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himself and others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

HERBERT HURTADO, on behalf of himself
and others similarly situated,

Plaintiff,

v.

J. MCCULLOUGH CORP. dba OREMOR
AUTOMOTIVE GROUP, a California
corporation; OREMOR OF FRESNO, INC.
dba FRESNO LEXUS, a California
corporation; OREMOR OF GLENDALE LLC
dba TOYOTA OF GLENDALE, a California
company; OREMOR OF RIVERSIDE, LLC
dba BMW OF RIVERSIDE, a California
company; OREMOR OF RIVERSIDE II, LLC
dba INFINITI OF RIVERSIDE, a California
company; OREMOR OF RIVERSIDE RC,
LLC dba RIVERSIDE CHEVROLET, a
California company; OREMOR OF
TEMECULA, LLC dba TEMECULA
VALLEY TOYOTA, a California company;
OREMOR OF TUSTIN, INC. dba TUSTIN
TOYOTA, a California corporation;
OREMOR EUROPEAN, LLC dba
MERCEDES BENZ OF EL CAJON, a
California company; UNITED RECOVERY,
INC., a California corporation; OREMOR OF

Case No.: CIVDS2006540

*[Assigned for all purposes to Hon. David
Cohn; Dept. S26]*

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Preliminary Approval Hearing

Date: August 14, 2020

Time: 10:00 a.m.

Dept.: S26

ITALY, INC. dba FIAT OF ONTARIO, a California corporation; OREMOR OF ITALY II, LLC dba MASERATI & ALFA ROMEO OF ONTARIO, a California company; OREMOR OF WOODLAND HILLS LLC dba LEXUS OF WOODLAND HILLS, a California company; ACQUIRECORP'S NORWALK AUTO AUCTION dba NORWALK AUTO AUCTION, a California corporation; JEEP CHRYSLER OF ONTARIO, INC. dba JEEP CHRYSLER DODGE RAM FIAT, DODGE OF ONTARIO, a California corporation; ROMERO MOTORS CORPORATION dba ONTARIO HYUNDAI MAZDA, a California corporation; EMPIRE NISSAN, INC., a California corporation; and DOES 1 through 100,

Defendants.

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on August 14, 2020 at 10:00 a.m. in Department S26 of the above-entitled Court, located at 247 West Third Street, San Bernardino, California 92415, plaintiff Herbert Hurtado ("Plaintiff") individually and on behalf of a class of similarly-situated individuals, will and hereby does move this Court for:

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

Settlement Class - All persons who are or were employed by Defendants in the State of California as non-exempt hourly employees at any time from October 1, 2015, and continuing through March 15, 2020. ("Settlement Class" or "Settlement Class Members")

3. Preliminary appointment of Plaintiff Herbert Hurtado as Class Representative;
4. Preliminary appointment of CounselOne, P.C. as Class Counsel;
5. The scheduling of a hearing to consider whether the settlement should be finally approved and award amounts for the Class Representative enhancement payment, Settlement

1 Administrator costs, the Private Attorneys General Act payment to the Labor and Workforce
2 Development Agency, as well as attorneys' fees and costs to Class Counsel;

3 6. Appointment of CPT Group, Inc. as the third-party Settlement Administrator; and

4 7. Approval of the proposed Notice and entry of the proposed Order instructing the
5 Notice to be disseminated to the Settlement Class as provided in the settlement.

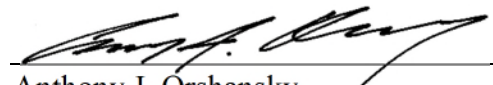
6 This motion is based on this notice of motion, the attached memorandum of points and
7 authorities, and the declaration of Anthony J. Orshansky filed concurrently herewith, and the
8 exhibits attached thereto, the pleadings and other papers filed in this action, and on any further
9 oral or documentary evidence or argument presented at the time of hearing. Finally, given the
10 multiplicity of issues addressed in this Motion, Plaintiff respectfully believes there is good cause
11 to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and respectfully
12 requests that the Court consider Plaintiff's memorandum of points and authorities.

13 Dated: July 22, 2020

Respectfully submitted,

14 COUNSELONE, PC

15
16 By:



17 Anthony J. Orshansky

18 Jennifer L. Connor

19 Justin Kachadoorian

20 Attorneys for Plaintiff and the Settlement
21 Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Herbert Hurtado (“Plaintiff” or “Class Representative”), on behalf of himself
4 and on behalf of a putative state class of current and former non-exempt hourly employees,¹ seeks
5 preliminary approval of the settlement agreement entered into with defendants J. McCullough
6 Corp. dba Oremor Automotive Group, a California corporation; Oremor of Fresno, Inc. dba
7 Fresno Lexus, a California corporation; Oremor of Glendale LLC dba Toyota of Glendale, a
8 California company; Oremor of Riverside, LLC dba BMW of Riverside, a California company;
9 Oremor of Riverside II, LLC dba Infiniti of Riverside, a California company; Oremor of
10 Riverside RC, LLC dba Riverside Chevrolet, a California company; Oremor of Temecula, LLC
11 dba Temecula Valley Toyota, a California company; Oremor of Tustin, Inc. dba Tustin Toyota,
12 a California corporation; Oremor European, LLC dba Mercedes Benz of El Cajon, a California
13 company; United Recovery, Inc., a California corporation; Oremor of Italy, Inc. dba Fiat of
14 Ontario, a California corporation; Oremor of Italy II, LLC dba Maserati & Alfa Romeo of
15 Ontario, a California company; Oremor of Woodland Hills LLC dba Lexus of Woodland Hills,
16 a California company; Aquirecorp’s Norwalk Auto Auction dba Norwalk Auto Auction, a
17 California corporation; Jeep Chrysler of Ontario, Inc. dba Jeep Chrysler Dodge Ram Fiat, Dodge
18 of Ontario, a California corporation; Romero Motors Corporation dba Ontario Hyundai Mazda,
19 a California corporation; and Empire Nissan, Inc., a California corporation (collectively,
20 “Defendants” or “Oremor Automotive”). The Stipulation of Resolution (“Settlement
21 Agreement”) between Plaintiff and Defendants (together, the “Parties”), if approved, will resolve
22 specific claims of the Plaintiff and Settlement Class Members in exchange for Oremor
23 Automotive’s agreement to pay a maximum amount of ***One Million Eight Hundred Thousand***
24 ***Dollars (\$1,800,000)*** into a ***non-reversionary*** common settlement fund that will be available for
25 distribution to Settlement Class Members. Based upon the data received from Oremor
26

27
28 ¹ “Settlement Class” members are defined as: All persons who are or were employed by Defendants in
the State of California as non-exempt hourly employees at any time from October 1, 2015, and continuing
through March 15, 2020. (“Settlement Class” or “Settlement Class Members”)

Automotive, there are approximately 2,109 Settlement Class Members employed as non-exempt hourly employees during the Settlement Period.

This is a class and representative action against a group of car dealerships in California owned and/or operated by Defendants for abusing their non-exempt hourly employees by violating wage-and-hour laws under the California Labor Code and Business and Professions Code. Plaintiff's lawsuit seeks to recover unpaid wages and overtime, premiums for improper meal and rest breaks, reimbursement of business expenses, restitution, liquidated damages, penalties for improper wage statements, waiting time penalties, wages, civil penalties pursuant to the Private Attorneys General Act ("PAGA"), injunctive and other equitable relief, prejudgment interest, and attorneys' fees and costs.

After engaging in substantial independent investigation and after mediation with the Honorable Peter D. Lichtman (Ret.) of JAMS, one of the preeminent wage and hour class action mediators in California, the Parties agreed, pursuant to a mediator's proposal, to settle Plaintiff's and the other Settlement Class Members' claims alleged in the action for the **non-reversionary** sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) ("Settlement Amount"). After deductions for attorneys' fees and costs to Class Counsel, enhancement payment to the Class Representative, Settlement Administrator costs, and the PAGA payment to the Labor & Workforce Development Agency ("LWDA"), the remaining amount (the "Net Settlement Amount" of approximately \$1,120,000 will be distributed to the Settlement Class.² The entire Net Settlement Amount must be paid out to Settlement Class Members. Payments to the Settlement Class will be determined on a claims-made basis for former employees and will be automatically paid to all current employees who do not request exclusion and **without the need to submit claim forms.**

The settlement is fair, reasonable, and adequate, and in the best interests of Settlement Class Members. Consequently, Plaintiff, with the consent and approval of Oremor Automotive, hereby moves for an order: (1) conditionally certifying the Settlement Class for settlement purposes; (2) granting preliminary approval of the Settlement Agreement; (3) approving the

² Payment of Defendants' share of employer payroll taxes for payments to Settlement Class Members allocated as wages shall be separately funded (i.e., outside of the settlement fund) by Defendants.

1 Notice (comprised of the Notice of Pendency of Class Action and Settlement, and the Notice of
2 Settlement Award) and the Claim Form to former employees; and (4) setting a hearing for final
3 approval of the settlement.

4 **II. THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS**

5 **A. Discovery And Investigation**

6 Prior to initiating this lawsuit, and as early as August 2019, counsel for Plaintiff (herein,
7 “Class Counsel”) thoroughly investigated the claims and considered the facts and circumstances
8 underlying the pertinent issues and applicable law. (Declaration of Anthony J. Orshansky
9 (“Orshansky Decl.”) ¶ 21 filed concurrently herewith). This required thorough discussions and
10 interviews with Plaintiff and several other Settlement Class Members as well as research into
11 the various legal issues involved in the case. After conducting their initial investigation, Class
12 Counsel determined that the claims were well suited for class action adjudication owing to what
13 appeared to be a common course of conduct affecting a similarly situated group of employees.
14 (Id.)

15 As a result, Plaintiff filed this wage and hour class and representative action alleging
16 the following claims: (1) failure to pay wages and overtime compensation; (2) failure to pay
17 minimum wage; (3) rest break liability under Labor Code section 226.7; (4) meal period liability
18 under Labor Code section 226.7; (5) failure to reimburse business expenses under Labor Code
19 section 2802; (6) failure to timely pay wages due at termination or resignation; (7) failure to
20 provide accurate itemized employee wage statements; (8) violations of Business & Professions
21 Code section 17200, *et seq.*; and (9) penalties pursuant to California’s Private Attorneys General
22 Act (Labor Code § 2698, *et seq.*). (Orshansky Decl. ¶ 22.)

23 Defendants deny Plaintiff’s allegations of wrongdoing. Defendants do not believe that
24 any liability to Plaintiff or other Settlement Class Members exist, or that Plaintiff or Settlement
25 Class Members are entitled to any recovery. (Id. ¶ 24.) In settling, Defendants do not admit
26 liability with respect to the alleged claims made by Plaintiff and make no admissions regarding
27 any facts or law related to the lawsuit. (Id.) Defendants also dispute that Plaintiff would be able
28 to certify a class outside of the settlement context because, *inter alia*, Plaintiff’s claims on the

merits would require a series of individualized mini-trials; Defendants agreed to a settlement class only. (Id.)

Class Counsel conducted discovery which yielded information and documentation concerning the claims set forth in the Action, such as Defendants' dealerships' written policies concerning the claims set forth in the Action, including Defendants' policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of Settlement Class Members and the mix of current versus former employees, the average number of hours worked, the wage rates in effect, and length of employment for the average Settlement Class Member. (Id. ¶ 25.)

Defendants produced a substantial amount of documentation for Settlement Class Members, including time and pay records and the employee handbooks, as well as composite data for the Settlement Class. Counsel met and conferred at length in-person and telephonically with defense counsel regarding the information and documents produced. (Id. ¶ 26.)

Class Counsel analyzed the documents produced by Defendants and Settlement Class Members in conjunction with Settlement Class Member interviews to determine Defendants' degree of liability and amounts due in damages. (Id. ¶ 27.)

B. Mediation And Settlement

Thereafter, the Parties participated in a full-day mediation, where they debated and discussed their positions. (Id. ¶ 28.) The Parties participated in a lengthy mediation session before the Honorable Peter D. Lichtman (Ret.). (Id.) During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. (Id. ¶ 29.) These were contentious issues because of the factual and legal complexity of the case. (Id.)

The case did not settle at mediation. (Id. ¶ 30.) The Parties continued to negotiate with the assistance of Judge Lichtman. (Id.) After several weeks, Judge Lichtman made a mediator's proposal for a class-wide settlement, which was ultimately accepted by the Parties. (Id.)

1 Thereafter the Parties engaged in extensive negotiations to draft the Stipulation of Resolution,
2 along with the Notice of Pendency of Class Action and Settlement, Claim Form, and Notice of
3 Settlement Award. (Id.)

4 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks
5 and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class
6 Counsel believe that the recovery being made available to the Settlement Class is fair and
7 reasonable taking into consideration the amounts received in other wage and hour class actions,
8 the risks inherent in litigation of this genre, and the reasonable tailoring of each Settlement Class
9 Members' claim to the settlement award he or she will receive. (Id. ¶ 32.) Further, and based on
10 the settlement negotiations, which were hard fought and conducted in good faith and at arm's
11 length between attorneys with substantial experience litigating class actions and wage and hour
12 cases, the settlement was the product of a non-collusive settlement process in which the Parties
13 were forced to make significant compromises in the interest of reaching a full and complete
14 settlement of the Action. (Id. ¶ 31.)

15 Defendants have concluded that, because of the substantial expense of defending this
16 Action, the length of time necessary to resolve the issues presented therein, the inconvenience
17 involved, and the concomitant disruption to their business operations, it is in their best interest to
18 accept the terms of this Settlement Agreement. (Settlement Agreement ¶ II.F.) Defendants deny
19 each of the allegations and claims asserted against them in the Action. (Id.) However, Defendants
20 nevertheless desire to settle the Action for the purpose of avoiding the burden, expense, and
21 uncertainty of continuing to defend the Action and for the purpose of putting to rest the
22 controversies engendered by further litigation. (Id.)

23 **III. SUMMARY OF BASIC SETTLEMENT TERMS**

24 Under the terms of the settlement, Defendants agree to pay a non-reversionary amount of
25 \$1,800,000 to settle the claims asserted in the Action. (See, Settlement Agreement ¶ I.P.) This
26 amount shall be inclusive of all settlement payments to Settlement Class Members, the
27 enhancement award to the Class Representative, all expenses and costs to the Settlement
28 Administrator, CPT Group, Inc., all attorneys' fees and costs to Class Counsel, and payment to

the California LWDA for civil penalties pursuant to statute. The amount available for distribution to Settlement Class Members is determined by deducting the following from the Settlement Amount:

- Up to 33-1/3 percent of the Settlement Amount in attorneys' fees to Class Counsel;
- Up to \$15,000 in litigation costs to Class Counsel;
- Up to \$10,000 to the Class Representative as an enhancement and in exchange for a general release of claims;
- \$30,000 – which is 75% of the \$40,000 allocated – to the LWDA for civil penalties pursuant to statute; and
- Up to \$25,000 to the Settlement Administrator to notify Settlement Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$1,120,000, is called the “Net Settlement Amount.” (Settlement Agreement ¶ I.H.) The entire Net Settlement Amount must be paid out to Settlement Class Members. Payments to the Settlement Class will be determined on a claims-made basis for former employees and will be automatically paid to all current employees who do not request exclusion and without the need to submit claim forms.

A. The Settlement Provides For Reasonable Monetary Payments

If all of the approximately 2,109 Settlement Class Members participate in the settlement and assuming hypothetically that distribution was on an individual *pro rata* basis, then the Net Settlement Payment would be an estimated \$531.06 per Settlement Class Member. Of course, any Settlement Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out. (Orshansky Decl. ¶ 8.)

In actuality, a participating Settlement Class Member will receive a proportional share of the Net Settlement Amount based on his or her eligible workweeks. (Settlement Agreement ¶ IX.A.) Each Net Settlement Payment will be determined by dividing the Net Settlement Amount by the total number of eligible workweeks worked by all Settlement Class Members during the Settlement Period (the “Weekly Amount”) and then multiplying the Weekly Amount by the

1 number of eligible workweeks of the individual Settlement Class Member as determined by the
2 Settlement Administrator, less any applicable withholding taxes based on the Parties' stipulated
3 allocation of the Net Settlement Amount. (Id.) If Settlement Class Members claim less than the
4 Net Settlement Amount, then the difference between the claimed amount and the Net Settlement
5 Amount shall be distributed on a *pro rata* basis to such participating Settlement Class Members.
6 (Id.) As a result, the consideration paid to each Settlement Class Member is tailored to the impact
7 of Oremor Automotive's alleged violations as well as the claims he or she is releasing if he or
8 she does not opt out of the settlement. (Orshansky Decl. ¶ 7.) Of course, any Settlement Class
9 Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery
10 may opt out. (Settlement Agreement ¶ VIII.C.)

11 **B. Attorneys' Fees, Costs, and Representative Enhancement Payments**

12 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of
13 seeking final approval of the settlement in the amount of \$10,000 for his services to the
14 Settlement Class and a general release of all claims against Defendants. (Settlement Agreement
15 ¶ XII.); (Orshansky Decl. ¶ 9.) "[I]ncentive awards are fairly typical in class action cases . . . and
16 are intended to compensate class representatives for work done on behalf of the class [and] to
17 make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee*
18 *Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393-1394. Plaintiff's requested enhancement
19 payment is intended to recognize the significant benefits conferred upon the Settlement Class
20 due to the time and effort that Plaintiff expended on behalf of the Settlement Class, including
21 providing factual information and documents to Class Counsel, identifying potential witnesses,
22 reviewing documents, discussing the claims and theories at issue in the case with Class Counsel,
23 participating in mediation, as well as the significant risks Plaintiff undertook by agreeing to serve
24 as the named plaintiff in this case, and the fact that Plaintiff agreed to a general release of all
25 claims subject to a waiver of Civil Code section 1542. See, (Settlement Agreement ¶ VI.B.);
26 (Orshansky Decl. ¶ 9.)

27 Class Counsel will apply for an attorneys' fees award of 33-1/3 percent of the Settlement
28 Amount, and up to \$15,000 in costs. (Settlement Agreement ¶ XI.); (Orshansky Decl. ¶ 10.)

1 Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,
2 expensive, and time-consuming litigation on a purely contingent fee basis. Class Counsel have
3 incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's
4 claims, conducting legal research and analysis, conducting discovery, meeting and conferring in-
5 person and telephonically with defense counsel; interviewing putative class members, reviewing
6 documents produced by Defendants, including corporate policies, employee time and payroll
7 records, building damages models, preparing for and attending mediation, routine case updates
8 and consultations with client, negotiating and preparing the long-form Settlement Agreement,
9 and preparing this motion for preliminary approval and supporting documents. (Orshansky Decl.
10 ¶ 10.) Class Counsel will also expend future attorney time in attending the hearing on this Motion,
11 overseeing the class notice and administration process, drafting the Final Approval Motion and
12 supporting documents, and attending the Final Approval hearing, among other tasks, such as
13 addressing questions from Settlement Class Members. (Id. ¶ 11.)

14 Both California and federal courts have recognized that an appropriate method for
15 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
16 as a result of the settlement. *See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal. 5th 480,
17 506 ("the percentage of fund method survives in California class action cases..."); *Wershba v.*
18 *Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 (recognizing both the "percentage of
19 recovery" and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees
20 in the range of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class*
21 *Actions* § 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable
22 percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee
23 award from a common fund in order to assure that the fees do not consume a disproportionate
24 part of the recovery obtained for the class, although somewhat larger percentages are not
25 unprecedented.")

26 Class Counsel submit that their request for attorneys' fees is reasonable when viewed as
27 an overall percentage of the settlement in light of the substantial risks and significant work
28 undertaken, the results obtained for the Settlement Class, and the efficiency with which the

Parties have conducted the litigation. (Orshansky Decl. ¶ 12.) Assuming that the Court grants preliminary approval, Class Counsel will seek an award of attorneys’ fees and litigation costs at the time of seeking final approval of the settlement.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Express judicial policy favors maintaining wage and hour actions as class actions. *Prince v. CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462 (finding that California public policy “encourages the use of the class action device”). Any doubt as to the appropriateness of class treatment should be resolved in favor of class certification, subject to later modification if necessary. *Id.* at 473-475. The decision to certify a class is purely a procedural one and should be based on the allegations in the operative complaint, and not in the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 439-441.

To certify a settlement class, the trial court must find the two primary requirements for maintaining a class action: (1) there must be an ascertainable class and (2) there must be a well-defined community of interest in the questions of law and fact involving the parties to be represented. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 805-809; *Daar v. Yellow Cab Company* (1967) 67 Cal. 2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal. App. 4th 467, 471; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341. These criteria are met here for the reasons set forth below.

A. There Is An Ascertainable And Sufficiently Numerous Settlement Class

Whether a class is ascertainable is determined by examining the class definition, the size of the class and the means available for identifying class members. *See, Vasquez, supra*, 4 Cal. 3d at 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263, 1271; *Miller v. Woods* (1983) 148 Cal. App. 3d 862, 873. Class members are “ascertainable” where they may be readily identified without unreasonable expense or time.

Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v. Target Corp.* (2010) 189 Cal. App. 4th 905, 919. Settlement Class Members are comprised of: “All persons who are or were employed by Defendants in the State of California as non-exempt

hourly employees at any time from October 1, 2015, and continuing through March 15, 2020.” (Settlement Agreement ¶ I.Q. R.) Thus, all Settlement Class Members are of a specific type (non-exempt employees and paid on an hourly basis) employed within California. Defendants are required to and do maintain a record of each such person, including contact information and Social Security numbers. (Orshansky Decl. ¶ 76.) Documents and information exchanged reflect a class of approximately 2,109 current and former hourly non-exempt employees working in California during the Settlement Period. (Id.) Thus, the Settlement Class satisfies the ascertainability and numerosity requirements. *See e.g., Collins v. Rocha* (1972) 7 Cal. 3d 232 (finding a class of 44 farm workers sufficiently numerous).

B. There Is A Well-Defined Community Of Interest

A community of interest is established by the preponderance of common issues of law and fact. *See, Vasquez, supra*, 4 Cal. 3d at 811. The requirement of a community of interest:

[D]oes not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered...The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiffs’ favor whatever questions were common to the class. *Id.* at 809.

Here, litigation is predicated on uniform company policies principally revolving around Defendants’ timekeeping policies, employee compensation, as well as meal and rest period practices and reimbursement policies. Plaintiff has alleged a single top-down compensation scheme where “the relevant proof [does] not vary among class members” and “clearly present[] a common question fundamental to all class members.” *See, In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123 (citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D. 493, 518). California courts show “no hesitancy” in inferring class-wide causation, class-wide injury, and class-wide damages when a common course of action has been shown. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1350 (granting class certification in a manufacturing defect case when a common course of action had been proven). This inference “*eliminates* the need for each class member to

1 prove individually the consequences of the defendants' actions to him or her." *Id.* at 1351
2 (emphasis added). Thus, the outcome of this matter depends upon questions that are common to
3 members of the Settlement Class. These types of claims are commonly held to be proper for class
4 certification. *See, e.g., Bluford v. Safeway, Inc.* (2013) 216 Cal. App. 4th 864, 871 (reversing
5 denial of rest period claim); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal. App.
6 4th 701, 726 (certifying meal period claim).

7 **C. The Claims Of The Named Plaintiff Are Typical**

8 The typicality requirement is satisfied where class representatives have claims that are
9 typical of those of the rest of the class. *B.W.I Custom Kitchen, supra*, 191 Cal. App. 3d at 1347.
10 Plaintiff's claims are typical of those held by the members of the Settlement Class. (Orshansky
11 Decl. ¶ 78.) Like all other Settlement Class Members, Plaintiff was a non-exempt hourly
12 employee working at Defendants' automobile dealerships during the Settlement Period. (*Id.*)
13 Plaintiff was not compensated for all of the hours he worked, was not provided with legally
14 compliant meal and rest breaks, and was required to incur business expenses necessary to perform
15 his job duties without reimbursement. (*Id.*) Plaintiff was therefore impacted by the same
16 challenged policies that allegedly injured the Settlement Class as a whole and was subject to the
17 same defenses forwarded by Defendants as to the Settlement Class and is therefore typical. (*Id.*)

18 **D. Named Plaintiff And Class Counsel Will Fairly And Adequately Represent**
19 **The Settlement Class**

20 The adequacy of representation requirement examines conflicts of interest between
21 named parties and the class(es) they seek to represent. *Capital People First v. Department of*
22 *Developmental Services* (2007) 155 Cal. App. 4th 676, 697. Here, Plaintiff and Class Counsel
23 will adequately represent the Settlement Class, as there are no conflicts between the named
24 Plaintiff and the Settlement Class he seeks to represent. (Orshansky Decl. ¶ 79); *McGhee v.*
25 *Bank of America* (1976) 60 Cal. App. 3d 442, 450 (finding adequacy satisfied where there was
26 no indication that plaintiff's counsel were not qualified and the named plaintiff had no interests
27 antagonistic to those of the proposed class). Class Counsel also have extensive experience in
28 wage and hour litigation. (Orshansky Decl. ¶¶ 70-74, 79.)

1 **E. A Class Action Is Superior To A Multiplicity Of Litigation**

2 In making its class certification decision, the court must determine that a class action
3 would be superior to alternative means for the fair and efficient adjudication of the litigation. By
4 consolidating potentially over two thousand individual actions into a single proceeding, this
5 Court’s use of the class action device enables it to manage this litigation in a manner that serves
6 the efficiency interests of the litigants and the judicial system. Absent class treatment, the only
7 alternative would be to force more than two thousand employees to file individual actions. *Sav-*
8 *on Drug Stores v. Super. Ct.* (2004) 34 Cal. 4th 319, 339, fn. 10 (stating “[t]he relevant
9 comparison lies between the costs and benefits of adjudicating Plaintiffs’ claims in a class action
10 and the costs and benefits of proceeding by numerous separate actions – not between the
11 complexity of a class suit that must accommodate some individualized inquires and the absence
12 of any remedial proceeding whatsoever.”) Finally, in the context of settlement, the superiority
13 concerns are essentially non-existent.

14 **V. THE TWO-STEP APPROVAL PROCESS**

15 Any settlement of class action litigation must be reviewed and approved by a court. This
16 is accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a
17 detailed review after the notice has been distributed to the class members for their comments or
18 objections. In this regard, the Manual for Complex Litigation (Second) explains:

19 A two-step process is followed when considering class settlements...If the
20 proposed settlement appears to be the product of serious, informed, non-collusive
21 negotiations, has no obvious deficiencies, does not improperly grant preferential
22 treatment to class representatives or segments of the class, and falls within the
23 range of possible approval, then the court should direct that notice be given to the
24 class members of a formal fairness hearing, at which evidence may be presented
25 in support of and in opposition to the settlement.

26 See, Manual for Complex Litigation (Second) (1985) at § 30.44. The preliminary approval of the
27 class action settlement by the trial court is simply a conditional finding that the settlement appears
28 to be within the range of acceptable settlements. See, e.g., Newberg, § 11.25; *North County*
Contractor’s Assn., Inc. v. Touchstone Ins. Services (1994) 27 Cal. App. 4th 1085, 1094-1095;
Federal Manual for Complex Litigation, Second (“MCL 2d”) § 30.44 (“Preliminary approval is

appropriate if the agreement is ‘fair, reasonable, and adequate under the circumstances’”). Thus, the preliminary approval of the class action settlement by the Court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. A review of the preliminary approval criteria demonstrates a substantial basis for granting the preliminary approval requested by this Motion and proceeding to a full settlement hearing.

VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

As a matter of public policy, courts both encourage the use of the class action device and favor settlement over continued litigation. *See, e.g. Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 (“Courts have long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system.”); *State v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 471; *Class Plaintiffs v. City of Seattle* (1992) 955 F. 2d 1268, 1276 (“[S]trong judicial policy...favors settlements, particularly where complex class action litigation is concerned.”); Newberg, § 11.41. Settlement is favored, and settlement agreements are realistically assessed. *Stamburgh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F. 2d 438, 447 (“The fact that plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.”)

To summarize, the settlement here is fair because it offers payment to each Settlement Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the settlement proceeds whereby the funds are allocated to individual Settlement Class Members proportionally based on the respective number of eligible workweeks that they worked during the Settlement Period. (Orshansky Decl., *passim*.)

A. The Settlement Is Entitled To A Presumption Of Fairness

Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. *See, Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980) 560 F. Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F. 2d 438, 447; *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.* (7th Cir. 1987)

834 F. 2d 677, 681. Courts do not substitute their judgment for that of the proponents, particularly when settlement has been reached by experienced counsel familiar with the litigation. *Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767 at 24. As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's length, and informed by substantial factual and legal investigations. (*Orshansky Decl., passim.*)

1) Negotiations Were At Arm's-Length Before A Respected Mediator

The Parties engaged in a mediation session before Hon. Peter D. Lichtman (Ret.), an experienced and well-regarded mediator of complex wage and hour class actions. (*Id.* ¶ 28.) The settlement negotiations were hard-fought and the settlement is the product of an adversarial, non-collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the Action. (*Id.* ¶ 31.)

2) Investigation Was Sufficient To Allow Counsel To Act Intelligently

Throughout this case, Settlement Class Members have been represented by counsel who have years of experience in employment class action litigation. (*Id.* ¶¶ 70-74.) Class Counsel devoted a considerable amount of time to the prosecution of this case, including, but not limited to, interviewing Plaintiff and other Settlement Class Members at length and on repeated occasions; reviewing Defendants' dealerships' written policies concerning the claims set forth in the Action, including Defendants' policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing all wages at separation; reviewing and analyzing Settlement Class Members' time and pay records; meeting and conferring at length in-person and telephonically regarding the information and documents produced; drafting pleadings; researching California law, preparing for and attending mediation; and negotiating and finalizing the settlement and related documents. (*Id.* ¶¶ 25-30.)

3) Class Counsel Are Experienced In Similar Litigation

Class Counsel believe that the settlement is fair and reasonable and serves the best interests of the Settlement Class Members. (*Id.* ¶ 32.) Although the recommendations of counsel

proposing the class settlement are not conclusive, the Court can properly take the recommendations into account, particularly if counsel have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and significant discovery has been completed. *See, Newberg*, § 11.47. Here, Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions and have been appointed as class counsel in numerous cases alleging similar claims. (Orshansky Decl. ¶¶ 70-74.)

B. The Settlement Is Fair, Reasonable, And Adequate

To make a fairness determination, the Court should consider several factors, including “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery and the stage of proceedings, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.* (1986) 48 Cal. App. 4th 1794, 1801. “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstance of each case.” *Wershba, supra*, 91 Cal. App. 4th 224, 245. As discussed below, the proposed settlement is fair, adequate, and reasonable in light of the overall factors in this case.

1) The Strength Of Plaintiff’s Case

Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages model for Defendants’ liability. (Orshansky Decl. ¶ 34.) Although Plaintiff steadfastly maintains that his claims are meritorious, he acknowledges that there were substantial risks and uncertainty in proceeding with class certification and trial. (*Id.*) Defendants presented numerous defenses to Plaintiff’s claims, both on the merits and with respect to class certification. (*Id.*) For example, Oremor Automotive argued that Plaintiff would not be unable to certify a class outside of the settlement context because Plaintiff and other Settlement Class Members executed arbitration agreements with class action waivers. (*Id.* ¶ 34.) If these agreements are enforced, Settlement Class Members would not be able to seek relief on a class-wide basis. *See Epic Sys. Corp. v. Lewis* (2018) 138 S. Ct. 1612 (class action waivers in arbitration agreements are enforceable).

1 Instead, Plaintiff would be limited to seeking individual relief in arbitration and PAGA relief in
2 Court. It is also possible that Defendants would be able to stay and delay the resolution of
3 Plaintiff's PAGA claims in Court while the individual claims were being resolved in arbitration.
4 C.C.P. § 1281.4. Although Plaintiff was prepared to litigate these claims through class
5 certification and, ultimately, through trial, given the substantial amount offered in settlement,
6 Plaintiff predicted that it was far from certain that Plaintiff would be able to recover a greater
7 amount at trial, particularly after considering the increased litigation costs that would accrue.
8 (Orshansky Decl. ¶ 37.) Thus, this factor supports preliminary approval of the settlement.

9 **2) Risk, Expense, Complexity, And Duration Of Further Litigation**

10 Although Plaintiff conducted extensive discovery prior to mediation, the Parties agreed
11 to focus on exhausting early settlement efforts at mediation before launching into full-fledged
12 and hotly-contested litigation. (Id. ¶ 35.) Therefore, absent settlement, the Parties would have
13 needed to conduct substantial additional discovery, such as the production of voluminous records
14 and numerous depositions of experts and percipient witnesses, and prepare the case for class
15 certification and trial. (Id.) The Parties would have had to depose a number of people such as
16 managers, supervisors, and employees in order to establish liability. (Id.) Discovery disputes
17 would have been in the offing. (Id.) This settlement avoids the considerable attorneys' fees and
18 costs associated with conducting gargantuan and costly supplemental discovery, moving for class
19 certification and potentially summary judgment or adjudication, and ultimately, trial, as well as
20 the risks and the accompanying burden of continued litigation on the Court. (Id.) Thus, this factor
21 supports preliminary approval of the settlement.

22 **3) Risk Of Maintaining Class Action Status**

23 Settlement was reached prior to class certification and the result was a successful outcome
24 for the Settlement Class. (Id. ¶ 36.) Yet, class certification was by no means a foregone
25 conclusion. (Id.) For example, Plaintiff would face significant hurdles to certification given that
26 Settlement Class Members encompass a variety of job positions occupied by non-exempt hourly
27 employees across 14 California dealerships. (Id.) More importantly, Settlement Class Members
28 signed arbitration agreements with class action waivers as a condition of their employment. (Id.)

1 If Defendants’ arbitration agreement defense is successful, it would severely limit the potential
2 relief available to Settlement Class Members. (*Id.*) Even if Plaintiff prevailed and certified a class
3 action, there is no guarantee Defendants would not later move for and obtain decertification. (*Id.*)
4 If the Court either denied class certification or later decertified it, the Settlement Class would
5 recover nothing and Settlement Class Members would be forced to retain their own counsel and
6 proceed on the basis of individual claims only. (*Id.*) Here, Settlement Class Members are
7 presented a great opportunity to avoid those risks and receive substantial monetary benefits,
8 thereby also weighing in favor of preliminary approval.

9 **4) Amount Offered In Settlement Given Realistic Value Of Claims**

10 A settlement is not judged against what might have been recovered had a plaintiff
11 prevailed at trial, nor does the settlement have to provide 100% of the damages to be fair and
12 reasonable. *Wershba, supra*, 91 Cal. App. 4th 224, 246, 250 (acknowledging that “Compromise
13 is inherent and necessary in the settlement process ... even if the relief afforded by the proposed
14 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
15 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
16 settlement in which each side gives in the interest of avoiding litigation.”) The proposed
17 settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face
18 of disputed claims. Moreover, Settlement Class Members executed arbitration agreements with
19 class action waivers which if enforced would preclude them from obtaining any relief on a class-
20 wide basis.

21 Plaintiff’s estimate of the settlement recovery is a reasonable percentage of possible
22 recoverable damages at trial. Plaintiff’s damages analysis shows that the settlement reflects an
23 estimated 50.14% of the maximum possible damages recoverable at trial. (*Orshansky Decl.* ¶¶
24 38, 69.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims
25 in question, *see, Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 123, this case
26 clearly meets requirements establishing that the class settlement is within the “ballpark” of
27 reasonableness.

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1 clock work is not amenable to class treatment, because employees worked in a variety of
2 departments with different requirements at 14 dealerships, and it would require an unmanageable
3 series of mini-trials to determine how much time was spent without pay. (Id.)

4 Meal and Rest Period Violations

5 Defendants contend that they had practices, policies, and procedures to provide meal and
6 rest breaks every workday to their employees that fully complied with the law. (Id. ¶ 47.)
7 Defendants vehemently argue that they complied with the requirements articulated by the
8 California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th
9 1004. (Id.) Specifically, Defendants maintain they “provide” employees with a reasonable
10 opportunity to take timely meal periods of at least 30 minutes, relieve employees of all duties
11 during meal periods, and relinquish control over employees’ activities, including the ability to
12 leave the premises during meal periods. (Id.) Defendants also maintain that they provided duty-
13 free rest breaks of not less than ten minutes for every major fraction of four hours worked as required
14 by Labor Code section 226.7. (Id.) Defendants obtained declarations from employees attesting
15 to this practice of providing compliant breaks. (Id.) Defendants argue that they provided all
16 required meal and rest breaks in a legally compliant manner and that any late, short, or missed
17 breaks were not the result of any overarching policy/practice. (Id.) To the extent that Settlement
18 Class Members failed to take their meal and rest breaks or took a short or late meal or rest break,
19 Defendants contend that they did so voluntarily and that all applicable meal and rest breaks were
20 still provided to them. Thus, Defendants argue that they did not act unlawfully to deprive
21 Settlement Class Members of meal and rest periods. Defendants contend that the issue of
22 voluntary waiver would necessarily devolve into a series of individualized mini-trials,
23 precluding class certification. *See, Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th
24 1, 25 (holding that the defendant must be provided an opportunity to litigate affirmative
25 defenses, even when they turn on individual questions).

26 Oremor Automotive contends that there were multiple individual issues that would pose
27 challenges to certification, including and not limited to, (a) whether any meal and rest periods
28 were non-compliant, and (b) why they were non-compliant. (Orshansky Decl. ¶ 48.) Further,

1 Defendants contend that Settlement Class Members worked in different job positions and had
2 different managers, and that as a result, there was variation to the circumstances that could
3 allegedly cause the employees to be deprived of the opportunity to take legally-compliant, duty-
4 free meal and rest periods, and this variation in circumstances raised highly individualized
5 questions of fact. (Id.)

6 Finally, as with Plaintiff's other claims, Defendants argue that meal and rest break claims
7 are subject to binding arbitration agreements. (Id. ¶ 49.) In addition, even absent the arbitration
8 agreements, Defendants vehemently contend that their written policies are facially compliant
9 under *Brinker v. Superior Court* (2012) 53 Cal. 4th 1004, are an obstacle to both certification
10 and success on the merits of the claim – especially across 14 different dealership locations. (Id.)
11 Defendants argue that no common evidence can establish *why* any employees clocked in early
12 from and/or late for a break. (Id.) Assuming *arguendo* that the class action waiver did not apply,
13 Defendants maintain that certification would be difficult because individualized inquiries
14 regarding the timing and extent of deviations from ordinary meal and rest break policies would
15 significantly predominate. (Id.)

16 Class Counsel considered the risk of further litigating the case, including the significant
17 additional costs that would be incurred by both sides if the matter did not settle, as litigating a
18 class action through class certification, trial, and/or appeals is very expensive. (Id. ¶ 50.)
19 Litigating meal and rest period claims is inherently difficult as an employer's records, as is the
20 case here, do not usually indicate when a meal period is interrupted and when a rest period is
21 short, late, interrupted, or missed entirely. (Id.) While Class Counsel disagreed with Defendants'
22 arguments and factual contentions, Class Counsel recognized the circumstances and realities of
23 the case, applicable case law and regulations, costs and expenses of further litigation and
24 certification, and risks to recovery, and applied appropriate discounts for them. (Id.)

25 Defendants dispute Plaintiff's characterization of working conditions, liability, and
26 damages, and possesses documentary and testimonial evidence rebutting Plaintiff's allegations.
27 (Id. ¶ 51.) Notwithstanding the strength of Defendants' defenses to certification and merits,
28 Class Counsel considered information obtained through investigations and from Plaintiff and

1 other Settlement Class Members, as well as class data provided by Defendants, and created
2 damages/valuation models prior to the mediation. (*Id.*) Based on Class Counsel’s investigation
3 and discovery evidencing a violation rate of 14% of missed, interrupted, or untimely meal and
4 rest breaks, the estimated meal and rest break claim valuation is estimated to be \$2,747,009.49,
5 without discounting associated risks of certification or merits. (*Id.*)

6 Unreimbursed Expenses

7 Plaintiff alleges a cause of action under Labor Code section 2802(a) which states that an
8 employer must reimburse employees for all necessary expenditures that employees incur in
9 discharging their duties. Here, Settlement Class Members were required to use their personal cell
10 phones to communicate with customers, supervisors, coworkers and other persons for reasons
11 related to work, yet Defendants failed to reimburse for these necessary business expenses. (*Id.* ¶
12 52.)

13 Defendants contend that they have a policy and practice of reimbursing employees for
14 necessary business-related expenses. (*Id.* ¶ 53.) Defendants also contend that, with respect to the
15 alleged expenses for which Plaintiff and other Settlement Class Members never requested
16 reimbursement from Defendants, Defendants did not know and had no reason to know that the
17 alleged business-related expenses were incurred. (*Id.*) Defendants maintain that employees were
18 able to use phones at the workplace to communicate with customers, supervisors, coworkers and
19 other persons for reasons related to work and that it was rare, if ever, that employees were
20 required to use their personal cell phones for business purposes. (*Id.*) Moreover, to the extent it
21 occurred, Defendants assert that this claim is not suitable for class treatment as it would require
22 individualized determinations as to whether each employee used a personal cell phone for work-
23 related purposes and, if so, how much of that use was a reasonable percentage of his or her
24 individual monthly phone bill. (*Id.*)

25 Defendants also contend that the California Labor Code only requires reimbursement of
26 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
27 work—and argued that distinguishing a necessary expense from an unnecessary one would
28 require individualized inquiry. (*Id.* ¶ 54.); see Cal. Lab. Code § 2802; *Gattuso v. Harte-Hanks*

1 *Shoppers, Inc.* (2007) 42 Cal. 4th 554. Furthermore, whether an expense was necessary would
2 depend in part on the reasonableness of the employee's choice and would thus have to be
3 established by way of extensive individual factual inquiry and/or statistical evidence. *Cochran v.*
4 *Schwan's Home Services, Inc.* (2014) 228 Cal. App. 4th 1137.

5 For the foregoing reasons and taking into account the wide variety of telephone plans,
6 providers and costs which creates evidentiary complexities on an individual basis, let alone class-
7 wide, Plaintiff assigns a *de minimis* value to this claim. (Orshansky Decl. ¶ 55.)

8 Wage Statement Violations

9 Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendants' failure
10 to provide accurate itemized wage statements. (Id. ¶ 56.) Failure to comply with the statute
11 entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the initial
12 pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
13 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000).
14 See, Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action
15 because if Defendants did not provide wages for all hours worked, meal and rest breaks, and so
16 forth, then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 56.) Based on
17 the \$50 initial violation, plus the \$100 per pay period subsequent violation rates, Plaintiff
18 estimates the total wage statement exposure to be \$1,917,500. (Id.)

19 Defendants contend, however, that Labor Code section 226(e) penalties are not
20 automatic. Rather, the employee must show that Defendants' noncompliance was "knowing and
21 intentional." Defendants suggest that any noncompliance was not knowing and intentional. (Id.
22 ¶ 57.) Moreover, Defendants argue that meal and rest period violations cannot support derivative
23 wage statement penalties. (Id.); see *Jones v. Spherion Staffing, Inc.* (C.D. Cal. Aug. 7, 2012) Case
24 No. LA CV11-06462, 2012 WL 3264081 at *8-9 (granting defendant's motion for judgment on
25 the pleadings because plaintiffs "cannot advance a claim for noncompliant wage statements or
26 failure to pay wages due upon termination based solely on alleged violations of section 226.7.")
27 Finally, because the damages for this cause of action are penalties, the statute of limitations is
28 only one year prior to the filing of the original complaint. See, Code Civ. Proc. § 340. The Parties

1 discussed these issues and, in light of these considerations, Class Counsel factored in a reduction
2 of liability and damages for this cause of action. (Orshansky Decl. ¶ 57.)

3 Derivative Waiting Time, PAGA Penalties, and UCL Claims

4 Plaintiff further asserts causes of action against Defendants for failure to timely pay all
5 wages due employees at separation, for civil penalties under the PAGA, and for engaging in
6 unfair, unlawful and fraudulent business practices. *See*, Labor Code §§ 203, 2699, *et seq.* and
7 Cal. Business and Professions Code § 17200, *et seq.* As with other claims, Defendants vigorously
8 disagree that they engaged in any conduct giving rise to liability or entitlement to recovery of
9 penalties or equitable relief. (Orshansky Decl. ¶ 58.)

10 Defendants argue that waiting time penalties are not appropriate because they attempted
11 to pay employees all final wages owed in good faith upon their separation, thereby precluding a
12 finding of willfulness necessary to obtain waiting time penalties. (Id. ¶ 59.) Moreover,
13 Defendants maintain that no waiting time penalties were recoverable from alleged meal or rest
14 period violations. (Id. ¶ 59.); *see Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal. App.
15 4th 1242, 1261 (holding that waiting time penalties are not recoverable as a result of unpaid meal
16 and rest period premiums). To the extent that Plaintiff's waiting time penalty claim is derivative
17 of the off-the-clock work, Defendants argue that it is overstated because not all of the former
18 employees could be proven to have experienced an underpayment of wages. (Orshansky Decl.
19 ¶ 59.)

20 The success of Plaintiff's PAGA claim is wholly dependent upon the success of his
21 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
22 Defendants contend that these penalties are derived from the underlying wage and hour
23 violations discussed above, which Defendants disputed. *See e.g., Green v. Lawrence Service Co.*
24 (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's success was
25 determined by the merits of its underlying claims). (Orshansky Decl. ¶ 60.) Defendants
26 maintained and continue to maintain that they had legally compliant employment policies and
27 practices throughout the statutory period. (Id.) Defendants denied and continue to deny that
28 they ever violated any provision of the California Labor Code and argued that, even assuming

1 *arguendo* that such violations occurred, Defendants will not be treated as having engaged in
2 subsequent violations giving rise to heightened penalties. (*Id.*) In other words, Defendants
3 argue that heightened civil penalties for subsequent violations would not be assessed unless it
4 could be shown that Defendants had notice that they were violating the law, e.g., they had been
5 cited by a labor agency or adjudged by a court to have done so. *See, e.g., Amaral v. Cintas*
6 *Corp.* (2008) 163 Cal. 4th 1157, 1209. Thus, Defendants contend that, at best, even if a violation
7 giving rise to a penalty was shown for each pay period, only the lower civil penalty associated
8 with initial violations would apply. (*Orshansky Decl.* ¶ 60.)

9 Importantly, to prevail on the PAGA claim, Defendants contend that some courts have
10 required a plaintiff to show at the outset that he or she has suffered injury, in order to establish
11 standing, and that Plaintiff would also have to prove all requisite elements to prove violations
12 of the underlying California Labor Code provisions, in order to show that Defendants’ conduct
13 gives rise to penalties. (*Id.* ¶ 61.) The unpaid wages and meal and rest period allegations are
14 fundamental to this action; however, for the reasons discussed above, there were substantial
15 challenges to showing liability and exposure for these claims. (*Id.*) Defendants argue that
16 Plaintiff would not be able to establish violations of the underlying California Labor Code
17 provisions and the fundamental allegations regarding unpaid wages and meal and rest periods.
18 (*Id.*) Defendants also contend that multiple individualized issues vitiated the manageability of
19 representative adjudication of PAGA penalties. (*Id.*)

20 Defendants also contend that, before a PAGA claim could be tried, under existing law,
21 the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a
22 theory of uniform wage and hour practices relating to a large group of aggrieved employees, is
23 sufficiently “manageable” so as not to interfere with Defendants’ right to due process. (*Id.* ¶
24 62.) Defendants allege that Settlement Class Members’ job duties and work hours varied. (*Id.*)
25 Defendants contend that there was variation as to the circumstances that could allegedly cause
26 the employees to work off the clock or to be deprived of the opportunity to take legally
27 compliant, duty-free meal and/or rest periods. (*Id.*) Defendants further contend that these issues
28 presented challenges not only to liability but also challenges to Plaintiff’s ability to show that a

1 PAGA claim could be efficiently and manageably adjudicated without abridging Defendants’
2 due process rights. (*Id.*) Moreover, the Court has discretion to reduce any award of PAGA
3 penalties where it views them as duplicative. *See*, § 2699e(2) (the Court may “award a lesser
4 amount than the maximum civil penalty amount [authorized by PAGA] if, based on the facts
5 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
6 arbitrary and oppressive, or confiscatory.”). (*Orshansky Decl.* ¶ 63.)

7 Defendants also point to case law demonstrating that courts have attributed little separate
8 value to PAGA claims, for example, allowing them to be resolved for \$0 where the other
9 underlying California Labor Code claims are being resolved. *See, e.g., Matter of Nordstrom*
10 *Commission Cases* (2010) 186 Cal. App. 4th 576, 588-590 (holding no abuse of discretion by
11 the trial court in approving the allocation of \$0 toward PAGA penalties, where PAGA claim is
12 resolved as a part of an overall resolution of the underlying California Labor Code violations);
13 *Franco v. Ruiz Food Prods, Inc.* (E.D. Cal. Nov. 27, 2012) No. 1:10-cv-02354-SKO, 2012 WL
14 5941801, at *14 (approving allocation of \$10,000, out of the settlement of \$2.5 million, toward
15 the settlement of the PAGA claim); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012)
16 No.1:10-CV-0324-AWI-SKO, 2012 WL 5364655, at *3 (approving the allocation of \$10,000,
17 out of the settlement of \$3.7 million, toward the settlement of the PAGA claim); *Chu v. Wells*
18 *Fargo Investments, LLC* (N.D. Cal. Feb. 16, 2011) No. C 05-4526 MHP, C 0647924 MHP, 2011
19 WL 672645, at *1 (approving the allocation of \$10,000, out of the settlement of \$6.9 million,
20 toward the settlement of the PAGA claim); *Jack v. Hartford Ins. Co.* (S.D. Cal. Oct. 13, 2011)
21 No. 3:09-cv-1683-MMA (JMA), 2011 WL 4899942, at *18 (approving the allocation of \$3,000,
22 out of the settlement of \$1.2 million, toward the settlement of the PAGA claim); *Schiller v.*
23 *David’s Bridal, Inc.* (E.D. Cal. June 11, 2012) 2012 WL 2117001, at *14 (approving the
24 allocation of \$10,000, out of the settlement of \$518,245, toward settlement of the PAGA claim).
25 (*Orshansky Decl.* ¶ 64.)

26 Plaintiff calculated an estimate of approximately \$5,090,160 in waiting time penalties
27 (approximately 1,270 former employees) and \$3,294,200 in PAGA penalty exposure (using the
28

1 “initial” \$100 per pay period violation as opposed to the \$200 subsequent per violation rate). (Id.
2 ¶ 65.)

3 Class Counsel applied discounts to assess the likely recovery of waiting time penalties.
4 Class Counsel also considered the likelihood of prevailing on each of the underlying claims, with
5 the additional hurdles required to establish waiting time penalties, such as the difficulty of
6 proving the “willful” prong of section 203. (Id. ¶ 66.) Additionally, Class Counsel weighed
7 applicable case law, the costs and expenses associated with further litigation and certification,
8 the circumstances and realities of the case, and risks to recovery, and applied appropriate
9 discounts for them. (Id.)

10 For the PAGA claim, Class Counsel applied discounts for the risks in establishing
11 manageability and possible bifurcation of discovery and/or trial, the risks regarding success on
12 the merits and establishing liability, and the risks with proving the extent of penalties that are
13 warranted and possible discretionary reduction of penalties by the Court. (Id. ¶ 67.)

14 Although, strictly speaking, class certification requirements are not required to be
15 satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication
16 and valuation of a PAGA claim is uncertain. Instead, what is clear is that the purpose of the
17 PAGA is not to generate revenue for the State but rather to facilitate the enforcement of the labor
18 laws. *See, e.g., Williams v. Superior Court* (2017) 3 Cal. 5th 531, 546; *Arias v. Superior Court*
19 (2009) 46 Cal. 4th 969, 986; Cal. Lab. Code § 2699(i). In assessing the adequacy of the recovery
20 under a PAGA claim, the focus is not the amount which the LWDA and the aggrieved employees
21 are to receive formally in the form of monetary civil penalties but instead whether the total
22 settlement amount achieves the PAGA’s objectives. “When PAGA claims are settled, courts
23 “consider whether the proposed PAGA settlement is fair and adequate in view of the purposes
24 and policies of the statute[]” and “[t]hose purposes and policies include benefit[ting] the public
25 by augmenting the state’s enforcement capabilities, encouraging compliance with California
26 Labor Code provisions, and deterring noncompliance.” *O’Connor v. Uber Techs., Inc.* (N.D.
27 Cal. 2016) 201 F. Supp. 3d 1110, 1132-33 and 1135. A “[c]ourt does not review the PAGA
28 allocation in isolation, but rather reviews the settlement as a whole, to determine whether it is

1 fundamentally fair, reasonable and adequate, with primary consideration for the interests of
2 absent class members.” LWDA’s Comments on Proposed PAGA Settlement in *O’Connor v.*
3 *Uber Techns.* (N.D. Cal. July 29, 2016) No. 13-CV- 03826-EMC, Docket No. 736, at 4:17-19.
4 “PAGA penalties must be evaluated in terms of their public policy objective and not just through
5 the prism of what private relief has been sought or obtained.” *Id.* at 4:14-16.

6 Summary

7 After Class Counsel calculated that the maximum possible recovery in damages to
8 Settlement Class Members, counsel discounted the maximum figure by a variable 50% for class
9 certification (conservative, given the existence of arbitration agreements with class action
10 waivers) and a 50% reduction across all claims for establishing liability on the merits, which
11 yields a potential recovery of \$3,589,242.31. (*Orshansky Decl.* ¶ 69.) Thus, the proposed
12 recovery to the Settlement Class of \$1,800,000 represents an approximate 50.14% of Plaintiff’s
13 potential recovery, while avoiding the further expense and serious risk of proceeding toward class
14 certification and trial. (*Id.*) “The fact that a proposed settlement may only amount to a fraction of
15 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
16 inadequate and should be disapproved.” *Linney v. Cellular Alaska Partnership* (9th Cir. 1998)
17 151 F. 3d 1234, 1242 (internal quotations omitted). *See, e.g., Altamirano v. Shaw Industries,*
18 *Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class
19 action settlement stating, “[a]lthough 15% represents a modest fraction of the hypothetical
20 maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant
21 preliminary approval given the merits of Plaintiff’s claims). (Note that \$1.2 million is 15% of
22 \$8 million.) Taking into account the risk of non-certification, failure to prevail on the merits,
23 and the Court’s power to reduce the civil penalties, the proposed settlement falls within the realm
24 of being fair, reasonable, and adequate. (*Id.* ¶ 69.)

25 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE** 26 **SETTLEMENT CLASS**

27 This Court should order distribution of the proposed Notice (comprised of the Notice of
28 Pendency of Class Action and Settlement, and the Notice of Settlement Award) and the Claim

1 Form to former employees, *see*, exhibits “A” and “B” to Stipulation of Resolution, to the
2 Settlement Class by first class mail, postage prepaid, using the last known mailing address
3 information provided by Defendants. This manner of giving notice is the “best notice practicable”
4 under the circumstances because it provides “individual notice to all members who can be
5 identified though reasonable effort.” *Eisen v. Carlisle and Jacqueline* (1974) 417 U.S. 156, 173.
6 Here, Plaintiff proposes that the settlement be administered by CPT Group, Inc. (“CPT”), an
7 experienced class action settlement administrator. (Settlement Agreement ¶ I.N.) Settlement
8 Class Members’ addresses will be ascertainable through Defendants’ personnel and payroll
9 records, which Defendants will provide to CPT within ten (10) days after preliminary approval
10 of the Settlement. (Id. ¶ VIII.A) To the extent that any notices are returned, CPT will run those
11 addresses through the National Change of Address database and/or conduct skip traces to obtain
12 current address information. (Id.)

13 The content of the proposed Notice satisfies California Rule of Court 3.766(d) because
14 it advises Settlement Class Members of the nature of the claims, basic contentions and denials
15 of the Parties, the key terms of the settlement, the uniform 45-day deadline to participate, submit
16 a dispute, opt out or object to the settlement and the procedure by which to do so, and explains
17 the recovery formula and expected recovery amount for each Settlement Class Member. *See*,
18 (internal ex. “A” to Stipulation of Resolution attached at Ex. “1” to Orshansky Decl.) The
19 proposed Notice will also notify Settlement Class Members of the final approval hearing date,
20 provide the contact information for Class Counsel, and advise Settlement Class Members that
21 they may enter an appearance through counsel if they wish. (Id.) This manner of giving notice
22 satisfies California Rule of Court 3.766(e) as the most reliable and cost-effective method of
23 reaching Settlement Class Members. Thus, the proposed method of notice is reasonably
24 calculated to reach Settlement Class Members by the best means practicable and should be
25 approved.

26 ///

27 ///

28 ///

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

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

5 **IX. CONCLUSION**

6 Based upon the foregoing, and because the proposed settlement is fair, reasonable, and
7 advantageous to the Settlement Class Members, Plaintiff respectfully requests that the Court
8 enter an Order:

9 1. Preliminarily approving this Settlement Agreement as fair, reasonable, and
10 adequate;

11 2. Preliminarily approving the form and content of the Notice (comprised of the
12 Notice of Pendency of Class Action and Settlement, and the Notice of Settlement Award) and
13 the Claim Form to former employees, attached as Exhibits “A” and “B,” respectively, to the
14 Settlement Agreement;

15 3. Provisionally certifying the Settlement Class under Cal. Civ. Code section 382 for
16 settlement purposes only;

17 4. Approving and appointing Plaintiff Herbert Hurtado as the Class Representative;

18 5. Approving and appointing the law firm of CounselOne, P.C. as Class Counsel;

19 6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;

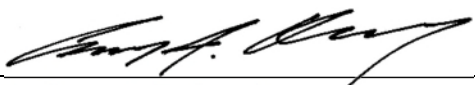
20 7. Setting a date for the Final Approval Hearing; and

21 8. Any further relief the Court deems just and proper.

22 Dated: July 22, 2020

Respectfully submitted,

23 COUNSELONE, PC

24 By: 

25 Anthony J. Orshansky

26 Jennifer L. Connor

Justin Kachadoorian

27 Attorneys for Plaintiff and the Settlement
28 Class

PROOF OF SERVICE
(CCP § 1013(a) and 2015.5)

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; am employed with the law offices of Fisher & Phillips LLP and my business address is 2050 Main Street, Suite 1000, Irvine, California 92614.

On July 22, 2020, I served the foregoing document entitled **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on all the appearing and/or interested parties in this action by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Anthony J. Orshansky, Esq.
Jennifer L. Connor, Esq.
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- ☒ **[by MAIL]** - I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.
- ☐ **[by FAX]** - I caused the aforementioned document(s) to be telefaxed to the aforementioned facsimile number(s). The machine printed a record of the transmission, and no error was reported by the machine.
- ☒ **[by ELECTRONIC SERVICE]** - Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification address listed above.
- ☐ **[by PERSONAL SERVICE]** - I caused to be delivered by messenger such envelope(s) by hand to the office of the addressee(s). Such messenger is over the age of eighteen years and not a party to the within action and employed with ASAP Legal Solution Attorney Services LLC, whose business address is 404 W. 4th Street, Suite B, Santa Ana, CA 92701.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 22, 2020, at Irvine, California.

MICHELE FELTS

Print Name

By:


Signature