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9 PAULA JOHNSON, and all others similarly situated

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN FRANCISCO**
12 **(UNLIMITED JURISDICTION)**

13 PAULA JOHNSON, on behalf of herself, all
14 others similarly situated, the general public, and
15 as an “aggrieved employee” on behalf of other
16 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19 NAN MCKAY & ASSOCIATES, INC., a
20 California corporation; and DOES 1–50,
21 inclusive,

22 *Defendant(s).*
23

Case No. CGC-20-586796

**PLAINTIFF PAULA JOHNSON’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: February 27, 2023
Hearing Time: 9:30 a.m.
Hearing Dept.: 302

Action filed: September 24, 2020



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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Paula Johnson ("Plaintiff") submits this memorandum of points and authorities
5 in support of her unopposed motion for preliminary approval of the JOINT STIPULATION OF
6 CLASS ACTION SETTLEMENT AND RELEASE OF CLAIMS (the "Settlement
7 Agreement")², which provides for a Gross Settlement Amount ("GSA") of \$280,000.00 in
8 compromise of all disputed claims on behalf of all persons hourly or nonexempt employee in
9 California of Defendant Nan McKay & Associates, Inc. ("Defendant") in California at any time
10 between September 25, 2016 through the earlier of Court preliminary approval of this Settlement
11 or June 16, 2022. Through this Motion, Plaintiff respectfully requests for this Court to (1)
12 provisionally certify the below-defined Class for settlement purposes only under Code of Civil
13 Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as
14 Plaintiff; (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines of United
15 Employees Law Group as Class Counsel; (5) approve the proposed notice procedures and related
16 forms; and (6) schedule a final approval hearing.

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

27 **II. BACKGROUND**

28 Defendant is a provider of professional services to the affordable housing industry. DS, ¶
4. Defendant employed Plaintiff as a customer service representative from about November 4,
2019 until May 26, 2020. *Id.*

² The Settlement is attached as Exhibit ("Ex.") 1 to the Declaration of David Spivak ("DS"),
which is submitted herewith under a separate cover.



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

2 On July 24, 2020, Plaintiff notified Defendant and the California Labor and Workforce
3 Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of
4 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations
5 committed by Defendant. DS, ¶ 5, Ex. 2.

6 On September 24, 2020, Plaintiff filed a Class Action Complaint in the San Francisco
7 County Superior Court, Case No. CGC-20-586796, against Defendant on behalf of herself and
8 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All
9 Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to
10 Provide Meal Periods (Lab. Code §§226.7, 512 and 1198); (3) Failure to Provide Rest Breaks
11 (Lab. Code §§226.7 and 1198); (4) Wage Statement Penalties (Lab. Code § 226); (5) Waiting
12 Time Penalties (Lab. Code §§ 201, 202, and 203); and (6) Unfair Competition (Bus. & Prof. Code
13 §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On September 30, 2020, Plaintiff filed her First Amended
14 Complaint adding a claim under PAGA. DS, ¶ 6, Ex. 4. On December 29, 2020, Defendant filed
15 an answer to Plaintiff’s First Amended Complaint. DS, ¶ 6, Ex. 5. Defendant denies all of
16 Plaintiff’s allegations and strongly contends that its wage and hour policies, practices and
17 procedures are fully compliant with all applicable laws. DS, ¶ 6.

18 **B. Mediation**

19 The Parties thereafter engaged in an informal, voluntary exchange of information in the
20 context of privileged settlement discussions to facilitate an early mediation. Defendant produced
21 Plaintiff’s personnel file, time-keeping records, and paycheck data and records for the putative
22 class, and more detailed time and payroll data for a random sample of putative class members
23 specifically selected by Plaintiff’s counsel. DS, ¶ 7. Defendant represented that there were 314
24 Class Members. According to Defendant, the majority of the Class entered into arbitration
25 agreements with Defendant. Defendant presented approximately 263 arbitration agreements as
26 part of confirmatory discovery. *Id.*

27 On January 24, 2022, following much of the foregoing informal discovery and exchange
28 of information, the Parties participated in a mediation session presided over by Mediator Gig
Kyriacou, an experienced class action mediator. During the mediation, the Parties had a full day
of productive negotiations and reached agreement on a class-wide settlement. During the
mediation session, each side, represented by its respective counsel, recognized the risk of an
adverse result in the Action and agreed to settle the Action and all other matters covered by this



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Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 8.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the class as all persons Defendant employed in California as an hourly or nonexempt employee in California at any time between September 25, 2016 through the earlier of Court preliminary approval of this Settlement or June 16, 2022. (Settlement Agreement, § I.B.)

B. Monetary Terms

Subject to the terms and conditions of this Agreement, the Gross Settlement Amount of Two Hundred Eighty Thousand Dollars and Zero Cents (\$280,000.00), plus Defendant's employer share of employer-side payroll taxes, is the maximum amount payable by Defendant. In no event will Defendant be required to pay more than the Gross Settlement Amount for distribution to the Plaintiff, Class Counsel, Class Members, LWDA, and Settlement Administrator.

Payments to Plaintiff and Class Counsel and Others. Subject to the terms and conditions of this Agreement, the Settlement Administrator will make the following payments out of the Gross Settlement Amount as follows:

To Plaintiff: Class Representative Payment. In addition to her Settlement Share, Plaintiff will apply to the Court for an award of not more than Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) as her Class Representative Payment. Defendant will not oppose a Class Representative Payment of not more than \$7,500.00. Plaintiff will receive no other payment other than her Settlement Share and Class Representative Payment from this Settlement. The Settlement Administrator will pay the Class Representative Payment approved by the Court out of the Gross Settlement Amount. Payroll taxes, withholdings, and deductions will not be taken from the Class Representative Payment, and instead a Form 1099 will be issued to Plaintiff with respect to that payment. Plaintiff agrees to assume all responsibility and liability for the payment of taxes due on the Class Representative Payment. The Class Representative Payment is in exchange for the release of Released Claims against the Released Parties, the general Release of Claims by Plaintiff, and for Plaintiff's time, effort and risk in bringing and prosecuting the Action. Any adjustments made by the Court to the requested Class Representative Payment shall not be deemed a material modification of this Settlement Agreement. In the event that the Court reduces or does not approve the requested Class Representative Payment, the Settlement Agreement



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1 remains in full force and effect, Plaintiff shall not have the right to revoke the Settlement for that
2 reason, it shall remain binding, and any portion of the Class Representative Payment not awarded
3 to Plaintiff will not revert to Defendant, but instead shall be returned to the Net Settlement
4 Amount.

5 To Class Counsel. Class Counsel will apply to the Court for an award of not more than
6 Ninety-Three Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents
7 (\$93,333.33) (which is 33 and 1/3% of the Gross Settlement Amount) as their Class Counsel Fees
8 Payment and an amount not more than Fifteen Thousand Dollars and Zero Cents (\$15,000.00) as
9 their Class Counsel Litigation Expenses Payment, and Defendant will not oppose this request.
10 The Settlement Administrator will pay the amount approved by the Court (but not more than
11 Ninety-Three Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents
12 (\$93,333.33) in fees and not more than Fifteen Thousand Dollars and Zero Cents (\$15,000.00) in
13 expenses) out of the Gross Settlement Amount. Withholding and deductions will not be taken
14 from the Class Counsel Fees and Litigation Expenses Payment and one or more Forms 1099 will
15 be issued to Class Counsel with respect to those payments.

16 To the Settlement Administrator. The Settlement Administrator will be paid from the
17 Gross Settlement Amount its reasonable fees and expenses as approved by the Court in an amount
18 currently estimated to not exceed Ten Thousand Dollars and Zero Cents (\$10,000.00).

19 To the LWDA. The Parties will jointly apply to the Court for approval of a settlement of
20 claims under the Private Attorneys General Act (PAGA), California Labor Code section 2698, et
21 seq., for Four Thousand Dollars and Zero Cents (\$4,000.00), of which, payment from the Gross
22 Settlement Amount to the LWDA will be made in the amount of Three Thousand Dollars and
23 Zero Cents (\$3,000.00), which is 75% of the PAGA settlement. One Thousand Dollars and Zero
24 Cents (\$1,000.00), 25% of the PAGA settlement, will remain in the Net Settlement Amount for
25 distribution and will be distributed to PAGA Members on a pro rata basis based on the total
26 number of Individual Pay Periods worked by each PAGA Member during the PAGA Period.
27 PAGA Members shall receive their portion of the PAGA Penalties regardless of their decision to
28 submit a request for exclusion to opt out of the Settlement. (Settlement Agreement, § III.B-C.)

C. Timing of Payments

The Settlement Administrator shall establish a Settlement Account for distributing
Settlement Shares and Payments identified in this Agreement. Within ten (10) calendar days of

1 the Effective Date, Defendant shall pay the Gross Settlement Amount into the Settlement
2 Account. Should the 10th calendar day following the Effective Date fall on a weekend or
3 state/federal holiday, Defendant shall remit payment on the following weekday/non-holiday.
4 (Settlement Agreement, § IV.J.) The “Effective Date” is defined as follows: If no objection to
5 this Settlement or to any of the terms and or conditions of the Settlement are filed by Plaintiff,
6 another member of the Settlement class, or any intervenor to this Lawsuit, the Effective Date
7 shall occur on the day that the Court enters an order of final approval of this Settlement; however,
8 if any objection to this Settlement or to any of the terms and or conditions of the Stipulation is
9 filed by a member of the Settlement class, or any intervenor to this Lawsuit, the Effective Date
10 shall occur upon the expiration of the time for the filing any appeal of the order of final approval
11 of this Settlement provided that this Settlement has not been materially modified. If an appeal is
12 filed or any writ granted, then the Effective Date shall occur after the appeal has been dismissed
13 or the writ dissolved and when there is no further time to appeal the dismissal of the appeal or
14 the dissolution of the writ, provided that this Settlement has not been materially
15 modified. (Settlement Agreement, § I.J.)

14 **D. Calculation of Settlement Shares**

15 The Settlement Administrator shall assign to each Class Member a “Settlement Ratio,”
16 which shall be a fractional number comprised of (a) that Class Member’s Individual Pay Periods
17 as the numerator, and (b) the aggregate total of all Class Members’ Individual Pay Periods as the
18 denominator. The Settlement Administrator shall assign to each Class Member the “Settlement
19 Share” which shall be calculated by multiplying that Class Member’s Settlement Ratio by amount
20 allocated to Class Members from the Net Settlement Amount. (Settlement Agreement, § III.D.b.)

20 **E. Apportionment of Settlement Shares**

21 The settlement shares are allocated 33.33% to wages (for which employment taxes will
22 be deducted and W-2s issued) and 66.66% to penalties and interest (for which 1099s will be
23 issued). (Settlement Agreement, § III.D.a.)

24 **F. The Releases**

25 The Parties agree that it is their intent that the resolution set forth in this Settlement will
26 release and discharge the Released Claims by way of any further attempt, by lawsuit,
27 administrative claim or action, arbitration, demand, or other action of any kind by each and all of
28 the Settlement Class Members (including participation to any extent in any representative or
collective action) against the Released Parties. This release will not take effect until Defendant

1 has paid the Gross Settlement Amount in full per this Settlement Agreement. All PAGA
2 Members, regardless of whether they submit timely and valid requests for exclusion from the
3 Settlement, will release all Released Claims under PAGA against the Released Parties. The State
4 of California will also release all Released Claims under PAGA against the Released Parties.
(Settlement Agreement, § V.)

5 **“Released Claims”** shall mean all claims, rights demands, liabilities and causes of action
6 that are alleged, or reasonably could have been alleged based on the facts and claims during the
7 period of September 25, 2016 through the earlier of Court preliminary approval of this Settlement
8 or June 16, 2022 asserted in the Operative Complaint and/or in the letter(s) sent by Plaintiff to the
9 LWDA concerning Defendant and the other Released Parties, whether sounding in law or equity,
10 tort, contract, statute, or other applicable federal, state or local law or regulation, including but
11 not limited to the following claims: failure to pay wages (including minimum, regular, overtime
12 and double time wages), unauthorized and unlawful wage deductions, failure to provide meal
13 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
14 failure to issue proper wage statements, failure to timely pay wages, failure to maintain required
15 payroll records, unfair business practices that could have been premised on the claims, causes of
16 action or legal theories of relief described above or any of the claims, causes of action or legal
17 theories of relief pleaded in the Action, all claims under PAGA or for civil penalties that could
18 have been premised on the claims, causes of action or legal theories described above or any of the
19 claims, causes of action or legal theories of relief pleaded in the Action or Plaintiff’s letter(s) to
20 the LWDA, including but not limited to the California Code of Regulations and to Labor Code
21 sections 201, 202, 203, 204, 218.5, 221, 226, 226.3, 226.7, 510, 512, 558, 1174, 1194, 1197,
22 1197.1, 1198, 1199, 2698-2699, and 2800 and any and all damages, restitution, disgorgement,
23 civil penalties, statutory penalties, taxes, interest or attorney’s fees or costs resulting therefrom.
24 Released Claims shall not apply to claims for workers compensation benefits, unemployment
25 insurance benefits, or any other claim or right that as a matter of law cannot be waived or released.
26 The Parties acknowledge that Released Claims includes any claims for penalties by a PAGA
27 Member resulting from any LWDA investigation. The Parties will meet and confer in good faith
28 if the Court requires changes to the scope of the Released Claims. (Settlement Agreement, § I.U.)

“Released Parties” shall mean Defendant, and any of its former and present agents,
employees, servants, officers, directors, partners, trustees, representatives, shareholders,



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1 stockholders, attorneys, parents, subsidiaries, equity sponsors, related corporations, divisions,
2 joint venturers, assigns, predecessors, successors, service providers, insurers, consultants,
3 subcontractors, joint employers, employee benefit plans and fiduciaries thereof, affiliated
4 organizations, and all persons acting under, by, through or in concert with any of them, and each
5 of them. (Settlement Agreement, § I.V.)

6 **Release of Claims by Plaintiff.** Upon the Effective Date, and only after Defendant pays
7 the entirety of the Gross Settlement Amount, Plaintiff will be deemed to have released the
8 Released Parties of and from all of the Released Claims during the Class Period. These claims
9 include all claims alleged or could have been alleged based on the facts, circumstances, and/or
10 primary rights at issue in the Complaint and any amendments thereto. They include without
11 limitation: (1) all claims for failure to pay wages earned, including minimum wages, and overtime
12 wages; (2) all claims for failure to provide rest periods and claims for rest period premium pay;
13 (3) all claims for failure to provide meal periods and claims for meal period premium pay; (4) all
14 claims for failure to provide accurate wage statements and related penalties; (5) all claims for
15 failure to timely pay wages during employment and at termination; (6) all claims for violation of
16 California Business and Professions Code §§ 17200, et seq., to the extent such claims are
17 predicated on the other claims released herein; and (7) all claims for violation of PAGA and all
18 related claims for penalties, to the extent such claims are predicated on the other claims released
19 herein. Plaintiff's release set forth herein shall include a waiver of all rights under California Civil
20 Code §1542, which includes a release of all known and unknown claims against the Released
21 Parties during the Class Period. Civil Code section 1542 provides:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
23 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
24 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
25 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED
26 HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

27 Upon the Effective Date, Plaintiff will be deemed to have waived her rights under Civil
28 Code §1542 during the Class Period, as set forth above. However, Plaintiff's release excludes any
claim for worker's compensation. It also excludes her claims in the matter of Paula Johnson v.
Nan McKay & Associates, Inc., San Francisco Superior Court Case No. CGC-21-591646, which
has since been dismissed with prejudice.

1 **Class Counsel.** As of the date the Judgment becomes Final, and except as otherwise
2 provided by this Agreement, Class Counsel and any counsel associated with Class Counsel (The
3 Spivak Law Firm and United Employees Law Group), including without limitation David G.
4 Spivak, Esq. and Walter L. Haines, Esq., waive any claim to costs and attorneys fees and expenses
5 against Defendant or the Released Parties arising from or related to the Action, except those
6 incurred to enforce this Agreement and collect the Judgment.

7 **Tax Liability.** Defendant makes no representation as to the tax treatment or legal effect
8 of the payments called for in this Agreement, and Plaintiff, Settlement Class Members, and PAGA
9 Members are not relying on any statement, representation, or calculation by Defendant or by the
10 Settlement Administrator in this regard. Plaintiff, Settlement Class Members, and PAGA
11 Members understand and agree that except for Defendant's payment of the employer's portion of
12 any payroll taxes, they will be solely responsible for the payment of any taxes and penalties
13 assessed on the payments described herein.

14 **Circular 230 Disclaimer.** EACH PARTY TO THIS AGREEMENT (FOR PURPOSES
15 OF THIS SECTION, THE ACKNOWLEDGING PARTY AND EACH PARTY TO THIS
16 AGREEMENT OTHER THAN THE ACKNOWLEDGING PARTY, AN OTHER PARTY)
17 ACKNOWLEDGES AND AGREES THAT: (1) NO PROVISION OF THIS AGREEMENT,
18 AND NO WRITTEN COMMUNICATION OR DISCLOSURE BETWEEN OR AMONG THE
19 PARTIES OR THEIR ATTORNEYS AND OTHER ADVISERS, IS OR WAS INTENDED TO
20 BE, NOR WILL ANY SUCH COMMUNICATION OR DISCLOSURE CONSTITUTE OR BE
21 CONSTRUED OR BE RELIED UPON AS, TAX ADVICE WITHIN THE MEANING OF
22 UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 (31 CFR PART 10, AS
23 AMENDED); (2) THE ACKNOWLEDGING PARTY (A) HAS RELIED EXCLUSIVELY
24 UPON HIS, HER OR ITS OWN, INDEPENDENT LEGAL AND TAX COUNSEL FOR
25 ADVICE (INCLUDING TAX ADVICE) IN CONNECTION WITH THIS AGREEMENT, (B)
26 HAS NOT ENTERED INTO THIS AGREEMENT BASED UPON THE RECOMMENDATION
27 OF ANY OTHER PARTY OR ANY ATTORNEY OR ADVISOR TO ANY OTHER PARTY,
28 AND (C) IS NOT ENTITLED TO RELY UPON ANY COMMUNICATION OR DISCLOSURE
BY ANY ATTORNEY OR ADVISER TO ANY OTHER PARTY TO AVOID ANY TAX
PENALTY THAT MAY BE IMPOSED ON THE ACKNOWLEDGING PARTY; AND (3) NO
ATTORNEY OR ADVISER TO ANY OTHER PARTY HAS IMPOSED ANY LIMITATION



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1 THAT PROTECTS THE CONFIDENTIALITY OF ANY SUCH ATTORNEY S OR ADVISER
2 S TAX STRATEGIES (REGARDLESS OF WHETHER SUCH LIMITATION IS LEGALLY
3 BINDING) UPON DISCLOSURE BY THE ACKNOWLEDGING PARTY OF THE TAX
4 TREATMENT OR TAX STRUCTURE OF ANY TRANSACTION, INCLUDING ANY
5 TRANSACTION CONTEMPLATED BY THIS AGREEMENT. (Settlement Agreement, § V.)

6 **G. Non-Publicity Provision**

7 The Parties and their counsel agree that they will not issue any press releases, initiate any
8 contact with the press, respond to any press inquiry, or have any communication with the press
9 about the fact, amount, or terms of the Settlement. In addition, the Parties and their counsel agree
10 that they will not engage in any advertising or distribute any marketing materials relating to the
11 Settlement of this case in any manner that identifies the Defendant, including but not limited to
12 any postings on any websites maintained by Class Counsel. Neither Plaintiff nor Class Counsel
13 will discuss the terms or the fact of the Settlement with third parties other than (1) their immediate
14 family members, (2) their respective accountants or lawyers as necessary for tax purposes; or (3)
15 other Class Members. Plaintiff and Class Counsel agree not to publish any of the terms or
16 conditions of this Settlement in any manner that identifies the Defendant. However, Class Counsel
may identify this Settlement in other matters to demonstrate their adequacy as counsel in such
other matters. (Settlement Agreement, § VI.)

17 **H. Notice and Claims Process and Procedures**

18 Notice to Class Members. After the Court enters its order granting Preliminary Approval
19 of the Settlement, every Class Member will be provided with a Class Notice.

20 Within fourteen (14) days after the Court grants Preliminary Approval of the Settlement,
21 Defendant shall provide to the Settlement Administrator: (a) An electronic database of all Class
22 Members, last known mailing address, Social Security number, and Defendant's employee
23 identification number (Class Members Data). (b) Corresponding to each Class Member's name,
24 Defendant shall provide a figure indicating the total number of Pay Periods during the Class
25 Period in which that Class Member was employed by Defendant as a Class Member. That number
26 of Pay Periods shall be referred to as that Class Member's Individual Pay Periods. (c) If any of
27 the Class Members Data are unavailable to Defendant, Defendant will so inform Class Counsel
28 and the Parties will make their best efforts to reconstruct or otherwise agree upon the Class
Members Data prior to when it must be submitted to the Settlement Administrator. Class
Members Data will otherwise remain confidential and will not be disclosed to anyone, except as



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1 necessary to applicable taxing authorities, or pursuant to Defendant's express written
2 authorization or by order of the Court.

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

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

21 Not later than twenty-one (21) court days prior to the Final Approval Hearing, the
22 Settlement Administrator will provide the Parties for filing with the Court a declaration of due
23 diligence setting forth its compliance with its obligations under this Agreement. Prior to the Final
24 Approval Hearing, the Settlement Administrator will supplement its declaration of due diligence
25 if any material changes occur from the date of the filing of its prior declaration. (Settlement
26 Agreement, § IV.B.)

27 **1. Class Member Disputes**

28 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
disputes and supporting documents must be postmarked by the Response Deadline. A Class



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1 Member may submit any document to the settlement administrator supporting his/her assertion
2 of the number of Pay Periods s/he contends s/he worked in connection with the dispute. Absent
3 evidence rebutting Defendants records, Defendant's records will be presumed determinative.
4 However, if a Class Member produces evidence contrary to Defendant's records by the Response
5 Deadline, the Settlement Administrator shall notify Class Counsel and Defense Counsel to discuss
6 and resolve the dispute, including providing all available relevant information to all counsel. The
7 Parties will resolve all disputes jointly, which shall be final and binding on any Class Member
8 disputes, and shall thereafter instruct the Settlement Administrator how to proceed in processing
9 the dispute. If the Parties cannot reach an agreement, the dispute shall be submitted to the Court
10 for final determination. All such disputes are to be resolved or submitted to the Court not later
than fourteen (14) calendar days after the Response Deadline. (Settlement Agreement, § IV.C.)

11 **2. Opting Out**

12 Class Members may submit requests to be excluded from the effect of the Settlement, or
13 objections to the Settlement, pursuant to the following procedures:

14 A Class Member may request to be excluded from the effect of this Agreement, and any
15 payment of amounts under this Agreement, by timely mailing a letter to the Settlement
16 Administrator stating that the Class Member wants to be excluded from this Action. This letter
17 must include the Class Member's name, address, telephone number, signature, and a clear
18 statement requesting to be excluded from the settlement of the class claims, as set forth on the
19 Request for Exclusion or similar to the following: "I wish to exclude myself from the class
20 settlement reached in the matter of *Johnson v. Nan McKay & Associates, Inc.*. I understand that
21 by excluding myself, I will not receive money from the settlement of my individual claims." To
22 be valid and timely, the request to be excluded must be postmarked by the Response Deadline
23 and received by the Settlement Administrator. A Class Member who properly submits a valid
24 and timely request to be excluded from the Action shall not receive any payment of any kind in
25 connection with this Agreement or this Action, shall not be bound by or receive any benefit of
26 this Agreement, and shall have no standing to object to the Settlement, except that the request for
27 exclusion shall not be effective as to the release of claims arising under PAGA and shall not
28 preclude the Class Member from receiving their share of the PAGA Penalties. A request for
exclusion must be mailed to the Settlement Administrator at the address provided on the Class
Notice. The Settlement Administrator shall transmit the request for exclusion to counsel for the



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Parties as follows:

To Class Counsel:

David G. Spivak, Esq.
The Spivak Law Firm
8605 Santa Monica Bl
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West Hollywood, CA 90069

To Defense Counsel:

Debra Ellwood Meppen, Esq.
Peter Choi, Esq.
Gordon Rees Scully Mansukhani, LLP
633 West Fifth Street
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(Settlement Agreement, § IV.D.1.)

3. Objecting

The Class Notice will provide that any Class Member who does not request exclusion from the Action and who wishes to object to the Settlement should submit an objection in writing to the Settlement Administrator. To be valid, an objection must be postmarked by the Response Deadline and received by the Settlement Administrator. The written objection to the Settlement should set forth the grounds for the objection and the other information required by this paragraph. The objection should be mailed to the Settlement Administrator at the address provided on the Class Notice. The Settlement Administrator shall transmit the objections to counsel for the Parties. Counsel will promptly file such objection with the Court.

The written objection should state the objecting Class Member's full name, address, and the approximate dates of his or her employment with Defendant. The written objection should state the basis for each specific objection and any legal support in clear and concise terms.

Regardless of whether an objecting Class Member complies with the objection procedure encouraged above, the Court will provide a Class Member with the opportunity to speak at the final approval hearing regardless of whether he or she has filed an appearance or submitted a written opposition beforehand. If the Court rejects the Class Member's objection, the Class Member will still be bound by the terms of this Agreement. (Settlement Agreement, § IV.D.2.)

I. Uncashed Checks

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



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

2 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
3 and its members are too numerous for joinder to be practical; (2) the representative and absent
4 class members share a community of interest and questions of law and fact common to the class
5 predominate over questions unique to individual class members; (3) the representative's claims
6 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
7 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
8 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
9 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

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

11 A class is ascertainable when it may be readily identified without unreasonable expense
12 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
13 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
14 defined Class is ascertainable because its members may be identified by reference to Defendant's
15 records and Defendant has agreed to share the relevant information from its records to facilitate
16 the settlement process. DS, ¶ 9; Settlement, § IV.B.1. Therefore, the Settlement Class is
ascertainable.

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

18 The Settlement Class has sufficiently numerous members to render joinder impractical.
19 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
20 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 314 Class
21 Members. DS, ¶ 10. Plaintiff maintains that it would be impractical and economically inefficient
22 to require each Class Member to separately maintain an individual action or be joined as a named
23 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
24 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
the Settlement Class' membership is sufficiently numerous. DS, ¶ 10. *See Daar v. Yellow Cab*
Co. (1967) 67 Cal.2d 695.

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

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



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

6 To justify certification, the class proponent ““must show ... that questions of law or fact
7 common to the class predominate over the questions affecting the individual members”” *See*,
8 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank*,
9 *FA v. Superior Court*, 248 Cal.4th 906, 913 (2001)). In light of the more lenient standard for
10 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
11 the claims of the Class Members all stem from the same sources. DS, ¶ 11.

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

D. Plaintiff Is Typical of the Settlement Class

The class representative must be similarly situated to the rest of the purported class. *See*



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

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

14 The adequacy requirement is met where the plaintiff is represented by counsel qualified
15 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
16 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
17 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
conflicts of interest that might hinder the plaintiff’s ability to represent the class. DS, ¶ 13.

18 First, Class Counsel have supplied the Court with declarations to show that they are
19 adequate to represent the Settlement Class and that they have significant experience in
20 employment litigation generally, and wage and hour and employment-related class action
21 litigation specifically. *See* DS, ¶¶ 15-22; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
Thus, Plaintiff’s counsel are adequate to serve as Class Counsel.

22 Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the
23 Class Members have strong and co-extensive interests in this litigation because they all worked
24 for Defendant during the relevant time period, allegedly suffered the same alleged injuries from
25 the same alleged course of conduct, and there is no evidence of any conflict of interest between
26 Plaintiff and the Class Members. DS, ¶ 14. Moreover, Plaintiff has demonstrated her commitment
27 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
28 with documents and extensively speaking with them to assist in identifying the claims asserted in



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1 this case, assisting them in identifying witnesses, as well as exposing herself to the risk of
2 attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 14. Thus,
3 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
4 find that Plaintiff and her counsel are adequate to represent the Settlement Class as required under
5 Code of Civil Procedure § 382.

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

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

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

19 **A. Legal Standard**

20 A class action settlement requires court approval. California Rules of Court (“CRC”), Rule
21 3.769 provides three steps for approval: (1) Preliminary approval after submission of a written
22 motion for preliminary approval, the proposed class settlement, and the proposed class notice; (2)
23 Issuance of notice of settlement to class members; and (3) A final settlement approval hearing
24 where class members may be heard regarding the settlement, and at which evidence and argument
25 concerning the fairness, adequacy, and reasonableness of the settlement is presented. The decision
26 to approve or reject a class settlement is committed to the Court’s broad discretion. *Kullar v. Foot*
27 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve class settlement
28 may be reversed only upon a showing of “clear abuse of discretion.” *Id.*

B. The Settlement Is Presumptively Fair

In assessing preliminary approval, a court evaluates if the settlement process has certain
indicia of fairness. 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



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objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th at 1794.

The class settlement here satisfies all of these factors. DS, ¶ 24. The Settlement resulted from thorough, arms’ length, negotiations between experienced counsel with the assistance of a respected mediator after sufficient discovery was exchanged to assess the relative strengths and weaknesses of their respective cases and Defendant’s estimated exposure. *Id.*

Plaintiff prepared “damages” estimates in advance of the mediation. DS, ¶ 25, Ex. 6. In advance of the mediation, Plaintiff determined Defendant’s maximum exposure for restitution and penalties to be approximately \$4,235,013.43 (consisting of \$13,572.88 in unpaid wages, \$417,078.39 in missed meal period premium wages, \$449,161.34 in missed rest break premium wages, \$391,644.00 for wage statement penalties, \$770,772.18 for waiting time penalties, and \$3,341,627.93 for civil penalties). Plaintiff calculated the damages based on the number of workweeks and pay periods provided by Defendant, Plaintiff’s reports, and the sample data. *Id.* Plaintiff also considered the possibility that Defendant could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class Members Plaintiff’s Counsel applied discounts to the maximum exposure to account for all other risks discussed below. While it is difficult to assign anything but crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone justifies a significant discount because Defendant would likely by trial have gathered releases from the majority of the Class Members.

Plaintiff is aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts.³ DS, ¶ 38. PAGA penalty awards are often

³ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from plaintiff’s claim for approximately \$33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant’s policies caused damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court noted had received “millions of dollars from the state of California” to train their flight attendants, engaged in glaring violations of the labor code, such as failing to compensate its flight attendants for work performed outside of “block time” (time during which the aircraft is moving), including time spent participating in pre-flight briefings, boarding passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049, 1055-1058. Indeed, the defendant’s liability was so clear in *Bernstein* that the case was resolved

1 small even for egregious, intentional violations of the Labor Code.⁴ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
5 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
6 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
7 result could occur here. *Id.*

8 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
9 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
10 \$280,000.00 is fair and reasonable. *Id.*

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

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

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

21 **a. Risks Associated With the Arbitration Agreements**

22 The arbitration agreements entered into between Defendant on the one hand, and the Class
23 Members, on the other, present a significant risk to the success of Plaintiff's class action
24 litigation. DS ¶ 27. Defendant represents that there are 319 Class Members. According to

25 on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019)
26 U.S. Dist. LEXIS 13253.

27 In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
28 awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
comply with the requirements of California Labor Code section 226.

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



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1 Defendant, the majority of the Class entered into arbitration agreements with Defendant.
2 Defendant presented approximately 263 arbitration agreements in confirmatory discovery. *Id.*
3 As the arbitration agreements in question restrict potential litigants from bringing class actions
4 against Defendant, Plaintiff would be effectively barred from pursuing claims on behalf of the
5 Class in Court. *Id.* Thus, there is a significant risk the Court could determine that those Class
6 Members who have not entered into arbitration agreements with Defendant do not constitute a
7 sufficiently numerous class to justify class action treatment. As such, by continuing to trial on
8 class-wide claims, Plaintiff would run the high risk of suffering defeat due to the existence of the
9 arbitration agreement. Moreover, the arbitration agreements would pose danger to any class
10 certification motion brought by Plaintiff. Because different defenses would apply to some Class
11 Members and not others – i.e., the existence of signed arbitration agreements – there is a risk that
12 the Court could determine that Plaintiff’s claims present too many individualized inquiries to
13 justify class certification. *Id.*

13 **b. Risks Associated with Off The Clock Theory For Unpaid**
14 **Wages**

14 There is a risk that Plaintiff’s recovery for unpaid wages would be extremely limited at
15 best, largely because Defendant’s written policies throughout the relevant time-period prohibited
16 off-the-clock work. DS, ¶ 28; Ex. 7 (Employee Handbook, NM000050.) Off-the-clock claims are
17 difficult where a defendant requires in its written policies that all work must take place while
18 clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer must
19 have notice of off-the-clock work for it to be compensable). *Id.* In its written employment policies,
20 Defendant mandates that employees must record all time worked accurately on their time records
21 and strictly prohibit employees from performing any work off-the-clock. DS, ¶ 41. Moreover,
22 while Defendant disputes that off-the-clock work occurred, it contends that if any time spent off
23 the clock was worked it was *de minimis*. The California Supreme Court in *Troester v. Starbucks*
24 *Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and minute periods of time may still be
25 subject to a *de minimis* defense even if compensable. (Stating that “We do not decide whether
26 there are circumstances where compensable time is so minute or irregular that it is unreasonable
27 to expect the time to be recorded.”). Following *Troester*, Defendant contends that the *de minimis*
28 doctrine may apply here because the time spent off the clock were minute and insignificant.
Accordingly, a large award of penalties seems unlikely with respect to this claim. *Id.*

The difficulty inherent in proving that off-the-clock work occurred poses a significant



1 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
2 Generally, a court will not certify a class unless it can determine an appropriate class-wide
3 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
4 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
5 the lack of records indicating when such off-the-clock work may have taken place. Individualized
6 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
7 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
8 risk that the Court would consider this evidentiary showing insufficient as a class-wide
methodology. DS, ¶ 29.

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

10 There are risks to Plaintiff’s meal period claim. DS, ¶ 30. Defendant contends that, to
11 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
12 was not taken. *Brinker*, 53 Cal.4th at 1004. So long as an employer provides employees with a
13 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
14 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
15 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
16 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
17 to the meal break claim is the reason that a particular employee may have failed to take a meal
break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

18 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
19 from taking their meal or rest periods. DS, ¶ 31. Defendant’s policies mandate that employees
20 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
21 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
22 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
23 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
24 individualized evidence may be necessary to determine whether they occurred due to conduct of
25 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
the value of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

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

27 There are risks to Plaintiff’s rest period claim. DS, ¶ 32. Employers are not required to
28 record rest periods and such periods are paid. *Id.* Defendant contends it provided non-exempt
employees the opportunity to take rest periods in accordance with California law. Further,

1 Defendant's written policies on meal and rest periods are consistent with the Wage Order. *Id.*
2 Thus, unlike meal periods, where there are often records showing whether an employee clocked
3 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
4 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
5 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
6 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
7 a trial management and due process perspective. *Id.*, See *Duran v. U.S. Bank National Assn.*,
8 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
9 certification, it may be possible to manage individual issues through the use of surveys and
10 statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

11 **e. Risks Associated with the Statutory "Wage Statement"**
12 **Penalty Claims**

13 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
14 PAGA penalties. Under Labor Code section 226, wage statements must include various
15 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
16 DS, ¶ 33.

17 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
18 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply
19 with the requirements of Labor Code § 226. DS, ¶ 33.

20 **f. Risks Associated with The Waiting Time Penalties Claim**

21 Plaintiff's claims for untimely wages are predicated on Labor Code §§ 201, 202, and 203.
22 Like the claim under Labor Code § 226, Plaintiff must establish that the late payments were
23 willful. The evidence of good faith Defendant will put forward could potentially defeat this claim.
24 DS, ¶ 35.

25 **g. Risks Associated With the PAGA Claim**

26 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
27 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
28 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid
defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA
claims likewise face significant uncertainty. DS, ¶ 36. There is a risk that the Court would consider
the maximum civil penalty available to be confiscatory. This is particularly the case considering



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1 Defendant's financial condition. *Id.* Moreover, the current COVID-19 pandemic could motivate
2 the Court to further reduce the penalty award to avoid what it may consider a confiscatory taking.
3 *Id.*

4 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
5 significant discount for settlement purposes. DS, ¶ 37. For mediation purposes, Plaintiff's counsel
6 estimated a maximum exposure of approximately \$3,341,627.93 in civil penalties. This estimate
7 did not take into account any of the risks discussed above and assumed a violation for every single
8 pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the
9 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
10 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
11 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
12 Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
13 penalties for the same violation for the same pay period under different Labor Code provisions.
14 *Id.* This may be because the PAGA does not provide for what many employers characterize as
15 claim splitting and not merely stacking. *Id.*

16 **h. Risks Associated With A Pick-Up Stix Campaign**

17 An employer enjoys the right to settle a putative class member's disputed wage claims
18 individually, without the consent or involvement of class counsel. DS, ¶ . (See *Chindarah v. Pick*
19 *Up Stix, Inc.* (2009) 171 Cal.App. 4th 796. *Id.* As discussed above, Defendant may launch a "pick
20 off" settlement campaign to pursue individual release agreements from the Class Members,
21 thereby potentially narrowing the size of the Settlement Class – 69 members - until it is no longer
22 numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient number of
23 employees to represent. This led to a significant reduction of claim value in settlement
24 negotiations. *Id.*

25 While the evidence gathered through Plaintiff's discovery supports the merits of the
26 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
27 presents significant risks that support a downward departure from Defendant's estimated liability
28 exposure. DS, ¶ 42. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
amount of damages, monetary penalties or other relief that the Class could reasonably expect to
be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
It also represents a fair, adequate, and reasonable compromise amount for these claims and



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warrants preliminary approval. *Id.*, *Torrise v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the reasonableness of the settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3.

2. Allocation of the PAGA Payment

The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and appropriate under the circumstances. DS, ¶ 43. The Parties negotiated a good faith amount for PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D.Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The amount to be paid to the LWDA comports with PAGA settlement amounts approved by other courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D.Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D.Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D.Cal. Nov. 27, 2012) 2012



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1 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement);
2 *Garcia v. Gordon Trucking* (E.D.Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (approving PAGA
3 payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

4 **3. Presence of Governmental Participant**

5 As required under Labor Code section 2699(1)(2), Plaintiffs will provide notice of this
6 settlement to the LWDA. DS, ¶ 52, Ex. 13.

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

8 If the settlement is preliminarily approved, Class Members will be provided with the Class
9 Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 49. The
10 parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
11 will allow Class Members to make informed responses to the proposed settlement. *Id.*

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

16 The Individual Settlement Payments will be paid to each Class Member based on his or
17 her eligible Pay Periods compared to the total Pay Periods. DS, ¶ 48, Settlement § III.D(b).
18 Because this method compensates Class Members based on the extent of their potential injuries,
19 in that Class Members who worked for Defendant longer would have been subject to more alleged
20 violations, it is fair, adequate, and reasonable. *Id.*

21 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'
22 FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE**

23 The Settlement states Class Counsel may seek attorneys' fees of \$93,333.32 (one-third of
24 the GSA) and up to \$15,000.00 for actual reasonable litigation costs and expenses incurred in
25 prosecuting the Action. Settlement § 45. These amounts are reasonable, given the facts and
26 circumstances of the case.

27 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
28 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
Beneficial Cal., Inc. (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
v. Moses (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)

1 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
2 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
3 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
4 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
5 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

6 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
7 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
8 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
9 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
10 down to devote time to this matter. DS, ¶ 45. Class Counsel interviewed and obtained information
11 from putative class members, met and conferred with Defendant's counsel on numerous
12 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
13 Defendant and obtained through other sources, researched applicable law, and provided
14 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

15 Class Counsel have borne all the risks and costs of litigation and will receive no
16 compensation until recovery is obtained. DS, ¶ 46. Class Counsel are well-experienced in wage-
17 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
18 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
19 the requested fees and costs are reasonable and should be awarded. *Id.*

20 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO PLAINTIFF SHOULD BE**
21 **PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
22 **REASONABLE**

23 Courts routinely approve incentive awards to compensate named plaintiffs for the services
24 they provide and the risks they incur during class action litigation, often in much higher amounts
25 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
26 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
27 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
28 enhancement award). The Settlement provides that Plaintiff may seek an Class Representative
Payment of \$7,500.00. This amount is entirely reasonable given Plaintiff's efforts in this action
and the risks she undertook on behalf of Class Members. DS, ¶ 47. Plaintiff has devoted many
hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
things, retaining experienced counsel, providing them with information about her work history



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1 with Defendant and Defendant's policies and practices with respect to the wage and hour claims
2 at issue, participating in mediation, and being actively involved in the settlement process to ensure
3 a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to
4 significant risks, including the risk of an order to pay Defendant's attorneys' fees and costs if this
5 action had been unsuccessful (See Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff
6 undertook on behalf of the Settlement Class shows that the proposed Class Representative
7 Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 47.

8 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
9 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE, AND**
10 **REASONABLE**

11 With regard to the settlement administration costs provision, it is reasonable. Before
12 agreeing to CPT Group, Inc. and its bid of \$10,000.00, the Parties sought and reviewed bids from
13 other reputable third-party administrators which provided comparable bids. DS, ¶ 50-51, Exs. 10,
14 11, and 12. Thus, the settlement administration costs provision should be given preliminary
15 approval.

16 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
17 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
18 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
19 **EXERCISE THEIR RIGHTS**

20 This Court should approve the proposed plans for giving notice to the Settlement Class
21 and administering the Settlement. The standard for determining the adequacy of notice is whether
22 the notice has "a reasonable chance of reaching a substantial percentage of the class members."
23 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
24 measures to ensure that as many Class Members as practicable receive actual notice of the
25 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
26 the Notice by First Class U.S. mail only. Settlement, § IV.B.2. Although there are current
27 employee Class Members, it is uncertain whether Defendant's records of their contact information
28 include email addresses and Class Members, who perform all of their work away from a desk, are
not in a position to check their emails. As such, notice by mail alone is fair, adequate, and
reasonable. DS, ¶ 49.

With respect to its content, "[The] notice given to the class must fairly apprise the class
members of the terms of the proposed compromise and of the options open to dissenting class
members." *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.

1 The purpose of the notice in class settlement context is to give class members sufficient
2 information to decide whether they should accept the benefits offered, opt out and pursue their
3 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
4 Class Members with all pertinent information that they need to fully evaluate their options and
5 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
6 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
7 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
8 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
9 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
10 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
11 include the number of Pay Periods a Class Member had during the Class Period. Accordingly, the
12 Notice should be approved because it describes the Settlement with sufficient clarity and
13 specificity to explain to Class Members what this action is about, their rights under the Settlement,
14 and how to exercise those rights. DS, ¶ 49.

15 **XI. CONCLUSION**

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

18 Respectfully submitted,

19 THE SPIVAK LAW FIRM

20 Dated: January 26, 2023

21 By: 

22 DAVID G. SPIVAK
23 MAYA CHEAITANI, Attorney for
24 Plaintiff, PAULA JOHNSON, and all
25 others similarly situated



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