

1 Neil M. Larsen (SBN 276490)  
neil@abramsonlabor.com  
2 Eli J. Drummond (SBN 348281)  
eli@abramsonlabor.com  
3 Jennifer Rivera (SBN 353268)  
jennifer.r@abramsonlabor.com  
4 **ABRAMSON LABOR GROUP**  
1700 W. Burbank Blvd.  
5 Burbank, California 91506  
Tel: (213) 493-6300  
6 Fax: (213) 723-2522

7 *Attorneys for Plaintiff*

8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES**

11 ELIAS MARTINEZ, on behalf of himself and  
12 all others similarly situated,

13  
14 Plaintiff,

15 vs.  
16

17 TRC INVESTMENTS, LLC dba SERVPRO, a  
18 limited liability company; and DOES 1 through  
19 100, inclusive,

20 Defendants.  
21

Case No.: 23STCV03176

**CLASS ACTION**

*[Assigned for all purposes to Hon.  
William F. Highberger, Dept. SSC-10]*

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

Date: November 27, 2024  
Time: 10:30 a.m.  
Dept.: SSC-10

Action Filed: February 14, 2023  
Trial Date: None Set

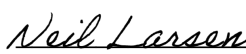
PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on November 27, 2024 at 10:30 a.m., in Department 10 of the above-entitled Court, located at the Spring Street Courthouse, 312 N. Spring Street, Los Angeles, California, 90012, Plaintiff Elias Martinez (“Plaintiff”) will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement (“Settlement”) between Plaintiff and Defendant TRC Investments, LLC dba ServPro (“TRC” or “Defendant”);
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:  
All current and former non-exempt employees who worked for Defendant in California at any time from February 14, 2019 through preliminary approval (the “Class Period”);
3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Abramson Labor Group as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice, and an order that the Class Notice be disseminated to the Settlement Class as provided in the Settlement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award a Class Representative Service Award to Plaintiff, and attorneys’ fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declaration of Neil M. Larsen and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declaration of Plaintiff; the pleadings and other papers filed in this action; and any further oral or documentary evidence or argument presented at the time of hearing.

Dated: November 4, 2024

Respectfully Submitted,  
ABRAMSON LABOR GROUP

  
Neil M. Larsen  
Attorneys for Plaintiff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

|                                                                           |    |
|---------------------------------------------------------------------------|----|
| I. INTRODUCTION .....                                                     | 1  |
| II. SUMMARY OF THE LITIGATION .....                                       | 2  |
| A. FACTUAL AND PROCEDURAL BACKGROUND.....                                 | 2  |
| B. PLAINTIFF’S CLAIMS AND DEFENDAT’S DEFENSES .....                       | 2  |
| 1. Claim for Underpaid Overtime Based on Regular Rate Miscalculation..... | 2  |
| 2. Meal Period Claim .....                                                | 3  |
| 3. Rest Period Claim .....                                                | 4  |
| 5. Claim for Failure to Reimburse Business Expenses.....                  | 4  |
| 6. Claims Under Labor Code §§ 203, 226 and the PAGA.....                  | 5  |
| C. DISCOVERY AND MEDIATION.....                                           | 6  |
| III. THE PROPOSED SETTLEMENT.....                                         | 7  |
| A. ESSENTIAL TERMS OF THE SETTLEMENT .....                                | 7  |
| 1. The Settlement Provides for Reasonable Monetary Payments.....          | 7  |
| 2. Attorneys’ Fees and Costs, Enhancement Award and PAGA Payment .....    | 8  |
| IV. ARGUMENT.....                                                         | 10 |
| A. PRELIMINARY APPROVAL IS WARRANTED .....                                | 10 |
| 1. Standard for Preliminary Approval.....                                 | 10 |
| a. The Strength of Plaintiff’s Case.....                                  | 10 |
| b. Risk, Expense, Complexity, and Duration of Further Litigation.....     | 11 |
| c. Risk of Maintaining Class Action Status .....                          | 11 |
| d. Amount Offered in Settlement Given Realistic Value of Claims.....      | 11 |
| e. The Experience and Views of Counsel .....                              | 11 |
| 2. The Preliminary Approval Standard Is Met.....                          | 12 |
| a. The Settlement Is Within the Range of Possible Approval .....          | 12 |
| b. The Settlement Resulted from Serious, Informed Negotiations .....      | 12 |
| c. The Settlement Is Devoid of Obvious Deficiencies.....                  | 12 |
| B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS.....                       | 13 |

1           1. The Proposed Class Is Ascertainable and Numerous ..... 13  
2           2. Common Issues of Law and Fact Predominate..... 13  
3           3. The Named Plaintiff’s Claims Are Typical ..... 14  
4           4. Plaintiff and Class Counsel Will Adequately Represent the Class..... 14  
5       C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE ..... 14  
6       D. THE COURT SHOULD SET A FINAL APPROVAL HEARING ..... 15  
7   V. CONCLUSION..... 15

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Federal Cases**

|                                                                         |    |
|-------------------------------------------------------------------------|----|
| <i>Eisen v. Carlisle &amp; Jacquelin</i> , 417 U.S. 156 (1974).....     | 14 |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) .....   | 10 |
| <i>In re Pac. Enter. Sec. Litig.</i> , 47 F.3d 373 (9th Cir. 1995)..... | 11 |
| <i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008) .....  | 10 |

**State Cases**

|                                                                                                 |        |
|-------------------------------------------------------------------------------------------------|--------|
| <i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4th 701 (2013).....            | 13     |
| <i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> , 191 Cal.App.3d 1341 (1987) .....         | 13     |
| <i>Brinker Restaurant Corp. v. Sup. Ct.</i> , 53 Cal.4th 1004 (2012).....                       | 3, 4   |
| <i>Capital People First v. State Dept. of Develop. Svcs.</i> , 155 Cal.App.4th 676 (2007) ..... | 14     |
| <i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018) .....                          | 6      |
| <i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43 (Cal.App. 1 Dist.,2008).....                | 9      |
| <i>Dunk v. Ford Motor Co.</i> 48 Cal.App.4th 1794 (1996) .....                                  | 10     |
| <i>Gattuso v. Hart-Hanks Shoppers, Inc.</i> , 42 Cal.4th 554 (2007) .....                       | 4      |
| <i>Grissom v. Vons Companies, Inc.</i> , 1 Cal.App.4th 52 (1991) .....                          | 4      |
| <i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4th 1380 (2010).....                 | 8      |
| <i>Kao v. Joy Holiday</i> , 12 Cal.App.5th 947 (2017) .....                                     | 5      |
| <i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....                     | 10, 12 |
| <i>Laffitte v. Robert Half Int’l, Inc.</i> , 1 Cal.5th 480 (2016).....                          | 9      |
| <i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal.App.5th 1308 (2018) .....                   | 5      |
| <i>McGhee v. Bank of Am.</i> , 60 Cal.App.3d 442 (1976) .....                                   | 14     |
| <i>Naranjo v. Spectrum Security Svcs., Inc.</i> , 15 Cal.5th 1056 (2024) .....                  | 5      |
| <i>Price v. Starbucks Corp.</i> , 192 Cal.App.4th 1136 (2011).....                              | 5      |
| <i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4th 322 (2012).....                    | 10     |
| <i>Sav-On Drug Store, Inc. v. Sup. Ct.</i> , 34 Cal.4th 319 (2004).....                         | 13     |
| <i>Sevidal v. Target Corp.</i> , 189 Cal.App.4th 905 (2010).....                                | 13     |
| <i>Soto v. Motel 6 Operating, L.P.</i> , 4 Cal.App.5th 385 (2016).....                          | 5      |

|    |                                                                                         |        |
|----|-----------------------------------------------------------------------------------------|--------|
| 1  | <i>Thurman v. Bayshore Transit Management, Inc.</i> , 203 Cal.App.4th 1112 (2012) ..... | 6      |
| 2  | <i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001) .....                | 10     |
| 3  | <b><u>Federal Statutes &amp; Rules</u></b>                                              |        |
| 4  | Fed. R. Civ. Proc. Rule 23 .....                                                        | 10     |
| 5  | <b><u>State Statutes and Rules</u></b>                                                  |        |
| 6  | 8 Cal. Code Regs. § 13520.....                                                          | 5      |
| 7  | Cal. Code Civ. Proc. § 382 .....                                                        | 13     |
| 8  | Cal. Rule of Court 3.766.....                                                           | 14     |
| 9  | Cal. Rule of Court 3.769 .....                                                          | 10, 15 |
| 10 | Cal. Labor Code § 203 .....                                                             | 5, 6   |
| 11 | Cal. Labor Code § 226 .....                                                             | 2, 5   |
| 12 | Cal. Labor Code § 2699 .....                                                            | 5, 9   |
| 13 | Cal. Labor Code § 2802 .....                                                            | 4      |
| 14 | <b><u>Unpublished Cases</u></b>                                                         |        |
| 15 | <i>Carlino v. CHG Medical Staffing, Inc.</i> ,                                          |        |
| 16 | No. 1:17-cv-01323-DAD-JLT, 2019 WL 1005070 (N.D. Cal. Oct. 20, 2019) .....              | 13     |
| 17 | <i>Chu v. Wells Fargo Inv., LLC</i>                                                     |        |
| 18 | No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) .....                       | 9      |
| 19 | <i>Fleming v. Covidien, Inc.</i>                                                        |        |
| 20 | No. ED CV 10-01487 RGK, 2011 WL 7563047 (C.D. Cal. Aug. 12, 2011) .....                 | 6      |
| 21 | <i>Hudson v. Libre Technology, Inc.</i>                                                 |        |
| 22 | No. 3:18-cv-1371-GPC, 2020 WL 2467060 (S.D. Cal. May 13, 2020) .....                    | 9      |
| 23 | <b><u>Other Citations</u></b>                                                           |        |
| 24 | <i>Manual for Complex Litig.</i> , § 30.41 (3rd Ed. 1995) .....                         | 12     |
| 25 | <i>Newberg on Class Actions</i> , §§ 11:24-25 (4th Ed. 2013).....                       | 12     |
| 26 |                                                                                         |        |
| 27 |                                                                                         |        |
| 28 |                                                                                         |        |

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Elias Martinez (“Plaintiff”) seeks preliminary approval of a class action  
4 settlement agreement (“Settlement”) with Defendant TRC Investments, LLC dba ServPro  
5 (“Defendant” or “TRC”) (together with Plaintiff, the “Parties”). The Settlement resolves a class  
6 and representative action pending before this Court (the “Action”), in which Plaintiff alleges that  
7 Defendant failed to include the weighted average of multiple hourly rates of pay when calculating  
8 employees’ regular rate of pay which resulted in underpaid overtime; failed to provide all meal  
9 periods; failed to authorize and permit all rest periods; and failed to reimburse employees for  
10 business expenses. Plaintiff further alleges that as a result of these violations, Defendant failed to  
11 issue accurate itemized wage statements, failed to pay all wages on termination of employment,  
12 engaged in unfair competition, and is liable for civil penalties under the Private Attorneys General  
13 Act (“PAGA”).

14 Plaintiff now respectfully requests that this Court preliminarily approve this non-  
15 reversionary, common-fund class action Settlement,<sup>1</sup> in which Defendant has agreed to pay  
16 \$330,000.00 to the following Settlement Class, which is estimated to consist of approximately  
17 167 individuals:

18 All current and former non-exempt employees who worked for Defendant  
19 in California at any time from February 14, 2019 through preliminary  
approval (the “Class Period”).

20 The Settlement was reached after the parties engaged in mediation with Ann Kotlarski,  
21 Esq., an experienced and respected wage and hour class action mediator. In connection with  
22 mediation, Defendant provided Plaintiff with extensive informal discovery, including an  
23 approximately 33% sampling of timekeeping and payroll records for putative class members  
24 during the Class Period; a detailed Class List that included each employees’ hire date and  
25 termination date (if applicable); relevant written policies; and additional relevant data and  
26 information. After extensive research and investigation, including a detailed analysis of  
27 Defendant potential exposure made with the assistance of an expert data analyst, the mediation

28 \_\_\_\_\_  
<sup>1</sup> The Settlement is attached as Exhibit 1 to the Larsen Declaration. The Class Notice and Notice of  
Estimated Settlement Award are attached as Exhibits A and B, respectively, to the Settlement.

1 session was held with Ms. Kotlarski on January 8, 2024. At the mediation, the Parties reached to  
2 a class-wide settlement in principle. Over the following months, the Parties negotiated the finer  
3 terms of the settlement, ultimately resulting in the Settlement.

4 Notably, Settlement Class members need not submit a claim to receive a payment  
5 (“Settlement Award”). After deductions for proposed administration costs, attorney fees and  
6 costs, Plaintiff’s service award, and the LWDA’s share of PAGA civil penalties, the average  
7 Settlement Award is estimated to be at least **\$913.67**. For the reasons discussed herein, Plaintiff  
8 respectfully requests that the Court grant preliminary approval of the Settlement.

9 **II. SUMMARY OF THE LITIGATION**

10 **A. FACTUAL AND PROCEDURAL BACKGROUND**

11 Defendant is a franchisee that owns and operates ServPro locations in California. *See*  
12 Declaration of Neil M. Larsen (“Larsen Decl.”), ¶ 7. Plaintiff is a former non-exempt employee  
13 who worked for Defendant in California during the Class Period. *Id.*

14 On February 14, 2023, Plaintiff filed this Action, alleging claims for failure to pay  
15 overtime wages at the regular rate of compensation, meal period violations, rest period violations,  
16 failure to reimburse business expenses, waiting time penalties, and unfair business practices.  
17 Larsen Decl., ¶ 8.

18 On April 20, 2023, Plaintiff filed a First Amended Complaint adding a claim for PAGA  
19 civil penalties. *Id.*, ¶ 9.

20 Thereafter, on October 11, 2024, Plaintiff filed the operative Second Amended Complaint  
21 adding a claim for wage statement penalties under Labor Code § 226, after this claim was valued  
22 and negotiated at mediation. *Id.*, ¶ 10.

23 **B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES**

24 **1. Claim for Underpaid Wages Based on Regular Rate Miscalculation**

25 Plaintiff alleges that Defendant miscalculated Plaintiff’s and other employees’ “regular  
26 rate” or pay, which resulted in an underpayment of overtime wages. Larsen Decl., ¶ 11.  
27 Specifically, Plaintiff alleges that during certain pay periods Defendant paid Plaintiff and other  
28 employees a base rate of pay and also a higher rate of pay for prevailing wage projects and/or

1 other specific projects, but when it paid overtime wages, Defendant consistently paid overtime  
2 wages at 1.5 times employees’ base rates of pay and failed to use the weighted average of  
3 employees’ multiple rates of pay when calculating the regular rate of pay. *Id.*; see *Alvarado v.*  
4 *Dart Container Corp. of Calif.*, 4 Cal.5th 542, 544 (2018) (“Not all employees earn at a fixed pay  
5 rate throughout a pay period, and therefore regular rate of pay is a *weighted average* reflecting  
6 work done at varying times, under varying circumstances, and at varying rates.”) (emphasis in  
7 original) (citing to DLSE Enforcement Manual § 49.2.5). Larsen Decl., ¶ 11.

8 Defendant contends that any alleged act or omission was inadvertent, the result of clerical  
9 error, not willful or intentional, in good faith (including, but not limited to, a good faith dispute  
10 concerning the amount of wages due), and/or Defendant had reasonable grounds for believing in  
11 good faith that their conduct did not violate any provision of applicable federal or state law,  
12 including the applicable wage orders. *Id.* Defendant further argues that any overtime under-  
13 payments were *de minimis* and not recoverable. *Id.*

## 14 **2. Meal Period Claim**

15 Plaintiff alleges that he and other employees were often unable to take compliant meal  
16 periods, and therefore took late and/or short meal periods or missed meal periods altogether, as a  
17 result of the workload imposed on them. Larsen Decl., ¶ 12.

18 Defendant argues that it has maintained legally-compliant meal period practices  
19 throughout the Class Period, and that under *Brinker* they are only required to “provide” the  
20 opportunity to take meal periods, not “ensure” they are taken. Larsen Decl., ¶ 12; see *Brinker*  
21 *Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (rejecting “ensure” standard). Defendant further  
22 argue that employees were permitted to take their meal periods at their own discretion, and thus  
23 any failure to take a timely, 30-minute meal period was the result of employee choice rather than  
24 any policy or practice of Defendant. *Id.* Defendant further argue that individualized inquiries  
25 would be required to determine whether individual employees – working on different shifts and  
26 under varying circumstances, and under different managers and supervisors over a 4-year period  
27 – received a non-compliant meal period on each individual shift, and why any meal period was  
28 late, short or missed, thereby precluding certification of this claim. *Id.*

1                                   **3. Rest Period Claim**

2           Plaintiff alleges that Defendant often failed to authorize and permit net 10-minute rest  
3 periods as a result of the workload mentioned above. Larsen Decl., ¶ 13; *Brinker*, 53 Cal.4th at  
4 1028-32 (discussing rest period requirements).

5           Defendant asserts that, in practice, they have always authorized and permitted all required  
6 rest periods to non-exempt employees; that they inform employees of their right to rest periods;  
7 and that any failure to take a rest period is the result of employee choice rather than any practice  
8 of Defendant. *Id.* Defendant further argues that, as with meal periods, this claim is not amenable  
9 to class treatment because individualized inquiries would be required to determine whether  
10 individual employees working varying shifts, working under different managers and supervisors,  
11 and in different time periods during the Class Period, were in fact authorized and permitted to  
12 take rest periods on any given shift, thus precluding class certification. *Id.* These manageability  
13 concerns are particularly present with respect to rest periods, Defendant contends, since rest  
14 periods are not (and need not be) recorded. *Id.*

15                                   **4. Claim for Failure to Reimburse Business Expenses**

16           Plaintiff alleges that Defendant failed to indemnify him and other employees for the use  
17 of their personal cell phones for work purposes. Larsen Decl., ¶ 14. Defendant counters that  
18 employees did not need to use their personal cell phones in connection with their job duties, and  
19 that if they did, there are procedures in place for employees to request reimbursement of work-  
20 related expenses. *Id.* Defendant also contends that employees are provided with any equipment  
21 necessary to perform their job duties. *Id.* Defendant further argues that this claim would not be  
22 certified, as it would require hundreds of individualized inquiries as to whether employees  
23 incurred business-related expenses, whether they were reimbursed, whether Defendant knew (or  
24 reasonably should have known) about the expense, and whether the expense was “necessary”  
25 under the circumstances. *See Gattuso v. Hart-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007)  
26 (“In calculating the reimbursement amount due under section 2802, the employer may consider  
27 not only the actual expenses that the employee incurred, but also whether each of those expenses  
28 was ‘necessary,’ which in turn depends on the reasonableness of the employee’s choices.”);  
*Grissom v. Vons Companies, Inc.*, 1 Cal.App.4th 52, 58 (1991) (under § 2802, “ascertaining what

1 was a necessary expenditure will require an inquiry into what was reasonable under the  
2 circumstances”).

3 **5. Claims Under Lab. Code §§ 203, 226, and the PAGA**

4 As a result of its alleged failure to pay all overtime wages, as well as its failure to provide  
5 all meal and rest periods, Plaintiff asserts that Defendant failed to comply with its final payment  
6 and wage statement obligations, in violation of Cal. Labor Code §§ 201-203 and 226, respectively.  
7 Larsen Decl., ¶ 15. Finally, Plaintiff seeks civil penalties under the PAGA based on the  
8 aforementioned claims. *Id.*

9 Defendant argues that Plaintiff’s derivative claims fail for the same reasons his underlying  
10 claims fail. Defendant further asserts it has strong, good-faith defenses to Plaintiff’s underlying  
11 claims, precluding waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a “good faith dispute  
12 that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*,  
13 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting  
14 time penalties). Defendant further contends that any alleged wage statement violations were not  
15 “knowing and intentional,” particularly given its good-faith defenses; that Plaintiff cannot show  
16 he or other employees “suffer[ed] injury” due to alleged wage statement violations, as required  
17 by Lab. Code § 226(e); and that employee wage statements always accurately reflect amounts  
18 *paid* to employees. Larsen Decl., ¶ 16; *Naranjo v. Spectrum Security Svcs., Inc.*, 15 Cal.5th 1056,  
19 1091 (2024) (holding that an employee’s “good faith” belief that it is not violating Labor Code  
20 Section 226 precludes a finding of a knowing and intentional violation). *see also Maldonado v.*  
21 *Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to  
22 ‘document the *paid wages* to ensure the employee is fully informed regarding the calculation of  
23 those wages.”) (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

24 Finally, Defendant contends Plaintiff’s PAGA claim fails because the underlying claims  
25 fail. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the  
26 underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). Defendant  
27 further maintains that given its strong defenses and its good-faith attempts to comply with the  
28 law, the Court would substantially reduce PAGA penalties even if it were to find in Plaintiff’s  
favor on his underlying claims. Larsen Decl., ¶ 16; *see also* Lab. Code § 2699(e)(2) (authorizing

discretionary reduction in PAGA penalties); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because, *inter alia*, “the evidence showed...defendants took their obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at \*4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer was “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

**C. DISCOVERY AND MEDIATION**

In preparation for mediation, the Parties engaged in extensive informal discovery. Defendant produced a class list with putative class members’ hire dates, termination dates (if applicable), and other information. Defendant also produced an approximate 33% sampling of timekeeping and payroll records for putative class members during the Class Period, Defendant’s relevant wage and hour policies, and other information. Larsen Decl., ¶ 17. Plaintiff’s counsel hired an expert data analyst to analyze and extrapolate the data produced by Defendant. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiff’s claims and Defendant’s defenses, as well as the chances for class certification. *Id.*

The Parties attended a mediation with Ann Kotlarski, Esq. on January 8, 2024. At mediation the Parties vigorously debated Plaintiff’s claims and Defendant’s defenses, the potential value of Plaintiff’s claims, and the chances of certification. Larsen Decl., ¶ 19. At the mediation, the Parties reached a settlement in principle on a class-wide basis, including an agreement to settle an additional claim for wage statement penalties, which was analyzed prior to the mediation and then negotiated at mediation. Over the following months, the Parties negotiated the finer terms of the settlement agreement, ultimately resulting in the Settlement. Larsen Decl., ¶ 19.

///

///

///

### III. THE PROPOSED SETTLEMENT

#### A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, Defendant will pay a non-reversionary Gross Settlement Amount (“GSA”) of \$330,000.00. The monetary terms of the Settlement are summarized below:

|                                                           |                     |
|-----------------------------------------------------------|---------------------|
| • Gross Settlement Amount (“GSA”):                        | \$330,000.00        |
| • Minus Court-approved attorneys’ fees (one-third):       | \$110,000.00        |
| • Minus Court-approved costs (up to):                     | \$20,000.00         |
| • Minus Court-approved Service Payment:                   | \$7,500.00          |
| • Minus Amount Set Aside as PAGA penalties:               | \$30,000.00         |
| • <u>Minus estimated settlement administration costs:</u> | <u>\$10,000.00</u>  |
| <b>Net Settlement Amount (“NSA”):</b>                     | <b>\$152,500.00</b> |
| PLUS 25% of PAGA penalties (“PAGA Amount”):               | \$7,500.00          |
| <b>Total Amount Paid to Settlement Class:</b>             | <b>\$160,000.00</b> |

##### 1. The Settlement Provides for Reasonable Monetary Payments

As noted above, after deducting amounts for a court-approved Class Representative Service Payment, administration costs, attorneys’ fees and costs, and PAGA payment to the LWDA, Defendant will pay at least \$152,500.00 to Settlement Class members. *See* Settlement, § 5(C). Defendant represents that there are approximately 167 Settlement Class members. *Id.*, § 1. Thus, **the average Settlement Award is estimated to be \$913.17**. Larsen Decl., ¶ 20.

In addition, all Settlement Class members (regardless whether they opt-out) who were employed by Defendant in California at any time from February 14, 2022 through Preliminary Approval (the “PAGA Period”), will receive a portion of the \$7,500 PAGA Amount, based on their proportionate number of pay periods worked during the PAGA Period. *See* Settlement, §§ 2, 5(C), 7(C).

Payments from the NSA will be treated as 33.33% wages reported on a Form W-2, 33.33% treated as interest, and 33.34% treated as penalties and reported on a Form 1099. *See* Settlement, § 7(E). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* Defendant will separately pay the employer’s share of payroll taxes on the amount designated as “wages,” in addition to the GSA. *Id.*, § 5(D). Settlement Class members will have 45 days from the Notice mailing to opt out of or object to the Settlement, or submit disputes, thereby providing ample time to review the Notice without unduly delaying the Settlement. *See id.*, § 12(C)-(E).

Participating Class Members will be bound by the Settlement and will release any and all claims, losses, damages, liquidated damages, penalties, interest, liabilities, causes of action, civil

1 complaints, arbitration demands, or suits which arise from or reasonably relate to the facts and  
2 allegations asserted in the Second Amended Complaint in the Action or that could have been  
3 alleged based on the facts alleged in the Second Amended Complaint in the Action, arising from  
4 their employment with Defendant. *See* Settlement, § 2. In addition, all Settlement Class members  
5 (regardless whether they opt-out) who worked for Defendant in California during the PAGA  
6 Period, will release all claims against Defendant for PAGA penalties based on the allegations in  
7 the Action, that arose during the PAGA Period (“PAGA Released Claims”). *See* Settlement, § 2.

8 **2. Attorneys’ Fees and Costs, Service Award, and PAGA Payment**

9 At final approval, Plaintiff will apply for a Class Representative Service Payment in the  
10 amount of \$7,500. *See* Settlement, § 5(C)(iii). “[I]ncentive awards are fairly typical in class action  
11 cases...and are intended to compensate class representatives for work done on behalf of the class  
12 [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re*  
13 *Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010).

14 As will be fully briefed at final approval, Plaintiff’s requested Class Representative  
15 Service payment is in recognition of the time and effort he expended on behalf of the Settlement  
16 Class, including providing factual information and documents to counsel, discussing with counsel  
17 the claims and theories at issue in the litigation, making himself available during mediation,  
18 reviewing the settlement agreement, and otherwise actively participating in the prosecution of  
19 this case, as well as his general release of claims and waiver of Civil Code § 1542. (*See* Settlement,  
20 § 3). Plaintiff respectfully submits that the requested payment is well within the range of approval.  
21 *See, e.g., Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 268 (N.D. Cal. 2015)  
22 (approving \$15,000 payment to named plaintiff from wage and hour class action settlement,  
23 including \$10,000 incentive payment and additional \$5,000 for his general release, where  
24 payments to class members averaged just over \$450); *Martinez v. Knight Transportation*, No.  
25 1:16-cv-01730, 2023 WL 5917989 (E.D. Cal. Sept. 11, 2023) (approving \$10,000 award to  
26 plaintiff in \$400,000 wage and hour class action settlement where payments to class members  
27 averaged about \$127).

28 The Parties have also designated \$30,000 of the GSA as PAGA penalties, of which

1 \$22,500 (75%) will be paid to the LWDA, with the remaining \$7,500 (25%) distributed to  
2 Settlement Class members (*see* Settlement, § 5(C)(v)), consistent with the PAGA’s requirement  
3 that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to  
4 aggrieved employees (Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is  
5 appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells*  
6 *Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 at \*1 (N.D. Cal. Feb. 16, 2011)  
7 (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement); *Hudson v. Libre*  
8 *Technology, Inc.*, No. 3:18-cv-1371-GPC, 2020 WL 2467060 at \*8 (S.D. Cal. May 13, 2020)  
9 (approving \$21,250 PAGA payment from \$425,000 settlement).

10 At final approval, Plaintiff’s counsel will request attorneys’ fees of one-third of the GSA  
11 (currently estimated at \$110,000.00), and up to \$20,000 in litigation costs. *See* Settlement, §  
12 5(C)(iv). The requested fee is fair compensation for undertaking complex, risky, expensive, and  
13 time-consuming litigation on a contingent basis. Plaintiff’s counsel have incurred substantial  
14 attorneys’ fees conducting pre-filing investigation and legal research; analyzing timekeeping,  
15 payroll, and other data with Plaintiff’s data expert to create a comprehensive damages model;  
16 preparing for and attending mediation; negotiating and preparing the Settlement; preparing this  
17 Motion; and otherwise prosecuting this case. Larsen Decl., ¶ 30. Counsel will also incur future  
18 attorney fees in overseeing the Notice process, fielding phone calls from Settlement Class  
19 members, preparing the Final Approval Motion, and appearing at the Final Approval Hearing. *Id.*

20 It is appropriate to award attorney fees as a percentage of the “common fund” created by  
21 the settlement. *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480 (2016) (holding “the percentage of  
22 fund method survives in California class action cases”). Counsel’s fee request is well within the  
23 range of reasonableness and is typical for common fund settlements. *See, e.g., Chavez v. Netflix,*  
24 *Inc.*, 162 Cal.App.4th 43, n.11 (2008) (“regardless whether the percentage method or the lodestar  
25 method is used, fee awards in class actions average around one-third of the recovery”). As will  
26 be briefed at final approval, the fee request is reasonable in light of the substantial risks and work  
27 undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

28 ///

1 **IV. ARGUMENT**

2 **A. PRELIMINARY APPROVAL IS WARRANTED**

3 California Rule of Court 3.769 conditions class action settlements on court approval,  
4 which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*  
5 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine  
6 “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*,  
7 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed  
8 settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of  
9 dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*,  
10 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role is to ensure the settlement agreement taken  
11 as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a  
12 presumption of fairness when a settlement is negotiated at arm’s length by counsel. *See, e.g.,*  
13 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

14 **1. Standard for Preliminary Approval**

15 To make a fairness determination, the Court should consider several factors, including:  
16 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further  
17 litigation, the risk of maintaining class action status through trial, the amount offered in  
18 settlement, the extent of discovery completed and the stage of the proceedings, [and] the  
19 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).  
20 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing  
21 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,  
22 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,  
23 and reasonable in light of the overall balance of factors in this case.

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

25 Although he maintains his claims are meritorious, Plaintiff acknowledges there were  
26 substantial risks and uncertainty in proceeding with class certification and eventual trial on the  
27 merits. As described in section II.B., *supra*, Defendant presented multiple defenses to Plaintiff’s  
28 claims, both on the merits and to class certification, rendering success far from certain.

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

2           Although the Parties engaged in significant informal discovery, they had not completed  
3 formal written and deposition discovery, which would have required expenditure of substantial  
4 time and resources. Larsen Decl., ¶ 32. Plaintiff also still had to file for class certification. *Id.*  
5 Even if Plaintiff obtained certification, the Parties would incur considerable fees and costs through  
6 a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id.*  
7 The Settlement avoids those risks and the accompanying expense.

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

9           Plaintiff had not yet filed his class certification motion, and as such, the extent to which  
10 Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there  
11 was a risk there would not be a certified class at trial, or if there were, that it would consist of a  
12 significantly smaller group of employees than the proposed Settlement Class, and the expected  
13 recovery would be significantly reduced. Thus, this factor supports preliminary approval.

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

15           The Settlement provides a fair and reasonable monetary recovery for the Settlement Class  
16 for disputed claims. As detailed in the Larsen Declaration, and with the assistance of an expert  
17 data analyst, Plaintiff conducted an analysis of potential damages due to Defendant's allegedly  
18 unlawful policies and practices. After applying reasonable discounts for risks of not obtaining  
19 class certification and risks of losing on the merits, Plaintiff estimated his claims had a realistic  
20 potential value of approximately \$436,632. Larsen Decl., ¶¶ 21-29. The proposed settlement of  
21 \$330,000 therefore represents approximately 75.5% of Plaintiff's reasonably forecasted classwide  
22 recovery. *Id.* As noted above, payments under the Settlement will average nearly \$913.17.  
23 Preliminary approval is appropriate as the Settlement will provide significant monetary relief to  
24 the Settlement Class.

25                                   **e. The Experience and Views of Counsel**

26           “Parties represented by competent counsel are better positioned than courts to produce a  
27 settlement that fairly reflects each party's expected outcome in litigation.” *In re Pac. Enter.*  
28 *Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience

litigating wage and hour class actions, and have been appointed class counsel in numerous cases alleging similar claims. *See* Larsen Decl., ¶¶ 2-5. Counsel conducted an in-depth review of Defendant’s policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiff’s claims. Larsen Decl., ¶¶ 17; 21-29. The Settlement was also reached after a mediation session with Ann Kotlarski, Esq. an experienced and respected wage and hour class action mediator. *Id.*, ¶ 18. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

## **2. The Preliminary Approval Standard Is Met**

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

### **a. The Settlement Is Within the Range of Possible Approval**

As noted, the Settlement reflects approximately 75.5% of the realistic estimated recovery on Plaintiff’s claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is clearly within the range of possible approval.

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

The Settlement resulted from an exchange of substantial information, arm’s-length negotiations, mediation with an experienced mediator, and months of additional negotiations. Plaintiff carefully vetted the claims at issue and conducted a detailed analysis of the relevant data and information. Larsen Decl., ¶¶ 18, 21-29. The Settlement is thus entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130.

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

The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys’ fees, costs, Plaintiff’s service award, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

1           **B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS**

2           The proposed Settlement Class satisfies the criteria for certification because: 1) the  
3 Settlement Class is ascertainable and numerous; 2) common questions of law and fact  
4 predominate; 3) Plaintiff's claims are typical of the Settlement Class; and 4) Plaintiff and his  
5 counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

6           **1. The Proposed Class Is Ascertainable and Numerous**

7           A class is "ascertainable" where members "may be readily identified without unreason-  
8 able expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189  
9 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked  
10 for Defendant in California during the Class Period, and thus can be readily identified from  
11 Defendant's records. Defendant represents there are about 167 Settlement Class members,  
12 rendering it impracticable to bring them all before the Court. Numerosity is therefore satisfied.

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

14           The focus on certification is not on the merits of the case, but rather on what types of  
15 questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v.*  
16 *Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated primarily on Defendant's  
17 alleged failure to pay overtime wages based upon the correct "regular rate" of pay and alleged  
18 unlawful meal and rest period policies/practices. Such claims are commonly held proper for class  
19 certification. *See, e.g., Carlino v. CHG Medical Staffing, Inc.*, No. 1:17-cv-01323-DAD-JLT,  
20 2019 WL 1005070 (N.D. Cal. Oct. 20, 2019) (certifying regular rate claim); *Benton v. Telecom*  
21 *Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period  
22 claims).

23           **3. The Named Plaintiff's Claims Are Typical**

24           The typicality requirement is satisfied where class representatives have claims that are  
25 typical of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347  
26 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff  
27 was employed by Defendant as a non-exempt employee in California during the Class Period, and  
28 he was injured by the same challenged policies that allegedly injured the Settlement Class as a

whole. See Declaration of Elias Martinez, ¶¶ 2-3. Thus, typicality is satisfied.

**4. Plaintiff and Class Counsel Will Adequately Represent the Class**

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiff or his counsel and the Settlement Class. See *McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff’s counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation, as noted above.

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

The Court should order distribution of the proposed Notice by U.S. Mail, using last known mailing addresses provided by Defendant. See Settlement, § 12. This is the “best notice practicable” under the circumstances, as it provides “individual notice to all members who can be identified through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff proposes the Settlement be administered by Pheonix Settlement Administrators, an experienced class action settlement administrator. See Jodey Lawrence Declaration and exhibits. Settlement Class members’ addresses will be ascertainable through Defendant’s records. Phoenix will also run all addresses through the U.S. Postal Service National Change of Address database and/or perform “skip traces” to obtain current addresses. See Settlement, § 12(B) & (F).

The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims; the basic contentions of the parties; the key terms of the Settlement; the 45-day deadline to opt-out, object, or submit a dispute and how to do so; explains the recovery formula and expected recovery amount for each Settlement Class member; and explains the releases of claims included in the Settlement. See Larsen Decl., Exh. A to Exh. 1. The proposed Notice also includes the final approval hearing date and time, and it provides contact information for Class Counsel and Phoenix in the event Settlement Class members have any questions about the Settlement. *Id.* This Notice satisfies Cal. Rule of Court 3.766(e) as the

1 most reliable and cost-effective method of reaching the Settlement Class.

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

3 Finally, the Court should set a hearing for final approval on a date appropriately scheduled  
4 to follow Settlement Class members' response deadline. See Cal. Rule of Court 3.769.

5 **V. CONCLUSION**

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

9  
10 Dated: November 4, 2024

Respectfully Submitted,  
ABRAMSON LABOR GROUP

11  
12 Neil Larsen  
13 Neil M. Larsen  
14 Attorneys for Plaintiff  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28