

1 **JUSTICE FOR WORKERS, P.C.**

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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN BENITO**

10 ERIC ECHEVERRIA, an individual and on
11 behalf of all others similarly situated;

12 Plaintiff,

13 vs.

14 FIRECLAY TILE, INC., a Delaware
15 corporation; and DOES 1 through 50,

16 Defendants.

Case No.: CU-23-00249

[Assigned for All Purposes to:
Hon. J. Omar Rodriguez, Dept. 1]

**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, Eric
Echeverria, and Apex Class Action, LLC;
[Proposed] Order)

DATE: To be assigned
TIME: To be assigned
DEPT.: 1

Action Filed: November 3, 2023
Trial Date: Not Set

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

3 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on a
4 date and time to be assigned by the Hon. J. Omar Rodriguez of Department 1 of the San Benito
5 County Superior Court, located at 450 Fourth Street, Hollister, California, Plaintiff Eric Echeverria
6 (“Plaintiff”), individually and on behalf of a class of similarly situated individuals, will and hereby
7 does move this Court for:

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

11 All persons employed by Defendant Fireclay Tile, Inc. in California and classified
12 as a non-exempt, hourly employee and who worked for Defendant between
November 3, 2019 to July 3, 2024 (the “Class Period”),

13 3. Preliminary appointment of Plaintiff as Class Representative;
14 4. Preliminary appointment of William C. Sung and Tiffany L. Luu of Justice for
15 Workers, P.C. as Class Counsel;

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

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

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

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

28 ///

1 DATED: August 28, 2024

Respectfully submitted,

2 **JUSTICE FOR WORKERS, P.C.**

3
4 By: 

5 William C. Sung

6 Tiffany L. Luu

7 Attorneys for Plaintiff ERIC ECHEVERRIA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Eric Echeverria (“Plaintiff”) brought this class and representative action for various
4 wage and hour violations on behalf of current and former employees of Defendant Fireclay Tile,
5 Inc. (“Defendant”) in California from November 3, 2019 to July 3, 2024 (the “Class Period”). The
6 primary issues in this case pertain to Defendant’s alleged failure to factor shift differentials and
7 other non-discretionary incentive compensation into the regular rate for overtime, meal period
8 premiums, and paid sick leave; unlawful rounding of employee time punches; and failure to provide
9 meal periods and rest periods. Plaintiff contends Defendant is also liable for inaccurate wage
10 statement penalties, waiting time penalties, and civil penalties under the Private Attorneys’ General
11 Act (“PAGA”).

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-
13 reversionary, common-fund class action settlement,¹ in which Defendant has agreed to pay Three
14 Hundred Forty Thousand Dollars and Zero Cents (\$340,000.00) to the following Settlement Class:

15 All persons employed by Defendant Fireclay Tile, Inc. in California and classified
16 as a non-exempt, hourly employee and who worked for Defendant between
November 3, 2019 to July 3, 2024 (the “Class Period”),

17 If the Settlement is approved, Defendant will pay a non-reversionary Gross Settlement
18 Amount (“GSA”) of \$340,000.00 to approximately 404 Class Members. After deducting
19 administration costs, Plaintiff’s requested Class Representative Service Award, the amount set aside
20 as PAGA civil penalties, and requested attorneys’ fees and costs, the Net Settlement Amount
21 (“NSA”) of approximately \$162,266.67 will be distributed to all Class Members who do not opt out
22 of the Settlement based on the proportionate number of workweeks worked by each Settlement
23 Class member during the Class Period. Employees with standing for PAGA civil penalties (subject
24 to a one-year statute of limitations) will receive additional consideration for their release of PAGA
25 claims.

26
27
28 ¹ The Class Action and PAGA Settlement Agreement (“Settlement”) is attached to the Declaration of
William C. Sung as **Exhibit 1**. The proposed Class Notice is attached to the Settlement as **Exhibit A**. All
defined terms in this motion have the same definition as that in the Settlement.

1 Significantly, Class Members do not need to file a claim to reap the financial benefits of the
2 Settlement, as all Class Members will automatically receive a payment unless they affirmatively
3 opt-out. There are approximately 404 Class Members, and **the average payment to participating**
4 **Class Members is projected to be approximately \$401.65.** This is an excellent result for Class
5 Members, who will be releasing only those claims alleged in the Action. The proposed Settlement is
6 within the range of possible approval in light of the significant legal and factual obstacles that
7 Plaintiff faced, the risks and costs of further litigation, and the tangible monetary benefits to be
8 received by Plaintiff and the Settlement Class. For the reasons discussed herein, Plaintiff
9 respectfully requests that this Court grant preliminary approval of the Settlement.

10 **II. SUMMARY OF THE LITIGATION**

11 **A. THE PARTIES AND BRIEF PROCEDURAL HISTORY**

12 Defendant owns and operates an architectural tile manufacturing company in Aromas,
13 California with showrooms in San Francisco and Berkeley. Declaration of William C. Sung in
14 Support of Plaintiff's Motion for Preliminary Approval of Class Settlement ("Sung Decl."), ¶ 9.
15 Plaintiff worked for Defendant as a Machine Operator from October 2019 to November 9, 2023.
16 Declaration of Eric Echeverria in Support of Plaintiff's Motion for Preliminary Approval of Class
17 Settlement ("Echeverria Decl."), ¶ 2.

18 On November 3, 2023, Plaintiff filed the Class Action Complaint in San Benito County
19 Superior Court, alleging the following causes of action against Defendant for (1) Minimum Wage
20 Violations; (2) Overtime Wage Violations; (3) Meal Period Violations; (4) Rest Period Violations;
21 (5) Wage Statement Penalties; (6) Waiting Time Penalties; (7) Failure to Reimburse Necessary
22 Business Expenses; and (8) Unfair Competition. Sung Decl., ¶ 10. Previously, on August 1, 2023,
23 Plaintiff sent a PAGA notice letter to the LWDA. Sung Decl., ¶ 11. On the same day, November, 3,
24 2023, Plaintiff sent a notice letter under the California Private Attorneys General Act ("PAGA") to
25 the Labor and Workforce Development Agency ("LWDA"). Sung Decl., ¶ 11, **Exhibit 2** (LWDA
26 Letter). Subsequently, on January 30, 2024, Plaintiff filed the First Amended Class and
27 Representative Action Complaint ("FAC") adding a cause of action for civil penalties under the
28 Private Attorneys' General Act of 2004, Labor Code Section 2698, *et seq.* Sung Decl., ¶ 12, **Exhibit**

1 3 (FAC).

2 **B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES**

3 **1. Unpaid Wages Due to Rounding**

4 Plaintiff contends that Defendant underpaid Class Members due to its allegedly unlawful
5 rounding policies/practices. Sung Decl., ¶ 13. Plaintiff contends that although Defendant’s
6 timekeeping system recorded hours worked to the minute, Defendant rounded all time punches to
7 the nearest quarter-hour from November 3, 2019 (the start of the Class Period) to September 19,
8 2021, resulting in an underpayment of wages, including overtime wages, to Class Members. *Ibid*;
9 *Camp v. Home Depot U.S.A., Inc.* (2022) 84 Cal.App.5th 638, 644, *review granted* 304 Cal.Rptr.3d
10 82 (reversing summary judgment in favor of Home Depot’s nearest-quarter-hour rounding practice
11 even though the plaintiff did not lose time due to rounding).

12 However, Defendant argues that its rounding policies/practices were lawful, since it was
13 both neutral on its face and resulted, over time, in employees being paid for all hours worked. Sung
14 Decl., ¶ 13. Defendant also contends that multiple Courts of Appeal have found rounding
15 mechanisms to be lawful under similar circumstances. *Ibid*; *see, e.g., Ferra v. Loews Hollywood*
16 *Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1254; *AHMC Healthcare, Inc. v. Superior Court* (2018) 24
17 Cal.App.5th 1014, 1028. Additionally, Defendant asserts Plaintiff would be unable to certify a
18 rounding class given the individualized inquiries as to whether Class Members were in fact
19 underpaid, or potentially overpaid, for each workday in question. Sung Decl., ¶ 13.

20 **2. Regular Rate Miscalculation**

21 Plaintiff alleges that Defendant failed to pay all overtime wages owed to Plaintiff and Class
22 Members by failing to include the value of all non-discretionary remuneration into the “regular
23 rate” of pay. Sung Decl., ¶ 14. Specifically, Plaintiff contends that Defendant failed to pay overtime
24 at or above the weighted average rate when Class Members received shift differentials; Defendant
25 failed to incorporate the following incentive compensation into the regular rate: Bonus, HPBonus,
26 MiscBonus, Incentive, and Servaward; and Defendant failed to pay meal period premiums and paid
27 sick leave at the regular rate. *Ibid*.

28 ///

1 Defendant contends that it properly utilized the “rate-in-effect” method when calculating the
2 overtime rate when Class Members earned shift differentials and the aforementioned types of
3 incentives were discretionary in nature and need not be incorporated into the regular rate of pay.
4 *Ibid.* Specifically, Bonus is an annual discretionary bonus, HPBonus is a discretionary bonus for a
5 specific hand painting department, MiscBonus is for small one-off bonuses, Incentive was a sale
6 commission no longer in use, and Servaward is a discretionary bonus for length of tenure. *Ibid.*
7 Defendant further argues that Class Members received different types of bonuses and incentives
8 throughout the Class Period, creating substantive differences among the Class Members with
9 respect to the incentives received, making class certification unlikely. *Ibid.*

10 **3. Meal and Rest Period Claims**

11 Plaintiff alleges that due to Defendant’s scheduling policies and operational needs, Class
12 Members’ first and second meal periods were frequently late (commencing after the fifth hour of
13 work) and/or short (i.e., less than a full 30 minutes). Sung Decl. ¶ 15. Plaintiff further challenges the
14 validity of Defendant’s meal period waivers for second meal periods because the waiver form failed
15 to disclose to Class Members of their rights to meal period premiums being affected by their
16 voluntary waiver. *Ibid.* As to rest periods, Plaintiff alleges that Class Members were not permitted
17 to take a third rest break when they worked more than 10 hours in a shift. *Ibid.*

18 Defendant counters that it has maintained compliant written meal and rest period policies
19 throughout the Class Period and has always provided compliant meal and rest periods in line with
20 those policies. *Ibid*; see *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1034 (rejecting
21 “ensure” standard). Defendant further contents that its meal period waivers are enforceable and the
22 law does not require disclosure to employees that they are waiving their rights to meal period
23 premiums and most Class Members voluntarily waived their second meal periods on shifts over
24 10.0 hours and under 12.0 hours so they do not need to stay at work for an extra unpaid 30 minutes.
25 Sung Decl. ¶ 15. Defendant further argues that any non-compliant meal periods or rest periods
26 resulted from lawful employee waiver or choice, rather than any systemic policy and/or practice of
27 Defendant. *Ibid.* Finally, Defendant maintains Plaintiff’s meal and rest period claims are not suited
28 for class certification since individual inquiries would be needed to assess which employees, if any,

1 took non-compliant or missed meal or rest periods, how many meal or rest periods were non-
2 compliant or missed, the reasons why a particular employee did not take a meal or rest period on a
3 particular shift, and for second meal periods, whether they waived the meal period.

4 **4. Failure to Reimburse Necessary Business Expenses**

5 Plaintiff contends that Defendant failed to reimburse necessary business expenses to him
6 and Class Members for the required use of their personal cellphones in the performance of their job
7 duties, including calling their supervisors while on shift. Sung Decl., ¶ 16. Defendant maintains
8 Plaintiff's reimbursement claims are not suited for class certification since individual inquiries
9 would be needed to assess which employees, if any, used their personal cellphone for work; whether
10 they were required to use their personal cellphone by Defendant or if it was merely convenient for
11 them to do so; whether they sought reimbursement from Defendant and were denied; and the
12 amount of their unreimbursed expenses. *Ibid.*

13 **5. Waiting Time and Wage Statement Penalties**

14 As a result of the unpaid wages and unpaid meal and rest period premium wages described
15 above, Plaintiff contends that Defendant failed to comply with its final pay obligations set forth in
16 Labor Code §§ 201 to 203 to former employees and failed to issue accurate itemized wage
17 statements to Class Members as set forth in Labor Code § 226(a). Sung Dec., ¶ 17. Thus, the claims
18 for waiting time and wage statement penalties are derivative of the underlying unpaid wages and
19 meal/rest period claims. *Ibid.*

20 Defendant argues that it possesses strong, good faith defenses to Plaintiff's underlying
21 claims, thus precluding recovery of waiting time penalties, which are only available for the
22 "willful" failure to pay wages. *Ibid.* Defendant further argues any alleged wage statement violations
23 were not "knowing and intentional," and Plaintiff cannot show the Class "suffer[ed] injury" due to
24 the alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of
25 penalties. *Ibid.* Notably, Defendant relied on the appellate decision of *Naranjo v. Spectrum Security*
26 *Services, Inc.* (2023) 88 Cal.App.5th 937, 951, for the proposition that an employer's good-faith
27 defenses precludes a "willfulness" finding under Labor Code § 203 and a "knowing and intentional"
28 finding under Labor Code § 226(e) for the imposition of statutory penalties (and this holding has

1 now been affirmed by the California Supreme Court in *Naranjo v. Spectrum Security Services, Inc.*
2 (May 6, 2024) 15 Cal.5th 1056). *Ibid.* Defendant further asserts that Plaintiff’s waiting time and
3 wage statement penalty exposure was grossly inflated as not every employee experienced the
4 alleged Labor Code violations. *Ibid.*

5 **6. PAGA Civil Penalties**

6 As a result of the foregoing Labor Code violations, Plaintiff contends that Defendant is
7 liable for civil penalties under the PAGA. Sung Decl., ¶ 18. Since Plaintiff’s PAGA claim is
8 derivative of Plaintiff’s underlying wage claims, Defendant asserts the PAGA claim would fail with
9 those claims. *Ibid*; see *Price v. Starbucks Corp.* 192 Cal.App.4th 1136, 1147 (2011) (“Because the
10 underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). Defendant
11 further maintains that, given its good faith defenses, this Court would exercise its discretion to
12 substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff’s
13 claims. Sung Decl., ¶ 18; see Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* 203
14 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*,
15 Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing
16 PAGA penalties by over 82% in part because employer “not aware” of violations); *Carrington v.*
17 *Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per pay
18 period where employer made “good faith attempts” to comply with the law).

19 **C. DISCOVERY AND MEDIATION**

20 In connection with mediation, the Parties engaged in informal discovery. Sung Decl., ¶ 19.
21 Defendant produced (1) a class list with unique identifying information for each class member and
22 the class member’s hourly rate, job title, location worked, and dates of employment; (2) a 25%
23 random sampling of employee time and payroll records in Excel format; (3) various policies and
24 procedural documents, including employee handbooks, meal and rest period policy, meal period
25 waiver, and alternative workweek agreement; and (4) class and PAGA statistics, including the
26 number of workweeks worked by Class Members during the Class Period and pay periods worked
27 by Aggrieved Employees during the PAGA Period. *Ibid.*

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

6 On June 3, 2024, the Parties participated in a full-day mediation with Lisa Klerman, Esq., a
7 well-respected wage and hour class action mediator. Sung Decl., ¶ 21. During mediation, the Parties
8 vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff’s
9 claims, and the legal basis for the claims and defenses. *Ibid.* The Parties reached a tentative class
10 and PAGA settlement at the mediation. *Ibid.* During the months that followed, the Parties finalized
11 the terms of the Settlement and executed the long-form Settlement now before the Court. *Ibid.*; see
12 Sung Decl., ¶ 21, **Exhibit 1** (Settlement).

13 **III. THE PROPOSED SETTLEMENT**

14 **A. ESSENTIAL TERMS OF THE SETTLEMENT**

15 If the Court preliminarily approves the Settlement, Defendant will pay a Gross Settlement
16 Amount (“GSA”) of \$340,000.00. Settlement, § 3.1². Significantly, this Settlement is non-
17 reversionary, and no Settlement Class member will have to submit a claim form to receive an
18 Individual Settlement Award. *Id.*, at §§ 3-4. Each Settlement Class member will automatically
19 receive an Individual Settlement Award unless they affirmatively opt out of the Settlement. *Ibid.*
20 The monetary terms of the Settlement are summarized below:

21	a.	Gross Settlement Amount (“GSA”):	\$340,000.00
22	b.	Minus Court-approved attorneys’ fees:	\$113,333.33
23	c.	Minus Court-approved verified costs (up to):	\$15,000.00
24	d.	Minus Court-approved Service Payment:	\$10,000.00
25	e.	Minus amount set aside as PAGA penalties:	\$30,000.00
	f.	Minus estimated settlement administration costs:	\$9,400.00
	g.	Net Settlement Amount (“NSA”):	\$162,266.67
	h.	Plus 25% “PAGA Penalties” to Settlement Class:	\$7,500.00
		Total Amount Paid to Class Members:	\$169,766.67

26 Sung Decl., ¶ 22.

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² As stated above, the Settlement is attached as Exhibit 1 to the Declaration of William C. Sung.

1 **1. The Settlement Provides for Reasonable Monetary Payments**

2 After deducting amounts for the Court-approved attorneys' fees and costs, Class
3 Representative Service Award to Plaintiff, the amount set aside as PAGA civil penalties, and
4 settlement administration costs, the Settlement requires Defendant to pay a Net Settlement Amount
5 ("NSA") of at least \$162,266.67 to all Class Members who do not timely opt-out. Settlement, §§ 3,
6 7.5. The NSA shall be distributed to participating Class Members as Individual Class Payments,
7 calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by
8 all Participating Class Members during the Class Period and (b) multiplying the result by each
9 Participating Class Member's Workweeks. Settlement, § 3.2.4. Additionally, \$7,500.00 of the Gross
10 Settlement Amount has been designated as Individual PAGA Payments and shall be distributed to
11 Aggrieved Employees (including those who submit a valid and timely Request for Exclusion from
12 the class action settlement) who were employed during the PAGA Period proportionally based on
13 the number of pay periods worked during the PAGA Period. Settlement, §§ 3.2.5, 7.5.4. In addition
14 to the Gross Settlement Amount, Defendant is obligated to pay the employer's share of payroll
15 taxes on Individual Class Payments allocated to settlement of wage claims. Settlement, § 4.3.

16 According to Defendant, there are approximately 404 Class Members. Sung Decl., ¶ 23.
17 Therefore, the average Individual Settlement Award from the NSA is projected to be approximately
18 \$401.65. *Ibid.* There are also approximately 259 Aggrieved Employees during the PAGA Period
19 who will each receive an average of approximately \$28.96 as Individual PAGA Payments. *Ibid.*
20 Class Members will have 60 calendar days from the mailing of the Class Notice to opt-out or object
21 to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying
22 the Settlement. *See* Settlement, §§ 7.4-7.7.

23 Effective on the date when Defendant fully funds the Gross Settlement Amount and the
24 employer's share of payroll taxes, Participating Class Members (Class Members who did not opt
25 out) will release all claims that were alleged, or reasonably could have been alleged, based on the
26 facts stated in the Operative Complaint (the First Amended Complaint); and all Aggrieved
27 Employees are deemed to release all claims for PAGA penalties that were alleged, or reasonably
28 could have been alleged, based on the facts stated in the Operative Complaint and PAGA Notice.

1 Settlement, §§ 5.2-5.3.

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

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

15 Class Counsel will also apply for an attorneys' fees award of one-third of the Gross
16 Settlement Amount, which is currently estimated to be \$113,333.33, and up to \$15,000.00 in
17 verified costs reimbursement. *See* Settlement, § 3.2.2; Sung Decl., ¶ 24. The requested fee is fair
18 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely
19 contingent fee basis. Sung Decl., ¶ 24. Class Counsel has incurred substantial attorneys' fees
20 conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research,
21 conducting extensive informal discovery, analyzing Class Members' time and payroll records,
22 creating a comprehensive damages model, preparing for and attending mediation, negotiating and
23 preparing the long-form Settlement, preparing this Motion, and otherwise litigating the case. *Ibid.*
24 Class Counsel expects to expend additional attorney time in attending the hearing on this Motion,
25 overseeing the Class Notice process and fielding questions from Class Members, preparing the
26 Final Approval papers, and attending the Final Approval hearing. *Ibid.*

27 California courts recognize that an appropriate method for awarding attorneys' fees in class
28 actions is to award a percentage of the "common fund" created as a result of a settlement. *See, e.g.,*

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

11 Additionally, the parties have agreed to designate \$30,000.00 of the Gross Settlement
12 Amount as PAGA civil penalties, of which \$22,500.00 (75%) will be paid to the LWDA, with the
13 remaining \$7,500.00 (25%) for distribution to the Aggrieved Employees, as the PAGA requires
14 such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, § 3.2.5. Plaintiff submits
15 this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo*
16 *Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving
17 PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro*
18 *Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA
19 payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

20 **IV. LEGAL ARGUMENT**

21 **A. PRELIMINARY APPROVAL IS WARRANTED**

22 California Rule of Court 3.769 conditions settlement of a class action on court approval,
23 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
24 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322,
25 337 (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
26 adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 (Rule
27 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair,
28 adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly in

1 complex class action litigation. See *In re Syncor ERISA Litig* (9th Cir. 2008) 516 F.3d 1095, 1101.
2 The Court's role in evaluating a proposed settlement is limited to ensuring that the agreement taken
3 as a whole is fair. See e.g., *Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of
4 fairness where, as here, the Settlement was negotiated at arm's-length by class counsel and with the
5 assistance of an experienced wage and hour class action mediator. See e.g., *Kullar v. Foot Locker*
6 *Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

7 **1. Standard for Preliminary Approval**

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

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

18 Although Plaintiff steadfastly maintains that Plaintiff's claims are meritorious, Plaintiff
19 acknowledges that there were substantial risks and uncertainty in proceeding with litigation. As
20 described above in section II.B., *supra*, Defendant presented multiple defenses to Plaintiff's claims,
21 both on the merits and with respect to class certification. Thus, while Plaintiff was prepared to
22 litigate these claims through class certification and ultimately trial, success was far from certain.

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

24 Although the Parties engaged in significant informal discovery prior to mediation, the
25 Parties still had significant formal discovery to complete had the matter not been settled. Sung
26 Decl., ¶ 25. This would have required the expenditure of substantial time and resources by both
27 Parties that would have very likely spanned several years. *Ibid.* Even if Plaintiff were to certify the
28 class, the Parties would incur considerably more attorneys' fees and costs through a possible

1 decertification motion, trial, and possible appeal. *Ibid.* This Settlement avoids those risks and the
2 accompanying expense. *Ibid.*

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

4 Plaintiff has not yet filed a motion for class certification, and as such, the extent to which
5 Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a
6 risk that there would not be a certified class at the time of trial, or if there were, it would consist of a
7 significantly smaller group of employees than the proposed Class (either due to a narrowing of the
8 class definition in a Court order on a contested motion for class certification, or through settlement
9 agreements entered into by Defendant with individual class members by way of *Pick Up Stix* type
10 settlement agreements³), and the expected recovery could be significantly reduced, given the
11 settlement amounts that are typically offered through the *Pick Up Stix* process. Sung Decl., ¶ 26.
12 Thus, this factor, too, supports preliminary approval of the settlement.

13 **d. Amount Offered in Settlement Given Realistic Value of Claims**

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

19 Unpaid Wages Due to Rounding: \$15,688.53

20 Based on Plaintiff's analysis of the sampling time records, Class Members lost a total of
21 494.02 hours due to rounding, gained only 256.5 hours, experienced a net loss of 237.52 hours.
22 Sung Decl., ¶ 27. Therefore, looking at shifts in which Class Members lost time due to rounding and
23 extrapolating the 25% sampling across the portion of the Class Period in which there was rounding
24 (November 3, 2019 to September 19, 2021), Plaintiff estimates Defendant's maximum exposure for
25

26 _____
27 ³ In *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009), the Court of Appeal held an employer may
28 enter into pre-certification settlement agreements with individual putative class members in which the
putative class members release claims for past unpaid wages and penalties in exchange for consideration.
The Court further held that such settlements could preclude those individual employees from recovery in
class action litigation against the employer for the same wage claims.

1 this claim is approximately \$41,836.09. *Ibid.*

2 However, only 56.86% of shifts were rounded against Class Members while 28.90% of
3 shifts were rounded in their favor and 14.24% were neutral, which support Defendant’s argument
4 that multiple Courts of Appeal have found rounding practices to be lawful under similar
5 circumstances. *Ibid*; see *Ferra, supra*, 40 Cal.App.5th at 1254 (reversed on other grounds)
6 (affirming classwide summary judgment for employer on rounding claim where employees were
7 underpaid on 54.6% of shifts, finding that such facts do not establish that employees were
8 “systematically undercompensate[d]”); *AHMC Healthcare, Inc., supra*, 24 Cal.App.5th at 1028
9 (affirming classwide summary judgment for employer where “bare majority” of employees were
10 underpaid due to rounding). Defendant further argues that it employed a neutral rounding practice
11 and Plaintiff would be unable to certify a rounding class given the individualized inquiries as to
12 whether Class Members were in fact underpaid, or potentially overpaid, for each workday in
13 question. Sung Decl., ¶ 27. In light of these defenses and arguments, Plaintiff discounted
14 Defendant’s maximum exposure by 25% for the risk of non-certification, and an additional 50% to
15 account for Defendant’s defenses on the merits or failing to recover the full amount sought to arrive
16 at an estimated potential recovery for these claims of approximately \$15,688.53. *Ibid.*

17 Regular Rate Miscalculations: **\$8,613.75**

18 Plaintiff alleges that Defendant miscalculated employees’ regular rate of pay by failing to
19 include non-discretionary bonuses into the “regular rate” when calculating overtime pay, meal
20 period premiums, and paid sick leave. Sung Decl., ¶ 28. Based on the data provided by Defendant,
21 Plaintiff calculated Defendant’s maximum potential liability to be approximately \$22,970 in unpaid
22 wages due to the regular rate violations during the Class Period. *Ibid.*

23 As stated above, Defendant contends that it properly utilized the “rate-in-effect” method
24 when calculating the overtime rate when Class Members earned shift differentials and the
25 aforementioned types of incentives were discretionary in nature and need not be incorporated into
26 the regular rate of pay. *Ibid.* Defendant further argues that Class Members received different types
27 of bonuses and incentives throughout the Class Period, creating substantive differences among the
28 Class Members with respect to the incentives received, making class certification unlikely. *Ibid.* In

1 light of these defenses and arguments, Plaintiff discounted Defendant's maximum exposure by 25%
2 for the risk of non-certification, and an additional 50% to account for Defendant's defenses on the
3 merits or failing to recover the full amount sought to arrive at an estimated potential recovery for
4 these claims of approximately \$8,613.75. *Ibid.*

5 Meal Period Violations: \$105,025.38

6 Plaintiff alleges that Defendant failed to provide compliant meal periods to Class Members.
7 Sung Decl., ¶ 29. Based on Plaintiff's analysis of the sampling time and payroll records, Plaintiff
8 found on average 1.67 meal period violations per pay period. *Ibid.* Extrapolating across the entire
9 Class Period, Plaintiff estimates the maximum exposure for this claim to be \$525,126.91. *Ibid.*

10 However, as noted above, Defendant contends that it maintained compliant meal period
11 policies throughout the Class Period and provided compliant meal periods in line with those
12 policies. Sung Decl., ¶ 30. Defendant also asserts that under *Brinker* it is only required to "provide"
13 the opportunity to take meal periods, not "ensure" meal periods are taken, and that, as described
14 above, it has always done so, and any non-complaint first meal periods in the timekeeping records
15 were the result of lawful employee waiver or choice. *Ibid.* Defendant also maintains that its meal
16 period waivers with Class Members were enforceable. *Ibid.* Finally, Defendant argues that meal
17 period claim is not suited for class certification, since individual inquiries would be needed to assess
18 which employees took non-compliant meal periods or missed meal periods, how many meal periods
19 were non-compliant or missed, and the reasons why a particular employee did not take a compliant
20 meal period on a particular shift. *Ibid.* In light of these defenses and arguments, Plaintiff discounted
21 Defendant's maximum exposure by 60% for the risk of non-certification, and an additional 50% to
22 account for Defendant's defenses on the merits or failing to recover the full amount sought, to arrive
23 at an estimated total of approximately \$105,025.38. *Ibid.*

24 Rest Period Violations: \$55,363.24

25 Plaintiff alleges that Defendant failed to provide third rest periods to Class Members when
26 they worked more than 10 hours in a shift. Sung Decl., ¶ 31. Based on Plaintiff's analysis of the
27 sampling time and payroll records, Class Members worked over 10 hours in 4,352 shifts. *Ibid.*
28 Extrapolating the 25% sampling across the full Class Period, Plaintiff estimates Defendant's

1 maximum exposure for unpaid rest period premiums as \$402,728.10. *Ibid.*

2 However, as discussed above, Defendant argues that it always maintained and enforced
3 lawful rest period policies and practices during the Class Period. Sung Decl., ¶ 32. Defendant also
4 maintains that any failure to take rest periods was the result of employee waiver or choice, and that
5 it is not required to police rest periods. *Ibid.* Defendant further argues that Plaintiff’s rest period
6 claim is not amenable to class treatment as individualized inquiries would be required to determine
7 which employees failed to take rest periods, and the reasons why each employee failed to take a rest
8 period on a particular shift. *Ibid.* These considerations are particularly present with respect to rest
9 periods, Defendant argues, as rest periods are not—and need not be—recorded. *Ibid.* In light of
10 these defenses, Plaintiff discounted the maximum amount that the class could potentially recover by
11 60% for risk of non-certification, and discounted an additional 50% for risk of being unsuccessful
12 on the merits or failure to recover the full amount sought, to arrive at a projected exposure of
13 \$55,363.24. *Ibid.*

14 Waiting Time Penalties: **\$103,184.64**

15 Defendant’s records show approximately 212 formerly employed Class Members who
16 separated their employment with Defendant since November 3, 2020 (three years prior to filing of
17 the Complaint) and are therefore eligible for waiting time penalties. Sung Decl., ¶ 33. Thus,
18 Plaintiff estimated the maximum waiting time penalty exposure to be approximately \$1,031,846.40
19 ($\$19.50 * 8.32 \text{ hours per day} * 30 \text{ days}$). *Ibid.*

20 Defendant presented several defenses to this claim, most notably its assertion that because
21 they possessed good-faith defenses to the underlying claims for unlawful rounding, regular rate
22 miscalculation, and meal and rest period violations, and any failure to pay wages was not “willful”
23 as a matter of law. Sung Decl., ¶ 34. Defendant further asserts that Plaintiff’s waiting time penalty
24 exposure was grossly inflated as not every former employee experienced the alleged Labor Code
25 violations. *Ibid.* Moreover, because the waiting time claim is derivative of Plaintiff’s underlying
26 wage claims, Plaintiff would need to overcome Defendant’s defenses, both as to class certification
27 and on the merits, as to the underlying claims. *Ibid.* To account for Defendant’s defenses, Plaintiff
28 discounted the maximum exposure by 50% for the risk of non-certification and an additional 80%

1 for the risk of losing on the merits and/or not receiving the maximum penalties sought to arrive at
2 an estimated exposure of approximately \$103,184.64. *Ibid.*

3 Wage Statement Penalties: \$18,549.10

4 Plaintiff alleges that Defendant is liable for wage statement penalties as a result of the
5 unpaid wages and unpaid meal and rest period premiums. Sung Decl., ¶ 35. Those penalties are
6 calculated as \$50 for each “initial” violation and \$100 for each “subsequent” violation, with a
7 maximum of \$4,000 per employee. *See* Labor Code § 226(e). Defendant’s data reflected there were
8 approximately 6,536 wage statements issued to Class Members since November 3, 2022 (one year
9 prior to the filing of the Complaint) and that approximately 56.76% of the pay periods in the
10 sampling had a potential rounding, regular rate, meal period, and rest period violation. *Ibid.*
11 Plaintiff, therefore, calculated maximum exposure for wage statement penalties at \$185,491.68
12 (6,536 wage statements x \$50 per wage statement x 56.76%). *Ibid.*; *see also* Labor Code § 226(e).

13 As discussed above, Defendant presented several defenses to this claim, most notably its
14 assertion that because they possessed good-faith defenses to the underlying claims for unlawful
15 rounding, regular rate miscalculation, and meal and rest period violations, and any failure to pay
16 wages was not “willful” as a matter of law. Sung Decl., ¶ 36. Moreover, because the wage statement
17 claim is derivative of Plaintiff’s underlying wage claims, Plaintiff would need to overcome
18 Defendant’s defenses, both as to class certification and on the merits, as to his underlying claims.
19 *Ibid.* To account for Defendant’s defenses, Plaintiff discounted the maximum exposure by 50% for
20 the risk of non-certification and an additional 80% for the risk of losing on the merits and/or not
21 receiving the maximum penalties sought to arrive at an estimated exposure of approximately
22 \$18,549.10. *Ibid.*

23 PAGA Penalties: \$130,720

24 Plaintiff estimated a maximum total PAGA exposure of approximately \$653,600 (6,536 pay
25 periods during the PAGA Period x \$100 “initial” penalty). Sung Decl., ¶ 37; *Amaral v. Cintas Corp.*
26 *No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate applies until employer is
27 notified that it is violating a Labor Code provision). However, these penalties derive from the
28 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., ¶ 37; *see also Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the maximum figure by 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 \$130,720. Sung Decl., ¶ 37.

Conclusion

Using these estimated figures for each of the claims described above, Plaintiff predicted that the potential realistic recovery for the Settlement Class would be approximately of \$521,829.03. Sung Decl., ¶ 38. The proposed Settlement of \$340,000 represents approximately 65.16% of the reasonably forecasted recovery for the Settlement Class. *Ibid.* Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Settlement Class, which is consistent with what Plaintiff’s counsel believes could have been recovered had the case proceeded through trial.

e. 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 *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., ¶¶ 2-8; Declaration of Tiffany L. Luu (“Luu Decl.”), ¶¶ 2-6; Class Counsel conducted an in-depth review of Defendant’s 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

1 strongly supports preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at
2 130.

3 **2. The Preliminary Approval Standard Is Met**

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

9 **a. The Settlement Is Within the Range of Possible Approval**

10 The proposed Settlement reflects approximately 65.16% of the estimated recovery the
11 Settlement Class could reasonably expect in light of the significant litigation risks and will provide
12 tangible, substantial monetary compensation for hotly disputed claims. Indeed, the percentage of the
13 liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See*,
14 *e.g.*, *Glass v. UBS Finan. Servs.* (N.D. Cal. 2007) Case No. C-06-4068 MMC, 2007 WL 221862, *4
15 (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir.
16 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of potential recovery);
17 *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“it is well-
18 settled law that a proposed settlement may be acceptable even though it amounts to only a fraction
19 of the potential recovery that might be available to the Class Members at trial”). Further, the
20 average Individual Settlement Award of approximately \$401.65 exceeds average payments
21 achieved in other wage and hour class action settlements.⁴ Thus, Plaintiff submits that the proposed
22

23 ⁴ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,
24 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case No.
25 BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90);
26 *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619 (Sacramento County Super. Ct.) (average net
27 recovery of approximately \$80); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D.
28 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

1 settlement is within the range of possible approval, such that notice should be provided to the Class
2 Members so that they can consider the Settlement. The Court will have the opportunity to again
3 assess the reasonableness of the Settlement after the Class Members have had the opportunity to
4 opt-out or object.

5 **b. The Settlement Resulted from Serious, Informed Negotiations**

6 The Settlement resulted from an exchange of substantial information, arm's-length
7 negotiations by counsel, a full-day mediation before an experienced wage and hour mediator, and
8 additional months of negotiating the long-form settlement agreement. Thus, the Settlement is
9 entitled to an initial presumption of fairness. *See Kullar, supra*, 168 Cal.App.4th at 130. As
10 discussed above, Plaintiff carefully vetted the claims at issue, reviewed extensive payroll data, and
11 conducted a detailed damages analysis to arrive at his estimated class-wide damages figures. *See*
12 *Sung Decl.*, ¶¶ 27-38. Thus, this factor supports preliminary approval.

13 **c. The Settlement Is Devoid of Obvious Deficiencies**

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

20 **B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

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

26 _____
27 substantial recovery where Defendants asserted compelling defenses to liability; Plaintiff also notes several
28 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).

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 proposed class is defined all persons employed by Defendant in California during the Class Period and classified as an exempt employee but who did not earn a monthly salary equivalent to no less than two times the State minimum wage for full-time employment. Therefore, Class Members can be identified from Defendant's personnel and employment records. Defendant represents that the Class consists of approximately 404 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).

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 classifying Class Members as exempt salaried employees by paying them less than the salary requirement to maintain the exemption as well as the lack of any policies or practices regarding payment of additionally minimum and overtime wages for work over eight hours in a workday and/or 40 hours in a workweek 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).

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1 **3. The Claims of the Named Plaintiff Are Typical**

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
4 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same
5 goods as the putative class in a consumer class action). Here, Plaintiff's claims are typical of those
6 held by the Class Members. First, Defendant employed Plaintiff as non-exempt employee during the
7 Class Period, and Plaintiff was subject to Defendant's wage and hour policies at issue in this case.
8 See Echeverria Decl., ¶¶ 2-3. Second, Plaintiff was injured by the same challenged
9 policies/practices that allegedly injured the Class as a whole. For example, Plaintiff asserts that he
10 was not paid all wages due as a result of Fireclay's rounding and incentive compensation policies
11 and practices, was not provided with compliant first and second meal periods or third rest periods
12 when he worked more than 10 hours in a shift, was not provided accurate wage statements, and was
13 not paid all wages due upon the separation of my employment. Echeverria Decl., ¶ 3. Because
14 Plaintiff has suffered the same injuries as the other members of the Class, the typicality requirement
15 is satisfied.

16 **4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
17 **Class**

18 The adequacy requirement examines conflicts of interest between named parties and the
19 class(es) they seek to represent. See *Capital People First v. State Dept. of Developmental Services*
20 (2007) 155 Cal.App.4th 676, 697. Plaintiff and Plaintiff's counsel will adequately represent the
21 Settlement Class, as there are no conflicts between Plaintiff and the proposed Class, and Plaintiff
22 possesses claims that are in line with those of the Class. See *McGhee v. Bank of America* (1976) 60
23 Cal.App.3d 442, 450-51 (adequacy satisfied where there was no indication that Class Counsel were
24 not qualified and the named plaintiff had no interests antagonistic to those of the proposed class).
25 Class Counsel also have extensive experience in wage and hour class action litigation. See Sung
26 Decl., ¶¶ 2-7; Luu Decl., ¶¶ 2-6.

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1 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE CLASS NOTICE**

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

17 The content of the proposed Class Notice satisfies California Rule of Court 3.766(d) because
18 it advises Class Members of the nature of the claims, basic contentions and denials of the parties,
19 and the key terms of the Settlement, the 60-day deadline to opt-out or object to the Settlement and
20 the procedures by which to do so, explains the recovery formula and expected recovery amount for
21 each Settlement Class member, and advises them that they will be bound by the terms of the
22 Settlement if they do not opt-out. *See* Settlement, Exh. A – Class Notice. The proposed Class Notice
23 will also notify Class Members of the final approval hearing date and provides the Class contact
24 information for Class Counsel and advises Class Members that they may enter an appearance
25 through counsel if they wish to. *Ibid.* This manner of giving notice satisfies California Rule of Court
26 3.766(e) as the most reliable and cost-effective method of reaching Class Members.

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1 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

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

5 **V. CONCLUSION**

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

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10 DATED: August 28, 2024

Respectfully submitted,

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JUSTICE FOR WORKERS, P.C.

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By: 

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William C. Sung

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Tiffany L. Luu

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Attorneys for Plaintiff ERIC ECHEVERRIA

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