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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

MANUEL BALUX OCH and PEDRO
GARCIA ALFEREZ on behalf of
themselves, all others similarly situated, and
on behalf of the general public,

Plaintiffs,

v.

SAC PROFLOORS; and DOES 1-100,
Defendants.

Case No. 23CV031860
(Consolidated with Case No. 23CV039543)

*[Assigned for All Purposes to the
Hon. Tara Desautels; Dept. 23]*

**PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND PAGA ACTION SETTLEMENT,
CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE,
SETTING OF FINAL APPROVAL
HEARING DATE**

Date: April 17, 2024
Time: 2:30 p.m.
Reservation ID: 457084238219

Action File: April 25, 2023
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs Manuel Balux Och and Pedro Garcia Alferez (hereinafter “Plaintiffs”), on behalf
3 of themselves and the approximately 329-member putative class, respectfully request that this
4 Court preliminarily approve the Joint Stipulation and Settlement Agreement (hereinafter
5 “Agreement”¹) entered into between Plaintiffs and Defendant Sac ProFloors (hereinafter
6 “Defendant”) (hereinafter Plaintiffs and Defendant are collectively referred to as the “Parties”).
7 The Parties’ Agreement seeks to resolve claims raised against Defendant in this matter in exchange
8 for a non-reversionary \$942,500 Gross Settlement Amount. The proposed Class is comprised of
9 all non-exempt, hourly employees of Defendant in the State of California from April 25, 2019,
10 through December 15, 2023.² It is requested that the Court grant preliminary approval as, when
11 analyzing the strengths and vulnerabilities of the claims and Defendant’s potential liability
12 exposure, this proposed settlement of \$942,500 is well within the range of reasonableness. This
13 settlement is estimated to pay Class Members an average payment of approximately \$1,621.17.³
14 The proposed Agreement satisfies all the criteria for preliminary approval under Rule 3.769 of the
15 California Rules of Court.

16 As the following sections show, Class Counsel are convinced that the proposed settlement
17 is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues
18 presented in this action. The length and risks of trial and perils of litigation that affect the value of
19 the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the
20 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
21 establishing specific damages and various possible delays and appeals, were also carefully
22 considered by Class Counsel in arriving at the proposed settlement. The Agreement was the
23 product of an all-day mediation with mediator Brandon McKelvey and was the product of non-
24 collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair,

25
26

¹ The Parties’ Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as
27 Exhibit 1. “Exhibit 1” herein refers to the Parties’ Agreement.

28 ² Exhibit 1 at Section I, Paragraph 5, Page 1.

³ The Net Settlement Amount is approximately \$533,365. \$533,365 divided by 329 class members
= \$1,621.17.

1 reasonable, and adequate. Accordingly, Plaintiffs seek: (1) preliminary approval of the terms
2 contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiffs
3 as Class Representatives; (4) appointment of Mara Law Firm, PC; Lawyers for Employee and
4 Consumer Rights; and Melmed Law Group P.C. as Class Counsel; (5) approval of the Parties'
5 proposed notice of class action settlement⁴ (referred to herein as the "Class Notice" or "Notice")
6 and method of notifying the Class about the settlement; and (6) a hearing date for final approval
7 of August 22, 2024.

8 **II. BACKGROUND**

9 Defendant provides services to multi-family residences including flooring installation and
10 repairs in both their residential and communal areas. Defendant's services include extended hours,
11 same day installations, and weekend installations. In furtherance of these services, Defendant
12 employs hourly, non-exempt employees, such as Plaintiffs in California.

13 A class action complaint was filed by Plaintiff Och on April 25, 2023, in Alameda County
14 Superior Court (Case No. 23CV031860). The complaint alleges the following causes of action
15 against Defendant: (1) Failure to Pay All Straight Time Wages; (2) Failure to Pay Overtime; (3)
16 Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Failure to
17 Adopt a Compliant Sick Pay/Paid Time Off Policy; (6) Knowing and Intentional Failure to Comply
18 with Itemized Employee Wage Statement Provisions; (7) Failure to Pay all Wages Due at the Time
19 of Termination; and (8) Violation of Unfair Competition Law. (Mara Dec. ¶ 10).

20 Plaintiff Manuel Balux Och submitted a Notice of Labor Code Violations to the Labor and
21 Workforce Development Agency ("LWDA") on April 13, 2023. Thereafter, a PAGA
22 representative action complaint against Defendant was filed by Plaintiff Och in the Alameda
23 County Superior Court on July 27, 2023 (Case No. 23CV039543). The complaint sought civil
24 penalties under the PAGA. Plaintiff Och's PAGA complaint alleged the same underlying
25 violations as his class complaint. On August 12, 2023, the Court granted the Parties' stipulation to
26 consolidate both the class and PAGA matters filed by Plaintiff Och, with Case No. 23CV031860
27 serving as the lead case. (Mara Dec. ¶ 11).

28 ⁴ The Class Notice is attached to the Agreement as Exhibit A.

1 Plaintiff Pedro Garcia Alferez filed a class action complaint on May 12, 2023, in Yolo
2 County Superior Court. The complaint alleged substantially the same class action allegations as
3 Plaintiff Och's class action complaint. On March 14, 2024, the Parties filed a stipulation to allow
4 Plaintiff Och to file a First Amended Complaint adding Plaintiff Pedro Garcia Alferez as a plaintiff
5 and class representative as well as his counsel. On March 18, 2024, the Court granted the Parties'
6 stipulation and Plaintiff Och filed his First Amended Complaint on March 20, 2024. (Mara Dec. ¶
7 12).

8 **III. INVESTIGATION/LITIGATION HISTORY**

9 **a. Discovery and Investigation**

10 After filing, the Parties engaged in informal discovery. These discovery efforts led to
11 Defendant producing policy documents that covered employees' employment with Defendant,
12 such as employee handbooks, and time and wage records. Included within these documents were
13 Defendant's wage and hour policies, including its meal and rest period policies. Defendant also
14 produced time and wage records to a mutually agreed upon mediation expert for the expert to pull
15 a random 20% sampling of Class Members. The records for these Class Members were then
16 analyzed by the expert. Defendant further produced a Class List that contained the hire and
17 termination dates of all Class Members which allowed Plaintiffs to determine the number of
18 workweeks worked by Class Members during the relevant time period. From this discovery,
19 Plaintiffs and their Counsel were able to analyze Defendant's liability in this action and prepare a
20 realistic damage model. (Mara Dec. ¶ 13).

21 **b. The Parties Agreed to Attend Mediation**

22 The Parties attended an all-day mediation presided over by wage and hour mediator
23 Brandon McKelvey on December 15, 2023. This mediation was successful. The Parties then met
24 and conferred over all the terms of the settlement and finalized their settlement in the Parties'
25 Agreement. The Parties seek preliminary approval of the Agreement in the instant motion. (*See*
26 Mara Dec. ¶ 14; *see also* Exhibit 1 attached thereto).

27 ///

28 ///

1 **c. The Parties' Staunchly Conflicting Positions**

2 **i. Meal Periods**

3 Plaintiffs contend that Defendant does not provide employees with meal periods that
4 conform with California law. Employers have an obligation under California law to provide
5 employees with thirty (30) minute meal periods. Under California Labor Code § 512(a), “[a]n
6 employer may not employ an employee for a work period of more than five hours per day without
7 providing the employee with a meal period of not less than 30 minutes” Cal. Lab. Code §
8 512(a). An employer “satisfies this obligation [to provide meal periods] if it relieves its employees
9 of all duty, relinquishes control over their activities and permits them a reasonable opportunity to
10 take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.”
11 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040. Here, Plaintiffs contend
12 that Defendant’s time records show non-compliant meal periods. (Mara Dec. ¶ 15).

13 In *Donohue v. AMN Services, LLC*, the California Supreme Court issued a decision,
14 wherein it ruled that time records showing late, short, or missed meal periods raises a rebuttable
15 presumption that the meal periods were not provided: “If time records show missed, short, or
16 delayed meal periods with no indication of proper compensation, then a rebuttable presumption
17 arises” that the meal periods were not provided in accordance with California law. *Donohue v.*
18 *AMN Services, LLC* (2021) 11 Cal.5th 58, 74. Plaintiffs contend that, here, the time records show
19 non-compliant meal periods. In these shifts, under *Donohue*, Plaintiffs contend that it is presumed
20 that meal period violations occurred. (Mara Dec. ¶ 16).

21 Defendant asserts that its meal period policy is lawful and that it provides employees with
22 meal periods in compliance with California law. Further, Defendant alleges that if litigation
23 continues it would be able to show that it advised employees of the right to take a meal period in
24 compliance with California law. Defendant contends that employees either took a lawful meal
25 period or knowingly and voluntarily decided to skip the meal period or take a late or short meal
26 period. Defendant contends that this evidence would rebut the presumption under *Donohue v. AMN*
27 *Services, LLC*. Defendant also asserts that the evidence in this case shows that it paid meal period
28 premiums in shifts in which employees were not provided with compliant meal periods. Thus,

1 Defendant contends that to the extent an employee was not provided the opportunity to take a
2 legally compliant meal period, they were provided a meal premium. (Mara Dec. ¶ 17).

3 In summary, Plaintiffs contend that because Defendant's time records show non-compliant
4 meal periods, it is presumed that meal period violations occurred in these shifts. Defendant
5 counters that it would be able to rebut this presumption because its meal period policy is lawful.
6 Defendant also asserts that in rebutting the presumption, the Court or fact finder would have to ask
7 each employee why their time records show a non-compliant meal period. This could be due to
8 employees knowingly and voluntarily deciding to skip the meal period or taking a late or short
9 meal period. To make this determination, Defendant contends the Court or fact finder would have
10 to ask each employee about each instance which would defeat certification as individual issues
11 would predominate. Plaintiffs contend that this is not the case and that certification under *Donohue*
12 is proper. As such, disputes exist as to whether certification is proper and as to whether Defendant
13 can rebut the presumption under *Donohue*. (Mara Dec. ¶ 18).

14 **ii. Rest Periods**

15 Plaintiff alleges that employees are not provided with lawful rest periods. Employers have
16 an obligation to provide employees with ten (10) minute rest periods. An employer's obligation to
17 provide its employees with rest periods arises under the Industrial Welfare Commission Wage
18 Orders. Wage Order 7-2001, Section 12(A) states, "[e]very employer shall authorize and permit
19 all employees to take rest periods, which insofar as practicable shall be in the middle of each work
20 period. The authorized rest period time shall be based on the total hours worked daily at the rate
21 of ten (10) minutes net rest time per four (4) hours or major fraction thereof." Here, the sampling
22 of records analyzed by an expert revealed that Defendant recorded rest periods until approximately
23 July 16, 2021. Plaintiffs believe that this same violation rate continued after rest periods stopped
24 being recorded. Plaintiffs contend that the same presumption under *Donohue* would apply to
25 Defendant's records showing unlawful rest periods. (Mara Dec. ¶ 20).

26 Defendant asserts that its rest period policy is lawful and that it provides employees with
27 rest periods in compliance with California law. Defendant alleges that if litigation continues it
28 would be able to show that it advised employees of their rest period rights in compliance with

1 California law. Defendant further asserts that employees were provided the opportunity to take
2 legally compliant rest periods, and employees were relieved of all work duties during such rest
3 periods. Defendant also contends that if litigation were to continue, it would provide declarations
4 from employees stating that they knew they were entitled to rest periods in accordance with
5 California law and that they were able to leave the work premises during rest periods. Defendant
6 contends that the presumption under *Donohue* does not apply to rest periods. Even if it did,
7 Defendant contends that it would be able to rebut the presumption. (Mara Dec. ¶ 21).

8 In summary, Plaintiffs contend that Defendant does not provide lawful rest periods because
9 its time records show rest period violations. Plaintiffs contend that it is presumed that rest period
10 violations occurred in these shifts. Defendant disagrees that the *Donohue* presumption applies to
11 rest periods. Defendant also counters that it, if it does apply, Defendant would be able to rebut this
12 presumption because its rest period policy is lawful. Defendant also asserts that in rebutting the
13 presumption, the Court or fact finder would have to ask each employee why their time records
14 show a non-compliant rest period. This could be due to employees knowingly and voluntarily
15 deciding to skip the rest period. To make this determination, Defendant contends the Court or fact
16 finder would have to ask each employee about each instance which would defeat certification as
17 individual issues would predominate. Plaintiffs contend that this is not the case and that
18 certification under *Donohue* is proper. As such, disputes exist as to whether certification is proper
19 and as to whether Defendant can rebut the presumption under *Donohue*. (Mara Dec. ¶ 22).

20 **iii. Wage Statements**

21 Plaintiffs allege that employees are not provided with accurate itemized wage statements.
22 Section 226(a) provides that employers must furnish an accurate itemized statement in writing
23 showing: (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece
24 rate units earned and applicable piece rate if the employee is paid on a piece rate basis; (4) all
25 deductions; (5) net wages earned; (6) the inclusive dates of the period for which the employee is
26 paid; (7) the name of the employee and only the last four digits of his or her social security number
27 or employee identification number other than a social security number; (8) the name and address
28 of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay

1 period and corresponding number of hours worked at each hourly rate by the employee. Plaintiffs
2 allege that Defendant fails to provide employees with accurate itemized wage statements because
3 Defendant's wage statements do not meet California Labor Code § 226(a)'s requirements.
4 Plaintiffs contend that Defendant's wage statements failed to accurately list the number of hours
5 being paid for the category of pay entitled "Break Time." (Mara Dec. ¶ 24).

6 Defendant disputes this claim. Defendant argues that employees can ascertain the required
7 information, such as hours worked, using simple math. Defendant relies on cases which hold that
8 "[w]age statements comply with § 226(a) when a plaintiff employee can ascertain the required
9 information by performing simple math, using figures on the face of the wage statement."
10 *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014) 554 Fed. Appx. 661, 662 (citing *Morgan*
11 *v. United Retail Inc.* (2010) 186 Cal.App.4th 1136). (Mara Dec. ¶ 25).

12 Further, Defendant also asserts that any violation of California Labor Code § 226 was not
13 "knowing and intentional." *See* Cal. Lab. Code § 226(e) ("An employee suffering injury as a result
14 of a **knowing and intentional** failure by an employer" may recover damages") (emphasis added);
15 *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195 ("Some statutory penalties are
16 imposed only if an employers' violation was 'willful' or 'knowing.' . . . [S]ection 226, subdivision
17 (e) penalizes an employer's 'knowing and intentional' failure to provide itemized wage statements
18 under section 226, subdivision (a)[.]"). Defendant further contends that employees cannot show
19 that they have suffered an injury because of any potential violation of California Labor Code §
20 226. Defendant contends that employees knew to talk to their supervisor if they had any questions
21 or concerns with their wage statements. As such, disputes exist as to whether Defendant's wage
22 statements violated California Labor Code § 226(a), whether any such violation was knowing and
23 intentional, and whether employees suffered an injury. (Mara Dec. ¶ 26).

24 **iv. Unpaid Wages**

25 Plaintiffs contend that Defendant does not pay employees for all time worked. Employees
26 must be paid for all "hours worked," as that phrase is defined in the Wage Order and interpreted
27 by California courts. Hours worked is defined in the Wage Order as "the time during which an
28 employee is subject to the control of an employer and includes all the time the employee is suffered

1 or permitted to work, whether or not required to do so.” Wage Order 7-2001, Subd. 2(G); *see also*
2 *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. Under the control standard, “it is
3 only necessary that the worker be subject to the control of the employer in order to be entitled to
4 compensation.” *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 584. The *Morillion* Court
5 reasoned that an employee is under the employer’s control and entitled to compensation when the
6 employer “directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (*quoting*
7 *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal. App. 4th 968, 975). Here, Plaintiffs contend
8 that Defendant does not pay employees for time employees must commute to and from their job
9 site. (Mara Dec. ¶ 28).

10 Plaintiffs contend that Defendant owes wages to employees for the time spent driving to
11 and from job sites. Plaintiffs assert that employees work in teams. Plaintiffs allege that at the
12 beginning of a shift, employees are picked up by their supervisor and driven to the job site.
13 Plaintiffs assert that employees are required to ride with their team to the job location, so
14 employees cannot drive themselves or use another method of transportation. Thus, Plaintiffs
15 contend that this time must be paid. (Mara Dec. ¶ 29).

16 Defendant contends that employees are paid for this time. Defendant asserts that employees
17 are told to begin recording their time when their supervisor picks them up. Because of this
18 Defendant asserts that no additional wages are owed to employees. Defendant contends that if
19 litigation were to continue, it would provide declarations from employees attesting to the fact that
20 they were paid for this time. Defendant asserts the Court or fact finder would have to ask each
21 employee about whether or not they were paid for this time in each shift which would defeat
22 certification as individual issues would predominate. As such, a dispute exists regarding whether
23 employees were paid for the time they spend going to and from the job site at the beginning and
24 end of their shifts. (Mara Dec. ¶ 30).

25 **v. Unpaid Overtime Wages**

26 Plaintiffs assert that Defendant does use the proper regular rate of pay when calculating
27 overtime owed to employees. As a result, Plaintiffs argue that Defendant paid employees less
28 overtime wages than they were owed. California Labor Code § 510 and Wage Order 7 require

1 employers to pay non-exempt employees overtime wages of no less than one and one-half times
2 their respective regular rates of pay. The regular rate of pay under California law includes all
3 remuneration for employment paid to the employee. The California Supreme Court discussed how
4 bonuses effect an employee's regular rate of pay in the case *Alvarado v. Dart Container*
5 *Corporation of California* ("*Alvarado*") (2018) 4 Cal. 5th 542. There, the California Supreme
6 Court observed, the "[r]egular rate of pay, which can change from pay period to pay period,
7 includes adjustments to the straight time rate, reflecting, among other things, shift differentials and
8 the per hour value of any nonhourly compensation the employee has earned." *Id.* at 554. (Mara
9 Dec. ¶ 32).

10 Plaintiffs contend that Defendant pays employees performance pay in addition to hourly
11 pay. Plaintiffs assert that Defendant does not adjust the regular rate of pay when determining the
12 overtime rate owed. Defendant argues that performance pay is entirely discretionary and, therefore,
13 does not need to be included in the regular rate of pay. Thus, the Parties have a dispute about
14 whether Defendant was required to adjust the regular rate of pay due to performance pay paid to
15 employees. (Mara Dec. ¶ 33).

16 **vi. Waiting Time Penalties**

17 Plaintiffs also contend that Defendant failed to pay employees their final wages within the
18 timeframes outlined by California law. This claim is derivative of Plaintiff's unpaid wages, meal
19 period, and rest period claims. Should Plaintiffs' unpaid wage, meal period, and rest period claims
20 fail, these claims would also fail. (Mara Dec. ¶ 35).

21 In addition, Defendant contends that even if Plaintiff were successful in their unpaid wage,
22 meal period, and rest period claims, they would have to prove Defendant "willfully" failed to pay
23 employees the appropriate wages due upon separation of employment. "A willful failure to pay
24 wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails
25 to pay wages to an employee when those wages are due. However, a good faith dispute that any
26 wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code
27 Regs. Tit. 8 § 13520. "A 'good faith dispute' that any wages are due occurs when an employer
28 presents a defense, based in law or fact, which would preclude any recovery on the part of the

1 employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good
2 faith dispute did exist.” *Id.* Defendant contends that any failure to pay wages due at the separation
3 of employment was not willful. Defendant argues that it would not be liable for waiting time
4 penalties because a “good faith dispute” exists over the payment of those wages. *See* Cal. Code
5 Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201. Defendant
6 also argues that Plaintiffs’ unpaid wage claims cannot form the basis of their wage statement claim.
7 Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for
8 the position that employees do not suffer injury under California Labor Code § 226(a) so long as
9 the wage statements correctly reflected the hours worked and the pay received even if the pay is
10 later determined to be inaccurate. (Mara Dec. ¶ 36).

11 **IV. TERMS OF THE PROPOSED SETTLEMENT**

12 Under the terms of the settlement, Defendant will create a settlement fund of \$942,500.

13 **a. Deductions from the Settlement**

14 The Parties have agreed (subject to and contingent upon the Court’s approval) that this
15 action be settled and compromised for the non-reversionary total sum of \$942,500 (“Gross
16 Settlement Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of
17 up to \$314,135 (33.33% of the GSA)⁵ to compensate Class Counsel for work already performed
18 and all work remaining to be performed in documenting the settlement, administering the
19 settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to
20 exceed, \$20,000;⁶ (c) a Class Representative Service Payment to each named class representative
21 in a sum not to exceed \$7,500 (\$15,000 total) in consideration for prosecuting this class action,
22 serving as Class Representatives, work performed, and risks undertaken for the payment of
23 attorneys’ fees and costs in the event they had been unsuccessful in the matter; (d) settlement
24 administration fees and expenses to APEX Class Action Administration (hereinafter “APEX”),

25 ⁵ Although Plaintiffs’ Counsel seeks attorneys’ fees under the percentage method, Plaintiff’s
26 Counsel will also provide the Court with their lodestar information at final approval.

27 ⁶ These will be tabulated and presented to the Court at final approval. Plaintiffs will only seek the
28 amount of actual costs incurred during the litigation of this case. Should the actual costs exceed
\$20,000, Plaintiffs will only seek reimbursement of costs up to \$20,000. Should the actual costs
be lower than \$20,000, the difference will be added to the Net Settlement Amount for disbursement
to Participating Class Members.

1 estimated not to exceed approximately \$10,000;⁷ and (e) \$50,000 allocated to Plaintiffs' claims
2 under the PAGA. Of this payment, 75%, or \$37,500 will be provided to the LWDA, and 25%, or
3 \$12,500, will be available for distribution to Aggrieved Employees.⁸

4 **b. Calculation of the Settlement Payments to Class Members**

5 After all Court-approved deductions from the GSA, it is estimated that \$533,365 ("Net
6 Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement
7 payment, will be distributed to Participating Class Members.⁹ Subject to the terms and conditions
8 of the settlement, each Participating Class Member will receive a proportionate share of the Net
9 Settlement Amount that is equal to (i) the number of weeks he or she worked for Defendant, based
10 on the Class Data provided by Defendant, divided by (ii) the total number of weeks worked by all
11 Participating Class Members based on the same Class Data, which is then multiplied by the Net
12 Settlement Amount. One day worked in a given week will be credited as a work week for purposes
13 of this calculation. Therefore, the value of each Class Member's Individual Settlement Share ties
14 directly to the amount of weeks that he or she worked. (Exhibit 1 at Section III, Paragraph 49(A)(i),
15 Pages 9-10). This payment will be divided into a "wage portion" to compensate Participating Class
16 Members for alleged unpaid wages and a "non-wage portion" to compensate Participating Class
17 Members for alleged interest and penalties. The wage portion will make up 40% of each
18 Participating Class Members' individual settlement payment, and the non-wage portion will make
19 up 60% of each Participating Class Members' individual settlement payment. (Exhibit 1 at Section
20 III, Paragraph 59(B), Page 10).

21 In addition, each Aggrieved Employee will receive a proportionate share of the Net PAGA
22 Settlement Amount that is equal to (i) the number of pay periods he or she worked for Defendant,

23 ⁷ APEX provided the Parties with the lowest bid for the settlement administration process in this
24 case, meaning that more of the Net Settlement Amount will be available for Participating Class
25 Members. Further, APEX will present to the Court a declaration in conjunction with the final
26 approval motion outlining the costs of the settlement administration process. If the settlement
27 administration costs are lower than the amount allocated in the Agreement, the difference will be
28 added to the Net Settlement Amount for distribution to Participating Class Members.

⁸ Aggrieved Employees are all non-exempt, hourly employees of Defendant in the State of
California from April 13, 2022, through December 15, 2023. (Exhibit 1 at Section I, Paragraph 3,
Page 1).

⁹ Participating Class Members are all Class Members who do not submit a valid and timely request
to exclude themselves from this Settlement. (Exhibit 1 at Section I, Paragraph 34, Page 5).

1 based on the PAGA Data provided by Defendant, divided by (ii) the total number of pay periods
2 worked by all Aggrieved Employees based on the same PAGA data, which is then multiplied by
3 the Net PAGA Settlement Amount. One day worked in a given pay period will be credited as a
4 pay period for purposes of this calculation. Therefore, the value of each Aggrieved Employee's
5 Individual PAGA Settlement Share ties directly to the amount of pay periods that he or she worked
6 during the PAGA Period. (Exhibit 1 at Section III, Paragraph 60(A)(i), Page 10). This payment
7 will be treated as 100% penalties. (Exhibit 1 at Section III, Paragraph 60(B), Pages 10-11).

8 Under no circumstances will any portion of the \$942,500 settlement revert to Defendant
9 and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's
10 share of taxes will be paid in addition to and outside of the GSA. (See Exhibit 1 at Section I,
11 Paragraph 19, Page 3).

12 **c. Notice to the Class**

13 Within ten (10) business days after entry of the Preliminary Approval Order, Defendant
14 shall deliver to the Settlement Administrator an electronic database, which will list the Class¹⁰ and
15 PAGA Data¹¹. The Settlement Administrator will use the National Change of Address Database
16 to obtain updated addresses for Class Members. (Exhibit 1 at Section III, Paragraph 63(D)(i), Pages
17 14-15).

18 Within ten (10) business days after receipt of the Class and PAGA Data, the Settlement
19 Administrator will mail via first-class regular U.S. Mail the Class Notice to all identified Class
20 Members and Aggrieved Employees using the mailing address information provided by Defendant

21 ¹⁰ The "Class Data" is the electronic database Defendant shall deliver to the Settlement
22 Administrator which will list the following information for each Class Member: (1) first and last
23 name; (2) last known mailing address; (3) social security number; (4) telephone number; and (5)
24 the total number of weeks during which the Class Member performed work during the Class
Period. The Class Data shall be based on Defendant's payroll, personnel, and other business
records. (Exhibit 1 at Section I, Paragraph 7, Page 2).

25 ¹¹ The "PAGA Data" is the electronic database Defendant shall deliver to the Settlement
26 Administrator which will list the following information for each Aggrieved Employee: (1) first
27 and last name; (2) last known mailing address; (3) social security number; (4) telephone number;
28 and (5) the total number of weeks the total number of weeks during which the Aggrieved Employee
performed work during the PAGA Period as an Aggrieved Employee. The PAGA Data shall be
based on Defendant's payroll, personnel, and other business records. (Section I, Paragraph 30,
Page 5).

1 and the results of the search of the National Change of Address Database on all Class Members
2 and Aggrieved Employees. (Exhibit 1 at Section III, Paragraph 63(D)(iii), Page 15). The Notices
3 will be mailed in English and Spanish.

4 After notices are mailed, Class Members will have sixty (60) days to respond to the
5 settlement. (Exhibit 1 at Section I, Paragraph 40, Page 6). Class Members may respond to the
6 settlement by requesting to be excluded from it or objecting to it. Class Members can also file a
7 dispute as to the number of workweeks attributed to them.

8 **i. Requests for Exclusion**

9 The Class Notice will provide that Class Members who wish to exclude themselves from
10 the Settlement must mail to the Settlement Administrator a written request for exclusion. The
11 written request for exclusion must: (a) state the Class Member's name, address, telephone number,
12 and the last four digits of the Class Member's social security number or employee identification
13 number; (b) state the Class Member's intention to exclude themselves from or opt-out of the
14 Settlement; (c) be addressed to the Settlement Administrator; (d) be signed by the Class Member
15 or his or her lawful representative; and (e) be postmarked no later than the Response Deadline.
16 (Exhibit 1 at Section III, Paragraph 63(F), Pages 16-17).

17 **ii. Objections to the Settlement**

18 The Class Notice will provide that the Class Members who wish to object to the Settlement
19 must do so in writing, signed, dated, and mailed to the Settlement Administrator postmarked no
20 later than the Response Deadline. The timeframe to submit an objection will not be increased for
21 returned mailings. Any Objections shall state: (a) the objecting person's full name, address, and
22 telephone number; (b) the words "Notice of Objection" or "Formal Objection;" (c) describe, in
23 clear and concise terms, the legal and factual arguments supporting the objection; (d) list
24 identifying witness(es) the objector may call to testify at the Final Approval hearing; and (e)
25 provide true and correct copies of any exhibit(s) the objector intends to offer at the Final Approval
26 hearing. Objecting Class Members may (though are not required to) appear at the Final Approval
27 Hearing, either in person or through the objector's own counsel. Objecting Class Members are
28 permitted to appear regardless of whether they submitted a written objection. (Exhibit 1 at Section

1 III, Paragraph 63(E), Page 16).

2 **iii. Disputes**

3 If a Class Member or Aggrieved Employee who receives a Class Notice wishes to dispute
4 the number of work weeks listed on the Class Notice, the Class Member or Aggrieved Employee
5 may notify the Settlement Administrator by mail or telephone no later than the Response Deadline
6 and should produce any available supporting evidence, such as wage statements, offers of
7 employment, termination letters, and/or other employment records, to the Settlement
8 Administrator. The documentation should provide evidence of the dates the Class Member or
9 Aggrieved Employee contends he or she worked for Defendant during the Class or PAGA Period.
10 The Settlement Administrator shall then provide the documentation provided by the Class Member
11 or Aggrieved Employee to Defendant. Defendant shall review its records, the documentation
12 provided by the Class Member or Aggrieved Employee, and shall provide information to the
13 Settlement Administrator in response to any such disputed claim. Defendant's records shall be
14 presumed to be determinative, but the Settlement Administrator shall evaluate the evidence
15 submitted by the Class Member or Aggrieved Employee and make the decision as to which dates
16 should be applied. The determination by the Settlement Administrator shall be final and binding.
17 (Exhibit 1 at Section III, Paragraph 63(G), Pages 17-18).

18 **iv. Returned Notices**

19 If a Class Notice is returned because of an incorrect address, within five (5) business days
20 from receipt of the returned notice, the Settlement Administrator will conduct a search for a more
21 current address for the Class Member and re-mail the Class Notice to the Class Member. The
22 Settlement Administrator will use the National Change of Address Database and skip traces to
23 attempt to find the current address. The Settlement Administrator will be responsible for taking
24 reasonable steps to trace the mailing address of any Class Member for whom a Class Notice is
25 returned by U.S. Postal Service as undeliverable. These reasonable steps shall include, at a
26 minimum, the tracking of all undelivered mail, performing address searches for all mail returned
27 without a forwarding address, and promptly re-mailing to Class Members for whom new addresses
28 are found. (Exhibit 1 at Section III, Paragraph 63(D)(iv), Page 15).

1 **d. Website**

2 The Settlement Administrator will maintain a website to host documents relevant to this
3 lawsuit and the proposed settlement. Such documents include: the operative complaint, the
4 Agreement, and the Class Notice. (Exhibit 1 at Section III, Paragraph 63(I), Page 18).

5 **e. Distribution of Funds**

6 Defendant shall wire or otherwise provide to the Settlement Administrator the Gross
7 Settlement Amount no later than six (6) months after the Court grants final approval or June 15,
8 2024, whichever is later. (Exhibit 1 at Section I, Paragraph 21, Page 3; Section III, Paragraph
9 63(M)(i), Page 20). Within ten (10) business days after the Settlement Administrator's receipt of
10 the Gross Settlement Amount, the Settlement Administrator shall disburse: (1) the Net Settlement
11 Amount to be paid to Participating Class Members; (2) the Net PAGA Settlement Amount to
12 Aggrieved Employees; (3) the Attorney Fee Award and Cost Award to Class Counsel for
13 attorneys' fees and costs, as approved by the Court; (4) the Class Representative Enhancement
14 Payments paid to the Class Representatives, as approved by the Court; (5) the Administration
15 Costs, as approved by the Court; and (6) the LWDA Payment to the LWDA. (Exhibit 1 at Section
16 I, Paragraph 17, Page 3; Section III, Paragraph 63(M)(ii), Page 20).

17 Participating Class Members and Aggrieved Employees must cash or deposit their
18 Individual Settlement Share checks within one hundred and eighty (180) calendar days after the
19 checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar
20 days after mailing, the Settlement Administrator will send a reminder postcard indicating that
21 unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become
22 non-negotiable, and offer to replace the check if it was lost or misplaced. If any checks remain
23 uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice,
24 the Settlement Administrator will, within two hundred (200) calendar days after the checks are
25 mailed, cancel the checks. All funds associated with the Individual Settlement Share checks
26 returned as undeliverable and funds associated with those checks remaining un-cashed shall be
27 tendered to Legal Aid at Work. (Exhibit 1 at Section III, Paragraph 63(O), Pages 20-21).

28 Legal Aid at Work is a nonprofit legal services organization that has been assisting low-

1 income, working families for more than 100 years. Legal Aid at Work's Wage Protection Program
2 represents low-wage workers who are the victims of wage violations. The wage claims made by
3 Legal Aid at Work's clients are often the same type of claims made in wage-and-hour class actions
4 brought by workers under the federal Fair Labor Standards Act and under California wage-and-
5 hour laws. (Exhibit 1 at Section III, Paragraph 63(O), Pages 20-21). In addition, Legal Aid at Work
6 has also advised Class Counsel that it has instituted a policy where, upon request, Legal Aid at
7 Work will remit funds to a Class Member who did not cash their settlement check after Legal Aid
8 at Work confirms that the claimant was a Class Member in the case, did not cash their settlement
9 check, and the funds from their check were remitted to Legal Aid at Work. This allows Class
10 Members with uncashed checks to obtain their settlement funds even after the check cashing
11 deadline.

12 **f. Release of Claims**

13 In exchange for an Individual Class Payment, Participating Class Members will agree to
14 the following release:

15 The Released Class Claims include, for the entire Class Period, all claims that were
16 pled or that could have been pled in the operative class complaint based upon the
17 facts alleged in the Lawsuits including: (1) Failure to Pay All Straight Time Wages;
18 (2) Failure to Pay All Overtime Wages; (3) Failure to Authorize and Permit Rest
19 Periods and pay for missed rest periods; (4) Failure to Provide Meal Periods and
20 pay for missed meal periods; (5) Failure to Provide Accurate and Complete Wage
21 Statements; (6) Failure to Adopt A Compliant Sick Pay/Paid Time Off Policy; (7)
Waiting Time Penalties; (8) Failure to Reimburse Business Expenses; (9) Failure
to Timely Pay Wages During Employment; and (10) Violation of Unfair
Competition Law based upon violations of the California Labor Code sections set
forth herein.

22 (Exhibit 1 at Section I, Paragraph 37, Page 5).

23 In addition, all Aggrieved Employees will agree to the following release in exchange for
24 an Individual PAGA Payment:

25 The Released PAGA Claims include, for the entire PAGA Period, any and all
26 claims belonging to the State of California, the LWDA, and Plaintiff (as
27 representative of the State of California, the LWDA, and the general public) under
the California Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2698, *et*
28 *seq.* to the extent such claims are predicated on claims that were or reasonably could
have been alleged based on the claims, facts and/or allegations that were contained

1 in Plaintiff's PAGA Letters.
2 (Exhibit 1 at Section I, Paragraph 38, Pages 5-6).

3 In addition, Plaintiffs have agreed to a general release of their claims. (See Exhibit 1 at
4 Section III, Paragraph 66, Page 22).

5 **g. Class Representative Enhancement Payments**

6 Subject to the Court's approval, Plaintiffs shall receive a payment not to exceed \$7,500
7 each in consideration for a general release of all their claims against Defendant. The payment shall
8 be made from the GSA. As just noted, Plaintiffs have agreed to a general release of their claims
9 against Defendant. This general release is far greater than the release proposed for Class Members.
10 This payment not only compensates Plaintiffs for the work they undertook in this case, but also
11 for the claims and potential claims they may have against Defendant that they are releasing. For
12 example, Plaintiffs brought this class action lawsuit to seek recourse for other employees instead
13 of filing an individual case on behalf of merely themselves. Since the inception of this case, Plaintiffs
14 have put the Class's interests ahead of their own.

15 Moreover, as representative for the absent class members, Plaintiffs risked a potential
16 judgment taken against them for attorneys' fees and costs if this matter had not been successfully
17 concluded. Case law holds that a losing party is liable for the prevailing party's costs. *See Early v.*
18 *Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). And in some wage and hour actions, such as
19 this case, pursuant to California Labor Code § 218.5, the prevailing party can be liable for
20 attorneys' fees as well. Though the fee agreement provides that Class Counsel would pay such
21 costs, Plaintiffs would nevertheless have had a cost bill entered against them leaving them
22 ultimately liable for potentially hundreds of thousands of dollars in the unexpected possibility that
23 Class Counsel did not meet their obligation to cover those costs. Unfortunately, there have been
24 judgments like this entered against class representatives.¹² The risk of payment of Defendant's
25 costs, alone, is a sufficient basis for an award of the requested service award. Few individuals are

26 ¹² See, e.g. *Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action
27 where Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for
28 the Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, No. 05-
2320, 2007 U.S. Dist. LEXIS 95398 (N.D. Cal. Dec. 17, 2007) (a wage and hour misclassification
case lost on summary judgment, after the case was certified, the named Plaintiff was assessed costs
in the sum of \$56,788.).

1 willing to take this risk, and Plaintiffs championed a cause on behalf of others with potentially
2 huge monetary risks.

3 Additionally, the modern-day work force is mobile, with employees holding several jobs
4 over the span of their career. It is also true that prospective employers in this computer, high-tech
5 age “Google” and/or do extensive background checks and have access to court databases to see if
6 applicants have ever filed a lawsuit or have ever been sued. Here, Plaintiffs’ conduct will not be
7 lost on a prospective employer who has to choose between an applicant who has never sued an
8 employer and one who has done so. The requested award far from compensates Plaintiffs for
9 opportunities they may lose in the future because of the exercise of a Constitutional right to Petition
10 the Courts for redress of a grievance.

11 **h. Final Judgment**

12 Pursuant to Cal. Rules of Court, Rule 3.771(b), notice of the final judgment will be posted
13 on the settlement website.

14 **V. ARGUMENT**

15 **a. Class Action Settlements Are Subject to Court Review and Approval Under 16 the California Rules of Court**

17 Rule 3.769 requires court approval for class action settlements.¹³ “Before final approval,
18 the court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules
19 of Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of
20 class settlements:

21 (a) A settlement or compromise of an entire class action, or a cause of action in
22 a class action, or as to a party, requires the approval of the court after
23 hearing.

24 (c) Any party to a settlement agreement may serve and file a written notice of
25 motion for preliminary approval of the settlement. The settlement agreement
26 and proposed notice to class members must be filed with the motion, and
27 the proposed order must be lodged with the motion.

28 Courts act within their discretion in approving settlements that are fair, not

¹³ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

collusive, and take into account “all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den. sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

b. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. A proposed class action settlement is **presumed** fair under the following circumstances: (1) the parties reached settlement after arm’s-length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk v. Ford Motor Co.*, *supra*, at 1802. As the following shows, all of these elements – with the exception of the percentage of objectors, which cannot be anticipated at this stage of the litigation – bearing on the fairness of the proposed settlement are present here and the Court’s grant of preliminary approval is therefore requested.

i. The Settlement was Reached as a Result of Arm’s-Length Negotiations

The settlement was reached as a result of arm’s-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. Prior to, at, and after the mediation, Counsel for the Parties conducted extensive arm’s length settlement negotiations until the settlement was reached. The terms of the settlement are memorialized in the Agreement which is attached to the Declaration of David Mara, Esq. as Exhibit 1. While Plaintiffs believe in the merits of their case, they also recognize the inherent risks of litigation and understands the benefit of the class receiving significant settlement funds immediately as opposed to risking continued litigation in achieving class certification, preparing for and conducting a trial, and/or an appeal that may take several more years to litigate.

ii. The Settlement is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed settlement, and engaged in sufficient investigation, research and

1 discovery to support the settlement. The settlement was only possible following investigation,
2 discovery, and evaluation of Defendant's policies and procedures, as well as the data produced for
3 the putative class, which permitted Class Counsel to engage in a comprehensive analysis of
4 liability and potential damages. This litigation has reached the stage where "the Parties certainly
5 have a clear view of the strengths and weaknesses of their cases" sufficient to support the
6 settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

7 **iii. Counsel for Both Parties are Experienced in Similar Litigation**

8 Both Plaintiffs' Counsel and Defendant's Counsel are particularly experienced in wage and
9 hour employment law and class actions. Plaintiffs' Counsel has significant experience in litigating
10 unpaid wages, unprovided meal and rest periods, and wage statement claims. (Mara Dec. ¶¶ 2-9;
11 Declaration of Peter Horton, Esq. ¶¶ 2-4; Declaration of Jonathan Melmed, Esq. ¶¶ 4-7). Indeed,
12 Plaintiffs' Counsel at the Mara Law Firm, PC, was class counsel in *Hohnbaum et al. v. Brinker*
13 *Restaurant Corp et al.*, which is the subject case in the landmark decision of *Brinker Restaurant*
14 *Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (Mara Dec. ¶ 4). Plaintiffs' Counsel has
15 prosecuted numerous wage and hour class action cases on behalf of employees for California Labor
16 Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate
17 settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. This
18 experience instructed Plaintiffs' Counsel on the risks and uncertainties of further litigation and
19 guided their determination to endorse the proposed settlement.¹⁴ Defendant's Counsel practices
20 labor and employment law and have represented numerous employers in similar types of claims.
21 Accordingly, both Parties' Counsel are experienced in wage and hour employment law and class
22 actions.

23 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

24 An understanding of the amount in controversy is an important factor in determining
25 whether the settlement "of the class members' claims is reasonable in light of the strengths and
26 weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail,*

27 ¹⁴ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the
28 Class Notice has been provided to the class and they have had an opportunity to respond. This
information will be provided to the Court in conjunction with the final approval motion.

1 *Inc.* (2008) 168 Cal.App.4th 116, 129; *see also* *Munoz v. BCI Coca-Cola Bottling Co. of Los*
2 *Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength
3 of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.*

4 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
5 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
6 that of the attorneys.” *Kullar, supra*, 168 Cal.App.4th at 133. *Kullar* does not require an explicit
7 statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims,
8 provided there is a record which allows “an understanding of the amount that is in controversy and
9 the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409. Put differently,
10 “as the court does when it approves a settlement as in good faith under Code of Civil Procedure §
11 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of
12 reasonableness.” *Kullar, supra*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde &*
13 *Associates* (1985) 38 Cal.3d 488, 499-500. As the following subsections show, the Parties’
14 investigation and discovery revealed many reasons to discount claims and agree to this settlement.

15 **1. The Settlement is Fair and Reasonable Based on the Strengths**
16 **of Plaintiff’s Case and the Risks and Costs of Further Litigation**

17 The proposed settlement was only possible following significant discovery and an
18 evaluation of Defendant’s relevant policies and procedures, as well as the data that Defendant
19 produced for the putative class as referenced above. This permitted Class Counsel to engage in a
20 comprehensive analysis of liability and potential damages. The discovery conducted allowed
21 Plaintiffs to evaluate the strengths and weaknesses of their theories of liability, which are
22 predicated on Plaintiffs’ claims that Defendant failed to provide compliant meal and rest periods,
23 pay all wages owed, and provide accurate itemized wage statements. As explained herein,
24 Defendant maintains that the discovery produced demonstrates that it would succeed at both in
denying class certification and on the merits.

25 Although, Plaintiffs believe this case is suitable for certification on the claimed bases that
26 there are company-wide policies that Plaintiffs contend violate California law and uniformly affect
27 the Class Members, Defendant’s counterarguments raise uncertainties with respect to both class
28 certification and success on the merits. As the California Supreme Court ruled in *Sav-On v.*

1 *Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's
2 sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to
3 certification of wage and hour claims.¹⁵ While remaining confident in the strengths of their claims,
4 all of these factors led Plaintiffs to discount the following maximum potential damage exposure.

5 **2. Maximum Potential Exposure**

6 The settlement encompasses 19,947 workweeks.¹⁶ This equates to approximately 81,530
7 shifts worked by Class Members during the Class Period. Employees average hourly rate is
8 approximately \$15.30 per hour.

9 Plaintiff alleges that Defendant failed to provide employees with meal periods in
10 accordance with California law because Defendant's time records show unlawful meal periods.
11 The sampling of time records produced shows that there are meal period violations in
12 approximately 15% of shifts. If Plaintiffs were to prevail on this claim for the entire class period,
13 Plaintiffs and the Class Members would be entitled to the following **maximum** potential damages:
14 \$187,103 (12,229 shifts with meal period violations x \$15.30 per hour = \$187,103.70). (Mara Dec.
15 ¶ 19). Defendant contends that this amount is too high as it has paid meal period premiums to
16 employees and has meal period waivers from employees that would cover these shifts. Defendant
17 asserts that no damages would be attributable to shifts in which a premium has already been paid
18 or where a meal period waiver was in place and the maximum potential damages would be reduced.
19 Defendant also contends that that this amount should be zero because it would be able to rebut the
20 presumption under *Donohue*, in part, by showing it has a lawful meal period policy.

21 Plaintiffs allege that Defendant failed to provide employees with rest periods in accordance
22 with California law because Defendant's time records show unlawful rest periods in 40% of shifts.
23 If Plaintiff were to prevail on this claim for the entire class period, Plaintiffs and the Class Members

24
25 ¹⁵ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of
26 class claiming misclassification and ordering summary adjudication in favor of employees), *review*
27 *granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only);
28 *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class
claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing
denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming
denial of certification).

¹⁶ See Exhibit 1 at Section III, Paragraph 54(A), Page 9.

1 would be entitled to the following **maximum** potential damages: \$498,963 (32,612 shifts x \$15.30
2 average hourly rate = \$498,963.60). (Mara Dec. ¶ 23). Defendant contends that this amount should
3 be zero because it has a lawful rest period policy. Defendant contends that it would provide
4 declarations confirming this is the case if litigation were to continue.

5 Plaintiffs allege that Defendant does not provide accurate itemized wage statements to
6 employees. Under California Labor Code § 226(e)(1), the damages for breach of this section are
7 fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars
8 (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate
9 penalty of four thousand dollars (\$4,000). If Plaintiffs were to prevail on this claim, Plaintiffs and
10 the Class Members would be entitled to the following **maximum** damages: \$230,750 (155 pay
11 periods x \$50 initial violation = \$7,750 plus 2,230 pay periods x \$100 subsequent violation =
12 \$223,000). (Mara Dec. ¶ 27). Defendant contends that its wage statements do not violate California
13 Labor Code § 226(a). Defendant also contends that Plaintiffs would not be able to show that this
14 violation was knowing and intentional. On this basis, Defendant contends that Plaintiffs would not
15 be entitled to any damages for unlawful wage statements.

16 In addition, Plaintiffs allege that Defendant failed to pay all wages owed for time spent
17 driving to and from the work location. Plaintiffs estimate that Defendant owes Plaintiffs and the
18 Class Members thirty minutes per shift. If Plaintiffs were to prevail on this claim for the entire
19 class period, Plaintiffs and the Class Members would be entitled to the following **maximum**
20 potential damages: \$623,704 (81,530 shifts x \$15.30 x 0.5 hours = \$623,704.50). (Mara Dec. ¶
21 31). Defendant contends that it paid employees for this time and, as such, no wages are owed.

22 Further, Plaintiffs allege that Defendant failed to adjust the regular rate of pay to account
23 for performance pay paid to employees. Based upon the sampling of records, if Plaintiffs were to
24 prevail on this claim for the entire class period, Plaintiffs and the Class Members would be entitled
25 to **maximum** potential damages in the amount of \$497,201. (Mara Dec. ¶ 34). Defendant contends
26 that performance pay was discretionary and, on that basis, does not need to be included in the
27 regular rate of pay.

28 If Plaintiffs were to prevail on their unpaid wages, meal period, and/or rest period claims,

1 they and the Class Members may also be entitled to waiting time penalties. Plaintiffs calculate the
2 potential **maximum** exposure under their waiting time penalties cause of action as \$940,032 (256
3 former employees x 30 days x 8 hours x \$15.30 = \$940,032). (Mara Dec. ¶ 37). As these damages
4 are derivative of Plaintiffs' unpaid wage, meal period, and rest period claims, if Plaintiffs' unpaid
5 wage, meal period and rest period claims fail, this claim also would fail. Defendant also contends
6 that Plaintiffs would not be able to show that this violation was willful. On this basis, Defendant
7 contends that Plaintiffs would not be entitled to any damages for waiting time penalties.

8 Plaintiffs also seek PAGA penalties. PAGA allows the private enforcement of certain
9 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
10 reads, in part, as follows:

11 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per
12 pay period for the initial violation and two hundred dollars (\$200) for each
aggrieved employee per pay period for each subsequent violation.

13 The statute of limitations for PAGA violations go back one year. The maximum potential damages
14 under Plaintiffs' PAGA claim is: \$1,003,100 (\$100 x 4 PAGA violations (meal periods, rest
15 periods, unpaid wages, and wage statements) x 2,469 pay periods = \$987,600 plus \$100 x 1 PAGA
16 violation (waiting time penalties) x 155 pay periods = \$15,500). (Mara Dec. ¶ 38). As Plaintiffs'
17 PAGA claims are based on the same alleged unlawful conduct as their class claims, Plaintiffs'
18 PAGA claims are subject to the same risks on the merits as Plaintiffs' class claims. In addition,
19 the Court may reduce any PAGA penalties awarded under Section 2699, subdivision (e)(2). The
20 likelihood of the Court reducing the PAGA penalties awarded to Plaintiffs and the Aggrieved
21 Employees – assuming liability is proven as to each of Plaintiffs' claims – is higher in this case
22 where these same individuals may also be receiving money for the same unlawful conduct under
23 the class claims. *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-
24 001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 (“Because the PAGA penalties sought are
25 at least partially duplicative of penalties granted by the underlying Labor Code violations, *see*,
26 *e.g.*, Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether
27 and in what amount to award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiffs
28

1 recognize that the potential PAGA penalties are highly uncertain.”). As such, the Court may reduce
2 any PAGA penalty amount awarded to Plaintiffs and the Aggrieved Employees.¹⁷ (Mara Dec.
3 ¶ 39).

4 Thus, not taking into account any of its defenses or arguments, Plaintiffs estimate that if
5 they were successful in their core claims, Defendant’s total exposure would be approximately
6 \$2,037,721 [\$498,963 (rest period exposure) + \$187,103 (meal period exposure) + \$623,704
7 (unpaid wage exposure) + \$230,750 (wage statements) + \$497,201 (unpaid overtime wages) =
8 \$2,037,721]. If Plaintiffs are successful in their unpaid wage, meal period, and rest period claims,
9 they may also be entitled to damages for waiting time penalties in the amount of \$940,032. If
10 Plaintiffs’ claims are successful, they may also be entitled to PAGA penalties in the amount of
11 \$1,003,100. (Mara Dec. ¶ 40).

12 This exposure is comprised of \$1,806,971 for wages and \$2,173,882 for non-wages. As
13 such, wages comprise approximately 45% of the exposure and penalties comprise approximately
14 54% of the exposure. This split is in line with the tax split allocated to Participating Class
15 Members’ Individual Settlement Shares which is 40% wages and 60% non-wages.

16 **3. The Settlement Amount of \$942,500 is Reasonable**

17 In light of the risks Plaintiffs’ claims faced, Plaintiffs and their Counsel believe that the
18 settlement amount of \$942,500 – with an average settlement share amount estimated at \$1,621.17
19 – is a reasonable and fair settlement amount. (Mara Dec. ¶ 41).

20 It should be noted that a settlement is not judged solely against what might have been
21 recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the
22 damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91
23 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139;
24 “Compromise is inherent and necessary in the settlement process...even if the relief afforded by
25 the proposed settlement is substantially narrower than it would be if the suits were to be
26 successfully litigated, this is no bar to a class settlement because the public interest may indeed be

27 ¹⁷ The amount allocated to Plaintiff’s PAGA claims takes into account the risk that the Court will
28 likely reduce Plaintiffs’ PAGA exposure for the reasons outlined above. It should be noted that all
Aggrieved Employees are also Class Members.

1 served by a voluntary settlement in which each side gives ground in the interest of avoiding
2 litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688
3 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the
4 potential recovery does not...render the settlement inadequate or unfair”); *see also In re*
5 *Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21 , (noting that
6 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
7 attorneys’ fees was higher than median percentage for recoveries in shareholder class action
8 settlements, averaging 2.2%-3% from 2002 through 2006).

9 **c. Provisional Certification Should be Granted**

10 Under California law, a class action is appropriate when the class is ascertainable and there
11 is “a well defined community of interest in the questions of law and fact involved affecting the
12 parties to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code
13 of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of
14 the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives’ claims,
15 adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P.
16 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted
17 that while a court must certify a class for settlement purposes if a class has not already been
18 certified, “it is well established that trial courts should use different standards to determine the
19 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser
20 standard of scrutiny is used for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior*
21 *Court* (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
22 1794, 1807, fn. 19.

23 Plaintiffs contend, and Defendant does not dispute for settlement purposes only, each of
24 these elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224,
25 237-38. Plaintiffs seek approval of the following Class for settlement purposes only: All non-
26 exempt, hourly employees of Defendant in the State of California from April 25, 2019 through
27 December 15, 2023.

28 ///

1 **i. The Proposed Settlement Class is Ascertainable**

2 Plaintiffs contends that the proposed Class is ascertainable because of all of the Class
3 Members have worked for Defendant as non-exempt employees and have been identified through
4 Defendant's own records, such as employee and payroll files. *See Rose v City of Hayward* (1981)
5 126 Cal.App.3d 926, 932 (finding that "Class Members are 'ascertainable' where they may be
6 readily identified without unreasonable expense or time by reference to official records."); *Sevidal*
7 *v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 ("[c]lass members are 'ascertainable' where they
8 may be readily identified without unreasonable expense or time by reference to official [or
9 business] records."). Thus, the ascertainability requirement is met.

10 **ii. The Proposed Settlement Class is Sufficiently Numerous**

11 The numerosity requirement is met if the class is so large that joinder of all members would
12 be impracticable. *Gay v. Waiters' & Dairy Lunchmen's Union* (N.D. Cal. 1980) 489 F. Supp. 282,
13 *aff'd* (9th Cir. 1982) 694 F.2d 531. "There is no set number required to maintain a class action,
14 and the statutory test is whether a class is so numerous that 'it is impracticable to bring them all
15 before the court.'" *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213,
16 1223 (reversing superior court ruling that nine class members was too few); *Bowles v. Superior*
17 *Court* (1995) 44 Cal.2d 574 (upholding a class of ten members). "The numerosity requirement is
18 more readily met when a class contains employees suing their present employer . . . This is because
19 class members may be unwilling to sue their employer individually out of fear of retaliation."
20 *Romero v. Producers Dairy Foods* (E.D. Cal. 2006) 235 F.R.D. 474, 485. As explained by the
21 California Supreme Court, "fear of retaliation for individual suits against an employer is a
22 justification for class certification in the arena of employment litigation, even when it is otherwise
23 questionable that the numerosity requirements were satisfied . . . It needs no argument to show that
24 fear of economic retaliation might often operate to induce aggrieved employees quietly to accept
25 substandard conditions." *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460 (citation omitted),
26 overruled on other grounds in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348.

27 Here, Defendant's records show that they proposed Class has approximately 329 members.
28 Plaintiffs contend that joinder of all Class Members is impracticable and, therefore, a class wide

proceeding is preferable. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue have held that classes of over forty (40) individuals are numerous enough to meet the numerosity requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly, the Class is comprised of approximately 329 members and is sufficient to satisfy the numerosity requirement.

iii. The Commonality Requirement is Met

The commonality requirement is met if there are questions of law and fact common to the class. *Hanlon, supra*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies within the class.”). “Predominance is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. Commonality exists if there is a predominant common legal question regarding how an employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) (“[T]he common legal question remains the overall impact of Diva’s policies on its drivers.”). Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

Here, Plaintiffs contend that the proposed Class Members’ claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiffs seek the same legal remedies under state law on behalf of themselves and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiffs allege violate California law, the commonality requirement has been satisfied.

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1 **iv. The Typicality Requirement is Met**

2 The typicality requirement is met if the claims of the named representative are typical of
3 those of the class, though “they need not be substantially identical.” *Hanlon, supra*, 150 F.3d at
4 1020; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Plaintiffs contend that their claims are
5 typical of the Class Members’ claims because they arise from the same factual basis and are based
6 on the same legal theory as those applicable to the Class Members. *See Wehner v. Syntex Corp.*
7 (N.D. Cal. 1987) 117 F.R.D. 641, 644. Each Class Member is challenging the same policies and
8 practices. Plaintiffs allege that Defendant’s policies applied to all Class Members. Factual
9 differences may exist between Plaintiffs’ and the Class Members so long as the claims arise from
10 the same events or course of conduct and are based on the same legal theories. *Hanlon, supra*, 150
11 F. 3d at 1020; *see also Wehner, supra*, 117 F.R.D. at 644; *Newberg on Class Actions*, 4th ed. §
12 3:15, p.335 [When it is alleged that the same unlawful conduct was directed at or affected both the
13 named plaintiff and the class sought to be represented, the typicality requirement is usually met
14 irrespective of varying fact patterns which underlie individual claims.] As such, the typicality
15 requirement is satisfied.

16 **v. The Adequacy Requirement is Met**

17 The adequacy requirement is met if Plaintiffs have no interests adverse to the interests of
18 the proposed Class Members and is committed to vigorously prosecuting the case on behalf of the
19 class. *Hanlon, supra*, 150 F.3d at 1020; *McGhee v. Bank of America* (1976) 70 Cal.App.3d 442,
20 450-51. Plaintiffs contend those standards are met here. Plaintiffs do not have any conflicts of
21 interest with the Class. They have been and continue to be committed to vigorously prosecuting
22 this case. If any Class Member wishes to opt-out of the Settlement, he or she may do so. Therefore,
23 there is no conflict of interest between Plaintiffs and the Class Members.

24 **d. Notice to the Class Complies with California Rule of Court 3.769(f)**

25 California Rule of Court 3.769(f), provides:

26 If the court has certified the action as a class action, notice of the final approval
27 hearing must be given to class members in the manner specified by the court. The
28 notice must contain an explanation of the proposed settlement and procedures for
class members to follow in filing written objections to it and in arranging to appear
at the settlement hearing and state any objections to the proposed settlement.

1 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises the
2 class of their rights to participate in the settlement, how to and when to object to or request
3 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
4 proposed Class Notice is attached as Exhibit A to the Agreement.

5 **VI. CONCLUSION**

6 Plaintiffs respectfully submit that the proposed settlement is in the best interests of the
7 Class and Class Members, as it is fair, adequate, and reasonable, and one that should ultimately be
8 granted final approval. Under the applicable class action criteria and guidelines, the proposed
9 settlement should be preliminarily approved by the Court, the class should be conditionally
10 certified for purposes of settlement only, and the Class Notice should be approved. Plaintiffs also
11 respectfully request the Court set a final approval hearing date of August 22, 2024.

12 Dated: March 25, 2024

MARA LAW FIRM, PC

14 
15 David Mara, Esq.
16 Jill Vecchi, Esq.

17 Attorneys for Plaintiffs MANUEL BALUX OCH
18 and PEDRO GARCIA ALFEREZ, on behalf of
19 themselves, all others similarly situated, and on
20 behalf of the general public
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