David Mara, Esq. (230498)
Matthew Crawford, Esq. (310230)
MARA LAW FIRM, PC
2650 Camino Del Rio North, Suite 302
San Diego, California 92108
Telephone: (619) 234-2833
Facsimile: (619) 234-4048

Peter Horton, Esq. (227678)
LAWYERS FOR EMPLOYEE AND CONSUMER RIGHTS
4100 West Alameda Avenue, Third Floor
Burbank, California 91505
Telephone: (323) 486-5101
Facsimile: (323) 306-5571

Attorneys for FRANCISCO ARROYO MORA, on behalf of himself, all others similarly situated, and on behalf of the general public

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

FRANCISCO ARROYO MORA on behalf of himself, all others similarly situated, and on behalf of the general public, Plaintiffs, v. STERLING PLUMBING, INC.; and DOES 1-100, Defendants.	Case No. 30-2024-01371468-CU-OE-CXC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE** Date: June 12, 2025 Time: 2:00 p.m. Department: CX-102 Reservation No.: 74513908

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff Francisco Arroyo Mora (hereinafter "Plaintiff"), on behalf of himself and the approximately 180-member putative class, respectfully requests that this Court preliminarily approve the Joint Stipulation and Settlement Agreement (hereinafter "Agreement"[1]) entered into between Plaintiff and Defendant Sterling Plumbing, Inc. (hereinafter "Defendant") (hereinafter Plaintiff and Defendant are collectively referred to as the "Parties"). The Parties' Agreement seeks to resolve claims raised against Defendant in this matter in exchange for a non-reversionary $239,300 Gross Settlement Amount. The proposed Class is comprised of all hourly, non-exempt employees of Defendant who worked in California at any time from November 4, 2022, to October 28, 2024.[2] It is requested that the Court grant preliminary approval, as, when analyzing the strengths and vulnerabilities of the claims and Defendant's potential liability exposure, this proposed settlement of $239,300 is well within the range of reasonableness.

This settlement is estimated to pay Class Members an average payment of approximately $414.07.[3] In addition, there are approximately 8,958 workweeks in the Class Period. This equates to a workweek value of $8.32.[4] As such, the low payment is $8.32 for Class Members who worked one workweek in the Class Period. Class Members will receive approximately $432.64 per year (if they worked 52 workweeks in a year). The high payout is approximately $856.96.[5] Under the settlement, Plaintiff's Individual Settlement Share as a Class Member is estimated to be $124.80 (representing 15 workweeks).[6]

In addition, the settlement encompasses claims under the Private Attorneys General Act of 2004 ("PAGA"). The Parties have allocated $50,000 to Plaintiff's PAGA claims. Of this amount,

---

[1] The Parties' Joint Stipulation and Settlement Agreement ("Agreement") is attached to the Declaration of David Mara, Esq. as **Exhibit 1**. "**Exhibit 1**" herein refers to the Parties' Agreement.
[2] *See* **Exhibit 1** at Section I, Paragraph 4, Page 1 and Section I, Paragraph 9, Page 2.
[3] The Net Settlement Amount is approximately $74,533.34. $74,533.34 divided by approximately 180 Class Members = $414.07.
[4] $74,533.34 divided by approximately 8,958 workweeks = $8.32.
[5] $8.32 per workweek multiplied by 103 weeks between November 4, 2022, to October 28, 2024 = $856.96.
[6] These are just estimates. These amounts will change based upon factors such as whether Class Members request to be excluded from the settlement and the amounts awarded by the Court for attorneys' fees and costs. As such, the Parties will provide the actual high and low settlement payments, and Plaintiff's estimated payment, at the time of final approval.

$37,500 will be distributed to the Labor and Workforce Development Agency ("LWDA") and $12,500 will be distributed to PAGA Aggrieved Employees.[7] Aggrieved Employees will receive an average payment of approximately $69.44.[8] There are approximately 4,685 pay periods within the PAGA Period. This equates to a pay period value of $2.67. As such, the low payment is $2.67 for PAGA Aggrieved Employees who worked one pay period in the PAGA Period. PAGA Aggrieved Employees will receive approximately $69.42 per year (if they worked 26 bi-weekly pay periods). The high payout is approximately $138.84.[9] 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 presented 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 Agreement was the product of an all-day mediation with respected wage and hour 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. Accordingly, Plaintiff seeks: (1) preliminary approval of the terms contained in the Agreement; (2) provisional certification of the Class; (3) appointment of Plaintiff as Class Representative; (4) appointment of Mara Law Firm, PC and Lawyers for Employee and Consumer Rights, as Class Counsel; (5) approval of the Parties' proposed notice of class action settlement[10] (referred to herein as the "Class Notice" or "Notice") and method of notifying the Class about the settlement; and (6) a hearing date for final approval on December 4, 2025.

---

[7] "PAGA Aggrieved Employees" are Class Members who worked during the PAGA Period. The PAGA Period is November 4, 2022, to October 28, 2024.

[8] $12,500 divided by 180 PAGA Aggrieved Employees = $69.44.

[9] $2.67 per pay period multiplied by 52 bi-weekly pay periods between November 4, 2022, to October 28, 2024 = $138.84.

[10] The Class Notice is attached to the Agreement as **Exhibit A**.

II. BACKGROUND

Defendant provides plumbing installation and bathroom construction services for its customers. In order to carry out their business, Defendant employs hourly non-exempt employees, like Plaintiff and Class Members. Mara Dec. ¶ 9.

On October 31, 2023, Plaintiff provided notice to the Labor and Workforce Development Agency ("LWDA") in accordance with the Private Attorneys General Act of 2004 ("PAGA").[11] A PAGA complaint against Defendant was filed by Plaintiff in the Orange County Superior Court on January 8, 2024 (Case No. 30-2024-01371468-CU-OE-CXC). The complaint alleged violations against Defendant of the PAGA, Labor Code §2699, et seq. for failure to pay straight time and minimum wages, failure to pay overtime, failure to provide meal periods, failure to provide rest periods, failure to provide compliant wage statements, failure to keep accurate records of time worked, failure to pay all wages due at termination, failing to pay wages twice per month, and failure to reimburse business expenses. Mara Dec. ¶ 10.

As part of the Settlement, Plaintiff filed a First Amended Complaint to include class claims for the original underlying alleged PAGA violations. The First Amended Complaint alleges causes of action against Defendant for: (1) Failure to Pay All Straight Time Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (6) Failure to Pay All Wages Due at Termination; (7) Failure to Pay All Wages Twice Per Month; (8) Failure to Reimburse/Illegal Deductions; (9) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.); and (10) Violations of the PAGA. Mara Dec. ¶ 11.

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

---

[11] A true and correct copy of Plaintiff's notice is attached to the Mara Dec. as **Exhibit 2**.

finally contends that, if this matter were to be litigated further, it would have strong defenses to oppose class certification and succeed on the merits of Plaintiff's causes of action. Mara Dec. ¶ 12.

III. INVESTIGATION/ LITIGATION HISTORY

a. Discovery And Investigation

After filing, the Parties engaged in extensive informal discovery and Plaintiff conducted further investigation into the claims. On February 9, 2024, Plaintiff served one set of interrogatories and one set of requests for production of documents on Defendant. In addition, the Parties conducted informal discovery prior to mediation. These discovery efforts led to Defendant producing policy documents, such as its employee handbooks, which include Defendant's meal and rest period policies, as well as the other employment policies at issue in this matter. Defendant also produced time and wage records for Plaintiff and time and wage records for a sampling of Class Members. Mara Dec. ¶ 13.

b. The Parties Agreed To Attend Mediation

The Parties attended an all-day mediation with respected wage and hour mediator Jeff Ross on August 28, 2024. This mediation was successful, and a Memorandum of Understanding was drafted and executed by the end of the day. The Parties then met and conferred over all the terms of the settlement and finalized their settlement in the Parties' Agreement. The Parties seek preliminary approval of the Agreement in the instant motion. Mara Dec. ¶ 14; **Exhibit 1**.

c. The Parties' Staunchly Conflicting Positions

i. Unpaid Wages Claim

Based upon the discovery conducted, Plaintiff contends – and Defendant denies – that Defendant failed to pay all wages owed to Class Members. Specifically, Plaintiff contends that the Class Members should be compensated for the time spent pre-shift and post-shift commuting to and from customer worksites in their own personal vehicles.

Employees must be paid for all "hours worked," as that phrase is defined in the Wage Orders and interpreted by California courts. Hours worked is defined in Wage Order 16-2001 as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Wage Order 16-2001, Subd. 2(K). "[A]n employee who is subject to the control of an employer does not have to be working during that time to be compensated under the applicable wage order . . . [and] an employee who is suffered or permitted to work does not have to be under the employer's control to be compensated, provided the employer has or should have knowledge of the employee's work." *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046 (citations omitted).

There is a factual dispute as to this claim. Plaintiff asserts that Defendant does not pay for any hours worked until the Class Member reaches the first customer location. Plaintiff further alleges that Defendant mandates that Class Members clock-out when they are finished with the last customer location. Plaintiff contends that this pay structure does not compensate Class Members for time spent commuting in their personal vehicles. Mara Dec. ¶ 15.

Plaintiff argues that this commute time must be compensated under California law. Plaintiff argues that the case *Oliver v. Konica Minolta Business Solutions U.S.A.* ("*Oliver*") (2020) 51 Cal.App.5th 1, supports his position. In *Oliver*, employees were required to drive their personal vehicles for work and the employer did not have an express policy restricting service technicians from using their vehicles for personal use during their commutes. There, the Court of Appeal outlined three factors that must be shown in order for commute time to be compensable: (1) Were employees required to drive their own vehicles; (2) Were employees required to bring tools with them on the commute; and (3) If employees had to bring tools with them on their commute, was there so many tools that the employee was effectively prevented from using the commute time for his or her own purposes. Mara Dec. ¶ 16.

Here, the Parties have a factual dispute about whether the third factor is met. Plaintiff argues that Class Members have to bring so many tools that they are prevented from using their commute time for their own purposes. Mara Dec. ¶ 17.

Defendant argues that employees do not have to transport a large amount of tools. Defendant asserts that the tools fit into a small box that can be kept in a Class Members' trunk. Defendant asserts that, should litigation continue, it will provide the Court with declarations from Class Members stating that the amount of tools they transport easily fit in their trunk. As such, Defendant contends that California law does not require it to compensate Class Members for this commute time. Defendant also contends that Class Members can use their commute time for their own purposes and they are not limited in what they can do during this time, as having to carry the limited amount of tools in their trunk has no effect on this fact. Therefore, as Class Members do not report to work in the traditional sense, meaning they do not travel to a regular, fixed location every workday, the time they spend traveling to and from customer worksites is properly considered commute time, which is not compensable. *Frlekin*, 8 Cal.5th 1038; *Morillion*, 22 Cal.4th at 587; Lab. Code, § 510, subd. (b) (time spent commuting to and from work is not considered to be part of a day's work). Mara Dec. ¶ 18.

ii. Meal Period Claims

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

The California Supreme Court in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 has determined that "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Donohue*, 11 Cal.5th at 74 (citing *Brinker*, 53 Cal.4th at 1052–1053 (conc. opn. of Werdegar, J.)). This presumption does not "only [apply] to records showing missed meal periods," as "the presumption applies to records showing short and delayed meal periods as well." *Id.* at 76.

Plaintiff contends that, here, the time records Defendant maintains for Class Members evidence a significant amount of non-compliant meal periods: 34.4% of shifts over 5 hours in length. In these shifts, under *Donohue*, Plaintiff contends that it is presumed that meal period violations occurred, and argues that Defendant will be unable to provide sufficient evidence to rebut this presumption. Mara Dec. ¶ 19.

Defendant claims that its meal period policy is facially lawful, that it provides Class Members with meal periods in compliance with California law, and that Defendant would be able to provide declarations from Class Members stating that they were able to take these meal periods without any interference from Defendant. As such, any records reflecting non-complaint meal periods would be insufficient to demonstrate any purported violations, and Defendant would be able rebut the presumption under *Donohue v. AMN Services, LLC* for meal periods and defeat Plaintiff's claim both at class certification and on the merits. Mara Dec. ¶ 20.

iii. Rest Period Claims

Plaintiff further contends that Defendant fails to provide employees with lawful rest periods. Under Wage Order 16-2001, Section 12(A), "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.".

Here, Plaintiff argues that Defendant fails to provide employees with lawful rest periods because it requires employees to combine their rest periods with their meal period. Plaintiff contends that when Defendant sends Class Members on a meal period, that is the only break that they will receive throughout the shift. This is because Plaintiff alleges that Defendant tells Class Members that they are receiving their meal and rest periods at the same time in one combined break. Mara Dec. ¶ 21.

Defendant disputes Plaintiff's contention in its entirety. Defendant contends that it provides employees with separate rest breaks and meal periods. Defendant points to the fact that it has maintained facially lawful rest period policies at all times and informs each and every Class Member that they are entitled to take rest periods in accordance with those policies. Defendant contends that it instructs managers and supervisors to provide rest breaks in accordance with its written policy. Defendant further claims it has spoken to numerous employees who say they were able to take compliant rest periods, which both refutes Plaintiff's claim and creates individualized issues that would predominate and any trial would be rendered unmanageable. Based on the foregoing, Defendant contends that Plaintiff's rest period claims cannot be certified and will not succeed on the merits. Mara Dec. ¶ 22.

iv. Reimbursement Claim

Plaintiff further alleges that Defendant fails to reimburse Class Members for business expenses. Under Labor Code § 2802, Plaintiff argues that Defendant is required to reimburse Plaintiff and employees for tools Class Members purchased. Labor Code § 2802(a) reads:

> An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, 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.

Plaintiff contends that Defendant does not reimburse Class Members for purchasing the tools required to perform their jobs. Mara Dec. ¶ 23.

Defendant asserts that it provides all tools necessary for performing the work duties and that should Class Members have to purchase a tool themselves at any point, Defendant always reimburses this cost. Mara Dec. ¶ 24.

v. Wage Statement And Waiting Time Claims

Plaintiff also pursued wage statement and waiting time penalties. These claims are derivative of Plaintiff's unpaid wages claim. Should Plaintiff's unpaid wages claim fail, these claims would also fail. Mara Dec. ¶ 25.

In addition, Defendant contends that even if Plaintiff were successful in his unpaid wage claims, he would have to prove Defendant "willfully" failed to pay Class Members the appropriate wages due upon separation of employment. "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. Tit. 8 § 13520. "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." *Id.*

Defendant contends that any failure to pay wages due at the separate of employment was not willful. Defendant argues that it would not be liable for waiting time penalties because a "good faith dispute" exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.

Defendant also argues that Plaintiff's unpaid wage claims cannot form the basis of his wage statement claim. Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for the position that employees do not suffer injury under California Labor Code § 226(a) so long as the wage statements correctly reflected the hours worked and the pay received even if the pay is later determined to be inaccurate.

IV. TERMS OF THE PROPOSED SETTLEMENT

Under the terms of the settlement, Defendant will create a settlement fund of $239,300.

a. Deductions From The Settlement

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of $239,300 ("Gross Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of up to $79,766.66 (one-third of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement, and securing Court approval; (b) litigation costs estimated at approximately, and not to exceed, $22,500; [12] (c) a Class Representative Enhancement Payment to the named class representative, Francisco Arroyo Mora, in a sum not to exceed $5,000 in consideration for prosecuting this class action, serving as Class Representative, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) claims administration fees and expenses to Apex Class Action LLC (hereinafter "Apex"), estimated not to exceed approximately $7,500;[13] and (e) $50,000 allocated to Plaintiff's

[12] These will be tabulated and presented to the Court at final approval. Plaintiff will only seek the amount of actual costs incurred during the litigation of this case. Should the actual costs exceed $22,500, Plaintiff will only seek reimbursement of costs up to $22,500. Should the actual costs be lower than $22,500, the difference will be added to the Net Settlement Amount for disbursement to Participating Class Members.

[13] Apex 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

claims under the PAGA. Of this payment, 75%, or $37,500 will be provided to the LWDA, and 25%, or $12,500, will be available for distribution to PAGA Aggrieved Employees.[14]

b. Calculation Of The Settlement Payments To Class Members

After all Court-approved deductions from the GSA, it is estimated that $74,533.34 ("Net Settlement Amount" or "NSA"), less employee taxes on the "wage portion" of the settlement payment, will be distributed to Participating Class Members.[15] Subject to the terms and conditions of the settlement, 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 in California, in an hourly, non-exempt position, 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** at Section III, Paragraph 55(A)(i), Page 9.

In addition, each PAGA Aggrieved Employee will receive a will receive a proportionate share of the PAGA Fund that is allocated for distribution to PAGA Aggrieved Employees (i.e., 25% of the PAGA Payment), equal to (i) the estimated number of pay periods he or she worked at least one (1) day of the pay period for Defendant in California during the PAGA Period based on the Class data provided by Defendant, divided by (ii) the total estimated number of pay periods worked by all PAGA Aggrieved Employees during the PAGA Period based on the same Class data, which is then multiplied by the PAGA Payment allocated for distribution to PAGA Aggrieved Employees. **Exhibit 1** at Section III, Paragraph 55(A)(ii), Page 9. Therefore, the value of each PAGA Aggrieved Employees' PAGA Settlement Share ties directly to the amount of pay periods that the PAGA Aggrieved Employees worked during the PAGA Period.

---

are lower than the amount allocated in the Agreement, the difference will be added to the Net Settlement Amount for distribution to Participating Class Members.

[14] PAGA Aggrieved Employees are Class Members who worked from November 4, 2022, to October 28, 2024. **Exhibit 1** at Section I, Paragraphs 26 and 30, Page 4.

[15] Participating Class Members are Class Members who do not submit a valid and timely request to exclude themselves from this Settlement. **Exhibit 1** at Section I, Paragraph 32, Page 5.

Under no circumstances will any portion of the $239,300 settlement revert to Defendant and 100% of the NSA will be paid out to Participating Class Members. In addition, the employer's share of taxes will be paid in addition to and outside of the GSA. **Exhibit 1** at Section I, Paragraph 18, Page 3.

The individual settlement payments 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. The wage portion will make up 20% of each Participating Class Members' Individual Settlement Share, and the non-wage portion will make up 80% of each Participating Class Members' Individual Settlement Share. In addition, each PAGA Aggrieved Employees' PAGA Settlement Share will be apportioned as 100% penalties. **Exhibit 1** at Section III, Paragraph 55(B), Pages 9-10.

c. Notice To The Class

Within fourteen (14) calendar days after entry of the Preliminary Approval Order, Defendant shall deliver to the Settlement Administrator an electronic database, which will list the following information for each Class Member: (1) first and last name; (2) last known mailing address; (3) last know telephone number; (4) social security number; and (5) hire and termination dates. The Settlement Administrator will conduct a skip trace for the address of all former Defendant employee Class Members. **Exhibit 1** at Section III, Paragraph 58(B)(i), Page 13.

Within fourteen (14) calendar days after receipt of the Class Data, the Settlement Administrator will mail via first-class regular U.S. Mail the Class Notice to all identified Class Members using the mailing address information provided by Defendant and the results of the skip trace performed on all former Defendant employee Class Members. **Exhibit 1** at Section III, Paragraph 58(B)(iii), Page 14. The Class Notices will be mailed in both English and Spanish.

After notices are mailed, Class Members will have forty-five (45) days to respond to the settlement. **Exhibit 1** at Section I, Paragraph 38, Page 5. This deadline is referred to as the "Response Deadline." Class Members may respond to the settlement by requesting to be excluded from it or objecting to it. Class Members can also file a dispute as to the number of workweeks attributed to them.

i. Requests For Exclusion

Class Members can request to be excluded from the settlement by mailing a written request for exclusion to the Settlement Administrator. This can be done on the Request for Exclusion Form enclosed with the Class Notice. Whether on the Request for Exclusion Form or otherwise, the written request for exclusion must: (a) state the Class Member's name, address, telephone number, and the last four digits of the Class Member's social security number or employee identification number; (b) state the Class Member's intention to exclude themselves from or opt-out of the Settlement; (c) be addressed to the Settlement Administrator; (d) be signed by the Class Member or his or her lawful representative; and (e) be postmarked no later than the Response Deadline. A request to Opt-Out of the Settlement shall not serve to exclude the Class Member from participation in the settlement of PAGA claims. PAGA Aggrieved Employees who opt-out from the class portion of the settlement will still receive their share of the PAGA Fund. Subject to Court approval of the PAGA Payment, PAGA Aggrieved Employees shall have no right or ability to opt out of the PAGA portion of this Settlement and PAGA Released Claims. **Exhibit 1** at Section III, Paragraph 58(D), Pages 15-16. At final approval, the Plaintiff will present the Court with a report on all requests for exclusion received.

ii. Objections To The Settlement

Class Members who wish to object to the settlement can do so by mailing a written objection to the Settlement Administrator. This can be done on the Formal Objection Form mailed with the Class Notices. Whether on the Formal Objection Form or otherwise, objections shall: (a) state the Class Member's name, address, telephone number, and the last four digits of the Class Member's social security number or employee identification number; (b) the words "Notice of Objection" or "Formal Objection;" and (c) a short statement of the facts supporting the objection, such as, the legal and factual arguments supporting the objection. Class Members may (though are not required to) appear at the Final Approval Hearing to state an objection, either in person or through the objector's own counsel. Absent good cause found by the Court, objections will not be considered by the Court if not timely or otherwise compliant with the procedures set forth in the Parties' Agreement. **Exhibit 1** at Section III, Paragraph 58(C), Page 15. At final approval, Plaintiff will provide the Court with a single packet of objections submitted by Class Members, if any.

If a Class Member first requests exclusion from the settlement and then objects, the objection will not be considered valid. In addition, if a Class Member objects then requests to be excluded from the settlement, the Class Member will be deemed to have waived their objection and will be excluded from the settlement. **Exhibit 1** at Section III, Paragraph 58(B)(ii), Pages 13-14.

iii. Disputes Regarding Workweeks

If a Class Member who receives a Class Notice wishes to dispute the number of work weeks listed on the Class Notice, the Class Member may notify the Settlement Administrator by mail or telephone no later than the Response Deadline and should produce any available supporting evidence, such as wage statements, offers of employment, termination letters, and/or other employment records, to the Settlement Administrator by the Response Deadline. The documentation should provide evidence of the dates the Class Member contends he or she worked for Defendant during the Class Period. The Settlement Administrator shall then provide the documentation provided by the Class Member to Defendant. Defendant shall review its records, the documentation provided by the Class Member, and shall provide information to the Settlement Administrator in response to any such disputed claim. The Settlement Administrator shall evaluate the evidence submitted by the Class Member and make the decision as to which dates should be applied. All disputes submitted to the Settlement Administrator, including any evidence submitted in conjunction with a dispute, shall be presented to the Court in conjunction with final approval along with the determination made by the Settlement Administrator. The Court shall have the right to review any decision made by the Settlement Administrator regarding a workweek dispute. **Exhibit 1** at Section III, Paragraph 59(E), Pages 16-17.

iv. Returned Notices

If a Class Notice is returned because of an incorrect address, within five (5) business days from receipt of the returned notice, the Settlement Administrator will conduct a search for a more current address for the Class Member and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the current address. The Settlement Administrator will be responsible for taking reasonable steps to trace the mailing address of any Class Member for whom a Class Notice is returned by U.S. Postal Service as undeliverable. These reasonable steps shall include, at a minimum, the tracking of all undelivered mail, performing address searches for all mail returned without a forwarding address, and promptly re-mailing to Class Members for whom new addresses are found. **Exhibit 1** at Section III, Paragraph 58(B)(v), Page 14.

If a Class Notice is returned because of an incorrect address and re-mailed to a Class Member for whom a new address is found, the Class Member's deadline to respond to the settlement shall be increased by forty-five (45) calendar days. **Exhibit 1** at Section III, Paragraph 58(B)(v), Page 14. As such, if a Class Member's Class Notice is re-mailed, the Class Member shall have forty-five (45) extra days to request to be excluded from the settlement, object to the settlement, or submit a dispute as to the number of workweeks attributed to them.

d. Distribution Of Funds

Defendant shall wire to the Settlement Administrator the Gross Settlement Amount no later than fourteen (14) calendar days after the Effective Final Settlement Date.[16] **Exhibit 1** at Section I, Paragraph 20, Page 3. The Settlement Administrator shall inform Defendant of the amount of the employer's share of taxes no later than seven (7) calendar days after the Effective Final Settlement Date. Defendant shall wire to the Settlement Administrator the employer's share of taxes no later than fourteen (14) calendar days of the Effective Final Settlement Date. **Exhibit 1** at Section III, Paragraph 58(K)(i), Page 19. Within seven (7) calendar days after the Defendant wires the Gross Settlement Amount and employer's share of taxes to the Settlement Administrator, the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorney Fee Award and Cost Award to Class Counsel for

[16] The effective date of this Settlement will be the date by when both of the following have occurred: (a) the Court enters the Final Approval order; and (b) the Final Approval order is final. The Final Approval order is final as of the latest of the following occurrences: (a) if no Participating Class Member objects to the Settlement, the day the Court enters Final Approval order; (b) if one or more Participating Class Members objects to the Settlement, the day after the deadline for filing a notice of appeal from the Final Approval order if no appeal is filed; or (c) if a timely appeal from the Final Approval order filed, the day after the appellate court affirms the Final Approval order and issues a remittitur.

attorneys' fees and costs, as approved by the Court; (3) the Class Representative Enhancement Payment paid to the Class Representative, as approved by the Court; (4) the Administration Costs, as approved by the Court; (5) the PAGA Payment to the LWDA and the PAGA Aggrieved Employees; and (6) Defendant's portion of payroll taxes as the Class Members' current or former employer. **Exhibit 1** at Section III, Paragraph 58(K)(ii), Page 19.

Participating Class Members and PAGA Aggrieved Employees must cash or deposit their Individual Settlement Share checks within one hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced. If a check is returned because of an incorrect address, within five (5) business days from receipt of the returned check, the Settlement Administrator will conduct a search for a more current address for the Class Member and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the National Change of Address Database and skip traces to attempt to find the current address. The Settlement Administrator will be responsible for taking reasonable steps to trace the mailing address of any Class Member for whom a check is returned by U.S. Postal Service as undeliverable. If the Settlement Administrator is unable to locate a better address through a database search or skip trace, the Settlement Administrator shall call the last known phone number provided by Defendant to attempt to obtain an accurate address. If an address is obtained, the Settlement Administrator shall promptly re-mail the check to the updated address. If any checks remain uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, cancel the checks. All funds associated with the Individual Settlement Share checks returned as undeliverable and funds associated with those checks remaining un-cashed, shall escheat to the State of California Controller's Office under the Unclaimed Property Statutes in the name of the Class Member. **Exhibit 1** at Section III, Paragraph 58(M), Pages 20-21.

/ / /

e. Release Of Claims

The claims that Plaintiff and other Participating Class Members are releasing in exchange for an Individual Settlement Share payment are based on the facts and claims asserted in the class case. In exchange for an Individual Settlement Share, Plaintiff and Participating Class Members will release and discharge the Released Parties[17] from all claims asserted at any time in the operative complaint and from all other claims that could have been asserted based on the facts alleged in the operative complaint and/or the PAGA Letter. This release will be for the Class Period. **Exhibit 1** at Section I, Paragraph 35, Page 5.

The claims that Plaintiff and other PAGA Aggrieved Employees are releasing in exchange for a PAGA Settlement Share payment are based upon Plaintiff's PAGA complaint and include all claims for civil penalties under the California Labor Code and the Private Attorneys General Act predicated upon the claims asserted in the PAGA Letter and the operative complaint and from all other claims that could have been asserted based on the facts alleged in the PAGA Letter and the operative complaint. This release will be for the PAGA Period. **Exhibit 1** at Section I, Paragraph 36, Page 5.

In addition, Plaintiff has agreed to a broader release than Class Members. **Exhibit 1** at Section III, Paragraph 60, Page 21.

V. ARGUMENT

a. Class Action Settlements Are Subject To Court Review And Approval Under The California Rules Of Court

Rule 3.769 requires court approval for class action settlements.[18] "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (California Rules of Court, Rule 3.769(g)). Rule 3.769 further requires a noticed motion for preliminary approval of

---

[17] The Released Parties are Defendant and its past and present officers, directors, owners, parents, subsidiaries, divisions, related companies, Employee Stock Ownership Plans, employees, representatives, affiliates, administrators, attorneys, agents, consultants, shareholders, joint ventures, predecessors, successors, fiduciaries, beneficiaries, subrogees, executors, insurers, employee benefit plans, and/or assigns of said entities and individuals. **Exhibit 1** at Section I, Paragraph 37, Page 5.

[18] 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.

class settlements:

> (a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.
>
> . . .
>
> (c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.

Courts act within their discretion in approving settlements that are fair, not 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 arms-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 Plaintiff believes in the merits of his case, he also recognizes 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 discovery to support the settlement. The settlement was only possible following investigation, 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 particularly 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, and overtime claims. Mara Dec. ¶¶ 2-8; Declaration of Peter Horton, Esq. ("Horton Dec.") ¶¶ 2-4. Indeed, Plaintiff's Counsel 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. 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. This experience instructed Plaintiff's Counsel on the risks and uncertainties of further litigation and guided their determination to endorse the proposed settlement.[19] Defendant's Counsel practices labor and employment law and have represented

---

[19] 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

numerous employers in similar types of claims. Accordingly, both Parties' Counsel are experienced in wage and hour employment law and class actions.

iv. The Proposed Settlement Is A Reasonable Compromise Of Claims

An understanding of the amount in controversy is an important factor in determining whether the settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.*

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

1. The Proposed Settlement Is A Reasonable Compromise Of Claims

The proposed settlement was only possible following significant discovery and an evaluation of Defendant's relevant policies and procedures, as well as the data that Defendant produced for the putative class as referenced above. This permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. The discovery conducted allowed Plaintiff to evaluate the strengths and weaknesses of his central theories of liability, which are

---

information will be provided to the Court in conjunction with the final approval motion.

predicated on Plaintiff's claims that Defendant failed to pay all wages owed, failed to provide compliant meal and rest periods, and failed to reimburse business expenses. As explained herein, Defendant maintains that the discovery produced demonstrates that it would succeed at both in denying class certification and on the merits.

Although, Plaintiff believes this case is suitable for certification on the claimed bases that there are company-wide policies that Plaintiff contends violate California law and uniformly affect the Class Members, Defendant's counter-arguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.[20] While remaining confident in the strengths of his claims, all of these factors led Plaintiff to discount the following maximum potential damage exposure.

2. Maximum Potential Exposure As Estimated By Plaintiff

Class Members worked approximately 8,958 workweeks, which equates to approximately 44,612 shifts, during the Class Period. Based upon the data and documents requested of and produced by Defendant, Plaintiff calculated that Class Members were paid an average hourly rate of approximately $26.82.

Plaintiff alleges that Defendant fails to pay Class Members all wages owed because Plaintiff contends that Defendant was required to pay for the time spent commuting to and from customer worksites. Plaintiff estimates that Class Members are owed approximately fifteen (15) minutes of unpaid commute time per shift. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following estimated maximum potential damages: $299,123 (44,612 shifts x $26.82 per hour x 15 minutes = $299,123). Mara Dec. ¶ 26.

---

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

Plaintiff argues that Defendant fails to provide Class Members with 30-minute meal periods before the fifth hour of work in compliance with California law. Approximately 34.4% of Class Member shifts over five (5) hours in length in the time records provided by Defendant indicate an instance where Defendant failed to provide a meal period in compliance with California law, whether it be an untimely meal period, a short meal period, or the failure to provide a meal period at all. Under *Donohue*, these are presumed to be meal period violations for which Defendant must compensate Class Members. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following maximum potential damages: $404,794 (15,093 shifts with meal period violations x $26.82 = $404,794). Mara Dec. ¶ 27.

Plaintiff alleges that Defendant failed to provide lawful rest periods because Plaintiff contends Class Members were forced to combine their rest periods with their meal periods. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following maximum potential damages: $1,188,260 (44,305 shifts over 3.5 hours x $26.82 = $1,188,260). Mara Dec. ¶ 28.

Plaintiff also contends that Defendant fails to reimburse Class Members for business expenses, alleging that Defendant does not reimburse Class Members for purchasing the tools required to perform their jobs. If Plaintiff were to prevail on this claim for the entire class period, Plaintiff and the Class Members would be entitled to the following maximum potential damages: $27,000 (180 Class Members x $150 estimated tool costs = $27,000). Mara Dec. ¶ 29.

If Plaintiff were to prevail on his unpaid wages claim, he and the Class Members may also be entitled to wage statement and waiting time penalties. If Plaintiff assumes that all Class Members currently employed by Defendant were entitled to the maximum penalty under California Labor Code § 226(e)(1) of four thousand dollars ($4,000), Plaintiff and the Class Members would be entitled to the following maximum potential damages as $384,000 ($4,000 x 96 approximate Class Members in the wage statement statute of limitations = $384,000). As to the waiting time penalties cause of action, Plaintiff calculates the potential maximum exposure as $540,691 (84 approximate former Class Members x 30 days x 8-hour average shift length x $26.82

average hourly rate = $540,691). As these damages are derivative of Plaintiff's unpaid wages claim, if Plaintiff's unpaid wages claim fails, these claims also would fail. Mara Dec. ¶ 30.

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

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

Plaintiff alleges that Defendant has six (6) violations – unlawful rest and meal periods, failure to pay all wages owed, inaccurate wage statements, failure to reimburse business expenses, and waiting time penalties – of the California Labor Code sections which give rise to PAGA penalties. The statute of limitations for PAGA violations go back one year. Based upon the data and documents produced by Defendant, there are approximately 4,685 pay periods within the PAGA statute of limitations. Not all of the violations alleged by Plaintiff occurred in every pay period. For example, Plaintiff's claims for meal period violations only occurred in approximately 3,410 pay periods and Plaintiff's claims for waiting time penalties only occurred in one pay period for former employees. Therefore, the maximum potential damages under Plaintiff's PAGA claim are:

4,685 pay periods x 4 violations (unpaid wages, rest periods, wage statements, and reimbursement) x $100 = $1,874,000

3,410 pay periods x 1 violation (meal periods) x $100 = $341,000

84 pay periods x 1 violation (waiting time penalties) x $100 = 8,400

Total maximum PAGA penalties: $2,223,400

Mara Dec. ¶ 31.

Thus, <u>not taking into account any of its defenses or arguments</u>, Plaintiff estimated that if he were successful in his core claims, Defendant's total exposure would be approximately $1,919,177 [$299,123 (unpaid wages exposure) + $404,794 (meal period exposure) + $1,188,260 (rest period exposure) + $27,000 (reimbursement exposure) = $1,919,117]. If Plaintiff is successful in his unpaid wage claims, he may also be entitled to damages for wage statement and waiting time penalties in the amount of $384,000 and $540,691, respectively. If all of Plaintiff's claims are successful, he may also be entitled to PAGA penalties in the maximum amount of $2,223,400. Mara Dec. ¶ 32.

3. Risks To Plaintiff's Claims

a. Plaintiff's Unpaid Wages Claim is Subject to Risks at Certification and on the Merits

Plaintiff's unpaid wages claim is subject to risks at certification and on the merits. As discussed above, Plaintiff contends that the Class Members should be compensated for the time spent commuting to and from customer worksites in their own personal vehicles under California law. First, Defendant argues that commute time is not compensable. Defendant contends that employees do not transport so many tools and inventory that they cannot use their commute time effectively for their own purposes. Defendant contends that in order to determine whether each employee could use their commute time for their own purposes, the Court would have to ask each employee this question. Doing so, Defendant argues, would defeat class certification and make any potential trial unmanageable.

This claim is also subject to risks on the merits. Plaintiff argues that he would be able to show that technicians were not able to use their commute time effectively for their own purposes. Defendant contends that California law does not require it to compensate Class Members for this commute time. Defendant also contends that Class Members can use their commute time for their own purposes and they are not limited in what they can, as having to carry a small amount tools that easily fit in the trunk of employees' cars has no effect on this fact. Moreover, Defendant contends that Class Members do not report to work in the traditional sense, meaning they do not travel to a regular, fixed location every workday, the time they spend traveling to and from customer worksites is properly considered commute time, which is not compensable. Plaintiff had to take into consideration that there is a risk that the Court could agree with Defendant and find that commute time is not compensable.

Based on this, Plaintiff estimates that he has a 25% chance of prevailing on this claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as $74,780 (25% of $299,123). Mara Dec. ¶ 33.

b. Plaintiff's Meal Period Claim Is Subject To Risks At Certification And On The Merits

Plaintiff's meal period claim is subject to risks at certification and on the merits. Plaintiff contends that Class Member time records reflect a significant amount of noncompliant meal periods and that Defendant will be unable to rebut the presumption that it failed to provide Class Members with lawful meal periods for those shifts. Plaintiff's meal period claim is subject to risks at class certification. Defendant argues that Class Members were provided with meal periods in conformity with California law and that the policy in its employee handbook complies with California law. Defendant contends that if litigation continues, it will provide declarations from Class Members that show they received meal periods in conformity with California law. If meal periods are late, missing, or short in the time records, Defendant contends that this is due to Class Members' choice. Defendants asserts that at certification the Court would have to ask each Class Member whether or not they were provided with a lawful meal period which would defeat certification because individualized issues would then predominate. Defendant contends that the Court would also have to ask the reason why each Class Member took a late, missing, or short meal period if their time records show such a meal period.

Plaintiff's meal period claim is also subject to risks on the merits. Plaintiff relies on *Donohue v. AMN Services, Inc.* (2021) 11 Cal.5th 58, 74, to show that Defendant does not provide meal periods in conformity with California law. Defendant contends that it can rebut the resumption that arises under *Donohue v. AMN Services, Inc.* Defendant asserts that it can show that Class Members voluntarily chose to take a short or late meal period or to skip the meal period entirely in these shifts. There is a risk that Defendant could meet its burden of proof in showing this by providing evidence that Class Members were provided with proper meal periods and it was the their choice to take a late or short meal period or forgo taking a meal period altogether.

For all of these reasons, Plaintiff estimates that he has a 20% chance of prevailing on this claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as $80,958 (20% of $404,794). Mara Dec. ¶ 34.

/ / /

c. Plaintiff's Rest Period Claim Is Subject To Risks At Certification And On The Merits

Plaintiff's rest period claim is subject to risks at certification and on the merits. As noted previously, Plaintiff alleges that Class Members are not provided lawful rest periods because they are forced to combine their rest and meal periods. Plaintiff's rest period claim is subject to risks at class certification. Defendant contends that the policies in its employee handbooks are lawful and that Class Members were instructed by supervisors to comply with Defendant's written policy, which clearly provides for rest periods that are taken separate and apart from meal periods. Should litigation continue, Defendant contends that it will provide declarations which show that Class Members did receive compliant rest periods pursuant to Defendant's written policy. Defendant asserts that at certification the Court would have to ask each Class Member whether or they received lawful rest periods and, if not, why they did not receive lawful rest periods, which would defeat certification because individualized issues would then predominate.

This claim is also subject to risks on the merits. Defendant contends that employees were required to follow the rest period policy in Defendant's employee handbook, which it contends is lawful. If the case is certified, Defendant would file a motion for summary judgment on this issue. There is a risk that the Court could agree with Defendant, which would eliminate all exposure under this claim.

For all of these reasons, Plaintiff estimates that he has a 15% chance of prevailing on this claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as $178,239 (15% of $1,188,260). Mara Dec. ¶ 35.

d. Plaintiff's Reimbursement Claim Is Subject To Risks At Certification And On The Merits

Plaintiff's reimbursement claim is subject to risks at certification and on the merits. Plaintiff contends that Defendant does not reimburse Class Members for purchasing the tools required to perform their jobs. Plaintiff's reimbursement claim is subject to risks at class certification. Defendant points out that it has no policies that require Class Members to purchase their own tools. Therefore, Defendant contends that the Court would have to ask each Class Member whether they were required to purchase their own tools, which would defeat certification because individualized issues would then predominate.

Plaintiff's reimbursement claim is also subject to risks on the merits. Defendant asserts that it provides Class Members all tools necessary for performing work duties. However, should a Class Member need to purchase a tool for business purposes, Defendant claims it does reimburse such expenses, and points out that it has a policy that explicitly authorizes these cost reimbursements.

As such, Plaintiff estimates that he has a 70% chance of prevailing on this claim at certification and on the merits. Therefore, Plaintiff estimates the realistic value of this claim as $18,900 (70% of $27,000). Mara Dec. ¶ 36.

e. Plaintiff's Wage Statement And Waiting Time Claims Are Subject To Risks On The Merits

Plaintiff also pursued claims for wage statement and waiting time penalties. These claims are derivative of Plaintiff's unpaid wages claim. Should Plaintiff's unpaid wages claim fail or not be certified, these claims would also fail. As noted above, Plaintiff's unpaid wages claim is subject to risks at certification and on the merits. This claim is subject to those same risks.

Further, this claim is also subject to its own risks on the merits independent of the risks of Plaintiff's unpaid wages claim. This is because this claim has a "willful" component. "Some statutory penalties are imposed only if an employers' violation was 'willful' or 'knowing.' . . . [*S*]*ection 203* penalizes an employer that 'willfully' fails to pay wages due under *section 201* or *202*[.]" *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195. Defendant contends that even if Plaintiff were successful in his unpaid wages claim, he would have to prove Defendant "willfully" failed to pay Class Members appropriate wages due upon separation of employment. "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs. Tit. 8 § 13520; *see also Amaral*, *supra*, 163 Cal.App.4th at 1201 ("The settled meaning of 'willful,' as used in *section 203*, is that an employer has intentionally failed or refused to perform an act which was required to be done."). "However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. Tit. 8 §

13520. "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." *Id.*

Defendant contends that any failure to pay wages due at the separation of employment was not willful. Defendant argues that it would not be liable for waiting time penalties because a "good faith dispute" exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral*, *supra*, 163 Cal.App.4th at 1201. As outlined above, Defendant contends that the time employees spend commuting to and from customer worksites is not compensable time under California law.

Defendant also argues that Plaintiff's unpaid wage claims cannot form the basis of his wage statement claim. Defendant relies on the case *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for the position that employees do not suffer injury under California Labor Code § 226(a) so long as the wage statements correctly reflected the hours worked and the pay received even if the pay is later determined to be inaccurate

Due to these defenses, Plaintiff estimates that he has a 15% chance of prevailing on these claims. Therefore, Plaintiff estimates the realistic value of these claim as $138,703 (15% of $384,000 + 15% of $540,691). Mara Dec. ¶ 37.

f. Plaintiff's PAGA Exposure Would Likely Be Reduced By The Court

Plaintiff's PAGA claims are subject to the same risks on the merits as Plaintiff's non-PAGA claims. Section 2699, subdivision (e)(2) provides that "[i]n any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary, oppressive, or confiscatory." In *Thurman v. Bayshore Transit Management, Inc.* ("*Thurman*") (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum penalty allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the maximum amount. *Thurman v. Bayshore Transit Management, Inc*. (2012) 203 Cal. App. 4th

1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has taken its obligations to comply with the law seriously. *Id.* Defendant argues that if the case were to continue in litigation, it would be able to show that it took its obligations to comply with the law seriously. As 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.

As Plaintiff's PAGA claims are based on the same alleged unlawful conduct as his class claims, Plaintiff's PAGA claims are subject to the same risks on the merits as Plaintiff's class claims. Therefore, *PAGA penalties can only be awarded if the factfinder agrees with Plaintiff's meal and rest period, and unpaid wages allegations.* The likelihood of the Court reducing the PAGA penalties awarded to Plaintiff and the aggrieved employees – assuming liability is proven as to each of Plaintiff's claims – is higher in this case where these same individuals may also be receiving money for the same unlawful conduct under the class claims. *See Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 ("Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, *see*, *e.g.*, Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, *see* Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain."). Plaintiff must take into consideration the risks his underlying claims faced, as well as the risk that the Court would likely reduce the amount of PAGA penalties awarded.

4. The Settlement Amount Of $239,300 Is Reasonable

For the reasons just outlined, Defendant's adjusted exposure of his non-PAGA claims is approximately $491,580 ($74,780 (unpaid wages) + $80,958 (meal periods) + $178,239 (rest periods) + $18,900 (reimbursement) + $138,703 (wage statement and waiting time penalties) = $491,580). In light of the risks Plaintiff's claims faced, Plaintiff and his Counsel believe that the settlement amount of $239,300 – with an average settlement share amount estimated at $414.07 – is a reasonable and fair settlement amount. Mara Dec. ¶ 38.

It should be noted that a settlement is not judged solely against what might have been recovered, had the plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139; "Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba*, *supra*, at 250; *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not…render the settlement inadequate or unfair"); *see also In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 95616, *21 , (noting that certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorneys' fees was higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2002 through 2006).

c. Provisional Class Certification Should Be Granted

Under California law, a class action is appropriate when the class is ascertainable and there is "a well defined community of interest in the questions of law and fact involved affecting the parties to be represented." Cal. Civ. P. Code § 382. State law requirements under California Code of Civil Procedure section 382 for class certification follow federal law according to Rule 23 of the Federal Rule of Civil Procedure: numerosity, typicality of the class representatives' claims, adequacy of representation, predominance of common issues, and superiority. Fed. R. Civ. P. 23(a); *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. It should be noted that while a court must certify a class for settlement purposes if a class has not already been certified, "it is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Glob. Minerals & Metals Corp. v. Superior*

Court (2013) 113 Cal.App.4th 836, 859 *citing Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807, fn. 19.

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 of Defendant who worked in California at any time from November 4, 2022, to October 28, 2024.

i. The Proposed Settlement Class Is Ascertainable

Plaintiff contends that the proposed Class is ascertainable because of all of the Class Members have worked for Defendant as non-exempt employees 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. Los Angeles, LLC* (2014) 59 Cal.4th 348.

Here, Defendant's records show that they proposed Class has approximately 180 members. Plaintiff contends 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 180 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, Plaintiff contends that the proposed Class Members' claims all stem from the same allegedly unlawful policies and practices, which were addressed previously in this motion. Plaintiff seeks the same legal remedies under state law on behalf of himself and all Class Members. As liability as to all Class Members is predicated on the same policies and practices, which Plaintiff alleges violates California law, the commonality requirement has been satisfied.

iv. The Typicality Requirement Is Met

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

v. The Adequacy Requirement Is Met

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

d. Notice To Class Members Complies With California Rule Of Court 3.769(f)

California Rule of Court 3.769(f), provides:

> If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The 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.

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

VI. CONCLUSION

Plaintiff respectfully submits that the proposed settlement is in the best interests of the class and class members, as it is fair, adequate, and reasonable, and one that should ultimately be granted final approval. Under the applicable class action criteria and guidelines, the proposed settlement should be preliminarily approved by the Court, the class should be conditionally certified for purposes of settlement only, and the Class Notice should be approved. Plaintiff also respectfully requests the Court set a final approval hearing date of December 4, 2025.

Dated: March 18, 2025

MARA LAW FIRM, PC

David Mara, Esq.
Matthew Crawford, Esq.
Attorneys for Plaintiff FRANCISCO ARROYO MORA on behalf of himself, all others similarly situated, and on behalf of the general public