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8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF CONTRA COSTA
11

12 LINDSAY JORGE, on behalf of herself, all
others similarly situated,

13 *Plaintiff,*

14 vs.
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16 THE MICHAELS ORGANIZATION, LLC, a
New Jersey Limited Liability Company; and
DOES 1 through 50, inclusive,

17 *Defendant.*
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Case No. MSC20-00462

Assigned For All Purposes to the Honorable Edward
G. Weil, Dept, 39

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND CERTIFICATION OF
SETTLEMENT CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of Shaun
Setareh in support thereof]*

Date: TBA
Time: TBA
Place: Department 39

Complaint Filed: March 4, 2020

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

2 PLEASE TAKE NOTICE that on the date and time to be decided by the Court, or as soon
3 thereafter as the matter may be heard in Department 39 of the above-entitled Court located at 725 Court
4 Street, Martinez, CA 94553, Plaintiff LINDSAY JORGE (“Plaintiff”) will and does hereby move this
5 Court for an Order:

- 6 • Preliminarily approving the proposed Joint Stipulation of Class Action and PAGA
7 Settlement and Release Between Plaintiff and Defendant;
- 8 • Certifying the Settlement Class;
- 9 • Appointing Plaintiff as the Class Representative;
- 10 • Appointing Shaun Setareh and William M. Pao of Setareh Law Group as Class Counsel;
- 11 • Appointing Simpluris, Inc. as the Settlement Administrator;
- 12 • Directing that notice be mailed to the Settlement Class; and
- 13 • Scheduling a hearing date for the Motion for Final Approval of Class Action Settlement.

14 This motion is made pursuant to California Rules of Court 3.769. This motion will be based
15 upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the
16 Declaration of Shaun Setareh as well as exhibits attached thereto, the arguments of counsel, the
17 documents filed in this action and any other matters as may be properly presented on or before the
18 hearing on this motion.

19
20 DATED: August 31, 2022

SETAREH LAW GROUP

21
22 /s/ Jose Maria D. Patino, Jr.

23 SHAUN SETAREH
24 WILLIAM M. PAO
25 JOSE MARIA D. PATINO, JR.
26 Attorneys for Plaintiff
27 LINDSAY JORGE
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff LINDSAY JORGE (“Plaintiff”) seeks preliminary approval of a non-reversionary class
4 and representative action settlement wage and hour and PAGA penalty claims against Defendant THE
5 MICHAELS ORGANIZATION, LLC.¹ for a Maximum Settlement Amount (“MSA”) of **\$720,000.00**.
6 The Settlement consists of a Settlement Class consisting of 1,081 members.

7 The Net Settlement Amount (“NSA”) expected to be paid to Class Members – after payment of
8 Class Counsel fees of one-third (1/3) of the MSA (\$240,000) and costs of up to \$15,000, settlement
9 administration costs of up to \$15,000, Plaintiff’s enhancement award of \$5,000, and a payment to the
10 California Labor & Workforce Development Agency (“LWDA”) pursuant to the Private Attorneys
11 General Act of 2004 (“PAGA”) of \$30,000 (75% of the total PAGA Settlement Amount of \$40,000) – is
12 **\$415,000.00** (which includes the 25% portion of the PAGA Settlement Amount, or \$10,000, that will be
13 paid to PAGA Employees employed during the PAGA period. The average estimated share of the NSA
14 per Class Member is approximately **\$465.77**. Plaintiff has obtained a significant monetary recovery for
15 Class Members.

16 The Settlement occurred as a result of extensive, arm’s-length negotiations by experienced
17 counsel after sufficient formal and informal written discovery and investigation into the facts with
18 guidance of Tripper Ortman, Esq., an experienced and well-respected class action mediator. The
19 Settlement seeks to fully and finally settle and resolve all claims that were pled or could have pled based
20 on the allegations in the operative Second Amended Complaint (“SAC”) filed with the Court,
21 individually and on behalf of the Class. The Settlement Class contains all persons employed by
22 Defendant as non-exempt employees in California from March 4, 2016 through date the Court grants
23 preliminary approval of the Settlement.

24 Based upon their evaluation, Plaintiff and her counsel, Shaun Setareh and William M. Pao of the
25 Setareh Law Group, have determined that the Settlement is fair, reasonable, adequate and in the best
26

27 ¹ The Parties executed a Stipulation Regarding Class Action and PAGA Settlement (“Settlement”),
28 attached as **Exhibit 1** to the Declaration of Shaun Setareh filed concurrently herewith.

1 interest of the Class, and they request that this Court grant preliminary approval of the Settlement.

2 **II. THE MAJOR TERMS OF SETTLEMENT**

3 Key provisions of the proposed settlement include the following:

- 4 • Defendant stipulates to certification of a Settlement Class for purposes of settlement only.
- 5 • Defendant will pay a maximum of **\$720,000**, referred to as the MSA.
- 6 • Defendant will not oppose Class Counsel’s application for fees of 1/3 of the MSA (**\$240,000**)
7 and costs not to exceed **\$15,000**, to be paid out of the MSA.
- 8 • The notice portion of the Settlement will be administered by Simpluris, Inc. (“Simpluris”),
9 whose costs are not expected to exceed **\$15,000** (based upon Simpluris’s actual price quote of
10 **\$8,860**) to administer the Settlement per its terms.
- 11 • Out of the MSA, **\$40,000** is allocated to resolve the PAGA claims, with 75%, i.e., **\$30,000**, to be
12 paid by the Settlement Administrator to the LWDA, and 25%, i.e., **\$10,000**, to be paid to PAGA
13 Employees – i.e., Class Members employed at any time during the PAGA Period.
- 14 • Defendant will not oppose the application for Class Representative Service Award in the amount
15 of **\$5,000** to Plaintiff, to be paid out of the MSA.
- 16 • After deducting Class Counsel’s attorneys’ fees and costs, enhancement payment to Plaintiff,
17 settlement administration costs, and the payment to the LWDA, the remainder – i.e., the NSA –
18 is calculated to be at least **\$415,000.00**. The NSA shall be distributed *pro rata* to the Settlement
19 Class Members based upon the number of weeks worked during the Class Period. Each
20 Aggrieved Employee’s PAGA share will be similarly calculated based on the number of weeks
21 worked during the PAGA Period.
- 22 • Settlement Class Members will be mailed a check so long as they do not opt out.
- 23 • The Settlement will release specified PAGA claims for all PAGA Employees. Class Members
24 who were employed with Defendant during the PAGA Period. Such Class Members cannot opt
25 out of the PAGA portion of the Settlement and will be mailed their share of the PAGA Payment
26 even if they opt out of the rest of the Settlement.
- 27 • Any checks issued by the Settlement Administrator to participating Class Members shall be
28 negotiable for not less than 120 calendar days after mailing. Those checks remaining uncashed

for more than 120 days after issuance will paid to Koinonia Family Services (“Koinonia”), a non-profit 501(c)(3) organization, for child advocacy programs in the state of California, subject to Court approval.

(Declaration of Shaun Setareh (“Setareh Decl.”), ¶ 12, Ex. 1 (“Settlement”).)

III. STATEMENT OF FACTS

A. THE PARTIES

The Michaels Organization, LLC is involved in the development, management, construction and finance of housing communities. (*Id.*, ¶ 18.) Specifically, one of the properties that it operates is Diamond Terrace, an elderly assisted living facility located in Clayton, California where Plaintiff was employed. (*Id.*) Plaintiff Lindsay A. Jorge was employed as a server by Defendant approximately from about December 29, 2016 to June 28, 2019 as a non-exempt hourly employee. (*Id.*)

1. Wage and Hour Allegations

Plaintiff alleges Defendant failed to provide her and putative class members proper meal breaks. (SAC, ¶¶ 27-31.) Specifically, Plaintiff and the aggrieved employees would be required to clock out for their meal periods every day. (*Id.*, ¶ 28.) However, on a frequent basis, Plaintiff and the aggrieved employees would be unable to step away from their job duties due to the fact that there were not enough employees working during their shifts to attend to customers. (*Id.*) As a result, Plaintiff and the aggrieved employees would clock out for their meal periods and continue working to assist their understaffed colleagues. (*Id.*) Defendants had a strict "no-overtime" policy in place which required employees to clock out for their meal periods regardless of whether or not they were allowed to actually take them. (*Id.*) Plaintiff and the aggrieved employees would experience these issues at least twice a month. (*Id.*)

Plaintiff alleges Defendant failed to provide her and putative class members proper rest breaks. (*Id.*, ¶¶ 32-33.) Plaintiff and the putative class were not provided with rest breaks of at least ten (10) minutes for each four (4) hour work period, or major fraction thereof, due to (1) Defendants' policy of not scheduling each rest breaks as part of each work shift; (2) chronically understaffing each work shift with not enough workers; (3) imposing so much work on each employee such that it made it unlikely that an employee would be able to take their breaks if they wanted to finish their work on time; and (4)

1 no formal written rest break policy that encouraged employees to take their rest breaks. (*Id.*, ¶ 32.)

2 Plaintiff also alleges that Defendant failed to pay her and other class members wages for all
3 hours worked. (*Id.*, ¶¶ 34-39.) Plaintiff and the aggrieved employees regularly started work before their
4 scheduled work hours and were not paid for this time. (*Id.*, ¶ 35.) Specifically, Plaintiff and the
5 aggrieved employees would arrive at work at least 15 minutes before they were scheduled to clock in to
6 set up the tables and the restaurant. (*Id.*) This was an occurrence that happened on a daily basis as
7 Plaintiff and the aggrieved employees would work off-the-clock preparing the restaurant for service prior
8 to being allowed to clock in. (*Id.*)

9 Plaintiff also alleges that she and the putative class members were not paid out all accrued
10 vacation pay upon termination. (*Id.*, ¶¶ 40-43.) Plaintiff and the aggrieved employees accrued vacation
11 wages during their employment with Defendants. (*Id.*, ¶ 40.) Plaintiff and the aggrieved employees are
12 entitled to vacation accrued during their employment with Defendants. (*Id.*, ¶ 43.) Upon termination.
13 Plaintiff and the aggrieved employees were not paid out all accrued vacation pay. (*Id.*)

14 Plaintiff further alleges that she and putative class members were not reimbursed for all of their
15 expenses (*Id.*, ¶¶ 46-49.) Specifically, Defendants provided Plaintiff and the aggrieved employees with
16 aprons, however informed them that they had to purchase their own black shirt, black pants, and black
17 shoes on their own time and at their own expense. (*Id.*, ¶ 47.) Plaintiff and the aggrieved employees
18 were not reimbursed for business expenses incurred in purchasing their uniforms. (*Id.*, ¶ 48.) Due to
19 these violations, Plaintiff alleges that she and the putative class members were not provided with
20 accurate wage statements and not paid all final wages timely as required by California law. (*Id.*, ¶¶ 118-
21 135.)

22 **B. PROCEDURAL HISTORY**

23 On March 4, 2020, Plaintiff filed a complaint in the Contra Costa Superior Court alleging claims
24 for failure to provide meal periods, failure to pay hourly wages, failure to pay vacation wages, failure to
25 indemnify, failure to provide accurate wage statements, and unfair competition on behalf of all non-
26 exempt employees who worked for Defendant in California from March 4, 2016 to the present.
27 (Settlement, ¶ 2.) On May 28, 2020, Plaintiff a First Amended Complaint added a claim for penalties
28 under the Private Attorneys General Act (“PAGA”) (“Complaint” or “Action”). (*Id.*) On March 9, 2022,

1 Plaintiff filed a Second Amended Complaint and added a claim for failure to provide rest periods and
2 named additional Defendants. (Setareh Decl., ¶ 21.) On April 12, 2022, on Defendant filed an answer to
3 this Complaint denying all material allegations and asserting affirmative defenses. (*Id.*)

4 On May 4, 2021, the Parties participated in a private mediation session with Tripper Ortman,
5 Esq., a well-regarded and experienced class action mediator. (Setareh Decl., ¶ 6.) As a result of the
6 mediation, the Parties, through counsel, reached an agreement. (*Id.*) The parties fully executed a
7 memorandum of understanding on August 18, 2021 which outlined the material terms of a proposed
8 class action settlement that would fully resolve this Action in its entirety, subject to the Parties entering
9 into a more comprehensive written settlement agreement. (*Id.*) On January 28, 2022, the Parties
10 executed the Settlement. (*Id.*)

11 **C. INVESTIGATION AND DISCOVERY**

12 The Parties agreed to attend mediation to attempt to resolve the action entirely and further
13 agreed to engage in informal discovery in advance and in preparation thereof. (*Id.*, ¶ 6.) Defendant
14 produced hundreds of pages of documents. (*Id.*) This included, but was not limited to, the informal
15 exchange of excerpts of the relevant portions of Defendant's Handbooks in effect during the class
16 period; meal period forms related to missed meals and waiver documents; Plaintiff's personnel file and
17 wage statements; random sampling of Class Members' payroll records; and other documents relevant to
18 the litigation. (*Id.*) Plaintiff hired an expert to hire analyze the produced data with respect to potential
19 damages and penalties in preparation for mediation. (*Id.*)

20 **D. SETTLEMENT NEGOTIATIONS AND SETTLEMENT**

21 On May 4, 2021 the Parties participated in a full-day mediation before experienced mediator
22 Tripper Ortman, Esq. (Setareh Dec, ¶ 7.) During the mediation, the Parties had a full day of productive
23 negotiations and were able to reach an agreement on a class-wide settlement shortly after as a result of
24 the arm's length negotiations. (*Id.*) During the mediation, each of the Parties, represented by its
25 respective counsel, recognized the risk of an adverse result in the Action. (*Id.*)

26 **E. REASONABLENESS OF THE SETTLEMENT**

27 Plaintiff's counsel believe that the Settlement is in the best interest of the class members based on
28 their investigation and discovery, their detailed understanding of the issues raised, and the outcome of

1 extensive settlement negotiations. (Setareh Decl., ¶¶ 6-9.) Plaintiff’s counsel balanced the Settlement
2 against the probable outcome of class certification, liability, the range of recovery at trial, the risks of
3 losing class certification, losing at trial, or not recovering as much as provided by the proposed
4 Settlement, as well as the difficulties and complexity of the litigation, the lengthy process of litigating to
5 judgment, and the various possible delays and appeals. (*Id.*) Although Defendant contends it has no
6 liability in this case, Defendant’s counsel shares Plaintiff’s Counsel’s belief that the Agreement
7 represents a fair, reasonable and adequate settlement given the respective risks associated with the
8 Action. (Settlement, ¶¶ 6, 9.)

9 **IV. DESCRIPTION OF THE SETTLEMENT**

10 **A. CONTINGENT NATURE OF THE SETTLEMENT**

11 Solely for purpose of settling this case, the Parties stipulate and agree that the requisites for
12 establishing class certification with respect to the Settlement Class have been met and are met.
13 (Settlement, ¶ 5.)

14 **B. APPOINTMENT OF SETTLEMENT CLASS COUNSEL**

15 The Parties have stipulated to the appointment of Shaun Setareh and William M. Pao of Setareh
16 Law Group as Settlement Class Counsel (“Class Counsel”). (*Id.*, ¶ 5(d).)

17 **C. APPOINTMENT OF SETTLEMENT ADMINISTRATOR**

18 The Parties have agreed to the appointment of Simpluris to administer the Settlement and to
19 provide notice to the Class Members (the “Settlement Administrator” or “Claims Administrator”).
20 (Settlement., ¶ 12(c)(vii).) Plaintiff estimates that settlement administration costs shall not exceed
21 **\$15,000.** (*Id.*) The Settlement Administrator’s bid of a capped fee at \$8,860 for a class cap of 1,081
22 Class Members is reasonable for a settlement with a class of this size. (*Id.*)

23 **D. DESCRIPTION OF THE SETTLEMENT CLASS**

24 “Settlement Class”, “Class”, or “Class Member(s)” means all persons employed by Defendant as
25 non-exempt employees in California from March 4, 2016 through the date the Court grants preliminary
26 approval of the Settlement (the “Settlement Class Period”). (Settlement, ¶ 4.) It has been determined that
27 there are approximately 1,081 individuals that comprise the Class who have worked a total of
28 approximately 101,039 workweeks during the Class Period. (Setareh Dec, ¶ 22.) The “PAGA Period” is

March 4, 2019 through the date of preliminary approval of the Settlement. (Settlement, ¶ 12(c)(ii).)
“Participating Class Members” means all Class Members who do not submit a valid and timely Request
for Exclusion. (*Id.*, ¶ 19.)

E. SCOPE OF THE RELEASE

1. Release of Class Claims

Effective upon the date of final approval by the Court of this Stipulation of Settlement, and upon funding of the Maximum Settlement Amount in full by Defendant, and except as to such rights or claims as may be created by this Stipulation of Settlement, the Settlement Class and each member of the Class who has not submitted a valid Request for Exclusion, fully releases and discharges (i) Defendant; (ii) Michaels Management – Affordable, LLC; (iii) Interstate Realty Management Company; (iv) Michaels Management Services, LLC; (v) Michaels Management Services, Inc.; (vi) Michaels Student Living Management; (vii) University Student Living, LLC; (viii) Michaels Student Living Management; (ix) University Student Living Management, LLC; (x) their respective past, present and future direct and indirect subsidiaries and affiliates of any of the foregoing; (xi) the past, present, and future, shareholders, directors, officers, agents, employees, clients, attorneys, insurers, predecessors, successors, and assigns of any of the foregoing; (xii) any individual or entity which could be jointly liable with any of the foregoing (collectively “Released Parties”), from all claims alleged in the Action and that reasonably could have been alleged in the Action based on the factual allegations contained in the operative complaint in the Action and any amendments thereto, as to the Class Members, including without limitation, California Labor Code sections 4, 201, 202, 203, 204, 215, 216, 218.6, 221, 222, 223, 225, 225.5, 226, 226.6, 226.7, 227.3, 256, 354, 408, 452, 510, 512, 553, 1174, 1194, 1194.2, 1197, 1197.1, 1198, 2698 *et seq.*, 2802, California Industrial Commission Wage Orders, Cal. Code Regs., Title. 8, section 11040, *et seq.*, and Business and Professions Code sections 17200, *et seq.*, and including all claims for or related to alleged unpaid wages, vacation, overtime or double time wages, minimum wages, regular rate of pay, timely payment of wages during employment, timely payment of wages at separation, meal periods and meal period premiums, rest periods and rest period premiums, off-the-clock work, wage statements, payroll records and recordkeeping, unreimbursed business expenses, uniforms and equipment, failure to pay additional 401 (k) benefits and/or deferred compensation benefits and/or matching benefits for payments received under the Settlement, unfair competition, unfair business practices, unlawful business practices, fraudulent business practices, conversion, class actions, representative actions, aggrieved party claims, injunctive relief, declaratory relief, accounting, punitive damages, liquidated damages, penalties of any nature (including but not limited to civil penalties, waiting-time penalties, and PAGA penalties), interest, fees, costs, as well as all other claims and allegations alleged in the Action from March 4, 2016 through the date the Court finally approves the Settlement (collectively “Released Class Claims”).

(*Id.*, ¶ 21.) Claims for retaliation, discrimination, unemployment insurance, disability, workers compensation, and claims outside the Released Class Claims are expressly excluded from the release.

(*Id.*, ¶ 23.)

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1 2. **PAGA Release**

2 The claims to be released by the PAGA Members include all claims arising during the
3 PAGA Period to the maximum extent permitted by law, and as a private attorney general
4 acting on behalf of himself and the PAGA Members, asserted or could reasonably have
5 asserted based on the facts alleged in the Action and/or the LWDA letter, including but not
6 limited to all such claims arising under the California Labor Code (including, but not
7 limited to, sections 4, 201, 202, 203, 204, 215, 216, 218.6, 221, 222, 223, 225, 225.5, 226,
8 226.6, 226.7, 227.3, 256, 354, 408, 452, 510, 512, 553, 1174, 1194, 1194.2, 1197, 1197.1,
9 1198, 2698 et seq., 2802 as alleged in the Complaint), California Industrial Commission
10 Wage Orders, Cal. Code Regs., Title. 8, section 11040, et seq.) and any other Labor Code
11 section or Wage Order based on the facts alleged in the Action (collectively "Released
12 PAGA Claims").

13 (*Id.*, ¶ 22.)

14 3. **Release by Plaintiff**

15 In addition to the claims above, Plaintiff executes a general release including an express waiver
16 of California Civil Code Section 1542. (*Id.*, ¶ 24.)

17 F. **SETTLEMENT AMOUNT AND ALLOCATION OF SETTLEMENT MONIES**

18 To implement the terms of this Settlement, Defendants agree to pay \$720,000, which includes all
19 Settlement Awards to Class Members, the Enhancement Award to the Class Representative, \$40,000.00
20 allocated to penalties under PAGA with \$30,000.00 (75% of PAGA allocation) paid to the LWDA and
21 \$10,00.00 (25% of PAGA allocation) paid to the Settlement Class, and settlement administration
22 expenses ("Maximum Settlement Amount" or "MSA"), but excludes the employer share of the payroll
23 taxes, which shall be Defendant's responsibility in addition to this amount. (Settlement ¶ 12(c).) The
24 MSA will be fully paid out without any residue returning to Defendant. (*Id.*) Any residue from uncashed
25 Settlement Award checks after the expiration date will be paid within fourteen (14) calendar days after
26 the one hundred twenty (120) day check cashing period expires, pursuant to Code of Civil Procedure
27 section 384(b), to Koinonia Family Services ("Koinonia"), a non-profit 501(c)(3) organization, for child
28 advocacy programs in the state of California as a *cy pres* recipient, subject to Court approval. (*Id.*, ¶ 18.)

29 G. **CLASS MEMBER SETTLEMENT PAYMENT FORMULA**

30 The settlement payments to Class members will be calculated on a pro rata basis based on the
31 number of workweeks worked. (*Id.*, ¶ 12(c)(i).) The amount to be paid per workweek to eligible Class
32 Members will be calculated by the Settlement Administrator by dividing the Net Class Settlement

Amount by the aggregate number of weeks worked by Class Members who do not opt out of the Settlement. (*Id.*, ¶ 3.07(g)(ii).) Individual Settlement Awards – the individual amount paid to a Participating Class Member from the NSA – will be allocated as wages (for which employment taxes will be deducted and IRS Forms W-2 issued). (*Id.*, ¶ 12(c)(iii).) The amount paid to aggrieved employees from the \$10,000.00 PAGA portion of the NSA – will be allocated as penalties (for which IRS Forms 1099 will be issued). (*Id.*)

1. Calculation of the Individual Settlement Award and the PAGA Payment to the Settlement and Aggrieved Employees

Within 30 calendar days of preliminary approval of this Settlement by the Court, Defendant shall provide to the Settlement Administrator the Class Members’ names, last-known addresses, last-known telephone numbers, social security numbers, and workweek data during the Class Period. (*Id.*, ¶ 16(a).)

(a) PAGA Settlement Amount, Payment to the LWDA, PAGA Shares

The Parties agree to allocate **\$40,000** of the MSA for settlement of claims for civil penalties under PAGA, Labor Code § 2699, *et seq.* (the “PAGA Settlement Award”) (*Id.*, ¶ 12(c)(ii).) Pursuant to Labor Code section 2699(i), 75% of that amount (**\$30,000**) will be paid to the LWDA. (*Id.*) The remaining 25% (**\$10,000**) will be distributed to PAGA Employees on a *pro rata* basis according to the number of pay periods they worked during the PAGA Period in relation to the total amount of pay periods in the PAGA Period. (*Id.*) These PAGA Settlement Awards shall be allocated as 100% penalties. (*Id.*, 12(c)(iii).)

(b) Settlement Shares to the Participating Class Members

The Net Settlement Amount shall be used to satisfy Individual Settlement Awards to Class Members who did not opt-out from the Settlement Class in accordance with the terms of this Settlement. (*Id.*, 12(c)(i).) The Claims Administrator will allocate the Individual Settlement Awards by paying Participating Class Members a *pro rata* share of the Net Settlement Amount based on their *pro rata* share of class workweeks. (*Id.*)

H. NOTICE TO CLASS MEMBERS OF SETTLEMENT

Within 30 calendar days of preliminary approval of this Settlement by the Court, Defendant shall provide to the Settlement Administrator the Class Members’ names, last-known addresses, last-known

1 telephone numbers, social security numbers, and workweek data during the Class Period. (*Id.*, ¶ 16(a).)
2 The Settlement Administrator will run a check of the Class Members' addresses against those on file
3 with the U.S. Postal Service's National Change of Address ("NCOA") List. (*Id.*) Within 30 days of
4 receiving the class information from Defendant, the Settlement Administrator will mail the Notice and
5 Notice of Settlement Award Form to Class Members (*Id.*)

6 Notices returned to the Settlement Administrator as not delivered during the 60-calendar-day
7 period for the submission of exclusions or objections shall be resent to the forwarding address, if any, on
8 the returned envelope. (*Id.*, ¶ 16(b).) If there is no forwarding address, the Settlement Administrator will
9 do an NCOA check, skip-trace returned mail, and re-mail within five (5) days of receipt using the Class
10 Member's Social Security Number; this search will be performed only once per Class Member by the
11 Settlement Administrator. (*Id.*) Class Members who receive re-mailed notices will receive an extension
12 of time to submit an exclusion or objection accordingly. (*Id.*) The Notice will provide information about
13 the settlement including the number of weeks the Class Member worked during the Class Period, their
14 estimated Settlement Award amount, and the procedures for opting out and objecting to the settlement.
15 (*Id.*, ¶¶ 12(c)(ix), 16(c).) The Notice will be substantially in the form identified as Exhibit 2 attached to
16 the Settlement. (*Id.*, ¶ 16, Ex. 2.) The Settlement Awards will be mailed out to all class members who did
17 not properly opt out of the Settlement. (*Id.*, ¶¶ 12(c)(viii).)

18 **I. NOTICE AND PAGA PAYMENT TO THE LWDA**

19 The Settlement provides for a total amount of **\$40,000** in settlement of all claims for civil
20 penalties under PAGA. (*Id.*, ¶ 12(c)(i).) Pursuant to Labor Code section 2699(i), 75% of the PAGA
21 settlement amount, or **\$30,000**, will be paid to the LWDA. (*Id.*) The remaining 25%, or **\$10,000**, will
22 be included in the NSA and distributed Class Members who worked for Defendant during the PAGA
23 Period. (*Id.*) In connection with Settlement approval, Class Counsel must notify the LWDA of the
24 Settlement's existence. This settlement was forwarded to the LWDA by Class Counsel. (Setareh Decl.,
25 ¶ 17.)

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1 **V. ARGUMENT**

2 **A. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT**
3 **CLASS BECAUSE IT MEETS ALL THE REQUIREMENTS FOR CLASS**
4 **CERTIFICATION FOR SETTLEMENT PURPOSES ONLY UNDER CODE OF**
5 **CIVIL PROCEDURE SECTION 382**

6 Under Code of Civil Procedure § 382, class certification is warranted so long as there is “a
7 numerous and ascertainable class with a well-defined community of interest among its members” and a
8 “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.”
9 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332. “The certification question
10 is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’”
11 *Id.* at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440). Indeed, the certification
12 question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove
13 amenable to class treatment. *E.g., Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298. In
14 ruling on a certification motion, a trial court’s task is to determine “whether...the issues which may be
15 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
16 that the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
17 *Id.*

18 “[I]t is also well established that trial courts should use different standards to determine the
19 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard
20 of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court* (2003) 113
21 Cal.App.4th 836, 859 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19
22 (“*Dunk*”). As the court noted in *Dunk*, although certification requirements are intended “to protect the
23 interests of the non-representative class members,” that concern is “protected by the trial court’s fairness
24 review of the settlement.” *Id.*

25 Indeed, numerous courts have certified settlement classes. For example, *In re Drexel Burnham*
26 *Lambert Group, Inc.* (2d Cir. 1992) 960 F.2d 285, *cert. dismissed*, 506 U.S. 1088, 122 L. Ed. 497, 113 S.
27 Ct 1070 (1993), the parties entered into a tentative settlement before a class was certified. After a
28 hearing, the “district court issued an order certifying the class and approving the settlement agreement.”
Id. at 289; *see also, Alaniz v. California Processors, Inc.* (N.D. Cal. 1976) 73 F.R.D. 269, 278 (“the use

1 of the tentative settlement class procedure was appropriate in this case"), *aff'd*, 572 F.2d 657 (9th Cir.),
2 *cert. denied*, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action
3 litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class*
4 *Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; and *Manual for Complex Litigation*, 2d (1993) §
5 30.45.

6 As shown below, this Settlement and the Settlement Class easily meet all of the requirements for
7 certification for settlement purposes.

8 **1. Objectively Ascertainable and Sufficiently Numerous Class**

9 A class is ascertainable when it may be readily identified via an objectively stated definition
10 without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981)
11 126 Cal.App.3d 926, 932. No set number of class members is required to maintain a class action.
12 *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. The California Supreme Court has upheld a
13 class of as few as ten members. *Bowles v. Super. Ct. (Nickel, Jr.)* (1955) 44 Cal.2d 574, 577-81. Here,
14 the Settlement Class is made up of about 1,081 individuals, all of whom may be readily ascertained by
15 reference to Defendant's personnel records. (Setareh Decl., ¶ 22.) Accordingly, the Settlement Class is
16 not only ascertainable but also sufficiently numerous.

17 **2. Predominance of Common Questions**

18 A question of law or fact is common to the members of a class if it may be resolved through
19 common proof. *See Jaimez, supra*, 181 Cal.App.4th at 1305. As for predominance, it "is a comparative
20 concept, and 'the necessity for class members to individually establish eligibility and damages does not
21 mean individual fact questions predominate.'" *Sav-on, supra*, 34 Cal.4th at 334 (quoting *Reyes v. San*
22 *Diego Cty. Bd. of Supervisors* (1979) 196 Cal.App.3d 1263, 1278). Thus, "[i]ndividual issues do not
23 render class certification inappropriate so long as such issues may effectively be managed." *Id.* This is
24 especially so where the key difference between class members solely concerns their respective amounts
25 of damages. *See id.* As a general rule, if a defendant's liability can be determined by facts common to
26 all members, a class will be certified even if the members must individually prove their damages. *See*
27 *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.

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1 In this case, the Settlement Class meets these requirements. Plaintiff submits that Defendant's
2 liability arises from the same set of facts and legal questions that apply to and are answered equally as to
3 all Class Members. Plaintiff alleges Class Members were subjected to a common practice in that
4 Defendant: failed to pay them, inter alia, for missed meal periods, including premiums (SAC, ¶¶ 55-65),
5 for rest periods, including premiums (Id., ¶¶ 66-75), for all wages and overtime wages owed (Id., ¶¶ 76-
6 99), for all vacation wages owed (Id., ¶¶ 100-105), and for all business expenses (Id., 106-117); failed to
7 provide compliant wage statements (Id., ¶¶ 118-124); and failed to pay all wages due upon separation of
8 employment. (Id., ¶¶ 125-135.)

9 The Court accordingly should certify the Settlement Class for purposes of settlement under Code
10 of Civil Procedure section 382 and Rule of Court 3.769(c).

11 **3. Typicality of Plaintiff's Claims**

12 Typicality "requires a showing that the class representative has claims or defenses typical of the
13 class." *See, e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090. This focuses on
14 "the nature of the claim or defense of the class representative, and not to the specific facts from which it
15 arose or the relief sought." *Hanlon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 508 (internal
16 citations omitted). "The test of typicality 'is whether other members have the same or similar injury,
17 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other
18 class members have been injured by the same course of conduct.'" *Id.* (quoting *Schwartz v. Harp* (C.D.
19 Cal. 1985) 108 F.R.D. 279, 282; *accord Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 ("it has never
20 been the law in California that the class representative must have *identical* interest with the class
21 members"))).

22 Under these standards, Plaintiff's claims are typical of those of the class members. Like other
23 Class Members, Plaintiff was an hourly non-exempt employee of Defendant in California. (Setareh
24 Decl., ¶ 10.) Plaintiff alleges that she and the putative class members was not provided with compliant
25 rest breaks and meal breaks, was not paid all wages, was not paid all vacation wages, was not reimbursed
26 for all business expenses, did not receive all final wages timely, and did not receive accurate wage
27 statements. (*Id.*) *See Classen, supra*, 145 Cal.App.3d at 46 (representative plaintiffs need not have all
28 claims or identical interests with class members; they need only have claims that are "typical of the

class”); *see also* *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347 (representative plaintiffs need not suffer all of the exact same damages as every class member). Accordingly, Plaintiff pursues claims typical of the class she seeks to represent.

4. Adequacy of Plaintiff and Class Counsel to Represent the Class

The adequacy requirement is met where the named plaintiffs are represented by counsel qualified to conduct the litigation and the plaintiffs’ interest in the litigation is not antagonistic to the class’s interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51. In other words, where the named plaintiffs have adequate counsel, they may represent the entire class absent any disabling conflicts of interest that might hinder the named plaintiffs’ ability to represent the class. *Id.*

In this case, Plaintiff has no conflict of interest with absent Settlement Class Members and has agreed to place the class’s interests above her own. (Setareh Decl., ¶ 10.) *See Global Minerals, supra*, 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative is intended to uncover any conflicts between the plaintiff and the class he or she seeks to represent). Plaintiff’s counsel, Setareh Law Group, is experienced in wage and hour class action litigation and has no conflicts of interest with absent Class Members. (Setareh Decl., ¶¶ 4-5, 10.) Thus, this Court should appoint Plaintiff as Class Representative for the Settlement Class and appoint her counsel as Class Counsel.

B. STANDARD FOR GRANTING PRELIMINARY SETTLEMENT APPROVAL

Cases brought as class actions may only be settled upon court approval and then only after a determination that the settlement is fair, adequate, and reasonable is made. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Courts have broad discretion to make this determination and consider factors, such as the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, and the reaction of the class members to the proposed settlement. *In re Microsoft*, 135 Cal.App.4th at 723; *Dunk*, 48 Cal.App.4th at 1800-01; *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336. “[A] presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (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

1 small.” *Dunk, supra*, at 1802; *see also Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52.

2 California Rule of Court 3.769 sets forth the procedures for settlement of class actions in
3 California. A two-step process is required. First, the court preliminarily approves the settlement and the
4 class members are notified as directed by the court. Cal. Rule of Court 3.769(c)-(f). “The notice must
5 contain an explanation of the proposed settlement and the procedures for class members to follow in
6 filing written objections to it and in arranging to appear at the settlement hearing and state any objections
7 to the proposed settlement.” Cal. Rule of Court 3.769(f). Second, the court conducts a final approval
8 hearing to inquire into the fairness of the proposed settlement. Cal. Rule of Court 3.769(g). If the court
9 approves the settlement, a judgment is entered with provision for continued jurisdiction for the
10 enforcement of the judgment. Cal. Rule of Court 3.769(h).

11 In deciding whether to grant preliminary approval, courts are to give “due regard” to “what is
12 otherwise a private consensual agreement between the parties.” *Sutter Health Uninsured Pricing Cases*
13 (2009) 171 Cal. App. 4th 495, 505. When approving a settlement, “the court need not ‘reach any
14 ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for
15 it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation
16 that induce consensual settlements.’” *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268,
17 1291 (quoting *Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625).² The
18 court’s inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement
19 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
20 settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *Id.*

21 **C. THIS COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
22 **PRELIMINARILY APPROVING THE SETTLEMENT BECAUSE IT IS FAIR,**
ADEQUATE, AND REASONABLE

23 **1. Settlement Resulted From Serious, Informed, Non-Collusive Negotiations**

24 The Parties reached this settlement only after they conducted extensive and protracted arm’s-

25 _____
26 ² The California Supreme Court has suggested that trial courts, in the absence of controlling California
27 authority, utilize class action procedures of the Federal Rules of Civil Procedure. *See LaSala v.*
28 *American Sav. & Loan Ass’n* (1971) 5 Cal. 3d 864, 872. Thus, the Court may look to federal authorities
in ruling on this motion.

length negotiations through an experienced and knowledgeable mediator, Tripper Ortman, Esq. (Setareh Decl., ¶ 7.) The Parties have not engaged in any collusion or improper negotiations. (*Id.*) Plaintiff and Defendant do not have any agreements regarding the proposed Settlement that are not reflected in the Settlement. (*Id.*)

2. **Sufficient Fact Investigation and Discovery Has Occurred to Assess the Fairness of the Settlement**

As discussed above, Plaintiff's counsel engaged in extensive investigation and informal written discovery that has allowed them to evaluate the merits of the Class Members' claims and Defendant's defenses as well as the range of possible recoverable damages. (*Id.*, ¶¶ 6-9.) Based on Plaintiff's counsel's investigation and discovery, Plaintiff and her counsel are of the opinion that this settlement is fair, reasonable, adequate, and in the Class Members' best interest. (*Id.*) Plaintiff's counsel's investigation and discovery is more than sufficient to warrant their and Plaintiff's decision to enter into the Settlement. (*Id.*)

Plaintiff and Defendant engaged extensively in formal and informal discovery prior to resolving the Action. (*Id.*, ¶ 6.) Specifically, the Parties engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. (*Id.*) The Parties agreed to attend mediation to attempt to resolve the action entirely and further agreed to engage in informal discovery in advance and in preparation thereof. (*Id.*) Defendants produced hundreds of pages of documents. (*Id.*) This included, but was not limited to, the informal exchange of excerpts of the relevant portions of Defendant's Handbooks in effect during the class period; meal period forms related to missed meals and waiver documents; Plaintiff's personnel file and wage statements; random sampling of Class Members' payroll records; and other documents relevant to the litigation. (*Id.*) Plaintiff hired an expert to hire analyze the produced data with respect to potential damages and penalties in preparation for mediation. (*Id.*)

For example, Plaintiff obtained Defendant's written policies regarding meal and rest periods effective during the Class Period. (Setareh Decl., ¶ 19.) While the policies were facially compliant with California law, Plaintiff's expert found that 36.6% of the pay periods analyzed contained at least one meal break violation. (*Id.*)

Furthermore, Plaintiff obtained a sample of the timesheet data for the Class. (Setareh Decl., ¶ 20.) The timesheet contained a suspicious amount of “round” time entries, which supports Plaintiff allegations for her off-the-clock claim in that she and the putative class were not allowed to clock-in until the official start time of their shift. (*Id.*)

3. Plaintiff’s Counsel Are Experienced Class Action and Employment Attorneys and the Amount of Attorneys’ Fees Sought Are Appropriate

As detailed more completely in the declaration of Shaun Setareh, Plaintiff’s counsel are particularly experienced in employment law and wage and hour class actions. (Setareh Decl., ¶¶ 4-5, 15.)

Plaintiff’s counsel believe that the one-third of the MSA that they will seek in attorneys’ fees are appropriate in this matter. (*Id.*, ¶ 15.) The Court of Appeal has recognized that one factor supporting a lodestar multiplier is comparison to the fees typically earned in contingency fee litigation where the plaintiff’s attorney is awarded fees based on a percentage of the award recovered for the client: “to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 50. As the Court knows, contingency fees typically range from one-third to forty percent. Indeed, Setareh Law Group has been awarded one-third-common-fund attorneys’ fees in numerous class actions. (Setareh Decl., ¶ 15.)

Factors that courts consider in determining the multiplier include: “The quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.” *Lafitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 489. “There is no hard and fast rule limiting [these]...numerous factors, and their evaluation is entrusted to a trial court’s sound discretion.” *Center for Biological Diversity v. Cty. of San Bernardino* (2010) 185 Cal.App.4th 866, 901.

Counsel believe the proposed Settlement is fair, reasonable, and adequate in light of the complexities of the case, the uncertainties of further litigation, and that it represents a fair and reasonable recovery for the Settlement Class. (Setareh Decl., ¶ 7; Settlement, ¶ 9.)

4. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation

(a) The Wage and Hour Claims of the California Settlement Class

California courts recognize that “the merits of the underlying class claims are not a basis for

upsetting the settlement of a class action.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 246 (quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1150). The settlement need not provide one-hundred percent of the damages sought in order to be judged reasonable. *Wershba*, 91 Cal.App.4th at 250. “Thus, even if ‘the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,’ this is not a bar to a class settlement because ‘the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.’” *Id.* (quoting *Air Lines Stewards v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).

The following chart provides the estimated potential recovery on a class basis that Plaintiff believes she could reasonably achieve *if she were to prevail on all her causes of action*³:

Plaintiff's Estimated Potential Recovery		
Assumptions During Class Period (based on time/payroll data provided by Defendant) <u>Number of Workweeks:</u> 101,039 <u>Number of Class Members:</u> 1,081 <u>Rest Break Violation Rate:</u> 10% <u>Unique Meal Period Violations:</u> 57,827 <u>Average pay rate:</u> \$19.62 <u>Number of untaken vacation days:</u> <u>Shifts that are longer than 3.5 hours:</u> 451,863 <u>Off-The-Clock Hours:</u> 38,776 <u>Initial Pay Periods Within Wage Statement SOL:</u> 760 <u>Subsequent Pay Periods Within Wage Statement SOL:</u> 26,942		
Cause of Action	Estimated Potential Recovery	Calculations for Estimated Potential Recovery
Meal Period Claim	\$1,060,887.86	(\$19.62 Average Hourly Rate x 57,827 unique meal violations) – \$73,677.88 meal premiums already paid to Class Members
Rest Period Claim	\$886,555.91	\$19.62 Average Hourly Rate x 451,863 shifts longer than 3.5 hours x 10% violation rate

³ Civil penalties are estimated and interest is not included in this analysis. This is proper because, first, PAGA penalties are discretionary (see Lab. Code § 2699(e)(2) (the court in its discretion “may award a lesser amount than the maximum civil penalty amount specified by this part...”), and courts evaluate the strength of a proposed settlement without taking potential penalties or interest into consideration. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2000) 563 F.3d 948, 955; see also *Miller v. CEVA Logistics U.S.A., Inc.* (E.D. Cal. Feb. 19, 2015) 2015 WL 729638, at *7(court utilized calculation of a defendant’s exposure exclusive of interest and penalties to determine whether the settlement fell within the range of possible approval).)

Off-the-clock Claim	\$760,785.12	38,776 off the clock hours x \$19.62 Average Hourly Rate
Vacation Claim	Nominal value ⁴	<i>Please see fn. 4</i>
Reimbursement Claim	\$97,152.88	101,039 workweeks ÷ 52 days per year x \$50 reimbursement per year
Sub-Total Unpaid Wages	\$2,805,381.78	
Labor Code § 203 Penalties	\$2,481,537.60	527 former employees x 30 days x 8 hours x \$19.62
Labor Code § 226 Penalties	\$2,732,200.00	(760 initial pay periods x \$50) + (26,942 subsequent pay periods x \$100)
TOTAL	\$8,019,119.38	
PAGA Penalties	\$2,770,200.00	
<i>Total if PAGA included</i>	\$10,789,319.38	

(Setareh Decl., ¶ 8.)

Despite a total potential recovery of just over \$2.8 million on her unpaid wage, non-penalty class claims, and approximately \$8 million on all class claims, including statutory penalties, Plaintiff recognizes the challenges she faces in certifying a class action and establishing liability on the wage and hour claims. (*Id.*, ¶ 8.) Plaintiff estimates that her likelihood of prevailing on all her causes of action are extremely low and thus her likelihood of recovering \$8 million or anything close to that amount on behalf of a class is very unlikely. (*Id.*) For those claims, if any, that are certified for class treatment,

⁴ The Parties have found little evidence in the data of pervasive class-wide failure to pay vacation wages upon separation of employment, with Defendant having paid out approximately \$2 million dollars in vacation wages during relevant time period. Therefore, the Parties have assigned a nominal value to the vacation claim in this settlement.

1 Plaintiff must prevail at a trial on the merits. (*Id.*) In addition to having to prove that Plaintiff and other
2 workers were not paid for all hours worked, Plaintiff must establish willfulness with respect to her
3 waiting time penalties claim under Labor Code Section 203. (*Id.*)

4 With respect to the claims asserted on behalf of the Settlement Class in this case, there are
5 significant risks that support the reduced compromise amount. These risks include, but are not limited to,
6 the following:

7 (i) The risk that Plaintiff would be unable to establish liability for allegedly unpaid overtime
8 wages. See *Duran v. US Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 39 & fn. 33 ("*Duran*"), citing *Dilts v.*
9 *Penske Logistics* (S.D. Cal. 2014) LLC 2014 WL 205039 (dismissing certified off-the-clock claims
10 based on proof at trial). Defendant contends, e.g., that overtime was properly paid or not due or owing
11 across the putative Class as alleged by Plaintiff.

12 (ii) The risk that Plaintiff would not be able to prove liability for alleged failure to provide
13 compliant meal and rest breaks; or that to establish liability for the failure to provide compliant rest
14 breaks would require an individualized inquiry that would prevent these issues from being resolved on a
15 class and/or collective basis. Plaintiff alleged employees were regularly subject to meal break violations.
16 Defendant alleges that many employees took their meal and rest breaks and that in order to prove
17 whether each employee took their meal periods and/or rest breaks would require an individualized
18 inquiry that would prevent this issue from being resolved on a class and/or collective basis.

19 (iii) The risk that Plaintiff would not recover waiting time and wage statement penalties
20 pursuant to Labor Code sections 203 and 226. For example, Plaintiff might not prove that Defendant
21 acted with the intent necessary for the alleged claims for penalties under Labor Code sections 203 and
22 226. For example, there is currently a split of authority as to whether such penalties can be obtained
23 based on failure to provide rest breaks. See, e.g., *Singletary v. Teavana Corporation* (N.D. Cal. May 2,
24 2014) 2014 WL 1760884, *4 (noting that "the law in this area is murky at best" and holding that section
25 203 penalties are not applicable to meal and rest break claims). Specifically, section 203 requires that a
26 plaintiff show the employer committed a "willful" violation of the law in withholding wages. "A good
27 faith dispute that any wages are due will preclude imposition of waiting time penalties under Section
28 203." 8 Cal. Code Regs. § 13520. Similarly, penalties pursuant to section 226 require a "knowing and

1 intentional” violation. Defendant contends that it would present several good faith defenses that would
2 preclude a finding of willfulness under section 203. *See Choate v. Celite Corp.* (2013) 215 Cal. App.4th
3 1460 (reversing award of section 203 penalties based on good faith defense where underlying wage
4 claim presented issue of first impression). Any such good faith dispute could preclude penalties.

5 (iv) The risk that Defendant’s challenged employment policies might not ultimately support
6 class certification or a class-wide liability finding, *see, Duran*, 59 Cal.4th at 14 & fn. 28 (citing Court of
7 Appeal decisions favorable on class certification issue without expressing opinion as to ultimate viability
8 of proposition). Defendant has contended, for example, that the managers were unaware of the off-the
9 clock work which was happening during clocked-out meal breaks, and therefore had not reason to know
10 or suspect that such off-the clock work was occurring. *See, e.g., Morillion v. Royal Packing Co.* (2000)
11 22 Cal. 4th 575, 585 (employer not required to pay employees for time spent performing work of which
12 the employer had no knowledge). Even if such a problem did exist, Defendant did not have such a
13 policy, and therefore, it is not a systematic problem across Defendant’s entire California workforce.

14 (v) For the same reasons, liability, damages recovery, and certification risks are heightened
15 given: (1) the risk that uncertainties pertaining to the ultimate legality of Defendant’s policies and
16 practices could preclude class-wide awards of statutory penalties under Labor Code section 226(e); (2)
17 the risk that individual differences between settlement Class Members could be construed as pertaining
18 to liability, and not solely to damages, *see, Duran*, 59 Cal.4th at 19; and (3) the risk that class or
19 collective treatment could be deemed improper as to one or more claims except for settlement purposes.

20 (vi) The risk that any civil penalties award under PAGA could be reduced by the Court in its
21 discretion could materially impact the recovery by the Class, *see* Labor Code section 2699(e)(1).

22 (vii) The risk that lengthy appellate litigation could ensue as to both liability and certification
23 issues, with associated litigation risk and costs, further enhances the value of a confirmed settlement as
24 opposed to unpredictable litigation.

25 (viii) Although the PAGA penalties calculated by Plaintiff’s expert amounts to an extravagant
26 \$2,770,200, that amount is not likely to bear fruit in this case. Most significantly, the ultimate decision
27 as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states:
28 “In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision

1 (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this
2 part if, based on the facts and circumstances of the particular case, to do otherwise would result in an
3 award that is unjust, arbitrary and oppressive, or confiscatory.” Subdivision (a) states, “Notwithstanding
4 any other provision of law, any provision of this code that provides for a civil penalty to be assessed and
5 collected by the Labor and Workforce Development Agency or any of its departments, divisions,
6 commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be
7 recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and
8 other current or former employees pursuant to the procedures specified in Section 2699.3.” Subdivision
9 (f) specifies the penalties in instances where the underlying statute does not specify any civil penalty. In
10 other words, where the facts and circumstances of the particular case demonstrate that an unreduced
11 award would be “unjust, arbitrary and oppressive, or confiscatory,” the court (or arbitrator) may reduce
12 the award so as to ameliorate any such finding. (Setareh Decl., ¶ 8.)

13 In these respects, Defendant strongly denies any liability and the propriety of class certification
14 for any reason other than settlement. (*Id.*) Continued litigation of this lawsuit presented Plaintiff and
15 Defendant with substantial legal risks that were (and continue to be) very difficult to assess. (*Id.*)

16 In light of the uncertainties of protracted litigation, the Settlement amount reflects a fair and
17 reasonable recovery for the Class Members. (*Id.*) The Settlement amount is, of course, a compromise
18 figure. (*Id.*) By necessity, it took into account risks related to liability, damages, class action
19 certification, and all the defenses asserted by Defendant as to all such matters. (*Id.*) Moreover, each
20 settlement Class Member will be given the opportunity to opt out of the Settlement, allowing those who
21 feel they have claims that are greater than the benefits they can receive under this Settlement to pursue
22 their own claims. (*Id.*)

23 **D. THE COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
24 **DIRECTING THAT NOTICE BE SENT**

25 “The notice given to the class must fairly apprise the class members of the terms of the proposed
26 compromise and of the options open to dissenting class members.” *Trotsky v. L.A. Fed. Sav. & Loan*
27 *Ass’n* (1975) 48 Cal.App.3d 134, 151-52. “The notice must be structured to enable class members to
28 decide whether to intervene or object, ‘opt out,’ or accept the settlement.” *Id.* at 152. Class notice must

1 strike a balance between thoroughness and the need to avoid unduly complicating the content of the
2 notice and confusing class members. *Wershba*, 91 Cal. App. 4th at 252. Furthermore, an appropriate
3 notice is one which has a reasonable chance of reaching the class members. *Cartt v. Superior Court*
4 (1975) 50 Cal.App.3d 960, 974.

5 The Notice of Class Action Settlement explains in plain and easily understood language what the
6 case is about; the class definition and claims; the settlement amount and approximate individual amount
7 each Class Member and/or PAGA Employee will receive; the requested amounts to be paid to class
8 counsel and as an enhancement award to the class representative; the rights of class members to opt out
9 or object to the Settlement's terms and the process by which they can do so; the binding effect of the
10 Settlement on those who do not request exclusion, including a description of the claims being released;
11 and the particulars of the final fairness hearing. (Settlement, ¶ 16, Ex. 2.)

12 The Parties' proposed plan for directing notice to the Class is also the best notice that is
13 practicable under the circumstances. Using last-known addresses provided by Defendants, the
14 Settlement Administrator will send the Notice by First Class U.S. Mail to all Class Members. (*Id.*, ¶ 16.)
15 Further, the Settlement Administrator will perform skip traces to obtain the correct address of any Class
16 Members for whom the Notice is returned as undeliverable and will attempt re-mailings where new
17 addresses are ascertained. (*Id.*)

18 **E. THE COURT SHOULD SET A HEARING FOR FINAL APPROVAL**

19 Finally, the Court should set a formal hearing to conduct an inquiry into the fairness of the
20 proposed settlement. Cal. Rule Ct. 7.769(e), (g). At the hearing, proponents of the Settlement may
21 explain and describe the terms and conditions and offer argument of settlement approval. Members of
22 the Settlement Class, or their counsel, may also appear and offer evidence and testimony in opposition to
23 the Stipulation of Settlement. The Parties request that the hearing on final approval of the settlement be
24 set 150 days from the Preliminary Approval Hearing, or as soon thereafter as may be convenient for the
25 Court.

26 **VI. CONCLUSION**

27 For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair,
28 adequate, and reasonable and that it is in the best interest of the Class Members. Under the applicable

1 class action criteria and guidelines, this Class should be conditionally certified, the Settlement should be
2 preliminarily approved, the Class should be notified regarding the Settlement, and the Court should
3 schedule a final approval hearing.
4

5 DATED: August 31, 2022

SETAREH LAW GROUP

6
7 /s/ Jose Maria D. Patino, Jr.

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