

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

William C. Sung SB# 280792

2 E-Mail: william@justiceforworkers.com

Tiffany L. Luu SB# 335127

3 E-Mail: tluu@justiceforworkers.com

3600 Wilshire Boulevard, Suite 1815

4 Los Angeles, CA 90010

Tel: 323-922-2000

5 Fax: 323-922-2000

6 Attorneys for Plaintiff NORMA BORQUEZ

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

10 NORMA BORQUEZ, an individual and on
11 behalf of all others similarly situated;

12 Plaintiff,

13 vs.

14 SMART METALS RECYCLING LLC, a
15 Limited Liability Company; and DOES 1
through 50,

16 Defendants.

Case No.: CV2024-0050

[Assigned for All Purposes to:
Hon. Samuel T. McAdam, Dept. 14]

**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, Norma
Borquez, and Jodey Lawrence; [Proposed]
Order)

DATE: November 5, 2024

TIME: 9:00 a.m.

DEPT.: 14

Action Filed: January 3, 2024

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
4 November 5, 2024 at 9:00 a.m., in Department 14 of the Yolo County Superior Court, located at
5 1000 Main Street, Woodland, California 95695, Plaintiff NORMA BORQUEZ (“Plaintiff”),
6 individually and on behalf of a class of similarly situated individuals, will and hereby does move
7 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 Smart Metals Recycling, LLC as non-exempt employees
12 in California from January 3, 2020 through December 31, 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 Phoenix Class Settlement Administration Solutions as the third-
20 party Administrator for 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 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 Norma
25 Borquez, and Jodey Lawrence of Phoenix Class Settlement Administration Solutions, and the
26 exhibits attached thereto; the pleadings, and other papers filed in this Action; and on any further oral
27 or documentary evidence or argument presented at the time of the hearing.

28 ///

1 DATED: October 7, 2024

Respectfully submitted,

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

3
4 By: 

5 William C. Sung

6 Tiffany L. Luu

7 Attorneys for Plaintiff NORMA BORQUEZ

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE LITIGATION	2
A. THE PARTIES AND BRIEF PROCEDURAL HISTORY	2
B. PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES.....	2
1. Unpaid Wages Due to Unlawful AWS Policy.....	2
2. Regular Rate Miscalculation	3
3. Meal and Rest Period Claims	3
4. Waiting Time and Wage Statement Penalties.....	4
5. PAGA Civil Penalties	4
C. DISCOVERY AND MEDIATION	5
III. THE PROPOSED SETTLEMENT.....	6
A. ESSENTIAL TERMS OF THE SETTLEMENT	6
1. The Settlement Provides for Reasonable Monetary Payments	6
2. Attorneys’ Fees and Costs, Service Award, and PAGA Payment	7
IV. LEGAL ARGUMENT.....	9
A. PRELIMINARY APPROVAL IS WARRANTED	9
1. Standard for Preliminary Approval	9
a. The Strength of Plaintiff’s Case	10
b. Risk, Expense, Complexity, and Duration of Further Litigation	10
c. Risk of Maintaining Class Action Status	10
d. Amount Offered in Settlement Given Realistic Value of Claims	11
e. The Experience and Views of Counsel	15
2. The Preliminary Approval Standard Is Met	16
a. The Settlement Is Within the Range of Possible Approval.....	16
b. The Settlement Resulted from Serious, Informed Negotiations.....	17
c. The Settlement Is Devoid of Obvious Deficiencies	17
B. THE COURT SHOULD CERTIFY THE CLASS	17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. The Proposed Class Is Ascertainable and Numerous	18
2. Common Issues of Law and Fact Predominate.....	18
3. The Claims of the Named Plaintiff Are Typical	18
4. Plaintiff and Class Counsel Will Fairly and Adequately Represent the Class.....	18
C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE	19
D. THE COURT SHOULD SET A FINAL APPROVAL HEARING	20
V. CONCLUSION	20

TABLE OF AUTHORITIES

Federal Cases

<i>Dunleavy v. Nadler</i> , 213 F.3d 454 (9 th Cir. 2000)	16
<i>Eisen v. Carlisle & Jacquelin</i> 417 U.S. 156 (1974)	19
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9 th Cir. 1998)	10, 11
<i>In re Pacific Enterprises Securities Litigation</i> 47 F.3d 373 (9 th Cir. 1995)	17
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9 th Cir. 2008)	11
<i>Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004)	18

State Cases

<i>AHMC Healthcare, Inc. v. Superior Court</i> (2018) 24 Cal.App.5th 1014.....	3
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4 th 1157 (2008)	16
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> 191 Cal.App.3d 1341 (1987)	20
<i>Benton v. Telecom Network Specialists, Inc.</i> , 220 Cal.App.4 th 701 (2013)	20
<i>Bowles v. Sup. Ct.</i> , 44 Cal.2d 574 (1955)	20
<i>Brinker Rest. Corp. v. Sup. Ct.</i> , 53 Cal.4 th 1004 (2012)	4
<i>Capital People First v. State Dept. of Developmental Services</i> 155 Cal.App.4 th 676 (2007)	21
<i>Camp v. Home Depot U.S.A., Inc.</i> 84 Cal.App.5th 638, 644 (2022)	3
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5 th 504 (2018)	6
<i>Chindarah v. Pick Up Stix, Inc.</i> , 171 Cal.App.4 th 796 (2009)	12
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4 th 1794 (1996)	11
<i>Ferra v. Loews Hollywood Hotel, LLC</i> (2019) 40 Cal.App.5th 1239	3
<i>In re Cellphone Fee Termination Cases</i> , 186 Cal.App.4 th 1380 (2010)	9
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4 th 116 (2008)	passim
<i>Laffitte v. Robert Half Int'l, Inc.</i> , 1 Cal.5 th 480 (2016)	8
<i>McGhee v. Bank of America</i> 60 Cal.App.3d 442 (1976)	21
<i>Price v. Starbucks Corp.</i> 192 Cal.App.4 th 1136 (2011)	6
<i>Reed v. United Teachers Los Angeles</i> , 208 Cal.App.4 th 322 (2012)	10
<i>Sav-On Drug Store, Inc. v. Superior Court (Rocher)</i> 34 Cal.4 th 319 (2004)	20

1	<i>Sevidal v. Target Corp.</i> 189 Cal.App.4 th 905 (2010)	19
2	<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> 203 Cal.App.4 th 1112 (2012)	6, 16
3	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4 th at 245 (2001)	11
4	<u>State Statutes and Rules</u>	
5	Cal. Civ. Proc. § 382	19
6	Cal. Code Regs., tit. 8, § 11040.....	6
7	Cal. Rule of Court 3.769	10
8	Cal. Lab. Code § 226	5
9	Cal. Lab. Code § 2699(e)(2)	6
10	<u>Unpublished Cases</u>	
11	<i>Bercea v. AE Retail West</i>	
12	Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9, 2012)	18
13	<i>Chu v. Wells Fargo Investments, LLC</i>	
14	Case No. C 05-4526 MHP, 2011 WL 672645 (N.D. Cal. 2011)	10
15	<i>Doty v. Costco Wholesale Corp.</i>	
16	Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007)	18
17	<i>Fleming v. Covidien Inc.</i>	
18	Case No. ED CV10-01487 RGK (Opx), 2011 WL 7563047 (C.D. Cal. 2011)	19
19	<i>Fleming v. Covidien Inc.</i>	
20	Case No. ED CV10-01487 RGK (Opx), 2011 WL 7563047 (C.D. Cal. 2011)	7
21	<i>Glass v. UBS Finan. Servs.</i>	
22	Case No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. 2007).....	18
23	<i>Gomez v. Amadeus Salon, Inc.</i>	
24	Case No. BC392297 (Los Angeles County Super. Ct. July 23, 2010)	18
25	<i>Green v. Lawrence Service Co.</i>	
26	2013 WL 3907506 (C.D. Cal. 2013).....	16
27	<i>Lazarin v. Pro Unlimited, Inc.</i>	
28	Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013)	10
	<i>Lim v. Victoria's Secret Stores, Inc.</i>	
	Case No. 04CC00213 (Orange County Super. Ct. Jan. 20, 2006)	18
	<i>Palencia v. 99 Cents Only Stores</i>	
	Case No. 34-2010-00079619 (Sacramento County Super. Ct.)	18
	<i>Ressler v. Federated Department Stores, Inc.</i>	
	Case No. BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009)	18

1	<i>Schiller v. David's Bridal, Inc.</i>	
2	Case No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 (E.D. Cal. June 11, 2012).....	18
3	<i>Sorenson v. PetSmart, Inc.</i>	
4	Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. Dec. 17, 2008)	18
5	<i>Williams v. Centerplate, Inc.</i>	
6	Case Nos. 11-CV-2159-H-KSC, 2013 WL 4525428 (S.D. Cal. Aug. 26, 2013).....	18
7	<u>Other Sources</u>	
8	Manual for Complex Litigation (3 rd Ed. 1995)	17
9	4 Newberg on Class Actions (4 th Ed. 2013)	10, 17
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff NORMA BORQUEZ (“Plaintiff”) brought this class and representative action for
4 various wage and hour violations on behalf of current and former employees of Defendant Smart
5 Metals Recycling LLC (“Defendant”) in California from January 3, 2020 to December 31, 2024
6 (the “Class Period”). The primary issues in this case pertain to Defendant’s allegedly unlawful
7 alternative workweek schedule (“AWS”) policy and purported meal period violations. Plaintiff
8 contends Defendant is also liable for inaccurate wage statement penalties, waiting time penalties,
9 and civil penalties under the Private Attorneys’ General Act (“PAGA”).

10 Plaintiff now respectfully requests that this Court preliminarily approve this non-
11 reversionary, common-fund class action settlement,¹ in which Defendant has agreed to pay
12 \$400,000.00 to the following Class:

13 All persons employed by Smart Metals Recycling, LLC as non-exempt employees
14 in California from January 3, 2020 through December 31, 2024 (the “Class
Period”),

15 If the Settlement is approved, Defendant will pay a non-reversionary Gross Settlement
16 Amount (“GSA”) of \$400,000.00 to approximately 172 Class Members. After deducting
17 administration costs, Plaintiff’s requested Class Representative Service Award, the amount set aside
18 as PAGA civil penalties, and requested attorneys’ fees and costs, the Net Settlement Amount
19 (“NSA”) of approximately \$191,216.67 will be distributed to all Class Members who do not opt out
20 of the Settlement based on the proportionate number of workweeks worked by each Class Member
21 during the Class Period. Class Members who are eligible for PAGA civil penalties (i.e., a one-year
22 statute of limitations) will receive additional consideration for their release of PAGA claims.

23 Significantly, Class Members do not need to file a claim to reap the financial benefits of the
24 Settlement, as all Class Members will automatically receive a payment unless they affirmatively
25 opt-out. There are approximately 172 Class Members, and **the average payment to participating**
26

27
28 ¹ The Joint Stipulation of Class Action and PAGA Settlement and Release (the “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.

1 **Class Members is projected to be approximately \$1,111.72.** This is an excellent result for the
2 Class, who will release only those claims alleged in the Action. The proposed Settlement is within
3 the range of possible approval in light of the significant legal and factual obstacles that Plaintiff
4 faced, the risks and costs of further litigation, and the tangible monetary benefits to be received by
5 Plaintiff and the Class. Plaintiff respectfully requests that this Court grant preliminary approval.

6 **II. SUMMARY OF THE LITIGATION**

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

8 Defendant owns and operates an electronics recycling facility that recycled computer parts
9 and harvested hard drives, RAMs, memory cards, etc. for resale, and is based in Woodland,
10 California. Declaration of William C. Sung in Support of Plaintiff's Motion for Preliminary
11 Approval of Class Settlement ("Sung Decl."), ¶ 9. Defendant employed Plaintiff as an hourly-paid,
12 non-exempt employee from approximately February 2022 to October 24, 2023 as an operator who
13 wiped hard drives and harvested computer parts. Declaration of Norma Borquez in Support of
14 Plaintiff's Motion for Preliminary Approval of Class Settlement ("Borquez Decl."), ¶ 2.

15 On January 3, 2024, Plaintiff commenced this Action by filing a Class Action Complaint,
16 alleging the following six causes of action against Defendant: (1) failure to pay overtime wages; (2)
17 failure to provide meal periods; (3) failure to provide rest breaks; (4) failure to provide accurate
18 wage statements; (5) failure to provide timely pay at separation; and (6) unfair competition in
19 violation of Business and Professions Code sections 17200 *et seq.* Sung Decl., ¶ 10. Previously, on
20 January 1, 2024, Plaintiff sent a notice letter under the California Private Attorneys General Act
21 ("PAGA") to the Labor and Workforce Development Agency ("LWDA"). Sung Decl., ¶ 11,
22 **Exhibit 2** (LWDA Letter). Subsequently, on March 13, 2024, Plaintiff filed a First Amended Class
23 and Representative Action Complaint ("FAC"), adding a cause of action for civil penalties under
24 the PAGA. Sung Decl., ¶ 12, **Exhibit 3** (FAC).

25 **B. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

26 **1. Unpaid Wages Due to Unlawful AWS Policy**

27 Plaintiff contends that Defendant failed to pay Class Members overtime wages due to its
28 allegedly unlawful AWS schedule. Sung Decl., ¶ 13. In September 2022, Defendant's workforce

1 voted on and passed 9/80 workweek AWS policy in which employees would, over a two-week
2 period, work eight 9-hour days and one 8-hour day with one day off, totaling 80 hours and without
3 payment of overtime for the 8th to 9th hour of work. *Ibid*; see Cal. Code Regs., tit. 8, § 11040 (Wage
4 Order 4 AWS regulations). Plaintiff alleges that Defendant violated its own AWS policy by having
5 Class Members work eight 9-hour days and two 4-hour days over two weeks without payment of
6 overtime for the 8th to 9th hour of work. Sung Decl., ¶ 13. Plaintiff contends that the AWS schedule
7 is void because Defendant failed to follow its AWS policy and the Class is entitled to overtime pay
8 for the 8th to 9th hour of work. *Ibid*. Defendant argues that it has a lawfully voted on AWS policy
9 and its implemented AWS schedule substantially complied with the AWS policy such that it is not
10 required to pay overtime for the 8th to 9th hour of work. *Ibid*. Defendant further contends that
11 damages are limited because Defendant did not implement any AWS schedule until July 2023. *Ibid*.

12 **2. Regular Rate Miscalculation**

13 Plaintiff alleges that Defendant failed to pay all overtime wages owed to Plaintiff and Class
14 Members by failing to include the value of all non-discretionary remuneration, including bonuses,
15 into the “regular rate” of pay. Sung Decl., ¶ 14. Defendant contends that it properly paid overtime
16 and the bonuses were non-discretionary in nature and need not be factored into the regular rate of
17 pay. *Ibid*. Defendant further argues that Class Members received different types of bonuses
18 throughout the Class Period, creating substantive differences among the Class Members with
19 respect to the incentives received, making class certification unlikely. *Ibid*.

20 **3. Meal Period and Rest Break Claims**

21 Plaintiff alleges that, due to Defendant’s scheduling policies and operational needs, Class
22 Members’ first and second meal periods were frequently late (commencing after the fifth hour of
23 work) and/or short (i.e., less than a full 30 minutes). Sung Decl. ¶ 15. As to rest breaks, Plaintiff
24 alleges that Class Members were sometimes not permitted to take compliant rest breaks due to
25 Defendant’s scheduling policies and operational needs. *Ibid*. Defendant counters that it has
26 maintained compliant written meal and rest break policies and practices throughout the Class
27 Period, and that it has always provided compliant meal and rest periods in line with those policies
28 and practices. *Ibid*; see *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1034 (rejecting

1 “ensure” standard). Defendant further argues that any non-compliant meal periods or rest periods
2 resulted from lawful employee waiver or voluntary choice, rather than any systemic policy and/or
3 practice of Defendant. *Ibid.* Finally, Defendant maintains Plaintiff’s meal and rest period claims are
4 not suited for class certification since individual inquiries would be needed to assess which
5 employees, if any, took non-compliant or missed meal or rest periods, how many meal or rest
6 periods were non-compliant or missed, the reasons why a particular employee did not take a meal or
7 rest period on a particular shift, and for second meal periods, whether they waived the meal period.

8 **4. Claims for Waiting Time and Wage Statement Penalties**

9 In light of the unpaid wages and meal and rest period premium wages discussed above,
10 Plaintiff claims that Defendant failed to comply with its final pay obligations set forth in Labor
11 Code §§ 201 to 203 to former employees and to issue accurate wage statements to Class Members
12 as set forth in Labor Code § 226(a). Sung Dec., ¶ 16. Thus, the claims for waiting time and wage
13 statement penalties are derivative of the underlying unpaid wages and meal/rest period claims. *Ibid.*

14 Defendant denies liability for waiting time and wage statements, and argues that it possesses
15 strong, good faith defenses to Plaintiff’s underlying claims, thus precluding recovery of waiting
16 time penalties that are only available for “willful” failure to pay wages. Sung Dec., ¶ 17. Defendant
17 further avers that any alleged wage statement violations were not “knowing and intentional,” and
18 that Plaintiff cannot show the Class “suffer[ed] injury” due to these alleged violations as required by
19 Labor Code § 226(e) for the imposition of penalties. *Ibid.* Defendant relies on *Naranjo v. Spectrum*
20 *Security Services, Inc.* (2024) 15 Cal.5th 1056, 1065, for the proposition that an employer’s good-
21 faith defenses precludes a “willfulness” finding under Labor Code § 203 and a “knowing and
22 intentional” finding under Labor Code § 226(e) for the imposition of statutory penalties. Defendant
23 also claims that Plaintiff’s alleged exposure for waiting time and wage statement penalties was
24 grossly inflated because not every employee experienced an alleged Labor Code violations. *Ibid.*

25 **5. Claim for PAGA Civil Penalties**

26 As a result of the foregoing, alleged Labor Code violations, Plaintiff contends that
27 Defendant is liable for civil penalties under the PAGA. Sung Decl., ¶ 18. Since Plaintiff’s PAGA
28 claim is derivative of Plaintiff’s underlying wage claims, Defendant asserts the PAGA claim would

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

11 **C. DISCOVERY AND MEDIATION**

12 In connection with mediation, the Parties engaged in informal discovery. Sung Decl., ¶ 19.
13 Defendant produced (1) a 20% random, anonymized sampling of employee time and payroll records
14 in Excel format; (2) Defendant’s relevant employment policies, including but not limited to
15 Defendant’s employee handbooks in effect during the Class Period; (3) Plaintiff’s personnel file,
16 time records, and wage statements; and (4) class and PAGA metrics, including but not limited to
17 the number of workweeks worked by Class Members during the Class Period and pay periods
18 worked by Aggrieved Employees during the PAGA Period. *Ibid*.

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

24 On September 12, 2024, the Parties participated in a full-day mediation with Russ Wunderli,
25 Esq., a well-respected wage and hour class action mediator. Sung Decl., ¶ 21. During mediation, the
26 Parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff’s
27 claims, and the legal basis for the claims and defenses. *Ibid*. The Parties reached a tentative class
28 and PAGA settlement at the mediation. *Ibid*. During the months that followed, the Parties finalized

the terms of the Settlement in a Confidential Memorandum of Understanding, followed by the Parties' execution of the Joint Stipulation of Class and PAGA Settlement and Release ("Joint Stipulation of Settlement" or "Agreement") now before the Court. *Ibid*; see Sung Decl., ¶ 21, **Exhibit 1** (Agreement).

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

If the Court preliminarily approves the Settlement, Defendant will pay a Gross Settlement Amount of \$400,000. 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 Class Payment. *Id.*, at §§ 3-4. Each Class Member will automatically receive an Individual Class Payment unless they affirmatively opt out of the Settlement. *Ibid*. The monetary terms of the Settlement are summarized as follows:

a.	Gross Settlement Amount:	\$400,000.00
b.	Minus Court-approved attorneys' fees:	\$133,333.33
c.	Minus Court-approved verified costs (up to):	\$20,000.00
d.	Minus Court-approved Service Payment:	\$7,500.00
e.	Minus amount set aside as PAGA penalties:	\$40,000.00
f.	Minus estimated settlement administration costs:	\$7,950.00
g.	Net Settlement Amount ("NSA"):	\$191,216.67
h.	Plus 25% "PAGA Penalties" to the Class:	\$10,000.00
	Total Amount Paid to Class Members:	\$201,216.67

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 the Net Settlement Amount of at least \$191,216.67 to all Class Members who do not timely opt-out. Agreement, §§ 3, 7.5. The Net Settlement Amount shall be distributed to participating Class Members as Individual Class Payments, calculated by (a) dividing the Net Settlement Amount 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. *Id.*, § 3.2.4. Additionally, \$10,000.00 of the Gross Settlement Amount has been designated as Individual PAGA Payments and shall be

1 distributed to Aggrieved Employees (including those submitting a timely Request for Exclusion
2 from the class action settlement) who were employed during the PAGA Period proportionally based
3 on the number of pay periods worked during the PAGA Period. *Id.*, §§ 3.2.5, 7.5.4. In addition to
4 the Gross Settlement Amount, Defendant must pay the employer's share of payroll taxes on
5 Individual Class Payments allocated to settlement of wage claims. *Id.*, § 4.3.

6 According to Defendant, there are approximately 172 Class Members. Sung Decl., ¶ 23.
7 Therefore, the average Individual Class Payment from the NSA is projected to be approximately
8 \$1,111.72. *Ibid.* There are also approximately 146 Aggrieved Employees during the PAGA Period
9 who will each receive an average of approximately \$68.49 as Individual PAGA Payments. *Ibid.*
10 Class Members will have 45 calendar days from the mailing of the Class Notice to opt-out or object
11 to the Settlement, thereby providing ample time to review the Class Notice without unduly delaying
12 the Settlement. *See* Agreement, §§ 7.4-7.7.

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

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

21 Plaintiff will apply for Class Representative Service Payment at the time of seeking final
22 approval of the Settlement in the amount of \$7,500.00 for Plaintiff's service to the Class. *See*
23 Agreement, § 3.2.1. "[I]ncentive awards are fairly typical in class action cases...and are intended to
24 compensate class representatives for work done on behalf of the class [and] to make up for financial
25 or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*
26 (2010) 186 Cal.App.4th 1380, 1393-94. As will be fully briefed at the time of final approval,
27 Plaintiff's requested Service Payment is intended to recognize the time and effort Plaintiff expended
28 on behalf of the Class, including providing substantial factual information and documents to Class

1 Counsel, discussing the claims and theories at issue in the litigation, actively participating in the
2 prosecution of Plaintiff's claims, as well as the risks Plaintiff undertook by agreeing to serve as the
3 named plaintiff in this case. *See* Borquez Decl., ¶¶ 4-6.

4 Class Counsel will also apply for an attorneys' fees award of one-third of the Gross
5 Settlement Amount, which is currently estimated to be \$133,333.33, and up to \$20,000.00 in
6 verified costs reimbursement. *See* Agreement, § 3.2.2; Sung Decl., ¶ 24. The requested fee is fair
7 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely
8 contingent fee basis. Sung Decl., ¶ 24. Class Counsel has incurred substantial attorneys' fees
9 conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research,
10 conducting extensive informal discovery, analyzing Class Members' time and payroll records,
11 creating a comprehensive damages model, preparing for and attending mediation, negotiating and
12 preparing the Joint Stipulation of Settlement, preparing this Motion, and otherwise litigating the
13 case. *Ibid.* Class Counsel expects to expend additional attorney time in attending the hearing on this
14 Motion, overseeing the Class Notice process and fielding questions from Class Members, preparing
15 the Final Approval papers, and attending the Final Approval hearing. *Ibid.*

16 California courts recognize that an appropriate method for awarding attorneys' fees in class
17 actions is to award a percentage of the "common fund" created as a result of a settlement. *See, e.g.,*
18 *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund
19 method survives in California class action cases"). Class Counsel's request for fees of one-third of
20 the GSA is well within the range of reasonableness and indeed is considered the typical rate for
21 common fund settlements. Historically, courts have awarded percentage fees in the range of 20% to
22 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed.
23 2013). Class Counsel submit that their request for attorneys' fees is reasonable when viewed as an
24 overall percentage of the Settlement and in light of the substantial risks and significant work
25 undertaken, the results obtained, and the efficiency with which the litigation has been conducted.
26 Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees
27 and verified costs upon seeking Final Approval.

28 ///

1 Additionally, the parties have agreed to designate \$40,000.00 of the Gross Settlement
2 Amount as PAGA civil penalties, of which \$30,000 (i.e., 75%) will be paid to the LWDA, with the
3 remaining \$10,000 (i.e., 25%) for distribution to the Aggrieved Employees, as the PAGA requires
4 such penalties to be allocated per Labor Code § 2699(i). *See* Agreement, § 3.2.5. Plaintiff submits
5 this allocation to the LWDA for civil PAGA penalties is appropriate. *See, e.g., Chu v. Wells Fargo*
6 *Investments, LLC*, Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving
7 PAGA payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement); *Lazarin v. Pro*
8 *Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA
9 payment of \$7,500 to LWDA out of \$1.25 million common-fund settlement).

10 **IV. LEGAL ARGUMENT**

11 **A. PRELIMINARY APPROVAL IS WARRANTED**

12 California Rule of Court 3.769 conditions settlement of a class action on court approval,
13 which is generally evaluated under the federal standards applicable under Rule 23 of the Federal
14 Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322,
15 337 (Rule 3.769 requires trial court to determine “that the settlement is fair, reasonable and
16 adequate to all concerned”); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 (Rule
17 23(e) requires the trial court to determine “whether a proposed settlement is fundamentally fair,
18 adequate, and reasonable”). Settlement is the preferred means of dispute resolution, particularly in
19 complex class action litigation. *See In re Syncor ERISA Litig* (9th Cir. 2008) 516 F.3d 1095, 1101.
20 The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken
21 as a whole is fair. *See e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of
22 fairness where, as here, the Settlement was negotiated at arm’s-length by class counsel and with the
23 assistance of an experienced wage and hour class action mediator. *See e.g., Kullar v. Foot Locker*
24 *Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

25 **1. Standard for Preliminary Approval**

26 To make a fairness determination, the Court should consider several factors, including: “the
27 strength of Plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the
28 risk of maintaining class action status through trial, the amount offered in settlement, the extent of

1 discovery completed and the stage of the proceedings, [and] the experience and views of counsel.”
2 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive,
3 and the court is free to engage in a balancing and weighing of the factors depending on the
4 circumstances of each case.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th at 245. Here,
5 the proposed Settlement is fair, adequate, and reasonable in light of the balance of factors.

6 **a. The Strength of Plaintiff’s Case**

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

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

13 Although the Parties engaged in significant informal discovery prior to mediation, the
14 Parties still had substantial formal discovery to complete had the matter not been settled. Sung
15 Decl., ¶ 25. This would have required the expenditure of substantial time and resources by both
16 Parties that would have very likely spanned several years. *Ibid.* Even if Plaintiff were to certify the
17 class, the Parties would have incurred considerable attorneys’ fees and costs on a decertification
18 motion, trial, and possible appeal. *Ibid.* This Settlement avoids those risks and costs. *Ibid.*

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

20 Plaintiff has not yet filed a motion for class certification, and as such, the extent to which
21 Plaintiff’s proposed classes were certifiable is uncertain. Absent settlement, there was a risk that
22 there would not be a certified class at the time of trial, or if there were, it would consist of a
23 substantially smaller group of employees than the proposed Class,² and the expected recovery could

24
25
26 ² A smaller class could occur due to a narrowing of the class definition by Court order on a contested motion
27 for class certification or through settlement agreements entered into by Defendant with individual class
28 members by way of *Pick Up Stix* type settlement agreements. See *Chindarah v. Pick Up Stix, Inc.*, 171
Cal.App.4th 796 (2009) (holding that employer may enter into pre-certification settlement agreements with
individual putative class members involving release of 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 be 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.

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

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

8 Unpaid Overtime Wages Due to AWS Policy: \$29,478.50

9 As discussed above, Plaintiff contends that Defendant failed to pay Class Members all
10 overtime wages due to its allegedly unlawful AWS schedule. Based on Plaintiff's analysis of the
11 sampling time and payroll records, Plaintiff contends that Class Members on average experienced
12 24.55 hours of unpaid overtime hours at premiums rates (1/2 times regular rate). Sung Decl., ¶ 27.
13 Extrapolated to 172 Class Members and at an average hourly rate of \$20.68, Plaintiff alleges that
14 Defendant's maximum exposure for this claim is estimated to be \$43,671.85. *Ibid.* However,
15 Defendant argues that it has a lawfully voted on AWS policy and its implemented AWS schedule
16 substantially complied with the AWS policy such that it is not required to pay overtime for the 8th to
17 9th hour of work and that damages are limited because Defendant did not implement any AWS
18 schedule until July 2023. *Ibid.* In light of these defenses and arguments, Plaintiff discounted
19 Defendant's alleged maximum exposure by 10% to account for the risk of non-certification and an
20 additional 25% to account for Defendant's defenses on the merits or failing to recover the full
21 amount sought to arrive at an estimated potential recovery for these claims of approximately
22 \$29,478.50. *Ibid.*

23 Regular Rate Miscalculations: \$8,740.91

24 Plaintiff alleges that Defendant miscalculated employees' regular rate of pay by failing to
25 include non-discretionary bonuses into the "regular rate" when calculating overtime pay. Sung
26 Decl., ¶ 28. Based on the data provided by Defendant, Plaintiff calculated Defendant's maximum
27 potential liability to be approximately \$12,949.50 in unpaid wages due to the regular rate violations
28 during the Class Period. *Ibid.* However, Defendant contends that it properly paid overtime and the

1 bonuses were non-discretionary in nature and need not be factored into the regular rate of pay. *Ibid.*
2 Defendant further argues that Class Members received different types of bonuses throughout the
3 Class Period, creating substantive differences among the Class Members with respect to the
4 incentives received, making class certification unlikely. *Ibid.* In light of these defenses and
5 arguments, Plaintiff discounted Defendant’s maximum exposure by 10% for the risk of non-
6 certification, and an additional 25% to account for Defendant’s defenses on the merits or failing to
7 recover the full amount sought to arrive at an estimated potential recovery for these claims of
8 approximately \$8,740.91. *Ibid.*

9 Meal Period Violations: \$86,883.14

10 Plaintiff alleges that Defendant failed to provide compliant meal periods to Class Members.
11 Sung Decl., ¶ 29. Based on Plaintiff’s analysis of the sampling time and payroll records, Plaintiff
12 contends that there were an average of 1.54 meal period violations per pay period. *Ibid.*
13 Extrapolating across the entire Class Period, Plaintiff further alleges that the maximum exposure for
14 this claim is \$231,688.38. *Ibid.*

15 However, as noted above, Defendant contends that it maintained compliant meal period
16 policies and practices throughout the Class Period, and that it provided compliant meal periods in
17 line with such policies and practices. Sung Decl., ¶ 30. Defendant also asserts that, under *Brinker*, it
18 is only required to “provide” the opportunity to take meal periods—not “ensure” meal periods are
19 taken—and that, as described above, it has always done so, and any non-complaint first meal
20 periods in the timekeeping records were the result of lawful employee waiver or voluntary choice.
21 *Ibid.* Defendant also maintains that its meal period waivers with Class Members were enforceable.
22 *Ibid.* Finally, Defendant argues that meal period claim is not suited for class certification, since
23 individual inquiries would be needed to assess which employees took non-compliant meal periods
24 or missed meal periods, how many meal periods were non-compliant or missed, and the reasons
25 why a particular employee did not take a compliant meal period on a particular shift. *Ibid.* In light
26 of these defenses and arguments, Plaintiff discounted Defendant’s exposure by 25% for the risk of
27 non-certification, and an additional 50% to account for Defendant’s defenses on the merits or failing
28 to recover the full amount sought, to arrive at an estimated total of approximately \$86,883.14. *Ibid.*

1 Rest Period Violations: \$37,611.75

2 Plaintiff alleges that Defendant failed to provide rest periods to Class Members. Sung Decl.,
3 ¶ 31. Assuming each Class Member experienced one rest break violation per week, extrapolated to
4 7,275 workweeks during the Class Period, potential damages for rest period premiums are estimated
5 to be \$150,447. *Ibid.* However, as discussed above, Defendant argues that it always maintained and
6 enforced lawful rest period policies and practices during the Class Period. Sung Decl., ¶ 32.
7 Defendant also maintains that any failure to take rest periods was the result of employee waiver or
8 voluntary choice, and that it is not required to police rest periods. *Ibid.* Defendant further avers that
9 Plaintiff's rest period claim is not amenable to class treatment as individualized inquiries would be
10 required to determine which employees failed to take rest breaks and the reasons why each
11 employee failed to take a rest break during a shift. *Ibid.* These considerations are particularly
12 present with respect to rest periods, Defendant argues, as rest periods are not recorded. *Ibid.* In view
13 of these defenses, Plaintiff discounted the maximum amount that the class could potentially recover
14 by 50% to account for the risk of non-certification, and Plaintiff discounted her claim by an
15 additional 50% to account for the risk of being unsuccessful on the merits or failure to recover the
16 full amount sought, to arrive at a projected exposure of \$37,611.75. *Ibid.*

17 Waiting Time Penalties: \$142,270.13

18 Defendant's records show approximately 91 formerly employed Class Members who
19 separated their employment with Defendant since January 3, 2021 (i.e., three years prior to filing of
20 Plaintiff's original Complaint), and are therefore eligible for waiting time penalties. Sung Decl., ¶
21 33. Thus, Plaintiff estimated the maximum waiting time penalty exposure to be approximately
22 \$451,651.20 (\$20.68 * 8 hours per day * 30 days). *Ibid.* Defendant presented several defenses to
23 this claim, most notably its assertion that because they possessed good-faith defenses to the
24 underlying claims for unlawful AWS, regular rate miscalculation, and meal and rest period
25 violations, and any failure to pay wages was not "willful" as a matter of law. Sung Decl., ¶ 34.
26 Defendant further asserts that Plaintiff's waiting time penalty exposure was grossly inflated as not
27 every former employee experienced the alleged Labor Code violations. *Ibid.* Moreover, because the
28 waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff would need to

1 overcome Defendant’s defenses, both as to class certification and on the merits, as to the underlying
2 claims. *Ibid.* To account for Defendant’s defenses, Plaintiff discounted the alleged maximum
3 exposure by 90% to account for the risk of non-certification and an additional 65% to account for
4 the risk of losing on the merits and/or not receiving the maximum penalties sought to arrive at an
5 estimated exposure of approximately \$142,270.13. *Ibid.*

6 Wage Statement Penalties: \$127,386

7 Plaintiff alleges that Defendant is liable for wage statement penalties as a result of the
8 unpaid wages and unpaid meal and rest period premiums. Sung Decl., ¶ 35. Those penalties are
9 calculated as \$50 for each “initial” violation and \$100 for each “subsequent” violation, with a
10 maximum of \$4,000 per employee. *See* Labor Code § 226(e). Defendant’s data reflected there were
11 approximately 4,099 wage statements issued to 146 Class Members since January 3, 2023 (one year
12 prior to the filing of the Complaint). *Ibid.* Plaintiff contends that, at \$50 for the first wage statement
13 and \$100 for each subsequent wage statement, the alleged maximum exposure for wage statement
14 penalties is \$404,400. *Ibid.*; *see also* Labor Code § 226(e). As discussed above, Defendant
15 presented several defenses to this claim, including its assertion that because they possessed good-
16 faith defenses to the underlying claims for unlawful AWS, regular rate miscalculation, and meal and
17 rest period violations, and any failure to pay wages was not “willful” as a matter of law. Sung Decl.,
18 ¶ 36. Moreover, because the wage statement claim is derivative of Plaintiff’s underlying wage
19 claims, Plaintiff would need to overcome Defendant’s defenses, both as to class certification and on
20 the merits, as to his underlying claims. *Ibid.* To account for Defendant’s defenses, Plaintiff
21 discounted the maximum exposure by 90% to account for the risk of non-certification and an
22 additional 65% to account for the risk of losing on the merits and/or not receiving the maximum
23 penalties sought to arrive at an estimated exposure of approximately \$127,386. *Ibid.*

24 PAGA Penalties: \$81,980

25 Plaintiff contends that Defendant has a maximum total PAGA exposure of approximately
26 \$409,900 (4,099 pay periods during the PAGA Period x \$100 “initial” penalty). Sung Decl., ¶ 37;
27 *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 (finding “initial” violation rate
28 applies until employer is notified that it is violating a Labor Code provision). However, these

1 penalties derive from the underlying wage and hour violations discussed above, which Defendant
2 disputes vigorously. Sung Decl., ¶ 37; *see e.g., Green v. Lawrence Service Co.* 2013 WL 3907506,
3 *5, n.5 (C.D. Cal. 2013) (explaining that a PAGA claim’s success was determined by the merits of
4 its underlying claims). Defendant also asserts that the Court would drastically reduce any award of
5 PAGA penalties as “confiscatory.” Sung Decl., ¶ 37; *see also Thurman v. Bayshore Transit Mgmt.,*
6 *Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v.*
7 *Covidien Inc.* (C.D. Cal. 2011) Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4
8 (reducing PAGA penalties from \$2.8 million to \$500,000). Therefore, Plaintiff discounted the
9 maximum figure by 80% to account for the risk of losing on the merits and/or not recovering a
10 PAGA penalty for each pay period and to account for the possibility of this Court reducing
11 penalties, to arrive at an estimated exposure of approximately \$81,980. Sung Decl., ¶ 37.

12 Conclusion

13 Using these estimated figures for each of the claims described above, Plaintiff estimated that
14 the potential, realistic recovery for the Class would be approximately of \$514,350.43. Sung Decl., ¶
15 38. The proposed Settlement of \$400,000 represents approximately 77.77% of the reasonably
16 forecasted recovery for the Class. *Ibid.* Accordingly, preliminary approval is appropriate since the
17 Settlement will provide significant monetary relief to the Class, which is consistent with what
18 Plaintiff’s counsel believes could have been recovered had the case proceeded through trial.

19 **e. The Experience and Views of Counsel**

20 “Parties represented by competent counsel are better positioned than courts to produce a
21 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises*
22 *Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Here, Plaintiff is represented by competent,
23 experienced counsel with extensive experience prosecuting and defending wage-and-hour class
24 actions and who have been appointed as class counsel. *See* Sung Decl., ¶¶ 2-8; Declaration of
25 Tiffany L. Luu (“Luu Decl.”), ¶¶ 2-6; Class Counsel conducted an in-depth review of Defendant’s
26 records and drew on their extensive experience in similar cases to assess the strengths and
27 weaknesses of Plaintiff’s case. The Settlement was reached with the assistance of an experienced
28

1 and respected wage-and-hour class action mediator. Sung Decl., ¶ 21. This factor strongly supports
2 preliminary approval of the Settlement. *See Kullar, supra*, 168 Cal.App.4th at 130.

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

4 At this stage, the Court may 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 As discussed, the proposed Settlement reflects approximately 77.77% of the estimated
11 recovery that Plaintiff believed the Class could reasonably expect in light of the significant
12 litigation risks and will provide tangible, substantial monetary compensation for hotly disputed
13 claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds
14 percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.* (N.D. Cal. 2007)
15 Case No. C-06-4068 MMC, 2007 WL 221862, *4 (approving settlement representing 25% to 35%
16 of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement
17 representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*
18 (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“[I]t is well-settled law that a proposed settlement may be
19 acceptable even though it amounts to only a fraction of the potential recovery that might be
20 available to the Class Members at trial[.]”). Further, the average Individual Class Payment of
21 approximately \$1,111.72 exceeds average payments achieved in other wage and hour class action
22 settlements.³ Thus, Plaintiff submits that the proposed settlement is within the range of possible
23

24 ³ *See e.g., Bercea v. AE Retail West*, Case No. 34-2012-00123947 (Sacramento County Super. Ct. May 9,
25 2012) (average net recovery of approximately \$105); *Ressler v. Federated Department Stores, Inc.*, Case No.
26 BC335018 (Los Angeles County Super. Ct. Jan. 2, 2009) (average net recovery of approximately \$90);
27 *Palencia v. 99 Cents Only Stores*, Case No. 34-2010-00079619 (Sacramento County Super. Ct.) (average net
28 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) (average recovery was approximately \$60); *Schiller v. David's Bridal, Inc.*, Case No. 1:10-

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

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

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

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

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

18 **B. THE COURT SHOULD CERTIFY THE CLASS**

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

25 _____
26 cv-00616-AWI-SKO, 2012 WL 2117001 at *17 (E.D. Cal. June 11, 2012) ("Class Members will receive an
27 average of approximately \$198.70...[T]his is a substantial recovery where Defendants asserted compelling
28 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).

1 **1. The Proposed Class Is Ascertainable and Numerous**

2 A class is “ascertainable” where the members “may be readily identified without
3 unreasonable expense or time by reference to official [or business] records.” *See Sevidal v. Target*
4 *Corp.* (2010) 189 Cal.App.4th 905, 916 (alterations in original). Here, the proposed class is defined
5 as all persons employed by Defendant as non-exempt employees in California during the Class
6 Period. Therefore, Class Members can be identified from Defendant’s personnel and employment
7 records. Defendant represents that the Class consists of approximately 172 current and former non-
8 exempt employees. Sung Decl., ¶ 23. It would therefore be impracticable to bring all Class
9 Members before the Court or for each Class Member to bring an individual lawsuit. Thus, the
10 proposed Class satisfies the numerosity requirement. *See, e.g., Bowles v. Sup. Ct.* (1955) 44 Cal.2d
11 574 (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

12 **2. Common Issues of Law and Fact Predominate**

13 The focus in a certification dispute is not on the merits but rather on what types of questions,
14 “common or individual,” are likely to arise in the Action. *See Sav-On Drug Store, Inc. v. Superior*
15 *Court (Rocher)* 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated on, among other issues,
16 Defendant’s uniform policies and practices with respect to AWS scheduling, regular rate of pay,
17 meal and rest periods, timing of payment of final wages, and wage statements. These types of
18 claims are commonly held to be proper for class certification. *See e.g., Benton v. Telecom Network*
19 *Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 (certifying meal and rest period claims); *Sav-On*
20 *Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 324 (certifying exemption
21 misclassification and unpaid overtime claim).

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

23 The typicality requirement is satisfied where class representatives have claims that are
24 typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191
25 Cal.App.3d 1341, 1347 (finding typicality satisfied where named Plaintiff purchased the same
26 goods as the putative class in a consumer class action). Here, Plaintiff’s claims are typical of those
27 held by the Class Members. First, Defendant employed Plaintiff as non-exempt employee during the
28 Class Period, and Plaintiff was subject to Defendant’s wage and hour policies and practices at issue

1 in this case. *See* Borquez Decl., ¶¶ 2-3. Second, Plaintiff was injured by the same challenged
2 policies and practices that allegedly injured the Class as a whole. For example, although Defendant
3 denies Plaintiff’s allegations, Plaintiff alleges that she was subjected to Defendant’s AWS schedule
4 in which she allegedly was not paid any overtime for the 8th to 9th hour of work, and she
5 purportedly did not receive all of my meal and rest breaks due to Defendant’s operational needs.
6 Borquez Decl., ¶ 3. As Plaintiff allegedly has suffered the same injuries as the other members of the
7 Class with respect to the asserted claims, the typicality requirement is satisfied.

8 **4. Plaintiff and Class Counsel Will Adequately Represent the Class**

9 The adequacy requirement examines conflicts of interest between named parties and the
10 class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services*
11 (2007) 155 Cal.App.4th 676, 697. Plaintiff and Plaintiff’s counsel will adequately represent the
12 Class, as there are no conflicts between Plaintiff and the proposed Class and Plaintiff possesses
13 claims aligned with those of the Class. *See McGhee v. Bank of America* (1976) 60 Cal.App.3d 442,
14 450-51 (adequacy satisfied where there was no indication that Class Counsel were not qualified and
15 the named plaintiff had no interests antagonistic to the proposed class). Class Counsel also have
16 extensive experience in wage and hour class action litigation. Sung Decl., ¶¶ 2-7; Luu Decl., ¶¶ 2-6.

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

18 This Court should order distribution to the Class of the proposed Class Notice by U.S. Mail,
19 postage prepaid using the last known mailing address information provided by Defendant. *See*
20 Agreement, §§ 4.2, 7.4, Ex. A – Class Notice. The Class Notice will be distributed in English and
21 Spanish. Sung Decl., ¶ 39. This manner of giving notice is the “best notice practicable” under the
22 circumstances because it provides “individual notice to all members who can be identified through
23 reasonable effort.” *See Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173. Here, the Parties
24 have agreed that the Settlement be administered by Phoenix Class Action Administration Solutions
25 (“Phoenix”), an experienced class action settlement administrator. *See* Declaration of Jodey
26 Lawrence (“Phoenix Decl.”) and attached exhibits. Class Members’ addresses will be ascertainable
27 through Defendant’s personnel and payroll records, which Defendant will provide to Phoenix within
28 21 days of preliminary approval of the Settlement. *See* Agreement, § 4.2. Within 14 days of receipt

1 of the Class Members' addresses, Phoenix will run the names of all Class Members through the
2 National Change of Address database to update addresses and mail the Class Notice to all Class
3 Members. *See* Agreement, § 7.4.2. To the extent that any notices are returned, Phoenix will perform
4 a "skip trace" to track Class Members' current mailing address. *See* Agreement, § 7.4.3.

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

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

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

18 **V. CONCLUSION**

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

22 DATED: October 7, 2024

Respectfully submitted,

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

24
25 By: 

26 William C. Sung

27 Tiffany L. Luu

28 Attorneys for Plaintiff NORMA BORQUEZ