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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DAVID CANCINO, an individual, on his own
behalf and on behalf of all others similarly
situated,

Plaintiffs,

vs.

METRO EIGHTEEN, INC, a California
corporation; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO.: **22STCV37408**

**NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL**

Judge: Hon. Maren Nelson
Date: December 18, 2023
Time: 9:00 AM
Dept.: 17

Complaint Filed: November 29, 2022

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1 This motion is based upon this Notice of Motion and Motion; the Memorandum of Points
2 and Authorities in Support thereof; the declarations of Kevin Lipeles and David Cancino in Support
3 thereof; the Settlement Agreement; the proposed Order; the other records, pleadings, and papers
4 filed in this action; and upon such other documentary and verbal evidence or argument as may be
5 presented to the Court at the hearing of this motion.

6
7 Dated: September 5, 2023

Respectfully submitted,

8
9 LIPELES LAW GROUP, APC

10
11 By:



12 Kevin A. Lipeles, Esq.
13 Thomas H. Schelly, Esq.
14 Jasmine J. Badawi, Esq.
15 Attorneys for Plaintiff and the Settlement Class
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1 **I. INTRODUCTION**

2 Plaintiff David Cancino (“Plaintiff”), on behalf of himself and the putative Settlement
3 Class¹ requests that this Court preliminarily approve the parties’ proposed Settlement Agreement,²
4 entered into by Plaintiff and Metro Eighteen, Inc., (“Defendant” or “Metro Eighteen”) in August
5 2023. Defendant does not oppose Plaintiff’s instant Motion.³ The proposed Settlement Agreement
6 satisfies all of the criteria for preliminary settlement approval under California Code of Civil
7 Procedure §382, and falls well within the range of reasonableness. Accordingly, Plaintiff requests
8 that the Court grant preliminary approval of the proposed Settlement, approve the proposed notice
9 plan, and schedule a final approval hearing, all of which is described in detail below.

10 The Settlement Agreement seeks to fully release and discharge Defendant from the claims
11 brought against it in the above-captioned matter (the “Action”⁴) and all related penalties. In
12 exchange, Defendant will pay the Settlement Class up to \$495,000.00 (“Settlement Amount”) with
13 no reversion to Defendant.

14 The Settlement Agreement and Notice distribution plan were the products of non-
15 collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair,
16 reasonable and adequate to all. Accordingly, Plaintiff seeks: (1) preliminary approval of the
17 Settlement Agreement; (2) provisional certification of the Settlement Class; (3) appointment of
18

19 ¹ The proposed Settlement Class is defined as: all current and former employees who were hourly paid, nonexempt
20 employees of Defendant and who worked for Defendant in California between November 29, 2018 until the Effective
21 Date.

22 ² The Settlement Agreement is attached as Exhibit A to the Declaration of Kevin Lipeles (“Lipeles Decl.” filed
23 herewith). The proposed Class Notice is attached as Exhibit A to the Settlement Agreement.

24 ³ Metro Eighteen vigorously denies liability or wrongdoing with respect to its wage, meal/rest break, reimbursement
25 and vacation pay policies and practices. Metro Eighteen reserves its right to assert any and all defenses to the claims
26 asserted by Plaintiff and the putative class. Further, Metro Eighteen joins in this motion to preliminarily approve of the
27 settlement of a lawsuit that was filed as a class action, but specifically denies that a settlement was necessary as a result
28 of any action or inaction by Metro Eighteen. Metro Eighteen agrees to resolve the claims asserted by Plaintiff on a
class basis to avoid incurring additional substantial costs beyond those which have already been incurred as well as the
delay and risks that would be presented by further prosecution of the litigation. The proposed settlement includes a
non-admissions clause and Metro Eighteen has at all times maintained that its wage, meal/rest break period, expense
reimbursement and vacation pay policies and practices are fully lawful. Hence, Metro Eighteen does not join in the
substance of the representations made by Plaintiff in this motion and specifically denies the negative characterizations
of Metro Eighteen’s conduct as well as Plaintiff’s interpretation of certain legal authorities. Metro Eighteen, therefore,
also reserves its right to clarify any aspect of the motion that it believes needs to be addressed.

⁴ All capitalized terms have the same meaning as in the Settlement Agreement.

1 Plaintiff as Class Representative; (4) appointment of Kevin Lipeles, Esq., Thomas Schelly, Esq.
2 and Jasmine J. Badawi as Class Counsel; (5) approval of the parties' proposed form and method of
3 notifying Class Members of the Settlement Agreement; (6) an order scheduling the hearing date for
4 Final Approval of the Class Settlement; and (7) entry of a preliminary approval Order.

5 **II. FACTUAL SUMMARY**

6 **A. Claims**

7 Plaintiff alleges claims for failing to pay daily minimum wages due to rounding, including
8 overtime, failing to authorize and permit meal and rest breaks, not reimbursing all necessary
9 expenses and failing to pay accrued and unused vacation pay⁵. These extensive alleged Labor Code
10 violations also resulted in Defendant issuing inaccurate itemized wage statements to Class
11 Members and failing to pay wages due upon termination of employment to Class Members who are
12 former employees. Plaintiff contends that the foregoing also violated Cal. Bus. & Prof. Code
13 §17200, *et seq.*

14 On or about May 8, 2023, Plaintiff filed a First Amended Complaint, adding a claim for
15 PAGA remedies pursuant to California Labor Code §2699.

16 Defendant vigorously denies each of Plaintiff's allegations, and contends that they
17 maintained compliant minimum wage, meal and rest break and expense reimbursement policies.

18 **B. Procedural History**

19 On November 29, 2022, Plaintiff David Cancino filed his Original Class Action Complaint
20 in the Superior Court of California, Los Angeles County, on behalf of himself and others similarly
21 situated for certain present and former employees of Defendant Metro Eighteen for: (1) failure to
22 pay minimum wages due to rounding, including overtime (Cal. Labor Code §§1194, 1194.2, 1997,
23 1997.1, 1198; IWC Wage Order No. 4); (2) failure to provide timely off-duty meal periods (Cal.
24 Lab. Code §§ 226.7, 512; IWC Wage Order No. 4); (3) failure to provide rest periods (Cal. Lab.
25 Code §§ 226.7; IWC Wage Order No. 4); (4) failure to maintain records and provide accurate
26 itemized wage statements (Cal. Lab. Code § 226); (5) failure to pay wages due upon termination
27 (Cal. Lab. Code §§ 201–203); (6) failure to reimburse business expenses (Cal. Lab. Code § 2802);
28

⁵ Plaintiff no longer seeks damages under his claim for failure to pay unused vacation pay as he ascertained during mediation that there was no value to that claim.

(7) failure to pay accrued and unused vacation pay (Cal. Lab. Code §§ 201, 227.3); and (8) unfair competition (Cal. Bus. & Prof. Code §§ 17200 et seq.).

On May 8, 2023, Plaintiff filed his First Amended Class Action Complaint in the Los Angeles Superior Court, adding a claim pursuant to the Private Attorney General Act of 2004, Cal. Lab. Code §§2699, *et seq.*

C. Marshalling of Evidence

Through both formal and informal discovery, Plaintiff's counsel has diligently pursued an investigation of the putative Class Members' claims, including: (1) extensive review and analysis of relevant documents, including but not limited to documents demonstrating Defendant's minimum wage, meal and rest break, expense reimbursement and vacation pay policies and procedures; (2) detailed examination and analysis of combined redacted paystubs; (3) review of relevant data regarding the size of the putative class; (4) detailed examination of data related to Metro Eighteen's PAGA exposure; and (5) research with respect to the applicable law and the potential defenses thereto. Lipeles Decl., ¶4.

1. Documents

The parties engaged in both formal and informal discovery in preparation for a private mediation. Lipeles Decl., ¶6. Defendant provided information concerning the total number of Class Members (53) and Aggrieved Employees (39), time/punch records for *all* Class Members, answered a list of questions provided by Plaintiff relating to the Class and PAGA claims, and took Plaintiff's deposition, and propounded a written document request to Plaintiff. *Id.* Plaintiff contends that Defendant's internal documents and computerized records showed that Defendant did not pay minimum wages due to rounding, including overtime, did not afford putative class members meal/rest breaks and did not reimburse for business expenses. Lipeles Decl. ¶9.

2. Data and Damages Model

As part of informal discovery prior to mediation, Metro Eighteen culled its documents relating to its minimum wages, meal/rest break, expense reimbursement and vacation pay policies and practices. To estimate the class-wide damages associated with Plaintiff's and the Class's claims, Plaintiff's counsel examined and analyzed the above-described voluminous documents.

1 From the data received from Defendant, Plaintiff constructed a damages model based on
2 Defendant's exposure. Lipeles Decl., ¶13.

3 **a. Minimum Wage Claim (including overtime)**

4 Plaintiff assumed that the average rate of pay during the Class Period was \$31.00 per hour.
5 Plaintiff assumed there were 3 hours of unpaid wages per month and there were 1,243 months
6 between November 29, 2018 through July 15, 2023. Thus, the total amount of hours owed for
7 minimum wages, including overtime, was 3,729.

8 According to Plaintiff's damages model, Defendant's exposure for minimum wages,
9 including overtime, but excluding interest, through July 15, 2023 was \$173,399.00 (3,729 x
10 \$46.50). Lipeles Decl., ¶13.

11 **b. Meal Break Claim**

12 Regarding meal break violations, Plaintiff assumed a violation rate of 100%. The average
13 wage rate for all employees during the Class Period was \$31.00 per hour. There were 21,795 meal
14 break violations between November 29, 2018 through July 15, 2023. Defendant contended that it
15 has a valid meal break policy and that it authorized and permitted meal breaks. Lipeles Decl., ¶13.

16 According to Plaintiff's damages model, Defendant's exposure for meal period violations,
17 excluding interest, amounted to approximately \$675,645.00 (21,795 x \$31.00). Lipeles Decl., ¶13.

18 **c. Rest Break Claim**

19 Regarding rest break violations, Plaintiff assumed a violation rate of 100%. The average
20 wage rate for all employees during the Class Period was \$31.00 per hour. There were 21,795 rest
21 break violations between November 29, 2018 through July 15, 2023. Defendant contended that it
22 has a valid rest break policy and that it authorized and permitted rest breaks. Lipeles Decl., ¶13.

23 According to Plaintiff's damages model, Defendant's exposure for rest break violations,
24 excluding interest, amounted to approximately \$675,645.00 (21,795 x \$31.00). Lipeles Decl., ¶13.

25 **d. Expense Reimbursement Claim**

26 Plaintiff assumed there was \$100 of unreimbursed business expenses per month. There
27 were 762 months in the Class Period prior to October 2021.

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1 According to Plaintiff's damages model, Defendant's exposure for unreimbursed business
2 expenses, excluding interest, amounted to approximately \$76,200.00 (762 x \$100.00). Lipeles
3 Decl., ¶13.

4 **e. Damages Model**

5 The Damages Model manifested the following conclusions concerning Defendant's
6 exposure, excluding interest and penalties:

7

<u>ALLEGATION</u>	<u>LIABILITY RISK</u>
Minimum Wage Claim, Including Overtime	\$ 173,399.00
Meal Break Claim	\$675,645.00
Rest Break Claim	\$675,645.00
Business Expense Reimbursement Claim	\$76,200.00
Total, excluding penalties and interest	\$1,600,889.00

13

14 Lipeles Decl., ¶¶ 13-14.

15 **D. Settlement Negotiations**

16 On July 18, 2023, the parties virtually attended an all-day mediation with mediator David
17 Meadows, Esq. Lipeles Decl., ¶16. Thomas Schelly, Esq. and Jasmine Badawi, of Lipeles Law
18 Group, APC, attended on behalf of Plaintiff. Attorneys Dennis S. Kenny, Esq. and John B. Lough,
19 Jr., Esq., of Scherer Smith & Kenny, LLP, attended on behalf of Defendant. *Id.* Mr. Matt Lavin,
20 General Manager of Metro Eighteen, and Kevin Murphy, Operations Manager of Metro Eighteen,
21 also attended.

22 After a full day of negotiations, the parties agreed to settle for \$495,000.00 with no claims
23 process and **no reversion** to Defendant of any settlement monies remaining after all Settlement
24 Class Members claims are paid.⁶ Lipeles Decl., ¶¶18-19; Exhibit A thereto (the parties' Settlement
25 Agreement), §1.22.

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⁶ The parties continued to negotiate until their finalized Settlement Agreement was fully executed in August 2023.
Lipeles Decl., ¶19.

1 **E. Summary of Settlement Terms**

2 Under the terms of the Settlement Agreement, Defendant is discharged of all claims
3 asserted in the Action (“Released Claims”)⁷ in exchange for paying the Gross Settlement Amount
4 of \$495,000.00.⁸ The following amounts will be subtracted, subject to court approval: Plaintiff’s
5 Class Representative Service Payment of up to \$7,500, attorneys’ fees up to \$173,250.00, actual
6 costs to Plaintiff’s Counsel in an amount up to \$5,982.01, PAGA payment to the LWDA in the
7 amount of \$25,000, the Claims Administration Costs up to \$5,995.00 and Employer-Side Payroll
8 Taxes.⁹ The Net Settlement Amount (“NSA”) is the remainder, *i.e.*, approximately \$277,272.99,
9 which shall be available for distribution to Class Members in its entirety.¹⁰

10 The average Estimated Amount per class member is \$5,321.57.¹¹ Settlement Class
11 Members are not required to submit a claim form in order to receive an Individual Class Payment.¹²

12 To calculate Individual Class Payments, the Settlement Administrator, using the Class Data,
13 will calculate the total Workweeks for all Class Members. The Individual Class Payment for each
14 Settlement Class Member who does not Opt Out and is deemed a Participating Class Member shall
15 be calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked
16 by all Participating Class Members during the Class Period and (b) multiplying the result by each
17 Participating Class Member’s Workweeks. A Class Member who does not submit a timely request
18 for exclusion will receive an Individual Class Payment.¹³

19 Because Aggrieved Employees cannot opt out of the PAGA claims, each PAGA Employee,
20 whether or not a Participating Class Member, shall also receive his or her Individual PAGA Payment
21 calculated by (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties
22 Six Thousand Two Hundred Fifty and 00/100 Dollars (\$6,250.00) by the total number of PAGA
23 Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying
24 the result by each Aggrieved Employee’s PAGA Period Pay Periods. ¹⁴

25
26 ⁷ Settlement Agreement, §6.

27 ⁸ Settlement Agreement, §1.22.

28 ⁹ Settlement Agreement, §3.1.

¹⁰ Settlement Agreement, §3.1.

¹¹ \$277,272.99 (NSA)/53 (putative class members) =\$5,231.57 (average award per class member).

¹² Settlement Agreement, §3.1.

¹³ Settlement Agreement, §3.2.4.

¹⁴ Settlement Agreement, §3.2.5.1.

1 For tax purposes, Individual Class Payments shall be allocated and treated as follows:
2 twenty-five percent (25%) of each Participating Class Member's Individual Class Payment will be
3 allocated to settlement of wage claims and subject to withholdings and taxes, seventy-five percent
4 (75%) will be allocated as non-wages, i.e., penalties and interest, and not subject to withholding.¹⁵

5 Individual Class Payment checks issued to Participating Class Members and Aggrieved
6 Employees shall remain valid and negotiable for one hundred and eighty (180) calendar days from
7 the date of issuance. In the event an Individual Class Payment check has not been cashed within
8 one hundred and eighty (180) days, all such checks shall be cancelled and funds associated with
9 such cancelled checks, shall be remitted to the California State Controller's Office, Unclaimed
10 Property Division in the name of the Participating Class Member/Aggrieved Employee who failed
11 to cash their check.¹⁶

12 **F. Administration of Notice, Objections, and Claims**

13 The actual costs of administration, estimated at up to \$5,995.00, will be deducted from the
14 Settlement Amount (Settlement Agreement §3.2.3). The Parties have agreed that Phoenix Class
15 Action Administration Solutions ("Phoenix") shall serve as the Settlement Administrator. Within
16 thirty (30) calendar days after the entry of the Preliminary Approval Order, Defendant will provide
17 the Settlement Administrator with the Class Data. Within fourteen (14) calendar days after
18 receiving the Class Data from Defendant, Phoenix will mail all Class Members the Class Notice.
19 The Class Notice (Exhibit A to the Settlement Agreement) shall contain, *inter alia*, the employee
20 ending dates of employment, the number of workweeks during the Class Period/PAGA Period, and
21 the estimated amount of his or her Individual PAGA Payment and/or Individual Class Payment if
22 he or she does not request to be excluded from the Settlement. The Settlement Administrator shall
23 use the Class Data to determine the dates of employment, calculate the number of workweeks and
24 calculate the estimated Individual PAGA Payment/Individual Class Payment for each Settlement
25 Class Member.

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¹⁵ Settlement Agreement, §3.2.4.1.

¹⁶ Settlement Agreement, §4.4.3.

1 Settlement Class Members will not be required to submit a claim form and shall
2 automatically receive an Individual Class Payment unless they submit a valid Request for
3 Exclusion.¹⁷

4 Plaintiff negotiated this term to eliminate any potential fear of retaliation from Class
5 Members, for participating in the settlement.¹⁸ The proposed Class Notice is attached to the
6 Settlement Agreement as Exhibit A.

7 The Class Notice informs each Settlement Class Member of his or her right to object to the
8 settlement. Settlement Class Members who wish to object to the Settlement must object in writing,
9 file the objection with the Court and serve on Class Counsel and Defense Counsel, a written
10 statement of the grounds of objection, signed by the objecting Class Member or his or her attorney,
11 along with all supporting papers, no later than sixty (60) days after the initial mailing of the Class
12 Notice.¹⁹

13 **G. Procedure for Requesting Exclusion or Opting Out of Settlement**

14 Class Members who wish to exclude themselves from the Settlement Agreement must sign
15 and mail a written Request for Exclusion opting out of the Settlement Class postmarked no later
16 than sixty (60) days after the Class Notice is first mailed out²⁰ (Settlement Agreement § 8.5.1). All
17 Class Members who do not submit a valid Request for Exclusion shall be bound by all the terms of
18 the Settlement Agreement and any Final Judgment entered by the Court if the Court grants final
19 approval of the settlement.

20 **H. Mailing of Individual Class Payments**

21 Settlement Class Members will automatically receive an Individual Class Payment unless
22 they submit a valid Request for Exclusion. Defendant will transmit into an QSF account
23 (administered by the Settlement Administrator) Two Hundred Forty-Seven Thousand Five Hundred
24 Dollars and No Cents (\$247,500.00) of the Gross Settlement Amount, to the Settlement
25 Administrator within thirty (30) calendar days after the Court's order granting Preliminary

26 ¹⁷ Settlement Agreement, § 3.1.

27 ¹⁸ Neither Plaintiff nor his counsel believe that Defendant will retaliate against Class Members for participating in the
28 lawsuit. However, Plaintiff's counsel has found the fear of retaliation to be a common, albeit often unfounded, fear
among Class Members in virtually every case.

¹⁹ Settlement Agreement, §§ 8.7.2, 8.5.1.

²⁰ However, those Settlement Class Members who receive a re-mailed Class Notice shall have their response period
extended fourteen (14) calendar days from the original response period. Settlement Agreement, § 1.4.3.

1 Approval of the Settlement. Within two hundred ten (210) calendar days of the Court's order
2 granting Preliminary Approval of the Settlement, Defendant shall transmit the second half of the
3 Gross Settlement Amount in the amount of Two Hundred Forty Seven Thousand Five Hundred
4 Dollars and No Cents (\$247,500.00). Costs of opening, maintaining and closing the QSF account
5 will be part of the costs of Claims Administration, and shall be performed by the Claims
6 Administrator.²¹ Distribution to Settlement Class Members shall be within thirty (30) calendar days
7 after the Effective Date.²² Defendant will pay attorneys' fees and costs to Class Counsel within
8 thirty (30) calendar days after the Effective Date.²³ Additionally, within thirty (30) calendar days
9 after the Effective Date, the Administrator will pay the Class Representative Service Payment to
10 the Named Plaintiff.²⁴

11 III. CLASS ACTION SETTLEMENT APPROVAL PROCEDURE

12 Any settlement of class litigation must be reviewed and approved by the presiding court,
13 Cal. R. Ct. 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial
14 court; and (2) a subsequent (final) review after the notice has been distributed to the Class
15 Members for their comments and/or objections. The Preliminary Approval Hearing and Final
16 Approval Hearing coincide with these two required steps. The present motion seeks preliminary
17 approval and the setting of a Final Approval Hearing.

18 The first step, preliminary approval, proceeds as follows:

19 When the parties to an action reach a monetary settlement, they will usually
20 prepare and execute a joint stipulation of settlement, which is submitted to the
21 court for preliminary approval. The stipulation should set forth the central terms
22 of the agreement, including but not limited to, the amount of the settlement, form
23 of payment, manner of determining the effective date of settlement and any recapture
24 clause.

25 Rubinstein, Conte & Newberg, *Newberg on Class Actions*, §§ 11.24-11.26 (4th Ed. 2002)
26 ("Newberg").

27 ²¹ Settlement Agreement, § 8.3.

28 ²² Settlement Agreement, § 4.4.

²³ Settlement Agreement, § 4.4. Additionally, any portion of the Attorneys' Fees and Costs Award not awarded to
Plaintiff's Counsel will be available for distribution to Settlement Class Members as part of the NSA. Settlement
Agreement, § 3.3.2.

²⁴ Settlement Agreement, § 4.4. Additionally, any portion of the Class Representative Service Payment not awarded to
the Class Representative will be available for distribution to Settlement Class Members as part of the NSA. Settlement
Agreement, § 3.2.1.

1 California courts favor settlement. *Stambaugh v. Superior Court (Pacific Gas and Electric*
2 *Company)*, 62 Cal. App. 3d 231, 236 (1976). Courts have broad powers to determine whether a
3 proposed settlement is fair under the circumstances of the case. *Mallick v. Superior Court (County*
4 *of Marin)*, 89 Cal. App. 3d 434, 438 (1979).

5 Here, the parties have executed and hereby submit the Settlement Agreement, which sets
6 forth all material terms. “Where the settlement terms are fair and reasonable, the settlement is
7 presumptively valid, subject only to objections that may be raised at a final hearing.” *Newberg*,
8 § 11.26. California courts have certified classes in cases similar to the present Class in which
9 Plaintiff’s Counsel was appointed Class Counsel.²⁵

10 The schedule setting forth a proposed sequence for the relevant dates and deadlines is
11 outlined in the Proposed Order filed herewith. Having appropriately presented the materials and
12 information necessary for preliminary approval, the parties request that the Final Approval Hearing
13 be conducted in or about February 2024, or as soon thereafter as the Court’s calendar may
14 accommodate.

15 **IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

16 The law favors settlement, particularly in class actions and other complex cases where
17 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
18 *See Newberg* § 11:41 (and cases cited therein); *Class Plaintiff v. City of Seattle*, 955 F.2d 1268,
19 1276 (1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Potter v.*
20 *Pac. Coast Lumber Co.*, 37 Cal. 2d 592, 602 (1951). In evaluating class action settlements, the
21 court has broad powers to determine whether a proposed settlement is fair under the circumstances
22 of the case. *Wershba v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001); *Mallick v.*
23 *Superior Court (County of Marin)*, 89 Cal. App. 3d 434, 438 (1979). The purpose of the
24 preliminary evaluation of class action settlements is to determine only whether the proposed
25 settlement is within the range of possible approval, also described as the “range of reasonableness,”
26 and thus whether notice to the class of the settlement’s terms and conditions and the scheduling of
27 a formal fairness hearing are worthwhile. *See Wershba*, 91 Cal. App. 4th at 234-235; *North County*
28 *Contractor’s Ass’n, Inc. v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1089-1090 (1994); *In re*

²⁵ *See Lipeles Decl.*, ¶38.

1 *Traffic Exec Ass’n*, 627 F.2d 631, 633-634 (2nd Cir. 1980); *Newberg*, § 11:25-26.

2 The *Manual for Complex Litigation*, Fourth (Fed. Judicial Center 2004 (“*Manual*”),
3 § 21.632 characterizes the preliminary approval stage as an “initial evaluation” of the fairness of
4 the proposed settlement made by the court on the basis of written submissions and informal
5 presentation from the settling parties. To make a fairness determination, courts must consider
6 several factors, including “the strength of the Plaintiff’s case, the risk, expense and complexity and
7 likely duration of further litigation, the risk of maintaining class action status through trial, the
8 amount offered in settlement, the extent of the discovery completed and the stage of the
9 proceedings, [and] the experience and views of counsel. ...” *Dunk v. Ford Motor Co.*, 48 Cal. App.
10 4th 1794, 1801 (1996) “The list of factors is not exclusive and the court is free to engage in a
11 balancing and weighing of factors depending on the circumstances of each case.” *See Wershba*, 91
12 Cal. App. 4th at 245.

13 Furthermore, courts must give “proper deference to the private consensual agreement of the
14 parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement
15 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
16 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
17 between, the negotiating parties, and that the settlement, taken as a whole, is fair reasonable and
18 adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1027 (9th Cir. 1998) (internal
19 quotes and citation omitted). Once the judge is satisfied with the results of the initial inquiry into
20 the fairness, reasonableness, and adequacy of the settlement, the court should direct that the Class
21 Members be given notice of a formal fairness hearing, at which arguments and evidence may be
22 presented in support of, and in opposition to, the settlement. *See Manual*, § 21.633.

23 **A. The Proposed Settlement Is Fair to the Class**

24 The terms of the settlement recognize the strength of the case. The proposed settlement is
25 reasonable, in light of the strength of Plaintiff’s case and the risks of litigation. *Clark v. American*
26 *Residential Services, LLC*, (2009), 175 Cal. App. 4th 785, 799. Under *Clark* “the trial court is
27 obliged, at a minimum, to determine whether a legitimate controversy exists on a legal point, if that
28 legal point significantly affects the valuation of the case for settlement purposes.” *Id.* at 803.

1 However, the trial court is not required to reach any ultimate legal or factual conclusions.
2 *Id.* A settlement is not judged against what might have been recovered had a plaintiff prevailed at
3 trial, nor does the settlement have to provide 100% of the damages sought to be fair and
4 reasonable. *Wershba*, 91 Cal. App. 4th at 224 (holding that “[c]ompromise is inherent and
5 necessary in the settlement process...even if the relief afforded by the proposed settlement is
6 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to
7 a class settlement because the public interest may indeed be served by a voluntary settlement in
8 which each side gives ground in the interest of avoiding litigation”). Settlement agreements are
9 realistically assessed. *Stambaugh*, 62 Cal. App. 3d at 236; *Priddy v. Edelman*, 883 F.2d 438, 447
10 (6th Cir. 1989) (“The fact that a plaintiff might have received more if the case had been fully
11 litigated is no reason not to approve the settlement.”).

12 The Settlement Agreement in this case confers a substantial benefit on the Settlement Class.
13 Pursuant to the terms of the Settlement Agreement, Defendant will pay \$495,000 in exchange for a
14 full discharge of Plaintiff’s and Settlement Class Members’ Released Claims.²⁶ Once all the
15 adequate deductions have been made from the Settlement Amount, the amount available for
16 distribution to Plaintiff and the Settlement Class is approximately \$277,272.99.

17 Plaintiff has evaluated the strengths of the class claims, and assessed the range of potential
18 outcomes of the litigation. In addition to disputing the merits of Plaintiff’s claims, Defendant
19 would strongly challenge any request for class certification. Plaintiff believed that this case was
20 suitable for class certification. However, Plaintiff also realized that there is always a significant
21 risk associated with class certification proceedings. In light of the uncertainties of protracted
22 litigation, the Settlement Amount reflects an excellent recovery for the Class Members. Lipeles
23 Decl., ¶26.

24 **1. Plaintiff Faced Significant Risk**

25 Pursuit of the Action through trial would impose significant risks on the outcome of
26 Plaintiff’s claims.

27 **a. Defendant’s Liability For Violation of California’s Minimum Wage Claim,**
28 **Including Overtime Was Far From Certain.**

²⁶ Settlement Agreement § 6.

1 Plaintiff claims that Class Members were not paid minimum wages, including overtime.
2 Defendant argued that it maintained legally compliant wage compensation policies. Defendant also
3 contended that employee time records during the Class Period reveal *de minimis* amounts of time
4 allegedly shorted to employees due to Defendant's neutral rounding policy under which employees
5 were often paid more than the actual hours clocked and worked. Defendant maintained that Class
6 members were paid for all hours worked. Thus, not getting certified is a risk which Plaintiff
7 considered during the negotiations. Lipeles Decl., ¶21. Thus, there was a high risk that the Court
8 would deny certification of the minimum wage claim.

9 **b. Defendant's Liability For Failure to Afford Meal/ Rest Breaks Was Fraught**
10 **With Risk.**

11 Plaintiff also claims that Class Members were not afforded meal/rest breaks. Defendant
12 adamantly contends that it implemented a policy for when nonexempt employees were to take
13 meal/rest breaks. Further, Defendant provided its non-exempt employees with legally-compliant
14 meal/rest periods. Additionally, Defendant maintains that individual issues predominate. Defendant
15 stated that employees worked in teams and everyone on each team took their meal/rest breaks
16 together and that breaks were consistent with Defendant's policies and controlling law. Thus, there
17 was a high risk that the Court would deny certification of the meal/rest break claims. Lipeles Decl.,
18 ¶22.

19 **c. Plaintiff's Business Expense Reimbursement Claim Was Uncertain.**

20 Plaintiff also claims that Class members were not reimbursed for their business expenses
21 such as cell phone, hotel expenses and tool purchases expenses. Defendant maintains that it
22 provided its employees with a \$100 monthly cell phone allowance. Further, employees were
23 provided with a company credit card, a company Home Depot credit card as well as a fleet
24 maintenance/gas mileage to cover business-related expenses. Additionally, if there were any other
25 expenses, employees could seek reimbursement thereof. Thus, there was a significant risk that the
26 Court would deny the expense reimbursement claim. Lipeles Decl., ¶23.

27 **d. Plaintiff's Potential PAGA Damages Were Far From Certain**

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1 Uncertainty relating to Plaintiff's potential PAGA damages played a role in the negotiation
2 considerations. Questions were raised about whether and to what extent a court may award such
3 penalties, especially in light of the caps on punitive damages by the both U.S. Supreme Court and
4 California Supreme Court. Thus, Defendant would argue that penalties greatly in excess of actual
5 damages would be confiscatory and possibly unconstitutional. Further, the actual amount of PAGA
6 penalty awarded by the Court is completely discretionary.²⁷ As a result, Plaintiff considered that
7 PAGA penalties may not be awarded in amounts that are disproportionate to the actual amount of
8 wages owed. Lastly, since only 25% of any PAGA recovery reaches the PAGA claimants (with the
9 balance going to the state), the strength of Plaintiff's potential PAGA claims and the potentially
10 limited recovery were factors considered during settlement negotiations. Lipeles Decl., ¶24.

11 Where, as here, the settlement affords the Class members prompt, substantial relief, while
12 avoiding legal and factual hurdles that otherwise may have prevented the Class from obtaining any
13 recovery at all, or at least after a very significant delay, the reasonableness of the settlement is
14 clear. Because the Settlement Agreement provides immediate and substantial relief, without the
15 attendant risks and delay of continued litigation, it warrants the Court's preliminary approval.

16 **B. The Proposed Settlement Is the Result of Arm's-Length Negotiation**

17 Plaintiff's counsel conducted an extensive investigation, including reviewing voluminous
18 documentary evidence and obtaining employee sworn statements. Plaintiff's counsel also
19 participated in extensive meeting and conferring regarding discovery issues. The parties negotiated
20 in good faith and at arm's-length on several occasions over many months before reaching an
21 agreement. Thus, Class Counsel negotiated the proposed Settlement with ample knowledge of the
22 strengths and weaknesses of this case, the amounts necessary to compensate Settlement Class
23 Members for their damages, and the benefits of the proposed Settlement under the circumstances of
24 this case.

25 ²⁷ ²⁷ In granting final approval of the class action settlement in *Stuart v. RadioShack*, Judge Chen noted the following:

26 Plaintiffs could arguably get more . . . because they are entitled to penalties under the PAGA, [but] it is not
27 clear that they could get a significant additional amount because the PAGA provides that,
28 [i]n an action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or
 (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based
 on the facts and circumstances of the particular case, to do so otherwise would result in an award that is
 unjust, arbitrary and oppressive, or confiscatory.

1 In addition, Class Counsel and Defense Counsel, are experienced class action litigation and
2 employment attorneys, and have used their experience and expertise in fashioning a proposed
3 Settlement that is acceptable to both parties. *See* Lipeles Decl., ¶38.

4 The settlement terms also indicate that the Settlement is fair to the Class. Defendant has
5 legal and factual grounds for defending this action. Among other things, Defendant denies the
6 allegations asserted in the Action and continues to assert defenses to such claims. Defendant further
7 contends that at all relevant times it had valid minimum wage, including overtime, meal/rest break,
8 expense reimbursement and vacation pay policies and that they paid minimum wages, including
9 overtime, authorized and permitted meal/rest breaks, reimbursed business expenses and paid
10 accrued and unused vacation pay. Notwithstanding these arguments, the Settlement commits
11 Defendant to pay a total of \$495,000.00, of which approximately \$277,272.99 will go to
12 compensate the Settlement Class Members for their damages, which Class Counsel believes is a
13 fair and adequate amount given the litigation risks and delays inherent in further litigation and
14 appeals. *See* Lipeles Decl., ¶28.

15 Accordingly, preliminary approval of the Settlement is appropriate, and Plaintiff requests
16 that the Court order that Class Notice be disseminated to the Class, and that a final approval
17 hearing be scheduled.

18 **C. Provisional Certification of the Settlement Class Under the Lesser Standard**
19 **of Scrutiny for Settlement-Only Certification Is Appropriate**

20 “[P]re-certification settlements are routinely approved if found to be fair and reasonable.”
21 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App 4th 224, 240; *accord Dunk, supra*, 48 Cal.
22 App. 4th at 1803 (although the settlement was reached before any “adversary certification,” the
23 court was satisfied that it was “fair, adequate and reasonable.”); *see also, In re Baldwin-United*
24 *Corp.* 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this practice in the name
25 of judicial efficiency in order to facilitate apparently beneficial settlement proposals.”).

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1 The strength of the findings made by a judge at a preliminary hearing or
2 conference concerning a tentative settlement proposal . . . may be set out in
3 conditional orders granting tentative approval to the various items submitted to
4 the court. Three basic rulings are often conditionally entered at this preliminary
5 hearing. These conditional rulings may approve a temporary settlement class,
6 the proposed settlement, and the class counsel's application for fees and
7 expenses.

8 4 *Newberg on Class Actions*, at §11.26.

9 The standard for class certification in the settlement context is a significantly lower
10 threshold than in a contested proceeding or a trial context:

11 The two basic purposes for the Rule 23 certification requirements, as they
12 relate to questions of a nationwide class are: (1) to keep the lawsuit
13 manageable for trial; and (2) to protect the interests of the nonrepresentative
14 members. The first purpose is inapposite in the settlement context, and the
15 second, as it relates to commonality of issues, *only makes a difference if the*
16 *nonrepresentative class members would do much better by litigating on their*
17 *own or in their own jurisdiction.* The second category concerns are protected
18 by the trial court's fairness review of the settlement.

19 *Dunk*, 48 Cal. App. 4th at 1807, n. 19, (emphasis added). The reason for this is that no trial is
20 anticipated in the settlement context, so any case management issues inherent in determining if the
21 class should be certified need not be confronted. *Amchem Products, Inc. v. Windsor* 521 U.S. 591
22 (1987)

23 The very liberal standard expressed in *Dunk* is plainly satisfied here. The requirements for
24 class certification in the settlement context – ascertainability, numerosity, predominance of
25 common questions of law and fact, typicality, and adequacy – are all met. It certainly cannot be
26 said that the Settlement Class members would do “much better by litigating on their own”. *Dunk*,
27 48 Cal. App. 4th at 1807, n. 19. The proposed Settlement Class should be conditionally certified as
28 requested.

29 **1. Numerosity and Ascertainability.**

30 Numerosity is met if a proposed class is so large that joinder of all members would be
31 impracticable. *See* Code Civ. Proc. § 382. A proposed settlement class is ascertainable if the class
32 members can be objectively identified and given notice of the litigation without unreasonable time
33 or expense. *Medraza v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 101 (2008).

1 Here, the settlement class consists of 53 current and former employees of Metro Eighteen in
2 California from November 29, 2018 through the Effective Date, who have already been identified.
3 Lipeles Decl., ¶30.

4 **2. Well-Defined Community of Interest.**

5 **a. Commonality.**

6 To justify certification, the class proponent must show that questions of law or fact common
7 to the class predominate over the questions affecting the individual members. *See Arenas v.*
8 *El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010). While the parties dispute whether a class
9 would be appropriate if the litigation were to continue, they agree, for the purposes of this
10 settlement only, that the Class is subject to common compensation policies and challenges to those
11 policies that are certifiable for settlement purposes. *See e.g., Bluford*, 216 Cal. App. 4th at 872-73
12 (certifiable issues were raised by claim that the employer's per mile piece-rate system did not
13 compensate drivers for their statutory rest break time).

14 **b. Typicality.**

15 Typicality means merely that the class representative is similarly situated to the members of
16 the class, not that his claims are identical. *Classen v. Weller* 145 Cal. App. 3d 27, 45-46 (1983). It
17 suffices if the class representative's claims arise from the same event or course of conduct that
18 gives rise to the class claims, and are premised upon the same legal theories. *Id.* Here, for
19 purposes of settlement, the parties agree that Plaintiff asserts claims regarding Defendant's
20 compensation, meal/rest break and expense reimbursement practices that are at the core of the
21 action. Lipeles Decl., ¶¶5, 7.

22 **c. Adequacy of representation.**

23 The proposed class representative must establish that he or she will adequately represent the
24 proposed class. *See Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009).
25 Adequacy may be established by the fact that counsel are experienced. *See Local Joint Exec. Bd.*
26 *of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

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1 Here, Plaintiff alleges, and Metro Eighteen does not dispute for purposes of settlement, that
2 Plaintiff and the Class are represented by counsel with extensive experience in wage-and-hour
3 litigation and that Plaintiff is an adequate class representative. Lipeles Decl., ¶38.

4 **D. An Award of Class Counsel's Attorneys' Fees, Expenses and Costs, and**
5 **Payment for the Class Representative's Participation, Service and Risk**
6 **From the Settlement Fund Are Justified in this Case.**

7 The proposed Settlement provides that Plaintiff will request, and Defendant will not oppose,
8 an award to Class Counsel in an amount not to exceed \$173,250.00 in attorneys' fees (35% of the
9 Gross Settlement Amount), actual costs up to \$5,982.01, Class Representative Service Payment of
10 \$7,500 to the Named Plaintiff in recognition of his time, effort, and risk as Class Representative,
11 PAGA penalty payment to the LWDA in the amount of \$25,000, and up to \$5,995 in claims
12 administration costs. The foregoing awards amount to \$217,727.01 and Plaintiff therefore requests
13 that the Court approve a total deduction of \$217,727.01 from the \$495,000.00 Gross Settlement
14 Amount. Viewing the participation, service and risk payment as an additional cost of litigation, in
15 combination with the allocation for attorneys' fees, expenses and costs, this total deduction of
16 \$217,727.01 is within the range of attorneys' fees, expenses and costs awarded in similar cases. *See*
17 Lipeles Decl., at ¶29. The participation payment to Plaintiff is also justified as a Class
18 Representative Service Payment, which courts regularly award in class action litigation.

19 **1. The Proposed Attorneys' Fees and Cost Reimbursement Requested Is Reasonable,**
20 **Fair and Appropriate Under the Common Fund Doctrine and Should be**
21 **Preliminarily Approved.**

22 Plaintiff seeks preliminary approval of his request for reasonable attorneys' fees in an
23 amount up to \$173,250.00 and actual expenses and costs up to \$5,982.01.²⁸ As discussed in more
24 detail below, this fee award is reasonable under the common fund approach in determining
25 reasonable attorneys' fees.

26 ///

27 _____
28 ²⁸ Prior to the expiration of the period of time allotted for class members to make objections to the settlement, Plaintiff will file a motion and brief for fees and costs (to be heard at the same time as the Final Fairness Hearing) so that class members will be able, if they elect to do so, to review the fees motion prior to making objections or filing a claim. The motion and brief for fees and costs will include, *inter alia*, an itemized listing of all costs incurred in litigating this case. *See* Lipeles Decl., ¶41.

1 An attorneys' fees award is justified where the legal action has produced its benefits by way
2 of a voluntary settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987). California
3 law provides that when a party is entitled to statutory fees, he must be compensated for all time
4 reasonably spent seeking to accomplish the desired litigation result. *See Serrano v. Unruh*, 32
5 Cal.3d 621, 624 (1982). Courts in and out of California have long recognized the equitable
6 "common fund" doctrine under which attorneys that create a common fund or benefit for a group of
7 persons may be awarded their fees and costs out of the fund. "[W]hen a number of persons are
8 entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the
9 benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be
10 awarded attorneys' fees out of the fund." *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977), *see also*
11 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund...
12 is entitled to reasonable attorneys' fees from the fund as a whole").

13 In addition to spreading the litigation costs among all beneficiaries, awards of common fund
14 fees are essential to furthering the important societal goal of attracting competent counsel to handle
15 these often complex contingency cases, "who will be more willing to undertake and diligently
16 prosecute proper litigation for the protection or recovery of the fund if assured that [they] will be
17 promptly and directly compensated should [their] efforts be successful." *Melendres v. City of Los*
18 *Angeles*, 45 Cal. App. 3d 267, 273 (1975) (quoting *Estate of Stauffer*, 53 Cal.2d 124, 132 (1959)).
19 In California, trial courts have inherent equitable power to award attorneys' fees on a common fund
20 basis when counsel's efforts "have resulted in the preservation or recovery of a certain or easily
21 calculable sum of money." *Serrano*, 20 Cal.3d 25 at 35; *see also Bank of America Nat'l Trust &*
22 *Sav. Ass'n v. Cory*, 164 Cal. App. 3d 66, 89 (1985); *Melendres*, 45 Cal. App. 3d 267, 277 (trial
23 courts' "broad discretion" in awarding common fund fees is well-established).

24 The traditional method for calculating a common fund fee is to award a percentage of the
25 total fund. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 and 916 (1984); *Six (6) Mexican Workers*
26 *v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Lealao v. Beneficial California,*
27 *Inc.*, 82 Cal. App. 4th 19, 26 (2000); *Melendres*, 45 Cal. App. 3d at 278.

28 ///

1 Indeed, California courts have regularly approved payments of attorneys' fees amounting to
2 33% or more of the common fund in similar class actions.

3 California state and federal courts have regularly approved payments of attorneys' fees
4 amounting to as much as 33% or more of the common fund in similar wage and hour class actions
5 alleging missed meal and/or rest periods. *See, e.g., Morales v. Southland Sod Farms Operations, Inc.*,
6 No. 56-2017-00496912, 2018 WL 6928228, *2 (Cal. Super. Oct. 10, 2018) (granting final approval in a
7 wage and hour action and awarding 35% in attorneys' fees); *Erickson v. Q.S.P., Inc.*, No. BC469830,
8 2013 WL 4369736, *5, (Cal. Super. July 9, 2013) (granting final approval in a wage and hour action
9 and finding that 35% in attorneys' fees was reasonable); *Cabrera v. Advantage Sale & Marketing, LLC*,
10 No. BC485259, 2013 WL 1182822, (Cal. Sup. Mar. 12, 2013) (granting final approval for failure to
11 afford meal/rest breaks and awarding 35% in attorneys' fees). Where, as here, the common fund is
12 relatively small, class action commentators have noted that courts typically award 30-50% of the
13 common fund as attorneys' fees. *See Newberg* at §14.6.

14 Finally, several other factors support the requested attorneys' fees. Plaintiff and his counsel
15 brought this class action to prevent Defendant from continuing to commit the alleged violations of
16 California law regarding minimum wage (including overtime), meal/rest breaks and expense
17 reimbursement alleged in the Complaint. Plaintiff's Counsel handled this case on a contingency
18 basis and the case involved significant risks of non-payment of attorneys' fees and non-recovery of
19 litigation expenses if class certification was not granted and/or if Plaintiff's Counsel did not settle
20 or prevail. For these reasons, a costs award and common fund fee of 35% of the settlement fund
21 (*i.e.*, a total of up to \$179,232.01) is fair, reasonable and appropriate. Furthermore, because
22 Plaintiff's requested attorneys' fees of 35% of the common fund is reasonable and falls within the
23 range of approved percentages in similar common fund class action cases, Plaintiff's request for
24 fees of 35% of the common fund should be granted.

25 **2. The Proposed Payment to the Class Representative For His Service to the Class Is**
26 **Reasonable, Routinely Awarded, and Should be Preliminarily Approved.**

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1 The proposed payment of \$7,500 to the Named Plaintiff²⁹ is intended to recognize the
2 critical role he played in this case and the time, effort and risk undertaken in helping secure the
3 result obtained on behalf of the Class. *See Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726
4 (2004) (upholding “service payments” to named plaintiffs for their efforts in bringing class case);
5 Manual §21.62 n. 973 (noting service awards are warranted).

6 “Courts routinely approve incentive awards to compensate named plaintiffs for the services
7 they provide and the risks they incurred during the course of the class action litigation.” *Ingram v.*
8 *The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (quoting *In re S. Ohio Correctional*
9 *Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997) (approving \$303,000 payment to each class
10 representative plaintiff in employment case settling before class certification); *Martens v. Smith*
11 *Barney*, No. 96 Civ. 3779, 1998 W.L. 1661385, *4 (S.D.N.Y. 1998) and 181 F.R.D. 243, 262
12 (S.D.N.Y. 1998) (approving payments of up to \$150,000 for named plaintiffs, for a total of \$1.9
13 million in incentive payments for employment cases settling prior to class certification); *Roberts v.*
14 *Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (approving incentive payments up to \$85,000 for named
15 plaintiffs in employment case settling prior to class certification).

16 The factors courts use in determining the amount of incentive payments include (1) a
17 comparison between the incentive awards and the range of monetary recovery available to the
18 class; *see, e.g., Ingram*, 200 F.R.D. at 694; *Roberts v. Texaco, Inc.* 979 F. Supp. 185, 204
19 (S.D.N.Y. 1997); (2) time and effort put into the litigation; *see, e.g., Van Vranken v. Atlantic*
20 *Richfield Co.*, 901 F. Supp. 294, 299 (1995); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998);
21 (3) whether the litigation will further the public policy underlying the statutory scheme; *see, e.g.,*
22 *Roberts*, 979 F. Supp. at 201; (4) risks of retaliation; *see Roberts*, 979 F. Supp. at 202; *Cook*, 142
23 F.3d 1004, at 1016; (5) compromise of unique individual claims; *see, e.g. Women’s Comm. For*
24 *Equal Employment Opportunity v. Nat’l Broad. Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977); and (6)
25 risks of an adverse attorneys’ fees award; *see, e.g., Rodriguez v. West Publishing*, 563 F.3d 948,
26 958 (9th Cir. 2009) (“Incentive awards are intended to compensate class representatives for work
27 done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the

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²⁹ Any portion of the Class Representative Service Payment not awarded to Plaintiff will be made available for distribution to Settlement Class Members as part of the NSA. Settlement Agreement, §3.2.1.

1 action, and, sometimes, to recognize their willingness to act as a private attorney general.”).

2 These factors support the approval of the incentive payment requested here for the Class
3 Representative. First, the requested payment of \$7,500 to the Named Plaintiff constitutes only 1.5%
4 of the Gross Settlement Amount. Second, the Named Plaintiff spent time providing invaluable
5 assistance to Class Counsel and the Class in this case, including providing factual background for
6 the Class Complaint; providing and explaining documents corroborating his allegations to Class
7 Counsel; reviewing the Complaint and other pleadings filed with the Court by Plaintiff and
8 Defendant; participating in multiple conference calls and phone calls to discuss litigation and
9 settlement strategy, and attending via Zoom the all-day mediation. *See* Declaration of David
10 Cancino (“Cancino Decl.”), ¶6. The Named Plaintiff has been actively involved in this case, and
11 has proven himself to be an invaluable resource of information throughout the settlement
12 discussions. Lipeles Decl., ¶33; Cancino Decl., ¶6. Third, by bringing this action, the Named
13 Plaintiff furthered the public policy goal of encouraging compliance with the overtime, minimum
14 wage, meal/rest break and business expense reimbursement provisions of the Labor Code. Finally,
15 the requested Class Representative Service Payment of \$7,500 to the Plaintiff falls well within the
16 range of incentive payments typically awarded to Class Representatives in such class actions.
17 Lipeles Decl., ¶33; *see e.g., Ross v. US Bank Nat’l Ass’n*, No. C 07–02951 SI, 2010 WL 3833922,
18 at *2 (N.D. Cal. Sept. 29, 2010) (approving \$20,000 enhancement awards to each of four class
19 representatives in the wage and hour class action); *Garner v. State Farm Mut. Auto. Ins. Co.*, No.
20 CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) (“Numerous
21 courts in the Ninth Circuit and elsewhere have approved incentive awards of \$20,000 or more
22 where, as here, the class representative has demonstrated a strong commitment to the class”).

23 Accordingly, the requested Class Representative Service Payment of \$7,500 to the Named
24 Plaintiff is fully deserved and justified and thus should be preliminarily approved.

25 **V. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

26 **A. The Proposed Notice of Class Action Settlement Satisfies Due Process**

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1 California statutory and case law vests the Court with broad discretion in fashioning an
2 appropriate notice program. *See Cal. Rules of Court* 1859(f); *Cartt v. Superior Court*, 50 Cal. App.
3 3d 960, 973-74 (1975). The notice plan here entails mailing, and if necessary, re-mailing, the notice
4 to all identified participating Settlement Class Members based on Defendant's employment
5 records. Defendant will provide the last known addresses for all identified Class Members.
6 Plaintiff has proposed the services of an experienced class action settlement administration firm,
7 Phoenix, to implement the proposed Class Notice procedures. The Class Notice is consistent with
8 class certification notices approved by numerous state and federal courts, and is, under the
9 circumstances of this case, the best notice practicable. Such notice satisfies all due process
10 requirements. *See Cartt*, 50 Cal. App. 3d at 966-975.

11 **B. The Proposed Notice of Class Action Settlement is Accurate and**
12 **Informative**

13 The proposed Class Notice, attached as Exhibit A to the proposed Settlement Agreement,
14 provides among other things: (1) information regarding the nature of the Action; (2) a summary of
15 the substance of the settlement; (3) the class definition; (4) the formulae for calculating Individual
16 Class Payments; (5) the dates the Settlement Class Member was employed by Defendant during the
17 Class Period; (6) the number of workweeks based on Defendant's business records; (7) instructions
18 on how Settlement Class Members may submit a valid Request for Exclusion; (8) the procedure for
19 objecting to the settlement; (9) the deadline by which Settlement Class Members must postmark an
20 objection to the settlement; (10) notice that the Settlement Class Members will permanently forego
21 their right to pursue any and all of their released claims against Defendant, unless they elect not to
22 participate in the Action; and (11) notice that Settlement Class Members will automatically receive
23 an Individual Class Payment unless they submit a valid request for exclusion.

24 The best practicable means of providing notice to all Class Members will be used. Notice
25 will be mailed to all known and reasonably ascertainable Class Members, using Defendant's
26 records. The information in those records will be updated prior to mailing, using the National
27 Change of Address Database or its equivalent.

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1 If any Class Notices are returned as undeliverable, the Settlement Administrator will take
2 appropriate steps, such as skip-tracing, to maximize the probability that the Class Notice will be
3 received by all Class Members. (Settlement Agreement §8.4.3).

4 The Class Notice also fulfills the requirement of neutrality in Class Notices. *See Newberg* §
5 8:39 at pp. 284, 285. The Class Notice summarizes the proceedings to date, the significant legal
6 developments since the date of the settlement, and the terms and conditions of the settlement, in a
7 coherent and informative manner. The Class Notice clearly states that the Settlement does not
8 constitute an admission of liability by Metro Eighteen and recognizes that the Court has not ruled
9 on the merits of the Action. The Class Notice also states that the final settlement approval decision
10 has yet to be made. Accordingly, the Class Notice complies with the standards of fairness,
11 completeness and neutrality required of a settlement notice disseminated under authority of the
12 Court. *Newberg* §8:21, §8:39; *Manual* § 21.312.

13 **VI. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

14 The last step in the settlement approval process is the formal final approval hearing, at
15 which the Court may hear all evidence and argument necessary to evaluate the proposed
16 Settlement. *See Cal. Rules of Court* 1859(b). At that hearing, proponents of the Settlement may
17 explain and describe its terms and conditions and offer argument in support of the Settlement
18 approval. Furthermore, members of the Settlement Class, or their counsel, may be heard in support
19 of or in opposition to the proposed Settlement. Class Counsel requests that the hearing be held in
20 February 2024.

21 **VII. CONCLUSION**

22 For the reasons discussed above, Plaintiff requests that the Court enter an order of
23 preliminary approval of the class action settlement, approve the form of the proposed notice, and
24 approve the proposed schedule, including setting a date for a final approval hearing.

25
26 Dated: September 5, 2023

LIPELES LAW GROUP, APC

27 By: 
28 Jasmine J. Badawi
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