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

14 MARIA RIOS-ROMAN, on behalf of herself, all
15 others similarly situated, the general public, and
16 as an “aggrieved employee” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19
20 SEASONS MANAGEMENT, LLC, an Oregon
limited liability company; SM SANTA CRUZ
21 LIMITED PARTNERSHIP, an Oregon limited
partnership; SL - SUN OAK, LLC, an Oregon
22 limited liability company; and DOES 1–50,
23 inclusive,

24 *Defendant(s).*

Case No. 20CV00783

**PLAINTIFF MARIA RIOS-ROMAN’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: October 19, 2022
Hearing Time: 8:30 a.m.
Hearing Dept.: 10, The Honorable Paul
M. Marigonda

Action filed: March 09, 2020
Trial Date: Not Set



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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 Plaintiff Maria Rios-Roman ("Plaintiff") submits this memorandum of points and
5 authorities in support of her unopposed motion for preliminary approval of the Joint Stipulation
6 of Class Action and PAGA Settlement and Release of Claims (the "Settlement")², which provides
7 for a Gross Settlement Amount ("GSA") of \$350,000.00 in compromise of all disputed claims on
8 behalf of all persons Defendants employed on an hourly, non-exempt basis in California of
9 Defendants Seasons Management, LLC, SM Santa Cruz Limited Partnership, and SL - Sun Oak,
10 LLC (collectively "Defendants") in California at any time between November 13, 2016 through
11 the preliminary approval order date. Through this Motion, Plaintiff respectfully requests for this
12 Court to (1) provisionally certify the below-defined Class for settlement purposes only under
13 Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint
14 Plaintiff as Class Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter
15 L. Haines of United Employees Law Group as Class Counsel; (5) approve the proposed notice
16 procedures and related forms; and (6) schedule a final approval hearing.

17 This Court should grant Plaintiff's motion because: (1) for settlement purposes, the
18 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
19 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
20 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
21 Representative; (4) Plaintiff's attorneys are adequate to serve as Class Counsel; (5) the proposed
22 notice procedures, and related forms, fully comport with due process and adequately apprise Class
23 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
24 Class members an opportunity to be heard regarding the Settlement and to give it finality.
25 Accordingly, for the reasons detailed below, this Court should grant Plaintiff's Motion in its
26 entirety and preliminarily approve the Settlement.

27 **II. BACKGROUND**

28 Defendant is an adult residential care facility. DS, ¶ 4. Defendants employed Plaintiff as
a Caregiver from about October of 2018 until April 17, 2019. *Id.*

///

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 **A. The Claims and Procedural History**

2 On January 2, 2020, Plaintiff notified Defendants and the California Labor and Workforce
3 Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of
4 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations
5 committed by Defendants. DS, ¶ 5, Ex. 2.

6 On March 9, 2020, Plaintiff filed a Complaint for Violations of the Labor Code and Civil
7 Penalties Under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et*
8 *seq.* (“PAGA”) in the Santa Cruz County Superior Court, Case No. 20CV00783, against
9 Defendants on behalf of herself and others similarly situated. DS, ¶ 6, Ex. 3. On April 29, 2020,
10 Defendants filed an answer to Plaintiff’s Complaint. DS, ¶ 6, Ex. 4. Defendants deny all of
11 Plaintiff’s allegations and strongly contend that their wage and hour policies, practices and
12 procedures are fully compliant with all applicable laws. DS, ¶ 6. On June 14, 2022, Plaintiff filed
13 her First Amended Complaint adding class action claims alleging causes of action on a class-
14 wide basis for: (1) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510,
15 1194, 1197, and 1198); (2) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3)
16 Failure to Provide Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Failure to Indemnify
17 (Lab. Code §§ 1198 and 2802); (5) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6)
18 Waiting Time Penalties (Lab. Code §§ 201-203); and (7) Unfair Competition (Bus. & Prof. Code
19 §§ 17200, *et seq.*) and added SM SANTA CRUZ LIMITED PARTNERSHIP and SL - SUN
20 OAK, LLC as Defendants. DS, ¶ 6, Ex. 5

21 **B. Mediation**

22 The Parties thereafter engaged in an informal, voluntary exchange of information in the
23 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
24 Plaintiff’s entire personnel file (including policies and agreements she signed and acknowledged),
25 copies of their relevant company written policies, time-keeping records, email messages, and
26 paycheck data and records for the putative class, and more detailed time and payroll data for a
27 random sample of putative class members specifically selected by Plaintiff’s counsel. Defendants
28 also produced financial records to enable Plaintiff and her expert forensic accountant to evaluate
29 Defendants’ financial condition. DS, ¶ 7.

30 On February 11, 2021, following much of the foregoing informal discovery and exchange
31 of information, the Parties participated in a mediation session presided over by Mediator Mark C.
32 Peters, an experienced class action mediator. During the mediation, the Parties had a full day of



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1 productive negotiations and reached agreement on a class-wide settlement during the second
2 mediation session. During the mediation sessions, each side, represented by her/their respective
3 counsel, recognized the risk of an adverse result in the Action. Although the parties did not reach
4 a settlement at mediation, they continue to negotiate with the help of the mediator and ultimately
5 agreed to settle the Action and all other matters covered by this Agreement pursuant to the terms
and conditions of this Agreement. DS, ¶ 8.

6 **C. Defendants' Financial Condition**

7 At the mediation, it became clear that that Defendants had insufficient resources to cover
8 the full extent of alleged liability. DS ¶ 9. As part of the settlement negotiations, each of the
9 Defendants disclosed financial records. *Id.* Plaintiff's Counsel has reviewed the financial records
10 with the aid of a forensic economist. *Id.* The information provided was sufficient to demonstrate
11 the financial condition of the company and its owners. Based on such records, Plaintiff, on her
12 own behalf and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set
forth in the Settlement. *Id.*

13 **III. OVERVIEW OF THE SETTLEMENT**

14 **A. Settlement Class Definition**

15 The Settlement defines the class as all persons Defendants employed on an hourly, non-
16 exempt basis in California of Defendants Seasons Management, LLC, SM Santa Cruz Limited
Partnership, and SL - Sun Oak, LLC (collectively "Defendants") in California at any time between
November 13, 2016 through the preliminary approval order date.

17 **B. Monetary Terms**

18 "Gross Settlement Amount" shall mean the sum of Three Hundred and Fifty Thousand
19 Dollars and Zero Cents (\$350,000.00) payable by Defendants as provided by this Agreement,
20 which shall cover all Settlement Share payments, the Class Representative Payment, the Class
Counsel Fee Payment, the Class Counsel Litigation Expenses Payment, the PAGA Payment and
21 the Settlement Administration Costs. The Gross Settlement Amount is non-reversionary; no
22 portion of the Gross Settlement Amount will return to Defendants. Defendants' employer-side
23 payroll taxes arising from the payments made under this Settlement will be paid by Defendants
separate from and in addition to the Gross Settlement Amount. Defendants will pay the Gross
24 Settlement Amount as outlined further below. In no event shall Defendant be liable for more than
25 the Gross Settlement Amount of \$350,000.00 as a result of this Settlement, with the exception of
26 its employer-side payroll taxes which it shall pay in addition to the Gross Settlement Amount.
27 Settlement para. I.L.



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1 **C. Timing of Payments**

2 Subject to the terms and conditions of this Agreement, the Settlement Administrator will
3 make the following payments out of the Gross Settlement Amount as follows:

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

25 2. To Class Counsel. Class Counsel will apply to the Court for an award of not more than
26 One Hundred Sixteen Thousand Six Hundred Sixty-Six Dollars and Sixty-Five Cents
27 (\$116,666.65) (which is 33 and 1/3% of the Gross Settlement Amount) as their Class Counsel
28 Fees Payment and an amount not more than Seventeen Thousand Five Hundred Dollars and Zero
29 Cents (\$17,500.00) as their Class Counsel Litigation Expenses Payment, and Defendants will not
30 oppose this request. The Settlement Administrator will pay the amount approved by the Court
31 (but not more than One Hundred Sixteen Thousand Six Hundred Sixty-Six Dollars and Sixty-
32 Five Cents (\$116,666.65) in fees and not more than Seventeen Thousand Five Hundred Dollars



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1 and Zero Cents (\$17,500.00) in expenses) out of the Gross Settlement Amount. Withholding and
2 deductions will not be taken from the Class Counsel Fees and Litigation Expenses Payment and
3 one or more Forms 1099 will be issued to Class Counsel with respect to those payments. In the
4 event that the Court reduces or does not approve the requested Class Counsel Fees Payment
5 and/or Class Counsel Litigation Expenses, Plaintiff shall not have the right to revoke this
6 Settlement, and it will remain binding.

7 3. To the Settlement Administrator. The Settlement Administrator will be paid from the
8 Gross Settlement Amount its reasonable fees and expenses as approved by the Court in an amount
9 currently estimated to not exceed Ten Thousand Dollars and Zero Cents (\$10,000.00).

10 4. To the LWDA. Subject to Court approval, the Parties agree that the amount of Four
11 Thousand Dollars and Zero Cents (\$4,000.00) from the Gross Settlement Amount will be
12 designated for satisfaction of Plaintiff's and Class Members' PAGA claims. Pursuant to PAGA,
13 Seventy-Five Percent (75%), or Three Thousand Dollars and Zero Cents (\$3,000.00), of this sum
14 will be paid to the LWDA and Twenty-Five Percent (25%), or One Thousand Dollars and Zero
15 Cents (\$1,000.00), will become part of the Net Settlement Amount and will be distributed to
16 PAGA Members on a pro rata basis based on the total number of Individual Pay Periods (full or
17 partial) worked by each PAGA Member during the PAGA Period. Partial Pay Periods shall be
18 rounded up to the nearest whole integer. PAGA Members shall receive their portion of the PAGA
19 Payment regardless of their decision to submit a request for exclusion to opt out of the Settlement.
20 Settlement para. III.C 1-4.

21 **D. Calculation of Settlement Shares**

22 The Settlement Administrator shall assign to each Class Member a "Class Settlement
23 Ratio," which shall be a fractional number comprised of (a) that Class Member's Individual Pay
24 Periods as the numerator, and (b) the aggregate total of all Class Members' Individual Pay
25 Periods as the denominator. The Settlement Administrator shall assign to each Class Member the
26 "Settlement Share" which shall be calculated by multiplying that Class Member's Settlement
27 Ratio by amount allocated to Class Members from the Net Settlement Amount. (c) PAGA Portion
28 of Settlement Ratio Calculation. The Settlement Administrator shall assign to each Class Member
a "PAGA Settlement Ratio," which shall be a fractional number comprised of (a) that PAGA
Member's Individual Pay Periods during the PAGA Period as the numerator, and (b) the
aggregate total of all PAGA Members' Individual Pay Periods during the PAGA Period as the
denominator. The Settlement Administrator shall assign to each PAGA Member the "PAGA



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1 Settlement Share” which shall be calculated by multiplying that PAGA Member’s Settlement
2 Ratio by amount allocated to PAGA Members from the Net Settlement Amount. Settlement
3 Share Worksheet. Upon calculation of the Class Members’ and PAGA Members’ Settlement
4 Shares, the Settlement Administrator shall furnish to Class Counsel and Defense counsel a
5 worksheet containing a list of unique identifying numbers for each of the Class Members with
6 their corresponding Individual Pay Periods and Settlement Shares. Settlement para. III.D.a-c.

6 **E. Apportionment of Settlement Shares**

7 Each Settlement Share is intended, in part, to settle the Class Members’ claims for
8 Defendants’ alleged failure to pay wages, failure to provide meal periods, failure to authorize and
9 permit rest periods, failure to issue proper wage statements, failure to timely pay wages, and
10 related violations of PAGA and the unfair competition law. Each Class Member shall be
11 individually responsible for the employee’s share of applicable payroll tax withholdings and
12 deductions. Accordingly, each Settlement Share allocated to wages will be reduced by applicable
13 employee-side payroll tax withholdings and deductions, and the Settlement Administrator will
14 issue a Form W-2 to each Participating Class Member. The remaining non-wage payments will
15 be reported on an IRS Form-1099 by the Settlement Administrator. For PAGA Members who
16 submit a timely and valid request for exclusion to opt out of the class portion of the Settlement,
17 100% of the individual Settlement Share to that individual shall be allocated as penalties, and not
18 wages, for which the Settlement Administrator will issue to the PAGA Member an IRS Form-
19 1099. Defendants will be responsible for the normal employer’s share of any payroll tax
20 attributable to the wage portion of the Settlement Share payments. Defendants’ payment of the
21 normal employer’s share of payroll taxes attributable to the wage portion of the Settlement Share
22 payments will be in addition to the Gross Settlement Amount. Settlement para. III.E.

21 **F. The Releases**

22 Plaintiff and Class Members. The Parties agree that it is their intent that the resolution set
23 forth in this Settlement will release and discharge the Released Claims by way of any further
24 attempt, by lawsuit, administrative claim or action, arbitration, demand, or other action of any
25 kind by each and all of the Settlement Class Members (including participation to any extent in
26 any representative or collective action) against the Released Parties. This release will not take
27 effect until Defendants have paid in full the First Installment Payment of the Gross Settlement
28 Amount provided that Plaintiff retains the right to seek to void such effect of the release in the
event Defendants default on any subsequent installment payment as such payments are set forth



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1 in this Settlement Agreement. In the event Plaintiff establishes a payment default, this release will
2 not take effect until Defendants have paid the Gross Settlement Amount in full. All PAGA
3 Members, regardless of whether they submit timely and valid requests for exclusion from the
4 Settlement, will release all Released Claims under PAGA against the Released Parties. The State
5 of California will also release all Released Claims under PAGA against the Released Parties.
6 Release of Claims by Plaintiff. Upon the Effective Date, in addition to the claims being released
7 by all Participating Class Members, Plaintiff will provide the following additional general release
8 (“General Release”): Plaintiff, on her own behalf and on behalf of her heirs, spouses, executors,
9 administrators, attorneys, agents and assigns, fully and finally releases the Released Parties from
10 all claims, demand, rights, liabilities and causes of action of every nature and description
11 whatsoever, known or unknown, asserted or that might have been asserted, whether in tort,
12 contract, or violation of any state or federal statute, rule or regulation arising out of, relating to,
13 or in connection with any act or omission by or on the part of any of the Released Parties
14 committed or omitted prior to the execution of this Agreement, including, but not limited to claims
15 for violation of the Fair Labor Standards Act, the California Labor Code, the Wage Orders of
16 California’s Industrial Welfare Commission, other state wage and hour laws, the Americans with
17 Disabilities Act, the Employee Retirement Income Security Act, Title VII of the Civil Rights Act
18 of 1964, the California Fair Employment and Housing Act, the California Family Rights Act, the
19 Family Medical Leave Act, California’s Whistleblower Protection Act, and California Business
20 & Professions Code Section 17200 et seq. Plaintiff’s General Release set forth herein shall include
21 a waiver of all rights under California Civil Code §1542, which includes a release of all known
22 and unknown claims against the Released Parties. Civil Code section 1542 provides:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST
25 IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND
26 THAT, IF KNOWN BY HIM OR HER WOULD HAVE MATERIALLY AFFECTED
27 HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.
28



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1 Upon the Effective Date, Plaintiff will be deemed to have expressly waived all her rights and
2 benefits under Civil Code §1542. Plaintiff's release excludes any claim for worker's
3 compensation against Defendants. Settlement para. IV.V.A-C.

G. Notice and Claims Process and Procedures

4 Notice to Class Members. After the Court enters its order granting Preliminary Approval
5 of the Settlement, every Class Member will be provided with a "Class Notice."

6 1. List of Class Members. Within fourteen (14) days after the Court grants Preliminary
7 Approval of the Settlement, Defendants shall provide to the Settlement Administrator:

8 (a) An electronic database of all Class Members, last known mailing address, Social
9 Security number, and Defendants' employee identification number ("Class Members' Data").
10 The Settlement Administrator shall be obligated to keep the Class Members' Data confidential
11 and take reasonable and necessary precautions to maintain the confidentiality of the data. The
12 Settlement Administrator shall not distribute the Class Members' Data to anyone, or use the Class
13 Members' Data or any information contained therein for any purpose other than to administer this
14 Settlement.

15 (b) Corresponding to each Class Member's name, Defendants shall provide a figure
16 indicating the total number of Pay Periods during the Class Period in which that Class Member
17 was employed by Defendants as a Class Member and for which Pay Period Defendant issued the
18 Class Member a wage statement. That number of Pay Periods shall be referred to as that Class
19 Member's "Individual Pay Periods." (c) If any of the Class Members' Data are unavailable to
20 Defendants, Defendants will so inform Class Counsel and the Parties will make their best efforts
21 to reconstruct or otherwise agree upon the Class Members' Data prior to when it must be
22 submitted to the Settlement Administrator. Class Members' Data will otherwise remain
23 confidential and will not be disclosed to anyone, except as necessary to applicable taxing
24 authorities, or pursuant to Defendants' express written authorization or by order of the Court.

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

3. Returned Class Notice. If a Class Notice is returned because of an incorrect address,
the Settlement Administrator will promptly, and not later than ten (10) days from receipt of the

1 returned Class Notice, search for a more current address for the Class Member and re-mail the
2 Class Notice to the Class Member. The Settlement Administrator will use the Class Members'
3 Data and otherwise work with Defendants' Counsel and Class Counsel to find a more current
4 address. The Settlement Administrator will be responsible for taking reasonable steps, consistent
5 with its agreed-upon job parameters, court orders, and fee, to trace the mailing address of any
6 Class Member for whom a Class Notice is returned as undeliverable by the U.S. Postal Service.
7 These reasonable steps shall include the tracking of all undelivered mail; performing address
8 searches for all mail returned without a forwarding address; and promptly re-mailing to Class
9 Members for whom new addresses are found. If the Class Notice is re-mailed, the Settlement
10 Administrator will note for its own records and notify Class Counsel and Defendants' Counsel of
11 the date and address of each such re-mailing as part of a weekly status report provided to the
12 Parties. Settlement para. IV.B.1-3.

13 **1. Class Member Disputes**

14 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
15 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
16 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
17 disputes and supporting documents must be postmarked by the Response Deadline. A Class
18 Member may use the Pay Periods Dispute form (Exhibit C to this Settlement), though a Class
19 Member is not obligated to do so to dispute information in the Class Notice. Absent evidence
20 rebutting Defendants' records, Defendants' records will be presumed determinative. However, if
21 a Class Member produces evidence contrary to Defendants' records by the Response Deadline,
22 the Settlement Administrator shall notify Class Counsel and Defense Counsel to discuss and
23 resolve the dispute, including providing all available relevant information to all counsel. The
24 Parties will resolve all disputes jointly, which shall be final and binding on any Class Member
25 disputes, and shall thereafter instruct the Settlement Administrator how to proceed in processing
26 the dispute. If the Parties cannot reach an agreement, the dispute shall be submitted to the Court
27 for final determination. All such disputes are to be resolved or submitted to the Court not later
28 than fourteen (14) calendar days after the Response Deadline. Settlement para. IV.C.

29 **2. Opting Out**

30 Class Members may submit requests to be excluded from the Settlement, or objections to
31 the Settlement, pursuant to the following procedures:



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1 1. Request for Exclusion from Settlement. A Class Member may request to be excluded
2 from the Settlement, and any payment of amounts under this Agreement, by timely mailing a
3 letter to the Settlement Administrator stating that the Class Member wants to be excluded from
4 this Settlement. This letter must include the Class Member's name, address, telephone number,
5 signature, and a clear statement requesting to be excluded from the settlement of the class claims,
6 as set forth on the Request for Exclusion form or similar to the following: "I wish to exclude
7 myself from the class settlement reached in the matter of Rios-Roman v. Seasons Management,
8 LLC. I understand that by excluding myself, I will not receive money from the settlement of my
9 individual claims." To be valid and timely, the request to be excluded must be postmarked by the
10 Response Deadline and returned to the Settlement Administrator at the specified address. A Class
11 Member may use the Exclusion Request form (Exhibit B to this Settlement), though a Class
12 Member is not obligated to do so to request exclusion from the Settlement. A Class Member who
13 properly submits a valid and timely request to be excluded from the Settlement shall not receive
14 any payment of any kind in connection with this Agreement or this Action, shall not be bound by
15 or receive any benefit of this Agreement, and shall have no standing to object to the Settlement,
16 except that the request for exclusion shall not be effective as to the release of claims arising under
17 PAGA and shall not preclude the Class Member from receiving their share of the PAGA Payment.
18 Any Class Member who does not affirmatively opt out of the Settlement by submitting a timely
19 Request for Exclusion will be a Participating Class Member and will be bound by all of the terms
20 of the Settlement including those pertaining to Released Claims, as well as any Final Order that
21 may be entered by the Court if it grants final approval of the Settlement. A request for exclusion
22 must be mailed to the Settlement Administrator at the address provided on the Class Notice. The
23 Settlement Administrator shall transmit the request for exclusion to counsel for the Parties.
24 Settlement para. IV.D.2.

3. Objecting

22 **Objections to Settlement.** The Class Notice will provide that any Class Member who does
23 not request exclusion from the Action and who wishes to object to the Settlement should submit
24 an objection in writing to the Settlement Administrator. To be valid, an objection must be
25 postmarked by the Response Deadline and received by the Settlement Administrator at the
26 address specified. The written objection to the Settlement should set forth the grounds for the
27 objection and the other information required by this paragraph. The objection should be mailed
28

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

13 **H. Uncashed Checks**

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

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

20 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
21 and its members are too numerous for joinder to be practical; (2) the representative and absent
22 class members share a community of interest and questions of law and fact common to the class
23 predominate over questions unique to individual class members; (3) the representative's claims
24 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
25 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
26 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
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.



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

2 A class is ascertainable when it may be readily identified without unreasonable expense
3 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
4 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
5 defined Class is ascertainable because its members may be identified by reference to Defendants’
6 records and Defendants have agreed to share the relevant information from their records to
7 facilitate the settlement process. DS, ¶ 10. Therefore, the Settlement Class is ascertainable.

8 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

9 The Settlement Class has sufficiently numerous members to render joinder impractical.
10 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
11 (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 362 Class
12 Members. DS, ¶ 11. Plaintiff maintains that it would be impractical and economically inefficient
13 to require each Class Member to separately maintain an individual action or be joined as a named
14 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
15 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
16 the Settlement Class’ membership is sufficiently numerous. DS, ¶ 11. *See Daar v. Yellow Cab*
17 *Co.* (1967) 67 Cal.2d 695.

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

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

27 To justify certification, the class proponent “must show ... that questions of law or fact
28 common to the class predominate over the questions affecting the individual members” *See,*
29 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*
30 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for
31 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
32 the claims of the Class Members all stem from the same sources. DS, ¶ 12.



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

18 **D. Plaintiff Is Typical of the Settlement Class**

19 The class representative must be similarly situated to the rest of the purported class. *See*
20 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating "it has never been the law in California
21 that the class representative must have identical interests with the class members. The only
22 requirements are ... that the class representative be *similarly* situated") (emphasis in original); *See*
23 *also* Newberg, § 3:29 (typicality "focuses on whether there exists a relationship between the
24 Plaintiff's claims and the claims alleged on behalf of the class"). Plaintiff contends that her claims
25 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent
26 Class Members was subject to the same relevant policies and procedures governing her
27 compensation, hours of work and meal and rest periods. Because Plaintiff contends that she was
28 subject to the same general course of conduct as absent Class Members, resolving the common
questions as they apply to Plaintiff will determine Defendants' *prima facie* liability to all Class
Members. Moreover, Plaintiff's claims could potentially be subject to the same primary
affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical
of the Class. DS, ¶ 13.



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1 **E. 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, ¶ 14.

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, ¶¶ 16-23; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
11 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

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

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

26 Plaintiff further contends 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
29 of the *theoretical* alternatives that proposed class members could potentially utilize—
30 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
31 claims through the Division of Labor Standards Enforcement (where there would be relatively
32 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, ¶ 24.

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, ¶ 25. 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.*

26 At issue in this class and representative action is the alleged failure of adult residential
27 care facility operators to provide their hourly California employees with all off-duty, unrestricted
28 meal and rest periods. As a result of alleged inadequate staffing levels, Plaintiff alleges that
Defendants frequently required Plaintiff and the putative class members (“PCMs”) to work
through their meal and rest periods without pay, and further required that they remain on
Defendants’ premises. In addition, Defendants allegedly required Plaintiff and the PCMs to clock
out at their scheduled shift end times but remain on duty, without pay, while waiting for
employees from the following shift to arrive for work. Finally, Defendants allegedly failed to



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1 include non-discretionary signing bonuses issued to Plaintiff and the PCMs in their regular rates
2 of pay for purposes of calculating Plaintiff's and the PCMs' overtime pay rates. DS, ¶ 26. Plaintiff
3 prepared "damages" estimates in advance of the mediation. DS, ¶ 26, Ex. 6. In advance of the
4 mediation, Plaintiff determined Defendants' maximum potential exposure for restitution and
5 penalties to be approximately \$3,741,524.07 (consisting of \$188,345.00 in unpaid wages,
6 \$273,956.36 in missed meal period premium wages, \$429,198.30 in missed rest break premium
7 wages, \$224,600.00 for wage statement penalties, \$313,230.16 for waiting time penalties, and
8 \$2,310,000.00 for civil penalties). Plaintiff calculated the damages based on the number of
9 workweeks and pay periods provided by Defendants, Plaintiff's reports, and the sample data. *Id.*
10 Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix* campaign
11 and pursue individual release agreements from the Class Members. Defendants also represented
12 that they had interviewed Defendants' current employees regarding Plaintiff's claims, all of
13 whom would provide declarations, under penalty of perjury, that were favorable to Defendants
14 with respect to the relevant factual issues at issue in Plaintiff's action. Plaintiff's Counsel applied
15 discounts to the maximum exposure to account for all other risks discussed below. While it is
16 difficult to assign anything but crudely-determined percentages of risk to any of the claims, it is
17 safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees
18 is substantial and alone justifies a significant discount because Defendants would likely by trial
19 have gathered releases from the majority of the Class Members. A settlement for approximately
20 9.35% of the potential recovery is a proportion substantially in excess of recovery proportions
21 sanctioned by existing case law.³ *Id.*

22 Plaintiff is aware of only two significant awards under the PAGA in a contested
23 proceeding, both issued by federal district courts.⁴ DS, ¶ 38. PAGA penalty awards are often

24 ³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
25 ("[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
26 be within the targeted range of reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
27 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
28 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) ("a settlement for fourteen percent recovery
of Plaintiffs' maximum recovery is reasonable"); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
1036, 1042 (N.D. Cal. 2008) (approving settlement amount that "is just over 9% of the maximum
potential recovery asserted by either party.").

⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from



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1 small even for egregious, intentional violations of the Labor Code.⁵ *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
result could occur here. *Id.*

7 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
8 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
9 \$350,000.00 is fair and reasonable. *Id.*

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

11 The *Kullar* case sets forth several factors a court should consider in determining whether
12 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
13 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
14 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
15 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
of a governmental participant; and (8) the reaction of the class members to the proposed

16 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
17 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
18 suffered a particularly sizeable injury – the court found that the defendant's policies caused
19 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
20 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to
21 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
22 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.

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

25 ⁵ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
26 case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
27 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.

1 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
2 factors.

3 **1. Evaluation of Plaintiff's Case**

4 **a. Risks Associated with Defendants' Financial Condition**

5 Defendants' financial condition was the key factor in reaching this Settlement. DS, ¶ 29.
6 Due to Defendants' financial condition, even if Plaintiff prevailed on all claims at trial, she may
7 never recover the damages due to the risk of insolvency. A very large class action judgment
8 would almost certainly put the company out of business and/or would interfere with the
9 Defendants' ability to carry out their contractual obligations. *Id.* In short, the "poor financial
10 health of [the defendant will] seriously increase [] the chance that Plaintiffs would be left with
11 nothing if they continued to litigate their claims." *Torrissi v. Tucson Elec. Power Co.* (9th Cir.
12 1993) 8 F.3d 1370, 1376 (the financial condition of defendant predominated in assessing the
13 reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d
14 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the
15 reasonableness of the settlement"); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S.
16 App. LEXIS 10259 at *11 (finding potential insolvency to be additional risk that favors approval
17 of a class action settlement). Accordingly, Defendants' financial distress supports this settlement.
18 *Id.*

19 **b. Risks Associated with the Unpaid Wages Claim**

20 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
21 best, largely because Defendants' written policies throughout the relevant time period prohibited
22 off-the-clock work. DS, ¶ 29. Off-the-clock claims are difficult where a defendant requires in its
23 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
24 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
25 be compensable). *Id.* In their written employment policies, Defendants mandate that employees
26 must record all time worked accurately on their time records and strictly prohibit employees from
27 performing any work off-the-clock. DS, ¶ 29. Moreover, while Defendants dispute that off-the-
28 clock work occurred, they contend that any time spent off the clock was *de minimis*. The
California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested
that irregular and minute periods of time may still be subject to a *de minimis* defense even if
compensable. (Stating that "We do not decide whether there are circumstances where
compensable time is so minute or irregular that it is unreasonable to expect the time to be



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1 recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here
2 because the time spent off the clock were minute and insignificant. Accordingly, a large award of
3 penalties seems unlikely with respect to this claim. *Id.*

4 The difficulty inherent in proving that off-the-clock work occurred poses a significant
5 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
6 Generally, a court will not certify a class unless it can determine an appropriate classwide
7 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
8 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
9 the lack of records indicating when such off-the-clock work may have taken place. Individualized
10 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
11 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
12 risk that the Court would consider this evidentiary showing insufficient as a classwide
13 methodology. DS, ¶ 30.

14 **c. Risks Associated with the Meal Period Claims**

15 There are risks to Plaintiff’s meal period claim. DS, ¶ 31. Defendants contend that, to
16 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
17 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
18 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
19 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
20 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
21 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
22 to the meal break claim is the reason that a particular employee may have failed to take a meal
23 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

24 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
25 from taking their meal or rest periods. DS, ¶ 32. Defendants’ policies mandate that employees
26 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
27 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
28 sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
individualized evidence may be necessary to determine whether they occurred due to conduct of



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1 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
2 the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

3 **d. Risks Associated with the Rest Break Claims**

4 There are risks to Plaintiff's rest period claim. DS, ¶ 33. Employers are not required to
5 record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
6 employees the opportunity to take rest periods in accordance with California law. Further,
7 Defendants' written policies on meal and rest periods are consistent with the Wage Order. *Id.*
8 Thus, unlike meal periods, where there are often records showing whether an employee clocked
9 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
10 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
11 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
12 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
13 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
14 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
15 certification, it may be possible to manage individual issues through the use of surveys and
16 statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
17 *Corporation v. Behrend* (2013) 133 S.Ct. 1426.

18 **e. Risks Associated with the Statutory "Wage Statement"**
19 **Penalty Claims**

20 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
21 PAGA penalties. Under Labor Code section 226, wage statements must include various
22 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
23 DS, ¶ 34.

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

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

28 Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 203. Like
the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
The evidence of good faith Defendants put forth will defeat this claim.

g. Risks Associated With the PAGA Claim

Regarding PAGA, a court has discretion to award a lesser amount than the maximum
penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203



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1 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
2 valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the
3 PAGA claims likewise face significant uncertainty. DS, ¶ 36. There is a risk that the Court would
4 consider the maximum civil penalty available to be confiscatory. This is particularly the case
5 considering Defendants' financial condition. *Id.* Moreover, the current COVID-19 pandemic
6 could motivate the Court to further reduce the penalty award to avoid what it may consider a
confiscatory taking. *Id.*

7 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
8 significant discount for settlement purposes. DS, ¶ 37. For mediation purposes, Plaintiff's counsel
9 estimated a maximum exposure of approximately \$2,310,000.00 in civil penalties. This estimate
10 did not take into account any of the risks discussed above and assumed a violation for every single
11 pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the
12 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
13 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
14 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
15 Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
16 penalties for the same violation for the same pay period under different Labor Code provisions.
Id. This may be because the PAGA does not provide for what many employers characterize as
claim splitting and not merely stacking. *Id.*

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

18 An employer enjoys the right to settle a putative class member's disputed wage claims
19 individually, without the consent or involvement of class counsel. DS, ¶ 40. (See *Chindarah v.*
20 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
21 a "pick off" settlement campaign to pursue individual release agreements from the Class
22 Members, thereby potentially narrowing the size of the Settlement Class – 69 members - until it
23 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
24 number of employees to represent. This led to a significant reduction of claim value in settlement
negotiations. *Id.*

25 While the evidence gathered through Plaintiff's discovery supports the merits of the
26 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
27 presents significant risks that support a downward departure from Defendants' estimated liability



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1 exposure. DS, ¶ 41. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
2 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
3 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
4 It also represents a fair, adequate, and reasonable compromise amount for these claims and
5 warrants preliminary approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
6 1376 (the financial condition of defendant predominated in assessing the reasonableness of
7 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
8 concerning defendant's financial stability "strongly supports the reasonableness of the
9 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
WL 2465049, * 3.

10 2. Allocation of the PAGA Payment

11 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
12 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
13 appropriate under the circumstances. DS, ¶ 42. The Parties negotiated a good faith amount for
14 PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
15 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
16 "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount
17 was the result of self-interest at the expense of other Class Members," such amounts are generally
18 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
19 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
20 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
21 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
22 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
23 trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
24 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
25 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
26 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
27 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
28 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *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



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(approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

3. Presence of Governmental Participant

As required under Labor Code section 2699(1)(2), Plaintiffs will provide notice of this settlement to the LWDA. DS, ¶ 51, Ex. 12.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Notice of Proposed Settlement (attached as Exhibits A, B, and C to the Settlement) and an opportunity to object. DS, ¶ 48. The parties’ proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed settlement. *Id.*

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

The Individual Settlement Payments will be paid to each Class Member based on his or her eligible Pay Periods compared to the total Pay Periods. DS, ¶ 47, Settlement § III.D.c.2. Because this method compensates Class Members based on the extent of their potential injuries, in that Class Members who worked for Defendants longer would have been subject to more alleged violations, it is fair, adequate, and reasonable. *Id.*

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

The Settlement states Class Counsel may seek attorneys’ fees of \$116,666.65 (one-third of the GSA) and up to \$17,500.00 for actual reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement § IV.N.1-2. These amounts are reasonable, given the facts and circumstances of the case. DS, ¶¶ 43-45.

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.*





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1 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced
2 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
3 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
4 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
5 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
6 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
7 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
8 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
9 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
10 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
11 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

12 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
13 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
14 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
15 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
16 down to devote time to this matter. DS, ¶ 44. Class Counsel interviewed and obtained information
17 from putative class members, met and conferred with Defendants’ counsel on numerous
18 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
19 Defendants and obtained through other sources, researched applicable law, and provided
20 estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

21 Class Counsel have borne all the risks and costs of litigation and will receive no
22 compensation until recovery is obtained. DS, ¶ 45. Class Counsel are well-experienced in wage-
23 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
24 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
25 the requested fees and costs are reasonable and should be awarded. *Id.*

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

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*

1 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
2 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
3 Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this action
4 and the risks she undertook on behalf of Class Members. DS, ¶ 46. Plaintiff has devoted many
5 hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
6 things, retaining experienced counsel, providing them with information about her work history
7 with Defendants and Defendants' policies and practices with respect to the wage and hour claims
8 at issue, participating in mediation, and being actively involved in the settlement process to ensure
9 a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to
10 significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this
11 action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that 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, ¶ 46.

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

With regard to the settlement administration costs provision, it is reasonable. Before
agreeing to Phoenix Settlement Administrators, and its bid of \$8,000.00, the Parties sought and
reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶
50, Exs. 9, 10, and 11. Thus, the settlement administration costs provision should be given
preliminary approval.

18 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
19 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
20 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
21 **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. Settlement, § IV.B.2. Although there are current
employee Class Members, it is uncertain whether Defendants' records of their contact information



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1 include email addresses and Class Members, who perform all of their work away from a desk, are
2 not in a position to check their emails. As such, notice by mail alone is fair, adequate, and
3 reasonable. DS, ¶ 48.

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

21 **XI. CONCLUSION**

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

24 Respectfully submitted,

25 THE SPIVAK LAW FIRM

26 Dated: September 26, 2022

27 By:

28 

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