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on behalf of herself and others similarly situated
11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF SAN DIEGO**

14 ROSALINDA MARCHBANKS-POWELL,
an individual on behalf of herself and all
15 others similarly situated,

16 Plaintiffs,

17 vs.

18 TORRID ADMINISTRATION, INC., a
California corporation; TORRID
19 MERCHANDISING, INC., a California
corporation; TORRID PARENT, INC., a
20 Delaware corporation; TORRID LLC, a
California limited liability company; HOT
21 TOPIC ADMINISTRATION, INC., a
California corporation; HOT TOPIC
22 MERCHANDISING, INC., a California
corporation; HOT TOPIC TENNESSEE,
23 INC., a California corporation; HOT TOPIC,
INC., a California corporation; and DOES 1
24 through 50, inclusive,

25 Defendants.
26

Case No.: 37-2020-00008179-CU-OE-NC

Assigned For All Purposes to
The Honorable Timothy M. Casserly

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR AN ORDER
(1) PRELIMINARILY APPROVING THE
CLASS ACTION SETTLEMENT; (2)
APPROVING NOTICE OF CLASS
ACTION SETTLEMENT; AND (3)
SETTING HEARING FOR FINAL
APPROVAL**

*[Filed concurrently with Plaintiff's Notice of
Motion and Motion; Declaration of David
Yeremian; Declaration of Emil Davtyan; and
[Proposed] Order]*

Date: July 2, 2021
Time: 1:30 p.m.
Dept: N-31

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Rosalinda Marchbanks-Powell (“Plaintiff” or “Class Representative”) filed a
4 class action complaint in the Superior Court of the State of California, Orange County, Case No.
5 30-2019-01089455-CU-OE-CXC against Defendant Torrid, LLC (“Defendant”). Plaintiff alleged
6 the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and
7 Overtime Under Labor Code § 510; (3) Meal Period Liability Under Labor Code § 226.7; (4)
8 Rest-Break Liability Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6)
9 Violation of Labor Code §203; (7) Violation of Labor Code §204; (8) Failure to Keep Required
10 Payroll Records Under Labor Code §§ 1174 and 1174.5; (9) Failure to Reimburse Necessary
11 Business Expenses § 2802; (10) Violation of Labor Code § 246; (11) Violation of Business and
12 Professions Code § 17200 et seq.; (12) Failure to Provide Suitable Seating; and (13) Penalties
13 Pursuant to Labor Code § 2698 et seq.

14 Pursuant to the proposed Class and PAGA Action Settlement Agreement and Stipulation
15 (“Settlement” or “Settlement Agreement”), filed concurrently herewith, the class consists of “all
16 non-exempt employees who worked for Torrid LLC at any of its retail store locations in the State
17 of California at any time from February 11, 2016 through December 31, 2020.” After engaging in
18 substantial investigation and extensive negotiations with the assistance of a respected third-party
19 neutral, Hon. Carl J. West (Ret.), the parties have agreed to settle all claims alleged in the lawsuit
20 on a class-wide non-reversionary basis for Seven Hundred Thousand Dollars and Zero Cents
21 (\$700,000.00), inclusive of all fees and costs. All approximately 3,755 Class Members shall
22 receive a settlement share unless they opt out.

23 The proposed settlement reflected in the Settlement Agreement is fair, reasonable, and
24 adequate, and in the best interests of the Class. Consequently, Plaintiff, with the consent of
25 Defendant, hereby move this Court for an order: (1) granting preliminary approval of the
26 proposed class action settlement, as embodied in the Class and PAGA Action Settlement
27 Agreement and Stipulation (“Settlement” or “Settlement Agreement”) filed concurrently
28 herewith; (2) approving the Notice of Class Action Settlement to be sent to Class Members, and

1 the notification schedule as set forth in the Settlement Agreement and the Proposed Order, also
2 filed concurrently herewith; and (3) setting a hearing for final approval of the class action
3 settlement.

4 **II. STATUS OF THE LITIGATION**

5 **A. Procedural History**

6 On February 11, 2020, Plaintiff filed a class action complaint against Defendant alleging
7 eleven causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and
8 Overtime Under Labor Code § 510; (3) Meal Period Liability Under Labor Code § 226.7; (4)
9 Rest-Break Liability Under Labor Code § 226.7; (5) Violation of Labor Code § 226(a); (6)
10 Violation of Labor Code §203; (7) Violation of Labor Code §204; (8) Failure to Keep Required
11 Payroll Records Under Labor Code §§ 1174 and 1174.5; (9) Failure to Reimburse Necessary
12 Business Expenses § 2802; (10) Violation of Labor Code § 246; and (11) Violation of Business
13 and Professions Code § 17200 et seq. (Declaration of David Yeremian (“Yeremian Decl.”), filed
14 concurrently herewith, ¶ 10). Plaintiff alleges Defendant failed to pay minimum wages and
15 overtime for all hours worked, failure to provide compliant meal and rest breaks, failed to pay
16 premium wages for missed meal and rest breaks, failed to furnish accurate wage statements,
17 failed to timely pay wages including upon termination; failed to maintain accurate records, failed
18 to reimburse necessary business expenses, and failed to provide required paid sick days. (*Id.*)

19 On February 10, 2020, Plaintiff submitted a Private Attorneys General Act (“PAGA”)
20 notice letter to the Labor Workforce Development Agency (“LWDA”) and served Defendant.
21 (Yeremian Decl., ¶ 11) The LWDA did not express an interest in investigating Plaintiff’s claims
22 within the 65 day period. (*Id.*) Therefore, on May 26, 2020, Plaintiff filed a first amended
23 complaint adding a cause of action pursuant to the Private Attorneys General Act (“PAGA”)
24 under Labor Code § 2699, *et seq.* (*Id.*) On October 8, 2020, Plaintiff submitted an amended notice
25 letter to the LWDA and served Defendant. (Yeremian Decl., ¶ 12) On October 28, 2020, Plaintiff
26 filed a second amended complaint adding a cause of action for the failure to provide suitable
27 seating. (*Id.*)

28 ///

1 **B. Investigation**

2 Before filing the lawsuit, Class Counsel investigated and researched the facts and
3 circumstances underlying the pertinent issues and the law applicable thereto. (Yeremian Decl., ¶
4 13) This required thorough discussions and interviews between Class Counsel and Plaintiff, as
5 well as preliminary research into the various legal issues involved in the case. (*Id.*) After
6 conducting their initial investigation, Class Counsel determined that Plaintiff's claims were well-
7 suited for class and representative action adjudication owing to what appeared to be a common
8 course of conduct affecting a similarly situated group of employees. (*Id.*)

9 After filing the lawsuit, Class Counsel conducted a thorough investigation of the facts and
10 claims giving rise to the action, including: (1) conducting informal and formal discovery, and
11 meeting and conferring with defense counsel about same; (2) reviewing and analyzing
12 timekeeping and payroll records as well as employment handbooks, Plaintiff's personnel files,
13 relevant policies and other documentation; (3) researching the applicable law and potential
14 defenses; (4) constructing damage models based on interpretations of California law; and (5)
15 reviewing information provided by Defendant at the mediation. (Yeremian Decl., ¶ 14) The Class
16 enumerated in this action is ascertainable because the Class Members may be readily identified
17 by reference to Defendant's records. (*Id.*) Defendant has agreed to share the information from
18 these records with the Settlement Administrator in order to identify and contact the Class
19 Members. (*Id.*) There are approximately 3,755 total Class Members. (*Id.*)

20 Defendant, for their part, vigorously contested liability, the amount of claimed damages,
21 and the propriety of class certification. (Yeremian Decl., ¶ 15) After Class Counsel analyzed the
22 relevant documents and other gathered data, Class Counsel believed that this case was appropriate
23 for resolution via mediation. (*Id.*) Given the high level of risk present for both sides, the parties
24 elected to mediate Plaintiff's claims and explore the possibility of settlement. (*Id.*)

25 **C. Settlement Efforts**

26 On September 8, 2020, the parties mediated this case with Hon. Carl J. West (Ret.), a
27 respected and highly experienced mediator in wage and hour class actions. (Yeremian Decl., ¶ 16)
28 During mediation, Plaintiff's and Defendant's counsel discussed all aspects of the case, including

1 the risks of litigation and the risks to both parties of proceeding with a motion for class
2 certification as well as the law relating to unpaid wages, meal periods, rest periods, wage
3 statements, final pay, and reimbursement of business expenses. (*Id.*) As a result of the mediation,
4 the parties agreed to settle the lawsuit according to the terms set forth in the Settlement
5 Agreement. (*Id.*; See Exhibit 1 attached to Yeremian Decl., “Settlement” or “Settlement
6 Agreement”.)

7 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
8 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
9 Counsel believes that the recovery for each Class Member is fair and reasonable taking into
10 consideration the amounts received in other wage and hour class actions, the risks inherent in
11 litigation of this genre, and the reasonable tailoring of each Class Member’s claim to the
12 settlement award he or she will receive. (*Id.*) Further, and based on the settlement negotiations,
13 which were extensive, and conducted in good faith and at arm’s length between attorneys with
14 substantial experience litigating class actions and wage and hour cases, the Settlement Agreement
15 was the product of a non-collusive settlement process in which the parties were forced to make
16 significant compromises in the interest of reaching a full and complete settlement of the lawsuit.
17 (*Id.*)

18 **III. SETTLEMENT AGREEMENT AND ACCOMPANYING DOCUMENTS**

19 Under the terms of the proposed Settlement Agreement, the Defendant has agreed to pay
20 Seven Hundred Thousand Dollars and Zero Cents (\$700,000.00) (“Gross Settlement Amount”) on
21 a non-reversionary basis to settle and release all claims asserted by Plaintiff in the Second
22 Amended Complaint on behalf of the proposed Class. (Yeremian Decl., ¶ 17; Exh. 1, §43) The
23 Settlement Agreement defines the “Class Members” as “all non-exempt employees who worked
24 for Torrid LLC at any of its retail store locations in the State of California at any time from
25 February 11, 2016 through December 31, 2020.” (Yeremian Decl., ¶ 18; Exh. 1, §6) The “Net
26 Settlement Amount,” available for distribution to Class Members, shall be the Gross Settlement
27 Amount, less the Attorneys’ Fees and Costs, the Class Representative Enhancement Payment,
28 Settlement Administration Costs, and seventy-five percent (75%) of the LWDA Payment.

(Yeremian Decl., ¶ 19; Exh. 1, §16) These amounts are detailed as follows:

- not more than Two Hundred Thirty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents (\$233,333.33) to Class Counsel for attorneys' fees, and not more than Seventeen Thousand Dollars and Zero Cents (\$17,000.00) in reasonable litigation costs; (Yeremian Decl., ¶ 19; Exh. 1, §43(a))
- not more than Twenty Six Thousand Dollars and Zero Cents (\$26,000.00) for the Settlement Administration Costs; (Yeremian Decl., ¶ 19; Exh. 1, §43(b))
- not more than Ten Thousand Dollars and Zero Cents (\$10,000.00) for a Class Representative Enhancement Payment; and; (Yeremian Decl., ¶ 19; (Exh. 1, §43(c))
- Fifty Thousand Dollars and Zero Cents (\$50,000.00) for civil penalties under the PAGA, where 75% (\$37,500.00) will be paid to the LWDA and 25% (\$12,500.00) will be included in the Net Settlement Amount and distributed to Settlement Class Members). (Yeremian Decl., ¶ 19; Exh. 1, §43(d))

The "Class Member Payment of Net Settlement Amount," which is each Class Member's share of the Net Settlement Amount, will be calculated and apportioned from the Net Settlement Amount based on the number of workweeks a Class Member worked during the Class Period as a non-exempt employee in California. (Yeremian Decl., ¶ 20; Exh. 1, §43(e))

Defendant shall pay its corporate payroll tax obligations on the payouts to Class Members in addition to the Gross Settlement Amount. (Yeremian Decl., ¶ 21; Exh. 1, §43)

The settlement amount was a compromise figure, factoring in the inherent risks related to certification, liability and damages. (Yeremian Decl., ¶ 22.) However, taking into account all of the circumstances of the action and the defenses raised by Defendant against certification, liability and damages, Class Counsel believes that the settlement is fair and reasonable. (*Id.*)

Attached to the Settlement Agreement as Exhibit A, B, and C is the Notice of Class Action Settlement, Opt-out form, and Dispute form ("Notice Packet"). Class Members shall each receive a Notice Packet via first class mail (after the Settlement Administrator conducts a national change of address search). (Yeremian Decl., ¶ 23; Exh. 1, §46) Class Members will have an

1 opportunity to dispute the information provided in their Notice Packet and they may produce
2 evidence to support the information is inaccurate. (Yeremian Decl., ¶ 24; Exh. 1, §47; *see also*
3 Class Notice, **Exhibit A** attached to the Settlement Agreement.) Defendant shall have the right to
4 respond to the challenge by any Class Member. (Yeremian Decl., ¶ 24; Exh. 1, §47) The
5 Settlement Administrator will resolve the challenge and make a final and binding determination
6 without hearing or right of appeal. (Yeremian Decl., ¶ 24; Exh. 1, §47) Class Members wishing to
7 opt-out from the Settlement Agreement must sign and postmark a written Request for Exclusion
8 to the Settlement Administrator within the Notice Period. (Yeremian Decl., ¶ 25; Exh. 1, §48)
9 The Notice Period will be sixty (60) calendar days from the initial mailing of the Notice Packet.
10 (*Id.*)

11 Class Members will also have the opportunity to object to the Settlement Agreement, by
12 filing a valid Objection with the Court and serving copies of the Notice of Objection on the
13 Parties before the Notice Period. (Yeremian Decl., ¶ 26; Exh. 1, §49)

14 The parties have also agreed that CPT Group, Inc. shall handle the notice and settlement
15 administration, and the parties respectfully request this Court to appoint CPT Group, Inc. to
16 handle those procedures. The procedures for mailing notice and processing exclusions and
17 objections as well as distribution of the Net Settlement fund is detailed in the Stipulation. (Exh. 1,
18 §46)

19 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS APPROPRIATE**

20 Express judicial policy favors maintaining wage and hour actions as class actions. (*Prince*
21 *v. CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richmond v. Dart Industries, Inc.*
22 (1981) 29 Cal. 3d 462.) Any doubt as to the appropriateness of class treatment should be resolved
23 in favor of class certification, subject to later modification if necessary. (*Richmond*, 29 Cal. 3d at
24 473-75.) The decision to certify a class is a procedural one, and should be based on the allegations
25 in the operative complaint, and not in the perceived factual or legal merit of the class claims.
26 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 439-41.)

27 To certify a settlement class, the Court must find the two primary requirements for
28 maintaining a class action: (1) there must be an ascertainable class, and (2) there must be a well-

1 defined community of interest in the questions of law and fact involving the parties to be
2 represented. (*See Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 805-09; *Daar v. Yellow Cab*
3 *Company* (1967) 67 Cal. 2d 695, 704.) These criteria are met here for the reasons set forth below.

4 **A. There Is A Numerous and Ascertainable Class**

5 Whether a class is ascertainable is determined by examining the class definition, the size
6 of the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal. 3d
7 at 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263,
8 1271.) Class members are “ascertainable” where they may be readily identified without
9 unreasonable expense or time.

10 Plaintiff contends, and Defendant does not dispute for settlement purposes only, this
11 requirement and the requirement of numerosity is met. Class Members are “all non-exempt
12 employees who worked for Torrid LLC at any of its retail store locations in the State of California
13 at any time from February 11, 2016 through December 31, 2020” (Yeremian Decl., ¶ 74(a))
14 Documents and information exchanged between the parties reflect a class of approximately 3,755
15 Class Members. (Yeremian Decl., ¶ 74(a)) The Class Members have already been identified by
16 reference to Defendant’s payroll and personnel records. (Yeremian Decl., ¶ 74(b))

17 Therefore, and notwithstanding the foregoing, there is a numerous and ascertainable class.

18 **B. There Is A Well-Defined Community of Interest**

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

21 [D]oes not depend upon an identical recovery, and the fact that each
22 member of the class must prove his separate claim to a portion of
23 any recovery by the class is only one factor to be considered ... The
24 mere fact that separate transactions are involved does not of itself
25 preclude a finding of the requisite community of interest so long as
26 every member of the alleged class would not be required to litigate
27 numerous and substantial questions to determine his individual right
28 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.

Plaintiff contends, and Defendant does not dispute for settlement purposes only, that

1 common issues of fact and law predominate as to each of the claims alleged by Plaintiff, and the
2 Class is united in its proof. (Yeremian Decl., ¶ 74(e)) Because Plaintiff has alleged a single
3 scheme, “the relevant proof [does] not vary among class members” and “clearly presents a
4 common question fundamental to all class members.” (See *In Re NASDAQ Market-Makers*
5 *Antitrust Litigation* (SDNY 1997) 172 F.R.D. 119, 123 (citing *In Re NASDAQ Market-Makers*
6 *Antitrust Litigation*, (SDNY 1997) 169 F.R.D. 493, 518).) California courts show “no hesitancy”
7 in inferring class-wide causation, class-wide injury, and class-wide damages when a common
8 course of action has been shown. (*B.W.I. Custom Kitchen*, 191 Cal. App. 3d at 1350.) This
9 inference ““eliminates the need for each class member to prove individually the consequences of
10 the defendants’ actions to him or her.”” (*Id.* at 1351 (quoting *Rosack v. Volvo of America Corp*
11 (1982) 131 Cal. App. 3d 741, 753 [emphasis added])).)

12 This action involves, *inter alia*, a determination about Defendant’s alleged failure to
13 provide meal period and rest periods, failure to pay wages and overtime due to allegedly common
14 and unlawful policies, failure to pay final wages when required, failure to provide accurate
15 paystubs, failure to maintain accurate records, failure to reimburse for necessary business
16 expenditures, and largely derivative claims under the Business & Professions Code and PAGA.
17 Plaintiff contends these practices affected Class Members in the same way. Plaintiff contends
18 these practices resulted in a failure to compensate employees at termination, and incomplete
19 wages displayed on wage statements. The outcome of litigation on this matter depends upon
20 questions that are common to Class Members. (Yeremian Decl., ¶ 74(f)) While Defendant
21 maintained otherwise, these issues will not be decided on the basis of facts peculiar to each Class
22 Member, but rather on the basis of facts common to them all. It is also true that these issues of
23 liability can be determined on a class-wide basis. (*Id.*)

24 C. The Named Plaintiff’s Claims Are Typical

25 A class representative’s claims are typical when they arise from the same event, practice,
26 or course of conduct that gives rise to the claims of other putative class members, and if their
27 claims rest on the same legal theories. The class representative’s claims must be “typical” but not
28 necessarily identical to the claims of other class members. It is sufficient that the representative is

1 similarly situated so that he or she will have the motive to litigate on behalf of all class members.
2 (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*
3 (1987) 191 Cal.App.3d 1341, 1347 (“[I]t has never been the law in California that the class
4 representative must have identical interests with the class members.”) Thus it is not necessary that
5 the class representative should have personally incurred all of the damages suffered by each of the
6 other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 228.)

7 Plaintiff contends, and Defendant does not dispute for settlement purposes only, that
8 Plaintiff’s claims are typical of Class Members’ claims because they arose from the same factual
9 basis and are based on the same legal theories. (Yeremian Decl., ¶ 74(c)) Plaintiff was employed
10 by Defendant during the Class Period, and was subject to the allegedly unlawful meal policies
11 and pay practices at issue in this litigation. (*Id.*) Accordingly, Plaintiff is a member of the Class.
12 (*Id.*) The central issues of this litigation (whether Defendant failed to pay all wages, whether
13 Defendant failed to provide meal and rest periods, etc.), which would arise if this was an
14 individual action, applies to the other Class Members as well. The answer to these questions
15 would determine Defendant’s liability to the putative class. (*Id.*) Thus, the claims of Plaintiff are
16 typical of the claims of the putative class. (*Id.*) Accordingly, the typicality requirement is
17 satisfied.

18 **D. Adequacy of Class Counsel and Class Representative**

19 Class Counsel are experienced in class actions, have represented their clients zealously
20 and have no conflicts of interest. (Yeremian Decl., ¶¶ 3-9, 74(d)) The Class Representative’s
21 interests are aligned with those of the Class Members, they have suffered the same injuries as the
22 Class Members, and have no conflicts of interest. (*Id.*) Therefore Class Counsel and the Class
23 Representative are adequate.

24 **E. Predominance and Superiority**

25 Individual issues do not predominate over those common to the class. (Yeremian Decl., ¶
26 74(f)) The class action mechanism is superior to individualized actions because Class Members
27 have little incentive to bring claims that are small. (*Id.*)

28 ///

V. THE TWO-STEP APPROVAL PROCESS

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

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

(*Manual for Complex Litigation (Second)* (1985) at § 30.44.) The preliminary approval of the class action settlement by the trial court is simply a conditional finding that the settlement appears 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, 1094-95.) Thus, the preliminary approval of the class action settlement by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements.

Settlements to resolve PAGA claims also require court approval. (Labor Code § 2699(1)(2).) There is no articulated standard for approving PAGA settlements. PAGA settlements for as little as \$0 have been approved. (See *Nordstrom Com'n Cases* (2010) 186 Cal.App.4th 576, 589 (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 \$4 million settlement); *Chu v. Wells Fargo Invest. LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, at *1 (approving PAGA payment of \$7,500 in \$6.9 million settlement); *Williams v. Brinderson Constructors* (C.D. Cal. Feb. 6, 2017) 2017 WL 490901, at *5 (\$10,000 PAGA settlement in \$300,000 settlement).)

A review of the preliminary approval criteria demonstrates a substantial basis for granting

1 the instant Motion and proceeding to a full settlement hearing.

2 **VI. THE SETTLEMENT IS FAIR AND ADEQUATE**

3 As a matter of public policy, courts both encourage the use of the class action device and
4 favor settlement over continued litigation. (*See, e.g., Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th
5 429, 434 (“Courts have long acknowledged the importance of class actions as a means to prevent
6 a failure of justice in our judicial system.”); *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d
7 1268, 1276 (“[S]trong judicial policy . . . favors settlements, particularly where complex class
8 action litigation is concerned.”).)

9 Moreover, courts presume the absence of fraud or collusion in the negotiation of a
10 settlement unless evidence to the contrary is offered. In short, there is a presumption that the
11 negotiations were conducted in good faith. (*Newberg*, §11.51; *Rodriguez v. West Publ. Corp.*
12 (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25 ; *Priddy v. Edelman* (6th Cir.
13 1989) 883 F.2d 438, 447.) Courts do not substitute their judgment for that of the proponents,
14 particularly when settlement has been reached by experienced counsel familiar with the litigation.
15 (*Rodriguez*, 2007 U.S. Dist. LEXIS 74767 at 24; *Hammon v. Barry* (D.D.C. 1990) 752 F. Supp.
16 1087.)

17 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008), the court laid out
18 several factors that should be analyzed in determining if a class action settlement should be
19 approved. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense,
20 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
21 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and
22 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
23 governmental participant; and (8) the reaction of the Class Members to the proposed settlement.

24 The Settlement here satisfies each of these factors. Class Counsel conducted extensive
25 informal discovery before entering into meaningful settlement negotiations in this matter,
26 including a detailed analysis of Defendant’s policies and a considerable sample of Defendant’s
27 time and pay records. (Yeremian Decl., ¶¶ 11-12) This discovery permitted Class Counsel to
28

1 fairly evaluate the strengths of the case and the risks associated with ongoing litigation. Class
2 Counsel is very experienced in the handling of wage and hour class actions and supports this
3 Settlement. (Yeremian Decl., ¶¶ 3-9)

4 **A. The Strength of Plaintiff's Case.**

5 The claims in this action include failure to pay minimum and overtime wages, failure to
6 provide meal and rest breaks or provide premium pay in lieu thereof, failure to provide accurate
7 wage statements, failure to timely pay wages including upon termination, failure to reimburse for
8 necessary business expenditures, failure to maintain accurate records, failure to provide required
9 paid sick days, failure to provide suitable seating and related claims for violations of California's
10 Business & Professions Code and for penalties under PAGA. (Yeremian Decl., ¶ 10)

11 Class Counsel felt confident that the claims in this case would be certified given that
12 Defendant's policies were applicable to all Class Members and unlawful on their face. (Yeremian
13 Decl., ¶¶ 28-56) Defendant contended, however, that that its policies and practices complied with
14 California law, and that a majority of putative class members signed arbitration agreements with
15 class action waivers which would preclude certification.

16 **B. The Risks Associated with the Merits.**

17 As with all litigation, there are risks that a party will not prevail on the merits. In this case,
18 Plaintiff contends that they and other Class Members were not properly provided meal periods.
19 (Yeremian Decl., ¶¶ 35-38) Defendant contended that Class Members signed meal period
20 waivers, were given a reasonable opportunity to take their meal periods, and in fact received their
21 meal periods most of the time. Moreover, Defendant contended and the payroll data confirmed
22 that Defendant consistently paid meal period premium payments for alleged meal period
23 violations. (*Id.*) If Defendant's contentions are proven true and prevail in trial, the likely outcome
24 of this claim would be no recovery for the Class Members. Plaintiff also contended that
25 Defendant did not provide Class Members with paid 10-minute rest breaks for every four hours or
26 major fraction thereof. (Yeremian Decl., ¶¶ 39-41) Class Members consistently worked in excess
27 of consecutive four-hour shifts and were entitled to paid rest breaks of not less than ten minutes
28 for each consecutive four hour shift which they were denied. Class Members were required to

1 work through their rest breaks, and through their entire shifts. Defendant maintained that they did
2 provide the reasonable opportunity for Class Members to take duty-free rest breaks. (*Id.*)
3 Defendant also pointed out that, unlike meal periods, rest breaks need not be recorded and
4 employees need not be allowed to leave the premises. As these considerations would likely
5 depress the damages *vel non* ultimately awarded, Class Counsel applied significant and
6 appropriate discounts to the rest-break claim.

7 Plaintiff alleged that Defendant failed to pay Plaintiff and Class Members minimum
8 wages for all hours worked, in violation of minimum wage laws. (Yeremian Decl., ¶ 32-34)
9 Additionally, Plaintiff contended that Class Members were forced to work off the clock in part
10 due to pre-shift off the clock work, post-shift off the clock work, and time spent working through
11 meal periods. (*Id.*) Moreover, Plaintiff contended Class Members were paid bonuses and/or
12 commissions each week which were tied directly to the daily or weekly performance of their jobs
13 and Defendant failed to incorporate the non-discretionary, performance based bonuses and/or
14 commissions into the overtime rate calculation. (*Id.*)

15 Defendant contends that they paid for all reported hours worked, that Class Members were
16 trained to record all hours worked, and that they paid proper minimum wages. (*Id.*) Defendant
17 contended that its no off-the-clock work written policy was, in fact, complied with throughout the
18 class period. Defendant also maintained that the allegations regarding failure to pay wages for
19 hours worked in excess of eight hours in a day did not constitute a basis for violation of Labor
20 Code § 510. Defendant argued that given their written policies and practices, any unrecorded
21 hours were likely subject to individualized inquiry and unlikely to be certified. Given the
22 difficulty in certifying this claim, Class Counsel had to apply a significant discount to damages
23 based on this theory.

24 Plaintiff also claimed that she worked for Defendant and in the course of performing their
25 job duties, incurred necessary business related expenses, including, but not limited to cellular
26 telephone expenses, the purchase of supplies, and mileage. (*Id.* at ¶ 49-50) Defendant maintained
27 that Plaintiff and the Class members were not required to use their personal cell phones, purchase
28 supplies, or drive for work purposes. (*Id.*)

1 **C. The Risks Associated with Paystub Violations and Waiting Time Penalties.**

2 In order to establish liability for these penalties, Plaintiff would first have to establish
3 liability for the underlying claims. Moreover, Defendant argued that meal violations, even if
4 established, could not be the predicate for a Labor Code § 226 wage statement or § 203 waiting
5 time claim. (Yeremian Decl., ¶¶ 43, 47) For example, the California Supreme Court has recently
6 held that claims for meal period penalties do not constitute “action[s] brought for the nonpayment
7 of wages” for the purpose of determining statutory fees. (*Kirby v. Immoos Fire Prot., Inc.* (2012)
8 53 Cal.4th 1244, 1259.) In *Ling v. P.F. Chang’s China Bistro* (2016) 245 Cal.App.4th 1242, the
9 Court of Appeal noted an action for unlawful meal periods under “cannot support a section 203
10 penalty because section 203, subdivision (b) tethers the waiting time penalty to a separate action
11 for wages.” Authority is divided on this point. Moreover, although authority is divided, many
12 district court rulings support the conclusion that any unpaid meal period premium pay cannot give
13 rise to derivative wage statement liability. (*See, e.g., Culley v. Lincare Inc.* (E.D. Cal. 2017) 236
14 F.Supp.3d 1184, 1195-96; *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392-393
15 (noting a wage statement need only document compensation *actually received* and the hours used
16 to calculate that compensation).) Thus, it is unclear if the Court would have permitted untimely
17 wage penalties or wage statement violations for Defendant’s alleged failure to provide meal
18 period penalties.

19 In addition, Plaintiff would have to establish that Defendant’s conduct was willful to
20 recover waiting time penalties. (Labor Code § 203.) With these penalties, there is always the risk
21 that the trier of fact would not have held that Defendant’s actions were done “willfully.” A good
22 faith belief in a legal defense can preclude a finding of willfulness. (*Gonzalez v. Downtown LA*
23 *Motors* (2013) 215 Cal.App.4th 36, 54; 8 C.C.R. § 13520.) As discussed above, Plaintiff
24 contended the wage statements given to Class Members failed to incorporate non-discretionary
25 bonuses into the regular rate of pay used to calculate and pay overtime compensation and
26 therefore did not provide accurate hourly rates for overtime. Additionally, Plaintiff contended the
27 wage statements given to Class Members failed to accurately account for unpaid wages and
28 overtime due to the off the clock work, miscalculating of proper overtime pay, and premium pay

1 for deficient meal periods and rest breaks which Defendant knew or reasonably should have
2 known were owed to Plaintiff and Class Members. If Plaintiff is successful on her claims, the
3 penalties pursuant to Labor Code § 203 shall attach. Defendant, however, contend they provided
4 employees with the reasonable opportunity to take meal and rest breaks, asked Class Members to
5 confirm the accuracy of their time records, and therefore had good-faith defenses under *Brinker*
6 and its progeny. As such, there was some risk associated with waiting time penalties that Class
7 Counsel had to consider. (Yeremian Decl., ¶¶ 47-48)

8 Additionally, Defendant argued the claims for paystub violations and waiting time
9 penalties had little or no value. *See e.g.*, *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.
10 App. 5th 444 (2019), *rev. granted Naranjo v. Spectrum Security Services, Inc.*, No. S258966,
11 2020 Cal. LEXIS 167 (Jan. 2, 2020) (noting, for example, that the remedy for a meal period/rest
12 break violation is an extra hour of pay, but that does not transform the remedy into a wage for
13 triggering section 203 waiting time penalties; similar analysis applied in rejecting a derivative
14 claim for paystub penalties); *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308,
15 1336-1337 (2018) (wage statements that accurately report wages paid to employees do not violate
16 Labor Code § 226, even if it is later determined that employer did not properly pay all wages
17 due).

18 **D. The Risks Associated with the PAGA Penalties.**

19 Labor Code § 2699.3 gives aggrieved employees the right to recover civil penalties for
20 specific Labor Code violations by way of a civil action. The PAGA provides a penalty amount of
21 one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation
22 and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent
23 violation. Labor Code § 2699(e)(2). However, if a civil penalty is provided in a specified amount
24 by the Labor Code section relating to the underlying alleged Labor Code violation, that amount
25 shall apply. (*Id.*) The PAGA also gives the Court discretion to award any lesser amount than the
26 maximum civil penalty. (*Id.* [“...a court may award a lesser amount than the maximum civil
27 penalty amount specified by this part if, based on the facts and circumstances of the particular
28 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or

confiscatory.”]); *See, e.g., Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773, 788 (2017), *rev. denied* (2018), (recognizing court’s ability to reduce PAGA penalties). Courts have held that situations similar to the current one (e.g. injuryless violations, technical errors, and substantial compliance) should lead to reductions in penalties. *See Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1134-1135 (2012) (holding that reduction was justified when employer “attempted to comply with the law”); *Fleming v. Covdien, Inc.*, No. ED CV10-01487 RGK (OPx), 2011 U.S. Dist. LEXIS 154590 at *8-9 (C.D. Cal. August 12, 2011) (reducing PAGA penalties more than 80% – from \$2.8 million to \$500,000 – when “employees suffered no injury” employers were “not aware” of the violation and “took prompt steps to correct all violations once notified”).

Plaintiff discounted potential penalties under this claim given this authority, and for other reasons. The PAGA claims are premised on the same underlying meal, wage statement, and waiting time claims, and thus subject to the same disputes and defenses. There is also a dispute as to whether violations in later pay periods trigger the \$200 penalty under PAGA as a “subsequent violation.” (*Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1203 (2008).) As such, there is a fair amount of risk associated with PAGA claims. (Yeremian Decl., ¶¶ 51-54) The parties also considered that the purpose of PAGA is to “achieve maximum compliance with state labor laws,” and that through the proposed settlement, Defendant has agreed to ensure policies comply with California law. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 379.) This makes the settlement’s contemplated PAGA payment of \$50,000 appropriate.

Based on this analysis, Class Counsel believes that this settlement is fair and reasonable and in the best interest of the Class. (Yeremian Decl., *passim*.)

E. The Risk, Expense, Complexity and Likely Duration of Any Litigation.

Given the risks outlined above, the issues in this case were complex and the risk for Plaintiff and the Class Members associated with this litigation was high. (Yeremian Decl., ¶¶ 58-61) A class trial would have required the retention of expensive expert witnesses, the accrual of extensive litigation costs, and the parties would have had to spend a substantial amount of time. (Yeremian Decl., ¶¶ 14, 57)

1 Finally, given the complexity and unsettled nature of the issues, it is likely that any
2 outcome at trial would have resulted in a lengthy and costly appeal. An appeal would result in
3 further delay for the Class Members who have already waited years for resolution in this matter.

4 **F. The Risk of Maintaining Class Action Status Through Trial.**

5 In class actions, decertification is always a possibility. There is always a risk that a trial of
6 this magnitude can become unmanageable. (*Id.*) Given cases like *Duran v. U.S. Bank Nat. Assn.*,
7 59 Cal. 4th 1, 34 (2014) that deal with the complexity of using statistical samples in class actions,
8 decertification is a real risk that Class Counsel must take into account.

9 **G. The Amount Offered in Settlement.**

10 There can be no doubt that this Settlement is the result of vigorous, adversarial, non-
11 collusive, and arms-length negotiations between the parties with an experienced mediator. In
12 order to determine the approximate potential damages which would be owed to each of the Class
13 Members, Class Counsel analyzed the time records for Plaintiff and Defendant provided Class
14 Counsel with records for a sampling of the class members. By analyzing this information, Class
15 Counsel was able to estimate the full value of the case if Plaintiff was to prevail at trial.

16 There are approximately 3,755 total Class Members. Class Counsel estimated that the
17 maximum award the class could have obtained is approximately \$13,231,425. Class Counsel
18 estimated the following maximum exposures: unpaid wage claim at \$754,309, meal period claim
19 at \$1,035,854, rest period claim at \$1,035,854, wage statement claim at \$1,996,000, waiting time
20 penalties at \$6,145,958, reimbursement of business expenses claim at \$187,750, and on PAGA,
21 Plaintiff estimated the maximum exposure at \$2,075,700. (Yeremian Decl., ¶ 29)

22 However, taking into account the difficulties of proof, the Defendant's defenses, and other
23 attendant risks, Plaintiff estimates that the total amount of damages, monetary penalties, or other
24 relief that the class could reasonably expect to be awarded at trial is significantly less than the
25 maximum exposure. (Yeremian Decl., ¶ 30)

26 Plaintiff believes they would be awarded approximately \$2.8 million at trial. Class
27 Counsel estimates they would recover the following amount in damages at trial: unpaid wage
28 claim at \$388,229, meal period claim at \$517,927, rest period claim at \$0, wage statement claim

1 at \$698,600, waiting time penalties at \$1,229,191, reimbursement of business expenses claim at
2 \$0, and on PAGA, Plaintiff estimates they would recover anywhere from \$25,000-50,000.
3 (Yeremian Decl., ¶ 31)

4 Once Class Counsel was able to determine the maximum potential damages, it was able to
5 determine a fair and reasonable settlement for the Class. (*Id.* at ¶¶ 58-61) Class Counsel analyzed
6 the likelihood of success on the merits. (*Id.*) It believes that the Class had a reasonable likelihood
7 of success on the core claims. (*Id.*) However, Defendant disputes this contention, deny all
8 wrongdoing in this matter and are confident they have strong legal and factual defenses to
9 Plaintiff's claims. Moreover, Class Counsel determined that the likelihood of success on the
10 claims for unpaid wages and waiting time penalties were not as strong, because various defenses
11 including issues not suitable for class treatment, no detriment to the class members over time, and
12 *de minimis* defenses. Defendant may have had the opportunity to establish that they had a good
13 faith belief that they were complying with law. (*Id.*) After taking into account the likelihood of
14 success on each claim and the challenges faced with certifying these claims, Class Counsel
15 determined that the settlement amount of \$700,000 was fair and reasonable.

16 Under the Settlement, each of the approximately 3,755 Class Members will receive on
17 average \$100 after expenses. (*Id.* at ¶ 57) Plaintiff feels that this Settlement is fair, reasonable,
18 and advantageous to the class. (*Id.*)

19 To summarize, the Settlement here is fair because it provides a substantial payment to
20 each Class Member for releasing his or her claims; extinguishes the risk of litigation; and
21 provides a fair and adequate distribution of the settlement proceeds whereby the funds are
22 allocated to Class Members proportionally based on their Payout Ratio.

23 As detailed at length in the accompanying Declaration of David Yeremian, the settlement
24 is the result of extensive settlement negotiations between the parties, conducted at arm's length,
25 and informed by substantial factual and legal investigations. (Yeremian Decl., *passim.*)
26 Throughout this case, Class Members have been represented by experienced counsel with many
27 years of experience in employment class action litigation. (Yeremian Decl., ¶¶ 3-9)

28 Class Counsel has devoted a considerable amount of time to the prosecution of this case,

1 including but not limited to, interviewing Plaintiff on repeated occasions; drafting pleadings;
2 conducting considerable discovery, and meeting and conferring with defense counsel about same;
3 reviewing and analyzing time records and various handbooks and policies, Plaintiff's personnel
4 file, and other documentation; researching California law; interviewing numerous class members
5 regarding their experiences; preparing for and attending mediation; and negotiating and finalizing
6 the Settlement Agreement and related documents. (Yeremian Decl., ¶¶ 11-14)

7 Among those matters considered during the course of settlement negotiations were the
8 strength of Plaintiff's case versus the amounts offered in settlement; the risks, expenses, and
9 length of further litigation, including class certification and the appeals process; the present state
10 of the law as it applies to wage and hour class actions, particularly in light of *Brinker*; the present
11 value of a settlement versus the long wait necessitated by any potential judgment in class
12 members' favor; the burdens of proof necessary to establish liability against Defendant; and
13 Defendant's defenses to the action. (Yeremian Decl., *passim*.)

14 These factors each indicated that the interests of Class Members are best served by a
15 settlement of this action in the manner and upon the terms set forth in the Settlement Agreement.
16 The Settlement Agreement confers a substantial benefit on the class of up to \$700,000. Moreover,
17 the settlement awards for each Class Member will be tailored to their workweeks during the class
18 period. (*Id.* at ¶ 20) In addition Class Counsel secured prospective relief for the class in that
19 Defendant will ensure their policies comply with California law.

20 Class Counsel believes that the settlement is fair and reasonable and serves the best
21 interests of the Class Members. Although the recommendations of counsel proposing the class
22 settlement are not conclusive, the Court can properly take the recommendations into account,
23 particularly if counsel has been involved in litigation for some period of time, appear to be
24 competent, and have experience with this type of litigation, and significant discovery has been
25 completed. *See Newberg*, §11.47.

26 **VII. THE CLASS REPRESENTATIVE ENHANCEMENTS ARE FAIR AND** 27 **REASONABLE**

28 It is appropriate to provide a relatively modest additional incentive payment to the class

1 representative. See *Newberg*, § 12.1; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901
2 F.Supp. 294.

3 Plaintiff is entitled to reasonable service payments for their efforts and initiative in
4 bringing and helping to prosecute this class action. Plaintiff spent significant time better apprising
5 herself of her rights, deciding whether remedial action should be taken, how it should be taken,
6 searching for attorneys, and contacting Class Counsel, who spent many hours with Plaintiff
7 discussing her case and the law. (Yeremian Decl., ¶¶ 69-73) In the end, Plaintiff decided to
8 vindicate not only her own rights but also those of her co-workers by filing a class action lawsuit.

9 The courage it took to do this should not be underestimated. By suing Defendant, Plaintiff
10 contends she increased her risk of retaliation by prospective employers. (*Id.*) Plaintiff's lawsuit
11 has now cost Defendant considerable resources, and Plaintiff contends such conduct will not be
12 lost on a prospective employer who has to choose between an applicant who has never sued a
13 prior employer and one who has. (*Id.*) Plaintiff contends this risk is particularly real in the
14 information age, where employers can, more easily than ever, perform background checks of
15 prospective employees, sometimes with the stroke of a key. (*Id.*)

16 But Plaintiff did not allow her fear of the potential repercussions of being class
17 representative deter her from acting for the benefit of Class Members. (*Id.*) To the contrary,
18 Plaintiff has been intimately involved in this case since its inception. (*Id.*) She has devoted a
19 substantial amount of time to helping Class Counsel effectively develop and prosecute this action
20 at every stage of the litigation. (*Id.*) Both before and after the filing of this lawsuit, Plaintiff
21 conferred with Class Counsel to discuss every aspect of this case; Plaintiff has provided Class
22 Counsel with information about Defendant and about the industry generally, reviewed documents,
23 identified witnesses, consulted Class Counsel throughout the litigation, participated in the
24 mediation process, monitored the progress of the litigation with Class Counsel, and reviewed and
25 signed the settlement agreement. (*Id.*)

26 Plaintiff has spent a significant amount of time with Class Counsel detailing her
27 knowledge of Defendant's practices. (*Id.*) They have diligently, adequately, and fairly represented
28 Class Members, and have not placed her interests above any member of the putative class. (*Id.*)

1 This sort of payment to a class representative has been a common feature of settlements
2 negotiated by Class Counsel and has been routinely approved by trial courts. (*Id.*)

3 In light of the foregoing, Class Counsel believes that the incentive award in the amount of
4 Ten Thousand Dollars and Zero Cents (\$10,000.00) to the Class Representative is fair and
5 reasonable. (*Id.*)

6 **VIII. THE PROPOSED CLASS NOTICE PROVIDES ADEQUATE NOTICE TO THE**
7 **CLASS MEMBERS.**

8 Constitutional due process requires that class members be provided with notice sufficient
9 to give them an opportunity to be heard in the proceedings. *Mullane v. Central Hanover Bank &*
10 *Trust Co.* (1950) 339 U.S. 306. Proper notice must provide the class members with sufficient
11 information to make an informed decision as to whether to accept or object to the settlement. (*Id.*
12 at 314.) The notice must apprise the class members of the pendency of the action; reasonably
13 convey information regarding the settlement and the class members' rights, entitlements, and
14 obligations; and afford class members the opportunity to present their objections. (*Id.*)

15 The Notice Packet meets constitutional standards because it provides all the information a
16 reasonable person would need to make a fully informed decision about the settlement. It will
17 notify all class members of the terms of the settlement, of its effect on their rights, of their options
18 as class members (i.e., participate, object, opt out, do nothing), and of the consequences of
19 exercising those options. (Yeremian Decl., ¶¶ 62-64) Moreover, the Notice Packet will
20 specifically direct any class members who have questions or concerns to contact the Settlement
21 Administrator, CPT Group, Inc., or Class Counsel. (*Id.*)

22 The standard for determining the adequacy of notice is whether the notice has "a
23 reasonable chance of reaching a substantial percentage of the class members." (*Cartt v. Superior*
24 *Court* (1975) 50 Cal.App.3d 960, 974.) The Judicial Council of California's Deskbook on the
25 Management of Complex Civil Litigation (Matthew Bender 2003), § 3.74 notes that individual
26 notice by mail is preferred when possible and dissemination of combined certification/settlement
27 notice is a common and accepted practice. (*In re Vitamin Cases* (2003) 107 Cal.App.4th 820,
28 828.)

1 Here, the Notice Packet will be sent via first-class mail to each class member. (Yeremian
2 Decl., ¶ 62) If any Notice Packet is returned undeliverable without a forwarding address, the
3 Settlement Administrator will use the national change of address database and perform a skip
4 trace to locate the class member and mail a new Notice Packet to him or her at the correct
5 address. (*Id.*) Thus, most, if not all, class members will likely receive the Notice Packet.

6 Pursuant to controlling authority, the proposed Notice Packet and method of distribution
7 fully comport with due process requirements. Therefore, the Court should approve the Notice
8 Packet and direct that it be distributed as proposed herein.

9 **IX. STANDING TO OBJECT TO PROPOSED SETTLEMENT**

10 Non-settling parties and third parties periodically may attempt to object to proposed class
11 action settlements, but the right of non-settling parties to object at the final settlement approval
12 hearing, let alone the preliminary approval hearing, is quite limited. As a general rule, only class
13 members have standing to object to a proposed settlement. “Beginning from the unassailable
14 premise that settlements are to be encouraged, it follows that to routinely allow non-class
15 members to inject their concerns via objection at the settlement stage would tend to frustrate this
16 goal.” (*Gould v. Alleco, Inc.* (4th Cir. 1998) 883 F.2d 281, 284.) Since an application is being
17 filed to obtain a good faith determination, no persons other than class members have standing to
18 object to the proposed settlement. (*In re School Asbestos Litigation* (3rd Cir. 1990) 921 F.2d
19 1330.)

20 **X. THE STIPULATED AWARD OF ATTORNEYS’ FEES AND COSTS IS** 21 **REASONABLE AND SHOULD BE APPROVED.**

22 Under the Settlement Agreement, subject to approval by this Court, Class Counsel will
23 seek an award of fees of no more than Two Hundred Thirty Three Thousand Three Hundred
24 Thirty Three Dollars and Thirty Three Cents (\$233,333.33), one-third of the Gross Settlement
25 Amount, and not more than Seventeen Thousand Dollars and Zero Cents (\$17,000.00) in costs.
26 The requested fees are fair compensation for a law firm involved in undertaking complex, risky,
27 expensive, and time-consuming litigation solely on a contingent basis. (Yeremian Decl. ¶¶ 66-68)
28 Defendant will not oppose Class Counsel’s fees and cost request.

1 California courts routinely look to the federal courts on class action approvals. The Ninth
2 Circuit has recognized that an appropriate method for awarding attorneys' fees in class actions is
3 to award a percentage of the "common fund" created as a result of the settlement. (*Vincent v.*
4 *Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) The purpose of the common
5 fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries
6 so that the active beneficiary does not bear the entire burden alone." (*Id.*) Accordingly, courts
7 have discretion to choose either the percentage-of-the-fund method or the lodestar method. (*In re*
8 *Wash. Pub.Power Supply Sys. Sec. Litigation* (9th Cir. 1994) 19 F.3d 1291, 1295-96.)

9 Several courts have, however, expressed frustration with the "lodestar" approach for
10 deciding fee awards, which usually involves wading through voluminous time records. Thus, the
11 percentage approach can be preferable to the lodestar in certain situations because: (1) it aligns
12 the interests of class counsel and absent class members; (2) it encourages efficient resolution of
13 the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the
14 demands on judicial resources. (*In re Activision Securities Litigation*, (N.D. Cal. 1989) 723
15 F.Supp. 1373, 1378-79.) The Ninth Circuit has used the percentage of the common fund approach
16 to determine the award of attorneys' fees. (*In re Pacific Enterprises Securities Litigation* (9th Cir.
17 1994) 47 F.3d 373, 378-79 (approving attorneys' fee of 33 1/3% of settlement fund).)

18 Class Counsel's application for attorneys' fees in light of the facts and circumstances
19 surrounding this case is well within the range of reasonableness. Historically, courts have
20 awarded percentage fees in the range of 20% to 50% of the common fund, depending on the
21 circumstances of the case. (*Newberg*, at §14.03; *see also In re Activision Securities Litigation*,
22 723 F. Supp. at 1378.) *Newberg* further notes: "[A]chievement of a substantial recovery with
23 modest hours expended should not be penalized but should be rewarded for considerations of
24 time saved by superior services performed." (*Id.* at §§ 14-10:14-11.)

25 The attorneys' fees request provided for in the Settlement Agreement is commensurate
26 with judicial precedent. Both state and federal courts regularly approve fee awards equal to or
27 greater than the percentage requested in this case. (*See, e.g., In re Pacific Enterprises Securities*
28 *Litigation* (9th Cir. 1995) 47 F.3d 373, 379 (affirming an award equal to 33% of the common

1 fund); *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (awarding
2 plaintiffs' counsel 32.8% of the common fund created to settle the litigation); *In re Ampicillin*
3 *Antitrust Litigation* (D. D.C. 1981) 526 F.Supp. 494 (awarding 45% of \$7.3 million settlement
4 fund); *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 557-568 (affirming fee award to
5 counsel of one-third (1/3) of recovery achieved).)

6 In wage and hour class actions in particular, California trial courts have customarily
7 approved attorney's fees consistent with or greater than the percentage of the common fund
8 requested in this case. (See *Evans v. Coca-Cola*, Los Angeles County Super. Ct. Case No. BC
9 220525 (Hon. Richard C. Hubbell) (Dec. 2001) (approving an award of attorneys' fees of at least
10 33-1/3% of the settlement); see also *Estrada v. Dr. Pepper/Seven-Up*, Los Angeles County Super.
11 Ct. Case No. BC 262247 (May 2005) (Hon. Anthony J. Mohr); *Moreno v. Miller Brewing*, Los
12 Angeles County Super.Ct. Case No.BC 278170 (April 2004) (Hon. David M. Minning); *Josiah*
13 *Eaton v. Adolph Coors Company* (2003) Orange County Super. Ct. Case No. 01CC00140 (Hon.
14 Stephen J. Sundvold); *Kimbell v. Abercrombie & Fitch Stores, Inc.*, Los Angeles County
15 Super.Ct. Case No.BC 277359 (Sept. 2006) (Hon. Kenneth R. Freeman); *Daum v. Claim Jumper*
16 *Restaurants*, Orange County Super.Ct. Case No.02CC10201 (2006) (Hon. Ronald L. Bauer).)

17 Here, Class Counsel has borne the entire risk and costs of litigation and will not receive
18 any compensation until recovery is obtained. (See Yeremian Decl., ¶¶ 66-68) The Court should
19 also consider the benefit obtained by Class Counsel on behalf of class members. Thus, the
20 requested award for Class Counsel is reasonable.

21 **XI. ACTION REQUESTED AS A PART OF THE MOTION FOR PRELIMINARY** 22 **APPROVAL**

23 The parties respectfully request this Court, as part of the preliminary approval process, to
24 grant the following relief and make the following orders:

- 25 1. Review and approve the Settlement Agreement;
- 26 2. Review and approve the Notice, attached to the Settlement Agreement as Exhibit A;
- 27 3. Consider and determine that the proposed class action settlement as set forth in the
28 Settlement Agreement preliminarily appears fair, reasonable, and adequate;

1 4. Enter an order conditionally certifying the action as a class action for settlement
2 purposes only and preliminarily approving the proposed class action settlement and the
3 Settlement Agreement;

4 5. Approve and appoint David Yeremian of David Yeremian & Associates, Inc. and Emil
5 Davtyan of Davtyan Law Firm, Inc. to serve as Class Counsel for settlement purposes;

6 6. Approve and appoint CPT Group, Inc. as the Settlement Administrator to handle the
7 notice and claims procedures as set forth in the Settlement Agreement;

8 7. Approve the proposed settlement's allocation of funds to claims made under PAGA;

9 8. Order Defendant to disclose to CPT Group, Inc. the names, last-known addresses,
10 telephone numbers, dates of employment, and social security numbers of class members as set
11 forth in the Settlement Agreement;

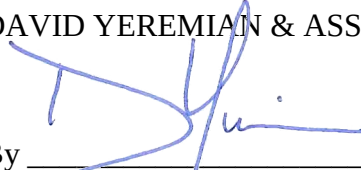
12 9. Order that CPT Group, Inc mail the Notice to class members; and

13 10. Set a date for the Final Approval Hearing.
14

15 Dated: March 9, 2021

Respectfully submitted,

16 DAVID YEREMIAN & ASSOCIATES, INC.

17
18 By  _____

19 David Yeremian
20 Attorneys for Plaintiff ROSALINDA
21 MARCHBANKS-POWELL on behalf of herself
22 and others similarly situated
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I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 535 N. Brand, Blvd. Suite 705, Glendale CA 91203.

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[] (COURTESY COPY BY ELECTRONIC TRANSMISSION) by use of email by scanning the documents and any and all documents and emailing them to email addresses above.

[] (BY OVERNIGHT DELIVERY) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the address above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

Natalia Bermudes
Natalia Bermudes