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6 Attorneys for Claimant
7 RAFFE CHAMOUN, on behalf of himself and
others similarly situated

8
9 **ARBITRATION BEFORE JUDICATE WEST**

10
11 RAFFE CHAMOUN, on behalf of himself
12 and others similarly situated,

13 Claimants,

14 v.

15 JONES ONTARIO ACQUISITION, LLC, a
16 California limited liability company, doing
business as MERCEDES-BENZ OF
17 ONTARIO; and DOES 1 to 50, inclusive,

18 Respondents.

Case No. S277006
Arbitrator Hon. Herbert B. Hoffman, Ret.

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF THE
CLASS AND REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

PRELIMINARY APPROVAL HEARING

Hearing Date: May 17, 2021
Time: 3:00 p.m.
Location: Judicate West
1851 East First Street, Suite 1600
Santa Ana, California 92705

1 **TO RESPONDENT AND ITS ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 17, 2021, at 3:00 p.m., or as soon thereafter as this
3 matter may be heard, the Honorable Herbert B. Hoffman (Ret.) serving as Arbitrator will hear the
4 Motion of named claimant Raffae Chamoun (“Named Claimant” or Class Representative”) for an
5 order: (1) preliminarily approving the class and representative action settlement reached between the
6 Parties; (2) conditionally certifying the Settlement Class; (3) directing distribution to the Settlement
7 Class of the Notice of Class & Representative Action Resolution (“Notice”) and Claim Form; and
8 (4) setting the final approval hearing. As reflected in the proposed Stipulation of Resolution
9 (“Settlement” or “Settlement Agreement”), respondent Jones Ontario Acquisition, LLC, a California
10 limited liability company, doing business as Mercedes-Benz of Ontario (“Respondent”) concurs in
11 and consents to the preliminary approval of the class and representative action settlement in
12 accordance with the terms of the Settlement Agreement.

13 Under the terms of the Settlement, Respondent agrees to pay \$275,000.00 (“Settlement
14 Amount”) to settle specific wage and hour claims of members of the Settlement Class. This amount
15 shall be inclusive of all settlement payments to the Named Claimant and participating Settlement
16 Class Members, except those that make a valid and timely request to be excluded from the
17 Settlement Class, the enhancement award to the Class Representative, all expenses and costs to the
18 Settlement Administrator, CPT Group, Inc., all attorneys’ fees and costs to Class Counsel, payment
19 to the California Labor and Workforce Development Agency (“LWDA”) for civil penalties pursuant
20 to statute, and payment to PAGA Group Members. The amount available for distribution to
21 Settlement Class Members is determined by deducting the following from the Settlement Amount:

- 22 • Up to \$6,500.00 to the Named Claimant as an enhancement for prosecuting this
- 23 action and in exchange for a general release of claims;
- 24 • Up to 35 percent of the Settlement Amount in attorneys’ fees to Class Counsel;
- 25 • Up to \$18,000.00 in litigation costs to Class Counsel;
- 26 • \$30,000.00 pursuant to California’s Private Attorneys General Act (“PAGA”)
- 27 (“PAGA Settlement”); and

28 ///

- Up to \$7,500.00 to the Settlement Administrator to notify Settlement Class Members and administer the Settlement.

The amount remaining after the foregoing deductions, approximately \$116,750.00, is called the “Net Settlement Amount.” (Settlement Agreement ¶ I.H.) Individual settlement payments (“Net Settlement Payments”) will be distributed to Settlement Class Members who submit timely and valid Claim Forms. (Settlement Agreement ¶¶ I.I., VIII.A.) However, Settlement Class Members employed at any time from March 13, 2019, and continuing through December 31, 2020 (“PAGA Group Members”), will receive a pro rata portion of twenty-five percent (25%) of the \$30,000.00 allocated to the PAGA Settlement, whether or not they submit a Claim Form or request exclusion from the Settlement Class.

Payments to members of the Settlement Class will be determined on a claims-made basis; each member of the Settlement Class who submits a timely and valid Claim Form will be paid a percentage of the Net Settlement Amount based upon his or her Eligible Workweeks during the Settlement Period. (Settlement Agreement ¶ X.A.) Each Net Settlement Payment will be determined by dividing the Net Settlement Amount by the total number of Eligible Workweeks worked by all members of the Settlement Class during the Settlement Period (the “Weekly Amount”) and then multiplying the Weekly Amount by the number of Eligible Workweeks by the individual Settlement Class Member as determined by the Settlement Administrator. (Settlement Agreement ¶ X.A.)

This Notice of Motion and Motion is based on the fact that this a fair and reasonable settlement that benefits the Settlement Class and was the product of informed, non-collusive negotiations by Parties who were represented by experienced and able counsel. *See, Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802; *Manual for Complex Litigation*, (Second) (1985) § 30.44.

This Notice of Motion and Motion is based on this Notice, the Parties’ Settlement Agreement, and the accompanying Memorandum of Points and Authorities, the Declaration of Anthony J. Orshansky (“Orshansky Decl.”) and exhibits attached thereto, the pleadings, records and files in this arbitration, and such other further oral and documentary evidence which may be submitted at or before the hearing on this Motion. The Settlement Agreement, along with the Notice

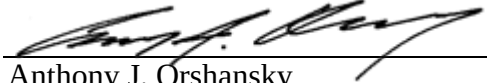
1 and Claim Form (internal exhibits “A” and “B,” respectively), is attached at Exhibit “1” to the
2 Orshansky Decl. filed contemporaneously herewith.
3

4 Dated: May 7, 2021

Respectfully submitted,

5 COUNSELONE, P.C.
6

7 By:


8 Anthony J. Orshansky
9 Jennifer L. Connor
10 Attorneys for Named Claimant and the
11 Settlement Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Named claimant Raffe Chamoun (“Named Claimant” or “Class Representative”), on his own
4 behalf and on behalf of similarly situated employees,¹ seeks preliminary approval of the settlement
5 agreement with respondent Jones Ontario Acquisition, LLC, a California limited liability company,
6 doing business as Mercedes-Benz of Ontario (“Respondent”). The Stipulation of Resolution
7 (“Settlement” or “Settlement Agreement”) between Named Claimant and Respondent (the
8 “Parties”), if approved, will resolve specific wage and hour claims of members of the Settlement
9 Class, except those that make a valid and timely request to be excluded, in exchange for
10 Respondent’s agreement to pay \$275,000.00 into a common settlement fund.

11 This is a wage and hour class and representative action alleging a car dealership in California
12 owned and/or operated by Respondent abused their service advisors by failing to pay wages
13 (including minimum wages and overtime), failing to provide meal and rest breaks, failing to
14 reimburse business expenses, failing to provide accurate itemized wage statements, failing to pay all
15 wages upon separation of employment, and, based on the foregoing allegations, engaging in unfair
16 business practices under California’s Business and Professions Code section 17200, *et seq.* (“UCL”) and violating California’s Private Attorneys General Act (“PAGA”). Named Claimant seeks unpaid
17 wages, liquidated damages, wages for improper meal and rest breaks, penalties for noncompliant
18 wage statements, waiting time penalties, civil penalties pursuant to the PAGA, injunctive and other
19 equitable relief, prejudgment interest, and attorneys’ fees and costs.

20
21 After engaging in substantial independent investigation and after mediation with Jill R.
22 Sperber, Esq., an experienced attorney and mediator in wage and hour class and representative
23 actions, the Parties agreed to settle the claims alleged in the action for the maximum amount of
24 \$275,000.00 (“Settlement Amount”).

25 This Settlement is fair, reasonable, and adequate, and in the best interests of Settlement Class
26 Members. Consequently, Named Claimant, with the consent and approval of Respondent, hereby

27
28 ¹ “Settlement Class” members are defined as: All persons who are or were employed by Respondent in the State of California as service advisors at any time from March 13, 2016, and continuing through December 31, 2020.

1 moves for an order: (1) conditionally certifying the class for settlement purposes; (2) granting
2 preliminary approval of the Settlement Agreement filed concurrently herewith; (3) approving the
3 Notice of Class & Representative Action Resolution (“Notice”) and Claim Form to be sent to
4 Settlement Class Members, and the notification schedule as set forth in the Settlement Agreement
5 and the Proposed Award, also filed concurrently herewith; and (4) setting a hearing for final
6 approval of the Settlement.

7 **II. STATUS OF THE ARBITRATION**

8 Prior to initiating this action, counsel for Named Claimant (“Class Counsel”) thoroughly
9 investigated the claims and considered the facts and circumstances underlying the pertinent issues
10 and the applicable law. (Declaration of Anthony J. Orshansky (“Orshansky Decl.”) ¶ 15 filed
11 concurrently herewith). After conducting their initial investigation, Class Counsel determined that
12 the claims were well-suited for class action adjudication owing to what appeared to be a common
13 course of conduct affecting a similarly situated group of employees. (Ibid.) As a result, Named
14 Claimant submitted a demand for arbitration, on behalf of himself and similarly situated persons,
15 entitled *Chamoun, et al. v. Jones Ontario Acquisition, LLC*, Case No. S277006 (“Arbitration”). After
16 conducting extensive discovery, the Parties participated in a full-day mediation. The Parties reached
17 a settlement pursuant to a mediator’s proposal. (Id. ¶ 24.)

18 **A. Discovery And Investigation**

19 From the inception of this action, Class Counsel investigated and researched the facts and
20 circumstances underlying the pertinent issues and the law applicable thereto. This required thorough
21 discussion and interviews with Named Claimants and several other Settlement Class Members, as
22 well as research into the various legal issues involved in the case. (Id. ¶¶ 15, 18, 21.) Further,
23 Respondent produced a substantial amount of documentation for Class Counsel’s review such as:
24 employee handbooks; written policies for payment of wages (*i.e.*, wages, advances, commissions,
25 and bonuses); policies for meal and rest breaks; time-keeping policies, including recording hours;
26 provisions for the issuance of wage statements; and policies for payment of all wages at separation.
27 (Id. ¶ 17.) Class Counsel also reviewed volumes of Settlement Class Member information, including
28 time and pay records. (Id. ¶ 18.) The Parties met and conferred at length regarding discovery and the

1 information and documents produced. (Id.)

2 Respondent also provided composite data for the Settlement Class including the number of
3 putative class members, the counts of former versus current employees, the average number of hours
4 worked, the wage rates in effect, and the length of employment for the average putative class
5 member. (Id. ¶ 19.) Class Counsel analyzed the documents produced by Respondent in conjunction
6 with interviews of Settlement Class Members to determine the incidence and extent of non-
7 productive and non-sales activities performed by Settlement Class Members. (Id. ¶¶ 18, 21.) Class
8 Counsel also gathered evidence pertaining to Respondent's practice of requiring Settlement Class
9 Members to remain at the dealership and available to customers during meal breaks, along with
10 incidences and amount of missed, late and interrupted rest breaks. (Ibid.) In the end, Class Counsel
11 contend they were able to assess Respondent's potential liability on the alleged causes of action and
12 were able to estimate the amount of damages due. (Id. ¶ 21.)

13 **B. Mediation And Settlement**

14 Class Counsel thoroughly investigated the claims and engaged in extensive, hard-fought, and
15 contentious negotiations to obtain a settlement for the benefit of the Settlement Class. (Id. ¶ 15-24.)
16 The Parties participated in a lengthy mediation session before Jill R. Sperber, Esq., an experienced
17 attorney and mediator in wage and hour class and representative actions. (Id. ¶ 22.) During the
18 mediation, the Parties exchanged further information and discussed all aspects of the case, including
19 the risks and delays of further litigation/arbitration and the risks to both Parties for proceeding with a
20 motion for class certification, liability under the claims asserted, and the implications of a PAGA
21 representative action. (Id. ¶ 22.) These were contentious issues because of the factual and legal
22 complexity of the case. (Ibid.) The Parties reached a settlement pursuant to a mediator's proposal.
23 (Id. ¶ 24.) The final settlement amount was reached as a result of reasonable compromises in light of
24 the foregoing considerations. (Ibid.)

25 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks
26 and delays posed by further litigation/arbitration, and Class Counsel's own prior litigation
27 experience, Class Counsel believe that the recovery being made available to the Settlement Class is
28 fair and reasonable taking into consideration the amounts received in other wage and hour class and

1 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
2 each participating Settlement Class Member's claim to the settlement award he or she will receive.
3 (Id. ¶¶ 6, 54.) Further, and based on the settlement negotiations, which were hard fought and
4 conducted in good faith and at arm's length between attorneys with substantial experience litigating
5 class and representative actions, the Settlement was the product of a non-collusive settlement process
6 in which the Parties were forced to make significant compromises in the interest of reaching a full
7 and complete settlement of the action. (Id. ¶¶ 7, 15, 22, 24, 29, 54.)

8 Respondent has concluded that, because of the substantial expenses of defending this action,
9 the length of time necessary to resolve the issues presented herein, the inconvenience involved, and
10 the concomitant disruption to its business operations, it is in its best interest to accept the terms of
11 the Settlement Agreement. (Settlement Agreement ¶ II.F.) Respondent denies each of the allegations
12 and claims asserted against it in the Arbitration. (Id. ¶¶ II.F., V.A.) However, Respondent
13 nevertheless desires to settle the Arbitration for the purpose of avoiding the burden, expense, and
14 uncertainty of continuing to defend the action and for the purpose of putting to rest the controversies
15 engendered by the Arbitration of this matter. (Id. ¶ II.F.)

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

17 Under the terms of the Settlement, Respondent agrees to pay \$275,000.00 ("Settlement
18 Amount") to settle the claims asserted in this Arbitration. This amount shall be inclusive of all
19 settlement payments to the Named Claimant and participating Settlement Class Members, except
20 those that make a valid and timely request to be excluded from the Settlement Class, the
21 enhancement award to the Class Representative, all expenses and costs to the Settlement
22 Administrator, CPT Group, Inc., all attorneys' fees and costs to Class Counsel, payment to the
23 California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to
24 statute, and payment to PAGA Group Members. The amount available for distribution to Settlement
25 Class Members is determined by deducting the following from the Settlement Amount:

- 26 • Up to \$6,500.00 to the Named Claimant as an enhancement for prosecuting this
27 action and in exchange for a general release of claims;
- 28 • Up to 35 percent of the Settlement Amount in attorneys' fees to Class Counsel;

- Up to \$18,000.00 in litigation costs to Class Counsel;
- \$30,000.00 pursuant to California’s Private Attorneys General Act (“PAGA”) (“PAGA Settlement”); and
- Up to \$7,500.00 to the Settlement Administrator to notify Settlement Class Members and administer the Settlement.

The amount remaining after the foregoing deductions, approximately \$116,750.00, is called the “Net Settlement Amount.” (Settlement Agreement ¶ I.H.) Individual settlement payments (“Net Settlement Payments”) will be distributed to Settlement Class Members who submit timely and valid Claim Forms. (Id. ¶¶ I.I., VIII.A.) However, Settlement Class Members employed at any time from March 13, 2019, and continuing through December 31, 2020 (“PAGA Group Members”), will receive a pro rata portion of twenty-five percent (25%) of the \$30,000.00 allocated to the PAGA Settlement, whether or not they submit a Claim Form or request exclusion from the Settlement Class. (Orshansky Decl. ¶ 6.)

Payments to members of the Settlement Class will be determined on a claims-made basis; each member of the Settlement Class who submits a timely and valid Claim Form will be paid a percentage of the Net Settlement Amount based upon his or her Eligible Workweeks during the Settlement Period. (Settlement Agreement ¶ X.A.) Each Net Settlement Payment will be determined by dividing the Net Settlement Amount by the total number of Eligible Workweeks worked by all members of the Settlement Class during the Settlement Period (the “Weekly Amount”) and then multiplying the Weekly Amount by the number of Eligible Workweeks by the individual Settlement Class Member as determined by the Settlement Administrator. (Id. ¶ X.A.)

As a result, the consideration paid to participating Settlement Class Members is tailored to the impact of the Respondent’s alleged violations on each of them, as well as to the claims he or she is releasing if he or she does not opt out of the Settlement. (Orshansky Decl. ¶ 6.) For tax purposes the amount to be paid to each participating Settlement Class Member is allocated as follows: 30 percent represents wages and 70 percent represents penalties and interest. (Settlement Agreement ¶ XIV.A.)

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1 The Parties have agreed to and now seek the Arbitrator’s approval of the Notice of Class &
2 Representative Action Resolution (“Notice”) and Claim Form (attached as internal exhibits “A” and
3 “B,” respectively, to the Settlement Agreement) to be disseminated to members of the Settlement
4 Class consistent with the manner and timing set out in the Settlement. (Settlement Agreement ¶
5 VIII.) The Parties have also agreed that CPT Group, Inc. shall handle the notice and claims
6 administration. (Id. ¶ VII.)

7 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

8 Express judicial policy favors maintaining wage and hour actions as class actions. *Prince v.*
9 *CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981) 29
10 Cal. 3d 462 (finding that California public policy “encourages the use of the class action device”).
11 Any doubt as to the appropriateness of class treatment should be resolved in favor of class
12 certification, subject to later modification if necessary. *Id.* at 473-475. The decision to certify a class
13 is purely a procedural one and should be based on the allegations in the operative complaint, and not
14 in the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th
15 429, 439-441.

16 To certify a settlement class the Arbitrator must find the two primary requirements for
17 maintaining a class action: (1) there must be an ascertainable class and (2) there must be a well-
18 defined community of interest in the questions of law and fact involving the parties to be
19 represented. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 805-809; *Daar v. Yellow Cab Co.*
20 (1967) 67 Cal. 2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal. App. 4th 467, 471;
21 *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341. These criteria are met
22 here for the reasons set forth below.

23 **A. There Is An Ascertainable And Sufficiently Numerous Class.**

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

1 Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v. Target*
2 *Corp.* (2010) 189 Cal. App. 4th 905, 919. Settlement Class Members are comprised of: “[a]ll persons
3 who are or were employed by Respondent in the State of California as service advisors at any time
4 from March 13, 2016, and continuing through December 31, 2020.” (Settlement Agreement ¶ I.O.)
5 Thus, all Settlement Class Members are all of a specific type (service advisors) employed at a
6 specific dealership (Mercedes-Benz of Ontario). Respondent is required to and does maintain a
7 record of each such person, including contact information and Social Security numbers. Therefore,
8 there is an ascertainable class. (Orshansky Decl. ¶ 62.)

9 Documents and information exchanged reflect a class of approximately 47 Settlement Class
10 Members. (*Id.* ¶¶ 19, 62.) *See, Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 934, stating
11 that “[n]o set number is required as a matter of law for the maintenance of a class action” and citing
12 examples wherein classes as little as 10 (*Bowles v. Superior Court* (1955) 44 Cal. 2d 574) and 28
13 (*Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017) were upheld. Thus, there is a sufficiently
14 numerous class.

15 **B. There Is A Well-Defined Community Of Interest.**

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

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

23 Here, common issues of fact and law predominate as to each of the claims alleged by Named
24 Claimant. Because Named Claimant has alleged a single scheme, “the relevant proof [does] not vary
25 among class members” and “clearly presents a common question fundamental to all class members.”
26 *See, In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123
27 (citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D. 493, 518).
28 California courts show “no hesitancy” in inferring class-wide causation, class-wide injury, and class-

1 wide damages when a common course of action has been shown. *B.W.I. Custom Kitchens, supra*,
2 191 Cal. App. 3d at 1350 (granting class certification in a manufacturing defect case when a
3 common course of action had been proven). This inference “*eliminates* the need for each class
4 member to prove individually the consequences of the defendants’ actions to him or her.” *Id.* at 1351
5 (quoting *Rosack v. Volvo of America Corp.* (1982) 131 Cal. App. 3d 741, 753 [emphasis added]).

6 This litigation/arbitration involves a determination about Respondent’s alleged failure to pay
7 wages (including minimum wage and overtime), provide meal periods and rest breaks, reimburse
8 business expenses, provide accurate itemized wage statements, pay all wages owed upon separation,
9 and so forth – which is applicable to all members of the Settlement Class. Thus, the outcome of this
10 matter depends upon questions that are common to members of the Settlement Class.

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

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

16 A two-step process is followed when considering class settlements...If the proposed
17 settlement appears to be the product of serious, informed, non-collusive negotiations,
18 has no obvious deficiencies, does not improperly grant preferential treatment to class
19 representatives or segments of the class, and falls within the range of possible
20 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.

21 *See, Manual for Complex Litigation (Second)* (1985) at § 30.44. The preliminary approval of the
22 class action settlement by the trial court or arbitrator is simply a conditional finding that the
23 settlement appears to be within the range of acceptable settlements. *See, e.g., Newberg*, § 11.25;
24 *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal. App. 4th 1085,
25 1094-1095; *Federal Manual for Complex Litigation, Second* (“MCL 2d”) § 30.44 (“Preliminary
26 approval is appropriate if the agreement is ‘fair, reasonable, and adequate under the
27 circumstances’”). Thus, the preliminary approval of the class settlement by the Arbitrator is simply a
28 conditional finding that the Settlement appears to be within the range of acceptable settlements.

1 A review of the preliminary approval criteria demonstrates a substantial basis for granting the
2 preliminary approval requested by this Motion and proceeding to a full settlement hearing.

3 **VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.**

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

14 To summarize, the Settlement here is fair because it offers payment to each participating
15 Settlement Class Member, extinguishes the risk of litigation, and provides a fair and adequate
16 distribution of the Settlement proceeds whereby the funds are allocated to participating Settlement
17 Class Members proportionally based on the respective number of eligible workweeks that they
18 worked during the Settlement Period. (Orshansky Decl. ¶ 6.)

19 **A. The Settlement Is Entitled To A Presumption Of Fairness.**

20 Moreover, courts (here, the arbitrator) presume the absence of fraud or collusion in the
21 negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption
22 that the negotiations were conducted in good faith. *Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.*
23 (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25; *In re Chicken Antitrust Litigation*
24 (N.D. Ga. 1980) 560 F. Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F. 2d 438, 447; *Mars*
25 *Steel Corp. v. Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F. 2d 677, 681.
26 Courts do not substitute their judgment for that of the proponents, particularly when settlement has
27 been reached by experienced counsel familiar with the litigation. *Rodriguez*, 2007 U.S. Dist. LEXIS
28 74767 at 24; *Hammon v. Barry* (D.D.C. 1990) 752 F. Supp. 1087; *In re Armored Car Antitrust*

1 *Litigation* (N.D. Ga 1979) 472 F. Supp. 1357; *Sommers v. Abraham Lincoln Federal Savings &*
2 *Loan Association* (E.D. Pa 1978) 79 F.R.D. 571.

3 As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the
4 Settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's
5 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)
6 Throughout this case, Settlement Class Members have been represented by experienced counsel who
7 have years of experience in employment class and representative action litigation. (Id. ¶¶ 57-60.)

8 Class Counsel have devoted a considerable amount of time to the prosecution of this case,
9 including, but not limited to, interviewing Named Claimant at length and on repeated occasions,
10 reviewing employee handbooks, reviewing Respondent's written policies regarding the payment of
11 wages and providing meal and rest breaks, along with its time-keeping and pay policies (*e.g.*,
12 recording hours, issuance of wage statements, and providing all wages at separation), reviewing
13 compensation pay plans during the applicable period, reviewing time records and pay records,
14 meeting and conferring with defense counsel, researching California law, interviewing numerous
15 Settlement Class Members, preparing for and attending mediation, and negotiating and finalizing the
16 Settlement Agreement and related documents. (Id. ¶¶ 15-24.)

17 Class Counsel believe that the Settlement is fair and reasonable and serves the best interests
18 of Settlement Class Members. (Id. ¶¶ 7, 29, 54.) Although the recommendations of counsel
19 proposing the class settlement are not conclusive, the Arbitrator can properly take the
20 recommendations into account, particularly if counsel have been involved in litigation for some
21 period of time, appear to be competent, have experience with this type of litigation, and significant
22 discovery has been completed. *See, Newberg*, § 11.47.

23 **B. The Settlement Is Fair, Reasonable, And Adequate.**

24 A settlement is not judged against what might have been recovered had a plaintiff prevailed
25 at trial, nor does the settlement have to provide 100% of the damages sought to be fair and
26 reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal. App. 4th 224, 246, 250.
27 ("Compromise is inherent and necessary in the settlement process...even if the relief afforded by the
28 proposed settlement is substantially narrower than it would be if the suits were to be successfully

1 litigated, this is no bar to a class settlement because the public interest may indeed be served by a
2 voluntary settlement in which each side gives ground in the interest of avoiding litigation.”)

3 Among those matters considered during the course of settlement negotiations were the
4 strength of the case versus the amounts offered in settlement; the risks, expenses, and length of
5 further litigation/arbitration, class certification, and the possibility for seeking review or appeal from
6 courts; the present state of the law as it applies to wage-and-hour class and representative actions;
7 the present value of a settlement versus the long wait necessitated by any potential judgment in
8 Settlement Class Members’ favor; the burdens of proof necessary to establish liability against
9 Respondent; and Respondent’s defenses to the action. (Orshansky Decl. ¶¶ 55-56.) These factors
10 each indicate that the interests of Settlement Class Members are best served by a settlement of this
11 action in the manner and upon the terms set forth in the Settlement Agreement.

12 **1) Unpaid Wages**

13 Named Claimant worked at Respondent’s dealership and, along with other service advisors,
14 was compensated either entirely or partially on the basis of commissions. Problematic, however, is
15 that Respondent did not fully compensate Named Claimant and Settlement Class Members for non-
16 sales activities (*e.g.*, attending meetings) and for pre- and post-shift *off-the-clock* work (*e.g.*, doing
17 paperwork or remaining on the yard to assist customers). (Id. ¶ 31.)

18 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded *off-the-clock*
19 hours, as with all of Named Claimant’s claims, Respondent contends the vast majority of this
20 potential exposure was subject to arbitration agreements that could preclude any class-wide
21 recovery. (Id. ¶ 32.) Moreover, Respondent maintains that all work performed by commissioned
22 employees was “directly related” to the activities that were being compensated via commissions, and
23 therefore did not need to be separately compensated. *Cf.* Labor Code § 226.2 (stating that
24 compensable non-productive time is “time under the employer’s control, exclusive of rest and
25 recovery periods, that is not directly related to the activity being compensated on a piece-rate
26 basis”); *Vaquero v. Stoneledge* (2017) 9 Cal. App. 5th 98, 111 (hereinafter “*Stoneledge*”) (“nothing
27 about commission compensation plans justified treating commissioned employees different from
28 other employees”). (Orshansky Decl. ¶ 32.)

Respondent also argues that Named Claimant’s claim for uncompensated non-productive time is not amenable to class treatment because it would require an unmanageable series of mini-trials to determine how much time was spent on non-sales activities for each employee. (*Id.* ¶ 33.) In light of these arguments, Named Claimant applied appropriate discounts for the risk of non-certification and being unsuccessful on the merits. (*Ibid.*)

2) Rest Period Violations

Named Claimant alleges that he did not receive complaint rest breaks because Respondent did not “relinquish control over how employees spend their time and relieve employees of all duties.” *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal. 5th 257, 260. (*Orshansky Decl.* ¶ 34.) Settlement Class Members did not receive timely and compliant rest breaks, nor did Respondent relinquish control over how they spent their 10-minute rest periods. (*Orshansky Decl.* ¶ 34.) Among other things, Named Claimant argues that Respondent wanted service advisors to remain on the yard ready to assist customers at a moment’s notice, which created an implied pressure restricting the freedom of Named Claimant and Settlement Class Members. (*Ibid.*) Named Claimant further alleges that Respondent did not provide premium pay for each situation when Named Claimant contends rest breaks were not provided as required under Labor Code section 226.7. (*Ibid.*)

In addition, Named Claimant argues that Respondent’s commission pay plans are the functional equivalent of the commission pay plan found to be unlawful in *Stoneledge*. (*Id.* ¶ 35.) In *Stoneledge*, sales associates who worked for Ashley Furniture Store were paid on a commission pay plan, which guaranteed a minimum hourly rate as an advance against commission earned in later pay periods. The *Stoneledge* court held the commission pay plan was unlawful because it failed to **separately** compensate sales associates for rest breaks in weeks where the employee was paid on a commission basis. In essence, the reasoning of the *Stoneledge* court was a natural extension of its prior holding in *Bluford v. Safeway, Inc.* (2013) 216 Cal. App. 4th 864, 872, which held that “under the rule of *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 4th 314, 323, rest periods must be separately compensated in a piece-rate system.” *See also, Stoneledge, supra*, 9 Cal. App. 5th at 110 (“We agree with *Bluford* that Wage Order 7 requires employers to separately compensate employees for rest periods if an employer’s compensation plan does not already include a minimum hourly

1 wage for such time.”). Named Claimant asserts that Respondent failed to separately compensate
2 Settlement Class Members for rest breaks as held in *Stoneledge*. (Orshansky Decl. ¶ 35.)

3 It bears mentioning that the application of rest break pay requirements to incentivized pay
4 plans is a relatively recent occurrence: until February of 2017, there was no case law extending
5 separate rest period pay requirements to other forms of incentive pay, including commissions, and no
6 California appellate court had specifically ruled that such employees were to be compensated
7 separately for rest period time. As a result, Respondent seizes on the opportunity to suggest that even
8 if *Stoneledge* applies, it does so only prospectively, not retroactively. (Orshansky Decl. ¶ 36.)
9 Named Claimant countered that *Stoneledge* only crystallized existing law and is like *Gonzales v.*
10 *Downtown LA Motors* (2013) 215 Cal. App. 4th 36, which applied both prospectively and
11 retroactively. (Ibid.)

12 Respondent also cites the California Labor Commissioner’s determination that the relatively
13 recent AB1513 formula for rest period compensation for piece workers does not apply to employees
14 earning productive pay for commissions. (Id. ¶ 37.) Further, as to employees paid on commissions,
15 to the extent the Settlement Class Member waived his or her rest period for the purpose of earning
16 more commissions, Respondent posits there was no “unpaid” rest period on those occasions because
17 none were taken. (Ibid.) Though Named Claimant finds that argument absurd, questions of whether
18 meal and rest breaks were provided and *why* they were missed are points of robust contention
19 between the Parties. (Ibid.)

20 Named Claimant contends Settlement Class Members are entitled to rest period premium pay
21 for every rest period not *separately* compensated for by Respondent. (Id. ¶ 38.) Respondent argues
22 that it is not liable for rest period premiums, but that it is only liable for the missed and unpaid rest
23 period minutes at most. (Ibid.)

24 In light of these arguments, along with the fact that rest breaks are not required to be
25 recorded (and were not in fact) for timekeeping purposes, Named Claimant applied appropriate
26 discounts for the risk of non-certification and being unsuccessful on the merits to properly value this
27 claim for settlement purposes. (Id. ¶ 39.)

28 ///

1 **3) Meal Period Violations**

2 Named Claimant faced significant challenges to his Labor Code section 226.7 meal period
3 claim. (Orshansky Decl. ¶ 40.) Named Claimant argues Respondent did not provide compliant meal
4 periods to Settlement Class Members. (Ibid.) As with Named Claimant’s other claims, Respondent
5 argues that the meal period claim was subject to binding arbitration agreements with class action
6 waivers. (Ibid.) In addition, Respondent argues that even absent the arbitration agreements, its
7 facially compliant meal period policy was an obstacle to both certification and success on the merits
8 of the claim. (Ibid.)

9 Moreover, Respondent vehemently argues that it complied with the requirements for meal
10 breaks articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court*
11 (2012) 53 Cal. 4th 1004. (Orshansky Decl. ¶ 41.) Specifically, Respondent maintains it “provides”
12 employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieves
13 employees of all duties during meal periods, and relinquishes control over employees’ activities,
14 including the ability to leave the premises during meal periods. (Orshansky Decl. ¶ 41.) Respondent
15 obtained declarations from employees attesting to this practice of providing compliant meal breaks.
16 (Ibid.) Respondent argues that it provided all required meal periods in a legally compliant manner
17 and that any late, short, or missed meal periods were not the result of any overarching policy or
18 practice. (Ibid.)

19 Like most employers facing meal period litigation, Respondent argues that Settlement Class
20 Members were apprised of their right to take meal periods, but voluntarily waived them. (Id. ¶ 42.)
21 Additionally, Respondent argues that Settlement Class Members were apprised of their right to take
22 second meal periods and that the majority of them voluntarily waived them, which would absolve
23 liability for those meal periods. (Ibid.) Further, Respondent contends that the issue of voluntary
24 waiver would necessarily devolve into a series of individualized mini-trials, precluding class
25 certification. *See, Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th 1, 25 (holding that the
26 defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on
27 individual questions). (Orshansky Decl. ¶ 42.) Respondent disputes Named Claimant’s
28 characterization of working conditions, liability, and damages, and possesses documentary and

1 testimonial evidence rebutting Named Claimant’s allegations. (Ibid.) Notwithstanding the strength of
2 Respondent’s defenses to certification and merits, including that some Settlement Class Members
3 may have voluntarily waived meal periods, Named Claimant believes his claim is meritorious and
4 determined the violation rate by reviewing time records and interviewing Settlement Class Members.
5 (Ibid.)

6 **4) Wage Statement Violations**

7 Named Claimant alleges a cause of action under Labor Code section 226(a) for Respondent’s
8 failure to provide accurate itemized wage statements. (Id. ¶ 43.) Failure to comply with the statute
9 entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the initial
10 pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
11 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). *See*,
12 Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action; if
13 Respondent did not provide all wages owed for all hours worked, meal and rest breaks, and so forth,
14 then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 43.)

15 Respondent contends, however, that Labor Code section 226(e) penalties are not automatic.
16 (Id. ¶ 44.) Rather, the employee must show that Respondent’s noncompliance was “knowing and
17 intentional.” (Ibid.) Respondent suggests that any noncompliance was not knowing and intentional,
18 especially given the uncertain applicability of *Stoneledge* in a commission pay context. (Ibid.)
19 Moreover, Respondent argues that meal and rest period violations cannot support derivative wage
20 statement penalties. *See Jones v. Spherion Staffing, Inc.* (C.D. Cal. Aug. 7, 2012) Case No. LA
21 CV11-06462, 2012 WL 3264081 at *8-9 (granting defendant’s motion for judgment on the pleadings
22 because plaintiffs “cannot advance a claim for noncompliant wage statements or failure to pay wages
23 due upon termination based solely on alleged violations of section 226.7.”) (Orshansky Decl. ¶ 44.)
24 Finally, because the damages for this cause of action are penalties, the statute of limitations is only
25 one year prior to the filing of the original complaint. *See*, Code Civ. Proc. § 340. The Parties
26 discussed these issues and, in light of these considerations, Named Claimant factored in a reduction
27 of liability and damages for this cause of action. (Orshansky Decl. ¶ 44.)

28 ///

1 **5) Unreimbursed Business Expenses**

2 Named Claimant alleges a cause of action under Labor Code section 2802(a) which states
3 that an employer must reimburse employees for all necessary expenditures that employees incur in
4 discharging their duties. (Id. ¶ 45.) Here, Settlement Class Members were required to use their
5 personal cell phones to communicate with customers, supervisors, coworkers and other persons for
6 reasons related to work, yet Respondent failed to fully reimburse for these necessary business
7 expenses. (Ibid.)

8 Respondent contends that it has a policy and practice of reimbursing employees for necessary
9 business-related expenses. (Id. ¶ 46.) Respondent also contends that, with respect to the alleged
10 expenses for which Named Claimant and other Settlement Class Members never requested
11 reimbursement from Respondent, Respondent did not know and had no reason to know that the
12 alleged business related expenses were incurred. (Ibid.) Respondent maintains that employees were
13 able to use phones at the workplace to communicate with customers, supervisors, coworkers and
14 other persons for reasons related to work and that it was rare, if ever, that employees were required
15 to use their personal cell phones for business purposes. (Ibid.) Moreover, to the extent it occurred,
16 Respondent asserts that this claim is not suitable for class treatment as it would require
17 individualized determinations as to whether each employee used a personal cell phone for work-
18 related purposes and, if so, how much of that use was a reasonable percentage of his or her
19 individual monthly phone bill. (Ibid.)

20 Respondent also contends that the California Labor Code only requires reimbursement of
21 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
22 work—and argued that distinguishing a necessary expense from an unnecessary one would require
23 individualized inquiry. *See* Cal. Lab. Code § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42
24 Cal. 4th 554. (Orshansky Decl. ¶ 47.) Furthermore, whether an expense was necessary would depend
25 in part on the reasonableness of the employee’s choice and would thus have to be established by way
26 of extensive individual factual inquiry and/or statistical evidence. *Cochran v. Schwan’s Home*
27 *Services, Inc.* (2014) 228 Cal. App. 4th 1137. (Orshansky Decl. ¶ 47.)

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1 For the foregoing reasons and taking into account the wide variety of telephone plans,
2 providers, and costs which creates evidentiary complexities on an individual basis, let alone class-
3 wide, Named Claimant assigns a *de minimis* value to this claim. (Id. ¶ 48.)

4 **6) Derivative Waiting Time, PAGA Penalties, And UCL Claims**

5 Named Claimant further asserts causes of action against Respondent for failure to timely pay
6 all wages due employees at separation, for civil penalties under the PAGA, and for engaging in
7 unfair, unlawful and fraudulent business practices. *See*, Labor Code §§ 203, 2699, *et seq.* and Cal.
8 Business and Professions Code § 17200, *et seq.* (Orshansky Decl. ¶ 49.) As with other claims,
9 Respondent vigorously disagrees that it engaged in any conduct giving rise to liability or entitlement
10 to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 49.)

11 Respondent argues that waiting time penalties are not appropriate because it attempted to pay
12 employees all final wages owed in good faith upon their separation, therefore precluding a finding of
13 willfulness necessary to obtain waiting time penalties. (Id. ¶ 50.) Moreover, Respondent maintains
14 that no waiting time penalties were recoverable from alleged meal or rest period violations. *See Ling*
15 *v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal. App. 4th 1242, 1261 (holding that waiting time
16 penalties are not recoverable as a result of unpaid meal and rest period premiums). (Orshansky Decl.
17 ¶ 50.) To the extent that Named Claimant's waiting time penalty claim is derivative of the unpaid
18 non-productive time claim, Respondent argues that it is overstated because not all of the former
19 employees could be proven to have experienced an underpayment of wages. (Ibid.)

20 The success of Named Claimant's PAGA claim is wholly dependent upon the success of his
21 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
22 Respondent contends that these penalties are derived from the underlying wage and hour violations
23 discussed above, which Respondent disputed. *See e.g., Green v. Lawrence Service Co.* (C.D. Cal.
24 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's success was determined by the
25 merits of its underlying claims). (Orshansky Decl. ¶ 51.) Named Claimant recognizes that the Court
26 has discretion to reduce any award of PAGA penalties where it views them as duplicative. *See*,
27 Labor Code § 2699e(2) (the Court may "award a lesser amount than the maximum civil penalty
28 amount [authorized by PAGA] if, based on the facts and circumstances of the particular case, to do

otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135 (affirming reduction of PAGA penalties); *Fleming v. Covidien* (C.D. Cal.) 2011 WL 7563047 (reducing PAGA penalties by 82%). (Orshansky Decl. ¶ 51.)

In light of the foregoing, Named Claimant took into consideration, when valuing the merits of these claims, the chances of prevailing on the derivative causes of action, as well as the additional hurdles of prevailing under each standalone cause of action in light of the defenses raised and applied the appropriate discounts. (Id. ¶ 52.)

C. The Risk, Expense, And Likely Duration Of Further Litigation/Arbitration.

Further litigation/arbitration of this case posed real risks for a number of reasons. First, there were the risks of unfavorable rulings on the merits of the various indeterminate legal issues outlined in the previous section. (Id. ¶ 55.) Second, it is always preferable to reach an early resolution of a dispute because, in addition to what has already been said, such resolutions save time and money that would otherwise go toward litigation/arbitration. (Ibid.) Most cases settle sooner or later. If this case ended up settling after further litigation/arbitration, the settlement amount would have taken into account the additional costs incurred, and there might have been less available for members of the Settlement Class after all was said and done. (Ibid.) The Parties would have had to depose a number of people such as managers, supervisors, and employees in order to establish liability. (Ibid.) Discovery disputes would have been in the offing. (Ibid.) In contrast, the Settlement provides real benefits for members of the Settlement Class here and now; these benefits are not insignificant for anyone, especially given the current economic climate. (Ibid.)

As laid out above, among the matters considered and researched in the course of this action were the strength of the case versus the amount offered in Settlement; the risks, expenses, and length of further litigation/arbitration, including class certification in the context of arbitration agreements with purported class action waivers, and the appeals process; the present value of a settlement versus the long wait necessitated by any potential judgment in favor of the Settlement Class; the burdens of proof necessary to establish liability against Respondent; and Respondent’s defenses to the action. (Id. ¶ 56.) Consequently, the risk and expense of further proceedings outweighed any benefit that

1 might have been gained otherwise. (*Ibid.*)

2 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS**

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

10 The Notice and Claim Form, respectively attached to the Settlement Agreement as Exhibits
11 "A" and "B", meet constitutional standards because these documents provide all of the information a
12 reasonable person would need to make a fully informed decision about the Settlement. The content
13 of the proposed Notice satisfies California Rule of Court 3.766(d) because it advises putative
14 Settlement Class Members of the nature of the claims, basic contentions and denials of the Parties,
15 the key terms of the Settlement, the uniform 45-day deadline to submit a Claim Form, dispute, opt
16 out or objection to the Settlement and the procedure by which to do so, explains the recovery
17 formula and expected recovery amount for each participating Settlement Class Member, and advises
18 them that they will be bound by the terms of the Settlement if they do not request exclusion.
19 (*Orshansky Decl.* ¶ 69.)

20 Moreover, the Notice will specifically direct any Settlement Class Member who has
21 questions or concerns to contact Class Counsel or the Settlement Administrator. (*Id.* ¶ 70.)

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

28 ///

1 Here, the Notice and Claim Form will be distributed to each Settlement Class Member by
2 first-class mail sent to the last-known address of each of the Settlement Class Members. (Settlement
3 Agreement ¶ VIII.A.) The Settlement Administrator will perform National Change of Address
4 (NCOA) searches using the class data provided by Respondent to update the class list of addresses as
5 accurately as possible. (Ibid.) If returned as undeliverable, the Settlement Administrator will attempt
6 to obtain a valid mailing address via skip trace and, if another address is identified, it will send the
7 Notice and Claim Form to the new address. (Ibid.) Thus, the Notice and Claim Form is likely to
8 reach most Settlement Class Members.

9 Pursuant to controlling authority, the Notice and method of distribution fully comport with
10 due process requirements; therefore, the Arbitrator should approve the Notice and Claim Form and
11 direct their distribution as proposed herein.

12 **VIII. THE AWARD OF ATTORNEYS' FEES AND COSTS IS FAIR AND REASONABLE**

13 Under the Settlement, the Parties have agreed that, subject to approval by the Arbitrator,
14 Class Counsel should be paid an award of fees equal to 35 percent of the Settlement Amount, plus
15 actual litigation costs estimated to be \$18,000. (Settlement Agreement ¶ XII.) The requested fees are
16 fair compensation for a law firm involved in undertaking complex, risky, expensive, and time-
17 consuming litigation on a solely contingent basis. Respondent does not oppose the amount of the
18 award in light of the work performed and benefits provided to the Settlement Class.

19 California courts routinely look to the federal courts on class action approvals. The Ninth
20 Circuit has recognized that an appropriate method for awarding attorneys' fees in class actions is to
21 award a percentage of the "common fund" created as a result of the settlement. *Vincent v. Hughes*
22 *Air West, Inc.* (9th Cir. 1977) 557 F. 2d 759, 769. The purpose of the common fund/percentage
23 approach is to "spread litigation costs proportionally among all the beneficiaries so that the active
24 beneficiary does not bear the entire burden alone." *Id.* Historically, courts have awarded percentage
25 fees in the range of 20% to 50% of the common fund, depending on the circumstances of the case.
26 *Newberg*, at § 14.03; *see also, In re Activision Securities Litigation*, (N.D. Cal. 1989) 723 F. Supp.
27 1373, 1378. *Newberg* further notes: "[A]chievement of a substantial recovery with modest hours
28 expended should not be penalized but should be rewarded for considerations of time saved by

1 superior services performed.” *Newberg*, §§ 14.10-14.11. The custom and practice in class actions is
2 to award approximately one-third of the fund as a fee award. *See, Chavez v. Netflix, Inc.* (2008) 162
3 Cal. App. 4th 43, 66, n.11 (“Empirical studies show that, regardless whether the percentage method
4 or the lodestar method is used, fee awards in class action average around one-third of the recovery.”)

5 The California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.* that “[t]he
6 percentage of fund method survives in California class action cases.” 1 Cal.5th 480, 506 (2016). In
7 *Laffitte*, the California Supreme Court held:

8 The **recognized advantages of the percentage method**—including relative ease
9 of calculation, alignment of incentives between counsel and the class, a better
10 approximation of market conditions in a contingency case, and the
11 encouragement it provides counsel to seek an early settlement and avoid
12 unnecessarily prolonging the litigation—**convince us the percentage method is**
13 **a valuable tool** that should not be denied our trial courts.” [emphasis added]

14 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal. 3d 25, 34 (“when
15 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or
16 plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
17 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal. 3d 621,
18 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court
19 acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v.*
20 *Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F. 3d 513, 516 (the percentage of the fund
21 method for calculating attorneys’ fees more accurately reflects the results achieved for the putative
22 class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’
23 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
24 litigation.”); *In re Rite Aid Corp. Securities Litigation* (3d Cir. 2005) 396 F. 3d 294, 300 (“The
25 percentage-of-recovery method is generally favored in common fund cases because it allows courts
26 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
27 failure.’”)²

28 ² *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools such as the lodestar cross-check, although they need not do so. *Laffitte, supra*, 1 Cal. 5th at 506 (“We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee...they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.”)

1 The attorneys' fees request provided for in the Settlement Agreement is consistent with
2 judicial precedent. Courts regularly approve fee awards equal to or greater than the percentage
3 requested in this case. *See, e.g., In re Ampicillin Antitrust Litigation* (D. D.C. 1981) 526 F. Supp.
4 494 (awarding 45% of \$7.3 million settlement fund); *Beech Cinema, Inc. v. Twentieth-Century Fox*
5 *Film Corp.* (S.D.N.Y. 1979) 480 F. Supp. 1195, *aff'd* (2d Cir. 1980) 622 F. 2d 1106 (approximately
6 53% of the settlement fund awarded); *Van Gemert v. Boeing Co.* (S.D.N.Y. 1981) 516 F. Supp. 412,
7 420 (awarding 36% of settlement fund).

8 Here, Class Counsel have borne the entire risk and costs and will not receive any
9 compensation until recovery is obtained. The Arbitrator should also consider the substantial benefit
10 obtained by Class Counsel on behalf of the Settlement Class. Finally, based on Class Counsel's
11 hourly rates, if the Arbitrator were to apply even a modest multiplier under a lodestar theory, Class
12 Counsel's attorneys' fees would easily justify the requested amount. Thus, the requested award for
13 Class Counsel is reasonable.

14 **IX. ENHANCEMENT PAYMENT TO THE CLASS REPRESENTATIVE**

15 It is appropriate to provide a relatively modest incentive payment to class representatives.
16 *See, Newberg*, § 12.1; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294;
17 *Bogosian v. Gulf Oil Corp.* (E.D. Pa. 1985) 621 F. Supp. 27 (award of \$20,000.00 each to two class
18 representatives in antitrust case); *Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.)* (W.D.
19 Pa. 1973) 59 F.R.D. 616, 617, *aff'd* 494 F.2d 799 (3d Cir.) *cert. denied in Abate v. Pittsburgh Plate*
20 *Glass Co.* (1974) 419 U.S. 900 (payments of \$17,500.00 to class members who aided in advancing
21 Title VII case).

22 Named Claimant herein is entitled to a reasonable service payment for his effort and
23 initiative in bringing and helping to prosecute this action. (*Orshansky Decl.* ¶ 71.) Named Claimant
24 assumed a great risk by challenging Respondent's wage-and-hour policies and bringing an action
25 against Respondent. (*Ibid.*) Named Claimant spent a considerable amount of time better apprising
26 himself of his rights, deciding whether remedial action should be taken, how it should be taken,
27 searching for attorneys, and finally contacting Class Counsel, who spent many hours with him
28 discussing his case and the law. In the end, Named Claimant decided to vindicate not only his rights,

1 but also those of his fellow employees by filing a class and representative action. (Ibid.)

2 The courage it took to stand up to Respondent in this way should not be underestimated.
3 Few people want to file lawsuits, especially against their current and former employer. (Id. ¶ 72.) In
4 addition, by suing his employer Named Claimant has increased his risk of retaliation by prospective
5 employers. (Ibid.) Named Claimant has now cost Respondent a substantial sum of money through
6 his courage in vindicating his rights and the rights of past and present employees, and these actions
7 will not be lost on a prospective employer who has to choose between an applicant who has never
8 sued a prior employer and one who has. (Ibid.) This risk is particularly real in the information age,
9 where employers can, more easily than ever, perform background checks of prospective employees,
10 sometimes with the stroke of a key. (Ibid.) Moreover, Named Claimant also risked being liable to
11 Respondent for its attorneys' fees if the case turned out to be unsuccessful—fees which can often run
12 into the hundreds of thousands of dollars. (Ibid.)

13 But Named Claimant did not allow his fears of the potential repercussions of being a class
14 representative deter him from acting for the benefit of Settlement Class Members. (Id. ¶ 73.) Quite
15 the contrary, Named Claimant has been intimately involved in this case. (Ibid.) He has devoted a
16 substantial amount of time to helping Class Counsel effectively develop and prosecute this action.
17 (Ibid.) Named Claimant provided Class Counsel with information about Respondent and about the
18 automotive dealership industry generally, identified witnesses, participated in the mediation,
19 monitored the progress of the case with Class Counsel, and reviewed and signed the Stipulation of
20 Resolution. (Ibid.) Named Claimant has spent a significant amount of time with Class Counsel
21 detailing his knowledge of Respondent's practices and helping Class Counsel with the prosecution
22 of this action. (Ibid.) He has diligently, adequately, and fairly represented Settlement Class
23 Members, has no conflicts, and has not placed his interests above that of any member of the
24 Settlement Class. (Ibid.) The Parties are in agreement that Named Claimant is entitled to an
25 enhancement for his time and effort in this matter. (Ibid.) In light of the foregoing, the requested
26 enhancement award in the amount of \$6,500.00 to Named Claimant is fair and reasonable.

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28 ///

1 **X. CONCLUSION**

2 The Parties respectfully request this Arbitrator, as part of the preliminary approval process, to
3 grant the following relief and make the following awards:

- 4 1. Review and approve the Settlement, along with the related Notice of Class &
5 Representative Action Resolution and Claim Form attached thereto;
- 6 2. Consider and determine that the proposed class and representative action settlement as set
7 forth in the Settlement Agreement preliminarily appears fair, reasonable, and adequate;
- 8 3. Enter an order conditionally certifying the action as a class action for settlement purposes;
- 9 4. Approve and appoint CounselOne, P.C. to serve as Class Counsel for settlement purposes;
- 10 5. Approve and appoint CPT Group, Inc. as the Settlement Administrator to handle the
11 notice and administrative procedures as set forth in the Settlement Agreement;
- 12 6. Order Respondent to disclose to the Settlement Administrator the names, last-known
13 mailing addresses, phone number(s) (if available), and Social Security numbers of Settlement Class
14 Members, along with each Settlement Class Member's respective number of eligible workweeks
15 worked during the Settlement Period;
- 16 7. Order that the Notice of Class & Representative Action Resolution and Claim Form be
17 mailed to Settlement Class Members by the Settlement Administrator pursuant to the schedule and
18 plan set forth in the Settlement Agreement; and
- 19 8. Set a date for the Final Approval Hearing.

20
21 Dated: May 7, 2021

Respectfully submitted,
COUNSELONE, PC

22
23
24 By: _____

Anthony J. Orshansky
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