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of himself and others similarly situated
8
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ORANGE**
12

13 MAURICIO VAZQUEZ, on behalf of himself
and others similarly situated,

14
15 Plaintiff,

16 v.

17 VOLCOM, LLC, a Delaware limited liability
company; VOLCOM RETAIL, LLC, a Delaware
18 limited liability company; VOLCOM RETAIL
OUTLETS, LLC, a Delaware limited liability
19 company; and DOES 1 through 100,

20 Defendants.
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Case No. 30-2020-01169022-CU-OE-CXC

Assigned for all purposes to:
Hon. Lon F. Hurwitz, Dept. CX103

CLASS ACTION

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

[Declarations of Anthony J. Orshansky and
Mauricio Vazquez and Proposed Order
submitted concurrently herewith]

Preliminary Approval Hearing

Date: December 7, 2022

Time: 1:30 p.m.

Dept. CX103

Reservation No.: 73884464

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on December 7, 2022 at 1:30 p.m. before the Honorable
3 Lon F. Hurwitz in Department CX103 of the above-entitled Court located at 751 West Santa Ana
4 Boulevard, Santa Ana, California 92701, plaintiff Mauricio Vazquez (“Plaintiff” or “Class
5 Representative”), individually and on behalf of all others similarly situated, will and hereby does
6 move this Court pursuant to California Rules of Court, Rule 3.769 for an order:

7 1. Granting preliminary approval of the proposed Stipulation of Class and
8 Representative Action Settlement (“Settlement Agreement”);

9 2. Provisionally certifying a class pursuant to Code of Civil Procedure section 382,
10 defined as follows:

11 **Class Members** – All hourly, non-exempt warehouse and retail employees employed
12 by Defendants within the State of California during the Class Period (the “Class” or
“Class Members”).¹

13 3. Preliminarily appointing Plaintiff as the Class Representative;

14 4. Preliminarily appointing CounselOne, P.C. as Class Counsel;

15 5. Scheduling a hearing to consider whether the settlement should be finally approved
16 and awarding amounts to the Class Representative as an Enhancement Payment, Administration
17 Costs to the Settlement Administrator, the Private Attorneys General Act payment to the California
18 Labor and Workforce Development Agency, as well as Attorneys’ Fees and Costs to Class Counsel;

19 6. Appointing CPT Group, Inc. as the third-party Settlement Administrator; and

20 7. Approving the proposed Notice of Pendency of Class and Representative Action
21 Settlement and instructing the notice to be disseminated to the Class as provided in the Settlement.

22 This motion is based on this Notice, the attached Memorandum of Points and Authorities,
23 the Declarations of Anthony J. Orshansky and Mauricio Vazquez filed concurrently herewith and
24 the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further
25

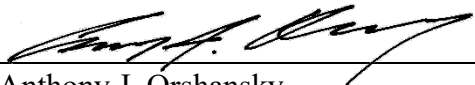
26 ¹ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who do not
27 opt out of this settlement. (Settlement Agreement ¶ 34.) “Class Period” is defined as the period
28 beginning on November 6, 2016 and ending on the date of Preliminary Approval, unless Defendants
shorten the Class Period pursuant to paragraph 54 of the Settlement Agreement. (Settlement
Agreement ¶¶ 7, 54.)

1 oral or documentary evidence or argument presented at the time of hearing. Finally, given the
2 multiplicity of issues addressed in this motion, Plaintiff respectfully submits there is good cause to
3 exceed the 20-page limit set forth in California Rules of Court, Rule 3.764(c)(2), and respectfully
4 requests that the Court consider the attached Memorandum of Points and Authorities.

5
6 Dated: November 7, 2022

Respectfully submitted,

COUNSELONE, PC

8
9 By: 

Anthony J. Orshansky

Jennifer L. Connor

Justin Kachadoorian

Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mauricio Vazquez (“Plaintiff” or “Class Representative”), individually and on
4 behalf of all others similarly situated,² seeks preliminary approval of the Stipulation of Class and
5 Representative Action Settlement (“Settlement Agreement”) entered into with defendants Volcom,
6 LLC, Volcom Retail, LLC, and Volcom Retail Outlets, LLC (collectively, “Defendants”). The
7 Settlement Agreement between Plaintiff and Defendants (together, the “Parties”), if approved, will
8 resolve specific claims of the Settlement Class Members and PAGA Group Members in exchange
9 for Defendants’ agreement to pay the amount of *Nine Hundred Thousand Dollars (\$900,000) into*
10 *a non-reversionary common settlement fund*.³

11 By way of this class and representative lawsuit, Plaintiff pursued his rights against
12 Defendants for abusing its hourly, non-exempt warehouse and retail employees by violating wage-
13 and-hour laws under the California Labor Code and Business and Professions Code. Plaintiff’s
14 lawsuit thus sought to recover unpaid wages, premiums for non-compliant meal and rest breaks,
15 reimbursement of business expenses, liquidated damages, penalties for improper wage statements,
16 waiting time penalties, restitution, civil penalties pursuant to the PAGA, injunctive and other
17 equitable relief, prejudgment interest, and attorneys’ fees and costs.

18 After engaging in substantial independent investigation and after two mediation sessions
19 with Jeffrey Krivis of First Mediation Corporation, the Parties agreed to settle the Settlement Class
20 Members’ and PAGA Group Members’ claims alleged in this litigation for the non-reversionary
21 sum of Nine Hundred Thousand Dollars (\$900,000) (“Gross Settlement Amount”). A true and

22 _____
23 ² “Class Members” are defined as all hourly, non-exempt warehouse and retail employees employed
24 by Defendants in the State of California during the Class Period. (Settlement Agreement ¶ 5.) “Class
25 Period” is defined as the period beginning on November 6, 2016 and ending on the date of
26 Preliminary Approval, unless Defendants shorten the Class Period pursuant to paragraph 54 of the
27 Settlement Agreement. (Settlement Agreement ¶¶ 7, 54.)

28 ³ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who do not
opt out of this settlement. (Settlement Agreement ¶ 34.) “PAGA Group Members” are defined as all
Class Members, whether or not they submit a request for exclusion from the Settlement Class,
employed by Defendants during the PAGA Period. (Settlement Agreement ¶ 23.) The “PAGA
Period” is defined as the period beginning on July 1, 2019 and ending on the date of Preliminary
Approval, unless Defendants shorten the PAGA Period pursuant to paragraph 54 of the Settlement
Agreement. (Settlement Agreement ¶¶ 26, 54.)

1 correct copy of the fully executed Settlement Agreement is attached as **Exhibit A** to Declaration of
2 Anthony J. Orshansky (“Orshansky Decl.”) filed concurrently herewith. After deductions for
3 Attorneys’ Fees and Costs to Class Counsel, Enhancement Payment to the Class Representative,
4 Administration Costs to the Settlement Administrator, and the PAGA Payment, the remaining
5 amount (the “Net Settlement Amount”) of approximately \$447,000 will be distributed to Settlement
6 Class Members. (Settlement Agreement ¶¶ 22, 48(f).) The entire Net Settlement Amount will be
7 paid out to Settlement Class Members. Settlement Class Members shall automatically receive
8 payments without the need to submit a claim form, and PAGA Group Members shall receive PAGA
9 payments irrespective of whether they opt out of the class settlement. (*Id.* at ¶¶ 48(d), 48(f), 52.)

10 The settlement is fair, reasonable, and adequate, and in the best interests of Class Members.
11 Consequently, Plaintiff, with the consent and approval of Defendants, hereby moves for an order:
12 (1) conditionally certifying the Class for settlement purposes; (2) granting preliminary approval of
13 the Settlement Agreement; (3) approving the Notice of Pendency of Class and Representative Action
14 Settlement; and (4) setting a hearing for final approval of the settlement.

15 **II. THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS**

16 **A. Discovery and Investigation**

17 Here, the Parties engaged in extensive discovery—informally exchanging information,
18 documents and reviewing and analyzing extensive data made available by Defendants—which
19 enabled the Parties to thoroughly evaluate Plaintiff’s claims, the claims of the putative Class
20 Members, and the aggrieved employees’ PAGA claim, along with Defendants’ affirmative defenses
21 and the likely outcomes, risks, and expense of pursuing litigation.

22 Prior to initiating the lawsuit, as early as June 2020, counsel for Plaintiff, CounselOne, P.C.,
23 independently and thoroughly investigated the claims and considered the facts and circumstances
24 underlying the pertinent issues and applicable law. (Orshansky Decl. ¶ 25.) This required thorough
25 discussions and interviews with Plaintiff and other Class Members as well as research into the
26 various legal issues involved in the case. (*Ibid.*) After conducting their initial investigation, Class
27 Counsel determined that the claims were well suited for class action adjudication owing to what
28 appeared to be a common course of conduct affecting a similarly situated group of employees. (*Ibid.*)

1 On July 1, 2020, Class Counsel provided pre-filing written notice to the LWDA and by
2 certified mail to Defendants of the above-identified allegations on behalf of Plaintiff and similarly
3 situated aggrieved employees in accord with the PAGA, California Labor Code sections 2698, *et*
4 *seq.* (Orshansky Decl. ¶ 26 and Exhibit B.)

5 On November 6, 2020, Plaintiff filed the Class and Representative Action Complaint for
6 Damages (the “Complaint”) asserting the following claims: (1) Violation of California Labor Code
7 §§ 1194, 1194.2, 1197, 1197.1 (Failure to Pay Minimum Wages); (2) Violation of California Labor
8 Code §§ 510 and 1198 (Failure to Pay All Overtime Wages); (3) Violation of California Labor Code
9 §§ 226.7 and 512 (Meal Period Liability); (4) Violation of California Labor Code § 226.7 (Rest
10 Break Liability); (5) Violation of Labor Code § 2802 (Failure to Reimburse Business Expenses);
11 (6) Violation of California Labor Code §§ 226 and 226.3 (Failure to Provide Accurate Itemized
12 Wage Statements); (7) Violation of California Labor Code §§ 201-204 and 210 (Failure to Pay All
13 Wages Owed Timely and Upon Separation of Employment); (8) Violation of California Labor Code
14 § 1174(d) (Failure to Maintain Accurate Payroll Records); (9) Violation of California Business and
15 Professions Code §§ 17200, *et seq.* (Unfair Business Practices); and (10) Penalties Pursuant to Labor
16 Code § 2699 (Private Attorneys General Act). (Orshansky Decl. ¶ 27.)

17 Defendants deny Plaintiff’s allegations of wrongdoing; Defendants make no admissions
18 regarding any facts or law related to the lawsuit. (Orshansky Decl. ¶ 29; Settlement Agreement ¶¶
19 43, 45.) Defendants do not believe that any liability to Plaintiff or other Class Members exists, or
20 that Plaintiff or other Class Members are entitled to any recovery. (Orshansky Decl. ¶ 29; Settlement
21 Agreement ¶¶ 43, 45.)

22 Class Counsel engaged in extensive informal discovery and investigation. (Orshansky Decl.
23 ¶ 30.) In advance of mediation, the Parties agreed to an informal exchange of information and
24 documents. (*Ibid.*) Defendants produced information and documentation concerning the alleged
25 violations, such as Defendants’ written policies concerning those claims, including Defendants’
26 employee handbooks, policies and procedures regarding the payment of wages, the provision of meal
27 and rest breaks, and time keeping policies, such as recording hours, issuance of wage statements,
28 and providing all wages at separation, as well as composite data regarding the number of Class

Members and the mix of current versus former employees, total number of pay periods, total number of workweeks, and the average hourly rate in effect. (*Ibid.*) Defendants also produced a 20% sample of time and pay records for Class Members. (*Ibid.*) Courts have found that the use of similar percentage samples is appropriate. (See e.g., *Brum v. MarketSource, Inc.* (E.D.Cal. 2018) 2018 WL 3861558, at *5 [10% sample]; *Talavera v. Sun Maid Growers of California* (E.D.Cal. 2017) 2017 WL 495635, at *4 [10% sample]; *Kaminske v. JP Morgan Chase Bank N.A.* (C.D.Cal. 2010) 2010 WL 5782995, at *5 [10% sample].)

Counsel met and conferred at length regarding the information and documents produced. (Orshansky Decl. ¶ 31.) Class Counsel interviewed Class Members, analyzed the documents and data produced, and spent significant time consulting with an expert to determine Defendants' degree of liability and potential amounts due in damages. (*Id.* at ¶ 32.)

B. Mediation and Settlement

After having performed extensive investigation and analysis of the legal and factual issues and risks, the Parties participated in a full day mediation before mediator Jeffrey Krivis of First Mediation Corporation, where they debated and discussed their respective positions in an attempt to resolve the lawsuit. (Orshansky Decl. ¶ 33.) Mr. Krivis is experienced in mediating complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. (*Ibid.*) The case did not settle at the initial mediation. (*Id.* at ¶ 34.) However, after exchanging additional information and documents, the Parties participated in an additional mediation session with Mr. Krivis, and pursuant to the mediator's proposal, the Parties came to an agreement on all material terms of settlement. (*Ibid.*) The Parties entered into a short form Memorandum of Understanding as to all material terms of the settlement. (*Ibid.*)

From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class Counsel believe that the recovery being made available to Class Members is fair, reasonable, and

adequate taking into consideration the amounts received in other wage and hour class and representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Class Members' claim to the settlement award he or she will receive. (Orshansky Decl. ¶ 36.) Class Counsel believe that the settlement serves the best interests of Class Members and PAGA Group Members. (*Ibid.*) Further, and based on the settlement negotiations, which were hard fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class actions, representative actions, and wage and hour cases, the settlement was the product of a non-collusive settlement process in which the Parties were forced to make significant compromises. (*Id.* at ¶ 35.) The Parties have concluded that it is in their best interests to compromise, settle, and accept the terms of the Settlement Agreement. (*See* Settlement Agreement ¶ 42.)

III. SUMMARY OF BASIC SETTLEMENT TERMS

Under the terms of the Settlement Agreement, Defendants have agreed to pay a non-reversionary amount of Nine Hundred Thousand Dollars (\$900,000) into a common fund to settle the specific wage and hour claims of the Settlement Class Members and PAGA Group Members; this amount is called the "Gross Settlement Amount." (Settlement Agreement ¶¶ 17, 48.) This Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class Members, the Enhancement Payment to the Class Representative, the Administration Costs to the Settlement Administrator, the Attorneys' Fees and Costs to Class Counsel, and the Private Attorneys General Act ("PAGA") Payment, including payment to PAGA Group Members and to the California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to statute. (Settlement Agreement ¶ 17.)

The amount available for distribution to Settlement Class Members is determined by deducting the following from the Gross Settlement Amount:

- Up to \$300,000—which is 33 ⅓% of the Gross Settlement Amount—in attorneys' fees and up to \$25,000 in litigation costs to Class Counsel (the "Attorneys' Fees and Costs");
- Up to \$10,000 to the Class Representative as an Enhancement Payment—as a service award and in exchange for a general release of claims;

///

- Up to \$100,000 allocated as a PAGA Payment—of which 75% is allocated for payment to the LWDA for civil penalties pursuant to statute and 25% is allocated to PAGA Group Members; and
- Up to \$18,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$447,000, is called the “Net Settlement Amount.” (Settlement Agreement ¶¶ 22, 47(f); Orshansky Decl. ¶ 7.) The entire Net Settlement Amount shall be paid out to Settlement Class Members. (Orshansky Decl. ¶ 7.) Settlement Class Members shall automatically receive payments without the need to submit a claim form, and PAGA Group Members shall receive PAGA payments irrespective of whether they opt out of the class settlement. (Settlement Agreement ¶¶ 48(d), 48(f), 52; Orshansky Decl. ¶ 7.)

A. The Settlement Provides for Reasonable Monetary Payments

Although exact recovery amounts depend on each Settlement Class Members’ relative number of qualifying workweeks, for estimation purposes only, if all of the approximately 825 Class Members participate in the settlement, then the average Individual Settlement Share would be an estimated \$541.82 per Class Member. (Orshansky Decl. ¶ 11.) Of course, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out. (*Ibid.*; Settlement Agreement ¶ 55.)

The Net Settlement Amount will be the amount that is available for distribution to Settlement Class Members on a *pro rata* basis, based on workweeks during the Class Period. (Settlement Agreement ¶¶ 36, 48(f); Orshansky Decl. ¶ 8.) Each Individual Settlement Share shall be calculated as follows: The Net Settlement Amount will be divided by the total of all Workweeks of Settlement Class Members during the Class Period in order to yield the “Workweek Value.” (Settlement Agreement ¶¶ 36, 48(f); Orshansky Decl. ¶ 8.) The Individual Settlement Share to each Settlement Class Member will be determined by multiplying his or her individual Workweeks by the Workweek Value. (Settlement Agreement ¶¶ 36, 48(f); Orshansky Decl. ¶ 8.)

In addition, each PAGA Group Member will receive a proportional share of 25% of the PAGA Payment based on his or her pay periods during the PAGA Period. (Settlement Agreement ¶

48(d); Orshansky Decl. ¶ 9.) Specifically, 25% of the PAGA Payment (or \$25,000) shall be divided by the total of all Pay Periods worked by PAGA Group Members during the PAGA Period in order to establish the value of each Pay Period. (Settlement Agreement ¶¶ 28, 48(d); Orshansky Decl. ¶ 9.) The individual PAGA Payment to be made to each PAGA Group Member shall be calculated by multiplying the value of a Pay Period by the number of Pay Periods worked by the PAGA Group Member during the PAGA Period, irrespective of whether he or she is a Settlement Class Member. (Settlement Agreement ¶¶ 28, 48(d); Orshansky Decl. ¶ 9.)

The payment to each Settlement Class Member will be the sum of his or her Individual Settlement Share plus, if applicable, the individual PAGA payment (collectively, “Individual Settlement Payment”). (Settlement Agreement ¶¶ 18-19; Orshansky Decl. ¶ 10.) As a result of the distribution formulas, the consideration paid to each Settlement Class Member is tailored to the impact of Defendants’ alleged violations as well to the claims he or she is releasing. (*Ibid.*) Further, a Settlement Class Member may submit a written letter to the Settlement Administrator disputing the number of workweeks credited if he or she believes that count is inaccurate. (Settlement Agreement ¶ 53.) Finally, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out.⁴ (*Id.* at ¶ 55.)

B. Class Representative Enhancement Payment, Attorneys’ Fees, and Expenses

As part of the settlement, Plaintiff will apply for an enhancement payment at the time of seeking final approval in the amount of \$10,000 for services to the Settlement Class. (*See* Declaration of Mauricio Vazquez (“Vazquez Decl.”), filed concurrently herewith, *passim*; Settlement Agreement ¶¶ 13, 48(c); Orshansky Decl. ¶ 12.) “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” (*In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-1394.) Plaintiff’s requested enhancement payment is intended to recognize the significant benefits conferred upon the Settlement Class and be proportional to the time and effort that Plaintiff expended on behalf of the

⁴ Again, if approved, PAGA Group Members will receive their individual PAGA payments irrespective of whether they opt out of the class settlement. (Settlement Agreement ¶ 48(d).)

1 Class including providing factual information and documents to Class Counsel, discussing the
2 claims and theories at issue in the case with Class Counsel, identifying potential witnesses, and
3 reviewing the Settlement Agreement, and the significant risks Plaintiff undertook by agreeing to
4 serve as a named plaintiff. (*See Vazquez Decl., passim*; Settlement Agreement ¶¶ 46, 48(c);
5 Orshansky Decl. ¶ 13.)

6 Class Counsel will apply for an attorneys’ fees award of no more than thirty-three and one-
7 third percent (33 ⅓%) of the Gross Settlement Amount, and reimbursement of litigation costs in an
8 amount up to \$25,000. (Settlement Agreement ¶¶ 2, 48(a); Orshansky Decl. ¶ 14.) Plaintiff submits
9 that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-
10 consuming litigation on a purely contingent fee basis. (*Ibid.*) Class Counsel have incurred substantial
11 attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal
12 research and analysis, conducting informal discovery, meeting and conferring with defense counsel,
13 interviewing putative class members, analyzing documents produced by Defendants, including
14 corporate policies and employee time and payroll records, consulting with an expert, building
15 damages models, preparing for and attending two mediations, routine case updates and consultations
16 with the client, and negotiating and preparing the Memorandum of Understanding, Settlement
17 Agreement, Notice of Pendency of Class and Representative Action Settlement, and this motion for
18 preliminary approval and supporting documents. (*Ibid.*) Class Counsel will also expend future
19 attorney time in attending the hearing on this motion, overseeing the notice and administration
20 process, drafting the final approval motion and supporting documents, and attending the final
21 approval hearing, among other tasks, such as addressing questions from Class Members. (*Id.* at ¶
22 15.)

23 Both California and federal courts have recognized that an appropriate method for awarding
24 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of
25 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the
26 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*
27 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and
28 “lodestar/multiplier” methods].) Historically, courts have awarded percentage fees in the range of

1 20% to 50%, depending on the circumstances of the case. (*See* 4 Rubenstein et al., Newberg on
2 Class Actions (4th Ed. 2013) § 14.6 (hereafter, “Newberg”) [“No general rule can be articulated on
3 what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on
4 a reasonable fee award from a common fund in order to assure that the fees do not consume a
5 disproportionate part of the recovery obtained for the class, although somewhat larger percentages
6 are not unprecedented.”].)

7 Class Counsel submit that their request for attorneys’ fees is reasonable when viewed as an
8 overall percentage of the settlement amount in light of the substantial risks and significant work
9 undertaken, the excellent results obtained for the Class Members, and the efficiency with which the
10 Parties have conducted the litigation. (Orshansky Decl. ¶ 16.) Assuming that the Court grants
11 preliminary approval, Class Counsel will seek an award of attorneys’ fees and litigation costs at the
12 time of seeking final approval of this settlement.

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

14 Express judicial policy favors maintaining wage and hour actions as class actions. (*Prince*
15 *v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981) 29
16 Cal.3d 462 [finding that California public policy “encourages the use of the class action device”].)
17 Any doubt as to the appropriateness of class treatment should be resolved in favor of class
18 certification, subject to later modification if necessary. (*Id.* at pp. 473-475.) The decision to certify
19 a class is purely a procedural one and should be based on the allegations in the operative complaint,
20 and not in the perceived factual or legal merit of the class claims. (*Linder v. Thrifty Oil Co.* (2000)
21 23 Cal.4th 429, 439-441.)

22 To certify a settlement class, the trial court must find the two primary requirements for
23 maintaining a class action: (1) there must be an ascertainable class, and (2) there must be a well-
24 defined community of interest in the questions of law and fact involving the parties to be
25 represented. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805-809; *Daar v. Yellow Cab*
26 *Company* (1967) 67 Cal.2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal.App.4th
27 467, 471; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341.) These criteria
28 are met here for the reasons set forth below.

1 **A. There Is an Ascertainable and Sufficiently Numerous Class**

2 Whether a class is ascertainable is determined by examining the class definition, the size of
3 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at
4 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,
5 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are “ascertainable” where
6 they may be readily identified without unreasonable expense or time.

7 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
8 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all hourly, non-
9 exempt warehouse and retail employees employed by Defendants in the State of California during
10 the Class Period. (Settlement Agreement ¶ 5.) Further, the Class Period is defined as the period
11 beginning on November 6, 2016 and ending on the date of Preliminary Approval, unless Defendants
12 shorten the Class Period pursuant to paragraph 54 of the Settlement Agreement. (*See id.* at ¶¶ 7, 54.)
13 Thus, all Class Members are of a specific type (hourly, non-exempt warehouse and retail employees)
14 employed within California. (Orshansky Decl. ¶ 87.) Defendants are required to and do maintain
15 employment records of such persons, including contact information and Social Security numbers.
16 (*Ibid.*) Documents and information exchanged reflect a class of approximately 825 current and
17 former hourly, non-exempt warehouse and retail employees working in California during the Class
18 Period. (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and numerosity requirements.
19 (*See e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers sufficiently
20 numerous].)

21 **B. There Is a Well-Defined Community of Interest**

22 A community of interest is established by the preponderance of common issues of law and
23 fact. (*See Vasquez, supra*, 4 Cal.3d at p. 811.) The requirement of a community of interest:

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

1 (*Id.* at p. 809.) The instant litigation is predicated on uniform company policies and systemic top-
2 down business practices revolving principally around Defendants’ timekeeping and pay practices—
3 *e.g.*, off-the-clock work attributed to understaffing, unreasonable workloads, and failure to pay meal
4 and rest break premiums. (Orshansky Decl. ¶ 88.) These allegations have given rise to the following
5 claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; and
6 derivative claims arising therefrom. (*Ibid.*)

7 Plaintiff has alleged a single top-down compensation scheme where “the relevant proof
8 [does] not vary among class members” and “clearly present[] a common question fundamental to
9 all class members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172
10 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169
11 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation, class-
12 wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I.*
13 *Custom Kitchen, supra*, 191 Cal.App.3d at p. 1350 [granting class certification in a manufacturing
14 defect case when a common course of action had been proven].) This inference “*eliminates* the need
15 for each class member to prove individually the consequences of the defendants’ actions to him or
16 her.” (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of this matter depends upon questions
17 that are common to members of the Class. (Orshansky Decl. ¶ 89.) These types of claims are
18 commonly held to be proper for class certification. (*Ibid.*; *see, e.g., Bluford v. Safeway, Inc.* (2013)
19 216 Cal.App.4th 864, 871 [reversing denial of rest period claim]; *Benton v. Telecom Network*
20 *Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal period claim].)

21 **C. The Claims of the Named Plaintiff Are Typical**

22 The typicality requirement is satisfied where class representatives have claims that are
23 typical of those of the rest of the class. (*B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d at p. 1347.)

24 Here, Plaintiff’s claims are typical of those held by the members of the Class. (Orshansky
25 Decl. ¶ 90.) Like all other Class Members, Plaintiff was an hourly, non-exempt employee working
26 for Defendants in California during the Class Period. (*Ibid.*) As alleged, Plaintiff was not
27 compensated for all hours he worked, not fully reimbursed for business expenses, and not provided
28 with legally compliant meal and rest breaks. (*Ibid.*) Plaintiff was therefore impacted by the same

1 challenged policies that allegedly injured the Class as a whole and subject to the same defenses
2 forwarded by Defendants as to the Class; thus, his claims are typical of the Class. (*Ibid.*)

3 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
4 **Settlement Class**

5 The adequacy of representation requirement examines conflicts of interest between named
6 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
7 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
8 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class
9 he seeks to represent. (Vazquez Decl. ¶ 10; Orshansky Decl. ¶ 91; *McGhee v. Bank of America*
10 (1976) 60 Cal.App.3d 442, 450 [finding adequacy satisfied where there was no indication that
11 plaintiff’s counsel were not qualified and the named plaintiff had no interests antagonistic to those
12 of the proposed class].) Class Counsel also have extensive experience in wage and hour litigation.
13 (Orshansky Decl. ¶¶ 81-85, 91.)

14 **E. A Class Action Is Superior to a Multiplicity of Litigation**

15 In making its class certification decision, the court must determine that a class action would
16 be superior to alternative means for the fair and efficient adjudication of the litigation. By
17 consolidating more than eight hundred individual actions into a single proceeding, this Court’s use
18 of the class action device enables it to manage this litigation in a manner that serves the efficiency
19 interests of the litigants and the judicial system. (Orshansky Decl. ¶ 92.) Absent class treatment, the
20 only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores*
21 *v. Super. Ct.* (2004) 34 Cal.4th 319, 339 fn. 10 [stating “[t]he relevant comparison lies between the
22 costs and benefits of adjudicating Plaintiff’s claims in a class action and the costs and benefits of
23 proceeding by numerous separate actions – not between the complexity of a class suit that must
24 accommodate some individualized inquires and the absence of any remedial proceeding
25 whatsoever.”].) Finally, in the context of settlement, the superiority concerns are essentially non-
26 existent.

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28 ///

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

2 Any settlement of class action litigation must be reviewed and approved by a court. This is
3 accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a detailed
4 review after the notice has been distributed to the class members for their comments or objections.

5 In this regard, the Federal Manual for Complex Litigation (Second) explains:

6 A two-step process is followed when considering class settlements...If the proposed
7 settlement appears to be the product of serious, informed, non-collusive negotiations,
8 has no obvious deficiencies, does not improperly grant preferential treatment to class
9 representatives or segments of the class, and falls within the range of possible
approval, then the court should direct that notice be given to the class members of a
formal fairness hearing, at which evidence may be presented in support of and in
opposition to the settlement.

10 See Federal Manual for Complex Litigation (Second) (1985) § 30.44 (“MCL 2d”). The preliminary
11 approval of the class action settlement by the trial court is simply a conditional finding that the
12 settlement appears to be within the range of acceptable settlements. (*See, e.g., Newberg, supra*, at §
13 11.25; *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
14 1085, 1094-1095; MCL 2d, *supra*, at § 30.44 [“Preliminary approval is appropriate if the agreement
15 is ‘fair, reasonable, and adequate under the circumstances’”].) Thus, the preliminary approval of the
16 class action settlement by the Court is simply a conditional finding that the settlement appears to be
17 within the range of acceptable settlements. A review of the preliminary approval criteria
18 demonstrates a substantial basis for granting the preliminary approval requested by this Motion and
19 proceeding to a full settlement hearing.

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

21 As a matter of public policy, courts both encourage the use of the class action device and
22 favor settlement over continued litigation. (*See, e.g., Linder, supra*, 23 Cal.4th at p. 434 [“Courts
23 have long acknowledged the importance of class actions as a means to prevent a failure of justice in
24 our judicial system.”]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471; *Class Plaintiffs v.*
25 *City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276 [“[S]trong judicial policy...favors settlements,
26 particularly where complex class action litigation is concerned.”]; *Newberg, supra*, at § 11.41.)
27 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior*
28 *Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The

fact that plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.”].)

To summarize, the settlement here is fair because it offers payment to each Settlement Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the settlement proceeds whereby the funds are allocated proportionally based on the respective number of workweeks/pay periods that he or she worked during the relevant periods. (Orshansky Decl., *passim*.) For all of the foregoing reasons, the proposed settlement should be preliminarily approved.

A. The Settlement Is Entitled to a Presumption of Fairness

Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. (*See Newberg, supra*, at § 11.51; *Rodriguez v. West Publ. Corp.* (C.D.Cal. August 10, 2007) 2007 U.S.Dist.LEXIS 74767, *24-25; *In re Chicken Antitrust Litigation* (N.D.Ga. 1980) 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.) Courts do not substitute their judgment for that of the proponents, particularly when settlement has been reached by experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S.Dist.LEXIS 74767 at *24.) As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm’s length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

B. Negotiations Were at Arm’s Length before a Respected Mediator

The Parties engaged in two mediation sessions with Jeffrey Krivis of First Mediation Corporation. (Orshansky Decl. ¶ 33.) Mr. Krivis is experienced in resolving complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) As a result of the second mediation session and pursuant to a mediator’s proposal, the Parties came to an agreement on all material terms of settlement. (*Id.* at ¶ 34.) The settlement negotiations were hard fought and conducted in good faith and at arm’s length between attorneys with substantial

1 experience litigating class actions, representative actions, and wage and hour cases. (*Id.* at ¶ 35.)
2 The settlement was the product of a non-collusive settlement process in which the Parties were
3 forced to make significant compromises. (*Ibid.*)

4 **C. Investigation Was Sufficient to Allow Counsel to Act Intelligently**

5 Throughout this case, Class Members have been represented by counsel who have years of
6 experience in employment class action litigation. (Orshansky Decl. ¶¶ 81-85.) Class Counsel
7 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,
8 analyzing Plaintiff's claims; conducting pre-filing investigation and research; conducting informal
9 discovery; reviewing Defendants' written policies concerning the claims set forth in the action,
10 including Defendants' policies and procedures regarding the payment of wages, the provision of
11 meal and rest breaks, time keeping policies, reimbursement for business expenses, issuance of wage
12 statements, and providing all wages at separation; reviewing and analyzing time and pay records;
13 meeting and conferring regarding the information and documents produced; interviewing Class
14 Members; drafting pleadings; preparing damages models; consulting with an expert; preparing for
15 and attending two mediations; providing routine case updates and consultations with the client; and
16 negotiating and preparing the Memorandum of Understanding, Settlement Agreement, Notice of
17 Pendency of Class and Representative Action Settlement, and this motion for preliminary approval
18 and supporting documents. (Orshansky Decl. ¶¶ 14, 25, 30-32.)

19 **D. Class Counsel Are Experienced in Similar Litigation**

20 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
21 of the Class Members and PAGA Group Members. (*See* Settlement Agreement ¶ 42; Orshansky
22 Decl. ¶ 36.) Although the recommendations of counsel proposing the class settlement are not
23 conclusive, the Court can properly take the recommendations into account, particularly if counsel
24 have been involved in litigation for some period of time, appear to be competent, have experience
25 with this type of litigation, and significant discovery has been completed. (*See* Newberg, *supra*, at
26 § 11.47.) Here, Plaintiff is represented by competent and experienced counsel who possess extensive
27 experience litigating wage and hour class actions and have been appointed as class counsel in
28 numerous cases alleging similar claims. (Orshansky Decl. ¶¶ 81-85.)

1 **E. The Settlement Is Fair, Reasonable, and Adequate**

2 To make a fairness determination, the Court should consider several factors, including “the
3 strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the
4 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
5 discovery and the stage of proceedings, [and] the experience and views of counsel.” (*Dunk v. Ford*
6 *Motor Co.* (1986) 48 Cal.App.4th 1794, 1801.) “The list of factors is not exclusive and the court is
7 free to engage in a balancing and weighing of factors depending on the circumstance of each case.”
8 (*Wershba, supra*, 91 Cal.App.4th at p. 245.) As discussed below, the proposed settlement is fair,
9 adequate, and reasonable in light of the overall factors in this case.

10 **1. The Strength of Plaintiff’s Case**

11 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
12 model for Defendants’ liability. (Orshansky Decl. ¶ 37.) Although Plaintiff steadfastly maintains
13 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
14 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4
15 *infra*, Defendants presented numerous defenses to Plaintiff’s claims, both on the merits and with
16 respect to class certification. (Orshansky Decl. ¶ 37.) For example, Defendants defended against the
17 minimum and overtime wage claims by relying on policies that explicitly prohibited Class Members
18 from engaging in off-the-clock work. (*Id.* at ¶ 38.) Defendants also argued that Class Members
19 worked in different job positions and had different managers, and, as a result, Defendants contended
20 there was variation to the circumstances that could allegedly cause the employees to be deprived of
21 the opportunity to take legally compliant, duty-free meal and rest periods, and this variation in
22 circumstances raised highly individualized questions of fact. (*Ibid.*) Defendants also possessed
23 written waivers for some employees of their meal break periods which would significantly reduce
24 the strength of Plaintiff’s meal break claims. (*Ibid.*) Further, Defendants made some premium
25 payments for non-complaint meal periods. (*Ibid.*)

26 Although Plaintiff was prepared to litigate these claims through class certification and
27 ultimately through trial, given the substantial amount offered in settlement, Class Counsel predicted
28 that it was far from certain that Plaintiff would be able to recover a greater amount at trial,

1 particularly after considering the increased litigation costs that would accrue. (Orshansky Decl. ¶
2 42.) Thus, this factor supports preliminary approval of the settlement.

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

4 Although Plaintiff investigated the claims prior to settlement, the Parties agreed to focus on
5 exhausting early settlement efforts before launching into full-fledged and hotly contested litigation.
6 (Orshansky Decl. ¶ 39.) Therefore, absent settlement, the Parties would have needed to conduct
7 substantial additional discovery, such as the production of voluminous records and numerous
8 depositions of experts and percipient witnesses, and prepare the case for class certification and trial.
9 (*Ibid.*) The Parties would have had to depose a number of people such as managers, supervisors,
10 human resource representatives, and employees in order to establish liability. (*Ibid.*) Discovery
11 disputes would have been in the offing and liability likely would have entailed a battle of experts.
12 (*Ibid.*) This settlement avoids the considerable time, attorneys' fees and costs, and party resources
13 associated with conducting additional discovery, moving for class certification and potentially
14 summary judgment or adjudication, and ultimately trial, as well as the risks and the accompanying
15 burden of continued litigation on the Court. (*Ibid.*) Thus, this factor supports preliminary approval
16 of the settlement.

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

18 Here, settlement was reached prior to class certification and the result was a successful
19 outcome for the Class. (Orshansky Decl. ¶ 40.) Yet, class certification was by no means a foregone
20 conclusion. (*Ibid.*) For example, Class Members worked in different job positions and had different
21 managers; as a result, Defendants contended there was variation to the circumstances that could
22 allegedly cause employees to work off-the-clock and/or be deprived of the opportunity to take
23 legally compliant, duty-free meal and rest periods, and this variation in circumstances raised highly
24 individualized questions of fact. (*Ibid.*) Defendants disputed Plaintiff's characterization of working
25 conditions, liability, and damages, and possessed documentary and testimonial evidence rebutting
26 Plaintiff's allegations. (*Id.* at ¶ 41.)

27 Here, Class Members may avoid each of the risks described and receive substantial monetary
28 benefits, which also weighs in favor of preliminary approval.

1 **4. Amount Offered in Settlement Given Realistic Value of Claims**

2 A settlement is not judged against what might have been recovered had a plaintiff prevailed
3 at trial, nor does the settlement have to provide 100% of the damages to be fair and reasonable.
4 (*Wershba, supra*, 91 Cal.App.4th at pp. 246, 250 [acknowledging that “[c]ompromise is inherent
5 and necessary in the settlement process ... even if the relief afforded by the proposed settlement is
6 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to
7 a class settlement because the public interest may indeed be served by a voluntary settlement in
8 which each side gives in the interest of avoiding litigation.”].)

9 Plaintiff’s estimate of the settlement recovery is a reasonable percentage of possible
10 recoverable damages at trial. Plaintiff’s damages analysis shows that the settlement reflects an
11 estimated 29.85% of the maximum potential damages recoverable at trial. (Orshansky Decl. ¶ 43.)
12 Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question
13 (*see Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123), this case clearly meets
14 requirements establishing that the class settlement is within the “ballpark” of reasonableness. The
15 settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed
16 claims.

17 Unpaid Minimum and Overtime Wages

18 Plaintiff, along with other hourly, non-exempt warehouse and retail employees, performed
19 pre- and post-shift off-the-clock work to minimize the incidence of overtime. (Orshansky Decl. ¶
20 45.) Plaintiff contended that all off-the-clock work is compensable time. (*Ibid.*) An employer must
21 pay its employees no less than the minimum wage for all hours worked (*see* Labor Code § 1197);
22 thus, Plaintiff sought to recover at least the minimum wage for all off-the-clock work, plus liquidated
23 damages in that amount under Labor Code section 1194.2. (Orshansky Decl. ¶ 45.)

24 Class Counsel analyzed the documents and data produced by Defendants and, in conjunction
25 with interviews of Plaintiff and Class Members, determined Defendants’ degree of liability and
26 amounts due in damages—specifically, the incidence and amount of purported off-the-clock
27 activity. (Orshansky Decl. ¶ 46.)

28 ///

1 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-clock
2 hours, Plaintiff estimated that Defendants are liable for an aggregate of approximately fifteen (15)
3 minutes of unpaid straight and overtime pay per workweek. (Orshansky Decl. ¶ 47.) Based on
4 Defendants' records, Plaintiff determined that 20.1% of Class Members' shifts qualified for the
5 overtime rate of pay. At the average straight time hourly rate of \$15.13 and the average overtime
6 hourly rate of approximately \$23.00, such yields an estimated damages amount of \$156,159.09,
7 without discounting for risks associated with certification or merits. (*Ibid.*)

8 In opposition to certification, Defendants contended that Plaintiff's claim for off-the-clock
9 work is not amenable to class treatment, because employees worked in a variety of departments with
10 different requirements, and it would require an unmanageable series of mini-trials to determine how
11 much time was spent without pay. (Orshansky Decl. ¶ 48.) Further, in terms of merit defenses,
12 Defendants vigorously disagreed with Plaintiff's theories regarding how much off-the-clock work
13 occurred in reality, and the credibility of those claimed hours given Defendants' policies to the
14 contrary. (*Id.* at ¶ 49.) The failure to track all hours poses evidentiary difficulties because it is hotly
15 contested how much off-the-clock work actually occurred. (*Id.* at ¶ 50.) Although Class Counsel
16 conducted multiple Class Member interviews, for Plaintiff to establish the quantity of specific
17 disputed and unrecorded work activities—especially over multiple job titles, at differing pay rates—
18 would have been costly, time-consuming, and daunting. (*Ibid.*)

19 Defendants further responded that any off-the-clock time is *de minimis*. (Orshansky Decl. ¶
20 51.) Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*
21 (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis*
22 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
23 performed off the clock. (Orshansky Decl. ¶ 51.) What is not clear, however, is to what extent the
24 *de minimis* defense would apply where the uncaptured hours were associated with an occasionally
25 recurring activity. (*Ibid.*) In light of these considerations—especially the evidentiary difficulties of
26 demonstrating off-the-clock work on a class-wide basis—Class Counsel applied a discount that
27 incorporated the risks of non-certification and being unsuccessful on the merits. (Orshansky Decl.
28 ¶ 52.)

Meal and Rest Period Violations

Plaintiff asserted that there are compliance issues *vis-à-vis* meal breaks—some are late, missed, short, or interrupted. (Orshansky Decl. ¶ 53.)

On February 25, 2021, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1) employers are not permitted to round time records when determining if employees are entitled to meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods were provided to employees if the time records show otherwise. Using this opportunity to echo its longstanding position that California liberally construes the Labor Code and Wage Orders to favor protection of employees, the California Supreme Court emphasized that meal periods are part of the remedial worker protection framework to protect the health and safety of employees.

Although Defendants made some premium payments, those amounts were only a portion of what should have been paid. (Orshansky Decl. ¶ 55; *c.f.* Wage Order No. 16-2001, § 11(b).) Consequently, Plaintiff alleged that Defendants violated Labor Code sections 226.7 and 512 and applicable Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and missed meal periods. (Orshansky Decl. ¶ 55.)

Defendants, however, contended that they had practices, policies, and procedures that fully complied with the law to provide meal and rest breaks every workday to their employees. (Orshansky Decl. ¶ 56.) Defendants vehemently argued that they complied with the requirements articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (Orshansky Decl. ¶ 56.) Specifically, Defendants maintained that they “provide” employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieve employees of all duties during meal periods, relinquish control over employees’ activities, and allow employees to leave the premises during meal periods. (*Ibid.*)

Like most employers facing meal period litigation, Defendants argued that employees were apprised of their right to take meal periods and provided compliant meal periods, but some may voluntarily have waived them. (Orshansky Decl. ¶ 57.) Indeed, Defendants possessed voluntary written waivers for some employees in regard to meal periods, which Defendants contended would

1 cause the action to necessarily devolve into a series of individualized mini-trials, precluding class
2 certification. (*Ibid.*; see *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25 [holding
3 that the defendant must be provided an opportunity to litigate affirmative defenses, even when they
4 turn on individual questions].)

5 Based upon the analysis of Class Members’ time and payroll records and, in conjunction
6 with interviews of Plaintiff and Class Members, Plaintiff determined that 28.4% of eligible shifts
7 were the subject of unique violations for missed, short, or late meal periods, and calculated the
8 potential exposure of this claim to be \$571,667.21. (Orshansky Decl. ¶ 58.)

9 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required
10 whereby employers “relinquish control over how employees spend their time and relieve employees
11 of all duties.” (Orshansky Decl. ¶ 59; *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257,
12 260.) Due to Defendants’ work demands and inadequate staffing, Plaintiff and Class Members did
13 not receive timely and compliant rest breaks, nor did Defendants relinquish control over how
14 employees spent their 10-minute rest periods. (Orshansky Decl. ¶ 59.) Plaintiff did not receive rest
15 break premium payments for non-compliant rest breaks, nor is there evidence that Defendants made
16 rest break premium payments to Class Members at any time (unlike non-compliant meal periods, for
17 which Defendants made some premium payments, as noted above). (*Id.* at ¶ 60.) Thus, Plaintiff
18 alleged that Defendants did not provide premium pay for each non-compliant rest break as required
19 under Labor Code section 226.7. (Orshansky Decl. ¶ 60.)

20 Here again, Defendants disputed liability and damages. Defendants maintained that they
21 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
22 of four hours worked as required by Labor Code section 226.7. (Orshansky Decl. ¶ 61.) Defendants
23 explained that Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*)
24 As with meal periods, Defendants argued that any Class Member who failed to take a rest break, or
25 took a short or late rest break, did so voluntarily and that all applicable rest breaks were still
26 authorized and provided. (*Ibid.*) Defendants also attempted to distinguish *Augustus*, *supra*, which
27 involved security guards who were required to monitor a pager, phone, or other device as having an
28 added constraint that is not present in the matter *sub judice*. (Orshansky Decl. ¶ 61.)

1 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendants’
2 exertion of pressure, control, and resulting violations is likely to be more difficult. (Orshansky Decl.
3 ¶ 62.) Therefore, Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and
4 other Class Members for a maximum exposure rate of \$486,995.01. (*Ibid.*) For settlement purposes,
5 and to account for the difficulties of certifying and proving unrecorded rest break violations, a
6 downward departure from that maximum exposure was and is warranted. (*Ibid.*)

7 Unreimbursed Expenses

8 Plaintiff alleged a cause of action under Labor Code section 2802(a), which states that an
9 employer must reimburse employees for all necessary expenditures that employees incur in
10 discharging their duties. (Orshansky Decl. ¶ 63.) Here, Plaintiff and Class Members were required
11 to use their personal cell phones to communicate with supervisors and coworkers for reasons related
12 to work, yet Defendants failed to reimburse for these necessary business expenses. (*Ibid.*)

13 Defendants contended that they have a policy and practice of reimbursing employees for
14 necessary business-related expenses. (Orshansky Decl. ¶ 64.) Defendants also contended that, with
15 respect to the alleged expenses for which Plaintiff and other Class Members never requested
16 reimbursement from Defendants, Defendants did not know and had no reason to know that the
17 alleged business-related expenses were incurred. (*Ibid.*) Moreover, to the extent it occurred,
18 Defendants asserted that this claim is not suitable for class treatment as it would require
19 individualized determinations as to whether each employee used a personal cell phone for work-
20 related purposes and, if so, how much of that use was a reasonable percentage of his or her individual
21 monthly phone bill. (*Ibid.*)

22 Defendants also argued that the California Labor Code only requires reimbursement of
23 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
24 work—and argued that distinguishing a necessary expense from an unnecessary one would require
25 individualized inquiry. (Orshansky Decl. ¶ 65; *see* Labor Code § 2802; *Gattuso v. Harte-Hanks*
26 *Shoppers, Inc.* (2007) 42 Cal.4th 554.) Furthermore, whether an expense was necessary would
27 depend in part on the reasonableness of the employee’s choice and would thus have to be established
28

1 by way of extensive individual factual inquiry and/or statistical evidence. (*Cochran v. Schwan's*
2 *Home Services, Inc.* (2014) 228 Cal.App.4th 1137.)

3 For the foregoing reasons, and taking into account the wide variety of telephone plans,
4 providers, and costs, which creates evidentiary complexities on an individual basis, let alone class-
5 wide, Plaintiff assigned *de minimis* value to this claim. (Orshansky Decl. ¶ 66.)

6 Wage Statement Violations

7 Plaintiff alleged a cause of action under Labor Code section 226(a) for Defendants' failure
8 to provide accurate itemized wage statements. (Orshansky Decl. ¶ 67.) Failure to comply with the
9 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
10 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
11 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*
12 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because
13 if Defendants did not provide wages for all hours worked, meal and rest breaks, and so forth, then
14 the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 67.)

15 Defendants contended, however, that Labor Code section 226(e) penalties are not automatic.
16 (Orshansky Decl. ¶ 68.) Rather, the employee must show that Defendants' non-compliance was
17 "knowing and intentional." (*Ibid.*) Defendants suggested that any non-compliance was not knowing
18 and intentional. (*Ibid.*) Moreover, Defendants argued that meal and rest period violations cannot
19 support derivative wage statement penalties. (*Ibid.*; *see Naranjo v. Spectrum Security Service, Inc.*
20 (2019) 40 Cal.App.5th 444, 474 [holding that violations of Labor Code's meal break provisions do
21 not entitle employees to pursue the derivative wage statement penalties]; *c.f.*, but *review granted*,
22 *Naranjo v. Spectrum Security Services, Inc.* (Cal., Jan. 2, 2020, No. S258966) 455 P.3d 704, 257
23 Cal.Rptr.3d 188.) Although on May 23, 2022, the California Supreme Court ruled that premium pay
24 for missed meal and rest breaks constitutes "wages" that must be reported on wage statements and
25 paid within the statutory deadlines for when an employee leaves the job, thereby overturning the
26 decision of the Court of Appeal, the risk of an adverse decision was still a threat during settlement
27 negotiations.

28 ///

1 Because the damages for this cause of action are penalties, the statute of limitations is only
2 one year prior to the filing of the original complaint. (*See* Code Civ. Proc. § 340.) The Parties
3 discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent
4 violation rates, Plaintiff estimates the total maximum wage statement exposure to be \$921,531.
5 (Orshansky Decl. ¶ 69.)

6 Derivative Waiting Time and UCL Claims

7 Plaintiff further asserted causes of action against Defendants for failure to timely pay all
8 wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business
9 practices. (Orshansky Decl. ¶ 70; *see* Labor Code § 203; Bus. & Prof. Code §§ 17200, *et seq.*) As
10 with other claims, Defendants vigorously disagreed that they engaged in any conduct giving rise to
11 liability, or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 70.)

12 Defendants argued that waiting time penalties are not appropriate because they attempted to
13 pay employees all final wages owed in good faith upon their separation, thereby precluding a finding
14 of willfulness necessary to obtain waiting time penalties. (Orshansky Decl. ¶ 71.) Moreover,
15 Defendants maintained that no waiting time penalties were recoverable from alleged meal or rest
16 period violations. (*Ibid.*) Defendants raised the Second Appellate District's decision in *Naranjo*,
17 *supra*, 40 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage
18 statement nor waiting time penalties. (Orshansky Decl. ¶ 71.) During settlement negotiations, the
19 *Naranjo* decision was still pending before the California Supreme Court, and though a decision has
20 since issued, the uncertainty and risk of an adverse decision added additional weight to the
21 Defendants' defense. (Orshansky Decl. ¶ 71.) Finally, Defendants argued that adequate remedies at
22 law exist to render the action unsuitable for equitable remedies, and again contended that the
23 allegations underlying the unfair competition claim lacked merit. (*Id.* at ¶ 72.)

24 Based on the count of 635 former employees, Class Counsel calculated the maximum value
25 of the waiting time claim to be \$2,336,292.00. (Orshansky Decl. ¶ 73.) However, to account for the
26 uncertainty of proving the underlying claims and risk of an adverse decision in *Naranjo*, Class
27 Counsel made a realistic allowance with the agreed upon settlement dollar figure. (Orshansky Decl.
28 ¶ 73.)

PAGA Penalties

The success of Plaintiff's PAGA claim is wholly dependent upon the success of his underlying claims occurring within the one-year statute of limitations applicable to the PAGA. (Orshansky Decl. ¶ 74.) Defendants maintained and continue to maintain they had legally compliant employment policies and practices throughout the statutory period. (*Id.* at ¶ 75.) Defendants denied and continue to deny that they ever violated any provision of the California Labor Code and argued that, even assuming such violations occurred, Defendants will not be treated as having engaged in subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendants argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendants had notice that they were violating the laws, *e.g.*, they had been cited by a labor agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal.4th 1157, 1209.) Thus, Defendants contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply. (Orshansky Decl. ¶ 75.)

Moreover, Defendants asserted that before a PAGA claim could be tried, the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently "manageable" so as not to interfere with Defendants' right to due process. (Orshansky Decl. ¶ 76.) Defendants reiterated how hourly employees' job duties and work hours varied. (*Id.* at ¶ 77.) Defendants contended that there was variation as to the circumstances that could allegedly cause employees to work off the clock or to be deprived of the opportunity to take legally compliant, duty-free meal and/or rest periods. (*Ibid.*) Defendants further opined that these issues presented challenges not only to liability but also to Plaintiff's ability to show that a PAGA claim could be efficiently and manageably adjudicated without abridging Defendants' due process rights. (*Ibid.*)

Finally, Defendants maintained that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. (Orshansky Decl. ¶ 78; *see* Labor Code § 2699e(2) [the Court may "award a lesser amount than the maximum civil penalty amount [authorized by PAGA]

1 if, based on the facts and circumstances of the particular case, to do otherwise would result in an
2 award that is unjust, arbitrary and oppressive, or confiscatory.”].)

3 Although, strictly speaking, class certification requirements are not required to be satisfied
4 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
5 valuation of a PAGA claim is uncertain.⁵ (Orshansky Decl. ¶ 79.) Thus, Class Counsel applied
6 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or
7 trial, the risks regarding success on the merits and establishing liability, and the risks with proving
8 the extent of penalties that are warranted and possible discretionary reduction of penalties by the
9 Court. (*Ibid.*) Plaintiff used the “initial” \$100 per pay period violation rate (as opposed to the \$200
10 subsequent per violation rate) to calculate a realistic estimate of \$1,332,300 in potential PAGA
11 penalty exposure—of which, by statute, only 25%, or \$333,075, would be recoverable by aggrieved
12 employees. (*Ibid.*)

13 Summary

14 After Class Counsel calculated the realistic possible recovery to Class Members for each of
15 the above claims, the aggregate result is \$4,472,644.31 in total damages (exclusive of PAGA
16 penalties). (Orshansky Decl. ¶ 80.) Discounting this amount by 25% for the risk of proceeding
17 toward class certification and by an additional 25% for the risk of losing on the merits results in
18 damages of \$2,515,862.42. (*Ibid.*) Recovery of PAGA penalties is predicated on the success of
19

20 ⁵ Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but
21 rather to facilitate the enforcement of the labor laws. (*See, e.g., Williams v. Superior Court* (2017)
22 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Labor Code § 2699(i).) In
23 assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount which the
24 LWDA and the aggrieved employees are to receive formally in the form of monetary civil penalties
25 but instead whether the total settlement amount achieves the PAGA’s objectives. “When PAGA
26 claims are settled, courts “consider whether the proposed PAGA settlement is fair and adequate in
27 view of the purposes and policies of the statute[]” and “[t]hose purposes and policies include
28 benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging compliance
with California Labor Code provisions, and deterring noncompliance.” (*O’Connor v. Uber Techs., Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110, 1132-33, 1135.) A “[c]ourt does not review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine whether it is fundamentally fair, reasonable and adequate, with primary consideration for the interests of absent class members.” (LWDA’s Comments on Proposed PAGA Settlement in *O’Connor v. Uber Techs. Inc.* (N.D.Cal. July 29, 2016, No. 13-CV-03826-EMC) Docket No. 736 at 4:17-19.) “PAGA penalties must be evaluated in terms of their public policy objective and not just through the prism of what private relief has been sought or obtained.” (*Id.* at 4:14-16.)

1 Plaintiff's underlying claims, each of which Defendants vigorously dispute. (*Ibid.*) Class Counsel
2 discounted the PAGA exposure of \$1,332,300 by 25% for the risk of losing on the merits and/or not
3 recovering a PAGA penalty for each pay period, and by an additional 50% for the risk of the Court
4 reducing penalties, to arrive at an estimated exposure of \$499,612.50. (*Ibid.*) The proposed
5 settlement amount of \$900,000 represents an approximate 29.85% of Plaintiff's maximum recovery
6 of damages and penalties, while avoiding the further expense and serious risk of proceeding toward
7 class certification and trial. (*Ibid.*) "The fact that a proposed settlement may only amount to a
8 fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is
9 grossly inadequate and should be disapproved." (*Linney v. Cellular Alaska Partnership* (9th Cir.
10 1998) 151 F.3d 1234, 1242 [internal quotations omitted]; see, e.g., *Altamirano v. Shaw Industries,*
11 *Inc.* (N.D.Cal. 2015) 2015 WL 4512372, at *9 [preliminarily approving wage and hour class action
12 settlement stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum
13 recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval
14 given the merits of Plaintiff's claims."].) Taking into account the risks of non-certification and
15 failure to prevail on the merits, and the Court's power to reduce the civil penalties, the proposed
16 settlement falls within the realm of being fair, reasonable, and adequate. (Orshansky Decl. ¶ 80.)

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

18 This Court should order distribution of the proposed Notice of Pendency of Class and
19 Representative Action Settlement (*see* Orshansky Decl. Exh. A [Settlement Agreement] at internal
20 Exhibit 1) to the Class by first class mail, postage prepaid, using the last known mailing address
21 information provided by Defendants. (Orshansky Decl. ¶ 93.) Here, Plaintiff proposes that the
22 settlement be administered by CPT Group, Inc. ("CPT"), an experienced class action settlement
23 administrator. (Settlement Agreement ¶¶ 33, 51(a); Orshansky Decl. ¶ 94.) Class Members'
24 addresses will be ascertainable through Defendants' personnel and payroll records, which
25 Defendants will provide to CPT within ten (10) calendar days after preliminary approval of the
26 settlement. (Settlement Agreement ¶ 51(b); Orshansky Decl. ¶ 94.) To the extent that any notices
27 are returned, CPT will run those addresses through the National Change of Address database and/or

1 conduct skip traces to obtain current address information. (Settlement Agreement ¶ 51(e);
2 Orshansky Decl. ¶ 94.)

3 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
4 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
5 the key terms of the Settlement Agreement, the uniform 45-day deadline to submit a dispute, opt-
6 out, or objection to the class settlement and the procedure by which to do so, and explains the
7 recovery formula and credited number of workweeks and pay periods for each Class Member.
8 (Orshansky Decl. ¶ 95.) The proposed notice will also notify Class Members of the final approval
9 hearing date, provide the contact information for Class Counsel, and advise Settlement Class
10 Members that they may enter an appearance through counsel if they wish. (*Id.* at ¶ 96.) This manner
11 of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable and cost-
12 effective method of reaching Class Members. Thus, the proposed method of notice is reasonably
13 calculated to reach Class Members by the best means practicable and should be approved.
14 (Orshansky Decl. ¶ 96.)

15 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

16 Finally, this Court should set a hearing for final approval of the settlement on a date
17 appropriately scheduled to follow the deadline by which Class Members must file objections to the
18 settlement or opt out. (*See* California Rules of Court, Rule 3.769.)

19 **IX. CONCLUSION**

20 Based upon the foregoing, and because the proposed settlement is fair, reasonable, and
21 advantageous to the Class Members, Plaintiff respectfully requests that the Court enter an order:

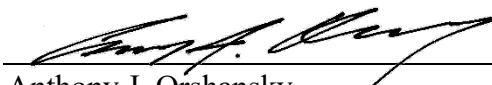
- 22 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 23 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
24 Representative Action Settlement, attached as Exhibit 1 to the Settlement Agreement;
- 25 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the
26 Class Members identified during the Class Period under Civil Code section 382 for settlement
27 purposes only;
- 28 4. Approving and appointing Plaintiff Mauricio Vazquez as the Class Representative;

5. Approving and appointing the law firm of CounselOne, P.C. as Class Counsel;
6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;
7. Setting a date for the Final Approval Hearing; and
8. Any further relief the Court deems just and proper.

Dated: November 7, 2022

Respectfully submitted,

COUNSELONE, PC

By: 

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