notify Settlement Class members of the final approval hearing
15 date and provides Settlement Class members the contact information for Class Counsel. This manner of
16 giving notice satisfies California Rule of Court 3.766(e).

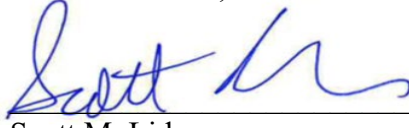
17 **E. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

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

21 **IV. CONCLUSION**

22 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve the
23 proposed Settlement.

24 Dated: November 27, 2023

25 Respectfully submitted,
26 LIDMAN LAW, APC
27 
28 By: Scott M. Lidman
Scott M. Lidman
Attorney for Plaintiff
LEONEL LUNA