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10 (Additional attorneys for Plaintiff(s) on following page)

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN FRANCISCO**
(UNLIMITED JURISDICTION)

13 CHARLES MIKICH, on behalf of himself and
14 all others similarly situated, and as an “aggrieved
15 employee” on behalf of other “aggrieved
Attorneys General Act of 2004,

16 *Plaintiff(s),*

17 vs.

18
19 SAYEH PETROLEUM, INC., a California
corporation; HEDIA PETROLEUM, INC., a
20 California corporation; HADAD ENTERPRISE,
INC., a California corporation; HADAD
21 PETROLEUM, INC., a California corporation;
BAY AREA AUTO CARE, INC., a California
22 corporation; HOUTAN PETROLEUM, INC. a
California corporation; GREEN PLANET GAS,
23 INC., a California corporation; ALI
BOZORGHADAD (also known as ED
24 BOZORGHADAD, also known as ED
HADAD), an individual; and DOES 8-50,
25 inclusive,

26 *Defendant(s).*

Case No. CGC-20-582385 to be
consolidated with CGC-21-594289

**PLAINTIFFS CHARLES MIKICH
AND JONATHON GORDON’S
NOTICE OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Date: October 20, 2022
Hearing Time: 8:30 a.m.
Hearing Dept.: 302

Action filed: January 22, 2020
Trial Date: Not Set

**Submitted Herewith Under Separate
Cover:**

1. Memorandum of Points and Authorities;
2. Declaration(s) of David Spivak and Walter L. Haines; and
3. [Proposed] Order



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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN FRANCISCO**
13 **(UNLIMITED JURISDICTION)**

14 CHARLES MIKICH and JONATHON
15 GORDON, on behalf of themselves, all others
16 similarly situated, the general public, and as
17 “aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

18 *Plaintiff(s),*

19 vs.

20 SAYEH PETROLEUM, INC., a California
21 corporation; HEDIA PETROLEUM, INC., a
22 California corporation; HADAD ENTERPRISE,
23 INC., a California corporation; HADAD
PETROLEUM, INC., a California corporation;
24 BAY AREA AUTO CARE, INC., a California
corporation; HOUTAN PETROLEUM, INC., a
25 California corporation; ALI BOZORGHADAD,
a natural person; GREEN PLANET GAS, INC.,
26 a California corporation; and DOES 1–50,
inclusive,

Case No. CGC-20-582385 to be
consolidated with CGC-21-594289

**PLAINTIFFS CHARLES MIKICH
AND JONATHON GORDON’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

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Defendant(s).

JONATHON GORDON on behalf of himself and all others similarly situated, and as an “aggrieved employee” on behalf of other “aggrieved employees” under the Labor Code Private Attorney General Act of 2004,

Plaintiff(s),

vs.

SAYEH PETROLEUM, INC., a California corporation; HEDIA PETROLEUM, INC., a California corporation; HADAD ENTERPRISE, INC., a California corporation; HADAD PETROLEUM, INC., a California corporation; BAY AREA AUTO CARE, INC., a California corporation; HOUTAN PETROLEUM, INC. a California corporation; GREEN PLANET GAS, INC., a California corporation; ALI BOZORGHADAD (also known as ED BOZORGHADAD also known as ED HADAD), an individual; and DOES 1-50, inclusive,

Defendant(s).

Case No.: CGC-21-594289
Action Filed: 08/04/2021
Dept: 610, Hon. Garrett L. Wong



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SPIVAK LAW
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiffs Charles Mikich, Jonathon Gordon, and all others similarly situated (collectively
5 “Plaintiffs”) submit this memorandum of points and authorities in support of their unopposed
6 motion for preliminary approval of the Joint Stipulation of Class Action Settlement and Release
7 of Claims (the “Settlement”)², which provides for a Gross Settlement Amount (“GSA”) of
8 \$1,600,000.00 in compromise of all disputed claims on behalf of all persons hourly, non-exempt
9 in California of Defendants Sayeh Petroleum, Inc., Hedia Petroleum, Inc., Hadad Enterprise, Inc.,
10 Hadad Petroleum, Inc., Bay Area Auto Care, Inc., Houtan Petroleum, Inc., Ali Bozorghadad, and
11 Green Planet Gas, Inc. (collectively “Defendants”) in California at any time between January 22,
12 2016 through preliminary Court approval of this Settlement, or September 3, 2022, whichever is
13 earlier. Through this Motion, Plaintiffs respectfully request for this Court to (1) provisionally
14 certify the below-defined Class for settlement purposes only under Code of Civil Procedure §
15 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiffs as Class
16 Representatives; (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines of
17 United Employees Law Group as Class Counsel; (5) approve the proposed notice procedures and
18 related forms; (6) direct that notice be mailed to the proposed Settlement Class; and (7) schedule
19 a final approval hearing.

20 This Court should grant Plaintiffs’ motion because: (1) for settlement purposes, the
21 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
22 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
23 reasonableness, and adequacy; (3) for settlement purposes, Plaintiffs are adequate to serve as
24 Class Representatives; (4) Plaintiffs’ attorneys are adequate to serve as Class Counsel; (5) the
25 proposed notice procedures, and related forms, fully comport with due process and adequately
26 apprise Class Members of their rights; and (6) a final approval hearing must be scheduled to allow
27 Settlement Class members an opportunity to be heard regarding the Settlement and to give it
28 finality. Accordingly, for the reasons detailed below, this Court should grant Plaintiffs’ Motion
in its entirety and preliminarily approve the Settlement.

///

² The Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of David Spivak (“DS”), which is submitted herewith under a separate cover.



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1 **II. BACKGROUND**

2 Defendants collectively operate more than twenty gas stations, some of which have
3 associated convenience stores. DS, ¶ 4. Defendants employed Plaintiffs as gas station attendants,
4 clerks, cashiers, and food preparers. *Id.*

4 **A. The Claims and Procedural History**

5 On January 16, 2020, Plaintiff Mikich notified Defendants and the California Labor and
6 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
7 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
8 Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

9 On January 22, 2020, Plaintiff Mikich filed a Class Action Complaint in the San Francisco
10 County Superior Court, Case No. CGC-20-582385, against Defendants on behalf of himself and
11 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All
12 Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to
13 Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab.
14 Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
15 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
16 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3.

17 On May 11, 2020, Plaintiff Mikich filed his First Amended Complaint adding a claim
18 under PAGA. DS, ¶ 6, Ex. 4. On November 4, 2021, Defendants filed an answer to Plaintiff
19 Mikich’s First Amended Complaint. DS, ¶ 6, Ex. 5. Defendants deny all of Plaintiffs’ allegations
20 and strongly contend that their wage and hour policies, practices and procedures are fully
21 compliant with all applicable laws. DS, ¶ 6.

22 On February 11, 2021, Plaintiff Gordon notified Defendants and the LWDA, pursuant to
23 PAGA, of alleged Labor Code violations committed by Defendants. DS, ¶ 7, Ex. 6.

24 On August 4, 2021, Plaintiff Gordon filed a Class and Representative Action in the San
25 Francisco County Superior Court, Case No. CGC-21-594289, against Defendants on behalf of
26 himself and others similarly situated, alleging causes of action on a class-wide basis for: (1)
27 Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and
28 1198); (2) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide
Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198
and 2802); (5) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time



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1 Penalties (Lab. Code §§ 201-203); (7) Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.);
2 and (8) Civil Penalties under PAGA. DS, ¶ 8, Ex. 7.

3 **B. Mediation**

4 The Parties thereafter engaged in an informal, voluntary exchange of information in the
5 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
6 each Plaintiff's entire personnel file (including policies and agreements he signed and
7 acknowledged), copies of their relevant company written policies, time-keeping records, email
8 messages, and paycheck data and records for the putative class, and more detailed time and
9 payroll data for a random sample of putative class members specifically selected by Plaintiffs'
10 counsel. DS, ¶ 9.

11 On January 31, 2022, the parties engaged Michael Loeb, Esq., an experienced class action
12 mediator, to mediate the dispute. DS, ¶ 10. While the Parties mediated with Mr. Loeb's assistance
13 for a full day, they were unable to reach a settlement. *Id.* The Parties agreed to engage a third-
14 party expert to analyze Defendants' time and payroll records and provide figures (such as average
15 work day length and the number of workdays for which Defendants' records reflected a facially-
16 compliant meal period) on which the Parties could build damages models. *Id.* The Parties agreed
17 to continue their mediation with Mr. Loeb on a second day. *Id.*

18 The Parties engaged EmployStats to conduct this analysis. DS, ¶ 11. The Parties asked
19 EmployStats to derive 98 categories of data from Defendants' records. *Id.* These categories
20 included the total number of workdays, average hours worked per day, average workweek length,
21 number of workdays of sufficient length to require a meal period, and number of workdays for
22 which a facially-compliant meal period was recorded, among many others. *Id.* EmployStats
23 provided its analysis to the Parties on April 19, 2022. *Id.*

24 On May 6, 2022, the Parties participated in a second day of mediation with Mr. Loeb.
25 During this second day of mediation, the Parties had a full day of productive negotiations and
26 reached agreement on a class-wide settlement. During the mediation sessions, each side,
27 represented by his/their respective counsel, recognized the risk of an adverse result in the Action
28 and agreed to settle the Action and all other matters covered by this Agreement pursuant to the
terms and conditions of this Agreement. DS, ¶ 12.



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1 **C. Consolidation**

2 On May 6, 2021, Plaintiff Mikich, through a fictitious name amendment after having
3 discovered the true names of the Doe Defendants, added the remaining Defendants to his lawsuit
4 in place of the first seven Doe Defendants (HEDIA PETROLEUM, INC., HADAD
5 ENTERPRISE, INC., HADAD PETROLEUM, INC., BAY AREA AUTO CARE, INC.,
6 HOUTAN PETROLEUM, INC., GREEN PLANET GAS, INC., and ALI BOZORGHADAD).
7 Whereas both the Mikich and Gordon matters are assigned to the same judge (Honorable Judge
8 Ganet L. Wong in Department 610 of the above-entitled Court) and allege the same violations
9 against the same Defendants, the parties requested for the Court to consolidate the matters for
10 settlement purposes. On July 28, 2022, the Court ordered the consolidation of the Mikich and
11 Gordon matters for settlement purposes. DS, ¶ 13, Ex. 8.

12 **III. OVERVIEW OF THE SETTLEMENT**

13 **A. Settlement Class Definition**

14 The Settlement defines the Class as all persons Defendants employed in California as
15 hourly, non-exempt employees during the Class Period, which is the period of time from January
16 22, 2016 through preliminary Court approval of this Settlement or September 3, 2022, whichever
17 is earlier.

18 **B. Monetary Terms**

19 Subject to the terms and conditions of this Agreement, the Gross Settlement Amount of
20 One Million Six Hundred Thousand Dollars and Zero Cents (\$1,600,000.00), plus Defendants'
21 employer share of employer-side payroll taxes, is the maximum amount payable by Defendants,
22 subject to the provisions of this Paragraph III.B. Defendants estimated for purposes of mediation
23 that there are 27,498 workweeks worked by the Class Members for the period of January 22, 2016
24 through May 6, 2022. For the avoidance of doubt, the term "workweeks" shall mean weeks during
25 which Class Members actually performed work for or on behalf of Defendants. These numbers
26 would be expected to increase proportionately for the passage of time between that date and the
27 time of court approval. Before the Parties seek or a Party seeks court approval of the Settlement,
28 the Settlement Administrator will advise Plaintiffs' counsel of Defendants' report of the total
number of workweeks worked. The Settlement Administrator shall determine the total number of
workweeks worked by Class Members by counting the number of paychecks issued by
Defendants during the Class Period, as evidenced by Defendants' payroll records, a sampling of
which was provided to EmployStats in connection with the Parties' mediation efforts, and



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1 multiplying that figure by two. If the workweeks worked as of the date the Court approves the
2 settlement exceed 28,960 workweeks worked by more than 10.00%, the Gross Settlement
3 Amount will increase proportionally according to the number of additional workweeks worked.
4 For example, if the number of workweeks as of the date the Court approves the settlement exceeds
5 28,960 by 11%, the Gross Settlement Amount shall increase by 1%. If the workweeks worked as
6 of the date the Court approves the settlement exceeds 28,960 workweeks by more than 20.00%,
7 Defendants shall have the option to (a) vacate the Parties' settlement and this Memorandum of
8 Understanding shall be null and void or (b) to cap the Class Period as of the date that the number
9 of workweeks reaches but does not exceed 31,856.

10 The Settlement Administrator will make the following payments out of the Gross
11 Settlement Amount as follows:

12 In addition to their Settlement Shares, each Plaintiff will apply to the Court for an award
13 of not more than Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00) as a Class
14 Representative Payment. Defendants will not oppose a Class Representative Payment of not more
15 than \$25,000.00. The Plaintiffs will receive no other payment other than their Settlement Share
16 and Class Representative Payment, and acknowledge that they are aware of no other facts or
17 circumstances related to their employment with Defendants that could give rise to any additional
18 entitlement to any further payments. The Settlement Administrator will pay the Class
19 Representative Payment approved by the Court out of the Gross Settlement Amount. Payroll
20 taxes, withholdings, and deductions will not be taken from the Class Representative Payment, and
21 instead a Form 1099 will be issued to Plaintiffs with respect to that payment. Each Plaintiff agrees
22 to assume all responsibility and liability for the payment of taxes due on the Class Representative
23 Payment. The Class Representative Payment is in exchange for the release of Released Claims
24 against the Released Parties, the general Release of Claims by Plaintiffs, and for the Plaintiffs'
25 time, effort and risk in bringing and prosecuting the Action. Any adjustments made by the Court
26 to the requested Class Representative Payment shall not be deemed a material modification of
27 this Settlement Agreement. In the event that the Court reduces or does not approve the requested
28 Class Representative Payment, the Settlement Agreement remains in full force and effect, shall
not have the right to revoke the Settlement for that reason, it shall remain binding, and any portion
of the Class Representative Payment not awarded to Plaintiffs will not revert to Defendants, but
instead shall be returned to the Net Settlement Amount.



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1 Class Counsel will apply to the Court for an award of not more than Five Hundred Thirty-
2 Three Thousand Three Hundred Thirty-Three Dollars and Zero Cents (\$533,333.00) (which is 33
3 and 1/3% of the Gross Settlement Amount) as their Class Counsel Fees Payment and an amount
4 not more than Thirty Five Thousand Dollars and Zero Cents (\$35,000.00) as their Class Counsel
5 Litigation Expenses Payment, and Defendants will not oppose this request. The Settlement
6 Administrator will pay the amount approved by the Court (but not more than Five Hundred Thirty
7 Three Thousand Three Hundred Thirty Three Dollars and Zero Cents (\$533,333.00) in fees and
8 not more than Thirty Five Thousand Dollars and Zero Cents (\$35,000.00) in expenses) out of the
9 Gross Settlement Amount. Withholding and deductions will not be taken from the Class Counsel
10 Fees and Litigation Expenses Payment and one or more Forms 1099 will be issued to Class
11 Counsel with respect to those payments.

12 The Settlement Administrator will be paid from the Gross Settlement Amount its
13 reasonable fees and expenses as approved by the Court in an amount currently estimated to not
14 exceed Thirty-Two Thousand Dollars and Zero Cents (\$32,000.00). Of the Gross Settlement
15 Amount, Fifty Thousand Dollars and Zero Cents (\$50,000.00) has been allocated to the
16 Settlement of claims under the Private Attorneys General Act ("PAGA"), California Labor Code
17 section 2698, et seq. Of this amount, the Settlement Administrator shall distribute Thirty Seven
18 Thousand Five Hundred Dollars and Zero Cents (\$37,500.00), which is 75% of the PAGA
19 settlement, to the Labor & Workforce Development Agency. Twelve Thousand Five Hundred
20 Dollars and Zero Cents (\$12,500.00), 25% of the PAGA settlement, will remain in the Net
21 Settlement Amount for distribution and will be distributed to PAGA Members on a pro rata basis
22 based on the total number of Individual Work Weeks (full or partial) worked by each PAGA
23 Member during the PAGA Period. Partial Work Weeks shall be rounded up to the nearest whole
24 integer. PAGA Members shall receive their portion of the PAGA Penalties regardless of their
25 decision to submit a request for exclusion to opt out of the Settlement.

26 **C. Timing of Payments**

27 Defendants will pay the Gross Settlement Amount to the Settlement Administrator for
28 the PAGA settlement and for Class Members who do not opt-out. Any amount attributed to the
share of class members who opt-out shall be redistributed to participating class members on a
pro-rata basis, and the Settlement Administrator will then be responsible for making appropriate
deductions, reporting obligations, and issuing the individual settlement awards. Defendants shall



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1 deposit one half of the Gross Settlement Amount with the Settlement Administrator within 30
2 days of the Court's granting preliminary approval of the Settlement. Defendants shall deposit the
3 remaining half of the Gross Settlement Amount with the Settlement Administrator within 365
4 days of their having deposited the first half of the Gross Settlement Amount.

5 There will be two distributions of the Gross Settlement Amount as follows:

6 Within fourteen (14) calendar days of the Effective Date³, or within ten (10) calendar
7 days of the deadline for the Defendants' first installment payment (whichever is later), the
8 Settlement Administrator shall distribute, pro rata, the portion of the Gross Settlement Amount
9 Defendants paid by that date, including pro rata portions of the Settlement Share, PAGA
10 payment, Class Representative Payment, the Class Counsel Fees Payment, the Class Counsel
11 Litigation Expenses Payment, and the Settlement Administrator's payment.

12 Within ten (10) calendar days of the Defendants' second installment payment, the
13 Settlement Administrator shall distribute, pro rata, the portion of the Gross Settlement Amount
14 Defendants paid since the first distribution, including pro rata portions of the PAGA payment,
15 Class Representative Payment, the Class Counsel Fees Payment, the Class Counsel Litigation
16 Expenses Payment, and the Settlement Administrator's payment.

17 **D. Calculation of Settlement Shares**

18 The Settlement Administrator shall assign to each Class Member a "Settlement Ratio,"
19 which shall be a fractional number comprised of (a) that Class Member's Individual Work Weeks
20 as the numerator, and (b) the aggregate total of all Class Members' Individual Work Weeks as
21 the denominator. The Settlement Administrator shall assign to each Class Member the
22 "Settlement Share" which shall be calculated by multiplying that Class Member's Settlement
23 Ratio by amount allocated to Class Members from the Net Settlement Amount. The Settlement
24

25 ³ The "Effective Date" means as follows: If no objection to this Settlement or to any of the
26 terms and or conditions of the Settlement are filed by Plaintiffs, another member of the
27 Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur on the day
28 that the Court enters an order of final approval of this Settlement; however, if any objection to
this Settlement or to any of the terms and or conditions of the Stipulation is filed by a member
of the Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur upon
the expiration of the time for the filing any appeal of the order of final approval of this
Settlement. If an appeal is filed or any writ granted, then the Effective Date shall occur after
the appeal has been dismissed or the writ dissolved and when there is no further time to appeal
the dismissal of the appeal or the dissolution of the writ. The occurrence of the Effective Date
is a prerequisite to any obligation of Defendants to pay any funds into the Settlement Account.



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1 Administrator shall assign to each Class Member a “PAGA Settlement Ratio,” which shall be a
2 fractional number comprised of (a) that PAGA Member’s Individual Work Weeks during the
3 PAGA Period as the numerator, and (b) the aggregate total of all PAGA Members’ Individual
4 Work Weeks during the PAGA Period as the denominator. The Settlement Administrator shall
5 assign to each PAGA Member the “PAGA Settlement Share” which shall be calculated by
6 multiplying that PAGA Member’s Settlement Ratio by amount allocated to PAGA Members
from the Net Settlement Amount.

7 **E. Apportionment of Settlement Shares**

8 The settlement shares are allocated 33.33% to wages (for which employment taxes will
9 be deducted and W-2s issued) and 66.66% to penalties and interest (for which 1099s will be
issued).

10 **F. The Releases**

11 The Parties agree that it is their intent that the resolution set forth in this Settlement will
12 release and discharge the Released Claims by way of any further attempt, by lawsuit,
13 administrative claim or action, arbitration, demand, or other action of any kind by each and all of
14 the Settlement Class Members (including participation to any extent in any representative or
collective action) against the Released Parties. This release will not take effect until Defendants
15 have paid the Gross Settlement Amount in full per this Settlement Agreement. All PAGA
16 Members, regardless of whether they submit timely and valid requests for exclusion from the
17 Settlement, will release all Released Claims under PAGA against the Released Parties. The State
of California will also release all Released Claims under PAGA against the Released Parties.

18 Upon the Effective Date, and only after Defendants pay the entirety of the Gross
19 Settlement Amount, each Plaintiff will be deemed to have released the Released Parties of and
20 from all of the Released Claims during the Class Period. These claims include all claims alleged
21 or which could have been alleged based on the facts, circumstances, and/or primary rights at issue
22 in the Complaint and any amendments thereto. They include without limitation: (1) all claims for
23 failure to pay wages earned, including minimum wages, and overtime wages; (2) all claims for
24 failure to provide rest periods and claims for rest period premium pay; (3) all claims for failure to
provide meal periods and claims for meal period premium pay; (4) all claims for failure to provide
25 accurate wage statements and related penalties; (5) all claims for failure to timely pay wages
26 during employment and at termination; (6) all claims for violation of California Business and
27 Professions Code §§ 17200, et seq., to the extent such claims are predicated on the other claims
28



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1 released herein; and (7) all claims for violation of PAGA and all related claims for penalties, to
2 the extent such claims are predicated on the other claims released herein. Each Plaintiff's release
3 set forth herein shall include a waiver of all rights under California Civil Code §1542, which
4 includes a release of all known and unknown claims against the Released Parties during the Class
5 Period. Civil Code section 1542 provides:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
7 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
8 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR
9 HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH
10 THE DEBTOR.

11 Upon the Effective Date, each Plaintiff will be deemed to have waived his rights under
12 Civil Code §1542 during the Class Period, as set forth above. Each Plaintiff's release excludes
13 any claim for worker's compensation. It also includes his claims, if any, for harassment,
14 discrimination, wrongful termination, negligent infliction of emotional distress and intentional
15 infliction of emotional distress and related prayers for compensatory and punitive damages,
16 interest, attorney fees and costs.

17 **G. Notice and Claims Process and Procedures**

18 After the Court enters its order granting Preliminary Approval of the Settlement, every
19 Class Member will be provided with a "Class Notice."

20 Within fourteen (14) days after the Court grants Preliminary Approval of the Settlement,
21 Defendants shall provide to the Settlement Administrator: (a) An electronic database of all Class
22 Members, last known mailing address, and Social Security number (if available); (b)
23 corresponding to each Class Member's name, Defendants shall provide a figure indicating the
24 total number of Work Weeks during the Class Period in which that Class Member was employed
25 by Defendants as a Class Member and during which they actually performed work for Defendants.
26 That number of Work Weeks shall be referred to as that Class Member's "Individual Work
27 Weeks;" (c) if any of the Class Members' Data are unavailable to Defendants, Defendants will so
28 inform Class Counsel and the Parties will make their best efforts to reconstruct or otherwise agree
upon the Class Members' Data prior to when it must be submitted to the Settlement Administrator.



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1 Class Members' Data will otherwise remain confidential and will not be disclosed to anyone,
2 except as necessary to applicable taxing authorities, or pursuant to Defendants' express written
3 authorization or by order of the Court.

4 Within fourteen (14) days after receiving the Class Members' Data, or as soon thereafter
5 as it can do so, the Settlement Administrator will mail the Class Notice to all identified Class
6 Members via first-class U.S. mail using the mailing address information provided by Defendants,
7 unless modified by any updated address information that the Settlement Administrator obtains in
8 the course of administration of the Settlement.

9 If a Class Notice is returned because of an incorrect address, the Settlement Administrator
10 will promptly, and not later than ten (10) days from receipt of the returned Class Notice, search
11 for a more current address for the Class Member and re-mail the Class Notice to the Class
12 Member. The Settlement Administrator will use the Class Members' Data and otherwise work
13 with Defendants' Counsel and Class Counsel to find a more current address. The Settlement
14 Administrator will be responsible for taking reasonable steps, consistent with its agreed-upon job
15 parameters, court orders, and fee, to trace the mailing address of any Class Member for whom a
16 Class Notice is returned as undeliverable by the U.S. Postal Service. These reasonable steps shall
17 include the tracking of all undelivered mail; performing address searches for all mail returned
18 without a forwarding address; and promptly re-mailing to Class Members for whom new
19 addresses are found. If the Class Notice is re-mailed, the Settlement Administrator will note for
20 its own records and notify Class Counsel and Defendants' Counsel of the date and address of each
21 such re-mailing as part of a weekly status report provided to the Parties.

22 **1. Class Member Disputes**

23 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
24 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
25 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
26 disputes and supporting documents must be postmarked by the Response Deadline. A Class
27 Member may use the Work Weeks Dispute form (Exhibit C to the Settlement), though a Class
28 Member is not obligated to do so, to dispute information in the Class Notice. Absent evidence
rebutting Defendants' records, Defendants' records will be presumed determinative. However, if
a Class Member produces evidence contrary to Defendants' records by the Response Deadline,
the Settlement Administrator shall notify Class Counsel and Defense Counsel to discuss and



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1 resolve the dispute, including providing all available relevant information to all counsel. The
2 Parties will resolve all disputes jointly, and such resolution shall be final and binding on any Class
3 Member disputes, and shall thereafter instruct the Settlement Administrator how to proceed in
4 processing the dispute. If the Parties cannot reach an agreement, the dispute shall be submitted to
5 the Court for final determination. All such disputes are to be resolved or submitted to the Court
not later than fourteen (14) calendar days after the Response Deadline.

6 **2. Opting Out**

7 Class Members may submit requests to be excluded from the effect of the Settlement, or
8 objections to the Settlement, pursuant to the following procedures:

9 A Class Member may request to be excluded from the effect of the Settlement Agreement,
10 and any payment of amounts under this Agreement, by timely mailing a letter to the Settlement
11 Administrator stating that the Class Member wants to be excluded from this Action. This letter
12 must include the Class Member's name, address, telephone number, signature, and a clear
13 statement requesting to be excluded from the settlement of the class claims, as set forth on the
14 Request for Exclusion form or similar to the following: "I wish to exclude myself from the class
15 settlement reached in the matter of Mikich, et al. v. Sayeh Petroleum, Inc. I understand that by
16 excluding myself, I will not receive money from the settlement of my individual claims." To be
17 valid and timely, the request to be excluded must be postmarked by the Response Deadline and
18 received by the Settlement Administrator. A Class Member may use the Exclusion Request form
19 (Exhibit B to this Settlement), though a Class Member is not obligated to do so to request
20 exclusion from the Settlement. A Class Member who properly submits a valid and timely request
21 to be excluded from the Action shall not receive any payment of any kind in connection with this
22 Agreement or this Action, shall not be bound by or receive any benefit of this Agreement, and
23 shall have no standing to object to the Settlement, except that the request for exclusion shall not
be effective as to the release of claims arising under PAGA and shall not preclude the Class
Member from receiving their share of the PAGA Penalties. A request for exclusion must be
mailed to the Settlement Administrator at the address provided on the Class Notice.

24 **3. Objecting**

25 The Class Notice provides that any Class Member who does not request exclusion from
26 the Action and who wishes to object to the Settlement should submit an objection in writing to
27 the Settlement Administrator. To be valid, an objection must be postmarked by the Response
28 Deadline and received by the Settlement Administrator. The written objection to the Settlement



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1 should set forth the grounds for the objection and the other information required by this paragraph.
2 The objection should be mailed to the Settlement Administrator at the address provided on the
3 Class Notice. The written objection should state the objecting Class Member's full name, address,
4 and the approximate dates of his or her employment with Defendants. The written objection
5 should state the basis for each specific objection and any legal support in clear and concise terms.
6 The written objection also should state whether the Class Member intends to formally intervene
7 and become a party of record in the action, and upon formally intervening, appear and argue at
8 the Final Approval Hearing. Regardless of whether an objecting Class Member complies with the
9 objection procedure encouraged above, the Court will provide a Class Member with the
10 opportunity to speak at the final approval hearing regardless of whether he or she has filed an
11 appearance or submitted a written opposition beforehand. If the objecting Class Member does not
12 formally intervene in the action and/or the Court rejects the Class Member's objection, the Class
13 Member will still be bound by the terms of this Agreement.

14 **H. Uncashed Checks**

15 Any check issued by the Settlement Administrator to Class Members who do not timely
16 and validly opt out shall be negotiable for one hundred and eighty (180) calendar days. Those
17 funds represented by checks returned as undeliverable and those checks remaining un-cashed for
18 more than 180 days after issuance (collectively, "Voided Settlement Checks"), plus any interest
19 that has accrued on those funds, will be paid to the California Unclaimed Property Fund.

20 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

21 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
22 and its members are too numerous for joinder to be practical; (2) the representative and absent
23 class members share a community of interest and questions of law and fact common to the class
24 predominate over questions unique to individual class members; (3) the representative's claims
25 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
26 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
27 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
28 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

29 **A. The Settlement Class Is Objectively Ascertainable**

30 A class is ascertainable when it may be readily identified without unreasonable expense
31 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932



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(citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiffs maintain that the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the settlement process. DS, ¶ 14; Settlement, § I.B., III.D.2., IV.B.1 Therefore, the Settlement Class is ascertainable.

B. The Membership of the Settlement Class Is Sufficiently Numerous

The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 1,002 Class Members. DS, ¶ 15. Plaintiffs maintain that it would be impractical and economically inefficient to require each Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. The California Supreme Court has upheld a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations, the Settlement Class' membership is sufficiently numerous. DS, ¶ 15. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

C. Class Members Share a Well-Defined Community of Interest

The community of interest requirement “embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

To justify certification, the class proponent “must show ... that questions of law or fact common to the class predominate over the questions affecting the individual members” *See, Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank, FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for certification of a settlement class, the Parties agree that for the purposes of the Settlement only, the claims of the Class Members all stem from the same sources. DS, ¶ 15.

In this case, Plaintiffs assert all class members were subject to the same or similar operations and employment policies, practices, and procedures. The claims arise from



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1 Defendants' alleged policy-driven failure to pay wages, unauthorized and unlawful wage
2 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to
3 indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
4 wages, failure to maintain required payroll records, and related labor law violations, all of which
5 Plaintiffs claim constitute unfair business practices and give rise to PAGA penalties. Plaintiffs
6 assert that common questions include, but are not limited to: (1) Whether Defendants failed to
7 pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether
8 Defendants failed to provide the class with all meal and rest periods in compliance with California
9 law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays they
10 failed to provide the class with one or more meal or rest periods in compliance with California
11 law; (4) Whether Defendants failed to indemnify the class for all necessary business expenditures
12 incurred during the discharge of their duties; (5) Whether Defendants knowingly and intentionally
13 failed to provide the class with accurate wage statements; (6) Whether Defendants willfully failed
14 to provide the class with timely final wages; and (7) Whether Defendants engaged in unfair
15 competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
16 respect to the class. DS, ¶ 16. Therefore, common questions predominate.

17 **D. Each Plaintiff is Typical of the Settlement Class**

18 The class representative must be similarly situated to the rest of the purported class. *See*
19 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
20 that the class representative must have identical interests with the class members. The only
21 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
22 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
23 Plaintiffs’ claims and the claims alleged on behalf of the class”). Plaintiffs contend that their
24 claims are typical for the purposes of certifying the Settlement Class. Plaintiffs asserts that they,
25 like absent Class Members was subject to the same relevant policies and procedures governing
26 their compensation, hours of work and meal and rest periods. Because Plaintiffs contend that they
27 were subject to the same general course of conduct as absent Class Members, resolving the
28 common questions as they apply to Plaintiffs will determine Defendants’ *prima facie* liability to
all Class Members. Moreover, Plaintiffs’ claims could potentially be subject to the same primary
affirmative defenses as those of absent Class Members. Accordingly, Plaintiffs’ claims are typical
of the Class. DS, ¶ 17.



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1 **E. Each Plaintiff Will Adequately Represent the Settlement Class**

2 The adequacy requirement is met where the plaintiff is represented by counsel qualified
3 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
4 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
5 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
6 conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 18.

7 First, Class Counsel have supplied the Court with declarations to show that they are
8 adequate to represent the Settlement Class and that they have significant experience in
9 employment litigation generally, and wage and hour and employment-related class action
10 litigation specifically. See DS, ¶¶ 20-27; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
11 Thus, Plaintiffs' counsel are adequate to serve as Class Counsel.

12 Second, each Plaintiff contends that he is an adequate class representative. Each Plaintiff
13 and the Class Members have strong and co-extensive interests in this litigation because they all
14 worked for Defendants during the relevant time period, allegedly suffered the same alleged
15 injuries from the same alleged course of conduct, and there is no evidence of any conflict of
16 interest between any Plaintiff and the Class Members. DS, ¶ 19. Moreover, each Plaintiff has
17 demonstrated his commitment to the Settlement Class by, among other things, retaining
18 experienced counsel, providing counsel with documents and extensively speaking with them to
19 assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as
20 well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit
21 had been unsuccessful. DS, ¶ 64. Thus, each Plaintiff is adequate to serve as settlement class
22 representative. Accordingly, this Court should find that Plaintiffs and their counsel are adequate
23 to represent the Settlement Class as required under Code of Civil Procedure § 382.

24 **F. Class Action Treatment Is the Superior Means For Resolving The Claims**
25 **Of The Class Members**

26 Plaintiffs further contend that a class action is also superior to other means adjudicating
27 the issues in this action. The predominance of common legal and factual questions shows that this
28 Court could fairly adjudicate the claims of Class Members through a single class action. In view
of the *theoretical* alternatives that proposed class members could potentially utilize—
representative PAGA action (where there is less relief available), individual civil lawsuits or wage
claims through the Division of Labor Standards Enforcement (where there would be relatively
little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly



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1 superior to all of them. Thus, this consideration supports conditional class action treatment for
2 purposes of this Settlement only. DS, ¶ 28.

3 **V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL BECAUSE THE**
4 **SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

5 **A. Legal Standard**

6 A class action settlement requires court approval. California Rules of Court (“CRC”),
7 Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
8 written motion for preliminary approval, the proposed class settlement, and the proposed class
9 notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval
10 hearing where class members may be heard regarding the settlement, and at which evidence and
11 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
12 The decision to approve or reject a class settlement is committed to the Court’s broad discretion.
13 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
14 class settlement may be reversed only upon a showing of “clear abuse of discretion.” *Id.*

15 **B. The Settlement Is Presumptively Fair**

16 In assessing preliminary approval, a court evaluates if the settlement process has certain
17 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
18 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
19 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
20 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
21 48 Cal.App.4th at 1794.

22 The class settlement here satisfies all of these factors. DS, ¶ 29. The Settlement resulted
23 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
24 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
25 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.* Moreover, the
26 Parties engaged a neutral third-party expert, EmployStats, to analyze Defendants’ time and
27 payroll records relating to the Settlement Class, to derive figures relevant to damages calculation
28 from the underlying records. *Id.*

Plaintiffs prepared “damages” estimates in advance of the mediation. DS, ¶ 30, Ex. 9. In
advance of the mediation, Plaintiffs determined Defendants’ maximum exposure for restitution
and penalties to be approximately \$10,731,169.55 (consisting of \$146,975.94 in unpaid wages,
\$910,175.92 in missed meal period premium wages, \$1,475,394.34 in missed rest break premium



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1 wages, \$722,000.00 for wage statement penalties, \$2,615,796.86 for waiting time penalties, and
2 \$4,026,000.00 for civil penalties). Plaintiffs calculated the damages based on the number of
3 workweeks and pay periods provided by Defendants, Plaintiffs' reports, the sample data, and
4 EmployStats' analysis. *Id.* Plaintiffs also considered the possibility that Defendants could launch
5 a *Pick Up Stix* campaign and pursue individual release agreements from the Class Members.
6 Plaintiffs' Counsel applied discounts to the maximum exposure to account for all other risks
7 discussed below. The Gross Settlement Amount, \$1.6 million, is approximately 15% of Plaintiffs'
8 calculation of Defendants' maximum potential exposure. A settlement for approximately 15.00%
9 of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned
10 by existing case law.⁴ *Id.*

11 Plaintiffs are aware of only two significant awards under the PAGA in a contested
12 proceeding, both issued by federal district courts.⁵ DS, ¶ 56. PAGA penalty awards are often

13 ⁴ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
14 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
15 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
16 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
17 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
18 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
19 of Plaintiffs' maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
20 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
21 potential recovery asserted by either party.”).

22 ⁵ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
23 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
24 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
25 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
26 suffered a particularly sizeable injury – the court found that the defendant's policies caused
27 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
28 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to
train their flight attendants, engaged in glaring violations of the labor code, such as failing to
compensate its flight attendants for work performed outside of “block time” (time during which
the aircraft is moving), including time spent participating in pre-flight briefings, boarding
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
awarded approximately \$102 million in damages, primarily based on the defendants' failures to
comply with the requirements of California Labor Code section 226. However, the Ninth Circuit



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1 small even for egregious, intentional violations of the Labor Code.⁶ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
5 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
6 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
7 result could occur here. *Id.* Notably, Defendants have not previously been found to have violated
8 the California Labor Code and there is significant evidence of Defendants' good faith efforts to
9 comply with their obligations under the Labor Code, both of which may result in the court's
10 exercising its discretion to limit penalties in this case well below their maximum potential value.

11 Plaintiffs' initial estimates do not realistically account for the risks outlined below or the
12 risk that a class will not be certified. *Id.* Therefore, Plaintiffs believe a class settlement for
13 \$1,600,000.00 is fair and reasonable. *Id.*

14 **C. The Settlement Satisfies the Kullar Factors for Approval**

15 The *Kullar* case sets forth several factors a court should consider in determining whether
16 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
17 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
18 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
19 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
20 of a governmental participant; and (8) the reaction of the class members to the proposed
21 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
22 factors.

23 **1. Evaluation of Plaintiffs' Case**

24 **a. Risks Associated with the Unpaid Wages Claim**

25 There is a risk that Plaintiffs' recovery for unpaid wages would be extremely limited at
26 best, largely because Defendants' written policies throughout the relevant time period prohibited
27

28 reversed *Magadia* on substantive and standing grounds. *Magadia v. Wal-Mart Assocs.* (9th Cir.
2021) 999 F.3d 668.

⁶ In 2012, Plaintiffs' Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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1 off-the-clock work. DS, ¶ 32. Off-the-clock claims are difficult where a defendant requires in its
2 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
3 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
4 be compensable). *Id.* In their written employment policies, Defendants mandate that employees
5 must record all time worked accurately on their time records and strictly prohibit employees from
6 performing any work off-the-clock. DS, ¶ 32. Moreover, while Defendants dispute that off-the-
7 clock work occurred, they contend that any time spent off the clock was *de minimis*. The
8 California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested
9 that irregular and minute periods of time may still be subject to a *de minimis* defense even if
10 compensable. (Stating that “We do not decide whether there are circumstances where
11 compensable time is so minute or irregular that it is unreasonable to expect the time to be
12 recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here
13 because the time spent off the clock were minute and insignificant. Lastly, Defendants rounded
14 hours worked by Class members to the nearest quarter-hour. EmployStats’ analysis showed that
15 Defendants’ rounding policy added nearly one hundred more hours worked to Class members’
16 time records than it deducted. *Id.* Accordingly, a large award of penalties seems unlikely with
17 respect to this claim. *Id.*

18 The difficulty inherent in proving that off-the-clock work occurred poses a significant
19 hurdle to Plaintiffs. Plaintiffs will rely on declarations and witness statements to prove this claim.
20 Generally, a court will not certify a class unless it can determine an appropriate classwide
21 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiffs
22 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
23 the lack of records indicating when such off-the-clock work may have taken place. Individualized
24 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
25 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
26 risk that the Court would consider this evidentiary showing insufficient as a classwide
27 methodology. DS, ¶ 33.

28 **b. Risks Associated with the Meal Period Claims**

There are risks to Plaintiffs’ meal period claim. DS, ¶ 34. According to Defendants,
Plaintiffs’ description of Defendants’ scheduling practices accurately describes only a tiny
fraction of Putative Class members: those who worked for stations that were staffed by a single



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1 employee (“Single- Employee Stations”) during morning and afternoon shifts. Further, every
2 employee who worked these shifts, including both named Plaintiffs, signed enforceable on-duty
3 meal period agreements. Defendants contend that every other Putative Class Member either
4 worked in a station with coworkers (“Multi-Employee Stations”), where employees were
5 permitted and encouraged to take their meal breaks, or worked at a Single-Employee Station
6 during the graveyard shift, when the policy requiring the station to remain open did not apply.
7 Time records show Defendants instructed Putative Class Members to take meal and rest breaks
8 and provided them the opportunity to do so. In other words, other than limited potential damages
9 associated with unpaid premiums for rest breaks not taken by Putative Class Members working
10 at Single-Employee Stations during the afternoon and graveyard shifts, Defendants contend they
11 face no liability whatsoever with regard to Plaintiffs’ first cause of action.

12 Defendants contend that even for this group, however, there is no evidence that
13 employees, whose job responsibilities were limited in light of the automation implemented at gas
14 stations, were unable to take off-duty rest breaks. While it is true that Defendants required
15 Putative Class Members to remain on premises throughout operating hours, this fact does not
16 necessarily result in liability for Defendants. See, e.g. *Schmidtberger v. W. Refining Retail, LLC*,
17 2021 WL 5024714, at *19 (C.D. Cal. Sept. 28, 2021) (“The Court . . . rejects Plaintiff’s contention
18 that a policy of requiring employees stay on the premises is invalid facially”) (citing *Augustus v.*
19 *ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016)). Rather, whether Defendants exercised such
20 control over Putative Class Members throughout their shifts such that they failed to provide off-
21 duty rest breaks is a matter for determination by individualized inquiry, and cannot be resolved
22 on a class-wide basis. *Id.* at *25 (“the evidence [including the policy requiring station attendants
23 to remain on premises at all times] does not show [that Putative Class Members] remainder under
24 Defendant’s control during breaks pursuant to a uniform policy”). *Id.*

25 The law governing Plaintiffs’ first cause of action is well-settled, and the dispute regarding
26 the provision of meal periods and rest breaks is not likely to turn on questions of law, except with
27 regard to the enforceability of the on-duty meal period agreements. As noted above, all Putative
28 Class Members, including both named Plaintiffs, executed on-duty meal period agreements at the
outset of their employment with Defendants. These agreements foreclose Plaintiffs’ theory of
liability regarding unpaid meal period premiums.



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1 On-duty meal period agreements are enforceable when the “nature of the work prevents
2 an employee from being relieved of all duty” during their meal period. Industrial Welfare
3 Commission Wage Order No. 7, 11(c). Like most gas stations, Defendants’ stations are franchises
4 of larger entities, such as Chevron, AMPM, Arco, 76, and Valero. Franchisors exert significant
5 control over the operations of franchisee stations: they dictate branding practices (including
6 employee uniforms), hours of operation, the types of services offered by the stations, and other
7 matters. In general, these requirements are set forth in the franchise agreement, though they are
8 sometimes set forth in branding agreements that mimic franchise agreements. For each of the
9 Single-Employee Stations, the relevant agreement requires Defendants to keep the station open
10 during daytime operating hours (i.e., whenever the station is open, other than during the
11 “graveyard” shift). Since it would not make financial sense to staff these stations with multiple
12 employees during these times, Defendants require employees to sign on-duty meal period
13 agreements to account for the fact that they must eat their lunches while working.

14 The nature of the work performed by Putative Class Members working daytime shifts at
15 Single-Employee Stations meets the criteria for enforceability of on-duty meal period agreements.
16 While there does not appear to be any precedent directly addressing employees working alone as
17 gas stations, two DLSE opinion letters, the Wage Order’s plain language, the Ninth Circuit’s
18 opinion in *Abdullah v. U.S. Sec. Associates, Inc.*, and the Department of Industrial Relations’
19 informational publications regarding meal periods all support the enforceability of Defendants’
20 on-duty meal period agreements. In the first opinion letter, issued in 1994, the DLSE opined that
21 on-duty meal period agreements are enforceable “where the employee is the only person
22 employed in the establishment and closing the business would work an undue hardship on the
23 employer.” DLSE Opinion Letter 1994.09.28, at 2. This language clearly applies to the Putative
24 Class Members working in Single-Employee Stations during daytime shifts, when allowing
25 employees to close the station to take an off-duty meal period would have violated Defendants’
26 franchise agreements, leading to potentially disastrous consequences for Defendants.

27 Similarly, the DLSE opined in 2003 that on-duty meal period agreements are enforceable
28 with regard to employees working at isolated gas stations in which only a single employee is
present. DLSE Opinion Letter, 2003.11.03, at 3. The 9th Circuit cited this opinion letter
approvingly in 2013 in *Abdullah v. U.S. Sec. Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 960
 (“DLSE has . . . found that the ‘nature of the work’ exception would apply to an ‘isolated’ gas



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1 station ‘in which only a single employee is present’”). In *Abdullah*, the Ninth Circuit explained
2 that “we can characterize the instances in which DLSE has found that the ‘nature of the work’
3 exception applies into two categories: (1) where the work has some particular, external force that
4 requires the employee to be on duty at all times, and (2) where the employee is the sole employee
5 of a particular employer.” *Id.* at 959. Rather than focusing solely on whether a station is
6 “isolated,” then, the standard for determining enforceability of on-duty meal period agreements
7 takes into consideration all the circumstances relating to the employee’s working environment.
8 Further, as the Ninth Circuit itself noted, “the DLSE opinion letters do not provide a definite
9 metric for deciding in what circumstances a lone employee may be permitted to take an on- duty
10 meal break – for example, it is not clear if an employee must be (1) the sole employee on duty at
11 a particular time, (2) the sole employee staffed at a particular location, or (3) the sole employee
12 working for the employer in order to qualify for the ‘nature of the work exception.’” *Id.* at 964,
13 n. 18. However, as the DIR’s FAQs regarding the exception imply, it appears that the DLSE
14 interprets the exception to apply in all three of *Abdullah*’s scenarios, as evidenced by the FAQs’
15 offering the following examples of when the exception does apply: “a sole worker in a coffee
16 kiosk, a sole worker in an all-night convenience store, and a security guard stationed alone at a
17 remote site.” See Dep’t of Indus. Relations, Meal Periods FAQs,
18 https://www.dir.ca.gov/dlse/faq_mealperiods.htm (last accessed January 25, 2022).

19 According to Defendants, Putative Class Members working daytime shifts at Single-
20 Employee Stations clearly meet this standard because the need to keep those stations open
21 throughout daytime operating hours is a contractual requirement imposed on the Entity
22 Defendants by their franchise and branding partners (who have considerably greater bargaining
23 power than Defendants). Further, as the DIR’s FAQs make clear, economic realities requiring
24 employers to single-staff convenience stores and other service sector operations create conditions
25 under which the nature of the work exception applies, rendering the on-duty meal period
26 agreements enforceable.

27 By contrast, the DLSE also found that these agreements are not enforceable with regard
28 to a night-shift manager at a fast-food restaurant because other employees are on duty and could
cover for the manager. DLSE Opinion Letter 2002.09.04, at 2-3. The negative implication of this
finding is that the absence of other employees would render the agreements enforceable. Taken



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1 together, these authorities may establish the enforceability of the on-duty meal period agreements
2 signed by all Putative Class Members who worked at Single-Employee Stations.

3 Accordingly, Defendants argue, the only potential liability Defendants face in connection
4 with Plaintiffs' first cause of action is for rest breaks missed by dayshift employees working at
5 Single-Employee Stations. However, Defendants opine, this claim is likely incapable of class-
6 wide resolution. As such, while Defendants did not pay rest break premiums to these employees,
7 Defendants believe that the settlement value of these unpaid premiums is significantly lower than
8 the potential maximum exposure.

9 Defendants contend that, to establish a violation for missed meal periods, a plaintiff must
10 do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an
11 employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it
12 has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at
13 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the
14 employee from taking a proper break, or otherwise failed to release the employee of all control.
15 *Id.* "Thus, the crucial issue with regard to the meal break claim is the reason that a particular
16 employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal.
17 2010) 271 F.R.D. 629, 641. *Id.*

18 Defendants contend they did not impede or discourage Plaintiffs, or any other employees,
19 from taking their meal or rest periods. DS, ¶ 43. Defendants' policies mandate that employees
20 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
21 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
22 sample Defendants produced to Plaintiffs for purposes of mediation show that meal periods were
23 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
24 individualized evidence may be necessary to determine whether they occurred due to conduct of
25 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
26 the value of Plaintiffs' meal period claim would be substantially reduced at trial. *Id.*

27 **c. Risks Associated with the Rest Break Claims**

28 There are risks to Plaintiffs' rest period claim. DS, ¶ 44. Plaintiffs face many of the same
risks to their rest period claim that they do to their meal period claims. Defendants produced
evidence that many of the shifts are staffed with at least two employees so one can cover for the
other to take a ten-minute duty-free rest period. The time records may show that Defendants



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1 instructed Putative Class Members to take rest breaks and provided them the opportunity to do
2 so. Defendants also provide evidence that the shifts the employees worked are largely duty free
3 with employees sitting and waiting for customers most of the time. Employers are not required to
4 record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
5 employees the opportunity to take rest periods in accordance with California law. Further,
6 Defendants' written policies on meal and rest periods are consistent with the Wage Order. *Id.*
7 Thus, unlike meal periods, where there are often records showing whether an employee clocked
8 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
9 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
10 Plaintiffs will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
11 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
12 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*
13 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
14 certification, it may be possible to manage individual issues through the use of surveys and
statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

15 **d. Risks Associated with the Failure to Indemnify Claim**

16 There is a risk that the Court may consider Plaintiffs' claims as to Defendants' alleged
17 failure to indemnify for business expenses to be individual in nature and thus decline to certify
18 the class. DS, ¶ 45. In their third cause of action, Plaintiffs allege that Defendants failed to
19 reimburse two business-related expenses they allege Putative Class Members incurred in
20 connection with their work for Defendants: deductions from employee pay made by Defendants
21 as deposits for the return of uniforms and cell phone-related expenses incurred by Putative Class
22 Members.

23 With regard to deductions taken as deposits for the return of Defendant-provided
24 uniforms, Defendants argue Plaintiffs cannot recover any damages on this theory. Payroll records
25 show uniform deposit returns upon termination. They also show that some employees did not
26 have uniform deductions in the first place.

27 Regarding the cell phone reimbursement claim, defendants argue neither the nature of
28 their work nor the nature of Defendants' operations appears to have involved any use of their cell
phones. As such, Defendants do not believe they face any liability on Plaintiffs' third cause of



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1 action. Plaintiffs allege that Defendants required Plaintiffs and the Class Members to use their
2 personal items including cellular phones, computers and other electronic devices, vehicles, and
3 tools, and failed to indemnify them for these business expenses. *Id.* Defendants presented
4 evidence that they have supplied their employees with tools, equipment, and other supplies. As
5 such, there is a risk that the Court may consider Plaintiffs’ claims to be individual in nature and
unfit for class wide resolution. *Id.*

6 e. **Risks Associated with the Statutory “Wage Statement”**
7 **Penalty Claims**

8 Plaintiffs also assert claims for wage statement violations, untimely wage violations, and
9 PAGA penalties. Plaintiffs’ fourth cause of action alleges that, as a result of Defendants’ other
10 alleged Labor Code violations (i.e., the unpaid meal and break premiums, unpaid wages, and
11 unreimbursed expenses), Defendants issued Putative Class Members deficient wage statements.
12 Plaintiffs do not allege that the wage statements Defendants issued were deficient because they
13 failed to include one of the enumerated categories of information required by the California Labor
Code, only that the information included was rendered inaccurate because of the alleged
underlying violations. This claim fails for multiple reasons.

14 First Defendants argue, derivative wage statement claims such as Plaintiffs are legally
15 deficient as “California Labor Code § 226 requires employers to show employees what they were
16 in fact paid, not what employee allege they should have been (but were not) paid.” *Madeira v.*
17 *Converse, Inc.* (C.D. Cal. Jan. 11, 2022) 2022 WL 109365, at *11 (citing *Maldonado v. Epsilon*
18 *Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018)); see also *Sagastume v. Psychemedic Corp.*
19 (C.D. Cal. Nov. 30, 2020) 2020 WL 8175597, at *5, *Hines v. Constellis Integrated Risk Mgmt.*
20 *Servs.*, (C.D. Cal. Sept. 25, 2020) 2020 WL 5764400, at *6 (dismissing wage statement claims
21 because ‘Plaintiff appears to allege only that the amount he was paid was incorrect, not that the
22 wage statements inaccurately reflected the wages he was paid’), and *Sherman v. Schneider Nat’l*
Carriers, Inc. (C.D. Cal. Mar. 6, 2019) 2019 WL 32200585, at *5 (same). This principle could
23 impair Plaintiffs’ recovery on their wage statement cause of action.

24 Next Defendants argue, even if Plaintiffs’ theory of wage statement liability were legally
25 sound, whether the wage statements issued by Defendants to Putative Class Members working
26 daylight shifts at Single-Employee Stations were rendered deficient by Defendants’ failure to pay
27 premiums for miss rest breaks cannot be resolved on a class-wide basis. It is well established that
28 “inaccurate wage statements alone do not justify penalties; the plaintiffs must establish injury



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1 flowing from the inaccuracy.” *Maldonado*, 22 Cal. App. 5th at 1334. However, “[u]nder
2 Maldonado, any failure of wage statements to reflect premium pay that should have been paid,
3 but was not paid, implicates only the requirements to show wages earned, which do not support
4 a statutory presumption of injury.” *Kazi v. PNC Bank* (N.D. Cal. Mar. 15, 2021) N.A., 2021 WL
5 965372, at *21. Because these injuries are not subject to the presumption of injury, they may be
6 inappropriate for resolution on a class basis because resolving the claim “would require
7 individualized showings of actual harm to each [Putative Class Member], in a manner unsuitable
8 for class resolution.” *Id.*

9 Additionally, Defendants argue, they did not fail to pay Putative Class Members for all
10 hours worked and, thus, the wage statements they issued were entirely accurate with regard to the
11 number of hours worked. They also paid overtime as appropriate and accurately represented these
12 overtime payments on the wage statements issued to Putative Class Members. To the degree any
13 Putative Class Members worked off-the-clock, they did so without Defendants’ knowledge,
14 precluding any recovery premised on the theory that the wage statements Defendants issued failed
15 to account for this time. See *Arroyo v. Int’l Paper Co.*, (N.D. Cal. Feb. 24, 2020) 2020 WL
16 887771, at *10-12 (“[l]iability arises under § 226(e) only where an employee suffers ‘injury as a
17 result of a knowing and intentional failure by an employer to comply with subdivision (a)’ . . . an
18 employer’s good faith belief that it is in compliance with § 226 precludes liability under the
19 statute”) (emphasis in original) (citing Cal. Lab. Code § 226(e)(1)).

20 Defendants do not believe they face any liability in connection with Plaintiffs’ claim for
21 inaccurate wage statements. Under Labor Code section 226, wage statements must include
22 various information, including the applicable rates of pay, corresponding hours worked, and gross
23 pay. DS, ¶ 52.

24 Here, Defendants contend, Plaintiffs’ wage statement claim has the same underlying risks
25 as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by
26 Defendants may comply with the requirements of Labor Code § 226.

27 **f. Risks Associated with The Waiting Time Penalties Claim**

28 Plaintiffs’ claim for untimely wages is predicated on Labor Code section 201 to 203. Like
the claim under Labor Code sec. 226, Plaintiffs must establish that the late payments were willful.
The evidence of good faith Defendants put forth may defeat this claim. Like their wage statement
cause of action, Defendants argue, Plaintiffs’ claim for waiting time penalties is derivative of



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1 Plaintiffs’ other allegations of Labor Code violations and it, too, is meritless. While Defendants
2 admit Plaintiff Mikich’s final paycheck was untimely, they state this was the result of an
3 administrative issue related to his sudden, unexpected termination for disciplinary issues. They
4 further argue that Plaintiffs do not identify any policy or practice that caused Defendants’ alleged
5 failure to timely pay final wages, except by virtue of alleging that the other alleged Labor Code
6 violations automatically give rise to waiting time penalties. Thus, Defendants’ potential
7 maximum exposure on the waiting time penalties claim must be heavily discounted for settlement
8 purposes.

8 **g. Risks Associated with the PAGA Claim**

9 Defendants contend that neither the alter ego doctrine nor the single-enterprise rule applies
10 to Defendants. As such, Plaintiffs can assert PAGA claims only against those entities for whom
11 the named Plaintiffs worked, Sayeh Petroleum and Green Planet Gas. *Magadia*, supra, 999 F.3d
12 at 678 (PAGA claim dismissed because plaintiff lacked Article III standing because “he himself
13 did not suffer injury”). Further, PAGA’s statute of limitations is only one year, rendering the
14 relevant claims period from January 16, 2019 onwards. Accordingly, in light of the weaknesses
15 in Plaintiffs’ theories of liability discussed above, PAGA’s per pay-period method of calculating
16 damages results in a maximum exposure of \$173,600.00.

17 However, Defendants believe that the value of Plaintiffs’ PAGA claim is less than
18 \$173,600. PAGA explicitly gives courts have nearly unlimited discretion to limit PAGA
19 penalties, or even eliminate them entirely. Cal. Lab. Code § 2699(e)(2) (providing that “a court
20 may award a lesser amount than the maximum civil penalty . . . if, based on the facts and
21 circumstances of the particular case, to do otherwise would result in an award that is unjust,
22 arbitrary and oppressive, or confiscatory”). This is especially relevant here, as both the United
23 States Department of Labor and the California Department of Labor Standards Enforcement
24 (“DLSE”) initiated investigations into Defendants’ operations and, after collecting various
25 documents and communicating with management, both dropped their investigations without
26 reaching findings. Further, Defendants have never previously been the subject of either an agency
27 finding or a successful class, or even individual, wage & hour action. Finally, given that 75% of
28 any PAGA recovery must be provided to the DLSE, Defendants argue it would be illogical to
award that agency the maximum penalties allowed under the statute when that very agency
investigated the same claims at issue in the Action and decided against pursuing them. Regarding



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1 PAGA, a court has discretion to award a lesser amount than the maximum penalty. Lab. Code §
2 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135
3 (reducing PAGA award). As set forth above, Defendants have posed valid defenses to the Labor
4 Code claims underlying Plaintiffs' PAGA allegations. Thus, the PAGA claims likewise face
5 significant uncertainty. DS, ¶ 54. There is a risk that the Court would consider the maximum civil
6 penalty available to be confiscatory. This is particularly the case considering Defendants'
7 financial condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to
8 further reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

9 This uncertainty increases Plaintiffs' risk of pursuing the PAGA claims and required a
10 significant discount for settlement purposes. DS, ¶ 55. For mediation purposes, Plaintiffs' counsel
11 estimated a maximum exposure of approximately \$4,026,000.00 in civil penalties. This estimate
12 did not take into account any of the risks discussed above and assumed a violation for every single
13 pay period. *Id.* Plaintiffs' counsel also assessed multiple penalties for the same pay period for the
14 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
15 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
16 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
17 Plaintiffs' counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
18 penalties for the same violation for the same pay period under different Labor Code provisions.
19 *Id.* This may be because the PAGA does not provide for what many employers characterize as
20 claim splitting and not merely stacking. *Id.*

21 **h. Risks Associated With A Pick-Up Stix Campaign**

22 An employer enjoys the right to settle a putative class member's disputed wage claims
23 individually, without the consent or involvement of class counsel. DS, ¶ 58. (See *Chindarah v.*
24 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
25 a "pick off" settlement campaign to pursue individual release agreements from the Class
26 Members, thereby potentially narrowing the size of the Settlement Class. *Id.* This could lead to a
27 significant reduction of claim value in settlement negotiations. *Id.*

28 While the evidence gathered through Plaintiffs' discovery supports the merits of the
claims asserted in this lawsuit, Plaintiffs and their counsel recognize that continued litigation
presents significant risks that support a downward departure from Defendants' estimated liability
exposure. DS, ¶ 59. In view of the risks, the Settlement reflects Plaintiffs' estimate of the total



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1 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
2 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
3 It also represents a fair, adequate, and reasonable compromise amount for these claims and
4 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
5 1376 (the financial condition of defendant predominated in assessing the reasonableness of
6 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
7 concerning defendant's financial stability "strongly supports the reasonableness of the
8 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
WL 2465049, * 3.

9 **1. Allocation of the PAGA Payment**

10 The settlement of PAGA penalties in the sum of \$50,000.00, of which 75% (\$37,500.00)
11 will be paid to the LWDA and 25% (\$12,500.00) will be distributed to the Class, is reasonable
12 and appropriate under the circumstances. DS, ¶ 60. The Parties negotiated a good faith amount
13 for PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the
14 LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where
15 settlements "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that
16 this amount was the result of self-interest at the expense of other Class Members," such amounts
17 are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No.
18 CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully,
19 and made good faith attempts to comply with wage and hour laws, a reduction or lesser penalty
20 is warranted because imposing maximum PAGA penalty for each violation would have been
21 unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504,
22 528-529 (affirming trial court's award of only 10% of maximum PAGA penalty for meal break
23 violations). *Id.* The amount to be paid to the LWDA comports with PAGA settlement amounts
24 approved by other courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16,
25 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million
26 common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217
27 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement);
28 *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving
PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576,
589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also



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1 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
2 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
3 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
4 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
5 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
6 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

7 **2. Presence of Governmental Participant**

8 As required under Labor Code section 2699(l)(2), Plaintiffs will provide notice of this
9 settlement to the LWDA. DS, ¶ 69, Ex. 15.

10 **3. Reaction of Class Members to Proposed Settlement**

11 If the settlement is preliminarily approved, Class Members will be provided with the
12 Notice of Proposed Class Action Settlement and Hearing Date for Court Approval (attached as
13 Exhibits A and C to the Settlement) and an opportunity to object. DS, ¶ 66. The parties’ proposed
14 notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class
15 Members to make informed responses to the proposed settlement. *Id.*

16 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
17 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
18 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
19 **COMPARED TO OTHER CLASS MEMBERS**

20 The Individual Settlement Payments will be paid to each Class Member based on his or
21 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 65, Settlement § III.B.
22 Because this method compensates Class Members based on the extent of their potential injuries,
23 in that Class Members who worked for Defendants longer would have been subject to more
24 alleged violations, it is fair, adequate, and reasonable. *Id.*

25 **VII. ALLOCATION FOR CLASS COUNSEL’S FEE AWARD AND ATTORNEYS’**
26 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS**
27 **APPROPRIATE**

28 The Settlement states Class Counsel may seek attorneys’ fees of \$533,333.00 (one-third
of the GSA) and up to \$35,000.00 for actual reasonable litigation costs and expenses incurred in
prosecuting the Action. Settlement § III.C.2. These amounts are reasonable, given the facts and
circumstances of the case. DS, ¶¶ 61-63.

Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their
decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v.*
Beneficial Cal., Inc. (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced



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1 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
2 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
3 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
4 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
5 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
6 of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee
7 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
8 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
9 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
10 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

11 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
12 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
13 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
14 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
15 down to devote time to this matter. DS, ¶ 62. Class Counsel interviewed and obtained information
16 from putative class members, met and conferred with Defendants’ counsel on numerous
17 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
18 Defendants and obtained through other sources, researched applicable law, and provided
19 estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

20 Class Counsel have borne all the risks and costs of litigation and will receive no
21 compensation until recovery is obtained. DS, ¶ 63. Class Counsel are well-experienced in wage-
22 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
23 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
24 the requested fees and costs are reasonable and should be awarded. *Id.*

25 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO EACH PLAINTIFF SHOULD**
26 **BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
27 **REASONABLE**

28 Courts routinely approve incentive awards to compensate named plaintiffs for the services
they provide and the risks they incur during class action litigation, often in much higher amounts
than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
(upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van*
Vranken v. Atlantic Richfield Co. (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000.00



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enhancement award). The Settlement provides that each Plaintiff may seek a Class Representative Payment of \$25,000.00. This amount is entirely reasonable given Plaintiffs' efforts in this action and the risks they undertook on behalf of Class Members. DS, ¶ 64. Each Plaintiff has devoted many hours advancing the interests of the Settlement Class. Each Plaintiff has done this by, among other things, retaining experienced counsel, providing them with information about his work history with Defendants and Defendants' policies and practices with respect to the wage and hour claims at issue, participating in mediation, and being actively involved in the settlement process to ensure a fair result for the Settlement Class as a whole. In doing this, each Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful (See Labor Code §§ 218.5-218.6). The efforts and risks that each Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class Representative Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 64.

IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE, AND REASONABLE

With regard to the settlement administration costs provision, it is reasonable. Before agreeing to CPT Group, Inc. and its bid of \$32,000.00, the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶ 67-68, Exs. 12, 13, and 14. Thus, the settlement administration costs provision should be given preliminary approval.

X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO EXERCISE THEIR RIGHTS

This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures to ensure that as many Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The Settlement requires distribution of the Notice by First Class U.S. mail only. DS, ¶ 66, Settlement, § IV.B.2. Although there are current employee Class Members, it is uncertain whether Defendants' records of their contact information include email addresses and Class Members, who perform all of their work away



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1 from a desk, are not in a position to check their emails. As such, notice by mail alone is fair,
2 adequate, and reasonable. DS, ¶ 66.

3 With respect to its content, “[The] notice given to the class must fairly apprise the class
4 members of the terms of the proposed compromise and of the options open to dissenting class
5 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
6 The purpose of the notice in class settlement context is to give class members sufficient
7 information to decide whether they should accept the benefits offered, opt out and pursue their
8 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
9 Class Members with all pertinent information that they need to fully evaluate their options and
10 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
11 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
12 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
13 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
14 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
15 individual Settlement Class Member’s estimated payment. Additionally, the Class Notice will
16 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
17 the Notice should be approved because it describes the Settlement with sufficient clarity and
18 specificity to explain to Class Members what this action is about, their rights under the Settlement,
19 and how to exercise those rights. DS, ¶ 66.

20 **XI. CONCLUSION**

21 For the reasons stated above, this Court should grant Plaintiffs’ Motion in its entirety and
22 adopt the proposed order submitted concurrently herewith.

23 Respectfully submitted,

24 THE SPIVAK LAW FIRM

25 Dated: September 22, 2022

26 By:



27 DAVID G. SPIVAK, Attorneys for
28 Plaintiff(s), CHARLES MIKICH,
JONATHON GORDON, and all others
similarly situated



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