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of himself, all others similarly situated, and
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF STANISLAUS

BRETT KELLY on behalf of himself, all
others similarly situated, and on behalf of the
general public,

Plaintiff,

v.

CONRAD WOOD PRESERVING CO. dba
CONRAD FOREST PRODUCTS; and
DOES 1-100,

Defendant.

Case No. CV-23-003516

[Consolidated with Case No. CV-23-004867]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL APPROVAL
HEARING DATE**

Date: May 14, 2024

Time: 8:30 a.m.

Dept.: 24

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I. INTRODUCTION

Plaintiff Brett Kelly (“Plaintiff”), on behalf of himself and the approximately 261-member putative class, respectfully request that this Court preliminarily approve the Joint Stipulation and Settlement Agreement¹ (“Settlement Agreement”) entered into between Plaintiff and Defendant Conrad Wood Preserving Co. dba Conrad Forest Products (“Defendant”) (Plaintiff and Defendant are collectively referred to as the “Parties”). The Parties’ Settlement Agreement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary \$900,000 Gross Settlement Amount (“GSA”). The proposed class is comprised of all hourly, non-exempt employees employed by Defendant in the State of California during the Class Period (“Class Members”). The Class Period is the time period beginning on from June 26, 2019, to April 13, 2024, which is sixty (60) days after the Parties’ attended mediation.

It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this proposed settlement of \$900,000 – **which is estimated to pay class members an average settlement share of approximately \$1,896.55²** – is well within the range of reasonableness. Moreover, the proposed Agreement satisfies all of the criteria for preliminary approval under Rule 3.769 of the California Rules of Court.

As the following sections show, Class Counsel are convinced that the proposed settlement is in the best interests of the Class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks of trial and perils of litigation that affect the value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant, the uncertainty of class certification, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in arriving at the proposed settlement. The Settlement Agreement was the product of an all-day mediation with well-regarded and experienced mediator Jeff Ross and was the product of non-collusive, arm’s-length negotiations by informed counsel and parties. The settlement is fair, reasonable, and adequate to all.

¹ The Settlement Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

² \$ 495,000 NSA / 261 class members = \$1,896.55 average payout per Class Member.

1 Accordingly, Plaintiff seeks: (1) preliminary approval of the terms of the Settlement Agreement; (2)
2 provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4)
3 appointment of Mara Law Firm, PC as Class Counsel; (5) approval of the Parties' proposed notice of
4 class action settlement³ (referred to herein as the "Class Notice" or "Notice") and method of notifying
5 the Class about the settlement; and (6) set a hearing date for final approval.

6 **II. FACTUAL/PROCEDURAL BACKGROUND**

7 Defendant engages in the operation of facilities which produce lumber and wood products to
8 serve Defendant's customers in the State of California. In order to carry out its business, Defendant
9 employs hourly non-exempt employees, like Plaintiff. Mara Dec. ¶ 9.

10 On June 21, 2023, Plaintiff sent notice to the LWDA of his intent to pursue various wage and
11 hour claims against Defendant on behalf of similarly situated aggrieved employees. Shortly thereafter,
12 Plaintiff filed a putative class action complaint on June 26, 2023, against Defendant in the San
13 Stanislaus County Superior Court, Case No. CV-23-003516, alleging causes of action for: (1) Failure
14 to Pay All Straight Time Wages; (2) Failure to Pay All Overtime Wages; (3) Failure to Provide Meal
15 Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Failure to Adopt a Compliant Sick
16 Pay/Paid Time Off Policy; (6) Knowing and Intentional Failure to Comply with Itemized Employee
17 Wage Statement Provisions; (7) Failure to Pay All Wages Due at the Time of Termination of
18 Employment; (8) Failure to Reimburse Business Expenses; and (9) Violation of Unfair Competition
19 Law. Plaintiff also filed a separate action alleging identical violations of the California Labor Code
20 and seeking civil penalties under the PAGA on August 28, 2023, against Defendant in the Stanislaus
21 County Superior Court, Case No. CV-23-004867. The Parties later agreed to consolidate both cases,
22 with CV-23-003516 designated as the lead case. Mara Dec. ¶ 10.

23 Defendant denies the allegations of the action in its entirety, denies any liability or wrongdoing
24 of any kind associated with the claims alleged in this action, and further denies that, for any purpose
25 other than settling this action, this matter is appropriate for class treatment. Defendant further contends
26 that it has complied with all applicable California laws, the California Labor Code, the applicable
27 California Wage Order(s), and the Unfair Competition Law. Defendant finally contends that, if this
28

³ The Class Notice is attached to the Settlement Agreement as **Exhibit A**.

1 matter were to be litigated further, it would have strong defenses to oppose class certification and
2 succeed on the merits of Plaintiff's causes of action. Mara Dec. ¶ 11.

3 **III. LITIGATION HISTORY/PARTIES CONTENTIONS**

4 **a. Discovery and Investigation**

5 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that
6 were needed to evaluate the case. These documents included requests for time and wage records for
7 the Class, employee handbooks, policies, and practices in place during the class period, as well as data
8 surrounding the number of current and former employees. Mara Dec. ¶ 12.

9 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
10 production of hundreds of documents and thousands of lines of data, including Defendant's employee
11 handbooks, policies, and practices, and a sampling of wage and time records for Plaintiff and Class
12 Members. Using the time and wage records for the Class provided and the data surrounding the number
13 of current and former employees, Plaintiff and his expert were able to establish a potential exposure
14 model in preparation for mediation. Mara Dec. ¶ 13.

15 **b. The Parties' Staunchly Conflicting Positions**

16 **i. Meal Periods**

17 Based upon the discovery conducted, Plaintiff contends – and Defendant denies – that
18 Defendant fails to provide Class Members with lawful meal periods. Under California Labor Code §
19 512(a), “[a]n employer may not employ an employee for a work period of more than five hours per
20 day without providing the employee with a meal period of not less than 30 minutes” Cal. Lab.
21 Code § 512(a). An employer “satisfies this obligation [to provide meal periods] if it relieves its
22 employees of all duty, relinquishes control over their activities and permits them a reasonable
23 opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from
24 doing so.” *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.

25 Plaintiff contends that Defendant fails to provide employees with full 30 minute meal periods.
26 Defendant sends employees to take a meal period and expects them to be back at their workstation
27 within 30 minutes. However, traveling to the break room and returning to their post eats approximately
28 5 minutes of a class member's meal period time. Plaintiff argues that such an intrusion cannot be

1 reconciled with California’s meal period laws. *See Kaanaana v. Barrett Business Services, Inc.* (2018)
2 29 Cal.App.5th 778, 801 (“On a 30-minute break, time is scarce” and “[w]hen time is scarce, minutes
3 count.”); *see also Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 69 (“A premium pay scheme
4 that discourages employers from infringing on meal periods by even a few minutes cannot be
5 reconciled with a policy that counts those minutes as negligible rounding errors.”). Mara Dec. ¶ 14.

6 Defendant asserts that employees are provided with meal periods in accordance with California
7 law. Defendant points out that the meal period policy in its employee handbook is facially lawful, that
8 nothing in Defendant’s meal period policy prevents employees from taking additional time beyond the
9 minimum allocated 30 minutes, and that no one is disciplined for not clocking in precisely at the 30-
10 minute mark upon their return from a meal period, nor would it be feasibly possible to expect
11 employees to do so, highlighting the absurdity of Plaintiff’s claims here. Defendant also argues that
12 Plaintiff would have to ask each employee whether they thought the policy Plaintiff relies upon
13 actually meant that employees were required to clock back in to work after a 30-minute meal period,
14 despite Defendant’s meal period policy explicitly providing for a minimum of 30 minutes, not a
15 maximum. Because each employee would have to testify as to their understanding of the policy, class
16 certification would be denied for lack of predominance. Mara Dec. ¶ 15.

17 **ii. Rest Periods**

18 Plaintiff further contends that Defendant fails to provide employees with lawful rest periods.
19 Per the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th
20 1004 (“*Brinker*”), the IWC wage order’s requirements for providing a meal period is satisfied if the
21 employee (1) has at least 30 minutes uninterrupted, (2) **is free to leave the premises**, and (3) is relieved
22 of all duty for the entire period. *Brinker*, 53 Cal.4th at 1036 (citing DLSE Opn. Letter No.
23 1988.01.05 (Jan. 5, 1988) p. 1; DLSE Opn. Letter No. 1996.07.12 (July 12, 1996) p. 1 (emphasis
24 added)). In *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 (“*Augustus*”), the California
25 Supreme Court determined that an employer’s obligation for rest periods follow that of the
26 requirements for meal periods laid out by *Brinker*:

27 It would be difficult to cast aside section 226.7’s parallel treatment
28 of meal periods and rest periods and conclude that employers had completely
distinct obligations when providing meal and rest periods. What makes sense
instead is to infer that employers’ responsibilities are the same for meal and

1 rest periods—an inference that also reflects the protective purpose of both.
2 *Augustus*, 2 Cal.5th 257, 265. Thus, as an employer must permit the employee to leave premises for
3 meal periods, they must do the same for rest periods.

4 Plaintiff contends that Defendant fails to permit employees to leave the premises for rest
5 periods and use the time effectively for their own purposes free from employer control. Employees
6 are thereby – as a matter of policy and practice – prevented from using all their break time free of
7 employer control for off-premises pursuits. For this reason, Defendant does not relinquish all control
8 over employees during their rest periods in violation of California law. Mara Dec. ¶ 16.

9 Defendant denies that employees were prevented from leaving the premises, contends that
10 employees are not under its control and command during rest periods, and contends that employees
11 are provided with duty-free breaks in which they can choose to do whatever they want. Defendant also
12 disagrees with Plaintiff’s interpretation of *Augustus*, claiming the California Supreme Court clearly
13 states that employees ordinarily have to remain on site or nearby “during a rest period [because] an
14 employee generally can travel at most five minutes from a work post before returning to make it back
15 on time,” and such a “constraint, which is of course common to all rest periods, is not sufficient to
16 establish employer control.” *Augustus*, 2 Cal.5th at 270. Further, Defendant claims that numerous
17 employees did, in fact, leave the premises for rest periods, and as such, Plaintiff could not bring this
18 claim on a classwide basis, as individualized issues would predominate. Mara Dec. ¶ 17.

19 **iii. Unpaid Wages**

20 In addition, Plaintiff claims that Defendant fails to pay all wages owed to employees for the
21 same reasons just discussed with the meal period claims. Under California law, employees must be
22 paid for all “hours worked,” as that phrase is defined in the Industrial Welfare Commission Wage
23 Orders and interpreted by California law. Hours worked is defined in Wage Order 1-2001 as “the time
24 during which an employee is subject to the control of an employer, and includes the time the employee
25 is suffered or permitted to work, whether or not required to do so.” Wage Order 1-2001, Subd. 2(K);
26 *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. Under this standard, “it is
27 only necessary that the worker be subject to the control of the employer in order to be entitled to
28 compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000).

1 The *Morillion* Court reasoned that an employee is under the employer's control and entitled to
2 compensation when the employer "directs, commands or restrains" an employee." *Morillion, supra*,
3 22 Cal. 4th at 583, quoting from *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975 (1995).
4 Whether time is considered compensable hours worked is based entirely on employer control. *Id.* at
5 584. That is, whether during the time in question the employee is subject to an employer's directive,
6 command, or restraint. *Id.* at 583. Completely irrelevant to the analysis of whether time is compensable
7 work time is whether employees were permitted to engage in limited, non-working activities, such as
8 eating, reading, or sleeping, while they are under the employer's directive, command, or restraint. *Id.*
9 at 587. Again, it is the existence of the directive, command, or restraint that the employee must oblige
10 that determines whether the employee is engaged in compensable hours worked. *Id.* at 583.

11 As discussed previously, Defendant does not pay employees for the time spent traveling from
12 the timeclock to the breakroom and back to the timeclock during their unpaid meal. Employees spend
13 5 minutes on average for this travel time through the sawmill while clocked out for their meal periods.
14 All of this time is spent under Defendant's compensable control, but employees are not paid for this
15 time at all. Mara Dec. ¶ 18.

16 Defendant argues that beyond the limited accusations of Plaintiff, there is no evidence that
17 employees performed *any* work-related tasks for which they were not compensated, and that
18 Defendant has uniform practices and policies *forbidding* employees from working off the clock.
19 Defendant claims that Plaintiff's "investigation" is wholly inaccurate, and that the time spent engaging
20 in the above activities takes merely seconds, not minutes. Due to this brevity, Defendant asserts that
21 it is not reasonably required to compensate employees for this time. Mara Dec. ¶ 19.

22 **iv. Reimbursement**

23 Plaintiff further contends that Defendant fails to reimburse Class Members for business
24 expenses. Under Labor Code § 2802, Plaintiff argues that Defendant is required to reimburse Plaintiff
25 and employees for a portion of their personal cell phone bills. Labor Code § 2802(a) reads:

26 An employer shall indemnify his or her employee for all necessary expenditures or
27 losses incurred by the employee in direct consequence of the discharge of his or her
28 duties, or of his or her obedience to the directions of the employer, even though
unlawful, unless the employee, at the time of obeying the directions, believed them
to be unlawful.

1 Plaintiff contends that the primary method of communication Defendant uses to contact Plaintiff and
2 employees throughout the day is their personal cell phones, and that Defendant is liable for a
3 reasonable percentage of their cell phone bills under § 2802. Mara Dec. ¶ 20.

4 Defendant contends that they never have required Plaintiff or other employees to use their
5 personal cell phone for business purposes. Defendant further contends if employees decide to use their
6 personal cell phones for business communications, that it was solely that employee's choice, and not
7 the result of any purported mandate by Defendant. Mara Dec. ¶ 21.

8 As evidenced above, the Parties took staunchly conflicting positions with respect to Plaintiff's
9 claims.

10 **c. The Parties Agreed to Attend Mediation**

11 The Parties agreed to attend mediation with mediator Jeff Ross on February 13, 2024. After a
12 full day of mediation, the Parties were able to reach a classwide settlement. Since then, the Parties
13 have met and conferred regarding all the terms of the settlement and finalized their agreement in the
14 Parties' Settlement Agreement. The Parties seek preliminary approval of the Settlement Agreement in
15 the instant motion. Mara Dec. ¶ 22; **Exhibit 1**.

16 **d. The Terms of the Proposed Settlement**

17 Under the terms of the proposed settlement, Defendant will create a settlement fund of
18 \$900,000.

19 **i. Deductions From the Settlement**

20 The Parties have agreed (subject to and contingent upon the Court's approval) that this action
21 be settled and compromised for the non-reversionary total sum of \$900,000, which includes, subject
22 to Court approval: (a) attorneys' fees of up to \$300,000 (one-third of the GSA) to compensate Class
23 Counsel for work already performed and all work remaining to be performed in documenting the
24 settlement, administrating the settlement, and securing Court approval; (b) litigation expenses
25 estimated not to exceed, \$30,000;⁴ (c) an enhancement payment to the named class representative,
26 Brett Kelly, in a sum not to exceed \$15,000 in consideration for agreeing to a general release of his
27 _____

28 ⁴ These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the
amount of actual expenses incurred during the litigation of this case. Should the actual expenses exceed
\$30,000, Plaintiff will only seek reimbursement of costs up to \$30,000.

claims against Defendant which is broader than that of other class members, and in recognition of their efforts in prosecuting their actions; (d) claims administration fees and expenses to Phoenix Class Action Administration Solutions (hereinafter “Phoenix”), estimated not to exceed approximately \$10,000;⁵ and (e) PAGA payment of \$50,000 allocated to Plaintiff’s PAGA claims.

ii. Calculation of the Settlement Payments to Participating Class Members

After all Court-approved deductions from the GSA, it is estimated that \$495,000 (“Net Settlement Amount” or “NSA”), less all applicable employee payroll taxes⁶, will be distributed to each Participating Class Member.⁷ Subject to the terms and conditions of the settlement, the Settlement Administrator will calculate and issue Individual Class Settlement Shares based on the following formula:

Each Participating Class Member will receive a proportionate share of the Net Settlement Amount that is equal to (i) the number of weeks he or she worked for Defendant, based on the Class Data provided by Defendant, divided by (ii) the total number of weeks worked by all Participating Class Members based on the same Class Data, which is then multiplied by the Net Settlement Amount. One day worked in a given week will be credited as a work week for purposes of this calculation. Therefore, the value of each Class Member’s Individual Settlement Share ties directly to the amount of weeks that he or she worked. **Exhibit 1** attached to the Mara Dec. at Section III (56)(A)(i).

Furthermore, the Settlement allocates \$50,000 in consideration for the settlement of Plaintiff’s PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who performed work for Defendant from June 21, 2022, to April 13, 2024 (“PAGA Period”) are also deemed “Aggrieved Employees” and able to recover their share of the civil penalties under the settlement. 75% of this \$50,000, or \$37,500, will be paid to the LWDA, while the remaining 25%, or \$12,500, will be distributed to the Aggrieved Employees. The Settlement Administrator will calculate and issue Individual PAGA Settlement Shares based on pay periods, similar to the class payments, but

⁵ Phoenix will present to the Court a declaration in conjunction with the final approval motion outlining the costs of the settlement administration process. If the settlement administration costs are lower than the amount allocated in the Settlement Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

⁶ The employer’s share of payroll taxes due on the portion of the Individual Settlement Payments that is allocated to wages shall be paid by Defendant separately and in addition to the GSA. **Exhibit 1** attached to the Mara Dec. at Section I (19).

⁷ Participating Class Members are Class Members who do not submit a valid and timely request to exclude themselves from this Settlement. **Exhibit 1** attached to the Mara Dec. at Section I (34).

only for the PAGA Period of June 21, 2022, to April 13, 2024. **Exhibit 1** attached to the Mara Dec. at Section III (57)(A)(i).

The precise number of compensable weeks worked per class member will not be known until the administrator tabulates them, following preliminary approval. Under no circumstances will any portion of the \$900,000 settlement revert to Defendant and one hundred percent (100%) of the NSA is available for Class Members to claim.

The Individual Class Settlement Shares will be divided into a “wage portion” to compensate Participating Class Members for alleged unpaid wages and a “non-wage portion” to compensate Participating Class Members for alleged interest and penalties. Participating Class Members’ individual settlement shares will be apportioned as follows: 20% wages and 80% penalties and interest. The Individual PAGA Settlement Shares will be apportioned as one-hundred percent (100%) penalties.

iii. Notice to the Class

Upon entry of the order of the Court granting preliminary approval of this Agreement, Defendant shall provide the Settlement Administrator with a list in Excel spreadsheet format containing the name and last known address, telephone number, and social security number of each Class Member within fourteen (14) business days for purposes of mailing the Notice of Class Action Settlement to the Settlement Class members. Upon receipt of the class data, the Settlement Administrator will perform a search based on the National Change of Address Database to update and correct any known or identifiable address changes. Within ten (10) business days of receipt of the class data, the Settlement Administrator shall mail copies of the Notice of Class Action Settlement to all Class Members via regular First-Class U.S. Mail. Class Members shall have sixty (60) days after the Class Notices are mailed to respond by submitting a challenge to the number of workweeks attributed to them, submitting an objection, or requesting to be excluded from the Settlement Agreement.

iv. Distribution of Funds

No later than thirty (30) days after the Effective Final Settlement Date⁸, Defendant shall provide the GSA to the Settlement Administrator to fund the Settlement and the employer’s share of

⁸ “Effective Final Settlement Date” of the Settlement means the date the court enters judgment granting final approval of the settlement.

1 payroll taxes due on the portion of the Individual Settlement Payments that is allocated to wages. Not
2 later than ten (10) business days after receiving the funds from Defendant, the Settlement
3 Administrator shall disburse: (1) the Individual Settlement Shares to each Class Member and
4 Aggrieved Employee; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys'
5 fees and costs, as approved by the Court; (3) the Enhancement Payment paid to the Class
6 Representative, as approved by the Court; (4) the Administration Costs, as approved by the Court; and
7 (5) the PAGA Payment to the LWDA and to Aggrieved Employees, as approved by the Court.

8 Class Members must cash or deposit their Individual Settlement Payment checks within one
9 hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not
10 redeemed or deposited within one hundred and eighty (180) calendar days after mailing, the Settlement
11 Administrator will transmit the funds to the State of California Controller's Office under the
12 Unclaimed Property Statutes in the name of the Class Member.

13 **v. Release of Claims**

14 As of the Effective Final Settlement Date, the Class Representative and the Class Members
15 will release the Released Class Claims:

16 All claims alleged or could have been alleged based on the facts alleged in the Class
17 Action which arose during the Class Period. **Exhibit 1** attached to the Mara Dec. at
Section I (37).

18 As of the Effective Final Settlement Date, the Class Representative and the Aggrieved
19 Employees will release the Released PAGA Claims:

20 Any claims for civil penalties under the California Labor Code and the Private
21 Attorneys General Act, to the extent such claims are predicated upon the Labor Code
22 violations alleged or could have been alleged based on the facts alleged in the PAGA
23 Action and Plaintiff's notice to the LWDA which arose during the PAGA Period.
Exhibit 1 attached to the Mara Dec. at Section I (38).

24 In addition, Plaintiff agreed to a general release of his claims against Defendant. *See Exhibit*
25 **1** attached to the Mara Dec. at Section III (63). At final approval, Class Counsel will seek approval of
26 this Enhancement Payment to the named Plaintiff in the sum of \$15,000. As will be detailed at final
27 approval, the requested enhancement is reasonable in light of the broad general release Plaintiff is
28 giving to Defendant in exchange for the \$15,000 payment.

In addition, this payment is further supported by the fact that plaintiffs are often subjected to

1 the stigma associated with bringing these types of lawsuits. In this age of technology, employers
2 engage in thorough background checks on their employees. As these case filings are all public record,
3 a simple “Google” search is all it would take for Plaintiff’s name to appear associated with these
4 pending lawsuits against their former employers. This could be a significant factor in any employer’s
5 decision to hire Plaintiff in the future.

6 Plaintiff took it upon himself to delay recovery of his individual claims by proceeding with
7 class and representative actions, with a full understanding of the risks involved. Plaintiff was fully
8 aware that class action and representative litigation would cause Defendants to incur hefty costs
9 throughout the litigation, and that if he was unsuccessful in these cases, may be liable for some, or
10 even all, of these costs. Despite this knowledge, Plaintiff pushed forward with the litigation; he was
11 always readily available by phone and fully participated every step of the way throughout the entirety
12 of this process. Not only that, Plaintiff had contemplated bringing a wrongful termination action
13 against Defendant but is also agreeing to release those claims through his general release as well, as
14 he opted to champion for the rights of his fellow employees instead.

15 Courts routinely approve service payments, or incentive awards, to compensate named
16 plaintiffs for the services they provide and the risks they incur during class litigation. See *In re*
17 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; see also *Bell v. Farmers Ins.*
18 *Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives);
19 Manual § 21.62 n.971 (noting that service payments are warranted). Based on the foregoing, the
20 \$15,000 payment to the named Class Representative is fair, appropriate and justified as part of the
21 overall settlement.

22 **IV. ARGUMENT**

23 **a. Class Action Settlements are Subject to Court Review and Approval Under the 24 California Rules of Court**

25 Rule 3.769 requires court approval for class action settlements.⁹ “Before final approval, the
26 court must conduct an inquiry into the fairness of the proposed settlement.” (California Rules of Court,

27 ⁹ The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23
28 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.

1 Rule 3.769(g)) Rule 3.769 further requires a noticed motion for preliminary approval of class
2 settlements:

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

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

9 Courts act within their discretion in approving settlements that are fair, not collusive, and take into
10 account “all the normal perils of litigation as well as the additional uncertainties inherent in complex
11 class actions.” *In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F. 2d 167, 179, cert. den.
12 sub nom. *Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.

13 **b. The Settlement is Fair, Reasonable, and Adequate**

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

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

25 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
26 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
27 nature. At the mediation and the following negotiations through the mediator, Counsel for the Parties
28 conducted extensive arm’s length settlement negotiations until the settlement was reached. The terms
of the settlement are memorialized in the Settlement Agreement which is attached to the Declaration

of David Mara, Esq. as **Exhibit 1**.

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

iii. Counsel for Both Parties are Experienced in Similar Litigation

Both Plaintiff's Counsel and Defendant's Counsel are experienced in wage and hour employment law and class actions. Plaintiff's Counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Plaintiff's Counsel has prosecuted numerous wage and hour class action cases on behalf of employees for California Labor Code violations and thus are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8. Indeed, Mara Law Firm, PC was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Mara Dec. ¶ 4. This experience instructed Plaintiff's Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement. Defendant's Counsel has experience representing companies and regularly deals with wage and hour litigation matters. Accordingly, both Parties' Counsel are experienced in wage and hour employment law and class actions.¹⁰

iv. The Proposed Settlement is a Reasonable Compromise of Claims

An understanding of the amount in controversy is an important factor into whether the

¹⁰ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the 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 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of the
2 claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
3 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
4 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs
5 on the merits, balanced against the amount offered in settlement.” *Id.*

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

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

19 The proposed settlement was only possible following significant discovery, an evaluation of
20 Defendant’s relevant policies and procedures, and Plaintiff’s independent investigation. This
21 permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The
22 discovery conducted resulted in Plaintiff’s central theories of liability, which are predicated on
23 Plaintiff’s claims that Defendant failed to pay hourly employees for all time worked, failed to provide
24 meal and rest periods, and failed to reimburse them for business expenses. As explained above,
25 Defendant maintains that the discovery conducted and documents produced demonstrates that it would
26 succeed at both class certification and on the merits.

27 Although, Plaintiff believes this case is suitable for certification on the claimed bases that there
28 are company-wide policies and practices that Plaintiff contends violate California law and uniformly
affect the class members, Defendant’s counter-arguments and affirmative defenses raise uncertainties

1 with respect to both class certification and success on the merits. As the California Supreme Court
2 ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the
3 trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with
4 respect to certification of wage and hour claims.¹¹ While remaining confident in the strengths of his
5 claims, all of these factors led Plaintiff to discount the following maximum potential damage claims.

6 **2. Exposure and the Risks for Each Claim**

7 In addition to being able to discover the strengths and vulnerabilities associated with Plaintiff's
8 claims, Defendant provided Plaintiff with information and data points which Plaintiff used to establish
9 a representative damage model, as explained below. Mara Dec. ¶ 23.

10 **A. Meal Periods**

11 Plaintiff argues that Defendant fails to provide Class Members with a full 30 minute meal
12 period "in which they are relieved of any duty or employer control." Defendant expects Class Members
13 to clock out and in for meal periods. However, there are no timeclocks in the breakroom. This means
14 Class Members must spend several minutes of their meal periods walking from the timeclock to the
15 breakroom and back to the timeclock to clock back in for work. All of this time spent under
16 Defendant's control cuts into the Class Members' 30 minute meal periods. Accordingly, Defendant's
17 **maximum** exposure under Plaintiff's meal period claim is \$2,078,880 (Approximately 104,888 shifts
18 over 5 hours x \$19.82 average hourly rate = \$2,078,880). Mara Dec. ¶ 24.

19 Plaintiff had to discount the maximum exposure of these claims to account for the viability of
20 Defendant's counter arguments. Defendant points out that nothing in its meal period policy prevents
21 Class Members from taking additional time beyond the minimum allocated 30 minutes and that no
22 one is disciplined for not clocking in precisely at the 30-minute mark. Defendant also argues that
23 Plaintiff would have to ask each Class Member whether they thought they had to be back in exactly
24 30-minutes, and class certification would be denied for lack of predominance. Mara Dec. ¶ 25.

25 ¹¹ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class
26 claiming misclassification and ordering summary adjudication in favor of employees), *review granted*,
27 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON*
28 *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).

1 **B. Rest Periods**

2 Plaintiff also contends that Defendant has failed to provide Class Members with lawful rest
3 periods. Plaintiff argues that Class Members were unable to leave the work premises during their rest
4 periods. Accordingly, Defendant's *maximum* exposure under Plaintiff's rest period claim is
5 \$2,095,846 (Approximately 105,744 approximate shifts over 3.5 hours x \$19.82 average hourly rate
6 = \$2,095,846). Mara Dec. ¶ 26.

7 Plaintiff had to discount the maximum exposure of these claims to account for the viability of
8 Defendant's counter arguments. Defendant argues that Class Members are free to spend their rest
9 period time however they choose, including leaving the premises, even despite the fact that Defendant
10 does not agree *Augustus* stands for the proposition that employees must be able to leave during breaks.
11 This, coupled with Class Member testimony that Defendant claims will definitively demonstrate that
12 employees were free to leave the premises, and did leave the premises, during rest periods, will defeat
13 Plaintiff's claims both on the merits and at class certification. Mara Dec. ¶ 27.

14 **C. Unpaid Wages**

15 In addition, Plaintiff claims that Defendant does not pay Class Members for all time worked.
16 Specifically, they are not paid for the time spent traveling from the timeclock to the breakroom and
17 from the breakroom to the timeclock during their unpaid meal periods. All of this time is spent under
18 Defendant's compensable control, but remains unpaid. Based on these allegations, for each and every
19 shift worked, Class Members would be entitled to approximately 5-minutes worth of additional wages
20 per shift. Accordingly, Defendant's *maximum* exposure under Plaintiffs' unpaid wages claim is
21 \$166,955 (Approximately 101,083 shifts indicating a potential meal period x 5 minutes of unpaid time
22 x \$19.82 average hourly rate = \$166,955). Mara Dec. ¶ 28.

23 Further, if Plaintiff were to prevail on his unpaid wages claim, he may also be entitled to
24 waiting time penalties. Plaintiff calculates the potential *maximum* exposure under the waiting time
25 penalties cause of action as \$604,113 (127 former employees x 30 days x 8 hours x \$19.82 average
26 hourly rate = \$604,113). Mara Dec. ¶ 29.

27 Additionally, if Plaintiff were to prevail on his unpaid wages claim, he may also be entitled to
28 wage statement penalties. Plaintiffs calculate the potential *maximum* exposure under the wage

1 statement cause of action as \$412,000 (\$4,000 maximum penalty x 103 current employees =
2 \$412,000). Mara Dec. ¶ 30.

3 Plaintiff had to discount the maximum exposure of these claims to account for the viability of
4 Defendant's counter arguments. As discussed above, Defendant contends that there is no evidence that
5 Class Members performed *any* work-related tasks for which they were not compensated, and that
6 Defendant has uniform practices and policies *forbidding* Class Members from working off the clock.
7 Defendant claims that any of this purported travel time takes merely seconds, not minutes. Due to this
8 brevity, Defendant asserts that it is not reasonably required to compensate Class Members for this
9 time. Further, as Plaintiff's claims for waiting time and wage statement penalties are derivative of his
10 wage claims, Defendant argues that they would not be liable for these either. Should the Court agree
11 with Defendant's arguments, Plaintiff and Class Members would be entitled to no recovery under these
12 causes of action. Mara Dec. ¶ 31.

13 **D. Reimbursement**

14 Further, Plaintiff claims that Defendant has required Plaintiff and Class Members to incur
15 business expenses during their employment without receiving any reimbursement from Defendant.
16 Specifically, Plaintiff contends that Class Members are required to use their personal cell phones to
17 communicate with Defendant during the workday. If Plaintiff were to prevail on his reimbursement
18 cause of action, Class Members would be entitled to reimbursement for a reasonable percentage of
19 their costs associated with their personal cell phones. Therefore, the *maximum potential exposure*
20 under this theory of liability would be \$141,625 (Approximately 55 months during the relevant time
21 period x \$25, or 25% of a \$100 monthly phone bill x 103 Class Members employed at any given time
22 = \$141,625). Mara Dec. ¶ 32.

23 Plaintiff's reimbursement claim is also subject to risks of obtaining certification and on the
24 merits. Defendants assert that it does not have a policy or practice that requires Class Members to use
25 their personal cell phones for business purposes. Further, Defendant points out that because each Class
26 Member would have to testify as to the extent of their use of their personal cell phone and their
27 understanding of company policy surrounding these issues, class certification would be denied for lack
28 of predominance. Mara Dec. ¶ 33.

1 **E. PAGA**

2 Plaintiff is also seeking PAGA penalties. PAGA allows the private enforcement of certain
3 California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2)
4 provides for a standard penalty amount where a civil penalty is not otherwise specified by statute:

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

8 Plaintiff alleges that Defendant has four (4) core violations –failure to pay all time worked, failure to
9 provide meal periods, failure to provide rest periods, and failure to reimburse business expenses – of
10 the Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA
11 violations goes back one year. As there were approximately 3,937 pay periods in the statutory period
12 at the time of mediation, Plaintiff calculated Defendants’ potential maximum exposure under PAGA
13 as follows:

14
$$\$100 \times 4 \text{ PAGA violations} \times 3,937 \text{ pay periods} = \$1,574,800$$

15 Mara Dec. ¶ 34.

16 Plaintiff’s PAGA claims are subject to the same risks on the merits as Plaintiff’s non-PAGA
17 claims. In addition, Labor Code § 2699, subdivision (e)(2) provides that “[i]n any action by an
18 aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court
19 may award a lesser amount than the maximum penalty amount specified by this part if, based on the
20 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
21 arbitrary, oppressive, or confiscatory.” In *Thurman v. Bayshore Transit Management, Inc.*
22 (“*Thurman*”) (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum
23 penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the
24 maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112,
25 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its
26 obligations to comply with the law seriously. *Id.* Defendant maintains that if the case were to continue
27 in litigation, it would be able to show that it took its obligations to comply with the law seriously. As
28 such, if Plaintiff were able to prevail on the merits of his PAGA claims, it is likely that the Court would
reduce the maximum penalty allowed.

1 In addition, as the PAGA violations asserted by Plaintiff are predicated on the same unlawful
2 conduct that Plaintiff bases his other claims, Plaintiff's PAGA claims are subject to the same risks on
3 the merits as Plaintiff's class claims. If Plaintiff is ultimately unable to prevail on any one of his class
4 claims, his recovery under the PAGA as to that violation would also fail. The likelihood of the Court
5 reducing the PAGA damages awarded to Plaintiff and the aggrieved employees – assuming liability
6 is proven as to each of Plaintiff's claims – is also higher in this case where these same individuals will
7 also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold*
8 *Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist.
9 LEXIS 6142 *17 (“Because the PAGA penalties sought are at least partially duplicative of penalties
10 granted by the underlying Labor Code violations, *see, e.g.,* Cal. Lab. Code §§
11 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award
12 PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA
13 penalties are highly uncertain.”).

14 **3. The Settlement Amount of \$900,000 is Reasonable**

15 Not taking into account any of their defenses or arguments, Defendant's total exposure if
16 Plaintiff was successful in his core claims would be approximately \$4,483,306 [\$2,078,880 (meal
17 period exposure) + \$2,095,846 (rest period exposure) + \$166,955 (unpaid wages exposure) + \$141,625
18 (reimbursement exposure) = \$4,483,306]. If Plaintiff is successful in his unpaid wage claims, he may
19 also be entitled to damages for waiting time and wage statement penalties in the amount of \$604,113
20 and \$412,000, respectively. If all of Plaintiff's claims are successful, he may also be entitled to PAGA
21 penalties in the maximum amount of \$1,574,800. *Mara Dec.* ¶ 35.

22 Based upon the risks just discussed, Plaintiff had to discount the maximum potential exposure.
23 Plaintiff also had to consider that, should the Court agree with his theories and grant certification as
24 to each of the claims, she may not be awarded the full exposure at trial. Plaintiff also had to consider
25 that the Court could agree with Defendants' arguments. The vast majority of the damages at issue
26 hinge on Plaintiff's theory of liability regarding the ability to leave for meal and rest periods. Should
27 this claim fail, the meal period, rest period, and unpaid wages claims would all fail. Similarly, the
28 derivative claims for waiting time, wage statement, and PAGA penalties would also fail. All of these
factors led Plaintiff to reduce the realistic potential exposure in order to gain a definite monetary

1 recovery for the class.

2 In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the settlement
3 amount of \$900,000 – **with an average settlement share amount estimated at \$1,896.55** – is a
4 reasonable and fair settlement amount. Mara Dec. ¶ 36.

5 A settlement is not judged **solely** against what might have been recovered, had the plaintiff
6 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and
7 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells*
8 *Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; “Compromise is inherent and necessary in the
9 settlement process...even if the relief afforded by the proposed settlement is substantially narrower
10 than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because
11 the public interest may indeed be served by a voluntary settlement in which each side gives ground in
12 the interest of avoiding litigation.” *Wershba, supra*, at 250; *Officers for Justice v. Civil Serv. Comm’n*
13 (9th Cir. 1982) 688 F.2d 615, 628 (“It is well-settled law that a cash settlement amounting to only a
14 fraction of the potential recovery does not...render the settlement inadequate or unfair”).

15 **c. Provisional Class Certification Should be Granted**

16 Under California law, a class action is appropriate when the class is ascertainable and there is
17 “a well-defined community of interest in the questions of law and fact involved affecting the parties
18 to be represented.” Cal. Civ. P. Code § 382. State law requirements under California Code of Civil
19 Procedure § 382 for class certification follow federal law according to Rule 23 of the Federal Rule of
20 Civil Procedure: numerosity, typicality of the class representatives’ claims, adequacy of
21 representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also*
22 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court
23 must certify a class for settlement purposes if a class has not already been certified, “it is well
24 established that trial courts should use different standards to determine the propriety of a settlement
25 class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used
26 for settlement cases.” *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836,
27 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

28 Plaintiff contends, and Defendant does not dispute for settlement purposes only, each of these

elements must be present. *See Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 237-38. Plaintiff seeks approval of the following Class for settlement purposes only: All hourly, non-exempt employees employed by Defendant in the State of California from June 26, 2019, to April 13, 2024.

i. The Proposed Settlement Class is Ascertainable

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

ii. The Proposed Settlement Class is Sufficiently Numerous

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

1 *Los Angeles, LLC* (2014) 59 Cal.4th 348.

2 Here, Defendant's records show that the proposed Settlement Class has approximately two-
3 hundred sixty-one (261) members. Plaintiff contends that joinder of all Class Members is
4 impracticable and, therefore, a class wide proceeding is preferable. *See Hebbard v. Colgrove* (1972)
5 28 Cal.App.3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite,
6 but that a class of as few as 28 is acceptable.). In fact, a class of ten (10) has been certified as a class
7 action. *Id.*, citing *Bowles v. Superior Court* (1995) 44 Cal.2d 574. Several federal cases on this issue
8 have held that classes of over forty (40) individuals are numerous enough to meet the numerosity
9 requirement. *See Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988) 122 F.R.D. 258, 262. Accordingly,
10 the Class that is comprised of approximately two-hundred sixty-one (261) members is sufficient to
11 satisfy the numerosity requirement.

12 **iii. The Commonality Requirement is Met**

13 The commonality requirement is met if there are questions of law and fact common to the class.
14 *Hanlon, supra*, 150 F.3d at 1019 ("The existence of shared legal issues with divergent factual
15 predicates is sufficient, as it a common core of salient facts coupled with disparate legal remedies
16 within the class."). "Predominance is a comparative concept, and 'the necessity for class members to
17 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
18 is a predominant common legal question regarding how an employer's policies impact its employees.
19 *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (2008) ("[T]he common legal
20 question remains the overall impact of Diva's policies on its drives."). Whether Plaintiff is likely to
21 prevail on his theory of recovery is irrelevant at the certification stage since the question is "essentially
22 a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v.*
23 *Thrifty Oil Co.* (2003) 23 Cal.4th 429, 439-440.

25 Here, Plaintiff contends that the proposed Class Members' claims all stem from the same
26 allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff
27 seeks the same legal remedies under state law on behalf of themselves and all Class Members. As
28 liability as to all Class Members is predicated on the same policies and practices, which Plaintiff

1 alleges violates California law, the commonality requirement has been satisfied.

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

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

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

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

24 **vi. Notice to Class Members 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 hearing
27 must be given to class members in the manner specified by the court. The notice must
28 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
2 The proposed Class Notice meets all of these requirements. The proposed Class Notice advises
3 the class of their rights to participate in the settlement, how to and when to object to or request
4 exclusion from the settlement, and the date, time, and location of the final approval hearing. The
5 proposed Class Notice is attached as **Exhibit A** to the Settlement Agreement.

6 **V. CONCLUSION**

7 Plaintiff respectfully submits that the proposed settlement is in the best interests of the class
8 and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted
9 final approval. Under the applicable class action criteria and guidelines, the proposed settlement
10 should be preliminarily approved by the Court, the class should be conditionally certified for purposes
11 of settlement only, and the Notice of Class Action Settlement should be approved.

12
13 Respectfully Submitted,

14 **MARA LAW FIRM, PC**

15
16 Date: March 21, 2024

Signed: 
David Mara, Esq.
Matthew Crawford, Esq.
Attorneys for Plaintiff