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8 Attorneys for Plaintiff,
9 CHRIS MARCUS CALKINS, and all others similarly situated

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

13 CARISSA CALKINS, 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 UNITED SECURITY SERVICES, INC., an
20 Illinois corporation; and DOES 1–50, inclusive,

21 *Defendant(s).*
22
23

Case No. 20STCV35391

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

Hearing Date: December 9, 2024
Hearing Time: 10:00 a.m.
Hearing Dept.: SSC-7, The Honorable
Lawrence P. Riff

Action filed: September 16, 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 Chris Marcus Calkins née Carissa Calkins (“Plaintiff”) submits this
5 memorandum of points and authorities in support of his unopposed motion for preliminary
6 approval of the Class Action and PAGA Settlement and Class Notice (the “Settlement” or
7 “Settlement Agreement”)², which provides for a Gross Settlement Amount (“GSA”) of
8 \$350,000.00 in compromise of all disputed claims on behalf of all hourly, non-exempt security
9 guards Defendant United Security Services, Inc. (“Defendant”) employed during the period of
10 September 16, 2016 through May 31, 2024. Through this Motion, Plaintiff respectfully requests
11 for this Court to (1) provisionally certify the below-defined Class for settlement purposes only
12 under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily
13 appoint Plaintiff as Class Representative; (4) appoint David Spivak of The Spivak Law Firm and
14 Walter L. Haines of United Employees Law Group as Class Counsel; (5) approve the proposed
15 notice procedures and related forms; and (6) schedule a final approval hearing.

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

26 **II. BACKGROUND**

27 Defendant provides security guard services to its customers in different industries such as
28 hospitality and entertainment industries. DS, ¶ 4. Defendant employed Plaintiff in California as a
security guard from about December 27, 2019 until March 2, 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 7, 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 16, 2020, Plaintiff filed a Class Action Complaint in the Los Angeles
7 County Superior Court, Case No. 20STCV35391, against Defendant on behalf of himself 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 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab.
11 Code §§226.7, 512 and 1198); (4) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (5)
12 Waiting Time Penalties (Lab. Code §§ 201-203); (6) Unfair Competition (Bus. & Prof. Code §§
13 17200, *et seq.*); and (7) Civil penalties under PAGA. DS, ¶ 6, Ex. 3. On March 26, 2021,
14 Defendant filed an answer to Plaintiff’s Complaint. DS, ¶ 6, Ex. 4. Defendant denies all of
15 Plaintiff’s allegations and strongly contends that its wage and hour policies, practices and
16 procedures are fully compliant with all applicable laws. DS, ¶ 6.

17 **B. Investigation and Sampling**

18 On November 30, 2021, Plaintiff requested that Defendant informally disclose documents
19 and data to enable Plaintiff to prepare for settlement discussions, including the number of putative
20 class members and aggrieved employees, the number of paychecks and workweeks for the various
21 limitations periods applicable to Plaintiff’s claims. DS, ¶ 7. Plaintiff also requested a reasonable,
22 randomly selected sample of Defendant’s time, payroll, and expense records, and related
23 personnel records. *Id.* Finally, Plaintiff requested Defendant’s written policies applicable to the
24 claims at hand and asked Defendant identify any and all comparable claims against it.

25 The Parties thereafter engaged in an informal, voluntary exchange of information in the
26 context of privileged settlement discussions to facilitate an early mediation. Defendant produced
27 Plaintiff’s entire personnel file (including policies and agreements he signed and acknowledged)
28 and copies of its relevant company written policies. DS, ¶ 8.

 Defendant disclosed that there have not been any comparable claims against it. Defendant
disclosed and/or Plaintiff discovered the following comparable claims: . DS, ¶ 13.

 Plaintiff chose certain months during the relevant period and Defendant produced
handwritten time sheets and payroll records and related records for all employee who worked for



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1 Defendant during those selected months. Defendant contends that it employed 2,669 putative
2 class members during the relevant time period. There were records for 420 employees in the
3 sample. Defendant, therefore, produced the records of 15.56% of the putative class members. DS,
¶ 9.

4 Plaintiff retained James Toney, a data analyst, to analyze the sample. Plaintiff also
5 employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to
6 determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004)
7 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative
8 margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin
9 of error of 43.3 percent was unacceptable. Using a margin of error of 32.4%, a confidence level
10 of 95%, and a population size of 2,669, the Raosoft Sample Size Calculator recommended a
11 sample of 10. DS, ¶ 10, **Exhibit 5**. Thus, the sample population that Plaintiff's data analyst
12 evaluated is statistically reliable. *Id.*

13 **C. Mediation**

14 On July 17, 2023, following much of the foregoing informal discovery and exchange of
15 information, the Parties participated in a mediation session presided over by Mediator Louis
16 Marlin, an experienced class action mediator. During the mediation, the Parties had a full day of
17 productive negotiations and reached agreement on a class-wide settlement after the mediation
18 session. During the mediation sessions, each side, represented by his / its respective counsel,
19 recognized the risk of an adverse result in the Action. The Parties did not reach a settlement at the
20 mediation but continued their negotiations and ultimately agreed to settle the Action and all other
21 matters pursuant to the terms and conditions of this Settlement Agreement. DS, ¶ 11.

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27 ³ Raosoft advertises, “Raosoft, Inc. produces EZSurvey for the
28 Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software
programs for information gathering and analysis. The family of survey software supports data
collection and reporting for any form-based data. Support is for web-surveys and forms, email
distribution, diskette, PDA, laptop or pen-based: all types of distribution.” The Raosoft webpage
advertises that is it “database web survey software for gathering information.”
<http://www.raosoft.com/> . It also advertises, “The parameters of the sample size calculation are
something that you choose.” <http://www.raosoft.com/suggestreading.html>.

1 **D. Defendant's Financial Condition**

2 At the mediation, it became clear that Defendant had insufficient resources to cover the
3 full extent of liability. DS ¶ 12. As part of the settlement negotiations, Defendant disclosed its
4 balance sheets, profit and loss statements, bank statements, and related information for 2021,
5 2022, 2023. *Id.* Plaintiff's Counsel has reviewed the financial records. *Id.* The information
6 provided was sufficient to demonstrate the financial condition of the Defendant and that it will
7 unlikely be able to afford payment of a larger amount than the Settlement amount. Based on such
8 records, Plaintiff, on his own behalf and on behalf of the Class Member, has agreed to settle the
lawsuit on the terms set forth in the Settlement. *Id.*

9 **III. OVERVIEW OF THE SETTLEMENT**

10 **A. Settlement Class and Aggrieved Employees Definition**

11 The Settlement defines the Settlement Class as all of Defendant's hourly, non-exempt
12 California Security guard employees during the Class Period. "Class Period" means the period
13 from September 16, 2016 to May 31, 2024. The "Aggrieved Employees" are all persons employed
14 by Defendant in California and classified as hourly, non-exempt security guards who worked for
15 Defendant during the PAGA Period. "PAGA Period" means the period from July 7, 2019 to May
31, 2024. 1.32. The "PAGA Period" begins July 07, 2019 and ends April 24, 2024. Settlement
Agreement, §§ 1.4 and 1.32.

16 **B. Monetary Terms**

17 Except as otherwise provided by Paragraph 9 of the Settlement Agreement, Defendant
18 promises to pay \$350,000.00 and no more as the Gross Settlement Amount and to separately pay
19 any and all employer payroll taxes owed on the Wage Portions of the Individual Class Payments.
20 None of the Gross Settlement Amount will revert to Defendant. The Administrator will make and
21 deduct the following payments from the Gross Settlement Amount, in the amounts specified by
the Court in the Final Approval:

22 **To Plaintiff:** Class Representative Service Payment to the Class Representative of not
23 more than \$15,000.00 (in addition to any Individual Class Payment and any Individual PAGA
24 Payment the Class Representative is entitled to receive as a Participating Class Member).
25 Defendant will not oppose Plaintiff's request for a Class Representative Service Payment that
26 does not exceed this amount. If the Court approves a Class Representative Service Payment less
27 than the amount requested, the Administrator will retain the remainder in the Net Settlement
28 Amount. The Administrator will pay the Class Representative Service Payment using IRS Form
1099.



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1 **To Class Counsel:** A Class Counsel Fees Payment of not more than 33.33%, which is
2 currently estimated to be \$116,666.00 and a Class Counsel Litigation Expenses Payment of not
3 more than \$16,500.00. Defendant will not oppose requests for these payments provided that do
4 not exceed these amounts. If the Court approves a Class Counsel Fees Payment and/or a Class
5 Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will
6 allocate the remainder to the Net Settlement Amount. The Administrator will pay the Class
7 Counsel Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms.

8 **To the Administrator:** An Administrator Expenses Payment not to exceed \$35,000.00
9 except for a showing of good cause and as approved by the Court. To the extent the
10 Administration Expenses are less or the Court approves payment less than \$35,000.00, the
11 Administrator will retain the remainder in the Net Settlement Amount.

12 **To Each Participating Class Member:** An Individual Class Payment calculated by (a)
13 dividing the Net Settlement Amount by the total number of Class Work Weeks worked by all
14 Participating Class Members during the Class Period and (b) multiplying the result by each
15 Participating Class Member's Class Work Weeks.

16 Settlement Agreement, §§ 3.1-3.2.4.

17 **C. Timing of Payments**

18 Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts
19 necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the
20 Administrator no later than 14 days after the Effective Date. Within 14 days after Defendant funds
21 the Gross Settlement Amount, the Administrator will mail checks for all Individual Class
22 Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration
23 Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses
24 Payment, and the Class Representative Service Payment. Disbursement of the Class Counsel Fees
25 Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service
26 Payment shall not precede disbursement of Individual Class Payments and Individual PAGA
27 Payments. The Administrator will issue checks for the Individual Class Payments and/or
28 Individual PAGA Payments and send them to the Class Members via First Class U.S. Mail,
postage prepaid. The face of each check shall prominently state the date (not less than 180 days
after the date of mailing) when the check will be voided. The Administrator will cancel all checks
not cashed by the void date. The Administrator will send checks for Individual Settlement
Payments to all Participating Class Members (including those for whom Notice Packet was



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1 returned undelivered). The Administrator will send checks for Individual PAGA Payments to all
2 Aggrieved Employees including Non-Participating Class Members who qualify as Aggrieved
3 Employees (including those for whom Notice Packet was returned undelivered). The
4 Administrator may send Participating Class Members a single check combining the Individual
5 Class Payment and the Individual PAGA Payment. Before mailing any checks, the Administrator
6 must update the recipients' mailing addresses using the National Change of Address Database.

7 For any Class Member whose Individual Class Payment check or Individual PAGA
8 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
9 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
10 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
11 California Code of Civil Procedure Section 384, subd. (b).

12 Settlement Agreement, §§ 4.1-4.4.

13 **D. Calculation of Settlement Shares**

14 An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by
15 the total number of Class Work Weeks worked by all Participating Class Members during the
16 Class Period and (b) multiplying the result by each Participating Class Member's Class Work
17 Weeks. The Administrator will calculate each Individual PAGA Payment by (a) dividing the
18 amount of the Aggrieved Employees' 25% share of PAGA Penalties, \$2,500.00, by the total
19 number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period and
20 (b) multiplying the result by each Aggrieved Employee's PAGA Pay Periods. Aggrieved
21 Employees assume full responsibility and liability for any taxes owed on their Individual PAGA
22 Payment. Settlement Agreement, § 3.2.

23 **E. Apportionment of Settlement Shares**

24 20% of each Participating Class Member's Individual Class Payment will be allocated to
25 settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax
26 withholding and will be reported on an IRS W-2 Form. The 80% of each Participating Class
27 Member's Individual Class Payment will be allocated to settlement of claims for interest and
28 penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage
withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full
responsibility and liability for any employee taxes owed on their Individual Class Payment.
Settlement Agreement, § 3.2.4.1.

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1 **F. The Releases**

2 Effective on the date when Defendant fully funds the entire Gross Settlement Amount and
3 funds all employer payroll taxes owed on the Wage Portion of the Individual Class Payments,
4 Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as
5 follows:

6 **Plaintiff's Release.** Plaintiff and his respective former and present spouses,
7 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
8 and discharge Released Parties from all claims, transactions, or occurrences that occurred during
9 the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
10 been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims
11 that were, or reasonably could have been, alleged based on facts contained in the Operative
12 Complaint, Plaintiff's PAGA Notice, or ascertained during the Action and released under 6.2,
13 below ("Plaintiff's Release.") Plaintiff's Release does not extend to any claims or actions to
14 enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability
15 benefits, social security benefits, workers' compensation benefits that arose at any time, or based
16 on occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff may discover facts
17 or law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be
18 true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective in all respects,
19 notwithstanding such different or additional facts or Plaintiff's discovery of them.

20 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of
21 Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits,
22 if any, of section 1542 of the California Civil Code, which reads:

23 A general release does not extend to claims that the creditor or releasing party does not
24 know or suspect to exist in his or her favor at the time of executing the release, and that if
25 known by him or her would have materially affected his or her settlement with the debtor
26 or Released Party.

27 **Release by Participating Class Members Who Are Not Aggrieved Employees:** All
28 Participating Class Members, on behalf of themselves and their respective former and present
representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released
Parties from all claims stated in the Operative Complaint and those based solely upon the facts



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1 alleged in the Operative Complaint. Except as set forth in Section 6.3 of this Agreement,
2 Participating Class Members do not release any other claims, including claims for vested benefits,
3 wrongful termination, violation of the Fair Employment and Housing Act, unemployment
4 insurance, disability, social security, workers' compensation, or claims based on facts occurring
5 outside the Class Period.

6 **Release of PAGA Claim.** Plaintiff releases all claims for civil penalties under PAGA
7 stated in the Operative Complaint and Plaintiff's pre-filing letter to the LWDA (attached to the
8 Operative Complaint as Exhibit A) or that reasonably could have been alleged based solely upon
9 the facts alleged in Plaintiff's Operative Complaint and pre-filing letter to the LWDA. Plaintiff
10 releases all claims for civil penalties that could have been sought by the Labor Commissioner for
11 the violations identified in Plaintiff's pre-filing letter to the LWDA; Plaintiff does not release the
12 claim for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a
13 Participating Class Member. Settlement Agreement, § 6.

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

15 No later than three (3) business days after receipt of the Class Data, the Administrator
16 shall notify Class Counsel that the list has been received and state the number of Class Members,
17 Aggrieved Employees, Class Work Weeks and PAGA Pay Periods in the Class Data. Using best
18 efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class
19 Data, the Administrator will send to all Class Members identified in the Class Data, via first-class
20 United States Postal Service ("USPS") mail, the Notice Packet with Spanish translation, if
21 applicable substantially in the forms attached to the Settlement Agreement as Exhibits A, B, C,
22 and D.

23 Not later than three (3) business days after the Administrator's receipt of any Notice
24 Packet returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet
25 using any forwarding address provided by the USPS. If the USPS does not provide a forwarding
26 address, the Administrator shall conduct a Class Member Address Search, and re-mail the Notice
27 Packet to the most current address obtained. The Administrator has no obligation to make further
28 attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by
the USPS a second time.

The deadlines for Class Members' written objections, Challenges to Class Work Weeks
and/or PAGA Pay Periods (disputes), and Requests for Exclusion will be extended an additional
14 days beyond the 60 days otherwise provided in the Class Notice for all Class Members whose



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1 notice is re-mailed. The Administrator will inform the Class Member of the extended deadline
2 with the re-mailed Notice Packet.

3 If the Administrator, Defendant or Class Counsel is contacted by or otherwise discovers
4 any persons who believe they should have been included in the Class Data and should have
5 received Notice Packet, the Parties will expeditiously meet and confer in person or by telephone,
6 and in good faith, in an effort to agree on whether to include them as Class Members. If the Parties
7 agree, such persons will be Class Members entitled to the same rights as other Class Members,
8 and the Administrator will send, via email or overnight delivery, a Class Notice requiring them
9 to exercise options under this Agreement not later than 14 days after receipt of Class Notice, or
the deadline dates in the Class Notice, which ever are later. Settlement Agreement, § 8.4.

10 **1. Disputes**

11 Each Class Member shall have 60 days after the Administrator mails the Notice Packet
12 (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge
13 the number of Class Work Weeks and PAGA Pay Periods (if any) allocated to the Class
14 Member/Aggrieved Employee in the Class Notice. This is also known as a dispute. The
15 Administrator's determination of each Class Member's allocation of Class Work Weeks and/or
16 Pay Periods shall be final and not appealable or otherwise susceptible to challenge. The
17 Administrator shall promptly provide copies of all challenges to calculation of Class Work Weeks
18 and/or Pay Periods to Defense Counsel and Class Counsel and the Administrator's determination
the challenges. Settlement Agreement, § 8.6.

19 **2. Opting Out**

20 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
21 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later
22 than 60 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class
23 Members whose Notice Packet is re-mailed). A Request for Exclusion is a letter from a Class
24 Member or his/her representative that reasonably communicates the Class Member's election to
25 be excluded from the Settlement and includes the Class Member's name, address and email
26 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
27 or postmarked by the Response Deadline. An Election Not to Participate in Settlement form,
28 attached as Exhibit B, may be used for this purpose but is not required.

Every Class Member who does not submit a timely and valid Request for Exclusion is
deemed to be a Participating Class Member under this Agreement, entitled to all benefits and



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1 bound by all terms and conditions of the Settlement, including the Participating Class Members'
2 Releases under Paragraphs 6.2 and 6.3 of this Agreement, regardless of whether the Participating
3 Class Member actually receives the Class Notice or objects to the Settlement.

4 Every Class Member who submits a valid and timely Request for Exclusion is a Non-
5 Participating Class Member and shall not receive an Individual Class Payment or have the right
6 to object to the class action components of the Settlement. Aggrieved Employees are eligible for
an Individual PAGA Payment. Settlement Agreement, § 8.5.

7 **3. Objecting**

8 Only Participating Class Members may object to the class action components of the
9 Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or
10 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
11 Payment and/or Class Representative Service Payment. Participating Class Members may send
12 written objections to the Administrator, by fax, email, or mail. In the alternative, Participating
13 Class Members may appear in Court (or hire an attorney to appear in Court) to present verbal
14 objections at the Final Approval Hearing. A Participating Class Member who elects to send a
15 written objection to the Administrator must do so not later than 60 days after the Administrator's
16 mailing of the Notice Packet (plus an additional 14 days for Class Members whose Notice Packet
17 was re-mailed). An The Objection form attached as Exhibit D may be used for this purpose but is
18 not required. Non-Participating Class Members have no right to object to any of the class action
components of the Settlement. Settlement Agreement, § 8.7.

19 **H. Uncashed Checks**

20 For any Class Member whose Individual Class Payment check or Individual PAGA
21 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
22 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
23 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
California Code of Civil Procedure Section 384, subd. (b). (Settlement Agreement, § 4.4.3).

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

25 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
26 and its members are too numerous for joinder to be practical; (2) the representative and absent
27 class members share a community of interest and questions of law and fact common to the class
28 predominate over questions unique to individual class members; (3) the representative's claims
are typical of the class' claims; and (4) the representative will fairly and adequately represent the
class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,



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1 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
2 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
3 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

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

5 A class is ascertainable when it may be readily identified without unreasonable expense
6 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
7 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
8 defined Class is ascertainable because its members may be identified by reference to Defendant's
9 records and Defendant has agreed to share the relevant information from its records to facilitate
10 the settlement process. DS, ¶ 15; Settlement, §4.2. Therefore, the Settlement Class is
11 ascertainable.

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

13 The Settlement Class has sufficiently numerous members to render joinder impractical.
14 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
15 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 2,669 Class
16 Members. DS, ¶ 15; Settlement, §4.1. Plaintiff maintains that it would be impractical and
17 economically inefficient to require each Class Members to separately maintain an individual
18 action or be joined as a named plaintiff in this action. The California Supreme Court has upheld
19 a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light
20 of these considerations, the Class's membership is sufficiently numerous. DS, ¶ 15. *See Daar v.*
21 *Yellow Cab Co.* (1967) 67 Cal.2d 695.

22 **C. Class Member Share a Well-Defined Community of Interest**

23 The community of interest requirement "embodies three factors: (1) predominant common
24 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
25 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
26 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
27 uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
28 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and
practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
renders class certification appropriate." *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

To justify certification, the class proponent "must show ... that questions of law or fact
common to the class predominate over the questions affecting the individual members" *See,*
Arenas v. El Torito Rests., Inc. (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank,*



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1 *FA v. Superior Court* (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for
2 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
3 the claims of the Class Member all stem from the same sources. DS, ¶ 16; Settlement, §13.1

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

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

20 The class representative must be similarly situated to the rest of the purported class. *See*
21 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating "it has never been the law in California
22 that the class representative must have identical interests with the class members. The only
23 requirements are ... that the class representative be *similarly* situated") (emphasis in original); *See*
24 *also* Newberg, § 3:29 (typicality "focuses on whether there exists a relationship between the
25 Plaintiff's claims and the claims alleged on behalf of the class"). Plaintiff contends that his claims
26 are typical for the purposes of certifying the settlement Class. Plaintiff asserts that he, like absent
27 Class Member was subject to the same relevant policies and procedures governing his
28 compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was
subject to the same general course of conduct as absent Class Member, resolving the common
questions as they apply to Plaintiff will determine Defendant's *prima facie* liability to all Class
Member. Moreover, Plaintiff's claims could potentially be subject to the same primary
affirmative defenses as those of absent Class Member. Accordingly, Plaintiff's claims are typical



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of the Class. DS, ¶ 17.

E. Plaintiff Will Adequately Represent the Settlement Class

The adequacy requirement is met where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class' interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the 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, ¶ 18.

First, Class Counsel have supplied the Court with declarations to show that they are adequate to represent the Settlement Class and that they have significant experience in employment litigation generally, and wage and hour and employment-related class action litigation specifically. See DS, ¶¶ 19-27; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3. Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the Class Member have strong and co-extensive interests in this litigation because they all worked for Defendant during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiff and the Class Member. Moreover, Plaintiff has demonstrated his commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 19. Thus, Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under Code of Civil Procedure § 382.

E. Class Action Treatment Is the Superior Means For Resolving The Claims Of The Class Member

Plaintiff further contends that a class action is also superior to other means of adjudicating the issues in this action. The predominance of common legal and factual questions shows that this Court could fairly adjudicate the claims of Class Member through a single class action. In view of the *theoretical* alternatives that proposed class members could potentially utilize—representative PAGA action (where there is less relief available), individual civil lawsuits or wage claims through the Division of Labor Standards Enforcement (where there would be relatively little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly



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1 superior to all of them. Thus, this consideration supports conditional class action treatment for
2 purposes of this Settlement only. DS, ¶ 28.

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

5 **A. Legal Standard**

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

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

16 In assessing preliminary approval, a court evaluates if the settlement process has certain
17 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
18 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
19 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
20 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
21 48 Cal.App.4th at 1794.

22 The class settlement here satisfies all of these factors. DS, ¶ 29. The Settlement resulted
23 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
24 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
25 weaknesses of their respective cases and Defendant’s estimated exposure. *Id.*

26 Plaintiff claims that Defendant failed to pay Plaintiff and all Class Members all wages for
27 all hour worked at the correct rates of pay, failed to provide all meal periods, failed to permit and
28 authorize all rest breaks, and related violations. Plaintiff prepared “damages” estimates in advance
of the mediation. DS, ¶ 30., Ex. 6. Plaintiff determined Defendant’s maximum possible exposure
for restitution and penalties to be approximately \$18,186,006.66 (consisting of \$1,025,611.98 in
unpaid wages, \$1,026,670.83 in missed meal period premium wages, \$1,769,248.69 in missed
rest break premium wages, \$758,400.00 for wage statement penalties, \$9,937,225.16 for waiting
time penalties, and \$3,668,850.00 for civil penalties under PAGA. Plaintiff calculated the



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1 damages based on the number of workweeks and pay periods provided by Defendant, Plaintiff's
2 reports, and the sample data. *Id.*

3 However, based on the difficulties of proof, the Defendant's defenses, and the other
4 attendant risks Plaintiff identifies, Plaintiff estimates the likely awards at trial should Plaintiff
5 prevail to be the following amounts:

- 6 a. Unpaid wages and with interest in the amount of \$512,805.99;
- 7 b. Meal period premium wages with interest in the amount of \$513,335.42;
- 8 c. Rest period premium wages with interest in the amount of \$884,624.35;
- 9 d. Statutory pay stub penalties in the amount of \$189,600.00;
- 10 e. Waiting time penalties in the amount of \$2,484,306.29; and
- 11 f. Civil penalties in the amount of \$81,530.00.

12 The total of these amounts is \$4,666,202.04. The Gross Settlement Amount of \$350,000.00 is
13 7.5% of this amount. DS, ¶ 48.

14 Plaintiff also considered the possibility that Defendant could launch a *Pick Up Stix*
15 campaign and pursue individual release agreements from the Class Member. Defendant also
16 represented that it had interviewed all of Defendant's current employees regarding Plaintiff's
17 claims, all of whom would provide declarations, under penalty of perjury, that were favorable to
18 Defendant with respect to the relevant factual issues at issue in Plaintiff's action. Plaintiff's
19 Counsel applied discounts to the maximum possible exposure to account for all other risks
20 discussed below. While it is difficult to assign anything but crudely-determined percentages of
21 risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude
22 recovery for such employees is substantial and alone justifies a significant discount because
23 Defendant would likely by trial have gathered releases from the majority of the Class Member. A
24 settlement for approximately 7.5% of the potential recovery is a proportion substantially in excess
25 of recovery proportions sanctioned by existing case law.⁴ DS, ¶ 31.

26 ⁴ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
27 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
28 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum potential recovery asserted by either party.”).



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1 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
2 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
3 \$350,000.00 is fair and reasonable. *Id.*

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

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

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

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

15 Defendant's financial condition was the key factor in reaching this Settlement. DS, ¶ 33.
16 Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, he may
17 never recover the damages due to the risk of insolvency. A very large class action judgment would
18 almost certainly put the company out of business and/or would interfere with the company's
19 ability to carry out its contractual obligations. *Id.* In short, the "poor financial health of [the
20 defendant will] seriously increase [] the chance that Plaintiffs would be left with nothing if they
21 continued to litigate their claims." *Torrise v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
22 1376 (the financial condition of defendant predominated in assessing the reasonableness of
23 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
24 concerning defendant's financial stability "strongly supports the reasonableness of the
25 settlement"); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at
26 *11 (finding potential insolvency to be additional risk that favors approval of a class action
27 settlement). Accordingly, Defendant's financial distress supports this settlement. *Id.*

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

There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
best, largely because Defendant's written policies required the employees to record their hours
worked and prohibited off-the-clock work. Off-the-clock claims are difficult where a defendant
requires in its written policies that all work must take place while clocked in. *See Jong v. Kaiser
Foundation Hospital* (2014) 226 Cal.App.4th 391 (employer must have notice of off-the-clock



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1 work for it to be compensable). *Id.* Moreover, while Defendant disputes that off-the-clock work
2 occurred, it contends that any time spent off the clock was *de minimis*. The California Supreme
3 Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and
4 minute periods of time may still be subject to a *de minimis* defense even if compensable. (Stating
5 that “We do not decide whether there are circumstances where compensable time is so minute or
6 irregular that it is unreasonable to expect the time to be recorded.”). Following *Troester*,
7 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
8 clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with
respect to this claim. DS, ¶ 34.

9 The difficulty inherent in proving that off-the-clock work occurred poses a significant
10 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
11 Generally, a court will not certify a class unless it can determine an appropriate classwide
12 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
13 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
14 the lack of records indicating when such off-the-clock work may have taken place. Individualized
15 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
16 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
17 risk that the Court would consider this evidentiary showing insufficient as a classwide
methodology. DS, ¶ 35.

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

19 There are risks to Plaintiff’s meal period claim. Defendant contends that, to establish a
20 violation for missed meal periods, a plaintiff must do more than show that a meal break was not
21 taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
22 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
23 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
24 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
25 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
26 to the meal break claim is the reason that a particular employee may have failed to take a meal
27 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. DS, ¶ 36.

28 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
from taking their meal or rest periods. Defendant’s policies mandate that employees take at least
a 30-minute, uninterrupted meal periods and record the beginning and ending time of their meal



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breaks each day on their time records. The time records that comprise the random sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were taken. Of the time records that show a late, short or no lunch, individualized evidence may be necessary to determine whether they occurred due to conduct of 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. DS, ¶ 37.

d. Risks Associated with the Rest Break Claims

There are risks to Plaintiff's rest period claim. Employers are not required to record rest periods and such periods are paid. Defendant contends it provided non-exempt employees the opportunity to take rest periods in accordance with California law. Further, Defendant's written policies on meal and rest periods are consistent with the Wage Order. Thus, unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. Managing such claims at trial has become exceedingly difficult. Plaintiff will depend on sample witness testimony and surveys to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426. DS, ¶ 38.

e. Risks Associated with the Wage Statement Penalty Claims

Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA penalties. Under Labor Code section 226, wage statements must include various information, including the applicable rates of pay, corresponding hours worked, and gross pay. DS, ¶ 39.

Here, Plaintiff's wage statement claim has the same underlying risks as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply with the requirements of Labor Code § 226. DS, ¶ 39.

f. Risks Associated with the Waiting Time Penalty Claims.

Without proof willful behavior, Plaintiff will be unable to recover these penalties. DS, ¶ 40.



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

2 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
3 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
4 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid
5 defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA
6 claims likewise face significant uncertainty. There is a risk that the Court would consider the
7 maximum civil penalty available to be confiscatory. This is particularly the case considering
8 Defendant's financial condition. DS, ¶¶ 41-42.

9 Plaintiff is aware of only two significant awards under the PAGA in a contested
10 proceeding.⁵ DS, ¶ 44. PAGA penalty awards are often small even for egregious, intentional
11 violations of the Labor Code.⁶ *Id.* For instance, on October 24, 2017, the Los Angeles Superior
12 Court awarded a prevailing PAGA plaintiff, represented by very experienced counsel, civil
13 penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case
14 no. BC492828. Further, in *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529, the

15 ⁵ In *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
16 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
17 \$18,695,692.58. In this regard, the district court stated,

18 The plain language of PAGA provides that “a court may award a lesser amount than the
19 maximum civil penalty amount specified by this part if, *based on the facts and*
20 *circumstances of the particular case*, to do otherwise would result in an award that is
21 unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code s 2699(e)(2) (emphasis
22 added). The relationship between the amount of total damages and the amount of
23 maximum PAGA penalties is certainly a “circumstance” of the case under the term's
24 ordinary meaning. The weight given to that circumstance is greater in this case because
25 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
26 individual claims except for one. As a general matter, it would be excessively punitive
27 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
28 the damages caused by that injury or set of injuries.

Id., fn. 9. The district court further stated, “Virgin “has not presented any evidence that the full
penalty would be excessive in relation to its ability to pay,” the weight of this factor is lessened.”
Id.

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

⁶ 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 Court of Appeal affirmed judgment which provided for a PAGA penalty of only \$5 per pay period
2 for the defendant's meal period violations. A similar result could occur here. DS, ¶ 45.

3 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
4 significant discount for settlement purposes. DS, ¶ 43. For mediation purposes, Plaintiff's counsel
5 estimated a maximum possible exposure of approximately \$3,668,850.00 in civil penalties. This
6 estimate did not take into account any of the risks discussed above and assumed a violation for
7 every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay
8 period for the same alleged violations of different Labor Code provisions and derivative
9 violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties
10 in this fashion may be appropriate to determine the amount in controversy for purposes of removal
11 jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs
12 multiple PAGA penalties for the same violation for the same pay period under different Labor
13 Code provisions. *Id.* This may be because the PAGA does not provide for what many employers
14 characterize as claim splitting and not merely stacking. *Id.*

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

16 An employer enjoys the right to settle a putative class member's disputed wage claims
17 individually, without the consent or involvement of class counsel. DS, ¶46. See *Chindarah v. Pick*
18 *Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. As discussed above, Defendant may launch a "pick
19 off" settlement campaign to pursue individual release agreements from the Class Member,
20 thereby potentially narrowing the size of the Settlement Class until it is no longer numerous
21 enough for class certification. *Id.* Plaintiff, then, may not have sufficient number of employees to
22 represent. This led to a significant reduction of claim value in settlement negotiations. *Id.*

23 While the evidence gathered through Plaintiff's discovery supports the merits of the
24 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
25 presents significant risks that support a downward departure from Defendant's estimated liability
26 exposure. DS, ¶ 47. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
27 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
28 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
warrants preliminary approval. *Id.*, *Torrisi 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



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1 concerning defendant's financial stability "strongly supports the reasonableness of the
2 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
3 WL 2465049, * 3.

4 2. Allocation of the PAGA Payment

5 The settlement of PAGA penalties in the sum of \$10,000.00, of which 75% (\$7,500.00)
6 will be paid to the LWDA and 25% (\$2,500.00) will be distributed to the Class, is reasonable and
7 appropriate under the circumstances. The Parties negotiated a good faith amount for PAGA
8 Penalties to be paid to the LWDA and to the Class. The portion to be paid to the LWDA was not
9 the result of self-interest at the expense of other Class Member. DS, ¶ 49. Where settlements
10 "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount
11 was the result of self-interest at the expense of other Class Members," such amounts are generally
12 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
13 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
14 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
15 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
16 and oppressive. *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
17 trial court's award of only 10% of maximum PAGA penalty for meal break violations). The
18 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
19 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
20 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
21 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
22 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
23 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
24 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
25 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
26 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D.
27 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
28 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
(approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement).



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1 **3. Presence of Governmental Participant**

2 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
3 settlement to the LWDA with the filing and service of this motion. DS, ¶ 74, Ex. 19.

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

5 If the settlement is preliminarily approved, Class Member will be provided with the Notice
6 Packet (attached as Exhibits A and D to the Settlement) in English with a Spanish translation and
7 an opportunity to object. DS, ¶ 68. The parties' proposed notice fully complies with California
8 Rules of Court 3.766(d) and 3.769(f) and will allow Class Member to make informed responses
9 to the proposed settlement. *Id.*

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

14 The Individual Settlement Payments will be paid to each Class Members based on his or
15 her eligible Work Weeks compared to the total Work Weeks. Because this method compensates
16 Class Member based on the extent of their potential injuries, in that Class Member who worked
17 for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and
18 reasonable. DS, ¶ 66.

19 Plaintiff estimates that there are 30,741 Work Weeks for the Class Period. So, each Work
20 Week has a value of approximately \$5.26 (\$156,834.00 Net Settlement Amount / 30,741 Work
21 Weeks = \$5.10). Plaintiff had 9 Work Weeks during the Class Period. Based on this, it is
22 anticipated that Plaintiff Chris Marcus Calkins will receive an Individual Class Payment of
23 approximately \$45.92 as a Participating Class Member (9 Work Week x \$5.10 = \$45.92) while
24 the average estimated Individual Class Payment to Participating Class Members will be
25 approximately \$58.76. Some Class Members – those who worked more Work Weeks during the
26 Class Period - will receive more, and some less. The highest possible Individual Class Payment
27 to a Participating Class Member (i.e., to those who qualify for all Work Weeks in the Class Period)
28 will be approximately \$2,045.10. The lowest possible Individual Class Payment to a Participating
Class Member (i.e., to those who qualify for only one Work Week in the Class Period) will be
approximately \$5.10. Some Class Members – those who worked more Work Weeks during the
Class Period - will receive more, and some less. *See* DS, ¶ 66.

 It is anticipated that the average Aggrieved Employees Individual PAGA Payments
will be \$3.78. *Id.* Plaintiff's Individual PAGA Payments, his individual share of 25% of the
PAGA Penalties, will be less than that of some absent Aggrieved Employees. Under the



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1 Settlement, each Aggrieved Employees will receive a *pro rata* distribution of 25% of the PAGA
2 Penalties proportionate to the number of paychecks he or she had with Defendant during the
3 PAGA Period, compared to the total of all paychecks of all Aggrieved Employees during the
4 PAGA Period, as reflected by Defendant's records. Plaintiff estimates that there are 8,153
5 Aggrieved Employees paychecks for the PAGA Period. So, each Aggrieved Employees
6 paycheck from the PAGA Period has a value of approximately \$0.31 (25% of \$10,000.00 in
7 PAGA Penalties / 8,153 Aggrieved Employees paychecks = \$0.31). It is anticipated that Plaintiff
8 Chris Marcus Calkins will receive an Individual PAGA Payments of approximately \$2.79 as an
9 Aggrieved Employees (9 paychecks during the PAGA Period x \$0.31 paycheck value = \$2.79)
10 while the average estimated Individual PAGA Payments to an Aggrieved Employees will be
11 approximately \$3.78 (\$2,500.00, 25% of PAGA Penalties / Aggrieved Employees
12 paychecks during the PAGA Period = \$3.78 Individual PAGA Payments). Some Aggrieved
13 Employees – those who had more paychecks during the PAGA Period - will receive more, and
14 some less. The highest possible Individual PAGA Payments to an Aggrieved Employees (i.e., to
15 those who qualify for all paychecks in the PAGA Period) will be approximately \$78.20. The
16 lowest possible Individual PAGA Payments to an Aggrieved Employees (i.e., to those who
17 qualify for only one paycheck in the PAGA Period) will be approximately \$0.31. See DS, ¶ 67.

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

18 The Settlement states Class Counsel may seek attorneys' fees of \$116,666.00 (one-third
19 of the GSA) and up to \$16,500.00 for actual reasonable litigation costs and expenses incurred in
20 prosecuting the Action. These amounts are reasonable, given the facts and circumstances of the
21 case. DS, ¶¶ 50-53.

21 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
22 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
23 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
24 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
25 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
26 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
27 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
28 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee



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

5 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
6 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
7 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
8 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
9 down to devote time to this matter. DS, ¶ 51. Class Counsel interviewed and obtained information
10 from putative class members, met and conferred with Defendant's counsel on numerous
11 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
12 Defendant and obtained through other sources, researched applicable law, and provided
13 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

14 Class Counsel have borne all the risks and costs of litigation and will receive no
15 compensation until recovery is obtained. DS, ¶ 52. Class Counsel are well-experienced in wage-
16 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
17 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
18 the requested fees and costs are reasonable and should be awarded. *Id.*

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

22 Courts routinely approve incentive awards to compensate named plaintiffs for the services
23 they provide and the risks they incur during class action litigation, often in much higher amounts
24 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
25 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
26 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
27 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
28 Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
action and the risks he undertook on behalf of Class Member. DS, ¶ 54; Declaration of Chris
Marcus Calkins ("Plaintiff decl."), generally. 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 his work history with Defendant and
Defendant's policies and practices with respect to the wage and hour claims at issue, participating



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1 in mediation, and being actively involved in the settlement process to ensure a fair result for the
2 Settlement Class as a whole. In doing this, Plaintiff has been exposed to significant risks,
3 including the risk of an order to pay Defendant's attorneys' fees and costs if this action had been
4 unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on
5 behalf of the Settlement Class shows that the proposed Class Representative Service Payment is
6 fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 54-64, Exhibits 8-

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

10 With regard to the settlement administration costs ("Administration Expenses Payment")
11 provision, it is reasonable. Before agreeing to Xpand Legal Consulting LLC and its bid of
12 \$13,500, the Parties sought and reviewed bids from other reputable third-party administrators
13 which provided higher bids. DS, ¶ 72-73, Exs. 14 to 18 Thus, the settlement administration costs
14 provision should be given preliminary approval.

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

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



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1 settlement. *Id.* The Notice (Exhibit A to the Settlement) provides Class Member with all pertinent
2 information that they need to fully evaluate their options and exercise their rights under the
3 Settlement. Specifically, it clearly and concisely explains, among other things: (1) what the
4 Settlement is about; (2) who is a Settlement Class Members; (3) how Class Counsel will be paid;
5 (4) how to submit an exclusion request not to be bound by the Settlement; (5) how to object to
6 the Settlement; (6) how the Settlement will be allocated; (7) how payments to Class Member will
7 be calculated; (8) how the disputes will be resolved; and (9) the individual Settlement Class
8 Members's estimated payment. Additionally, the Class Notice will include the number of Work
9 Weeks a Class Members had during the Class Period. Accordingly, the Notice should be approved
10 because it describes the Settlement with sufficient clarity and specificity to explain to Class
11 Member what this action is about, their rights under the Settlement, and how to exercise those
12 rights. DS, ¶ 68-71.

13 **XI. CONCLUSION**

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

16 Respectfully submitted,

17 THE SPIVAK LAW FIRM

18 Dated: October 29, 2024

19 By: 

20 DAVID G. SPIVAK
21 CAROLINE TAHMASSIAN,
22 Attorneys for Plaintiff, CHRIS
23 MARCUS CALKINS, and all others
24 similarly situated



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