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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

MICHAEL FLORES, as an individual and on behalf of all others similarly situated,

Plaintiff,

vs.

WE CARE PLUMBING, HEATING & AIR, LLC; RUSSELL COCHRAN, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No.: CVRI2303843

[*Assigned for all purposes to the Hon. Angel M. Bermudez in Dept. M301*]

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

Date: November 4, 2024
Time: 8:30 a.m.
Dept: M301

Action Filed: July 27, 2023
Trial Date: None Set

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

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on November 4, 2024, at 8:30 a.m. in Department M301 of the above-entitled Court, located at 27401 Menifee Center Drive, Menifee, California 92584, Plaintiff Michael Flores ("Plaintiff") individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed class settlement of this lawsuit;
2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class defined as follows:

   > All current and former non-exempt employees who are or were employed by Defendant We Care Plumbing, Heating & Air, LLC, and who worked at least one shift in California from July 27, 2019 through June 30, 2024 (the "Class Period").

3. Preliminary appointment of Plaintiff Michael Flores as Class Representative;
4. Preliminary appointment of Paul K. Haines and Sean M. Blakely of Haines Law Group, APC, and Young W. Ryu of LOYR, APC, as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit a Class Representative Enhancement Payment to Plaintiff, civil penalties payable to the Labor & Workforce Development Agency "(LWDA"), settlement administration costs, and attorneys' fees and costs to Class Counsel;
6. Appointment of Phoenix Settlement Administrators as the third-party Settlement Administrator for mailing notices;
7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Settlement Agreement.

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This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the supporting declarations of Paul K. Haines, Sean M. Blakely, Young W. Ryu, Plaintiff Michael Flores, and Jodey Lawrence of Phoenix Settlement Administrators, and the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time of hearing. Defendant does not intend to oppose this Motion and given the multiplicity of issues addressed in this Motion, has indicated its approval of Plaintiff's expressed need to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2). Therefore, the parties jointly request the Court's consideration of Plaintiff's memorandum of points and authorities, which is 26 pages in length.

Dated: October 11, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: Sean Blakely

Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. INTRODUCTION

Plaintiff Michael Flores ("Plaintiff") brought this class and representative action for various wage and hour violations on behalf of current and former non-exempt employees of Defendant We Care Plumbing, Heating & Air, LLC ("We Care") who worked at least one shift in California from July 27, 2019 through June 30, 2024 (the "Class Period"). Plaintiff's primary allegations stem from We Care's piece-rate/commission compensation system, whereby Plaintiff and other non-exempt hourly employees are paid a piece-rate/commission for installation and repair work. Plaintiff alleges that We Care's piece-rate/commission compensation system failed to separately compensate its piece-rate and commissioned employees for rest periods and for time spent working on tasks that were not compensated on a piece-rate/commission basis (i.e., "non-productive time"). Plaintiff also alleges that We Care failed to provide all legally compliant meal periods, failed to pay all overtime wages due to its alleged regular rate miscalculations, and failed to reimburse for all necessary business expenditures. Based on these alleged wage and hour violations, Plaintiff also brought derivative claims for alleged waiting time penalties, We Care's alleged failure to issue accurate and compliant wage statements, and for civil penalties under the Private Attorneys General Act ("PAGA").[2]

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, common-fund class action settlement,[3] in which We Care has agreed to pay One

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[1] Plaintiff initially filed his Motion for Preliminary Approval on August 9, 2024. On August 26, 2024, the Court on its own motion continued the hearing to November 4, 2024, in order to issue a Case Management Order ("CMO") and to provide direction for settlement. The Parties have revised the Settlement Agreement pursuant to the CMO and now submit this Renewed Motion for Preliminary Approval of Class Action Settlement. Blakely Decl., ¶ 30.

[2] Plaintiff's operative First Amended Class and Representative Action Complaint ("FAC") pleads the following causes of action: (1) minimum wage violations; (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) waiting time penalties; (6) wage statement penalties; (7) failure to reimburse all necessary business expenditures; (8) unfair competition; and (9) civil penalties under the PAGA.

[3] The Stipulation of Settlement ("Settlement") is attached to the Declaration of Sean M. Blakely as **Exhibit A**. The proposed Class Notice, Request for Exclusion Form, Objection Form, and

Million Six Hundred Fifty Thousand Dollars and Zero Cents ($1,650,000.00) to the following Settlement Class:

> All current and former non-exempt employees who are or were employed by Defendant We Care Plumbing, Heating & Air, LLC, and who worked at least one shift in California from July 27, 2019 through June 30, 2024 (the "Class Period").

If the Settlement is approved, We Care will pay a non-reversionary Gross Settlement Amount of $1,650,000.00. After deducting estimated administration costs, Plaintiff's requested Class Representative Enhancement Payment, the amount designated as PAGA civil penalties, and requested attorneys' fees and costs, the Net Settlement Amount ("NSA") of approximately $978,000.00 will be distributed to all Settlement Class members who do not opt-out of the Settlement based on the proportionate number of workweeks worked by each Settlement Class member during the Class Period.

Significantly, Settlement Class members do not need to file a claim to reap the financial benefits of the Settlement, as all Settlement Class members will automatically receive a payment unless they affirmatively opt-out. There are approximately 628 Settlement Class members, and the average payment to participating Settlement Class members is projected to be approximately $1,557.32.

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

II. <u>SUMMARY OF THE LITIGATION</u>

A. <u>THE PARTIES AND BRIEF PROCEDURAL HISTORY</u>

We Care provides plumbing and heating, ventilation and air conditioning ("HVAC") services to residential and commercial clients throughout Southern California. *See* Declaration of

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Notice of Estimated Settlement Award are attached to the Settlement as **Exhibits 1, 2**, **3, and 4** respectively. All defined terms in this motion have the same definition as that in the Settlement.

Sean M. Blakely ("Blakely Decl."), ¶ 9. Plaintiff worked for We Care as a non-exempt "Installer" from approximately July 2021 through approximately February 2023. *See* Declaration of Michael Flores in Support of Approval of Class Action Settlement ("Flores Decl."), ¶ 2. As an Installer, Plaintiff performed various services to We Care's clients, including installing HVAC units and all necessary components such as condensers, ducting, diffusers, controls, and vent piping. *Id.* Installers for We Care also install refrigeration lines and provide HVAC cleaning and maintenance services to We Care's clients. Blakely Decl., ¶ 9.

On April 20, 2023, Plaintiff sent his PAGA notice letter to the LWDA. Blakely Decl., ¶ 10; **Exhibit B**. On July 27, 2023, Plaintiff filed his Class Action Complaint in Riverside Superior Court, alleging causes of actions for: (1) meal period violations; (2) rest period violations; (3) failure to reimburse business expenses; (4) civil penalties under the Private Attorneys' General Act of 2004, Labor Code Section 2698, *et seq*., and (5) unfair competition in violation of California Business & Professions Code § 17200 *et seq*. Blakely Decl., ¶ 10. On November 3, 2023 Plaintiff filed the operative First Amended Class and Representative Action Complaint ("FAC"), adding causes of action for minimum wage violations, failure to pay all overtime wages, waiting time penalties, and wage statement violations. *Id*.

B. PLAINTIFF'S CLAIMS AND WE CARE'S DEFENSES

1. Uncompensated Rest Periods Due to Piece-Rate/Commission Pay Plans

Plaintiff alleges that We Care failed to separately compensate Settlement Class members for paid rest periods when those employees were compensated under a piece-rate/commission pay plan, which included Installer positions and various non-exempt employees in We Care's Plumbing department. Blakely Decl., ¶ 14; *see Bluford v. Safeway, Inc.*, 216 Cal.App.4th 864 (2013)("Under the rule of *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323, rest periods must be separately compensated in a piece-rate system"); *see also Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98, 114 (2017) (holding that a commission pay plan was unlawful because it did not separately compensate for rest periods, stating "[w]e agree with *Bluford* that Wage Order 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan does not already include minimum hourly wage for such time"). However, We Care argues that its compensation plans are compliant with California law. Blakely Decl., ¶ 14. We Care further contends that any liability for its failure to separately compensate employees for rest periods during shifts would be limited to back-pay for the rest periods themselves (i.e., pay for the 10 minutes per rest period) as opposed to the rest period penalties under Labor Code § 226.7, measured as an hour of pay per workday, sought by Plaintiff. *Id*. We Care further contends that any questions of uncompensated rest periods would be highly individualized, precluding certification, as employees worked in a variety of positions, some of them not compensated by piece-rate/commission plans. *Id.*

2. <u>Unpaid Non-Productive Time Due to Piece-Rate/Commission Plans</u>

Plaintiff alleges that We Care's piece-rate/commission pay plans for Settlement Class members are further unlawful in that they fail to compensate for "non-productive" hours worked. Blakely Decl., ¶ 15; *see Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 40-41 (2013) (holding that where an employee is paid on a piece-rate basis, but is also required to complete tasks which are not assigned any piece-rate value such as time spent waiting in between piece-rate tasks, attending administrative meetings, and performing cleaning and maintenance work, referred to as "non-productive time," the pay plan fails to compensate for all hours worked). Here, Plaintiff reports that Installers and Plumbers were required to perform non-productive tasks throughout their workday, including travel time between work sites, loading and unloading trucks as well as cleaning company trucks, and other tasks which were not directly tied to activities which generated piece-rate/commission earnings, however, were not compensated for this time because We Care's compensation plans fail to compensate for non-productive time. Blakely Decl., ¶ 15.

We Care argues that its compensation plans fully comply with California law and compensate employees for all hours worked. Blakely Decl., ¶ 15. We Care further contends that employees experienced minimal (if any) uncompensated "non-productive" time. *Id*. We Care also argues that any questions of non-productive time would be highly individualized, as employees worked in a variety of positions, some of them not compensated by piece-rate/commission plans, and there are no records or other common evidence of time spent on potentially non-productive tasks necessary to prove class-wide liability, precluding certification. *Id.*

3. Meal Period Claims

Plaintiff alleges that We Care's meal period polices/practice resulted in missed, late, and/or short first meal periods. Blakely Decl., ¶ 16. Plaintiff further alleges that We Care did not always accurately record meal periods worked for many of its non-exempt employees. *Id.*

We Care argues that it has maintained compliant written meal period policies throughout the Class Period and has provide compliant meal periods in line with those policies. Blakely Decl., ¶ 16. We Care further contends that under *Brinker*, it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken. *Id.*; *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting "ensure" standard and holding employers only have to "provide" employees the opportunity to take meal periods). We Care also maintains that any short, missed, or late first meal periods were the result of lawful employee waiver or choice, thereby precluding liability. Blakely Decl., ¶ 16. Lastly, We Care argues that individualized inquiries will be required to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, thereby making class certification of this claim unlikely. *Id*.

4. Regular Rate Miscalculations

Plaintiff alleges that We Care failed to pay all overtime wages owed by not including all non-discretionary renumeration, such as the piece-rate/commission pay, into the "regular rate" of pay. Blakely Decl., ¶ 17; see Labor Code § 510(a) (requiring overtime to be paid at "one and one-half times the regular rate of pay"); Wage Order 4, § 3 ("[E]mployees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's <u>regular rate of pay</u> for all hours worked over 40 hours in the workweek") (emphasis added).

However, We Care argues that it properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class members. Blakely Decl., ¶ 17. We Care further argues that Settlement Class members received different types of piece-rate and/or commission pay throughout the Class Period, depending on their job positions, creating substantive differences among the Settlement Class members with respect to the incentives received, making class certification unlikely. *Id*

5. Failure to Reimburse Necessary Business Expenses

Plaintiff alleges that We Care required Settlement Class members to use their cell phones for a variety of work purposes, including but not limited to communicating with co-workers and management. Blakely Decl., ¶ 18. Despite requiring Plaintiff and putative class members to be in communication with each other and their supervisors by personal cellular phone, Plaintiff alleges that We Care did not reimburse its employees for any of these expenses, in violation of Labor Code § 2802(a) ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."); *see also Cochran v. Schwan's Home Service, Inc.,* 228 Cal.App.4th 1137 (2014) (holding employer must reimburse use of personal cell phone, even where employee already has "unlimited" plan); Blakely Decl., ¶ 18.

We Care maintains that Settlement Class members were not required to use their personal cell phones as a necessary part of their job. Blakely Decl., ¶ 18. We Care further argues that any expenses incurred by Settlement Class members were minimal, given the wide availability of low-cost cell phone plans. *Id.* Lastly, We Care argues this claim is not suitable for class treatment, as it would require individualized determinations as to whether each Settlement Class member used a personal cell phone for work-related purposes, and if so, how much of that use was a reasonable percentage of their individual monthly phone bill. *Id.*

6. Unpaid Travel Time

Plaintiff alleges that he and other non-exempt Installers and Plumbers who worked at alternative worksites were often required to meet at a central location, where they performed various tasks such as cleaning and loading the company vehicle, prior to driving to the worksite, where they would be clocked in for the day by their supervisors. Blakely Decl., ¶ 19. Plaintiff further alleges that We Care would only compensate Plaintiff and other non-exempt Installers and Plumbers for the time spent once the employees arrived at their worksites and thus failed to compensate the employees for all required travel time. *Id.*

We Care counters that its policies provided for travel time pay, that its timekeeping policies/practices complied with California law, that it has always properly compensated Settlement Class members for all hours worked throughout the Class Period. Blakely Decl., ¶ 19. We Care further argues that Plaintiff would be unable to certify this claim as individualized inquiries would be necessary as to whether employees were in fact not compensated for travel time as there are no records of travel time kept, resulting in an unmanageable series of mini-trials. *Id*.

7. Wage Statement Violations

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

8. Waiting Time Penalties

Plaintiff alleges that as a further result of its failure to pay all wages earned, as well as its failure to pay all meal and rest period premiums, We Care is liable for waiting time penalties pursuant to Labor Code §§ 201-203. Blakely Decl., ¶ 21. We Care argues that it possesses strong, good-faith defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id*; see *also* 8 Cal. Code

Regs. § 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203 . . . A 'good faith' dispute that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee."). We Care further asserts that Plaintiff's waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. Blakely Decl., ¶ 21.

9. PAGA Civil Penalties

As a result of the foregoing Labor Code violations, Plaintiff alleges that We Care is liable for civil penalties under the PAGA. Blakely Decl., ¶ 22. Since Plaintiff's PAGA claim is derivative of Plaintiff's underlying wage claims, We Care asserts the PAGA claim would fail with those claims. *Id.*; *see Price v. Starbucks Corp*. 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). We Care further maintains that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find We Care liable for any of Plaintiff's claims. Blakely Decl., ¶ 22; *see* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc*., 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc*., Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer "not aware" of violations); *Carrington v. Starbucks Corp*., 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, the Parties engaged in extensive informal discovery. Blakely Decl., ¶ 11. We Care produced timekeeping and payroll records for over 90% of putative class members. *Id*. We Care also provided a detailed Class List, which included putative class members' position, date of hire, and date of termination (if applicable), as well as its written wage and hour policies and compensation plans for employees paid on a piece-rate/commission basis. *Id*. Plaintiff hired a labor economist with a Ph.D. in economics to assist Plaintiff in analyzing and extrapolating the data produced to calculate We Care's potential exposure for each of Plaintiff's claims at issue. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiff's claims, the chances of certification of Plaintiff's claims, and We Care's potential defenses. *Id.*

On April 3, 2024, the Parties participated in a full-day mediation with Steven G. Mehta, Esq., a highly experienced wage and hour class action mediator. Blakely Decl., ¶ 12. During mediation, the Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and defenses. *Id*. At the conclusion of mediation, Mr. Mehta issued a mediator's proposal for a class-wide settlement, which was accepted by all Parties. *Id*. During the months that followed, the Parties finalized the terms of the Settlement and executed the long-form Settlement Agreement now before the court. *Id*.

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, We Care will pay a Gross Settlement Amount of $1,650,000.00. *See* Settlement, ¶ 3. Significantly, this Settlement is non-reversionary, and no Settlement Class member will have to submit a claim form to receive a Settlement Award. *Id*., at ¶¶ 3-4. Each Settlement Class member will automatically receive a Settlement Award unless he or she affirmatively opts out of the Settlement. *Id*. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount:	$1,650,000.00
• Minus Court-approved attorneys' fees:	$550,000.00
• Minus Court-approved verified costs (up to):	$50,000.00
• Minus Court-approved Enhancement Payment:	$10,000.00
• Minus amount set aside as PAGA penalties:	$50,000.00
• Minus estimated Settlement Administration costs:	$12,000.00
Net Settlement Amount ("NSA"):	$978,000.00
• PLUS 25% "PAGA Amount" to Settlement Class:	$12,500.00
Total Amount Paid to Settlement Class members:	**$990,500.00**

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys' fees and costs, the Class Representative Enhancement Payment to Plaintiff, the amount designated as PAGA civil penalties, and Settlement Administrator's fees and expenses, the Settlement requires We Care to pay a Net Settlement Amount ("NSA") of at least $978,000.00 to all Settlement Class members who do not timely opt out. *See* Settlement, ¶ 4. The NSA shall be allocated among Settlement Class members (except those who submit a timely and valid Request for Exclusion) based on each participating Settlement Class member's proportionate workweeks worked during the Class Period. *See* Settlement, ¶ 4(B)(i). Additionally, Twelve Thousand Five Hundred Dollars ($12,500.00) of the Gross Settlement Amount has been designated as the "PAGA Amount," and shall be distributed to those Settlement Class members (including those who submit a valid and timely Request for Exclusion from the class action settlement) who worked for We Care at any time from April 20, 2022 through June 30, 2024 (the "PAGA Period") proportionally based on the number of pay periods worked during the PAGA Period. Settlement, ¶¶ 2(B), 4(C).

We Care's share of employer-side payroll taxes will be paid by We Care separate, and in addition to, the Gross Settlement Amount. *See* Settlement, § 3(D). Any payment from the PAGA Amount shall be treated as 100% penalties; and any payment from the NSA to Settlement Class members shall be allocated as twenty percent (20%) wages, and eighty percent (80%) penalties and interest. *Id*., at § 4(E). The Settlement Administrator will issue to Settlement Class members an IRS Form W-2 (for amounts paid was wages) and an IRS Form 1099 (for amounts paid as penalties and interest). *Id*. The Parties propose that any uncashed checks shall escheat to the California State Controller's Office for deposit in the Unclaimed Property Fund in the name of the Settlement Class member who does not cash his/her check. Id., at § 4(F).

Based on information from We Care, there are approximately 628 Settlement Class members. Blakely Decl., ¶ 24. Therefore, the average Individual Settlement Amount from the NSA is projected to be approximately $1,557.32. *Id*. Based on the proposed allocations of the NSA, the lowest potential Individual Settlement Award is projected to be approximately $37.09, and the highest potential Individual Settlement Award is estimated to be approximately $9,539.29. *Id*. There are approximately 286 Aggrieved Employees who worked during the PAGA Period. *Id*. Therefore, the average payment from the PAGA Amount is estimated to be approximately $43.71. *Id*.

Settlement Class members will have sixty (60) calendar days from the mailing of the Class

Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Settlement, ¶¶ 9(C)-(D). Settlement Class members who do not opt out of the Settlement will be bound by its terms and will release all claims against We Care included within the Settlement. *See Id.*, at ¶ 2(A).

2. <u>Attorneys' Fees and Costs, Enhancement Payment, and PAGA Payment</u>

Plaintiff will apply for a Class Representative Enhancement Payment at the time of seeking final approval of the proposed class action settlement in the amount of $10,000, for his service to the Settlement Class. *See* Settlement, ¶¶ 3(C)(3), 6. "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases,* 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at the time of final approval, Plaintiff's requested Enhancement Payment is intended to recognize the time and effort Plaintiff expended on behalf of the Settlement Class, including providing substantial factual information and documents to Class Counsel, discussing the claims and theories at issue in the litigation, actively participating in the prosecution of his claims, gathering a reviewing documents for use in the lawsuit, preparing for mediation and reviewing the Settlement Agreement, as well as the significant risks Plaintiff undertook by agreeing to serve as the named plaintiff in this case, and the fact that Plaintiff agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement, ¶¶ 2(C), 6; Blakely Decl., ¶ 27; *see also* Flores Decl., ¶¶ 4-6.

Class Counsel will also apply for an attorneys' fees award of one-third of the Gross Settlement Amount, which is currently estimated to be $550,000.00, and up to $50,000.00 in verified costs reimbursement. *See* Settlement, ¶¶ 3(C)(4), 5; Blakely Decl., ¶ 26. Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Blakely Decl., ¶ 26. Class Counsel has incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, conducting extensive informal discovery, analyzing Settlement

Class members' timekeeping and payroll records and other data and documents with the help of a retained expert, creating a comprehensive damages model, preparing for and attending mediation, negotiating and preparing the long-form Settlement Agreement, preparing this Motion, and otherwise litigating the case. *Id*. Class Counsel expect to expend additional attorney time in attending the hearing on this Motion, overseeing the Notice process and fielding questions from Settlement Class members, preparing the final approval papers, and attending the Final Approval hearing. *Id*.

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

Class Counsel submit their request for attorneys' fees is reasonable when viewed as an overall percentage of the Settlement and in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which the litigation has been conducted. Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees and verified costs upon seeking final approval.

Additionally, the parties have agreed to designate $50,000.00 of the Gross Settlement Amount as PAGA civil penalties, of which $37,500.00 (75%) will be paid to the LWDA, with the remaining $12,500.00 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, ¶ 3(C)(5). Plaintiff submits this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of $7,500 to LWDA out of $6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D.

Cal. 2013) (approving PAGA payment of $7,500 to LWDA out of $1.25 million common-fund settlement).

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions settlement of a class action on court approval, which is generally evaluated under the federal standards applicable under Rule 23 of the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires trial court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires the trial court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair. See e.g., *Hanlon*, supra, 150 F.3d at 1027. There is an initial presumption of fairness where, as here, the Settlement was negotiated at arm's-length by class counsel and with the assistance of an experienced wage and hour class action mediator. *See e.g.*, *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

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

a. **The Strength of Plaintiff's Case**

Although Plaintiff steadfastly maintains that his claims are meritorious, he also acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described above, We Care presented multiple defenses to Plaintiff's claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification, and ultimately trial, success was far from certain.

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

Although the Parties engaged in significant informal discovery prior to mediation, the Parties still had significant formal discovery to complete had the matter not settled. Blakely Decl., ¶ 25. This would have required expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Id*. Even if Plaintiff was to certify the classes, the Parties would incur considerably more attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Id*. This Settlement avoids those risks and the accompanying expense. *Id*.

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

Absent settlement, there is a risk that the class would not be certified prior to trial, or, if it were certified, a risk that the class definition would be narrowed and the value of the case diminished accordingly. This would potentially be accomplished either due to a narrowing of the class definition in a Court order on a contested motion for class certification, or through settlement agreements entered into by We Care with individual class members by way of *Pick-up-Stix* type settlement agreements[4], and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick-up-Stix* process. Thus, this factor, too, supports preliminary approval of the settlement.

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

d. **<u>Amount Offered in Settlement Given Realistic Value of Claims</u>**

The Settlement provides a positive recovery for the Settlement Class in the face of hotly disputed claims. Plaintiff conducted an analysis of underpaid wages due to We Care's alleged unlawful piece-rate/omission compensation plans, potential meal period premiums owing, wage statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results of Plaintiff's exposure analysis are discussed below:

<u>Uncompensated Rest Periods</u>: $560,333

Plaintiff alleges that We Care failed to separately compensate Settlement Class members for required rest periods when they were compensated under We Care's piece-rate/commission pay plans. Blakely Decl., ¶ 14. Based on Plaintiff's review of employee timekeeping and payroll records, Plaintiff estimates that We Care's piece-rate/commission practices have resulted in approximately 61,056 daily shifts without separately compensated rest periods, leading to a maximum potential exposure for this claim at approximately $1,231,500 (61,056 daily shifts without separate compensation * $20.17 average rest period premium rate). *Id.*

However, as argued above, We Care argues that its pay plans are lawful and that any liability for its failure to separately compensate employees for rest periods during shifts would be limited to back-pay for the rest periods themselves (i.e., pay for the 10 minutes per rest period) as opposed to the rest period penalties under Labor Code § 226.7, measured as an hour of pay per workday, sought by Plaintiff. Blakely Decl., ¶ 14. Given these defenses, Plaintiff discounted the maximum amount by 30% for risk of non-certification and an additional 35% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately $560,333. *Id.*

<u>Unpaid Non-Productive Time</u>: $144,064

Plaintiff alleges that Settlement Class members compensated on a piece-rate/commission basis were not compensated for time spent for "non-productive" tasks, such as travel time between work sites, attending administrative meetings, and performing cleaning and maintenance work. Blakely Decl., ¶ 15. Plaintiff estimates that We Care is liable for approximately 1.5 hours of unpaid non-productive time per Installer or Plumbing employee per workweek, and 1 hour of unpaid non-productive time per other commission-based employees per workweek. *Id*. At 10,054 workweeks for Installers and Plumbing employees, and 3,233 workweeks for other commission-based employees, Plaintiff estimates maximum exposure for unpaid non-productive time at approximately $369,394 [(10,054 Installer/Plumbing workweeks * 1.5 hours of non-productive time * $20.17 average hourly rate) + (3,233 workweeks * 1 hour of non-productive time * $20.17 average hourly rate)]. *Id.*

However, as explained above, We Care argues that its compensation plans are compliant and compensate employees for all hours worked. Blakely Decl., ¶ 15. We Care also argues that almost all work performed by Settlement Class members was "directly related" to the activities that were being compensated via piece-rate/commission compensation, and therefore did not need to be separately compensated. *Id.*; *see also* Labor Code § 226.2 (stating that compensable non-productive time is "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis"). We Care also argues that Plaintiff's claims for uncompensated non-productive time are not amenable to class treatment because employees worked in a variety of different departments with different requirements, and it would require an unmanageable series of mini-trials to determine how much time was spent on non-productive activities for each Settlement Class member. Blakely Decl., ¶ 15. In light of these arguments, Plaintiff discounted We Care's maximum exposure on this claim by 35% to account for a risk of non-certification and potential inability to proceed on a class-wide basis due to the arbitration agreements, and by an additional 40% for risk of being unsuccessful on the merits or having the amount of unpaid wages reduced, for a reasonably expected total of approximately $144,064. *Id.*

<u>Meal Period Violations</u>: $531,605

Based on Plaintiff's review of We Care's timekeeping records, there were approximately 33,108 facially non-compliant first meal periods during the Class Period. Blakely Decl., ¶ 16. Furthermore, due to We Care's recordkeeping practices, Plaintiff estimated an additional 34,472 meal period violations for Settlement Class members who worked under a piece-rate and/or commission payment plan. *Id*. Therefore, Plaintiff estimated total maximum damages for meal period violations at approximately $1,363,089 (67,580 non-compliant meal periods * $20.17 average meal period premium). *Id*.

However, as noted above, We Care argues that it maintained compliant meal period policies/practices throughout the Class Period and under *Brinker* it is only required to provide employees the opportunity to take meal periods, not ensure that they are taken. Blakely Decl., ¶ 16; *see Brinker, supra*, 53 Cal.4th at 1034 (rejecting "ensure" standard). Furthermore, We Care argues that Plaintiff's meal period claim is not suited for class treatment, as individual inquiries would be needed as to which employees took non-compliant meal periods or missed meal periods, how many meal periods were non-compliant or missed, and why a particular employee did not a take compliant meal period on a particular shift. Blakely Decl., ¶ 16. Based on these defenses, Plaintiff discounted the maximum amount by 35% for risk of non-certification and an additional 40% for risk of losing on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of approximately $531,605. *Id*.

<u>Regular Rate Miscalculations</u>: $6,030

Based on Plaintiff's review of the payroll records, Plaintiff estimates the total underpayment of overtime wages due to the alleged regular rate miscalculations to be approximately $10,050. Blakely Decl., ¶ 17.

However, We Care argues that it properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class members. Blakely Decl., ¶ 17. We Care further argues that Settlement Class members received different types of piece-rate and/or commission pay throughout the Class Period, depending on their job positions, creating substantive differences among the Settlement Class members with respect to the incentives received, making class certification unlikely. *Id.* In light of these defenses, Plaintiff discounted the maximum exposure by 20% for the risk of non-certification, and an additional 25% for risk of losing on the merits, and/or not receiving the maximum penalties sought, to arrive at an estimated exposure of approximately $6,030. *Id*.

<u>Unreimbursed Business Expenses</u>: $51,266

Plaintiff alleges that We Care required Settlement Class members to use their personal cell phones and did not reimburse them for this necessary business expense. Blakely Decl., ¶ 18. Based on a review of We Care's records, Plaintiff estimates We Care's maximum exposure for unreimbursed business expenses at $189,875 (7,595 total months * $25 per month in reasonable work-related personal cell phone use). *Id.*

As noted above, We Care maintains that Settlement Class members were not required to use their personal cell phones as a necessary part of their job, that any expenses incurred by Settlement Class members were minimal, and that this claim is not suitable for class treatment. Blakely Decl., ¶ 18. In light of these defenses, Plaintiff discounted the maximum amount 40% for risk of non-certification and an additional 55% for risk of losing on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of approximately $51,266. *Id.*

<u>Unpaid Travel Time</u>: $168,837

Plaintiff alleges that he and other non-exempt employees were not compensated for additional travel time from the warehouse to various job site. Blakely Decl., ¶ 19. Using a conservative estimate of one (1) hour of unpaid travel time per shift, Plaintiff calculates We Care's liability for unpaid travel time for the Installers/Plumbers at approximately $937,986 (46,504 shifts * 1 hour * $20.17 average hourly rate). *Id.*

However, as noted above, We Care counters that it has always properly compensated Settlement Class members for all hours worked throughout the Class Period, and that Plaintiff would be unable to certify this as individualized inquiries would be necessary as to whether employees were in fact not compensated for travel time, resulting in an unmanageable series of mini-trials. Blakely Decl., ¶ 19. Given these defenses, Plaintiffs discounted this maximum amount by 55% for risk of non-certification and an additional 60% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately $168,837. *Id.*

<u>Wage Statement Penalties</u>: $84,080

Plaintiff alleges that We Care faces derivative wage statement liability as a result of its failure to pay all wages as well as its failure to pay all meal and rest period premium wages. Blakely Decl., ¶ 20. Those penalties are calculated as $50 for each "initial" violation and $100 for each "subsequent" violation, with a maximum of $4,000 per employee. *See* Labor Code § 226(e). *Id*. There were 286 Settlement Class members employed during the relevant period and a total of 4,347 pay periods. *Id*. Plaintiff, therefore, calculated potential wage statement exposure at approximately $420,400 [(286 "initial" violations * $50) + (4,061 "subsequent" violations * $100)]. *Id*.; *see also* Labor Code § 226(e).

In light of We Care's arguments that no violations occurred, that employees suffered no "injury," that any alleged violations were not "knowing and intentional," that the wage statements always accurately reflected hours worked and amounts paid to employees, as well as risks associated with Plaintiff's underlying claims discussed above, Plaintiff discounted the maximum exposure by 50% for risk of non-certification, and by an additional 60% for risk of being unsuccessful on the merits, for an estimated realistic exposure of approximately $84,080. Blakely Decl., ¶ 20.

<u>Waiting Time Penalties</u>: $223,654

We Care's records reflected approximately 231 former Settlement Class members separated from their employment and are therefore eligible for waiting time penalties. Blakely Decl., ¶ 21. Based on an hourly rate of $20.17, Plaintiff estimated the average waiting time penalty per former employee to be approximately $4,841 ($20.17 * 8 hours per day * 30 days). *Id*. Therefore, Plaintiff calculated We Care's maximum exposure for potential waiting time penalties to be approximately $1,118,271 (231 separated employees * $4,841 average waiting time penalty). *Id*.

We Care presented several defenses to this claim, most notably its assertion that because they possessed good-faith defenses to the underlying claims, any failure to pay wages was not "willful" as a matter of law. Blakely Decl., ¶ 21. We Care further asserts Plaintiff's waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. *Id*. Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome these defenses, both as to class certification and on the merits, as to his underlying claims. *Id*. To account for these defenses, Plaintiff discounted the maximum exposure by 50% for the risk of non-certification, and an additional 60% for risk of losing on the merits, and/or not receiving the maximum penalties sought, to arrive at an estimated exposure of approximately $223,654. *Id*.

<u>PAGA Penalties</u>: $65,205

Plaintiff estimated a maximum total PAGA exposure at approximately $434,700 (4,347 "initial" violations * $100 penalty). Blakely Decl., ¶ 22; *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from the underlying wage and hour violations discussed above, which We Care vigorously disputes. Blakely Decl., ¶ 22; *see e.g.*, *Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its underlying claims). We Care also asserts the Court would drastically reduce any award of PAGA penalties as "confiscatory." Blakely Decl., ¶ 22; *see also Thurman v. Bayshore Transit Mgmt., Inc*., 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc*. (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from $2.8 million to $500,000). Therefore, Plaintiff discounted the maximum figure by 50% for risk of losing on the merits and/or not recovering a PAGA penalty for each and every pay period, and an additional 70% to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately $65,205. *Id*.

Using these estimated figures for each of the claims described above, Plaintiff predicted that the potential recovery for the Settlement Class would be approximately $1,835,074. Blakely Decl., ¶ 24. The proposed Settlement of $1,650,000.00 therefore represents approximately 89.9% of the reasonably forecasted recovery for the Settlement Class. *Id*. Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Settlement Class, which is consistent with what Plaintiff's counsel believes could have been recovered had the case proceeded through trial.

e. <u>The Experience and Views of Counsel</u>

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific*

Enterprises Securities Litigation 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class actions, and who have been appointed as class counsel in numerous cases alleging similar claims. *See* Blakely Decl., ¶¶ 2-6; *see also* Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; Declaration of Young W. Ryu ("Ryu Decl."), ¶¶ 3-6. Class Counsel, with the help of a retained expert, conducted an in-depth review of We Care's timekeeping and payroll records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. The Settlement was also reached with the assistance of an experienced and respected wage-and-hour class action mediator. This factor strongly supports preliminary approval of the Settlement. *See Kullar*, *supra*, 168 Cal.App.4th at 130.

2. <u>The Preliminary Approval Standard Is Met</u>

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

a. <u>The Settlement Is Within the Range of Possible Approval</u>

The proposed settlement reflects approximately 89.9% of the estimated recovery the Settlement Class could reasonably expect in light of the significant litigation risks, and will provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Settlement Class members at trial"). Further, the average individual Settlement

Award of approximately $1,557.32 exceeds average payments achieved in other wage and hour class action settlements.[5] Thus, Plaintiff submits that the proposed settlement is within the range of possible approval, such that notice should be provided to the Settlement Class members so that they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Settlement Class members have had the opportunity to opt-out or object.

b. <u>The Settlement Resulted from Serious, Informed Negotiations</u>

The Settlement resulted from an exchange of substantial information, arm's-length negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and additional months of negotiating the long-form settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar*, *supra*, 168 Cal.App.4th at 130. As discussed above, Plaintiff carefully vetted the claims at issue and reviewed extensive timekeeping and payroll data and, with the help of a retained expert, conducted a detailed statistical analysis of the data to arrive at his estimated classwide damages figures. *See* Blakely Decl., ¶¶ 14-23. Thus, this factor supports preliminary approval.

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[5] *See e.g.*, *Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012) (average net recovery of approximately $105); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net recovery of approximately $90); *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619 (Sacramento County Super. Ct.) (average net recovery of approximately $80); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average recovery of approximately $65); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006) (average net recovery of approximately $35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010) (average net recovery of approximately $20); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008) (wage and hour class action settlement approved where average recovery was approximately $60); *Schiller v. David's Bridal, Inc.*, Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 at *17 (E.D. Cal. June 11, 2012) ("Class Members will receive an average of approximately $198.70…[T]his is a substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several similar actions where the gross recoveries per class member were less than $90…[T]he Court finds that the results achieved are good"); and *Williams v. Centerplate, Inc.*, Case Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428 (S.D. Cal. Aug. 26, 2013) (average recovery of approximately $108).

c. The Settlement Is Devoid of Obvious Deficiencies

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

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

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

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 916 (2010) (alterations in original). Here, the proposed class is defined as all current and former non-exempt employees employed by We Care and worked at least one shift in California during the Class Period. *See* Settlement, ¶ 1. Therefore, Settlement Class members can be identified from We Care's personnel and employment records. Based on information provided by We Care, the Settlement Class consists of approximately 628 current and former non-exempt employees. *See* Blakely Decl., ¶ 24. It would therefore be impracticable to bring all Settlement Class members before the Court, or for each Settlement Class member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not the merits, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Superior Court (Rocher)*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on, among other issues, We Care's uniform compensation pay plans, and meal and rest period policies and/or practices. These types of claims are commonly held to be proper for class certification. *See e.g.*, *Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

3. The Claims of the Named Plaintiff Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal.App.3d 1341, 1347 (1987) (finding typicality satisfied where named Plaintiff purchased the same goods as the putative class in a consumer class action). Here, Plaintiff's claims are typical of those held by the Settlement Class members. First, We Care employed Plaintiff as a non-exempt employee during the Class Period, and Plaintiff was subject to We Care's wage and hour policies at issue in this case. *See* Flores Decl., ¶ 2. Second, Plaintiff was injured by the same challenged policies/practices that allegedly injured the Settlement Class as a whole. For example, Plaintiff asserts that he was deprived of rest period pay and non-productive time due to We Care's compensation plans and contends that he was deprived of all legally compliant meal periods. *See generally*, Flores Decl. Plaintiff further asserts that he did not receive accurate and compliant wage statements and did not receive all wages at the time of separation of employment. *Id*. Because Plaintiff has suffered the same injuries as the other members of the Settlement Class, the typicality requirement is satisfied.

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

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services* 155, Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the

Settlement Class, as there are no conflicts between Plaintiff and the proposed Settlement Class, and Plaintiff possesses claims that are in line with those of the Settlement Class. *See McGhee v. Bank of America,* 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation. *See* Haines Decl., ¶¶ 2-8; Blakely Decl., ¶¶ 2-6.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE

This Court should order distribution to the Settlement Class of the proposed Class Notice, Notice of Estimated Settlement Award, Objection Form, and Request for Exclusion Form (the "Notice Packet") by U.S. Mail, postage prepaid, in English and Spanish, using last known mailing address information provided by We Care. *See* Settlement, ¶ 9. This manner of giving notice is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Here, the Parties have agreed that the Settlement be administered by Phoenix Settlement Administrators ("Phoenix"), an experienced class action settlement administrator. *See generally* Declaration of Jodey Lawrence ("Lawrence Decl.") and attached exhibits. Settlement Class members' addresses will be ascertainable through We Care's personnel and payroll records, which We Care will provide to Phoenix within ten (10) business days of preliminary approval of the Settlement. *See* Settlement, ¶ 9(A). Within ten (10) business days from receipt of this information, the Settlement Administrator will run the names of all Settlement Class members through the National Change of Address ("NCOA") database to determine any updated addresses for Settlement Class members, and mail a Notice Packet to each Settlement Class member in English and Spanish at his or her last known address. *See* Settlement, ¶ 9(B). To the extent that any notices are returned, Phoenix will perform a "skip trace" to track any Settlement Class member's current mailing address. *Id*., at ¶ 9(F).

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims, basic contentions and denials of the parties and the key terms of the Settlement, the 60-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Settlement Class member, and advises them that they will be bound by the terms of the Settlement if they do not opt-out. *See* Blakely Decl., Exhs. 1-4 to Exh. A; Settlement, ¶¶ 9(C)-(D). The proposed Class Notice will also notify Settlement Class members of the final approval hearing date and provides the Settlement Class contact information for Class Counsel and advises Settlement Class members that they may enter an appearance through counsel if they wish to. *Id.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement Class members.

D. <u>THE COURT SHOULD SET A FINAL APPROVAL HEARING</u>

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

V. <u>CONCLUSION</u>

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

Dated: October 11, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

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