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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

LINDA SALAZAR AYALA, an individual and on behalf of all others similarly situated; Plaintiff, vs. APPLIED MEMBRANES, INC., a California corporation; and DOES 1 through 50, Defendants.	Case No.: 37-2023-00054420-CU-OE-CTL [Assigned for All Purposes to: Hon. Matthew C. Braner, Dept. C-60] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** (Filed concurrently with Declarations of William C. Sung, Tiffany L. Luu, Linda Salazar Ayala, and Apex Class Action LLC; [Proposed] Order) DATE: August 15, 2025 TIME: 9:00 a.m. DEPT: C-60 Action Filed: November 27, 2023 Trial Date: Not Set

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

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on August 15, 2025 at 9:00 a.m. in Department C-60 of the San Diego Superior Court, Hall of Justice, located at 330 W. Broadway, San Diego, CA 92101, Plaintiff LINDA SALAZAR AYALA ("Plaintiff"), individually and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

1. Preliminary approval of the proposed class settlement of this lawsuit;

2. Pursuant to section 382 of the California Code of Civil Procedure, provisional certification of the following Class defined as follows:

> All current and former hourly paid or non-exempt employees of Defendant Applied Membranes, Inc. in California during the Class Period of November 27, 2019 to November 17, 2024.

3. Preliminary appointment of Plaintiff as Class Representative;

4. Preliminary appointment of William C. Sung and Tiffany L. Luu of Justice for Workers, P.C. as Class Counsel;

5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit a Class Representative Service Award to Plaintiff, civil penalties payable to the LWDA, settlement administration costs, and attorneys' fees and costs to Class Counsel;

6. Appointment of Apex Class Action LLC as the third-party Administrator for mailing notices and administering the Settlement; and

7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Class as provided in the Settlement Agreement.

This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the supporting declarations of William C. Sung, Tiffany L. Luu, Plaintiff Linda Salazar Ayala, and Sean Hartranft for Apex Class Action LLC, and the exhibits attached thereto; the pleadings, and other papers filed in this Action; and on any further oral or documentary evidence or argument presented at the time of the hearing.

/ / /

DATED: December 20, 2024

Respectfully submitted,

JUSTICE FOR WORKERS, P.C.

By: ______________________

William C. Sung
Tiffany L. Luu
Attorneys for Plaintiff
LINDA SALAZAR AYALA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes and Rules

Unpublished Cases

Other Sources

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Linda Salazar Ayala ("Plaintiff") brought this wage and hour class and representative action on behalf of a Class of current and former non-exempt employees of Defendant Edmund A. Gray Co. ("Defendant") in California from November 27, 2019 to November 17, 2024 (the "Class Period"). The primary issues in this case pertain to Defendant's alleged failure to provide employees with meal periods, including second meal periods; rest period violations; and off-the-clock work waiting in line to clock in and out. Plaintiff contends Defendant is also liable for inaccurate wage statement penalties, waiting time penalties, and civil penalties under the Private Attorneys' General Act ("PAGA"). Plaintiff now requests that this Court preliminarily approve this non-reversionary, common-fund class action settlement[1], in which Defendant has agreed to pay the Gross Settlement Amount ("GSA") of Three Hundred Seventy-Five Thousand Dollars and Zero Cents ($375,000) to the Class of approximately 375 members.

After deducting administration costs, Plaintiff's requested Class Representative Service Award, the amount set aside as PAGA civil penalties, and requested attorneys' fees and costs, the Net Settlement Amount ("NSA") of approximately $196,310 will be distributed to all Class Members who do not opt out of the Settlement based on the proportionate number of workweeks worked by each Class Member during the Class Period. Employees with standing for PAGA civil penalties will receive additional consideration for their release of PAGA claims.

Significantly, all Class Members will automatically receive a payment unless they affirmatively opt-out. There are approximately 375 Class Members, and **the average payment to participating Class Members is projected to be approximately $523.49**. This is an excellent result for Class Members, who will be releasing only those claims alleged in the Action. The proposed Settlement is within the range of possible approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the tangible

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[1] The operative Amended Class Action and PAGA Settlement Agreement ("Agreement") is attached to the Declaration of William C. Sung as **Exhibit 1**. The proposed Class Notice is attached to the Agreement as **Exhibit A**. All defined terms in this motion have the same definition as that in the Agreement.

monetary benefits to be received by Plaintiff and the Class. For the reasons discussed herein, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. THE PARTIES AND BRIEF PROCEDURAL HISTORY

Defendant owns and operates a Reverse Osmosis systems manufacturing and distributing company in Vista, California. Declaration of William C. Sung ("Sung Decl."), ¶ 9. Defendant hired Plaintiff as a non-exempt employee on approximately August 10, 2020 as a vacuum tester. Declaration of Linda Salazar Ayala ("Ayala Decl."), ¶ 2.

On November 27, 2023, Plaintiff commenced this Action by filing a Class Action Complaint alleging causes of action against Defendant for (1) Minimum Wage Violations; (2) Overtime Wage Violations; (3) Meal Period Violations; (4) Rest Period Violations; (5) Wage Statement Penalties; (6) Waiting Time Penalties; and (7) Unfair Competition. Sung Decl., ¶ 10. On the same day, November 27, 2023, Plaintiff sent a notice letter under the California Private Attorneys General Act ("PAGA") to the Labor and Workforce Development Agency ("LWDA"). *Id.* at ¶ 11, **Exhibit 2** (LWDA Letter). On January 30, 2024, Plaintiff filed the First Amended Complaint ("FAC") alleging a cause of action for Civil Penalties Under the PAGA. *Id.* at ¶ 12, **Exhibit 3** (FAC).

B. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES

1. Meal Period Violations

Plaintiff contends that Defendant failed to provide Class Members with meal periods, including second meal periods when Class Members worked over 10 hours in a shift. *Id.* at ¶ 13. Furthermore, Defendant did not pay Class Members any meal period premium and Class Members did not sign meal period waivers. *Ibid.* However, Defendant argues that it maintains compliant written meal period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. *Ibid.* Class Members, when clocking out, attested in the time clock that they took compliant meal periods. *Ibid.* Defendant further argues that its meal period policies address waiver of meal periods and any missed first meal periods for shifts between 5 to 6 hours and missed second meal periods for shifts between 10 to 12 hours were lawfully waived by Class Members pursuant to its policies. *Ibid.* Finally, Defendant maintains Plaintiff's meal period claim is not suited for class certification since individual inquiries would be needed to assess which employees, if any, took non-compliant meal periods, how many meal periods were non-compliant, and the reasons why a particular employee did not take a meal period on a particular shift. *Ibid; see Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1034 (rejecting "ensure" standard).

2. Rest Period Violations

Plaintiff contends that Defendant failed to provide Class Member with compliant rest periods. Sung Decl., ¶ 14. In response, Defendant argues that it maintains compliant written rest period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. *Ibid.* Class Members attested in the time clock to taking compliant rest periods. *Ibid.* Defendant further maintains Plaintiff's rest period claim is not suited for class certification since individual inquiries would be needed to assess which employees, if any, took non-compliant rest periods, how many rest periods were non-compliant, and the reasons why a particular employee did not take a rest period on a particular shift. *Ibid*; *see Brinker Rest. Corp.*, 53 Cal.4th at 1034 (rejecting "ensure" standard).

3. Unpaid Wages Due to Off-the-Clock Work

Plaintiff contends that she and Class Members were not paid all wages due, including minimum and overtime wages, because they had to wait in line for several minutes to clock in and of their shifts and Plaintiff sometimes was asked to perform work after she clocked out for the day. Sung Decl., ¶ 15. In response, Defendant argues that it provided seven time clocks in different parts of the facility for Class Members to use so they did not wait in long lines to clock in and out. *Ibid.* When this action was filed, Defendant's counsel conducted a site visit and did not see more than 3 employees at a time clock to clock in or out. *Ibid.* Thus, Defendant contends that Plaintiff's off-the-clock work theory is not suited for class certification since individual inquiries would be needed to assess which employees, if any, worked off the clock, how often and how much time were spent working off the clock, and the reasons why a particular employee worked off the clock. *Ibid.*

4. Waiting Time and Wage Statement Penalties

As a result of the unpaid wages and unpaid meal and rest period premium wages described above, Plaintiff contends that Defendant failed to comply with its final pay obligations set forth in

Labor Code §§ 201 to 203 to former employees and failed to issue accurate itemized wage statements to Class Members as set forth in Labor Code § 226(a). *Id.* at ¶ 16. Thus, the claims for waiting time and wage statement penalties are derivative of the underlying claims. *Ibid.* Defendant argues that it possesses strong, good faith defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id.* at ¶ 17. Defendant further argues any alleged wage statement violations were not "knowing and intentional," and Plaintiff cannot show the Class "suffer[ed] injury" due to the alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of penalties. *Ibid; Naranjo v. Spectrum Security Services, Inc.* (2024) 15 Cal.5th 1056, 1065. Defendant further asserts that Plaintiff's waiting time and wage statement penalty exposure was inflated as not every employee experienced the alleged Labor Code violations. Sung Decl., ¶ 17.

5. PAGA Civil Penalties

Plaintiff contends that, as a result of the foregoing Labor Code violations, Defendant is liable for civil penalties under the PAGA. *Id.* at ¶ 18. Since Plaintiff's PAGA claims are derivative of Plaintiff's underlying wage claims, Defendant asserts the PAGA claim would fail with those claims. *Ibid*; *see Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.").

Plaintiff also seeks PAGA penalties based on the theory that Defendant violated Labor Code § 1198 through Section 15 of IWC Wage Orders 1 and 7, which provides:

> "(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed. . . . (C) A temperature of not less than 68° F shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use." (SAC, ¶ 16.) Plaintiff alleges that Defendant failed to provide him and Class Members with reasonable comfort by maintaining the indoor temperature within the range of industry standards by, inter alia, providing adequate heating, air conditioning, and/or ventilation and failed to maintain a temperature of not less than 68° F in toilet rooms and/or breakrooms for Plaintiffs and other aggrieved employees."

(FAC, ¶¶ 16, 56.) Procedurally, there is no private right of action for this theory of liability but civil penalties may be pursued through PAGA. *See Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1475. Substantively, Defendant asserts that there are no industry-wide standards governing indoor temperature in distribution centers and Cal-OSHA has not promulgated any regulations on this issue. Sung Decl., ¶ 18. Defendant further argues that it complied with the temperature regulation because the temperature in Vista, California is generally between 65 to 85 degrees, it ventilated the workplace through commercial fans, and it has injury and illness prevention policies that addresses complaints of overheating by Class Members. *Ibid.*

Defendant further maintains that, given its good faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff's claims. *Ibid*; *see* Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties by over 82% in part because employer "not aware" of violations); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming PAGA civil penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, the Parties engaged in informal discovery. Sung Decl., ¶ 19. Defendant produced (1) a class list with unique identifying numbers for each Class Member and the Class Member's hourly rate, job title, and dates of employment; (2) class and PAGA statistics including workweeks worked during the Class Period and pay periods worked during the PAGA Period through mediation; (3) a random sampling of employee time and payroll records exported on Excel; (4) various policies and procedural documents, including employee handbooks, in effect during the Class Period; and (5) Plaintiff's personnel records. *Ibid.*

Defendant produced a random sampling of time and payroll records for 125 Class Members, including Plaintiff, which amounted to a 33.33% sampling. Pursuant to the Parties' pre-mediation agreement, employee's names were redacted, but employee ID numbers were provided on the sampling data records. *Ibid.* Plaintiff contends that a 33.33% sampling of records is statistically significant and reliable. The timekeeping data and payroll data produced for mediation were generated from uniform timekeeping and payroll systems, which allowed Plaintiff to extrapolate findings with confidence. *Ibid.* Class Members worked in similar job positions and were subject to the same wage and hour policies and procedures. Given these circumstances, the experiences of a subset of employees – the sampling – can be probative as to the experiences of all Class Members. *See e.g., Tyson Foods, Inc. v. Bouaphakeo* (2016) 136 S.Ct. 1036 (holding that statistical evidence was admissible to prove liability and damages across a class, thereby allowing it to support class certification); *Lubin v. The Wackenhut Corp*. (2016) 5 Cal.App.5th 926, 938 (following *Tyson* and finding that a sampling of class records is probative as to the experience of the entire class).

In preparation for mediation, Plaintiff's counsel conducted a comprehensive analysis and extrapolation of the payroll and timekeeping data produced by Defendant to create a detailed exposure analysis for all claims at issue. Sung Decl., ¶ 20. This discovery and analysis allowed the Parties to assess the merits and value of Plaintiff's claims, the chances of certification of Plaintiff's claims, and Defendant's potential defenses. *Ibid.*

On October 18, 2024, the Parties participated in a full-day mediation with Jason Marsili, Esq. a well-respected wage and hour class action mediator. Sung Decl., ¶ 21. During mediation, the Parties vigorously debated their opposing legal and factual positions, the likelihood of certification of Plaintiff's claims, and the legal basis for the claims and defenses. *Ibid.* The Parties did not settle at mediation but continued to engage in settlement talks through Mr. Marsili and reached a tentative class and PAGA settlement on November 15, 2024. *Ibid*. The Parties then finalized the terms of the Settlement and executed Agreement now before the Court. *Ibid*, **Exhibit 1** (Agreement).

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Defendant will pay a GSA of $375,000. Agreement, § 3.1 (Ex. 1 to Sung Decl.). Significantly, this Settlement is non-reversionary, and no Class Member will have to submit a claim form to receive an Individual Settlement Award. *Id.* at §§ 3-4, 7.5. Each Class Member will automatically receive an Individual Settlement Award unless they affirmatively opt out of the Settlement. *Id.* at § 7.5. The monetary terms of the Settlement are summarized below:

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Gross Settlement Amount ("GSA"):	$375,000.00
Minus Court-approved attorneys' fees:	$125,000.00
Minus Court-approved verified costs (up to):	$15,000.00
Minus Court-approved Service Payment:	$10,000.00
Minus amount set aside as PAGA penalties:	$20,000.00
Minus estimated settlement administration costs:	$8,690.00
Net Settlement Amount ("NSA"):	$196,310.00
Plus 25% "PAGA Penalties" to Class:	$5,000.00
Total Amount Paid to Class Members:	**$201,310.00**

Sung Decl., ¶ 22.

1. The Settlement Provides for Reasonable Monetary Payments

After deducting amounts for the Court-approved attorneys' fees and costs, Class Representative Service Award to Plaintiff, the amount set aside as PAGA civil penalties, and settlement administration costs, the Settlement requires Defendant to pay an NSA of at least **$196,310** to all Class Members who do not timely opt-out. Agreement, §§ 3, 7.5. The NSA shall be distributed to participating Class Members as Individual Class Payments, calculated by (a) dividing the NSA by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. Agreement, § 3.2.4. Additionally, $5,000.00 of the GSA has been designated as Individual PAGA Payments and shall be distributed to Aggrieved Employees (including those who submit a valid and timely Request for Exclusion from the class action settlement) who were employed during the PAGA Period proportionally based on the number of pay periods worked during the PAGA Period. Agreement, §§ 3.2.5, 7.5.4. In addition to the GSA, Defendant is obligated to pay the employer's share of payroll taxes on Individual Class Payments allocated to settlement of wage claims. Agreement, § 4.3.

According to Defendant, there are approximately 375 Class Members. Sung Decl., ¶ 23. Therefore, the average Individual Settlement Award from the NSA is projected to be approximately **$523.49**. *Ibid.* There are also approximately 125 Aggrieved Employees during the PAGA Period who will each receive an average of approximately **$26.74** as Individual PAGA Payments. *Ibid.* Class Members will have 45 calendar days from the mailing of the Class Notice to opt-out or object to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. *See* Agreement, §§ 1.44, 7.4-7.7.

Effective on the date when Defendant fully funds the GSA and the employer's share of payroll taxes, Participating Class Members (Class Members who did not opt out) will release all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint; and all Aggrieved Employees are deemed to release all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and PAGA Notice. Agreement, §§ 5.2-5.3.

2. Attorneys' Fees and Costs, Service Award, and PAGA Payment

Plaintiff will apply for Class Representative Service Payment at the time of seeking final approval of the proposed class action settlement in the amount of $10,000.00 for Plaintiff's service to the Class. *See* Agreement, § 3.2.1. "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." In *re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94. Plaintiff's requested Service Payment is intended to recognize the time and effort Plaintiff expended on behalf of the Class, including providing substantial factual information and documents to Class Counsel, discussing the claims and theories at issue in the litigation, actively participating in the prosecution of Plaintiff's claims, as well as the significant risks Plaintiff undertook by agreeing to serve as the named plaintiff in this case even though she was a current employee. *See* Ayala Decl., ¶¶ 4-6.

Class Counsel will also apply for an attorneys' fees award of One-Third (approximately 33.33%) of the GSA, which is currently estimated to be $125,000, and up to $15,000 in verified costs reimbursement. *See* Agreement, § 3.2.2; Sung Decl., ¶ 24. The requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Sung Decl., ¶ 24. Class Counsel has incurred substantial attorneys' fees and costs conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, conducting extensive informal discovery, analyzing Class Members' time and payroll records, creating a comprehensive damages model, preparing for and attending mediation, negotiating and preparing the long-form Agreement, preparing this Motion, and otherwise litigating the case. *Ibid.* Class Counsel expects to expend additional attorney time in attending the hearing on this Motion, overseeing the Class Notice process and fielding questions from Class Members, preparing the Final Approval papers, and attending the Final Approval hearing. *Ibid.*

California courts recognize that an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of a settlement. *See, e.g., Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund method survives in California class action cases"). Class Counsel's request for fees of one-third of the GSA is well within the range of reasonableness and indeed is considered the typical rate for common fund settlements. Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013). Class Counsel submit that their request for attorneys' fees is reasonable when viewed as an overall percentage of the Settlement and in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which the litigation has been conducted. Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees and verified costs upon seeking Final Approval.

Additionally, the parties have agreed to designate $20,000.00 of the GSA as PAGA civil penalties, of which $15,000.00 (75%) will be paid to the LWDA, with the remaining $5,000.00 (25%) for distribution to the Aggrieved Employees, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Agreement, § 3.2.5. Plaintiff submits this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of $7,500 to LWDA out of $6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of $7,500 to LWDA out of $1.25 million common-fund settlement).

IV. LEGAL ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

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

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

1. The Strength of Plaintiff's Case and Risk, Expense, Complexity, and Duration of Further Litigation

Although Plaintiff maintains that Plaintiff's claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As described above in section II.B., *supra*, Defendant presented multiple defenses to Plaintiff's claims, both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to litigate these claims through class certification and ultimately trial, success was far from certain. Although the Parties engaged in significant informal discovery prior to mediation, the Parties still had significant formal discovery to complete if the Action did not resolve. Sung Decl., ¶ 25. This would have required the expenditure of substantial time and resources by both Parties that would have very likely spanned several years. *Ibid.* Even if Plaintiff were to certify the class, the Parties would incur considerably more attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Ibid.* This Settlement avoids those risks and the accompanying expense. *Ibid.*

Plaintiff has not yet filed a motion for class certification, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk that there would not be a certified class at the time of trial, or if there were, it would consist of a significantly smaller group of employees than the proposed Class (either due to a narrowing of the class definition in a Court order on a contested motion for class certification, or through settlement agreements entered into by Defendant with individual class members by way of *Pick Up Stix* type settlement agreements), and the expected recovery could be significantly reduced, given the settlement amounts that are typically offered through the *Pick Up Stix* process[2]. Sung Decl., ¶ 26. Thus, this factor, too, supports preliminary approval of the settlement.

2. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a positive recovery for the Class in the face of disputed claims. Plaintiff conducted a detailed analysis of alleged unpaid wages and meal and rest period premium payments owing, wage statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results of Plaintiff's exposure analysis are discussed below:

<u>Meal Period Violations:</u> **$232,452.02**

Plaintiff alleges that Defendant failed to provide Class Members with compliant meal periods, including second meal periods. *Id.* at ¶ 27. Specifically, based on Plaintiff's counsel's analysis of the 33.33% sampling time records consisting of 41,794 shifts, 4.15% of shifts had a late first meal period, 9.48% of shifts had a short first meal period, 96.18% of second meal period-eligible shifts (shifts over 10 hours) had a missed second meal period, and 15.38% of shifts had a true meal period violation. *Ibid.* Extrapolating these findings to the full Class and utilizing an average hourly rate of $19.37, Plaintiff estimates Defendant's maximum exposure for unpaid meal

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[2] In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may enter into pre-certification settlement agreements with individual putative class members in which the putative class members release claims for past unpaid wages and penalties in exchange for consideration.

period premiums to be $413,248.03.

However, as discussed above, Defendant argues that it maintained compliant meal period policies, including a meal period waiver policy; Class Members lawfully waived their first and/or second meal periods pursuant to its policy; Class Members attested in time clocks to taking compliant meal periods; and the meal period claim is not suitable for class treatment because individualized inquiries predominate. *Id.* at ¶ 28. In light of these defenses, Plaintiff discounted Defendant's maximum exposure by 25% for the risk of non-certification, and an additional 25% to account for Defendant's defenses on the merits or failing to recover the full amount sought, to arrive at an estimated realistic recovery of approximately $232,452.02. *Ibid.*

Rest Period Violations: **$48,134.45**

Plaintiff alleges that Defendant failed to provide Class Members with compliant rest breaks. *Id.* at ¶ 29. However, any non-compliant rest breaks would not be reflected in the time records. *Ibid.* Estimating a 10% violation rate of rest period violations (i.e., one violation every two weeks), Plaintiff estimates Defendant's maximum exposure for unpaid rest period premiums to be $275,054. *Ibid.* However, as discussed above, Defendant argues that it maintained compliant rest period policies; Class Members attested in time clocks to taking compliant rest periods; and the rest period claim is not suitable for class treatment because individualized inquiries predominate. *Id.* at ¶ 30. In light of these defenses, Plaintiff discounted Defendant's maximum exposure by 65% for the risk of non-certification, and an additional 50% to account for Defendant's defenses on the merits or failing to recover the full amount sought, to arrive at an estimated realistic recovery of approximately $48,134.45. *Ibid.*

Unpaid Wages Due to Off-the-Clock Work: **$28,880.67**

Plaintiff alleges that Class Members worked off the clock waiting in line to clock in and out and were not paid all minimum and overtime wages due. *Id.* at ¶ 31. However, any off-the-clock work would not be reflected in the time records. *Ibid*. Estimating that Class Members on average worked 0.2 hour (12 minutes) of off-the-clock work per week, Plaintiff estimates Defendant's maximum exposure for unpaid rest period premiums to be $28,880.67. *Ibid.* However, as discussed above, Defendant argues that it provided Class Members with seven time clocks throughout the facility so they did not wait in long lines to clock in and out; Defendant's counsel conducted a site inspection and found no more than three employees clocking in or out at time clocks; and individualized issues predominate. *Id.* at ¶ 32. In light of these defenses, Plaintiff discounted Defendant's maximum exposure by 65% for the risk of non-certification, and an additional 50% to account for Defendant's defenses on the merits or failing to recover the full amount sought, to arrive at an estimated realistic recovery of approximately $28,880.67. *Ibid.*

<u>Waiting Time Penalties:</u> **$188,398.43**

Plaintiff alleges the failure to pay meal and rest period premiums and unpaid wages resulted in liability for waiting time penalties. Sung Decl., ¶ 33. Defendant's records show approximately 214 formerly employed Class Members who separated their employment with Defendant three years prior to filing of the Complaint and are therefore eligible for waiting time penalties. *Ibid.* In analyzing the sampling time records, Plaintiff's counsel found 79.03% of Class Members had a meal period violation. *Ibid.* Adjusting the waiting time penalty violation rate to 100% to account for off-the-clock work and rest period issues, at an average hourly rate of $19.37 and 8.08-hour shifts, waiting time penalties are $1,004,791.63 for 214 formerly employed Class Members. *Ibid.*

Defendant presented several defenses, most notably its assertion that because they possessed good-faith defenses to the underlying claims for meal and rest period violations, any failure to pay wages was not "willful" as a matter of law. *Id*. at ¶ 34. Defendant further asserts that Plaintiff's waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. *Ibid.* Moreover, because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome Defendant's defenses, both as to class certification and on the merits, as to the underlying claims. *Ibid.* To account for Defendant's defenses, Plaintiff discounted the maximum exposure by 25% for the risk of non-certification and an additional 75% for the risk of losing on the merits and/or not receiving the maximum penalties sought to arrive at an estimated exposure of approximately $188,398.43. *Ibid.*

<u>Wage Statement Penalties:</u> **$53,573.44**

Plaintiff alleges that Defendant is liable for wage statement penalties as a result of the unpaid wages and meal and rest period premiums. *Id.* at ¶ 35. Those penalties are calculated as $50 for each "initial" violation and $100 for each "subsequent" violation, with a maximum of $4,000 per employee. *See* Labor Code § 226(e). Defendant's data reflected there were approximately 5,756 wage statements issued Class Members from one year prior to the filing of the Complaint to present. Sung Decl. at ¶ 35. Plaintiff's counsel's meal period analysis found the meal period violation rate by pay period was 19.66%. *Ibid.* Adjusting the pay period violation rate to 50% to account for off-the-clock work and rest break issues, Plaintiff calculated maximum exposure for wage statement penalties at $285,725. *Ibid.*

As discussed above, Defendant presented several defenses, most notably its assertion that because they possessed good-faith defenses to the underlying claims for meal and rest period violations and any failure to pay wages was not "knowing and intentional" as a matter of law. *Id.* at ¶ 36. Moreover, because the wage statement claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to overcome Defendant's defenses, both as to class certification and on the merits, as to his underlying claims. *Ibid.* To account for Defendant's defenses, Plaintiff discounted the maximum exposure by 25% for the risk of non-certification and an additional 75% for the risk of losing on the merits and/or not receiving the maximum penalties sought to arrive at an estimated exposure of approximately $53,573.44. *Ibid.*

<u>PAGA Penalties:</u> **$115,120**

Plaintiff estimated a maximum total PAGA exposure of approximately $575,600 (5,756 pay periods during the PAGA Period x $100 "initial" penalty). Sung Decl., ¶ 37; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding "initial" violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from the underlying wage and hour violations discussed above, which Defendant disputes vigorously. Sung Decl., ¶ 37*; see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506, *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim's success was determined by the merits of its underlying claims). Defendant also asserts that the Court would drastically reduce any award of PAGA penalties as "confiscatory." Sung Decl., ¶ 36; *see also Thurman*, 203 Cal.App.4th at 1135 (affirming reduction of PAGA penalties); *Fleming*, 2011 WL 7563047, at *4 (reducing PAGA penalties from $2.8 million to $500,000). Therefore, Plaintiff discounted the maximum figure by 80% for the risk of losing on the merits and/or not recovering a PAGA penalty for each and every pay period and to account for the possibility of this Court reducing penalties, to arrive at an estimated exposure of approximately $115,120. Sung Decl., ¶ 37.

Conclusion

Using these estimated figures for each of the claims described above, Plaintiff predicted that the potential realistic recovery for the Class would be approximately $666,559.01. Sung Decl., ¶ 38. The proposed Settlement of $375,000 represents approximately **56.26%** of the reasonably forecasted recovery for the Class. *Ibid.* Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Class, which is consistent with what Plaintiff's counsel believes could have been recovered had the case proceeded through trial.

3. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." In *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent, experienced counsel who possess extensive experience prosecuting and defending wage-and-hour class actions and who have been appointed as class counsel. *See* Sung Decl., ¶¶ 2-7; Declaration of Tiffany L. Luu ("Luu Decl."), ¶¶ 2-6; Class Counsel conducted an in-depth review of class records and drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff's case. The Settlement was also reached with the assistance of an experienced and respected wage-and-hour class action mediator. Sung Decl., ¶ 21. This factor strongly supports preliminary approval of the Settlement. *See Kullar*, 168 Cal.App.4th at 130.

4. The Preliminary Approval Standard Is Met

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

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The proposed Settlement reflects approximately 56.26% of the estimated recovery the Class could reasonably expect in light of the significant litigation risks and will provide tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc*. (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Class Members at trial"). The average Individual Settlement Award of approximately **$523.49** far exceeds average payments achieved in other wage and hour class action settlements.[3] Thus, the proposed Settlement is within the range of possible approval, such that notice should be provided to the Class Members so that they can consider the Settlement. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Class Members have had the opportunity to opt-out or object.

The Settlement resulted from an exchange of substantial information, arm's-length negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and additional months of negotiating the long-form settlement agreement. Thus, the Settlement is entitled to an initial presumption of fairness. *See Kullar*, *supra*, 168 Cal.App.4th at 130. As

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

discussed above, Plaintiff carefully vetted the claims at issue, analyzed extensive sampling time and payroll data, and conducted a detailed damages analysis to arrive at his estimated class-wide damages figures. *See* Sung Decl., ¶¶ 27-37. Thus, this factor supports preliminary approval.

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

B. <u>THE COURT SHOULD CERTIFY THE CLASS</u>

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

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where the members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *See Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the Class is defined as all current and former non-exempt employees who worked for Defendant in California during the Class Period. Therefore, Class Members can be identified from Defendant's personnel and employment records. Defendant represents that the Class consists of approximately 375 current and former non-exempt employees. Sung Decl., ¶ 23. It would therefore be impracticable to bring all Class Members before the Court or for each Class Member to bring an individual lawsuit. Thus, the proposed Class satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.* (1955) 44 Cal.2d 574 (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

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2. Common Issues of Law and Fact Predominate

The focus in a certification dispute is not on the merits but rather on what types of questions, "common or individual," are likely to arise in the Action. *See Sav-On Drug Store, Inc. v. Superior Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on, among other issues, Defendant's uniform policy and practice regarding rounding and timekeeping and provision of meal and rest periods. These types of claims are commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 (certifying meal and rest period claims*); Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 324 (certifying exemption misclassification and unpaid overtime claim).

3. The Claims of the Named Plaintiff Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same goods as the putative class in a consumer class action). Here, Plaintiff's claims are typical of those held by the Class Members. First, Defendant employed Plaintiff as non-exempt employee during the Class Period, and Plaintiff was subject to Defendant's wage and hour policies at issue in this case. *See* Salazar Decl., ¶¶ 2-3. Second, Plaintiff was injured by the same challenged policies/practices that allegedly injured the Class as a whole: Plaintiff did not receive all meal and rest periods, including second meal periods when she worked more than 10 hours in a shift; Plaintiff worked off the clock waiting in time to clock in and out and sometimes worked after she clocked out; the workplace was uncomfortably hot during the summers because there was no air conditioning; and Plaintiff was not paid all wages and premiums due as a result of Defendant's break and timekeeping policies and was not provided accurate wage statements with the correct amount of wages due to her and hours she worked. *Id.* at ¶ 3. Because Plaintiff has suffered the same injuries as the other members of the Class, the typicality requirement is satisfied.

4. Plaintiff and Class Counsel Will Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*

(2007) 155 Cal.App.4th 676, 697. Plaintiff and Plaintiff's counsel will adequately represent the Class, as there are no conflicts between Plaintiff and the proposed Class, and Plaintiff possesses claims that are in line with those of the Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation. *See* Sung Decl., ¶¶ 2-7; Luu Decl., ¶¶ 2-6.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE CLASS NOTICE

This Court should order distribution to the Class of the proposed Class Notice by U.S. Mail, postage prepaid using the last known mailing address information provided by Defendant. *See* Agreement, §§ 4.2, 7.4, Ex. A – Class Notice. The Class Notice will be distributed in English and Spanish. *See id.* at §§ 1.11, 7.4.2. This manner of giving notice is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173. Here, the Parties have agreed that the Settlement be administered by Apex Class Action LLC ("Apex"), an experienced class action settlement administrator. *See generally* Declaration of Sean Hartranft ("Apex Decl.") and attached exhibits. Class Members' addresses will be ascertainable through Defendant's personnel and payroll records, which Defendant will provide to Apex within 21 days of preliminary approval of the Settlement. *See* Agreement, § 4.2. Within 14 days of receipt of the Class Members' addresses, Apex will run the names of all Class Members through the National Change of Address database to update addresses and mail the Class Notice to all Class Members. *See id* at, § 7.4.2. To the extent that any notices are returned, Apex will perform a "skip trace" to track any Class Member's current mailing address. *See id.* at § 7.4.3.

The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because it advises Class Members of the nature of the claims, basic contentions and denials of the parties, and the key terms of the Settlement, the 45-day deadline to opt-out or object to the Settlement and the procedures by which to do so, explains the recovery formula and expected recovery amount for each Class Member, and advises them that they will be bound by the terms of the Agreement if they do not opt-out. *See* Agreement, Exh. A – Class Notice. The proposed Class Notice will also notify Class Members of the final approval hearing date and provides the Class contact information for Class Counsel and advises Class Members that they may enter an appearance through counsel if they wish to. *Ibid.* This manner of giving notice satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Class Members.

D. THE COURT SHOULD SET A FINAL APPROVAL HEARING

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

V. CONCLUSION

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

DATED: December 20, 2024

Respectfully submitted,

JUSTICE FOR WORKERS, P.C.

By: ______________________________

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