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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

KYLE KELLUM, on behalf of himself and all others similarly situated, Plaintiff, vs. ACE PLUMBING & ROOTER INC., a California Corporation; and DOES 1 through 100, inclusive, Defendant.	Case No.: CGC-24-617510 **CLASS ACTION AND PAGA REPRESENTATIVE ACTION** [*Assigned for all purposes to the Hon. Ethan P. Schulman, Dept. 304*] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA ACTION SETTLEMENT** Date: August 18, 2026 Time: 11:00 a.m. Dept.: 304 [Hearing Date and Time Was Approved By Dept. 304] Action Filed: August 26, 2024 Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on August 18, 2026 at 11:00 a.m., in Department 304 of the above-entitled Court, located at 400 McAllister Street, San Francisco, California, 94102, Plaintiff Kyle Kellum ("Plaintiff") will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement ("Settlement") between Plaintiff and Defendant Ace Plumbing & Rooter, Inc. ("Defendant");
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class: **All non-exempt employees who worked for Defendant in California at any time from August 26, 2020 until June 30, 2025**.
3. Preliminary appointment of Plaintiff as the Class Representative;
4. Preliminary appointment of Tuvia Korobkin, Neil M. Larsen, and Alex Purcell of Marquee Law Group, APC as Class Counsel;
5. Appointment of Phoenix Class Action Administration Solutions ("Phoenix") as the Settlement Administrator;
6. Approval of the proposed Class Notice, and an order that the Class Notice be disseminated to the Settlement Class as provided in the Settlement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award a Class Representative Service Payment to Plaintiff, and attorneys' fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declaration of Neil M. Larsen and exhibits attached thereto; the declaration of Tuvia Korobkin; the declaration of Jodey Lawrence on behalf of Phoenix; the declaration of Plaintiff Kyle Kellum; the declaration of Hon. Mitchel R. Goldberg (Ret.)., the pleadings and other papers filed in this action; and any further oral or documentary evidence or argument presented at the time of hearing.

Dated: July 23, 2026

Respectfully submitted,
MARQUEE LAW GROUP, APC

By: Neil Larsen
Neil M. Larsen, Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kyle Kellum ("Plaintiff") seeks preliminary approval of a Class Action and PAGA Action Settlement Agreement ("Settlement") with Defendant Ace Plumbing & Rooter, Inc. ("Defendant") (together with Plaintiff, the "Parties").

The Settlement resolves a Class Action and PAGA Action pending before this Court (the "Action"), in which Plaintiff alleges that Defendant failed to pay minimum wages, failed to pay overtime wages, and failed to authorize and permit all rest periods. Plaintiff further alleges that as a result of these violations, Defendant failed to issue accurate itemized wage statements, failed to pay all wages on termination of employment, and is liable for civil penalties under the Private Attorneys General act ("PAGA").

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, common-fund class action Settlement[1], in which Defendant has agreed to pay $576,000 to the following Settlement Class, which is estimated to consist of approximately 178 individuals: **All non-exempt employees who worked for Defendant in California at any time from August 26, 2020 until June 30, 2025.**

The Settlement was reached after two mediation session. In connection with mediation, Defendant provided Plaintiff with extensive informal discovery, including Class Members' records, relevant written policies, additional relevant data and information. Defendant also produced relevant financial records to support its defense of financial distress. After extensive research and investigation, including a detailed analysis of Defendant's potential exposure and financial condition, the Parties attended the first mediation session with wage and hour mediator Craig J. Ackerman, Esq. on March 3, 2025. A resolution was not reached at the fist mediation.

Thereafter, a second mediation was held on June 13, 2025 with Hon. Mitchel R. Goldberg (Ret.), a respected and well-regarded retired federal bankruptcy judge and wage and hour mediator. At the second mediation, the merits of Plaintiff's claims and Defendant's financial condition were debated and considered, and the Parties were able to agree to a mediator's proposal

[1] The Settlement is attached as Exhibit 1 to the Larsen Declaration. The Class Notice and Notice of Estimated Settlement Award, respectively, are attached as Exhibits A and B to the Settlement.

to resolve the Action. Over the following months, the Parties negotiated the finer terms of the Settlement, ultimately resulting in the Settlement Agreement before the Court.

As noted above, Defendant made representations regarding its financial condition and agreed to produce relevant financial records to Plaintiff. In the opinion Judge Goldberg, Defendant could not pay more than the negotiated $576,000 Gross Settlement Amount and would need to fund the Settlement in an installment payment plan. See Declaration of Hon. Mitchel R. Goldberg (Ret.) ("Goldberg Decl."), ¶¶ 1-4.

Notably, Settlement Class Members need not submit a claim to receive a payment ("Settlement Award"). After deductions for proposed administration costs, attorneys' fees and costs, Plaintiff's Class Representative Service Payment, and the LWDA's share of PAGA civil penalties, the average Settlement Award is estimated to be approximately $1,705.06. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. <u>SUMMARY OF THE LITIGATION</u>

A. <u>FACTUAL AND PROCEDURAL BACKGROUND</u>

Defendant is a privately held company that offers plumbing, water heater, and sewer services in and around the San Francisco area. *See* Declaration of Neil M. Larsen ("Larsen Decl."), ¶ 7. Plaintiff worked for Defendant as a non-exempt plumber employee from approximately April 2022 to approximately January 2024. *Id*.

On August 23, 2024, Plaintiff submitted a notice letter to Defendant and to the Labor and Workforce Development Agency ("LWDA"), notifying Defendant and the LWDA of his intent to pursue civil penalties for wage statement violations under the Private Attorneys' General Act ("PAGA"). Larsen Decl., ¶ 8, **Exhibit 2**.

On August 26, 2024, Plaintiff filed the Class Action Complaint alleging causes of action for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to authorize and permit rest periods; (4) wage statement violations; (5) failure to timely pay final wages; and (6) violation of the Unfair Competition Law ("UCL"). Larsen Decl., ¶ 8.

On October 31, 2024, Plaintiff filed the First Amended Class and Representative Action

Complaint ("FAC"), which added a cause of action for civil penalties pursuant to PAGA. Larsen Decl., ¶ 9.

On November 20, 2024, Plaintiff submitted a copy of the FAC to the LWDA. *Id*., Exhibit 3.

B. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES

1. Commission Claims

Plaintiff alleges that Defendant failed to separately compensate him and other Class Members for all required rest period time they were entitled to when they were compensated on a commission-only basis. Larsen Decl., ¶ 10; *see Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98, 114 (2017) (holding that a commission pay plan was unlawful because it did not separately compensate for rest periods, stating "[w]e agree with *Bluford* that Wage Order 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan does not already include minimum hourly wage for such time").

Plaintiff further alleges that Defendant failed to separately compensate Class Members who were paid on a commission-only basis for "non-productive" time, such as time spent cleaning/reparing work trucks and training new hires. Larsen Decl., ¶ 10; *see Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 40-41 (2013) ("DTLA") ("…we conclude that class members [paid on a piece-rate basis] were entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by the employer...."); *see also Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150 (9th Cir. 2016) (affirming certification of a class of commission-only "sales associates" based on the failure to compensate for "non-sales" time).

Defendant argues that its commission pay plan complies with California law and that it has always compensated its commissioned-based employees for all required rest periods. Larsen Decl., ¶ 10. Defendant argues that at all times throughout the Class Period it has calculated separate rest period compensation for its commissioned based employees in accordance with Labor Code § 226.2. *Id*. Defendant also argues that employees experienced minimal (if any) uncompensated "non-productive" time. *Id*., ¶ 11. Additionally, Defendant argues that any questions of non-productive time would be highly individualized, as employees worked in a variety of locations, and there are no records or other common evidence of time spent on potentially non-productive tasks necessary to establish class-wide liability, thereby precluding certification. *Id*.

2. <u>Failure to Pay All Wages Owed – On Call Time</u>

Plaintiff further alleges that Defendant failed to pay him and other Class Members all wages owed during the Class Period, because Defendant required employees to remain on-call and subject to Defendant' control without being compensated. Larsen Decl., ¶ 12. Defendant argues that it consistently pays employees for all hours worked. *Id*. Defendant further argues that this claim would not be certified, as it would require individual inquiries into each unique event and each employee, as to whether the employee was subject to Defendant's control, how much on call time each incident consisted of, and whether such uncompensated on call time was reported to Defendant. *Id*.

3. <u>Rest Period Claim</u>

Plaintiff further alleges that Defendant failed to authorize and permit rest periods. Larsen Decl., ¶ 13; *Brinker Restaurant Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1028-32 (2012) (discussing rest period requirements). Defendant argues that it has always maintained legally compliant rest period policies, and that, in practice, it has always authorized and permitted all required rest periods to non-exempt employees; that it informs employees of their right to rest periods; and that any failure to take a rest period is the result of employee choice rather than any policy or practice of Defendant. *Id*. Defendant further argues that this claim is not amenable to class treatment as individualized inquiries would be required to determine whether individual employees were in fact authorized and permitted to take rest periods on any given shift, under various supervisors and time periods, thus precluding class certification. *Id*. These manageability concerns are particularly present with respect to rest periods, Defendant contend, since rest periods are not (and need not be) recorded. *Id*.

4. <u>Claims Under Lab. Code §§ 203, 226, and the PAGA</u>

As a result of its alleged failure to pay all minimum and overtime wages, as well as its alleged failure to authorize and permit rest periods, Plaintiff asserts that Defendant failed to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively. Larsen Decl., ¶ 14. Finally, Plaintiff seeks civil penalties under the PAGA based on the aforementioned claims and also for Defendant's alleged failure to maintain accurate timekeeping records for Plaintiff and other Aggrieved Employees in accordance with Labor Code §1174. *Id*.

Defendant argues that Plaintiff's derivative claims fail for the same reasons his underlying claims fail. *Id*., ¶ 14. Defendant further asserts that it has strong, good-faith defenses to Plaintiff's underlying claims, precluding waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a "good faith dispute that any wages are due will preclude imposition of waiting time penalties"); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding "good faith dispute" precluded imposition of waiting time penalties). Defendant further contends that any alleged wage statement violations were not "knowing and intentional," particularly given its good-faith defenses; that Plaintiff cannot show that he or other employees "suffer[ed] injury" due to alleged wage statement violations, as required by Lab. Code § 226(e); and that employee wage statements always accurately reflect amounts *paid* to employees. Larsen Decl., ¶ 14; *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) ("The purpose of section 226 is to '*document* the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages.") (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

Finally, Defendant argues that Plaintiff's PAGA claim fails because the underlying claims fail. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). Defendant further argues that given its strong defenses and its good-faith attempts to comply with the law, the Court would substantially reduce PAGA penalties even if it were to find in Plaintiff's favor on his claims for civil penalties. Larsen Decl., ¶ 15; *see also* Lab. Code § 2699(e)(2) (authorizing discretionary reduction in PAGA penalties); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because, *inter alia*, "the evidence showed…Defendant took their obligations…seriously and attempted to comply with the law"); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer was "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

C. <u>DISCOVERY AND MEDIATION</u>

In connection with mediation, the Parties engaged in extensive informal discovery. Defendant produced Class Members' records, relevant written policies, additional relevant data and information, and requested financial records pertaining to Defendant's financial condition. Larsen Decl., ¶ 16. Plaintiff's counsel analyzed and extrapolated the data produced by Defendant. *Id*. This discovery allowed the Parties to assess the merits and value of Plaintiff's claims and Defendant's defenses, as well as the chances for class certification. *Id*. Plaintiff's counsel also analyzed Defendant's financial records to assess Defendant's financial condition. *Id*.

The Parties attended the first mediation session with wage and hour mediator Craig J. Ackerman, Esq. on March 3, 2025, during which they vigorously debated the merits of Plaintiff's claims, Defendant's defenses, and Defendant's financial condition and ability to sustain a class-wide settlement. Larsen Decl., ¶ 17. The Parties did not reach a resolution at the fist mediation. *Id*. Thereafter, a second mediation was held on June 13, 2025 with Hon. Mitchel R. Goldberg (Ret.), a respected and well-regarded retired federal bankruptcy judge and wage and hour mediator. *Id*. Following a contentious and arms' length second mediation, in which the merits of Plaintiff's claims and Defendant's financial condition were debated and considered, the Parties were able to agree to a mediator's proposal to resolve the Action. *Id*. Over the following months, the Parties negotiated the finer terms of the Settlement, ultimately resulting in the Settlement Agreement before the Court. *Id*.

III. <u>THE PROPOSED SETTLEMENT</u>

A. <u>ESSENTIAL TERMS OF THE SETTLEMENT</u>

Under the Settlement, Defendant will pay a <u>non-reversionary</u> Gross Settlement Amount ("GSA") of $576,000.00. The monetary terms of the Settlement are summarized below:

- Gross Settlement Amount ("GSA"): $576,000.00

• Minus Court-approved attorneys' fees (one-third):	$192,000.00
• Minus Court-approved costs (up to):	$20,000.00
• Minus Court-approved Service Payment:	$7,500.00
• Minus Amount Set Aside as PAGA penalties:	$40,000.00
• Minus estimated settlement administration costs:	$13,000.00
Net Settlement Amount ("NSA"):	**$303,500.00**
PLUS 35% of PAGA penalties ("PAGA Amount"):	$14,000.00
Total Amount Paid to Settlement Class:	**$317,500.00**

1. The Settlement Provides for Reasonable Monetary Payments

As noted above, after deducting amounts for attorneys' fees, litigation costs, Plaintiff's Class Representative Service Payment, PAGA penalties, and administration costs, the Settlement provides for the total distribution of approximately $317,500.00 to the Settlement Class and PAGA Group. *See* Settlement, § 15(a).

The NSA shall be distributed to Participating Class Members (i.e., those Settlement Class members who do not opt-out of the Settlement) as follows: The NSA will be distributed to all Participating Class Members based on each Participating Class Member's proportional number of workweeks worked for Defendant as a non-exempt employee in California during the Class Period. *See* Settlement, §§ 1, 2, 12. The Settlement Administrator will calculate each Participating Class Member's payment from the NSA by multiplying the NSA by a fraction, the numerator of which is the participating Class Member's number of workweeks, and the denominator of which is the total workweeks worked by all Participating Class Members. *Id.*, § 12. There are approximately 178 Settlement Class members. Larsen Decl., ¶ 19. Thus, the average Settlement Award to Class Members is estimated to be $1,705.06. *Id.*

In addition, all Aggrieved Employees (regardless whether they opt-out from the Class Action portion of the Settlement) who worked for Defendant as a non-exempt employee in California at any time between August 26, 2023 until June 30, 2025 (the "PAGA Period"), will receive a portion of the $14,000.00 PAGA Amount, based on their proportionate number of pay periods worked during the PAGA Period. *See* Settlement, §§ 6, 7, 13. There are approximately 70 Aggrieved Employees. Larsen Decl., ¶ 20. Thus, the average payment to Aggrieved Employees is estimated to be $200.00. *Id.*

Payments from the NSA will be treated as 20% wages reported on a Form W-2, with the remaining 80% treated as interest and penalties and reported on a Form 1099. *See* Settlement, §

15(c). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* Defendant will separately pay the employer's share of payroll taxes on the amount designated as "wages," in addition to the GSA. *See* Settlement, §§ 15, 22.

2. <u>Notice Period, Requests for Exclusion, Objections, and Release of Claims</u>

Settlement Class members will have sixty (60) days from the Notice mailing to opt-out of or object to the Settlement, or submit disputes, thereby providing ample time to review the Notice without unduly delaying the Settlement. *See* Settlement, §§ 15-16, page 6.

Participating Class Members will be bound by the Settlement and will release and discharge Defendant and any of its directors, officers, members, parents, and subsidiaries (the "Released Parties") from any and all causes of action, claims, rights, damages, and penalties under California law that were alleged in the Complaint, or that could have been alleged based on the facts alleged in the Complaint, including but not limited to: (a) any alleged failure by Ace Plumbing (1) to pay at least the minimum wage for all hours worked, (2) to pay all overtime wages owed, (3) to authorize and permit rest periods or pay rest period premiums, (4) to issue accurate itemized wage statements, or (5) to timely pay all final wages; (b) any claim for unfair business practices based on the alleged failures set forth in (a)(1) through (5) above; and (c) any violation of the California Labor Code arising from or relating to the conduct alleged in (a)(1) through (5) above, including, without limitation, violation of California Labor Code sections 201-204, 226, 226.2, 226.7, 510, 516, 1182.12, 1194, 1194.2, or any other applicable state statute, rule and/or regulation (e.g., Wage Order), arising from Class Member employment with Ace Plumbing during the Class Period (" Released Class Claims"). *See* Settlement, § 8.

In addition, all Aggrieved Employee (regardless whether they opt-out from the Class Action portion of the Settlement) who worked for Defendant as a non-exempt employee in California at any time during the PAGA Period, will release any right or claim for civil penalties or other relief pursuant to the PAGA arising under the California Labor Code or Wage Orders based on the allegations set forth in the PAGA notice letter submitted by Plaintiff to the California Labor & Workforce Development Agency ("L WDA"), including but not limited to civil penalties and other PAGA relief based on the alleged violations set forth in (a)(1) through (a)(5) in the immediately preceding paragraph, arising from Aggrieved Employees' employment with Ace Plumbing during the PAGA Period ("Released PAGA Claims"). *See* Settlement, § 9.

3. **Funding of the Settlement & Payment Schedule of Settlement Proceeds**

The Gross Settlement Amount shall be funded by Defendant via a three year installment payment plan, with installment payments beginning to accrue as of July 1, 2025. *See* Settlement, §19.[2] Within ten (10) calendar days of the Effective Date, Defendant shall deposit with the Settlement Administrator all installment payments that had been accruing between July 1, 2025 and the Effective Date.[3] *See* Settlement, §§ 11, 19. Defendant shall then continue to fund the remaining outstanding Gross Settlement Amount in quarterly payments, in accordance with the Parties' installment payment plan. *Id*.

Distribution payments to Participating Class Members, Aggrieved Employees, Plaintiff for the Class Representative Service Payment, the Settlement Administrator, and Class Counsel for attorneys' fees and costs, will be made by the Settlement Administrator in three annual distributions: with the **first annual distribution** being made within ten (10) business days after Defendant funds the first 4 quarterly installments (i.e. $45,000 per quarter, totaling $180,000) ("Year 1" distribution); the **second annual distribution** will be made within ten (10) business days after Defendant funds the 5th-8th quarterly installments (i.e. $48,000 per quarter, totaling $192,000) ("Year 2" distribution); and the **third annual distribution** made within ten (10) business days after Defendant funds the 9th-12th quarterly installments (i.e. $51,000 per quarter, totaling $204,000) ("Year 3" distribution), pursuant to the following schedule (*See* Settlement, §§ 11, 19(a)-c)):

a) **Year 1 Distribution**: Defendant will submit a payment to the Settlement Administrator in the amount of $180,000.00: The Year 1 payment will be distributed as follows: (a) one-third of the Settlement Administration Costs, (b) the full amount of approved legal costs, (c) one-third of the PAGA payment that will be sent to the LWDA, (d) one-third of the Service Payment to Plaintiff, and (e) one-third of the approved attorney fees. For instance, if all requested amounts are approved, Defendant would pay: (a) $4,333.33 in

[2] The payment plan was warranted based on a review and analysis of Defendant's financial condition. *See* Declaration of Judge Mitchel Goldberg (Ret.).

[3] The "Effective Date" is defined to mean **the day after both** of the following have occurred: (i) final approval of the settlement is granted by the Court and Judgment is entered thereon, and (ii) Judgment becomes Final. Final shall mean, as applicable: (i) if there is an appeal of the Judgment, the date the Judgment is affirmed on appeal, the date of dismissal of such appeal, or the expiration of the time to file a petition for writ of certiorari to the California Superior Court, or (ii) if a petition of writ of certiorari is filed, the date of denial of the petition for writ of certiorari, or the date the Judgment is affirmed without material modification pursuant to such petition; or (iii) if no appeal is filed, the expiration date of the time for filing or noticing any appeal of the Judgment. *See* Settlement, § 5.

Administration Costs, (b) $20,000 in legal costs, (c) $8,666.67 to be sent to the LWDA out of an allocation of $26,000.00, (d) $2,500.00 service payment to Plaintiff, (e) $64,000 in attorneys' fees, (f) and the remainder of the Year 1 payment of $80,500.00 to be distributed to the Class for a total payment in Year 1 of $180,000.00.

b) **Year 2 Distribution**. Defendant will submit a payment to the Settlement Administrator in the amount of $192,000.00, which will cover: (a) one-third of the PAGA payment that will be sent to the LWDA, (b) one-third of the Settlement Administration costs, (c) one-third of the Service Payment to Plaintiff, (d) one-third of the approved attorney fees, and (e) the remainder of the Year 2 payment to be distributed to Class Members. For instance, if all requested amounts are approved, Defendant would pay (a)$8,666.67 to be sent to the LWDA out of an allocation of $26,000.00, (b) $4,333.33 in Administration Costs, (c) $2,500.00 service payment to Plaintiff, (d) $64,000 in attorneys' fees, (e) and the remainder of the Year 2 payment of $112,500.00 to be distributed to the Class, for a total payment in Year 2 of $192,000.00.

c) **Year 3 Distribution.** Defendant will submit a payment to the Settlement Administrator in the amount of $204,000.00 to cover: (a) one-third of the PAGA payment that will be sent to the LWDA, (b) one-third of the Settlement Administration costs, (c) one-third of the Service Payment to Plaintiff, one-third of the approved attorney fees, and (e) the remainder of the Year 3 payment to be distributed to Class Members. For instance, if all requested amounts are approved, Defendant would pay (a) $8,666.67 to be sent to the LWDA out of an allocation of $26,000.00, (b) $4,333.33 in Administration Costs, (c) $2,500.00 service payment to Plaintiff, (d) $64,000 in attorneys' fees, (e) and the remainder of the Year 3 payment of $124,500.00 to be distributed to the Class, for a total payment in Year 3 of $204,000.00.

Settlement checks paid to Participating Class Members and/or Aggrieved Employees, will remain valid and negotiable for 180 days from their issuance. *See* Settlement, § 17. Withing 20 days of the expiration of uncashed Settlement checks, the Settlement Administrator will pay the sum of uncashed checks to the *cy pres* approved by the Court. *Id.*, § 23. The Parties have agreed to propose Legal Aid at Work as the *cy pres* for this matter. *Id.*

4. Attorneys' Fees and Costs, Class Representative Service Payment, and PAGA Payment

At final approval, Plaintiff will apply for a Class Representative Service Payment of $7,500.00. *See* Settlement, §§ 15(a), 24. "[I]ncentive awards are fairly typical in class action cases…and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010).

As will be fully briefed at final approval, Plaintiff's requested Class Representative

Service Payment is in recognition of the time and effort he expended on behalf of the Settlement Class, including providing factual information and documents to counsel, discussing with counsel the claims and theories at issue in the litigation, reviewing the settlement agreement, and otherwise actively participating in the prosecution of this case. *See* Settlement, §§ 15, 24. Plaintiff respectfully submits that the requested service payment is well within the range of approval. *See, e.g., Bellinghausen v. Tractor Supply Company,* 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving $15,000 payment to named plaintiff from wage and hour class action settlement, including $10,000 incentive payment and additional $5,000 for his general release, where payments to class members averaged just over $450); *Martinez v. Knight Transportation*, No. 1:16-cv-01730, 2023 WL 5917989 (E.D. Cal. Sept. 11, 2023) (approving $10,000 award to plaintiff in $400,000 wage and hour class action settlement where payments to class members averaged about $127).

The Parties have also designated $40,000.00 of the GSA as PAGA penalties, of which $26,000.00 (65%) will be paid to the LWDA, with the remaining $14,000.00 (35%) distributed to Aggrieved Employees (*see* Settlement, §§ 13, 15(a), 25), consistent with the PAGA's requirement that 65% of penalties be allocated to the LWDA with the remaining 35% of penalties allocated to aggrieved employees (Labor Code § 2699(m)). Plaintiff submit that this allocation to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of $7,500 to LWDA from $6.9 million settlement).

At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA (currently estimated at $192,000), and up to $20,000.00 in litigation costs. *See* Settlement, § 15(a). The requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Plaintiff's counsel have incurred substantial attorneys' fees conducting pre-filing investigation and legal research; analyzing timekeeping records, payroll records, and other data to create a comprehensive damages model; preparing for and attending mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Larsen Decl., ¶ 29. Counsel will also incur future attorney fees in overseeing the Notice process, fielding phone calls from Settlement Class members, preparing the Final Approval Motion, and appearing at the Final Approval Hearing. *Id*.

It is appropriate to award attorney fees as a percentage of the "common fund" created by the settlement. *Laffitte v. Robert Half Int'l, Inc.,* 1 Cal.5th 480 (2016) (holding "the percentage of fund method survives in California class action cases"). Counsels' fee request is well within the range of reasonableness and is typical for common fund settlements. *See*, *e.g.*, *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, n.11 (2008) ("regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"). As will be briefed at final approval, the fee request is reasonable in light of the substantial risks and work undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions class action settlements on court approval, which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role is to ensure the settlement agreement taken as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a presumption of fairness when a settlement is negotiated at arm's length by counsel. *See, e.g.*, *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).

"The list of factors is not exclusive and the Court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. <u>The Strength of Plaintiff's Case</u>

Although Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges that there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described in section II.B., *supra*, Defendant presented multiple defenses to Plaintiff's claims, both on the merits and to class certification, rendering success far from certain.

b. <u>Risk, Expense, Complexity, and Duration of Further Litigation</u>

The Parties engaged in significant informal discovery. Larsen Decl., ¶¶ 16, 31. However, the Parties still had much formal discovery remaining and Plaintiff still had to file for class certification. *Id*. Even if Plaintiff obtained certification, the Parties would incur considerable fees and costs through a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id*. The Settlement avoids those risks and the accompanying expense. Moreover, as noted above, Judge Goldberg analysed Defendant's financial records and his opinion is that Defendant could not pay a class-wide settlement of more than $576,000, funded in instalment payments. *See* Goldberg Decl., ¶¶ 1-4.

c. <u>Risk of Maintaining Class Action Status</u>

Plaintiff had not yet filed his motion class certification, and as such, the extent to which Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk there would not be a certified class at trial, or if there were, that it would consist of a significantly smaller group of employees than the proposed Settlement Class, and the expected recovery would be significantly reduced. Moreover, given Defendant's financial condition, there was a real risk and concern that continued litigation could cause Defendant to file for bankruptcy. In such an event, it is unlikely that this matter would have been able to proceed as a Class Action and Class Members would likely not have received any financial recovery from Defendant. Thus, this factor supports preliminary approval.

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d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a fair and reasonable monetary recovery for the Settlement Class for disputed claims. As detailed in the Larsen Declaration, Plaintiff conducted an analysis of potential damages due to Defendant's allegedly unlawful policies and practices. After applying reasonable discounts for risks of not obtaining class certification and risks of losing on the merits, Plaintiff estimated the claims had a realistic potential value of approximately $885,556. Larsen Decl., ¶¶ 22-28. The proposed settlement of $576,000 therefore represents about 65% of Plaintiff's reasonably forecasted classwide recovery. Larsen Decl., ¶ 28. As noted above, the average payment to Participating Class Members will be $1,705.06. This is a significant monetary recovery for Class Members, who may not have seen any recovery from Defendant if litigation continued due to Defendant's precarious financial condition.

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 Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel has extensive experience litigating wage and hour class actions, and has been appointed class counsel in numerous cases alleging similar claims. *See* Korobkin Decl., ¶¶ 2-8; Larsen Decl., ¶¶ 2-5. Counsel conducted an in-depth review of Defendant's policies, Class Members' records, other relevant data and information, Defendant's financial records, and drew on their extensive experience to assess Plaintiff's claims. Larsen Decl., ¶¶ 6, 16, 22-28. The Settlement was also reached after a full-day mediation with Hon. Mitchel R. Goldberg (Ret.), a retired federal bankruptcy judge and respected and well-regarded wage and hour mediator. *Id.*, ¶ 18. This strongly supports preliminary approval. *Kullar*, *supra*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for*

Complex Litig., § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

As noted above, the Settlement reflects about 65% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits that the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations, two separate mediations with highly experienced mediators, and months of additional negotiations. Plaintiff carefully vetted the claims at issue and conducted a detailed analysis of the relevant data and information. Larsen Decl., ¶¶ 16, 22-28. The Settlement is thus entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130.

c. The Settlement Is Devoid of Obvious Deficiencies

The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees, costs, Plaintiff's service payment, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification because: (1) the Settlement Class is ascertainable and numerous; (2) common questions of law and fact predominate; (3) Plaintiff's claims are typical of the Settlement Class; and (4) Plaintiff and his counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes all non-exempt employees who worked for Defendant in California at any time during the Class Period, and thus can be readily identified from Defendant's records. There are approximately 178 Settlement Class members, rendering it impracticable to bring them all before the Court. Numerosity is therefore satisfied.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff' claims are predicated primarily on Defendant' allegedly unlawful failure to include bonuses and other payments in the "regular rate" and allegedly unlawful meal and rest period policies/practices. Such claims are commonly held proper for class certification. *See, e.g., Carlino v. CHG Medical Staffing, Inc.,* No. 1:17-cv-01323-DAD-JLT, 2019 WL 1005070 (N.D. Cal. Oct. 20, 2019) (certifying regular rate claim); *Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

3. The Named Plaintiff's Claims Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff was employed by Defendant as a non-exempt employee in California during the Class Period, and he was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. *See* Declaration of Kyle Kellum ("Kellum Decl."), ¶¶ 2-3. Thus, typicality is satisfied.

4. Plaintiff and Class Counsel Will Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) Plaintiff seeks to represent. *Capital People First v. State Dept. of Developmental Svcs.,* 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiff or his counsel and the Settlement Class. *See McGhee v. Bank of Am.,* 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation, as noted above.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE

The Court should order distribution of the proposed Notice by U.S. Mail, using last known mailing addresses provided by Defendant. *See* Settlement, § 29. This is the "best notice practicable" under the circumstances, as it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173 (1974). Plaintiff proposes that the Settlement be administered by Phoenix Settlement Administrators, an experienced class action settlement administrator. *See* Lawerence Declaration and exhibits. Settlement Class members' addresses will be ascertainable through Defendant' records. Phoenix will also run all addresses through the U.S. Postal Service National Change of Address database and/or perform "skip traces" to obtain current addresses. *See* Settlement, § 29.

The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims; the basic contentions of the parties; the key terms of the Settlement; the 60-day deadline to opt out, object, or submit a dispute and how to do so; explains the recovery formula and expected recovery amount for each Settlement Class member; and explains the releases of claims included in the Settlement. *See* Larsen Decl., Exhibit A to Exhibit 1. The proposed Notice also includes the final approval hearing date and time, and it provides contact information for Class Counsel and Phoenix in the event Settlement Class members have any questions about the Settlement. *Id.* This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching the Settlement Class.

D. <u>THE COURT SHOULD SET A FINAL APPROVAL HEARING</u>

Finally, the Court should set a hearing for final approval on a date appropriately scheduled to follow Settlement Class members' response deadline. *See* Cal. Rule of Court 3.769.

V. <u>CONCLUSION</u>

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

Respectfully submitted,

Dated: July 23, 2026

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