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12 JOSE LOZANO SANDOVAL, and all others similarly situated

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN BERNARDINO**
15 **(UNLIMITED JURISDICTION)**

17 JOSE LOZANO SANDOVAL, on behalf of
18 himself and all others similarly situated, and the
general public,

19 *Plaintiff,*

20 vs.

21
22 AMERICAN LANDSCAPE &
23 MAINTENANCE INC., a California corporation;
and DOES 1–50, inclusive,

24 *Defendants.*

Case No. CIVDS2011904

**PLAINTIFF JOSE LOZANO
SANDOVAL’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**



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v

Sandoval v. American Landscape & Maintenance Inc., et al.

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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 Jose Lozano Sandoval ("Plaintiff") submits this memorandum of points and
5 authorities in support of his unopposed motion for preliminary approval of the Joint Stipulation
6 of Class Action Settlement and Release of Claims (the "Settlement")², which provides for a
7 \$250,000.00 Gross Settlement Amount, payable by Defendant as provided in the Settlement
8 Agreement, in compromise of all disputed claims on behalf of all persons working for Defendant
9 as hourly, non-exempt employees in California of Defendant American Landscape &
10 Maintenance Inc. ("Defendant") in California at any time between May 29, 2016, through
11 November 3, 2021 (the "Class Period"). Through this Motion, Plaintiff respectfully requests for
12 this 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; (6) directing that notice be mailed to the proposed Settlement Class;
17 and (7) schedule a final approval hearing.

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

28 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
2 **II. BACKGROUND**

3 Defendant is a landscaping business. DS, ¶ 4. Defendant employed Plaintiff as an hourly,
4 non-exempt landscaper, groundskeeper, driver, leadman, and laborer from about June 2013 until
5 September 27, 2019. *Id.*

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

7 On March 13, 2020, Plaintiff notified Defendant and the California Labor and Workforce
8 Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of
9 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations
10 committed by Defendant. DS, ¶ 5, Ex. 2.

11 On May 29, 2020, Plaintiff filed a Class Action Complaint in the San Bernardino County
12 Superior Court, Case No. CIVDS2011904, against Defendant on behalf of himself and others
13 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
14 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
15 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
16 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
17 Statement Penalties (Lab. Code §§ 226); (6) Waiting Time Penalties (Lab. Code §§ 201-203); and
18 (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On December 18,
19 2020, Plaintiff filed his First Amended Complaint adding a claim under PAGA. *Id.*, Ex. 4.
20 Defendant denies all of Plaintiff’s allegations and strongly contends that Class Members have
21 been fully compensated and Defendant’s wage and hour policies, practices and procedures are
22 fully compliant with all applicable laws. *Id.*

23
24 **B. Settlement Negotiations**

25 The Parties discussed the possibility of settling the lawsuit without attending mediation
26 because Defendant has financial troubles. DS, ¶ 7. The Parties thereafter engaged in an informal,
27 voluntary exchange of information in the context of privileged settlement discussions to facilitate
28 an early resolution of the lawsuit. Defendant produced Plaintiff’s entire personnel file, including



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policies and agreements he signed and acknowledged, and its financial records, including balance sheets and an Internal Revenue Service letter regarding Defendant's tax obligations. *Id.* The Parties continued to negotiate after Plaintiff reviewed Defendant's financial records. *Id.* On September 8, 2021, the Parties agreed to settle for \$250,000.00, paid in 48 monthly installments of \$5,208.33. *Id.* The Parties concluded that no other Settlement was possible given Defendant's financial limitations. *Id.*

C. Defendant's Financial Condition

During settlement negotiations, it became clear that Defendant had insufficient resources to cover the full extent of alleged liability. DS ¶ 8. As part of the settlement negotiations, Defendant disclosed confidential copies of its financial records from December 2017 to March 2020. *Id.* Plaintiff's Counsel has reviewed the financial records. *Id.* The information provided was sufficient to demonstrate the financial condition of the company. Based on such records, Plaintiff, on his own behalf and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set forth in the Settlement for less than they might ordinarily have. *Id.*

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines "Class," "Class Members," or "Settlement Class" as all persons working for Defendant as hourly, non-exempt employees in California during the Class Period. The Settlement defines "Class Period" as the period of time from May 29, 2016, through November 3, 2021. Defendant estimates that, as of November 3, 2021, there were approximately 634 Class Members with 27,396 workweeks during the Class Period. Settlement § I(B).

B. Monetary Terms

The following table provides an overview of the Settlement's monetary terms.

Payment Type	Amount
Class Representative Payment	Not more than \$15,000.00
Class Counsel Fee Payment	Not more than \$83,333.00
Class Counsel Litigation Expenses Payment	Not to exceed \$12,500.00
Settlement Administrator	Not to exceed \$20,000.00



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PAGA Penalties	\$4,000 (\$3,000.00 paid to the LWDA and \$1,000.00 paid to the PAGA Members)
Net Settlement Amount	Estimated amount of \$123,167.00
Gross Settlement Amount	\$250,000.00

Settlement § III(B-F).

In consideration for settlement of this lawsuit, Defendant agrees to pay a maximum of \$250,000.00 (the “Gross Settlement Amount”), plus Defendant’s employer share of employer-side payroll taxes. Settlement § III(B). Defendant will not be required to pay more than the Gross Settlement Amount for distribution to the Plaintiff, Class Counsel, Class Members, LWDA, and Settlement Administrator. *Id.* However, if the number of Class Members during the Class Period increases by more than 10.00%, Defendant will pay a pro rata increase in the Gross Settlement Amount, including pro rata increases in the Class Counsel Fees Payment, and allocation to the PAGA claim. *Id.* Likewise, if the number of Workweeks during the Class Period increases by more than 10.00%, Defendant will pay a pro rata increase in the Gross Settlement Amount, including pro rata increases in the Class Counsel Fees Payment, and allocation to the PAGA claim. *Id.* The Settlement Administrator, Phoenix Class Action Administration Solutions, will make payments out of the Gross Settlement Amount to Plaintiff, Class Counsel, itself, the LWDA, and the participating Settlement Class Members. Settlement § III(C).

The Settlement permits Plaintiff to apply to the Court for an award of not more than \$15,000.00 as Class Representative Payment in addition to his Settlement Share. Settlement § III(C)(1). Per the Settlement, Plaintiff will receive no other payment other than his Settlement Share and Class Representative Payment. *Id.* Once the Court approves Plaintiff’s Class Representative Payment, the Settlement Administrator will pay it out of the Gross Settlement Amount. *Id.* However, payroll taxes, withholdings, and deductions will not be taken from the Class Representative Payment. *Id.* Instead, Plaintiff will receive a Form 1099. *Id.* In the event that the Court reduces or does not approve the requested Class Representative Payment, any portion of the Class Representative Payment not awarded to Plaintiff shall be returned to the Net Settlement Amount. Settlement. *Id.*



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1 The Settlement also permits Class Counsel to apply to the Court for an award of not more
2 than \$83,333.00 (which is 33 and 1/3% of the Gross Settlement Amount) as their Class Counsel
3 Fees Payment and up to \$12,500.00 as their Class Counsel Litigation Expenses Payment.
4 Settlement § III(C)(2). The Settlement Administrator will pay the court-approved Class Counsel
5 Fees Payment and Class Counsel Litigation Expenses Payment out of the Gross Settlement
6 Amount. *Id.* Moreover, withholdings and deductions will not be taken from the Class Counsel
7 Fees and Litigation Expenses Payment, and one or more Forms 1099 will be issued to Class
8 Counsel with respect to those payments. *Id.*

9 The Settlement also allocates money for the Settlement Administrator. Under the
10 Settlement, the Settlement Administrator will pay itself from the Gross Settlement Amount its
11 reasonable fees and expenses as approved by the Court in an amount estimated to not exceed
12 \$20,000.00. Settlement § III(C)(3).

13 Furthermore, the Parties will jointly apply to the Court for approval of a settlement of
14 claims under PAGA for \$4,000.00, paid from the Gross Settlement Amount. Settlement §
15 III(C)(4). This PAGA settlement payment will be allocated as follows: \$3,000.00 (75% of the
16 PAGA settlement) will be paid to the LWDA, while \$1,000.00 (25% of the PAGA settlement)
17 will remain in the Net Settlement Amount for distribution to PAGA Members. *Id.* The \$1,000.00
18 will be distributed to PAGA Members on a *pro rata* basis based on the total number of Individual
19 Workweeks (full or partial) worked by each PAGA Member during the PAGA Period. *Id.* Partial
20 workweeks shall be rounded up to the nearest whole integer. *Id.* The amount that each PAGA
21 Member will receive will be calculated by dividing each participating PAGA Member's
22 Individual Workweeks by the total workweeks of all PAGA Members, and then multiplying the
23 resulting fraction by the 25% share of the PAGA Penalties designated for distribution to PAGA
24 Members. *Id.* PAGA Members shall receive their portion of the PAGA Penalties regardless of
25 their decision to submit a request for exclusion to opt out of the Settlement. *Id.*

26 After the above described payments are made, the remainder of the funds ("Net Settlement
27 Amount") shall go to the participating Settlement Class members. Each Settlement Class member
28



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will receive a settlement share that is calculated using a settlement ratio (described below).
Settlement § I(N)(1-5).

C. Timing of Payments

Defendant will pay the Gross Settlement Amount in 48 monthly \$5,208.33 installments. There will be four (4) annual distributions of the Gross Settlement Amount. Settlement § IV(J), (L)(1-5).

D. Calculation of Settlement Shares

The Settlement Administrator will determine each Settlement Class member's Settlement Share by multiplying the Settlement Class member's Settlement Ratio by the amount allocated to Settlement Class members from the Net Settlement Amount. Settlement § III(D)(b). The Settlement Ratio is a fractional number comprised of (a) that Class Member's Individual Workweeks as the numerator, and (b) the aggregate total of all Class Members' Individual Workweeks as the denominator. *Id.*

To calculate the Settlement Class's PAGA settlement, Defendant will provide the Settlement Administrator with the total number of workweeks (full or partial) during the PAGA Period for each PAGA Member. Settlement § III(D)(c). Defendant will also provide the total aggregated number of Individual Workweeks worked by all PAGA Members during the PAGA Period. *Id.* The amount that each PAGA Member will receive will be calculated by dividing each participating PAGA Member's Individual Workweeks by the total workweeks of all PAGA Members, and then multiplying the resulting fraction by the 25% share of the PAGA Penalties designated for distribution to PAGA Members. *Id.* PAGA Members shall receive this portion of their individual Settlement Shares regardless of whether they submit a request for exclusion to opt out of the Settlement regarding the class claims. *Id.*

E. Apportionment of Settlement Shares

Each participating Settlement Class members' settlement shares will be allocated as 33.33% to wages (for which employment taxes will be deducted and W-2s issued) and 66.66% to penalties and interest (for which 1099s will be issued). Settlement § III(D)(a).

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1 **F. The Releases**

2 Under the Settlement, “Released Claims” are all claims, rights, demands, liabilities and
3 causes of action that are alleged, or reasonably could have been alleged based on the facts and
4 claims asserted in the Action and/or in the letters sent by Plaintiff to the LWDA concerning
5 Defendant and the other Released Parties, whether sounding in law or equity, tort, contract,
6 statute, or other applicable federal, state or local law or regulation, including but not limited to
7 the following claims:

- 8 (i) failure to pay all regular wages, minimum wages and overtime wages due;
9 (ii) failure to provide meal periods or compensation in lieu thereof;
10 (iii) failure to provide rest periods or compensation in lieu thereof;
11 (iv) failure to reimburse necessary business expenses;
12 (v) failure to provide complete, accurate wage statements;
13 (vi) failure to pay wages timely at time of termination or resignation;
14 (vii) failure to provide timely pay wages during employment;
15 (viii) unfair business practices that could have been premised on the claims,
16 causes of action or legal theories of relief described above or any of the claims, causes of
17 action or legal theories of relief pleaded in the Action;
18 (ix) failure to maintain required payroll records;
19 (x) all claims under PAGA or for civil penalties that could have been premised
20 on the claims, causes of action or legal theories described above or any of the claims, causes
21 of action or legal theories of relief pleaded in the Action or Plaintiff’s letters to the LWDA,
22 including but not limited to the California Code of Regulations and to Labor Code sections
23 210, 226, 226.3, 1174.5, 1197.1, 2802, 558, and 2699; and
24 (xi) any and all damages, restitution, disgorgement, civil penalties, statutory
25 penalties, taxes, interest or attorneys’ fees or costs resulting therefrom.

26 Settlement § I(U). Furthermore, Released Claims shall not apply to claims for workers’
27 compensation benefits, unemployment insurance benefits, or any other claim or right that as a
28



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1 matter of law cannot be waived or released. *Id.* Under this definition, the Parties still acknowledge
2 that Released Claims includes any claims for penalties by a PAGA Member resulting from any
3 LWDA investigation. *Id.* The definition also allows the Parties to meet and confer in good faith
4 should the Court require changes to the Released Claims' scope. *Id.*

5 Under the Settlement the Parties agree to release and discharge Released Claims by way
6 of any further attempt, by lawsuit, administrative claim or action, arbitration, demand, or other
7 action of any kind by each and all of the Participating Settlement Class members (including
8 participation to any extent in any representative or collective action), against Defendant and all
9 of those entities' and individual's past, present and future agents, employees, servants, officers,
10 directors, partners, trustees, representatives, shareholders, stockholders, attorneys, parents,
11 subsidiaries, equity sponsors, related corporations, divisions, joint venturers, assigns,
12 predecessors, successors, service providers, insurers, consultants, subcontractors, joint
13 employers, employee benefit plans and fiduciaries thereof, affiliated organizations, and all
14 persons acting under, by, through or in concert with any of them, and each of them, arising during
15 the period May 29, 2016 through the date of Preliminary Approval, and arising from, could have
16 been asserted, or related in any way to the claims asserted in the Action against Defendant based
17 on the facts pleaded in the operative complaint. Settlement § V(A).

18 Moreover, under the Settlement, the Participating Settlement Class members will release
19 and discharge Defendant, and any of its former, future and present parents, subsidiaries, owners,
20 shareholders, stockholders, officers, directors, employees, affiliates, predecessors, successors,
21 assigns, agents, servants, partners, trustees, attorneys, equity sponsors, related corporations,
22 divisions, joint venturers, insurers, consultants, subcontractors, joint employers, employee benefit
23 plans and fiduciaries thereof, affiliated organizations, representatives, and all persons acting
24 under, by, through or in concert with any of them, and each of them ("Released Parties") from
25 the Released Claims. *Id.* Moreover, all PAGA Members, regardless of whether they submit timely
26 and valid requests for exclusion from the Settlement, will release all claims under PAGA that
27 could have been premised on the claims, causes of action or legal theories during the PAGA
28 Period as described in the Action and/or in Plaintiff's letters to the LWDA concerning Defendant



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1 or any other Released Party. *Id.* The State of California will also release all claims under PAGA
2 that could have been premised on the claims, causes of action or legal theories described in the
3 Action and/or in Plaintiff's letters to the LWDA concerning Defendant or any other Released
4 Party. *Id.*

5 As of the date the Judgment becomes final, and except as otherwise provided by the
6 settlement, Class Counsel and any counsel associated with Class Counsel (The Spivak Law Firm
7 and United Employees Law Group), including without limitation David G. Spivak, Esq. and
8 Walter L. Haines, Esq., will waive any claim to costs and attorneys' fees and expenses against
9 Defendant or the Released Parties arising from or related to the Action, except those incurred to
10 enforce this Agreement and collect the Judgment, including but not limited to claims based on
11 the California Labor Code, the California Civil Code, the California Code of Civil Procedure, the
12 Fair Labor and Standards Act, or any other statute or law (the "Class Counsel Released Claims").
13 Settlement § V(B). The release provisions of this Settlement will be null and void in the event
14 Defendant fails to make any of the installment payments set forth in the Agreement.

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

16 After the Court enters its order granting Preliminary Approval of the Settlement, every
17 Class Member will be provided with a "Class Notice." Settlement § IV(B). Within fourteen (14)
18 days after the Court grants Preliminary Approval of the Settlement, Defendant shall provide to
19 the Settlement Administrator:

20 (a) An electronic database of all Class Members, last known mailing address, and
21 Social Security number ("Class Members' Data").

22 (b) Corresponding to each Class Member's name, Defendant shall provide a figure
23 indicating the total number of workweeks during the Class Period in which that Class Member
24 was employed by and worked for Defendant as a Class Member. That number of workweeks shall
25 be referred to as that Class Member's "Individual Workweeks."

26 (c) If any of the Class Members' Data are unavailable to Defendant, Defendant will
27 so inform Class Counsel and the Parties will make its best efforts to reconstruct or otherwise agree
28 upon the Class Members' Data prior to when it must be submitted to the Settlement Administrator.



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1 Class Members' Data will otherwise remain confidential and will not be disclosed to anyone,
2 except as necessary to applicable taxing authorities, or pursuant to Defendant's express written
3 authorization or by order of the Court. Settlement § IV(B)(1).

4 Within fourteen (14) days after receiving the Class Members' Data, or as soon thereafter
5 as it can do so, the Settlement Administrator will mail the Class Notice to all identified Class
6 Members via first-class U.S. mail using the mailing address information provided by Defendant,
7 unless modified by any updated address information that the Settlement Administrator obtains in
8 the course of administration of the Settlement. Settlement § IV(B)(2).

9 If a Class Notice is returned because of an incorrect address, the Settlement Administrator
10 will promptly, and not later than ten (10) days from receipt of the returned Class Notice, search
11 for a more current address for the Class Member and re-mail the Class Notice to the Class
12 Member. Settlement § IV(B)(3). The Settlement Administrator will use the Class Members' Data
13 and otherwise work with Defendant's Counsel and Class Counsel to find a more current address.
14 *Id.* The Settlement Administrator will be responsible for taking reasonable steps, consistent with
15 its agreed-upon job parameters, court orders, and fee, to trace the mailing address of any Class
16 Member for whom a Class Notice is returned as undeliverable by the U.S. Postal Service. *Id.*
17 These reasonable steps shall include the tracking of all undelivered mail; performing address
18 searches for all mail returned without a forwarding address; and promptly re-mailing to Class
19 Members for whom new addresses are found. *Id.* If the Class Notice is re-mailed, the Settlement
20 Administrator will note for its own records and notify Class Counsel and Defendant's Counsel of
21 the date and address of each such re-mailing as part of a weekly status report provided to the
22 Parties. *Id.*

23 1. Class Member Disputes

24 If a Class Member disputes his or her estimated Settlement Share, the Class Member may
25 produce evidence to the Settlement Administrator for the Class Period. Settlement § IV(C). In
26 order for the dispute to be considered, he or she must follow the directions on the Class Notice.
27 *Id.* To be valid and timely, all disputes and supporting documents must be postmarked by the
28 Response Deadline. *Id.* A Class Member may use the Workweeks Dispute form (Exhibit C to the



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1 Settlement), though a Class Member is not obligated to do so to dispute information in the Class
2 Notice. *Id.* Absent evidence rebutting Defendant's records, Defendant's records will be presumed
3 determinative. *Id.* However, if a Class Member produces evidence contrary to Defendant's
4 records by the Response Deadline, the Settlement Administrator shall notify Class Counsel and
5 Defense Counsel to discuss and resolve the dispute, including providing all available relevant
6 information to all counsel. *Id.* The Parties will resolve all disputes jointly, which shall be final
7 and binding on any Class Member disputes, and shall thereafter instruct the Settlement
8 Administrator how to proceed in processing the dispute. *Id.* If the Parties cannot reach an
9 agreement, the dispute shall be submitted to the Court for final determination. *Id.* All such
10 disputes are to be resolved or submitted to the Court not later than fourteen (14) calendar days
11 after the Response Deadline. *Id.*

12 **2. Opting Out**

13 A Class Member may request to be excluded from the effect of the Settlement, and any
14 payment of amounts under the Settlement, by timely mailing a letter to the Settlement
15 Administrator stating that he or she wants to be excluded from this Action. Settlement § IV(D)(1).
16 This letter must include the Class Member's name, address, telephone number, signature and a
17 clear statement requesting to be excluded from the settlement of the class claims, as set forth on
18 the Request for Exclusion form or similar to the following: "I wish to exclude myself from the
19 class settlement reached in the matter of *Lozano Sandoval v. American Landscape and*
20 *Maintenance, Inc.* I understand that by excluding myself, I will not receive money from the
21 settlement of my individual claims." *Id.* To be valid and timely, the request to be excluded must
22 be postmarked by the Response Deadline and received by the Settlement Administrator. *Id.* A
23 Class Member may use the Exclusion Request form (Exhibit B to this Settlement), though a Class
24 Member is not obligated to do so to request exclusion from the Settlement. *Id.* A Class Member
25 who properly submits a valid and timely request to be excluded from the Settlement shall not
26 receive any payment of any kind in connection with the Settlement or this Action, shall not be
27 bound by or receive any benefit of the Settlement, and shall have no standing to object to the
28 Settlement, except that the request for exclusion shall not be effective as to the release of claims



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1 arising under PAGA and shall not preclude the Class Member from receiving their share of the
2 PAGA Penalties. *Id.* A request for exclusion must be mailed to the Settlement Administrator at
3 the address provided on the Class Notice. *Id.* The Settlement Administrator shall transmit the
4 request for exclusion to counsel for both Parties. *Id.*

5 **3. Objecting**

6 The Class Notice will provide that any Class Member who does not request exclusion
7 from the Action and who wishes to object to the Settlement should submit an objection in writing
8 to the Settlement Administrator. Settlement § IV(D)(2). To be valid, an objection must be
9 postmarked by the Response Deadline and received by the Settlement Administrator. *Id.* The
10 written objection to the Settlement should set forth the grounds for the objection. *Id.* The written
11 objection should also state the objecting Class Member's full name, address, and the approximate
12 dates of his or her employment with Defendant. *Id.* Furthermore, the written objection should
13 state the basis for each specific objection and any legal support in clear and concise terms. *Id.*
14 Finally, the written objection also should state whether the Class Member intends to formally
15 intervene and become a party of record in the action, and upon formally intervening, appear and
16 argue at the Final Approval Hearing. *Id.* The objection should be mailed to the Settlement
17 Administrator at the address provided on the Class Notice. *Id.* The Settlement Administrator shall
18 transmit the objections to counsel for both Parties. *Id.*

19 **H. Uncashed Checks**

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

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

27 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
28 and its members are too numerous for joinder to be practical; (2) the representative and absent



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1 class members share a community of interest and questions of law and fact common to the class
2 predominate over questions unique to individual class members; (3) the representative's claims
3 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
4 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
5 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
6 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
7 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

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

9 A class is ascertainable when it may be readily identified without unreasonable expense
10 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
11 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
12 defined Class is ascertainable because its members may be identified by reference to Defendant's
13 records and Defendant has agreed to share the relevant information from their records to facilitate
14 the settlement process. Therefore, the Settlement Class is ascertainable.

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

16 The Settlement Class has sufficiently numerous members to render joinder impractical.
17 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
18 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 634 Class
19 Members. DS, ¶ 9. Plaintiff maintains that it would be impractical and economically inefficient
20 to require each Class Member to separately maintain an individual action or be joined as a named
21 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
22 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
23 the Settlement Class' membership is sufficiently numerous. *See Daar v. Yellow Cab Co.* (1967)
24 67 Cal.2d 695.

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

26 The community of interest requirement "embodies three factors: (1) predominant common
27 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
28 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*



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1 *Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have
2 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
3 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
4 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
5 renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

6 To justify certification, the class proponent ““must show ... that questions of law or fact
7 common to the class predominate over the questions affecting the individual members”” *See,*
8 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*
9 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)).

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

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

2 The class representative must be similarly situated to the rest of the purported class. *See*
3 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
4 that the class representative must have identical interests with the class members. The only
5 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
6 also Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
7 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that his claims
8 are typical for the purposes of certifying the Settlement Class. DS, ¶ 11. Plaintiff asserts that he,
9 like absent Class Members, was subject to the same relevant policies and procedures governing
10 compensation, reimbursement for business expenses, hours of work, and meal and rest periods.
11 *Id.* Because Plaintiff contends that he was subject to the same general course of conduct as absent
12 Class Members, resolving the common questions as they apply to Plaintiff will determine
13 Defendant’s *prima facie* liability to all Class Members. Moreover, Plaintiff’s claims could
14 potentially be subject to the same primary affirmative defenses as those of absent Class Members.
15 Accordingly, Plaintiff’s claims are typical of the Class.

16 **E. Plaintiff Will Adequately Represent the Settlement Class**

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

22 First, the attorneys representing Plaintiff in this Action, David G. Spivak of The Spivak
23 Law Firm and Walter L. Haines of United Employees Law Group, have supplied the Court with
24 declarations to show that they are adequate to represent the Settlement Class and that they have
25 significant experience in employment litigation generally, and wage and hour and employment-
26 related class action litigation specifically. *See* DS, ¶¶ 13-20; Declaration of Walter L. Haines
27 (“Haines Decl.”) ¶ 3. Thus, Plaintiff’s counsel are adequate to serve as the attorneys representing
28 Plaintiff in this Action.



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1 Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
2 Class Members have strong and co-extensive interests in this litigation because they all worked
3 for Defendant during the relevant time period, allegedly suffered the same alleged injuries from
4 the same alleged course of conduct, and there is no evidence of any conflict of interest between
5 Plaintiff and the Class Members. DS, ¶ 12. Moreover, Plaintiff has demonstrated his commitment
6 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
7 with documents and extensively speaking with them to assist in identifying the claims asserted in
8 this case, assisting them in identifying witnesses, as well as exposing himself to the risk of
9 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. *Id.* Thus,
10 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
11 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
12 Code of Civil Procedure § 382.

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

15 Plaintiff further contends that a class action is also superior to other means adjudicating
16 the issues in this action. DS, ¶ 21. The predominance of common legal and factual questions
17 shows that this Court could fairly adjudicate the claims of Class Members through a single class
18 action. *Id.* In view of the *theoretical* alternatives that proposed class members could potentially
19 utilize—representative PAGA action (where there is less relief available), individual civil
20 lawsuits or wage claims through the Division of Labor Standards Enforcement (where there
21 would be relatively little money at stake, but the claims would be time-consuming to litigate)—a
22 class action is plainly superior to all of them. *Id.* Thus, this consideration supports conditional
23 class action treatment for purposes of this Settlement only.

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

26 **A. Legal Standard**

27 A class action settlement requires court approval. California Rules of Court (“CRC”), Rule
28 3.769 provides three steps for approval: (1) Preliminary approval after submission of a written
motion for preliminary approval, the proposed class settlement, and the proposed class notice; (2)



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1 Issuance of notice of settlement to class members; and (3) A final settlement approval hearing
2 where class members may be heard regarding the settlement, and at which evidence and argument
3 concerning the fairness, adequacy, and reasonableness of the settlement is presented. The decision
4 to approve or reject a class settlement is committed to the Court's broad discretion. *Kullar v. Foot*
5 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve class settlement
6 may be reversed only upon a showing of "clear abuse of discretion." *Id.*

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

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

14 The class settlement here satisfies all of these factors. DS, ¶ 22. The Settlement resulted
15 from thorough, arms' length negotiations between experienced counsel after sufficient discovery,
16 and Defendant's financial documents were exchanged to assess the relative strengths and
17 weaknesses of their respective cases and Defendant's estimated exposure. *Id.*

18 Plaintiff prepared "damages" estimates in advance of settlement negotiations. DS, ¶ 23. ,
19 Ex. 12. Plaintiff determined Defendant's maximum exposure for restitution and penalties to be
20 approximately \$58,887,804.66 (consisting of \$4,008,034.80 in unpaid wages, \$4,008,034.80 in
21 liquidated damages, \$3,458,032.70 in missed meal period premium wages, \$3,493,318.75 in
22 missed rest break premium wages, \$13,741,833.60 for reimbursement for business expenses,
23 \$1,217,900.00 for wage statement penalties, \$1,617,000.00 for waiting time penalties, and
24 \$30,011,350.00 for civil penalties). *Id.* Plaintiff calculated the damages based on the number of
25 workweeks and pay periods provided by Defendant, Plaintiff's reports, and the sample data. *Id.*
26 The estimates are in essence "home run" projections that omit data points that will undoubtedly
27 reduce the maximum possible damages award and do not factor in any of the risks involved in
28 litigating this Action. *Id.* Plaintiff also considered the possibility that Defendant could launch a



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1 *Pick Up Stix* campaign and pursue individual release agreements from the Class Members. *Id.*
2 Plaintiff's Counsel applied discounts to the maximum exposure to account for all other risks
3 discussed below. *Id.* While it is difficult to assign anything but crudely-determined percentages
4 of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would
5 preclude recovery for such employees is substantial and alone justifies a significant discount
6 because Defendant would likely by trial have gathered releases from the majority of the Class
7 Members. *Id.* Plaintiff also considered Defendant's weak financial status. Defendant's financial
8 records indicate that Defendant would not be able to afford the amount Plaintiff calculated as
9 damages. *Id.* The agreed upon settlement of \$250,000.00 allows Plaintiff and the Class Members
10 to recover some of their damages as opposed to none of their damages. *Id.*

11 Plaintiff is aware of only two significant awards under the PAGA in a contested
12 proceeding, both issued by federal district courts.³ PAGA penalty awards are often small even for
13 egregious, intentional violations of the Labor Code.⁴ *Id.* For instance, on October 24, 2017, the
14 Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by very
15 experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving Company,*
16

17 ³ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
18 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
19 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
20 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
21 suffered a particularly sizeable injury – the court found that the defendant's policies caused
22 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
23 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to
24 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
25 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.

lul

26 ⁴ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles County Superior
27 Court case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime
28 wages. The plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a
bench trial, the Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil
penalties under the PAGA.



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1 Inc., LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.* (2018) 30
2 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a PAGA
3 penalty of only \$5 per pay period for the defendant's meal period violations. A similar result
4 could occur here.

5 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
6 risk that a class will not be certified. *Id.* Nor do these initial estimates reflect Defendant's weak
7 financial status. *Id.* Therefore, Plaintiff believes a class/PAGA settlement for \$250,000.00 is fair
8 and reasonable. *Id.*

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

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

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

19 **a. Risks Associated with Defendant's Financial Condition**

20 Defendant's financial condition was one key factor in reaching this Settlement. DS, ¶ 25.
21 Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, he may
22 never recover the damages. *Id.* Defendant provided Plaintiff with confidential financial records
23 reflecting debt. *Id.* A large class action judgment would almost certainly put the company out of
24 business and/or would interfere with the company's ability to carry out its contractual obligations.
25 *Id.* In short, the "poor financial health of [the defendant will] seriously increase [] the chance that
26 Plaintiffs would be left with nothing if they continued to litigate their claims." *Torrissi v. Tucson*
27 *Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial condition of defendant
28 predominated in assessing the reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D.



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1 Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's financial stability
2 "strongly supports the reasonableness of the settlement"); *Laguna v. Coverall N. Am., Inc.* (9th
3 Cir. 2014) 2014 U.S. App. LEXIS 10259 at *11 (finding potential insolvency to be additional
4 risk that favors approval of a class action settlement). Accordingly, Defendant's financial distress
5 supports this settlement. *Id.*

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

7 There is a risk that Plaintiff's recovery for unpaid wages would be limited because
8 Defendant's written policies throughout the relevant time period informed employees that they
9 were not required to report to work prior to the start of their shifts. DS, ¶ 26. Off-the-clock claims
10 are difficult where a defendant requires in its written policies that all work must take place while
11 clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer must
12 have notice of off-the-clock work for it to be compensable). *Id.* In its written Notice to Employees,
13 Defendant states that employees only obligation is to report to work on time. *Id.* Moreover, while
14 Defendant disputes that off-the-clock work occurred, it contends that any time spent off the clock
15 was *de minimis*. *Id.* The California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal.
16 5th 829, 835 suggested that irregular and minute periods of time may still be subject to a *de*
17 *minimis* defense even if compensable. (Stating that "We do not decide whether there are
18 circumstances where compensable time is so minute or irregular that it is unreasonable to expect
19 the time to be recorded."). Following *Troester*, Defendant contends that the *de minimis* doctrine
20 may apply here because the time spent off the clock were minute and insignificant. *Id.*
21 Accordingly, a large award of penalties seems unlikely with respect to this claim. *Id.*

22 The difficulty inherent in proving that off-the-clock work occurred poses a significant
23 hurdle to Plaintiff. DS, ¶ 27. Plaintiff will rely on declarations and witness statements to prove
24 this claim. *Id.* Generally, a court will not certify a class unless it can determine an appropriate
25 classwide methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here,
26 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially
27 given the lack of records indicating when such off-the-clock work may have taken place.
28 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine



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1 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there
2 is a significant risk that the Court would consider this evidentiary showing insufficient as a
3 classwide methodology. *Id.*

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

5 There are risks to Plaintiff’s meal period claim. DS, ¶ 28. Defendant contends that, to
6 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
7 was not taken. *Brinker*, 53 Cal. 4th at p. 1004. So long as an employer provides employees with
8 a “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
9 breaks and ensure no work thereafter is performed.” *Id.* at pp. 1040-41. Instead, a plaintiff must
10 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
11 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
12 to the meal break claim is the reason that a particular employee may have failed to take a meal
13 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. .

14 Defendant contends they did not impede or discourage Plaintiff, or any other employees,
15 from taking their meal or rest periods. DS, ¶ 28. Accordingly, there is a significant risk that the
16 value of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

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

18 There are risks to Plaintiff’s rest period claim. DS, ¶ 29. Employers are not required to
19 record rest periods and such periods are paid. Defendant contends it provided non-exempt
20 employees the opportunity to take rest periods in accordance with California law. *Id.* Unlike meal
21 periods, where there are often records showing whether an employee clocked out or not, there is
22 no such evidence to prove a missed rest period or that the employer refused to authorize and
23 permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.* Plaintiff will
24 depend on sample witness testimony and surveys to prove the claims. *Id.* While a victory with
25 such evidence is certainly possible, relevant caselaw makes such claims risky from a trial
26 management and due process perspective. *Id.*; see *Duran v. U.S. Bank National Assn.* (2014) 59
27 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class certification, it
28 may be possible to manage individual issues through the use of surveys and statistical



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sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

e. Risks Associated with the Failure to Indemnify Claim

There is a risk that the Court may consider Plaintiff’s claims as to Defendant’s alleged failure to indemnify for business expenses to be individual in nature and thus decline to certify the class. DS, ¶ 30. Plaintiff alleges that Defendant required Plaintiff and the Class Members to use their personal vehicles to commute to, from, and between job sites and failed to indemnify them for these business expenses. *Id.* Defendant presented evidence that they have supplied their employees with vehicles to commute to, from, and between job sites. *Id.* As such, there is a risk that the Court may consider Plaintiff’s claims to be individual in nature and unfit for class wide resolution. *Id.*

f. Risks Associated with the Statutory “Wage Statement” Penalty Claims

Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA penalties. DS, ¶ 31. Under Labor Code section 226, wage statements must include various information, including the applicable rates of pay, corresponding hours worked, and gross pay.

Here, Plaintiff’s wage statement claim has the same underlying risks as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply with the requirements of Labor Code § 226. *Id.* Further, to the extent that Plaintiff claims Defendant’s wage statements were inaccurate because they did not include wages or premium payments that Plaintiff contends Defendant should have paid, Plaintiff’s claims were subject to additional risk at the time the Parties negotiated this Settlement, as case law suggested that such premium payments were not to be considered wages, and therefore do not give rise to claims under section 203. *Id.* See *Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties based on meal period claims because “the underlying violation that gives rise to a section 226.7 [meal period] claim is not the nonpayment of wages”); *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not even cover meal



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1 period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely foreclose this
2 claim.⁵

3 **g. Risks Associated with The Waiting Time Penalties Claim**

4 Plaintiff's claims for untimely wages is predicated on Labor Code §§ 201, 202, and 203.
5 DS, ¶ 32. At the time the Parties negotiated the Settlement, Defendant argued that based on the
6 *Jones* and *Nguyen* decisions, *supra*, that meal or rest premium pay is not a "wage" for purposes
7 of Labor Code section 203 penalties.

8 **h. Risks Associated With the PAGA Claim**

9 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
10 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
11 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid
12 defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. DS, ¶ 33. Thus, the
13 PAGA claims likewise face significant uncertainty. *Id.* There is a risk that the Court would
14 consider the maximum civil penalty available to be confiscatory. *Id.* This is particularly the case
15 considering Defendant's financial condition. *Id.* Moreover, events occurring during the COVID-
16 19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may
17 consider a confiscatory taking. *Id.*

18 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
19 significant discount for settlement purposes. DS, ¶ 34. For settlement negotiation purposes,
20 Plaintiff's counsel estimated a maximum exposure of approximately \$30,011,350.00 in civil
21 penalties. *Id.* This estimate did not take into account any of the risks discussed above and assumed
22 a violation for every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for
23 the same pay period for the same alleged violations of different Labor Code provisions and
24 derivative violations. *Id.* Although two federal district court decisions held that "stacking" PAGA

25
26 ⁵ Moreover, the Court of Appeal's decision in *Naranjo v. Spectrum Security Services, Inc.* (2019)
27 40 Cal.App.5th 444, holding that a defendant's failure to pay meal premiums does not give rise
28 to violations of Labor Code sections 226 or 203, was pending before the California Supreme
Court when the Parties negotiated this Settlement. *Naranjo v. Spectrum Security Services, Inc.*
2020 Cal. LEXIS 167.



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1 penalties in this fashion may be appropriate to determine the amount in controversy for purposes
2 of removal jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding
3 plaintiffs multiple PAGA penalties for the same violation for the same pay period under different
4 Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many
5 employers characterize as claim splitting and not merely stacking. *Id.*

6 **i. Risks Associated With A Pick-Up Stix Campaign**

7 An employer enjoys the right to settle a putative class member's disputed wage claims
8 individually, without the consent or involvement of class counsel. DS, ¶ 37. See *Chindarah v.*
9 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. As discussed above, Defendant may launch a
10 "pick off" settlement campaign to pursue individual release agreements from the Class Members,
11 thereby potentially narrowing the size of the Settlement Class – approximately 634 members -
12 until it is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have
13 sufficient number of employees to represent. This led to a significant reduction of claim value in
14 settlement negotiations. *Id.*

15 While the evidence gathered through Plaintiff's discovery supports the merits of the
16 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
17 presents significant risks that support a downward departure from Defendant's estimated liability
18 exposure. DS, ¶ 38. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
19 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
20 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
21 It also represents a fair, adequate, and reasonable compromise amount for these claims and
22 warrants preliminary approval. *Id.*, *Torrison v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
23 1376 (the financial condition of defendant predominated in assessing the reasonableness of
24 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
25 concerning defendant's financial stability "strongly supports the reasonableness of the
26 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
27 WL 2465049, * 3.

28 ///



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1 **3. Presence of Governmental Participant**

2 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
3 settlement to the LWDA. DS, ¶ 40, Ex. 9.

4 **4. Reaction of Class Members to Proposed Settlement**

5 If the settlement is preliminarily approved, Class Members will be provided with the
6 Notice of Proposed Settlement and an opportunity to object to or request exclusion from the
7 Settlement, with the exception of the PAGA portion of the Settlement (attached as Exhibits A
8 through C to the Settlement). DS, ¶ 41, Ex. 1. The Parties' proposed notice fully complies with
9 California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed
10 responses to the proposed Settlement. *Id.*

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

15 The Individual Settlement Payments will be paid to each Participating Class Member
16 based on his or her eligible Work Weeks compared to the total Work Weeks of all Participating
17 Class Members. DS, ¶ 46, Settlement § III (D)(b). The Settlement Administrator shall assign to
18 each Participating Class Member a "Settlement Ratio," which shall be a fractional number
19 comprised of (a) that Class Member's Individual Workweeks as the numerator, and (b) the
20 aggregate total of all Class Members' Individual Workweeks as the denominator. *Id.* Because this
21 method compensates Class Members based on the extent of their potential injuries, in that Class
22 Members who worked for Defendant longer would have been subject to more alleged violations,
it is fair, adequate, and reasonable. *Id.*

23 **VII. ALLOCATION FOR CLASS COUNSELS' FEE AWARD AND ATTORNEYS'**
24 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS**
25 **APPROPRIATE**

26 The Settlement states the attorneys representing Plaintiff in the Action, David G. Spivak
27 of The Spivak Law Firm and Walter L. Haines of United Employees Law Group, may seek Class
28 Counsels' fees of \$83,333.00 (one-third of the Gross Settlement Amount) and up to \$12,500.00
for actual reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement



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§III(C)(2). These amounts are reasonable, given the facts and circumstances of the case as described within this Memorandum of Points and Authorities.

Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82 Cal.App.4th at p. 48-49). The Supreme Court has approved fees equal to one-third (1/3) of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises* (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned down to devote time to this matter. DS, ¶ 43. Class Counsel interviewed and obtained information from putative class members, met and conferred with Defendant’s counsel on numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided by Defendant and obtained through other sources, researched applicable law, and provided estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

Class Counsel have borne all the risks and costs of litigation and will receive no compensation until recovery is obtained. DS, ¶ 44. Class Counsel are well-experienced in wage-and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.* Considering the amount of the attorney fees requested, the work performed, and the risks incurred,



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1 the requested fees and costs are reasonable and should be awarded. *Id.*

2 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO PLAINTIFF SHOULD BE**
3 **PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
4 **REASONABLE**

5 Courts routinely approve incentive awards to compensate named plaintiffs for the services
6 they provide and the risks they incur during class action litigation, often in much higher amounts
7 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
8 (upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van*
9 *Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294 (approving \$50,000
10 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
11 Payment of \$15,000.00. DS, ¶ 45. This amount is entirely reasonable given Plaintiff’s efforts in
12 this action and the risks he undertook on behalf of Class Members. *Id.* Plaintiff has devoted many
13 hours advancing the interests of the Settlement Class. *Id.* Plaintiff has done this by, among other
14 things, retaining experienced counsel, providing them with information about his work history
15 with Defendant and Defendant’s policies and practices with respect to the wage and hour claims
16 at issue, and being actively involved in the settlement process to ensure a fair result for the
17 Settlement Class as a whole. *Id.* In doing this, Plaintiff has been exposed to significant risks,
18 including the risk of an order to pay Defendant’s attorneys’ fees and costs if this action had been
19 unsuccessful (*See* Labor Code §§ 218.5-218.6). *Id.* The efforts and risks that Plaintiff undertook
20 on behalf of the Settlement Class shows that the proposed Settlement is fair, adequate, and
21 reasonable, and thus warrants preliminary approval. *Id.*

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

25 With regard to the settlement administration costs provision, it is reasonable. Before
26 agreeing to Phoenix Class Action Administration Solutions and its bid of up to \$12,000.00, the
27 Parties sought and reviewed bids from other reputable third-party administrators which provided
28 higher bids. DS, ¶ 49, Exs. 6 through 8. Thus, the settlement administration costs provision should
be given preliminary approval.



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

5 This Court should approve the proposed plans for giving notice to the Settlement Class
6 and administering the Settlement. The standard for determining the adequacy of notice is whether
7 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
8 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
9 measures to ensure that as many Class Members as practicable receive actual notice of the
10 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
11 the Notice by First Class U.S. mail only. Settlement, § IV(B)(2).

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

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1 **XI. CONCLUSION**

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

4 Respectfully submitted,

6 THE SPIVAK LAW FIRM

7 Dated: August 19, 2022

By: 

8 DAVID G. SPIVAK,
9 CAROLINE TAHMASSIAN
10 SARA BROWN
11 Attorneys for Plaintiff, JOSE LOZANO
12 SANDOVAL, and all others similarly
13 situated
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