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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

GIOVANNI MITCHELL, AMMON
MENDES, MACKENZIE
HERNANDEZ and ELORA DORN,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

THE MADERA GROUP LLC, a
Nevada limited liability company;
TOCAYA ORGANICA, LLC, a
California limited liability company;
TOCAYA MANAGEMENT LLC, a
Nevada limited liability company;
TOCA MADERA WEHO LLC, a
California limited liability company;
TOCA MADERA MANAGEMENT
LLC, a Nevada limited liability
company; NOBLE 33 MANAGEMENT,
LLC, a Nevada limited liability
company; and DOES 1 through 100,
inclusive,

Defendants.

Case No. 20STCV24075

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

Date: June 29, 2022

Time: 9:30 a.m.

Dept.: 58

Judge: Hon. Bruce G. Iwasaki

[Assigned for all purposes]

Complaint Filed: June 25, 2020

Trial Date: None

Reservation Id: 238887947815

*[Declarations of Keith Custis, Anthony Orshansky,
Giovanni Mitchell, Ammon Mendes, Mackenzie
Hernandez, Elora Dorn and Julie Green filed and
[Proposed] Order lodged concurrently]*

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 29, 2022 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department 58 of the above-captioned court located at 111 North Hill Street, Los Angeles, California 90012, Plaintiffs Giovanni Mitchell, Elora Doran, Mackenzie Hernandez, and Ammon Mendes, individually and on behalf of a similarly situated class of individuals, will and hereby do move this Court pursuant to Code of Civil Procedure Section 382 and Rule 3.769(c) of the California Rules of Court to enter an Order to:

1. Preliminarily approve the proposed class and representative action settlement set forth in the Stipulation of Class and Representative Action Settlement (“Settlement Agreement” or “SA”), attached as **Exhibit A** to the Declaration of Keith Custis, which is submitted concurrently in support of the Motion;

2. Preliminarily certify the Class defined as: All current and former non-exempt employees who worked for Defendants Tocaya Management LLC, Tocaya Organica LLC, Toca Madera Management LLC, The Madera Group LLC, and Noble 33 Management LLC, and/or their predecessor or merged entities, at Tocaya Organica and/or Toca Madera Restaurants within the State of California at any time during the period beginning on April 6, 2016 and ending on February 15, 2022. (SA, ¶¶ 4, 7);

3. Preliminarily appoint Plaintiffs Giovanni Mitchell, Elora Doran, Mackenzie Hernandez, and Ammon Mendes as the Class Representatives;

4. Preliminarily appoint CounselOne, P.C. and its attorneys Anthony J. Orshansky and Jenifer L. Connor, and Custis Law, P.C. and its attorney Keith A. Custis as Class Counsel;

5. Appoint CPT Group, Inc. as the Settlement Administrator;

6. Approve as to form and content the Notice of Pendency of Class and Representative Action Settlement, attached as **Exhibit 1** to the Settlement Agreement, and direct its distribution to members of the Class; and

7. Set a hearing date, time and place to conduct the Final Approval Hearing on Plaintiffs’ Motion for Order Granting Final Approval of Class and Representative Action Settlement, as well as Plaintiffs’ Motion for an Award of Attorneys’ Fees and Costs, Class Representative Service

Awards and Settlement Administration Costs.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class and Representative Action Settlement; (3) the Declarations of Anthony J. Orshansky, Keith A. Custis, Giovanni Mitchell, Ammon Mendes, Mackenzie Hernandez, Elora Doran, and Julie Green; (4) the Stipulation of Class and Representative Action Settlement; (5) the Notice of Pendency of Class and Representative Action Settlement; (6) the concurrently-lodged [Proposed] Order Granting Preliminary Approval of Class and Representative Action Settlement; (7) the records, pleadings, and papers filed in this action; and (8) such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion.

As this Motion is unopposed, Plaintiffs respectfully request relief from the page limit requirement set by California Rules of Court 3.1113(d).

Pursuant to Labor Code Section 2699(l)(2), a copy of the Joint Stipulation of Class Action Settlement and Release was e-filed with the LWDA on June 7, 2022. Declaration of Keith Custis, ¶ 6, Exs. B & C.

Respectfully submitted,

CUSTIS LAW, P.C.

Dated: June 7, 2022

By:

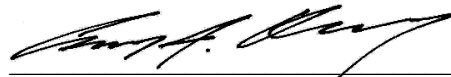

Keith Custis

Attorneys for Plaintiffs Ammon Mendes, Mackenzie Hernandez, Elora Doran and the Class

COUNSELONE, PC

Dated: June 7, 2022

By:


Anthony Orshansky
Jennifer L. Connor

Attorneys for Plaintiff Giovanni Mitchell and the Class

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1 **I. INTRODUCTION**

2 Plaintiffs Giovanni Mitchell, Elora Doran, Mackenzie Hernandez, and Ammon Mendes
3 respectfully seek preliminary approval of a non-reversionary, “no claim form required” class and
4 representative action settlement in this wage and hour action. If approved, the Settlement will provide
5 valuable monetary relief for approximately 3,272 current and former employees of Defendants at
6 their Tocaya Organica and/or Toca Madera Restaurants.¹

7 Subject to Court approval, Defendants have agreed to settle this action by paying a non-
8 reversionary Gross Settlement Amount of \$2,000,000, exclusive of the employer’s share of payroll
9 taxes that will be paid separately by Defendants. The relief offered by the Settlement is particularly
10 impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour
11 cases, as well as the financial difficulties experienced by the restaurant industry during the COVID
12 pandemic. The Parties negotiated the Settlement at arm’s-length after participating in three
13 mediations in 2020 and 2021, with two highly respected wage and hour class action mediators, the
14 Hon. Peter D. Lichtman (Ret.) and Paul Grossman, Esq. Shortly after the last mediation session in
15 November 2021, and following additional discovery that Defendants produced regarding their
16 financial condition, the Parties reached the Settlement now before this Court. If approved, all
17 Settlement Class Members and PAGA Group Members will have a check mailed to them after the
18 Settlement becomes final without any need to submit a claim form.

19 As detailed below, the proposed Settlement satisfies all criteria for preliminary approval.
20 Accordingly, Plaintiffs request that the Court grant this Motion, enter the proposed Preliminarily
21 Approval Order, and set a date for the Final Approval Hearing.

22 **II. BACKGROUND**

23 **A. The Parties**

24 Defendants operate a chain of restaurants in California called Tocaya Organica and a related
25 upscale restaurant named Toca Madera that is located in Los Angeles, California. Plaintiff Giovanni
26

27 ¹ Defendants consist of Tocaya Management LLC, Tocaya Organica LLC, Toca Madera
28 Management LLC, The Madera Group LLC, and Noble 33 Management LLC, and/or their
predecessor or merged entities (collectively, “Defendants”).

1 Mitchell worked as a non-exempt employee for Defendants in 2019. Declaration of Giovanni
2 Mitchell (“Mitchell Decl.”), ¶ 3. Plaintiff Elora Dorn worked as a non-exempt employee for
3 Defendants from March 2018 until January 2020. Declaration of Elora Dorn (“Dorn Decl.”), ¶ 3.
4 Plaintiff Mackenzie Hernandez worked as a non-exempt employee for Defendants from November
5 2017 until April 2019. Declaration of Mackenzie Hernandez (“Hernandez Decl.”), ¶ 3. Plaintiff
6 Ammon Mendes worked as a non-exempt employee for Defendants from June 2018 until August
7 2019. Declaration of Ammon Mendes (“Mendes Decl.”), ¶ 3.

8 **B. Complaints and PAGA Notices**

9 On June 25, 2020, Plaintiff Giovanni Mitchell filed his initial complaint asserting a single
10 cause of action pursuant to California’s Private Attorneys General Act of 2004, Labor Code sections
11 2698, *et seq.* (“PAGA”), based on alleged violations of Labor Code sections 201, 202, 203, 204,
12 226(a), 226.7, 510, 512(a), 1174(d), 1182.12, 1194, 1197, 1198, 2800 and 2802. In a related action,
13 Plaintiffs Elora Dorn, Mackenzie Hernandez, and Ammon Mendes asserted wage and hour class and
14 representative PAGA action claims against Defendants (the “*Del Prado* action”).

15 On February 17, 2022, the Court granted leave to file a First Amended Class and
16 Representative Complaint (“FAC”) adding Plaintiffs Dorn, Hernandez, and Mendes to this action, as
17 well as the wage and hour class claims asserted by them. The *Del Prado* action was dismissed without
18 prejudice. On February 18, 2022, Plaintiffs filed their First Amended Class and Representative
19 Complaint.

20 On March 6, 2020, counsel for Plaintiff Mitchell provided pre-filing written notice to the
21 LWDA and by certified mail to Defendants of the above-identified allegations on behalf of Plaintiff
22 Mitchell and similarly situated aggrieved employees in accord with the PAGA. On June 16, 2020,
23 counsel for Plaintiffs Hernandez, Dorn, and Mendes provided pre-filing written notice to the LWDA
24 and by certified mail to Defendants of the above-identified allegations on behalf of Plaintiffs
25 Hernandez, Dorn, and Mendes and similarly situated aggrieved employees in accord with the PAGA.
26 On August 24, 2020, counsel for Plaintiffs Hernandez, Dorn, and Mendes provided an amended
27 written notice to the LWDA by certified mail to Defendants of the above-identified allegations on
28 behalf of Plaintiffs Dorn and Mendes and similarly situated aggrieved employees in accord with

1 PAGA.

2 **C. Plaintiffs' Claims**

3 By their First Amended Class and Representative Complaint, Plaintiffs allege causes of action
4 for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal
5 periods; (4) failure to provide rest periods; (5) failure to provide accurate itemized wage statements;
6 (6) failure to pay all wages owed timely and upon separation of employment; (7) failure to reimburse
7 business expenses; (8) failure to provide split-shift premium pay; (9) failure to provide reporting-
8 time pay; (10) violation of Labor Code § 1174(d); (11) violation of Business & Professions Code §§
9 17200, *et seq.*; and (12) civil penalties pursuant to California's Private Attorneys General Act of 2004
10 (Labor Code §§ 2698, *et seq.*).

11 Defendants deny all material allegations and all liability, and contend that they have
12 consistently compensated employees in accordance with all applicable laws.

13 **D. Investigation and Discovery**

14 Plaintiffs' counsel thoroughly investigated and researched the class and representative claims
15 and their theories of liability before entering into the proposed Settlement. The Parties engaged in
16 extensive discovery and investigation, which was sufficient to allow the Parties to evaluate the case
17 prior to settlement. Custis Decl., ¶¶ 31-34; Orshansky Decl., ¶ 10. After meet and confer discussions
18 between counsel for the Parties, Defendants produced the following: (a) Defendants' timekeeping
19 and compensation policies, cell phone policies, meal and rest break policies, training documents, and
20 other related policies; (b) several relevant data points, including (1) the Class Members' average
21 hourly rate; (2) the total number of former and current employees during the Class and PAGA
22 periods; (3) the total number of separated employees during the relevant time period for Labor Code
23 Sections 201-203; (4) the total number of workweeks worked by Class Members during the Class
24 Period; and (5) the total number of pay periods during the PAGA period; and (c) information
25 regarding Defendants' finances. Plaintiffs' counsel also reviewed Plaintiffs' and other Class
26 Members' time and payroll records. Custis Decl., ¶¶ 32.

27 The aforementioned discovery was instrumental in assisting Plaintiffs' counsel to evaluate
28 the underlying claims and applicable defenses, the legal issues, and other issues relevant to reaching

1 a potential settlement. Custis Decl., ¶ 33; Orshansky Decl., ¶ 10.

2 In addition, Class Counsel’s investigation included (a) multiple telephonic conferences with
3 Plaintiffs; (b) interviews with approximately fifty (50) putative class members; (c) investigation into
4 the viability of class treatment of the claims; and (d) assembling data for calculating damages and
5 analysis of potential class-wide damages; and (e) engaging an expert to determine violation rates
6 across the Class. Custis Decl., ¶ 34.

7 **E. The Parties Settled After Three Mediation Sessions**

8 The Parties participated in multiple mediations. After having performed extensive
9 investigation and analysis of the legal and factual issues and risks, the Parties participated in a full-
10 day mediation before mediator, Hon. Peter D. Lichtman (Ret.) of Signature Resolution. Orshansky
11 Decl., ¶ 11. The settlement discussions were conducted at arm’s-length. No settlement was reached.
12 Thereafter, in July 2021 and November 2021, the Parties participated in additional mediation sessions
13 with Paul Grossman, Esq. of Paul Hastings LLP. Custis Decl., ¶ 36; Orshansky Decl., ¶ 12. These
14 settlement discussions were also conducted at arm’s-length. *Id.* At the conclusion of the November
15 2021 mediation, the mediator made a proposal for resolution of the action that was accepted by the
16 Parties. Thereafter, counsel for the Parties met and conferred extensively for several months to
17 finalize the terms of the Settlement in a long-form Settlement Agreement. Custis Decl., ¶ 36.

18 **F. Overview of the Settlement**

19 The comprehensive terms of the Settlement are set forth in the Stipulation of Class and
20 Representative Action Settlement, attached to the Custis Declaration as **Exhibit A**.

21 **1. Settlement Class Definition**

22 The Class is defined as: All current and former non-exempt employees who worked for
23 Defendants Tocaya Management LLC, Tocaya Organica LLC, Toca Madera Management LLC, The
24 Madera Group LLC, and Noble 33 Management LLC, and/or their predecessor or merged entities, at
25 Tocaya Organica and/or Toca Madera Restaurants within the State of California at any time during
26 the period beginning on April 6, 2016 and ending on February 15, 2022. SA, ¶¶ 4, 7.

27 **2. Monetary Terms**

28 Defendants have agreed to pay a Gross Settlement Amount of \$2,000,000 (“GSA”) to settle

this action. SA, ¶ 51. The GSA will be used to pay: (1) all Settlement Payments; (2) Attorneys' Fees and Costs (with the fee portion not to exceed 35% of the Gross Settlement Amount (i.e., up to Seven Hundred Thousand Dollars (\$700,000)), and costs not to exceed Thirty-Five Thousand Dollars (\$35,000); (3) the Enhancement Payments (in an amount up to Five Thousand Dollars (\$5,000) for each Plaintiff for his or her service to the Class and general release of all claims (for a total of \$20,000); (4) the PAGA Payment (\$200,000 of the GSA to be allocated towards settlement of the PAGA claim, with 75% (i.e., \$150,000) payable to the LWDA, and 25% (i.e., \$50,000) to be distributed to the PAGA Group Members; and (5) the Settlement Administration Costs (not to exceed Sixty-Thousand Dollars (\$60,000)). SA, ¶ 51. Defendants will pay the employers' share of payroll taxes on the settlement amounts allocated to wages in addition to the GSA. *Id.*

Defendants shall fund fifty percent (50%) of the GSA and fifty-percent (50%) of the Employers' Share of Payroll Taxes within thirty (30) calendar days after the Effective Date, and the remaining fifty percent (50%) of the GSA and other fifty-percent (50%) of the Employers' Share of Payroll Taxes six (6) months plus 30 calendar days after the Effective Date. SA, ¶ 61.b.

The Parties estimate the Net Settlement Amount ("NSA") as follows:

Maximum Settlement Amount:	\$2,000,000
PAGA Payment	-\$200,000
Class Representative Enhancement Awards (estimated)	-\$20,000
Settlement Administration Costs (estimated)	-\$60,000
Class Counsel's Attorneys' Fees (estimated)	-\$700,000
<u>Class Counsel Litigation Costs (estimated)</u>	<u>-\$35,000</u>
Net Settlement Amount (estimated)	\$985,000

SA, ¶ 51. There are approximately 3,272 Class Members, resulting in an average net settlement payment of approximately \$301.04 per Class Member. In addition, 25% of the PAGA Payment, or \$50,000, will be distributed to PAGA Group Members. As further discussed below, these are substantial payments for claims of the nature alleged and associated risks.

3. Individual Settlement Payments

To calculate Individual Settlement Shares, the Settlement Administrator will first calculate the aggregate number of Workweeks that all Class Members worked during the Class Period. SA, ¶ 51(f). The value of each Workweek will be determined by dividing the NSA by the aggregate number

1 of Workweeks worked by all Class Members (“Workweek Value”). *Id.* Each Class Member’s
2 payment will then be calculated by multiplying the total number of his or her workweeks by the
3 Workweek Value. *Id.*

4 To calculate a PAGA Group Member’s individual PAGA payment, the Settlement
5 Administrator will calculate the total number of PAGA Pay Periods worked by each PAGA Group
6 Member during the PAGA Period and the aggregate total number of PAGA Pay Periods worked by
7 all PAGA Group Members during the PAGA Period. SA, ¶ 51(d). The Settlement Administrator will
8 use the following formula to calculate each PAGA Group Member’s individual PAGA payment: The
9 \$50,000 amount, or other amount approved by the Court that is 25% of the PAGA Payment, will be
10 divided by the aggregate total number of PAGA Pay Periods of all PAGA Group Members worked
11 during the PAGA Period, resulting in the “PAGA Pay Period Value.” *Id.* Each PAGA Group
12 Member’s individual PAGA payment will be calculated by multiplying each individual PAGA
13 Group Member’s total number of PAGA Pay Periods worked during the PAGA Period by the PAGA
14 Pay Period Value.

15 The Settlement Administrator will determine each Settlement Class Member’s and/or PAGA
16 Group Member’s Individual Settlement Payment by adding, as applicable, each Settlement Class
17 Member’s and/or PAGA Group Member’s Individual Settlement Share and individual PAGA
18 payment. SA, ¶ 19.

19 For tax reporting purposes, the Settlement provides that twenty percent (20%) of each
20 Individual Settlement Share will be considered taxable wages and will be reported as such to each
21 Settlement Class Member on IRS Form W-2. SA, ¶ 53(a). The Parties agree that eighty percent (80%)
22 of each Individual Settlement Share will be considered interest and penalties and will be reported as
23 such to each Settlement Class Member on IRS Form 1099 (if required). *Id.* The Parties agree that
24 one hundred percent (100%) of each individual PAGA payment will be considered penalties and will
25 be reported as such to each PAGA Group Member on IRS Form 1099 (if required). *Id.*

26 Because no claim forms are required, checks will be mailed to all Settlement Class Members
27 and/or PAGA Group Members. Because the GSA is non-reversionary, the entire NSA will be
28 disbursed to Settlement Class Members and/or PAGA Group Members. SA, ¶ 51.

1 **4. Requests for Exclusion and Objection Procedure**

2 Class Members will have forty-five (45) days from the mailing of the Class Notice (the
3 “Response Deadline”) to mail a dispute, Request for Exclusion, or Notice of Objection to the
4 Settlement back to the Settlement Administrator. SA, ¶¶ 33, 56, 58(a), 60(a); *see also id.* (extending
5 Response Deadline by 30 days for any Class Member whose Class Notice is returned as undeliverable
6 and mailed again by the Settlement Administrator to an updated address). Class Members shall have
7 no right to opt-out of the PAGA component of the Settlement. SA, ¶¶ 58(f). The Notice of Pendency
8 of Class and Representative Action Settlement (“Class Notice”) explains to Class Members that they
9 may not exclude themselves from the PAGA component of the Settlement. SA, Ex. 1 at p.5

10 Class Members who wish to opt-out must submit their Request for Exclusion in writing by
11 the Response Deadline, but must sign and date their request and must include their name, address,
12 telephone number, and a statement that they wish to be excluded from the Settlement. SA, ¶ 58.

13 Any Class Member who has not timely sought exclusion from the Class may object to the
14 Settlement by submitting a valid written objection by the Response Deadline and/or by appearing at
15 the Final Approval Hearing to object in person. SA, ¶ 60.

16 **5. The Releases**

17 As of the Effective Date, each Settlement Class Member shall release the Released Parties
18 from the Settlement Class Members’ Released Claims for the Class Period, and all PAGA Group
19 Members shall release PAGA Group Members’ Released Claims only for the PAGA Period. SA, ¶¶
20 48, 49. The Settlement Class Members’ Released Claims are defined as follows:

21 [A]ll liabilities, causes of action and and/or claims that were alleged or
22 that could have been alleged based on the facts asserted in the First
23 Amended Class and Representative Action Complaint filed by
24 Plaintiffs in the Lawsuit arising at any time during the Class Period
25 including, but not limited to, all of the following claims for relief: (1)
26 failure to pay minimum, regular, overtime, or double time wages, and
27 failure to pay other wages of any kind; (2) failure to pay split shift pay
28 / split shift premiums; (3) failure to provide reporting-time pay; (4)
failure to authorize and permit rest periods or pay all rest period
premium pay; (5) failure to provide meal periods or pay all meal period
premium pay; (6) failure to provide accurate and itemized wage
statements; (7) failure to pay all wages timely; (8) failure to pay final
wages due at separation; (9) failure to reimburse or indemnify all

necessary business expenses; (10) failure to maintain records in violation of Labor Code section 1174(d); (11) claims brought under Business & Professions Code sections 17200, et seq., including, but not limited to, all claims for unfair, unlawful and harmful conduct to Settlement Class Members, the general public, and Defendants' competitors, and claims of unlawfully gaining an unfair advantage over other businesses; and (12) any claims for statutory penalties, interest and attorneys' fees and costs arising out of the facts asserted in the First Amended Class and Representative Action Complaint and the aforementioned causes of action.

SA, ¶ 36; *see also id.* ¶ 48. The PAGA Group Members' Released Claims are defined as

[A]ll liability, causes of action and and/or claims for civil penalties arising or accruing under the PAGA during the PAGA Period that were alleged or reasonably could have been alleged based on the facts alleged in the First Amended Class and Representative Action Complaint filed by Plaintiffs in the Lawsuit including, but not limited to, alleged violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12 *et seq.*, 1194, 1194.2, 1197, 1198.1, 1198, 2800, and 2802 and any applicable Wage Order(s); and shall further release the Released Parties from any claims and/or liability for interest and all attorneys' fees and costs available under the PAGA arising out of the facts asserted in the First Amended Class and Representative Action Complaint for the aforementioned Labor Code violations.

SA, ¶ 24; *see also id.* ¶ 49. Only Plaintiffs Mitchell, Dorn, Hernandez, and Mendes will provide a general release and waiver of Civil Code Section 1542. SA, ¶ 50. All releases provided for by the Settlement become effective on the Effective Date. SA, ¶¶ 48-50. However, the releases shall become null and void if Defendants fail to pay the GSA and the Employer's Share of Payroll Taxes in compliance with Settlement Agreement, and shall remain null and void until Defendants fully fund the Settlement. *Id.*

6. Treatment of Uncashed Settlement Checks

Settlement checks will be negotiable for 180 days. The Settlement Administrator will transmit the sum of uncashed settlement payments, if any, to the Controller of the State of California to be held pursuant to the Unclaimed Property Law in the names of those Settlement Class Members and/or PAGA Group Members who did not cash their settlement checks until such time they claim their property. *See Civ. Proc. Code § 1500, et seq.* SA, ¶ 61(d). This disposition results in no "unpaid

1 residue” under Civil Procedure Code Section 384 because the entire NSA will be paid out to
2 Settlement Class Members and/or PAGA Group Members, whether or not they all cash their
3 settlement checks. *Id.*

4 **III. THE CLASS SHOULD BE CONDITIONALLY CERTIFIED**

5 Certification is appropriate when there exists “an ascertainable and sufficiently numerous
6 class, a well-defined community of interest, and substantial benefits from certification that render
7 proceeding as a class superior to alternatives.” *Brinker Restaurant Corp. v. Superior Court* (2012)
8 53 Cal. 4th 1004, 1021. As the Supreme Court has noted, “[c]laims alleging a uniform policy
9 consistently applied to a group of employees in violation of the wage and hour laws are of the sort
10 routinely, and properly, found suitable for class treatment.” *Id.* at 1033. This is exactly such a case.

11 **A. The Class is Ascertainable**

12 A class is “ascertainable when it is defined ‘in terms of objective characteristics and common
13 transactional facts’ that make ‘the ultimate identification of Class Members possible when that
14 identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal. 5th 955, 974 (citation
15 omitted). The ascertainability requirement is met where Class Members “may be readily identified
16 without unreasonable expense or time by reference to official records.” *Id.* (citing *Rose v. City of*
17 *Hayward* (1981) 126 Cal. App. 3d 926, 932). Here, the Class Members can be ascertained from
18 Defendants’ payroll, time, and other similar employment records. Ascertainability is satisfied.

19 **B. The Class is Numerous**

20 The numerosity requirement is satisfied where it would be impracticable to bring all of the
21 potential Class Members before the Court. *See, e.g., Hebbard v. Colgrove* (1972) 28 Cal. App. 3d
22 1017, 1030 (holding that twenty-eight members sufficient to maintain class action). Here, the
23 proposed Class consists of approximately 3,272 potential Class Members. Numerosity is satisfied.

24 **C. The Community of Interest Requirements Are Met**

25 The community of interest requirement has three essential elements: “(1) predominant
26 common questions of law or fact; (2) class representatives with claims or defenses typical of the
27 class; and (3) class representatives who can adequately represent the class.” *Brinker*, 53 Cal. 4th at
28 1021. Each of these criteria is met here.

1 **1. Predominant Questions of Law and Fact Exist**

2 The predominance requirement is satisfied when questions of law or fact common to the class
3 predominate over individual questions. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. While
4 the predominance element is extremely important in a disputed class certification motion, courts
5 apply a “lesser standard of scrutiny for settlement cases” where the court does not need to consider
6 whether the lawsuit is manageable for trial. *See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
7 1794, 1807 n.19. Here, the predominance factor is met because each claim challenges an alleged
8 common policy or practice that Plaintiffs contend is illegal as to Plaintiffs and all Class Members.
9 *See* generally FAC. These sorts of claims are commonly held to be proper for class certification. *See,*
10 *e.g., Williams v. Superior Court* (2013) 221 Cal. App. 4th 1353, 1371 (certifying class based on
11 uncompensated work time).

12 **2. Typicality Is Satisfied**

13 Typicality “requires a showing that the class representative has claims or defenses typical of
14 the class.” *See, e.g., Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089. Typicality is
15 satisfied where the plaintiff’s claims are “reasonably co-extensive” with absent Class Members’
16 claims. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1020. “[I]t has never been the law
17 in California that the class representative must have identical interests with the class members.”
18 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46. Here, Plaintiffs’ claims are typical of those held
19 by the other Class Members. Defendants employed Plaintiffs and other Class Members as non-
20 exempt employees, and subjected Plaintiffs and other Class Members to the same wage and hour
21 policies. Plaintiffs’ claims and alleged injuries arise from the same facts and legal theories as the
22 Class Members’ claims. Typicality is satisfied.

23 **3. Adequacy Is Satisfied**

24 The adequacy requirement examines conflicts of interest between named parties and the class
25 they seek to represent. *See Capital People First v. State Dept. of Developmental Services* (2007) 155
26 Cal. App. 4th 676, 697. Here, Plaintiffs and Plaintiffs’ counsel will adequately represent the Class
27 Members, and there are no conflicts between Plaintiffs and the Class. Orshansky Decl., ¶ 18; Custis
28 Decl., ¶ 20; Mitchell Decl., ¶ 11; Dorn Decl., ¶ 11; Hernandez Decl., ¶ 11; Mendes Decl., ¶ 11.

Plaintiffs’ counsel have extensive experience litigating complex class actions, including wage and hour class actions. Orshansky Decl., ¶¶ 14-18; Custis Decl., ¶¶ 7-20; *see also McGhee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450 (finding adequacy satisfied where there was no indication that plaintiff’s counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class).

D. Superiority Is Satisfied

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual Class Member’s claim, Class Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense necessary to litigate each claim outweighs any potential recovery. *See also Martinez v. Joe’s Crab Shack Holdings* (2014) 231 Cal. App. 4th 362, 367 (“Litigation by class action has long been recognized as a superior method of resolving wage and hour claims in California.”).

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Standard for Preliminary Approval of Settlement

A class action may not be dismissed, compromised, or settled without approval of the Court. Cal. R. Ct. 3.769. The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is within the range of reasonableness. *See Hanlon*, 150 F.3d at 1027. All the criteria for preliminary approval are satisfied here.

B. The Settlement Is Entitled To A Presumption of Fairness

A presumption of fairness exists where: (1) the settlement is reached through arm’s-length negotiations; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th at 1802. The first three of these factors apply at the preliminary approval stage.

1. The Settlement is the Product of Arm’s-Length Negotiations

“[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement’s fairness.” *State v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 482. Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the

contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. *Newberg on Class Actions* § 11.51 (“Newberg”) (5th ed. 2011).

Here, as detailed above and in the Custis and Orshansky Declarations, the Settlement is the product of extensive arm’s-length negotiations carried out in an adversarial context. Orshansky Decl., ¶¶ 11-12; Custis Decl., ¶ 36. The Parties initially participated in a mediation with Hon. Peter D. Lichtman (Ret.), a skilled and experienced mediator of wage and hour class actions. Orshansky Decl., ¶ 11. In July and November 2021, the Parties participated in additional mediation sessions with Paul Grossman, Esq., who is also a skilled and experienced mediator of wage and hour class actions. Orshansky Decl., ¶ 12; Custis Decl., ¶ 36; *see also Satchell v. Fed. Express Corp.* (N.D. Cal. Apr. 13, 2007), Nos. C03-2659 SI, 2007 WL 1114010, at *4 (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.”); *In re Bluetooth Headset Prods. Liab. Litig.* (9th Cir. 2011) 654 F.3d 935, 948 (presence of a neutral mediator is a factor weighing in favor of a finding of non-collusiveness). Following the November 2021 mediation session, the Parties accepted the mediator’s proposal to resolve the action. The Parties continued to engage in extensive post-mediation settlement negotiations regarding settlement terms over several months. The Parties also exchanged drafts of the settlement documents before agreeing on the final form of the Settlement Agreement. The negotiations were at all times adversarial and at arm’s length. Orshansky Decl., ¶¶ 11-12; Custis Decl., ¶ 36.

2. Investigation and Discovery Were Sufficient To Evaluate Risks

As detailed above and in the Custis and Orshansky Declarations, the investigation and discovery were sufficient to permit counsel and the Court to evaluate risk intelligently. Orshansky Decl., ¶ 10; Custis Decl., ¶¶ 31-34.

3. Plaintiffs’ Counsel Is Experienced In Similar Litigation

Plaintiffs’ counsel has substantial experience litigating wage and hour class actions and representative actions. Orshansky Decl., ¶¶ 14-18; Custis Decl., ¶¶ 7-20.

C. The Proposed Settlement is Fair, Adequate and Reasonable

When determining a settlement’s fairness at preliminary approval, courts consider: “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the

1 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
2 discovery completed and the stage of the proceedings, [and] the experience and views of counsel . .
3 .” *Dunk*, 48 Cal. App. 4th at 1801. “The list of factors is not exclusive and the Court is free to engage
4 in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba*
5 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 245. Application of the *Dunk* factors here
6 demonstrates the proposed settlement is fair, adequate and reasonable.

7 **1. The Strength of Plaintiffs’ Case**

8 Although Plaintiffs maintain that their claims are meritorious, Plaintiffs acknowledge there
9 are substantial risks and uncertainty in proceeding with class certification and eventual trial on the
10 merits. Custis Decl., ¶ 39. As described below, Defendants could present multiple defenses to
11 Plaintiffs’ claims, both on the merits and to class certification. *Id.* Given those issues, and in light of
12 the economic realities, including Defendants’ financial condition and the impact of the COVID-19
13 pandemic on the restaurant industry, Plaintiffs and their counsel concluded that the non-reversionary
14 Settlement of \$2,000,000 was fair, reasonable and adequate, and ensured that the Class was left with
15 a substantial recovery. *Id.* Thus, while Plaintiffs were prepared to litigate their claims through class
16 certification and ultimately trial, success was far from certain. *Id.*

17 **2. Risk, Expense, Complexity and Duration of Further Litigation**

18 If the case had not settled, Plaintiffs would anticipate two to three years of additional
19 litigation, including resolution of Defendants’ renewed motion to compel arbitration and Plaintiffs’
20 motion for class certification. Custis Decl., ¶ 40. Both Parties would also engage in extensive formal
21 discovery including depositions of Plaintiffs, Defendants’ persons most knowledgeable and each
22 Party’s experts. *Id.* If Plaintiffs’ certification motion were granted, the Parties would incur more
23 attorneys’ fees and costs through a possible decertification motion, trial, and possible appeals. *Id.*
24 This settlement avoids those risks and the accompanying expense.

25 **3. Risk of Maintaining Class Action Status**

26 Plaintiffs have not yet moved for class certification. While Plaintiffs maintain that the
27 requirements of class certification are met, Defendants invariably will proffer various arguments why
28 class treatment is not appropriate, including, but not limited to, that individualized issues among

Class Members predominate over common ones. As detailed in the Custis Declaration, Defendants also would have challenged class certification on the basis that Class Members, or a large percentage of Class members, had entered into arbitration agreements that contain class action waivers. Custis Decl., ¶ 41; *see also id.* ¶¶ 44-59. Absent settlement, there was a risk that Plaintiffs could not certify a class before trial, or if a class were certified, that it would consist of a substantially smaller group of employees than the proposed Class, and the expected recovery would be significantly reduced. Custis Decl., ¶ 41. If Defendants defeated Plaintiffs’ certification motion, there would be no class wide relief whatsoever. *Id.* Thus, this factor supports preliminary approval.

4. Economic Realities

Defendants’ ability to pay a more significant settlement amount, or a judgment if one was later obtained, became an overriding issue, and was a critical factor affecting the settlement negotiations. Custis Decl., ¶ 42. Upon Plaintiffs’ counsel’s continued insistence as part of the settlement discussions, Defendants presented Plaintiffs with financial records, in the form of profit and loss statements, which highlighted Defendants’ financial issues. *Id.* In addition, as the Court is aware, the settlement was also reached during the COVID pandemic, which has adversely impacted the restaurant industry more so than many other industries. The COVID pandemic, in turn, has disrupted the supply chain on which businesses, including Defendants’ business, relies, resulting in increased operating costs.² Plaintiffs considered all of these factors in concluding that this settlement is fair, adequate and reasonable.

5. Amount Offered in Settlement Given the Realistic Value of the Claims

“The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130. In connection with mediation, Plaintiffs conducted an exposure analysis, which is detailed below. Custis Decl., ¶¶ 43-60. Based on that analysis, Plaintiffs predicted the realistic total class-wide recovery on the Class and PAGA claims would be in the aggregate \$5,066,968, as follows:

² See *Why the Pandemic Has Disrupted Supply Chains*, available at <https://www.whitehouse.gov/cea/written-materials/2021/06/17/why-the-pandemic-has-disrupted-supply-chains/> (last visited June 7, 2022).

1 **Unpaid Wages Claim:** Plaintiffs allege that Defendants failed to pay all minimum wages by
2 requiring Class Members to perform off-the-clock work pre- and post- shift that was not recorded or
3 compensated by Defendants, and by requiring Class Members to work during meal and rest breaks,
4 which time was not compensated. Based on Plaintiff's counsel's investigation and interviews with
5 Plaintiff and putative Class Members, Plaintiff alleges that, on average, Class Members spent on
6 average 20 minutes per week engaged in those off-the-clock activities. Custis Decl., ¶¶ 44. Plaintiffs
7 further allege that certain Class Members, comprising 20% of the workweeks, also worked an
8 additional 20 minutes of off-the-clock activities that qualifies as overtime. *Id.*

9 Plaintiffs' Counsel calculated the potential maximum exposure on the unpaid wage claim as
10 \$526,501 in two steps. First, Plaintiffs calculated the value of the unpaid minimum wage claim as
11 \$1,053,002, arrived at as follows: \$12.58/hour * 0.33 hours of off-the-clock work each workweek *
12 126,825 workweeks=\$526,501 plus liquidated damages.³ Custis Decl., ¶ 45. Second, Plaintiffs
13 calculated the value of the overtime wages as \$178,918, arrived at as follows: 25,365 workweeks *
14 \$14.25/hour * 1.5 (to account for overtime rate of pay) * 0.33 hours of off-the-clock work each
15 workweek.⁴ *Id.* That is full value.

16 Defendants would make several arguments to defeat the unpaid wages claim. First,
17 Defendants would argue that any claim for unpaid wages based on off-the-clock work could not be
18 certified because individual issues will predominate, requiring an employee-by-employee inquiry of
19 who worked off the clock, how long they worked, and whether Defendants knew or should have
20 known of the off-the-clock work. Defendants maintained that Class Members worked in different job
21 positions and had different managers at different restaurants, and, as a result, Defendants contended
22 there was variation to the circumstances that could allegedly cause employees to perform work off
23 the clock which would require an unmanageable series of mini-trials to determine how much time
24 was spent without pay. Second, Defendants would also argue that this amount is grossly inflated
25 because most Class Members do not work overtime. Third, Defendants defended against the unpaid

26 _____
27 ³ The average minimum wage for Class Members for the Class Period is \$12.58. Custis Decl., ¶ 45.

28 ⁴ Based on Plaintiffs' Counsel's discovery and investigation, the average final hourly rate paid to Class Members was \$15.05. For settlement purposes, Plaintiffs' Counsel estimated that the average hourly rate paid during the Class Period was approximately \$14.25. Custis Decl., ¶ 45.

1 wage claims by relying on policies that prohibited Class Members from engaging in off-the-clock
2 work. Last, Defendants contended Plaintiffs would face significant hurdles to certification given that
3 Class Members signed arbitration agreements with class action waivers as a condition of their
4 employment, which if enforceable would convert a putative class action (with the potential for class-
5 wide damages) into an individual dispute and action—effectively forcing Class Members to retain
6 their own counsel and proceed on the basis of individual claims only. Plaintiffs discounted the
7 maximum exposure by 75% for a risk of non-certification, and an additional 50% for a risk of being
8 unsuccessful on the merits, to arrive at an estimated total of \$153,990. Custis Decl., ¶ 46.

9 **Meal Period Premium Wages:** This claim is based on Defendants’ practice of failing to pay
10 Section 226.7 premium wages when Class Members were not provided with a legally compliant meal
11 period prior to the completion of the fifth hour of work. Based on the Class Counsel’s discovery and
12 investigation, Plaintiffs estimate that there were approximately 126,825 non-compliant meal periods
13 during the Class Period. Custis Decl., ¶ 47. Therefore, Plaintiffs calculated Defendants’ maximum
14 exposure under this theory of liability at \$1,807,256 (126,825 non-compliant meal periods * \$14.25
15 meal period premium). *Id.*

16 However, Defendants claim that they maintained legally-compliant meal period policies
17 throughout the Class Period. Custis Decl., ¶ 48. Defendants also contend that this claim would not
18 be certified due to the lack of any common evidence tying together the reason that Class Members
19 experienced a meal period violation. *Id.* Lastly, Defendants would likely assert that, if meal periods
20 were late, missed or short, individual issues predominate precluding class certification because Class
21 Members may have voluntarily skipped a meal period and/or taken a late or short meal period.
22 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 (holding that “the
23 employer is not obligated to police meal breaks and ensure no work thereafter is performed”).
24 Defendants contended that the issue of voluntary waiver would necessarily devolve into a series of
25 individualized mini-trials, precluding class certification. *See Duran v. U.S. Bank National*
26 *Association* (2014) 59 Cal.4th 1, 25 (holding that the defendant must be provided an opportunity to
27 litigate affirmative defenses, even when they turn on individual questions). In light of these defenses
28 and arguments, Plaintiffs discounted Defendants’ maximum exposure by 75% for the risk of non-

1 certification, and an additional 50% to account for Defendants’ defenses on the merits, to arrive at
2 an estimated total of \$225,907. Custis Decl., ¶ 48.

3 **Rest Period Premium Wages:** Plaintiffs allege that Defendants failed to authorize and
4 permit all legally-compliant rest periods throughout the Class Period. Custis Decl., ¶ 49. Based on
5 the Class Counsel’s discovery and investigation, Plaintiffs estimate that there were approximately
6 63,413 non-compliant rest periods during the Class Period. *Id.* Therefore, Plaintiffs calculated
7 Defendants’ maximum exposure on this claim at \$903,635 (63,413 non-compliant rest periods *
8 \$14.25 rest period premium). *Id.* That is full value. However, Defendants assert that they maintained
9 compliant rest period policies throughout the Class Period, and authorized and permitted all rest
10 periods to Class Members. *Id.* Further, Defendants contend that this claim is not amenable to class
11 treatment because individualized inquiries would be required to determine which employees failed
12 to take rest periods, and the reasons why each employee failed to take a rest period on a particular
13 shift. *Id.* To account for Defendants’ defenses that could reduce damages or preclude certification of
14 this claim, Plaintiffs discounted Defendants’ maximum exposure by 75% to account for the risk of
15 non-certification, and an additional 65% to account for Defendants’ defenses on the merits, to arrive
16 at an estimated exposure of approximately \$56,477. *Id.*

17 **Accurate Wage Statements:** Plaintiffs contend that, as a result of the foregoing Labor Code
18 violations, Defendants issued inaccurate wage statements. Custis Decl., ¶ 50; *see also Naranjo v.*
19 *Spectrum Security Services, Inc.* (Cal. May 23, 2022, No. S258966) 2022 WL 1613499, at *14
20 (holding “that an employer’s obligation under Labor Code section 226 to report wages earned
21 includes an obligation to report premium pay for missed breaks”). Plaintiffs’ data analysis reveals
22 there were approximately 37,753 wage statements issued during the one-year liability period. *Id.*
23 Therefore, Plaintiffs calculate Defendants’ maximum exposure for this claim at \$3,675,950, arrived
24 at as follows: 1,987 initial violations * \$50 for initial penalty = \$99,350) + (35,766 subsequent
25 violations * \$100 subsequent violation penalty = \$3,576,600). *Id.*; *see also* Labor Code § 226(e)
26 (providing for \$50 penalty for “initial” violations and \$100 for subsequent violations).

27 Based on Defendants’ arguments that: (i) no violations occurred; (ii) any alleged violations
28 were not “knowing and intentional” as required by Labor Code § 226(e); (iii) no actual injury was

1 suffered; and (iv) that its wage statements always accurately reflected hours worked and amounts
2 paid to employees, *see Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336-37
3 (agreeing with employer’s “commonsense position that the pay stubs were accurate in that they
4 correctly reflected the hours worked and the pay received), Plaintiffs discounted the calculated
5 maximum exposure by 75% for a risk of non-certification, and an additional 70% for a risk of being
6 unsuccessful on the merits, to arrive at an estimated total of \$275,696. Custis Decl., ¶ 51.

7 **Unpaid Reimbursements:** Plaintiffs allege that Defendants required Class Members to
8 download and the HotSchedules, Homebase and/or Radar Schedules (formerly Ctuit Schedules)
9 scheduling applications onto their personal cell phones and use them for work purpose, but failed to
10 reimburse them for any amount of their cell phone and data plan costs. Based on interviews with
11 Plaintiffs and putative Class Members, Plaintiffs estimate that Class Members incurred on average
12 \$17.30 in unreimbursed business expenses each workweek. Custis Decl., ¶ 52.

13 Among other defenses, Defendants contended that Class Members were not required to use
14 any application for scheduling purposes, and that the Class Members’ work schedules were available
15 at each worksite. Defendants also contended that the Labor Code only requires reimbursement of
16 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
17 work—and argue that distinguishing a necessary expense from an unnecessary one would require
18 individualized inquiry. Defendants also maintained that given the wide variety of telephone plans,
19 providers and costs creates evidentiary complexities on an individual basis, let alone class-wide.
20 Furthermore, whether or not an expense was necessary, would depend, in part, on the reasonableness
21 of the employee’s choice, and whether or not an expense was incurred, would have to be established
22 by way of extensive individual factual inquiry and/or statistical evidence. Plaintiff’s counsel
23 calculated the total potential exposure for unreimbursed business expenses as \$2,194,072, arrived at
24 as follows: \$17.30 of unreimbursed business expenses per workweek * 126,825 workweeks. To
25 account for Defendants’ defenses that could reduce damages or preclude certification of this claim,
26 Plaintiff reduced this damage exposure by 75% resulting in an estimated potential exposure of
27 \$548,518. Custis Decl., ¶ 53.

28 **Waiting Time Penalties:** Plaintiffs contend that all Class Members whose employment with

Defendants ended between March 18, 2017 and the end of the Class Period are entitled to a derivative “waiting time” penalty under Labor Code Section 203 as a result of Defendants’ failure to pay all wages due and owing at the end of employment. The average hourly rate at the time of separation for those Class Members was \$15.05. Custis Decl., ¶ 54. Based on the Class Data provided by Defendants, there are approximately 2,665 Class Members whose employment with Defendants ended during the relevant time period. Plaintiffs’ counsel calculated the total potential exposure for waiting time penalties as \$9,625,980, arrived at as follows: 2,665 employees * \$15.05/hour * 8 hours * 30 days. That’s full value. However, Defendants argued that Class Members could only recover waiting time penalties if they was able to establish an entitlement to the underlying wages. Defendants also argued that they attempted to pay employees all final wages owed in good faith upon their separation, therefore precluding the finding of willfulness necessary to obtain waiting time penalties. *See* Cal. Code Regs. tit. 8, § 13520. Plaintiffs discounted the calculated maximum exposure by 75% for a risk of non-certification, and an additional 70% for a risk of being unsuccessful on the merits, to arrive at an estimated total of \$721,949. *Id.*

Reporting Time Pay: Plaintiffs maintained that Class Members sometimes presented themselves at the workplace but there was no work to perform or they worked less than one-half of their scheduled shifts. Pursuant to the Wage Orders, employees are entitled to up to four hours of wages at their regular rates of pay for each day they reported to work but were given no assignments or worked less than one-half of their scheduled shifts. Defendants were adamant that no reporting-time pay was due. Defendants insisted that Class Members worked at least one half of their scheduled shifts and that if they were sent home early it was only toward the end of their shifts, when they did not qualify for reporting-time pay. Moreover, Defendants pointed out that Plaintiffs’ counsel were wrong in their assumption that Class Members were always entitled to reporting-time pay for each instance that they did not work their entire shifts, for the time records did not capture why Class Members worked short shifts, and thus they did not reflect, as Defendants asseverated, that Class Members had often chosen to leave work early (e.g., because of illness or personal engagements); and Defendants argued that there could be absolutely no reporting-time liability when Class Members shortened their shifts voluntarily. In this last respect Defendants repeatedly drummed upon the

1 problems of proof Plaintiffs would face in pursuing this cause of action; they contended that Plaintiffs
2 would have to prove that Class Members' schedules did not match up with the hours that Class
3 Members actually worked, a nearly impossible task because employers are not required to keep
4 records of the employee schedules in the same way they are required to record meal periods, and this
5 difficulty, Defendants contended, would only be intensified when the scope of liability was extended
6 to encompass the entire universe of employees—all the Class Members that Plaintiffs purported to
7 represent—and it therefore scotched any hope of certifying this claim on a classwide basis.
8 Defendants also urged that the evidence adduced by Class Counsel to support their claim, namely,
9 the time records of Class Members, was insufficient to establish liability because, even where the
10 time records showed that Class Members worked short shifts, the time records did not always show
11 the scheduled length of these shifts, without which it was impossible to determine whether reporting-
12 time pay was due and in what amount. In light of these considerations, Plaintiffs' counsel assigned
13 de minimis value to this claim for settlement purposes. Custis Decl., ¶ 55.

14 **Split Shift Pay:** Plaintiffs contended that Class Members occasionally worked split-shifts.
15 A split-shift occurs when an employee's work schedule is interrupted by a nonpaid, nonworking
16 period of more than 60 minutes. When there is more than one hour between shifts, the employee is
17 entitled to one additional hour of pay at no less than the minimum-wage rate. Defendants, however,
18 argued that Class Members hardly ever work split-shifts, as evidenced by Class Members' time
19 records. Further, in *Aleman v. Airtouch Cellular* (2012) 209 Cal. App. 4th 556, the California court
20 of appeal held that a split-shift premium is not required when an employee's pay is sufficiently
21 greater than minimum wage—which is typically the case here. At most Class Members are entitled to
22 any difference between what they actually earned and what they would have earned had they received
23 the minimum wage for their entire shift plus an extra hour. *See, e.g., Galvez v. Federal Express Inc.*,
24 2011 WL1599625, at *8-9 (N.D. Cal. Apr. 28, 2011) ("The plain language of the split shift regulation
25 reflects an intent to ensure that an employee who works a split shift must be compensated highly
26 enough so that he or she receives more than the minimum wage for the time actually worked plus
27 one hour."). In light of these considerations, Plaintiffs' counsel assigned de minimis value to this
28 claim for settlement purposes. Custis Decl., ¶ 56.

PAGA Claim: The success of Plaintiffs' PAGA claim is wholly dependent upon the success of their underlying claims occurring within the one-year statute of limitations applicable to the PAGA. Defendants maintained and continue to maintain that they had legally compliant employment policies and practices throughout the statutory period. Defendants denied and continue to deny that they ever violated any provision of the California Labor Code and argued that, even assuming such violations occurred, Defendants will not be treated as having engaged in subsequent violations giving rise to heightened penalties. In other words, Defendants argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendants had notice that they were violating the law, *e.g.*, they had been cited by a labor agency or adjudged by a court to have done so. *See, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal.4th 1157, 1209. Thus, Defendants contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply.

There are 47,079 pay periods at issue in the relevant PAGA period, according to the Class Data. Assuming that each pay period triggers PAGA penalties and that PAGA penalties may be "stacked," the maximum potential exposure was estimated to be approximately \$37,306,236. Custis Decl., ¶ 58. That amount, however, assumes 100% liability throughout the PAGA Period. As they did with Defendants would have presented a number of defenses to the PAGA claim. As with the other derivative claims, Defendants would argue that Plaintiffs would not be able to establish the underlying Labor Code violations, and therefore would not be able to recover any PAGA civil penalties. Moreover, Defendants would assert that, before a PAGA claim could be tried, the Court would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently "manageable" so as not to interfere with Defendants' right to due process. Defendants also would contend that employees' job duties and work hours varied. Defendants also would argue that there was variation as to the circumstances that could allegedly cause employees to work off the clock or to be deprived of the opportunity to take legally compliant, duty-free meal and/or rest breaks. Defendants further opined that these issues presented challenges not only to liability but also challenges to Plaintiffs' ability to show that a PAGA claim could be efficiently and manageably

1 adjudicated without abridging Defendants’ due process rights.

2 Defendants would further argue that, even if Plaintiffs were able to establish the underlying
3 Labor Code violations, the Court possesses the ability to significantly reduce any PAGA civil
4 penalties that may be awarded. *See* Labor Code §2699(e)(2) (the Court may “award a lesser amount
5 than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and
6 circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary
7 and oppressive, or confiscatory.”); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal. App.
8 4th 1112, 1135 (affirming reduction of PAGA penalties). That is particularly true where, as here, the
9 proposed settlement provides monetary relief to Class Members. “By providing fair compensation to
10 the Class Members as employees and substantial monetary relief, a settlement not only vindicates
11 the rights of the Class Members as employees, but may have a deterrent effect upon the defendant
12 employer and other employers, an objective of PAGA.” *O’Connor v. Uber Technologies, Inc.* (N.D.
13 Cal. 2016) 201 F. Supp. 3d 1110, 1134. Finally, Defendants would also contend that the Court should
14 not “stack” penalties for the same underlying conduct. Further, aggrieved employees would only be
15 entitled to 25% of any resulting award in the highly unlikely event that Plaintiffs could successfully
16 obtain a judgment for Defendants’ total estimated exposure. After taking these factors into
17 consideration, Class Counsel applied discounts for the risks in establishing manageability and
18 possible bifurcation of discovery and/or trial, the risks regarding success on the merits and
19 establishing liability, and the risks with proving the extent of penalties that are warranted and possible
20 discretionary reduction of penalties by the Court. Class Counsel believed it was appropriate to
21 discount the PAGA claim by 90% to this amount, resulting in an estimated potential recovery of
22 \$3,084,431.88. Custis Decl., ¶ 59.

23 The proposed settlement of \$2,000,000 thus represents approximately 39.5% of the predicted
24 realistic total class-wide recovery of \$5,066,968 a very good result in light of the cumulative risks
25 discussed in detail above. Custis Decl., ¶ 60.

26 Preliminary approval is appropriate since the actual settlement value of \$2,000,000 falls well
27 within the range of reasonableness, and is thus fair, adequate and reasonable, especially in light of
28 the risks highlighted above regarding Defendants’ financial condition and the likelihood that

Plaintiffs and the Class could be left with zero recovery. “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (internal quotations omitted); *see, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement stating, “[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff’s claims.”). Taking into account the risk of non-certification, failure to prevail on the merits, and the Court’s power to reduce the civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and adequate.

6. Discovery Completed and the Status of Proceedings

As detailed above and in the Custis and Orshansky Declarations, Plaintiffs’ counsel engaged in extensive investigation and discovery before and after mediation. Custis Decl., ¶¶ 31-34; Orshansky Decl., ¶¶ 10.

7. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation* (9th Cir. 1995) 47 F.3d 373, 378. Plaintiffs are represented by competent and experienced counsel who pressed Plaintiffs’ claims forward against reputable defense counsel well versed in class actions and employment litigation. Plaintiffs’ counsel possesses extensive experience litigating wage and hour class actions and representative actions. Orshansky Decl., ¶¶ 14-18; Custis Decl., ¶¶ 7-20. Based on that experience, Plaintiffs’ counsel believes that the settlement is fair, reasonable and adequate. Orshansky Decl., ¶ 17; Custis Decl., ¶ 38.

For all of these reasons, application of the *Dunk* factors weighs heavily in favor of granting preliminary approval to the Settlement.

D. The Court Should Preliminarily Approve the PAGA Penalties

Pursuant to the Settlement, \$200,000 from the GSA shall be allocated to the resolution of the PAGA claim, of which 75% (\$150,000) will be paid directly to the LWDA, and the remaining 25%

1 (\$50,000) will distributed to PAGA Group Members. SA, ¶¶ 25, 51(d), 61(c) . This result was reached
2 after good-faith negotiation between the Parties with input from the mediator. Where PAGA penalties
3 are negotiated in good faith and “there is no indication that [the] amount was the result of self-interest
4 at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson*
5 *v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9; *see*
6 *also Nordstrom Com. Cases* (2010) 186 Cal. App. 4th 576, 579 (“[T]rial court did not abuse its
7 discretion in approving a settlement which does not allocate any damages to the PAGA claims.”).
8 Pursuant to Labor Code § 2699(l)(2), Plaintiffs submitted the Settlement to the LWDA on June 7,
9 2022, and will inform the Court if the LWDA objects to the amount allocated to PAGA penalties.
10 Custis Decl., ¶ 6, Exs. B & C.

11 **E. The Court Should Preliminarily Approve The Enhancement Payments**

12 Enhancement payments “are fairly typical in class action cases.” *In re Cellphone Fee*
13 *Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393-94. Enhancement payments “are intended
14 to compensate class representatives for work done on behalf of the class, to make up for financial or
15 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to
16 act as a private attorney general.” *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948,
17 958–959.

18 The Settlement provides that each Plaintiff may apply for an enhancement payment to be paid
19 from the GSA in the amount of \$5,000 (for a total of \$20,000). SA, ¶ 51(c). The request for this
20 payment is disclosed in the proposed Class Notice. As will be fully briefed before the Final Approval
21 Hearing, the requested service awards are fair and reasonable compensation for each Plaintiff’s
22 efforts in representing the putative Class and the interests of the State of California, assisting counsel
23 with the litigation and settlement, attending in-person and telephonic meetings with Plaintiffs’
24 counsel to discuss the claims and theories at issue in the litigation, identifying potential witnesses,
25 assisting Plaintiffs’ counsel in defending Defendants’ arbitration motion, reviewing drafts of the
26 original complaint, the FAC and Settlement Agreement, and regularly communicating with counsel
27 about the status of the case. Based on the foregoing, Plaintiffs submit that the requested service
28 awards are reasonable and should be preliminarily approved, subject to Court approval at the Final

1 Approval Hearing.

2 **F. The Court Should Preliminarily Approve Class Counsel's Attorneys' Fees And**
3 **Costs**

4 The purpose of an attorneys' fee award in class action litigation is to reward counsel who
5 took the risk of non-payment and invested in a case that achieved a substantial positive result for the
6 Class. California courts routinely award attorneys' fees equaling one-third or more of the potential
7 value of the common fund. *See Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66 n.11
8 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is
9 used, fee awards in class actions average around one-third of the recovery.").

10 Here, the Settlement provides that Class Counsel may apply for an award of attorneys' fees
11 in an amount not to exceed 35% of the GSA and costs not to exceed \$35,000. SA, ¶ 51(a). Class
12 Counsel have entered into a fee splitting agreement, with each firm representing they will receive
13 50% of the fees, and reimbursement of the firm's Court-approved litigation costs. Custis Decl., ¶ 65.
14 Each of the Plaintiffs has given their written approval to the fee-splitting agreement. *Id.* The amount
15 of requested fees and costs is set forth in the proposed Class Notice. In connection with Plaintiffs'
16 Motion for an Award of Attorneys' Fees and Costs, counsel will address the many reasons why this
17 settlement justifies the requested fees and costs, and will provide additional information so that the
18 Court can conduct a lodestar analysis. Based on the foregoing, Plaintiffs submit that the requested
19 attorneys' fees and costs are reasonable and should be preliminarily approved, subject to Court
20 approval at the Final Approval Hearing.

21 **G. The Court Should Appoint CPT Group, Inc. As The Settlement Administrator**
22 **And Preliminarily Approve The Settlement Administration Costs.**

23 The Parties have agreed to use CPT Group, Inc. ("CPT") to administer the settlement. SA, ¶¶
24 34, 54(a). CPT is a reputable class action administrator that has successfully administered over a
25 thousand class action settlements. Declaration of Julie Green, ¶ 5. The Settlement provides that the
26 Court will approve the Settlement Administration Costs at the Final Approval Hearing. At this stage,
27 Plaintiffs request that the Court appoint CPT as the Settlement Administrator and submits that
28 Settlement Administration Costs in the amount of no greater than \$60,000 are reasonable, particularly
because this Settlement provides for two distributions of settlement payments to Settlement Class

Members and PAGA Group Members. The Settlement Administration Costs in the amount of no greater than \$60,000 should be preliminarily approved, subject to Court approval at the Final Approval Hearing.

V. THE COURT SHOULD ORDER DISTRIBUTION OF THE CLASS NOTICE

The Court should order distribution of the proposed Class Notice to the Class by first-class mail, postage prepaid, using the last known mailing address information provided by Defendants. This manner of providing notice satisfies California law because the notice has “a reasonable chance of reaching a substantial percentage of the Class Members.” *Noel*, 7 Cal. 5th at 984 (citation omitted); *see also* Cal. R. Ct. 3.769(f). Defendants will provide the Class Members’ addresses to the Settlement Administrator within 21 calendar days after the Preliminary Approval Date. SA, ¶ 54(b). The Settlement Administrator will mail the Class Notices to Class Members within 10 days after receiving the Class List. *Id.*, ¶ 54(d). To the extent any Class Notices are returned as undeliverable, CPT will run those addresses through the National Change of Address database and/or conduct skip traces to obtain current address information. *Id.*, ¶ 54(e). Providing notice in this manner satisfies Rule 3.766(e) as the most reliable, cost-effective method of reaching Class Members.

The content of the proposed Class Notice satisfies Rule 3.766(d) because it advises putative Class Members of the nature of the claims, basic contentions and denials of the Parties, the key terms of the Settlement, the uniform 45-day deadline to opt-out or object to the Settlement and the procedure by which to do so, explains the formula for calculating Individual Settlement Payments, provides the estimated Individual Settlement Payment for each Class Member, and advises them that they will be bound by the terms of the class settlement if they do not request exclusion. *See* Custis Decl., Ex. 1 to Ex. A (Proposed Class Notice). The proposed Class Notice will also notify Class Members of the Final Approval Hearing date and provide the Class with Class Counsel’s contact information and advise Class Members that they may enter an appearance through counsel if they wish at the Final Approval Hearing. *Id.* Finally, the proposed Class Notice will be provided to the Class in English and in Spanish. Custis Decl., ¶ 68.

To further ensure that Class Members are well informed concerning the Settlement, the Settlement Administrator will also establish a toll-free telephone number through which Class

Members may obtain information about the action and the Settlement. SA, ¶ 54(a). The Settlement Administrator will also establish both a Settlement website that will inform Class Members of the terms of the Settlement, their rights, dates, deadlines with respect to the Settlement and related information. *Id.* Provided the Court finally approves the Settlement, the Court’s Final Approval Order and Judgment will be posted on the Settlement website. *Id.*

VI. PROPOSED TIMELINE FOR SETTLEMENT

If the Court preliminary approves the Settlement, it envisions the following schedule:

Event	Timing
Last day for Defendants to produce the Class List to the Settlement Administrator.	21 calendar days after the Preliminary Approval Date
Last day for the Settlement Administrator to mail Class Notice to Class Members (“Notice Date”).	31 calendar days after the Preliminary Approval Date
Last day for Class Members to submit Requests for Exclusion or Objections to the Settlement (“Response Deadline”)	45 calendar days after Notice Date
Last day for Settlement Administrator to provide Counsel with Declaration of Due Diligence and Proof of Mailing	21 calendar days before Final Approval Hearing
Last day for Class Counsel to file the Motion for Final Approval of Class Action Settlement	16 court days before Final Approval Hearing or to be determined by the Court
Last day for Class Counsel to file the Motion for Attorneys’ Fees, Costs, and Class Representative Service Award.	16 court days before Final Approval Hearing or to be determined by the Court
Last day for Parties to respond to Notices of Objection, if any	16 court days before Final Approval Hearing or to be determined by the Court
Final Approval Hearing	_____, 2021 at _____ a.m./p.m

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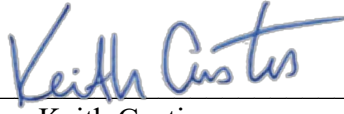
VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion, enter the proposed Preliminary Approval Order and set a date for Final Approval Hearing.

Respectfully submitted,

CUSTIS LAW, P.C.

Dated: June 7, 2022

By: 
Keith Custis

Attorneys for Plaintiffs Ammon Mendes, Mackenzie Hernandez, Elora Doran and the Class

COUNSELONE, PC

Dated: June 7, 2022

By: 
Anthony Orshansky
Jennifer L. Connor

Attorneys for Plaintiff Giovanni Mitchell and the Class

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1999 Avenue of the Stars, Suite 110, Los Angeles, California 90067.

On June 7, 2022, I served the foregoing document(s) described as:

PLAINTIFFS' NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT

on the interested parties in this action,

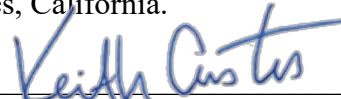
Matthew Golper
Ballard Rosenberg
Golper & Savitt, LLP
15760 Ventura Blvd 18th floor,
Encino, CA 91436
Email: mgolper@brgslaw.com

Mark Jacobs
Fisher & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614
Email: mjacobs@fisherphillips.com

by sending a true copy thereof to the other interested parties as follows:

- ☐ **(BY PERSONAL SERVICE)** By causing to be delivered the document(s) listed above to the person(s) at the address(es) set forth above.
- ☒ **(BY EMAIL)** By electronically mailing a true and correct copy through Custis Law, P.C.'s electronic mail system from kcustis@custislawpc.com to the email addresses set forth above pursuant to Rule 12 of the Judicial Council Emergency Rules and an agreement reached between the parties pursuant to Code of Civil Procedure § 1010.6.
- ☐ **BY OVERNIGHT DELIVERY:** I am readily familiar with the practice of Custis Law, P.C. for collection and processing of correspondence for overnight delivery and know that the document described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 7, 2022 in Los Angeles, California.



Keith Custis



Make a Reservation

GIOVANNI MITCHELL vs THE MADERA GROUP LLC, et al.

Case Number: 20STCV24075 Case Type: Civil Unlimited Category: Other Employment Complaint Case

Date Filed: 2020-06-25 Location: Stanley Mosk Courthouse - Department 58

Reservation

Case Name:

GIOVANNI MITCHELL vs THE MADERA GROUP LLC, et al.

Case Number:

20STCV24075

Type:

Motion re: (Motion for Preliminary Approval of Class and Representative Action Settlement)

Status:

RESERVED

Filing Party:

Giovanni Mitchell (Plaintiff)

Location:

Stanley Mosk Courthouse - Department 58

Date/Time:

07/29/2022 9:30 AM

Number of Motions:

1

Reservation ID:

238887947815

Confirmation Code:

CR-9BOT2GVWZABKTSHBC

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount:

\$61.65

Type:

MasterCard

Account Number:

XXXX1433

Authorization:

26112Z

Print Receipt

[Reserve Another Hearing](#)

[View My Reservations](#)