

Taras Kick (State Bar No. 143379)
Taras@kicklawfirm.com
Greg Taylor (State Bar No. 315128)
Greg@kicklawfirm.com
Ryan Tish (State Bar No. 274284)
Ryan@kicklawfirm.com

THE KICK LAW FIRM, APC
815 Moraga Drive
Los Angeles, CA 90049
Tel: (310) 395-2988
Fax: (310) 395-2088

Attorneys for Plaintiff YAZMIN GONZALEZ,
individually and on behalf of all others similarly
situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

YAZMIN GONZALEZ, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

BRANDED ONLINE, INC., a Delaware
corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No. 20STCV29702

*[Assigned for all purposes to the Honorable
Maren Nelson, Dept. 17]*

Complex Class Action

**NOTICE OF MOTION AND UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND PAGA REPRESENTATIVE
ACTION SETTLEMENT**

Date: April 20, 2023
Time: 9:00 AM
Dept: 17

*[Filed concurrently with Declaration of Taras Kick
and Declaration of Yazmin Gonzalez]*

Complaint filed: August 5, 2020
FAC filed: October 27, 2020
Trial date: None set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. INTRODUCTORY INFORMATION**

3 **a. Introduction**

4 This is an Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement.
5 Proposed Class Counsel are mindful of the fact that this Honorable Court has instructed them to carefully
6 review the Los Angeles Superior Court, Complex Civil Department Checklist For Preliminary Approval
7 of Class Action Settlement (“Checklist”), and that no motion for preliminary approval to date has been
8 filed without some correction. Counsel wish to be the first, and have carefully reviewed the Checklist as
9 found here: <https://www.lacourt.org/division/civil/pdf/PreliminaryApprovalOfClassActionSettlement.pdf>.

10 After two mediation sessions with experienced wage and hour mediators, the second with the
11 Honorable Lisa Hart Cole (Ret.), the parties reached a proposed settlement, subject to this Court’s review
12 and approval. A true and correct copy of the fully executed Class Action and PAGA Settlement Agreement
13 (“Settlement” or “SA”) is attached as Exhibit 1 to the concurrently filed Declaration of Taras Kick (“Kick
14 Decl.”). The proposed Notice of Class Action Settlement (“Class Notice”) is attached to the Settlement as
15 Exhibit A. Both the Settlement and Class Notice are based on the Model Class Action and PAGA
16 Settlement Agreement and Class Notice (LACIV296), provided by the LA County Superior Court for
17 optional use in June 2022.

18 The underlying putative class action is a wage-and-hour lawsuit. Plaintiff Yazmin Gonzalez brings
19 the action on behalf of herself and a class of 232 similarly situated non-exempt employees in California.
20 Plaintiff alleges that she and her fellow Class Members and aggrieved employees were deprived of certain
21 rights afforded to them by the Labor Code during their employment with Defendant. As shown below, and
22 following the format of the Checklist, all of the criteria for preliminary approval are met. (The header titles
23 of the sections below are from the Checklist wherever possible.) Plaintiff respectfully requests that the
24 Court preliminarily approve the Settlement so that notice of a final approval hearing may be disseminated.

25 **b. Identity of the Parties**

26 Defendant Branded Online, Inc. (“Defendant” or “Branded Online”)¹ is a Delaware corporation that
27 is headquartered in Tustin, California. (Declaration of Yazmin Gonzalez [“Gonzalez Decl.”], ¶ 4.) It
28 provides e-commerce services to third-party retailers or other vendors, including by hosting and creating
29

30 ¹ Branded Online rebranded itself as Nogin Commerce in 2021. (https://www.socaltech.com/nogin-commerce_merges_branded_online_onestop_commerce_zther_into_new_company/s-0081066.html)

1 web content to optimize online presence and sales. (*Id.*) Plaintiff Yazmin Gonzalez (“Plaintiff”) worked as
2 a non-exempt employee for Defendant in California during the Class Period. (*Id.*)

3 **c. Summary of the Litigation**

4 **i. Brief Procedural History**

5 On July 15, 2020, pursuant to Labor Code § 2699.3, Plaintiff submitted notice to the Labor and
6 Workforce Development Agency (“LWDA”) and to Defendant Branded Online, Inc., LWDA Case No.
7 LWDA-CM-797143-20, of her intention to litigate various alleged Labor Code violations. (Kick Decl., ¶ 8,
8 Ex. 2.) On August 5, 2020, Plaintiff filed the initial complaint on behalf of herself and others similarly
9 situated to recover damages and penalties for the Labor Code violations alleged against Defendant (the
10 “Action”). Plaintiff alleged further that these violations constituted unfair and unlawful business practices
11 under the Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200, *et seq.* (Kick Decl., ¶ 9.) On
12 October 27, 2020, Plaintiff filed the First Amended Complaint (“FAC”) to add a cause of action under
13 PAGA, Lab. Code § 2698, *et seq.* (*Id.*) On December 4, 2020, Defendant filed its Answer to the FAC. (*Id.*)

14 Both before and after initiating the Action on behalf of the putative class, Plaintiff and Class Counsel
15 diligently investigated the claims alleged and conducted legal research regarding Defendant’s potential
16 liability and defenses. (*Id.*, ¶ 10.) The Parties engaged in extensive formal discovery, and Class Counsel
17 prepared and propounded interrogatories, production demands, and multiple sets of requests for admissions
18 on Defendant. (*Id.*) Based on consistent good faith meet and confer efforts, the parties agreed to proceed to
19 private mediation with experienced wage-and-hour mediator, Kelly Knight, Esq. (*Id.*) Prior to mediation,
20 the Parties also engaged in substantial informal discovery, including production of a randomly selected time
21 and pay record sampling, which primarily covered the 2019 to 2021 period. (*Id.*)

22 On November 5, 2021, the Parties participated in an all-day private mediation, presided over by
23 mediator Kelly Knight, which did not result in a settlement. (*Id.*, ¶ 11.) Thereafter, Plaintiff resumed formal
24 discovery efforts, and the Parties continued to meet and confer regarding Defendant’s discovery responses.
25 Defendant also propounded interrogatories and production demands on Plaintiff. (*Id.*) Plaintiff also took the
26 deposition of Defendant’s Person Most Knowledgeable (“PMK”), propounded additional written discovery,
27 and obtained declarations from putative class members after a successful *Belaire-West* mailing. (*Id.*)

28 After substantial meet and confer efforts between counsel, Defendant provided supplemental
29 discovery responses and further production, including additional time and pay records from the 2017 to
30 2018 time period. (*Id.*, ¶ 12.) On September 23, 2022, the Parties participated in a second mediation, this

one presided over by Hon. Lisa Hart Cole (Ret.), which resulted in the Parties' acceptance of a mediator's proposal. (*Id.*) Based on the parties' substantial investigation and discovery, Class Counsel was able to act intelligently and effectively in negotiating at arm's-length and evaluating the mediator's recommendation. (*Id.*) Thereafter, counsel for the Parties negotiated the terms of the long form Settlement. (*Id.*) Plaintiff now seeks preliminary approval of the Settlement. (*See* Ex. 1.)

ii. Claims Asserted and General Factual Basis for the Claims

This is a wage-and-hour class and PAGA action. Plaintiff Yazmin Gonzalez ("Plaintiff") brings nine (9) causes of action on behalf of herself and a class of 232 similarly situated non-exempt employees in California. (*Id.*, ¶ 5.) Plaintiff alleges that she and her fellow Class Members and aggrieved employees were deprived of certain rights afforded to them by the Labor Code during their employment with Defendant. (*Id.*, ¶ 9.) For instance, Plaintiff alleges that throughout the Class Period, Branded Online maintained a policy and practice of pressuring its employees to work through their breaks through understaffing at all its locations and implementing corrective actions, up to and including termination, for failing to meet Defendant's production goals and/or quotas. (*Id.*) Defendant strongly denies these allegations. (*Id.*)

The operative complaint, the First Amended Complaint ("FAC"), alleges the following causes of action: 1) failure to pay minimum wage; 2) failure to pay overtime wages; 3) failure to provide meal periods; 4) failure to provide rest periods; 5) failure to indemnify employees for necessary business expenses; 6) failure to provide accurate itemized wage statements; 7) failure to timely to pay all wages due at separation; 8) unlawful and unfair business practices in violation of Bus & Prof. Code § 17200, *et seq.*, and 9) violation of PAGA, Lab. Code § 2698, *et seq.* (*See* FAC.)

B. DUNK/KULLAR ANALYSIS

a. Summary of the Case, Including the Legal and Factual Basis for Each Claim

Plaintiff's claims are summarized as follows:

1. Failure to Pay Meal Period Premiums

Labor Code § 512 and Wage Order 9 require employers to provide duty-free meal periods of not less than 30 minutes within the employee's first 5 hours of work or pay a meal break premium of an hour of additional pay at the employee's regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090(11); *see also* *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1036-37; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858. Liability arises when an employer adopts a uniform meal period policy that results in violations. Furthermore, "[a]n on-duty meal period is permitted only when the nature of the

work prevents an employee from being relieved of all duty and the parties agree in writing.” *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 932. Where it provides an “on-duty” meal period, the employer has an obligation first to determine “whether the nature of the work prevents an employee from being relieved.” *Id.* at 946 (citing *Brinker*, 53 Cal.4th 1004). Moreover, the agreement must state expressly that the employee may revoke consent in writing at any time. 8 Cal. Code Regs. § 11090(11)(C). Liability similarly attaches “upon a determination that [the employer’s] uniform on-duty meal break policy was unlawful.” *Faulkinbury v. Boyd & Associates* (2013) 216 Cal.App.4th 220, 235.

The systemic failure to pay meal period premiums is “a dominant common issue [that] makes certification proper.” *Safeway, Inc. v. Super. Ct.* (2015) 238 Cal.App.4th 1138, 1153 (quotations omitted); *see also Faulkinbury*, 216 Cal.App.4th at 234 (finding that the use of “blanket off-duty meal break waivers in advance from all security guard employees, regardless of the working conditions at a particular station,” made meal breaks a class wide issue). Here, the FAC alleges that during the Class Period, Plaintiff and Class Members were required and/or permitted to work more than 5 hours before receiving a meal period. (FAC, ¶ 28.) In addition, the FAC alleges that Plaintiff and Class Members received meal periods of less than 30 minutes and/or were required to perform work during their meal breaks. (*Id.*) The FAC further alleges that Branded Online failed to provide Plaintiff and Class Members with an additional hour of compensation each time a meal period was not provided. (*Id.*) Defendant denies these allegations. (*See Answer to FAC*, pg. 4.)

2. Failure to Pay Rest Period Premiums

Labor Code § 226.7 and Wage Order 9 require employers to provide employees timely, duty-free rest periods of not less than ten (10) minutes for every major fraction of four hours worked or pay an additional hour of pay at the employee’s regulate rate in lieu thereof. 8 Cal. Code Regs. § 11090(12). The FAC alleges that Plaintiff and Class Members were denied timely, uninterrupted rest periods. (FAC, ¶ 33.) As with meal periods, there is no evidence that Defendant paid all owed premium wages for missed or short rest periods or had any process for auditing records to identify violations, and this issue is also easily certifiable. *See, e.g., Safeway, Inc., supra*, 238 Cal.App.4th at 1153 (finding that the failure to pay statutory premium wage payments for years may constitute a “dominant common issue [that makes] certification proper.”) (internal quotations omitted). Defendant denies these allegations. (*See Answer to FAC*, pg. 4.)

3. Failure to Pay Minimum Wages

The Labor Code requires employers to pay employees at least minimum wage for each hour worked. *See Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 (“all hours must be paid at the statutory or

agreed rate and no part of this rate may be used as a credit against a minimum wage obligation.”) Labor Code §§ 1194 and 1197 make unlawful payments of less than minimum wages fixed by the IWC “for all hours worked.” In California, all time an employee spends subject to the employer’s control is compensable “hours worked.” *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 583. Furthermore, when the employer fails to pay at least minimum wage, the employee is entitled to recover unpaid minimum wages, liquidated damages, and interest. Labor Code § 1194.2. The California Supreme Court has also held that “the relevant wage order and statutes do not permit application of the de minimis rule.” *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 835. Accordingly, the failure to pay wages for *all* hours worked by an employee necessarily results in a minimum-wage violation.

Plaintiff alleges Branded Online’s systemic failure to pay at least minimum wages for all hours worked because not all hours were recorded and due to its unlawful practices of rounding hours. (*See* FAC, ¶ 19.) Defendant denies these allegations. (Answer to FAC, pg. 4.)

4. Failure to Pay Overtime Wages

California Labor Code §§ 510, 1194, and IWC Wage Order No. 4-2001, § 3 require that employers pay one and one-half (1½) times the regular rate of pay for all hours worked in excess of eight (8) hours per day and/or forty (40) hours per week. Plaintiff alleged Branded Online routinely failed to compensate Plaintiff and the Class for overtime wages at the applicable rate. (FAC, ¶ 23.)

5. Failure to Pay All Wages Due Upon Discharge of Employment

Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Labor Code § 203; *Mamika v. Barca*, 68 Cal. App. 4th 487, 492 (1998).

Plaintiff alleges Defendant failed to pay non-exempt California employees all wages due upon separation, in violation of Labor Code §§ 201-203. (FAC, ¶ 49.) As Defendant allegedly failed to pay Class Members all meal and rest period penalties and minimum wages due during their employment, Plaintiff asserted that Defendant is subject to waiting time penalties. Defendant denies this. (Answer to FAC, pg. 5.)

6. Failure to Furnish Accurate Wage Statements

Labor Code § 226(a) requires employers to provide accurate itemized wage statements, including: (1) gross wages earned; (2) total hours worked; (3) the number of piece-rate units earned and any applicable piece rate; . . . (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. *See*

1 also 8 Cal. Code Regs. § 11090, Sec. 7 (A-C).

2 Plaintiff contended that Branded Online’s wage statements do not provide accurate information,
3 including the correct amount of gross or net wages, total hours worked, the applicable hourly rates in effect
4 during the pay period, and the corresponding number of hours worked at each rate, in violation of Labor
5 Code § 226(a), based on its failure to provide wage statements showing all minimum and premium wages
6 due as well as alleged rounding. (See FAC, ¶ 43.) Plaintiff contended that by virtue of the asserted Labor
7 Code violations, Defendant failed to furnish accurate wage statements. Specifically, Plaintiff alleged that
8 because Class Members were denied all wages due, the wage statements issued by Defendant fail to
9 accurately state all gross wages earned, in violation of Labor Code § 226(a)(1), total hours worked, in
10 violation of Labor Code § 226(a)(2), net wages earned, in violation of Labor Code § 226(a)(5), and all
11 applicable hourly rates during the pay period and the corresponding number of hours worked, in violation
12 of Labor Code § 226(a)(9). Plaintiff contends such wage statements were not provided.

13 7. Failure to Reimburse Necessary Business Expenses

14 Labor Code § 2802(a) requires an employer to indemnify an employee for all necessary expenditures
15 or losses incurred by the employee in direct consequence of the discharge of his or her duties. Plaintiff
16 alleged that Defendant violated Labor Code § 2802 by failing to reimburse class members for multiple
17 expenses, primarily related to costs for cell phone and internet service.

18 8. Unfair Business Practices

19 The Labor Code and Wage Orders violations are actionable under Bus. and Prof. Code § 17200.
20 Plaintiff’s unfair business practices claim requires only the showing of an unfair, unlawful, or fraudulent
21 business practice by Defendant, which is clearly satisfied by the above-described claims. *See Cortez v.*
22 *Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 178-179 (“We recognize that any business
23 act or practice that violates the Labor Code through failure to pay wages is, by definition, an unfair business
24 practice”). Here, Defendant’s alleged practice of Labor Code and Wage Order violations is, in and of itself,
25 a violation of section 17200. Once a showing has been made, Plaintiff is entitled to restitution going back
26 four years from the filing of the lawsuit, per the four-year statute of limitations. Thus, Plaintiff sought
27 restitution of unpaid wages from August 5, 2016, to the last date of employment for each Class Member.

28 9. PAGA Penalties

29 The Private Attorneys General Act (PAGA) permits aggrieved employees to recover civil penalties
30 specified by the Labor Code that previously only the Labor Commissioner could recover. Labor Code

§ 2699(e)(1). Under PAGA, a successful employee acting as a private attorney general keeps 25% of the penalties collected, while 75% goes to the state. Labor Code § 558 provides: “(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: [¶] (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid ... [¶] (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid ...” Here, Plaintiff contended Defendant’s Labor Code violations, including meal and rest break violations, could give rise to substantial PAGA penalties, if proven. (FAC, ¶ 64.)

b. Summary of the Investigation and Discovery Conducted, Including the Specific Documents Reviewed Prior to Agreeing to Settle the Case

Throughout the litigation, the parties exchanged substantial formal and informal discovery to gather facts and data necessary to reach a fair and reasonable settlement. Class Counsel prepared and propounded interrogatories, production demands, and multiple sets of requests for admissions on Defendant. (Kick Decl., ¶¶ 10-12.) Class Counsel also took the deposition of Defendant’s PMK and obtained declarations from putative class members after a *Belaire-West* mailing. (*Id.*) The Parties engaged in substantial meet and confer efforts regarding discovery responses, and Plaintiff prepared to file a motion to compel unless supplemental responses were provided. (*Id.*) Ultimately, in addition to Defendant’s responses and supplemental responses to discovery requests, Defendant also informally produced documents and information for the purposes of mediation on the entry of a stipulated protective order. (*Id.*) In all, Defendant produced thousands of pages of data and documents, including written policies and a detailed sample of non-exempt employees’ timekeeping and payroll records. (*Id.*) Class Counsel retained preeminent labor violation statistician Dr. Richard Drogin, who tabulated meal breaks in the timekeeping data provided by Defendant and analyzed the data for systemic meal and rest break violations. (*Id.*) In addition, Class Counsel retained economic expert Berger Consulting Group, who analyzed the data and created a damages model based on it. (*Id.*) Class Counsel carefully considered the class claims at issue and its experts’ analysis of violation rates for Defendant’s timekeeping and payroll data. (*Id.*)

The investigation and discovery conducted in this matter have been adequate to give Plaintiff and Class counsel a sound understanding of the merits of their position, Defendant’s defenses, and to evaluate the reasonable value range of the claims of the Class. (*Id.*, ¶¶ 10-13.) The discovery conducted and the information exchanged through negotiations allowed Class counsel to reliably assess the merits of each

side's position and compromise the issues on a fair and equitable basis. (*Id.*) Based on their own independent investigation, discovery, and evaluation, Class counsel has determined that the settlement terms and conditions set forth below are in the best interests of Plaintiff and the members of the Class. (*Id.*)

c. Summary of Settlement Negotiations, Including When the Settlement Was Reached, and Whether the Parties Were Assisted by a Mediator

As discussed above, the Settlement was reached with the assistance of Hon. Lisa Hart Cole (Ret.), after participating in a second mediation on September 23, 2022. (*Id.*, ¶ 13.) Judge Cole made a mediator's proposal which the parties accepted. (*Id.*) This mediation with Judge Cole took place only after a prior mediation with another experienced wage and hour mediator, Kelly Knight, had failed to result in a proposed settlement. (*Id.*) All negotiations at all times were arm's length and adverse. (*Id.*)

d. Summary of the Risks, Expenses, Complexity, and Duration of Further Litigation if the Settlement is Not Approved

Were litigation to proceed, there is a strong likelihood it would be protracted and contentious, as Defendant disputes all aspects of Plaintiff's claims. Plaintiff would have to prepare and file a motion for class certification, which outcome is uncertain based on Defendant's anticipated contentions, *inter alia*, that individual questions of fact predominate, and that Plaintiff cannot show the "willfulness" requirement for Section 203 penalties. (*Id.*, ¶ 15; *See* Answer to FAC, pg. 5.) If the motion were granted, Defendant would likely move for decertification, appeal certification, or move for Summary Judgment. (*Id.*) Plaintiff believes she would prevail on certification, but the risks to absent Class Members are significant. (*Id.*)

To succeed on the merits, Plaintiff would have to prove that Defendant actually engaged in the practices and policies alleged and that those practices and policies violated the law. (*Id.*, ¶ 16.) While Class Counsel believe strong evidence exists showing Defendant's liability, there remains a risk that the trier of fact might find otherwise. (*Id.*) If the case were to proceed to trial, additional discovery would be needed and the Parties would thus incur significant additional expenses, which money could go instead to fund a settlement for the benefit of the Class as a whole. (*Id.*) Moreover, discovery disputes would have certainly arisen, which would have cost the Parties additional time and money. (*Id.*) Further, regardless of which Party prevailed, appellate practice would no doubt ensue, further delaying any possible recovery by Class Members. (*Id.*) In other words, both Parties would likely incur substantial attorneys' fees and costs from continued litigation, likely approaching hundreds of thousands of dollars. (*Id.*)

e. Summary of the Risks of Achieving and Maintaining Class Action Status

As stated above, the risks of achieving and maintaining class action status include, among others,

facing challenges to class certification and liability, the outcome of which is uncertain. Moreover, even though Class Counsel believe strong evidence exists showing Defendant's liability, the costs of continued discovery, law and motion, and trial preparation would be substantial for all Parties. (*Id.*, ¶¶ 14-16.)

f. Specific Information Sufficient for the Court to Independently Determine that the Settlement Is Reasonable

Plaintiff hereby provides specific information sufficient for the court to make an independent determination that the consideration being received for the release of Class Members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. *Kullar v. Footlocker* (2008) 168 Cal.App.4th 116, 129. Below, Plaintiff sets forth the maximum realistic recovery of Plaintiff's claims leading up to the November 2021 mediation, calculated with the assistance of Plaintiff's experts, as well as the defenses asserted by Defendant and other relevant factors:

<i>Figures used for calculations</i>	
231	Number of Employees in Class (7/13/18 to 11/5/21)
37,211	Number of Estimated Shifts in Class (based on data sample from 1/2/19 to 9/1/21)
7.9	Average Number of Hours per Shift (based on expert analysis of data sample from 1/2/19 to 9/1/21)
7,904	Number of Estimated Workweeks in the Class (based on data sample)
4,107	Number of Estimated Pay Periods in the Class (based on data sample)
12,876	Total Workweeks Worked by All Class Members
\$17.02	Average Rate of Pay
<i>DAMAGES, RESTITUTION & REIMBURSEMENT</i>	
<i>Meal Break Violations - as Compensatory Damages or Restitution</i>	
6.80%	Unique Meal Period Violation Rate in Sample
54,084.64	Estimated Shifts Worked Greater than 5 Hours by All Class Members
\$17.02	Penalty Per Meal Period Violation
\$62,595.39	Maximum Damages for Meal Break Violations
<i>Rest Break Violations - as Compensatory Damages or Restitution</i>	
100%	Estimated Rest Period Violation Rate
4.30	Average Shifts Greater than 3.5 Hours Worked Per Workweek
\$17.02	Penalty Per Rest Period Violation
\$942,342.94	Maximum Damages for Rest Break Violations
<i>Unpaid Minimum Wages - as Compensatory Damages & Restitution</i>	
1.00	Estimated One Hour of Unpaid Work Per Class Member per Workweek
42.99%	Percentage of Shifts Less than 8 Hours Worked by Class Member per Workweek
\$94,218.22	Maximum Damages & Restitution for Unpaid Minimum Wages
<i>Unpaid Minimum Wages - as Liquidated Damages</i>	
1.00	Estimated One Hour of Unpaid Work Per Class Member per Workweek
42.99%	Percentage of Shifts Less than 8 Hours Worked by Class Member per Workweek
\$94,218.22	Maximum Liquidated Damages for Unpaid Minimum Wages
<i>Overtime Wages (1.5x) - as Compensatory Damages & Restitution</i>	
\$25.53	Class Member Average Hourly Rate x 1.5
1.00	Estimated One Hour of Unpaid Work Per Class Member per Workweek

57.01%	Percentage of Shifts Greater than 8 Hours in Def's Informal Payroll Record Sample
\$187,396.96	Maximum Compensatory Damages & Restitution for Unpaid Overtime (1.5x)
<i>Overtime Wages (2x) - as Compensatory Damages & Restitution</i>	
\$34.04	Class Member Average Hourly Rate x 2
1.00	Estimated One Hour of Unpaid Work Per Class Member per Workweek
0.29%	Percentage of Shifts Greater than 12 Hours in Def's Informal Payroll Record Sample
\$1,283.88	Maximum Compensatory Damages & Restitution for Unpaid Overtime (2x)
<i>Business Expenses - Compensatory Damages or Restitution</i>	
\$2.50	Estimated Unreimbursed Expense Per Workweek
12,876	Total Workweeks Worked by All Class Members
\$32,190.00	Maximum Damages for Unreimbursed Expenses
STATUTORY PENALTIES	
<i>Final Wage Waiting Time Penalties (§ 203)</i>	
112	Terminated Employees Three Years Prior to Complaint (from 8/5/17 to 11/5/21)
7.9	Estimated Average Number of Hours Per Shift
30	Maximum Penalty Days per Employee
\$451,778.88	Maximum Labor Code § 203 Final Wage Statutory Penalties
<i>Labor Code § 226(e) Accurate Wage Statement Violation Statutory Penalties</i>	
151	Class Members from One Year Prior to Complaint
27.87	Average Number of Pay Periods Worked by All Class Members (from defense)
\$1,400	\$50 per Pay Period Violation (for 28 Pay Periods)
\$428,387	Maximum Labor Code § 226(e) Accurate Wage Statement Penalties
PAGA PENALTIES	
<i>PAGA Civil Penalties</i>	
151	Total Aggrieved Employees (Provided by Defense Counsel as of Nov. 2021)
2,839	Total Pay Periods
\$50	PAGA Penalty for Failure to Pay Wages/Overtime, Failure to Provide Meal Period Premiums and Failure to Provide Rest Breaks (Cal. Lab. Code § 558)
\$250	PAGA Penalty for Wage Statement Violations (Cal. Lab. Code § 226(a))
\$100	PAGA Penalty for Other Employment Violations (Cal. Lab. Code § 2699(f)(2))
\$9,652.60	Max. Est. PAGA Penalties for Meal Break Violations (assuming 6.80% violation rate)
\$283,900	Max. Est. PAGA Penalties for Rest Break Violations (assuming 100% violation rate)
\$141,950	Maximum Estimated PAGA Penalties for Failure to Pay Overtime Wages
\$141,950	Maximum Estimated PAGA Penalties for Minimum Wage Violations
\$709,750	Maximum Estimated PAGA Penalties for Wage Statement Violations
\$283,900	Maximum Estimated PAGA Penalties for Failure to Maintain Records
\$283,900	Maximum Estimated PAGA Penalties for Failure to Reimburse Business Expenses
TOTAL DAMAGES & PENALTIES	
\$1,414,245.61	Maximum Total Damages
\$1,855,002.60	Maximum Total PAGA Penalties
\$878,728.88	Maximum Total Statutory Penalties

Accordingly, if Plaintiff were to prevail on all liability issues as well as on class certification, Plaintiff estimated a maximum total exposure of \$4,147,997, taking into account all possible damages and penalties. Therefore, the proposed settlement of \$827,500 represents approximately 19.95% of Defendant's maximum possible exposure for damages and penalties, not including interest. (Kick Decl., ¶ 18.) As

discussed below, accounting for real litigation risks, relative strengths and weaknesses of Plaintiff's claims, and other factors, it is about 43%. (*Id.*, ¶¶ 14-18.)

1. Risks and Defenses.

There were numerous risks to continuing to litigate, including potentially viable defenses that Defendant asserted or could have asserted as outlined below:

Non-Certification and Liability. Had the Action not settled, Defendant would have challenged class certification and liability, as Defendant vigorously disputes all of Plaintiff's contentions. For instance, when calculating maximum potential damages, Plaintiff's expert economic consultants assumed an average of 1 hour of unpaid work per workweek per employee, and extrapolated that to all Class Members, to estimate approximately \$94,218.22 in damages for unpaid minimum wages. (*Id.*, ¶ 17(a).) However, Defendant denies the allegation that Class Members were not properly compensated for all hours worked, and Defendant alleges that its third-party payroll provider was instructed to process the exact times that employees clocked in and out. (*Id.*)

Defendant also argues that any overtime hours which Plaintiff and any allegedly aggrieved employees now claim were worked were either unauthorized, were actively concealed from Defendant, or there was no reasonable basis why Defendant knew or should have known of such overtime work. (*Id.*) Plaintiff also faced the risk Defendant would successfully argue that individualized questions of fact predominate over any common issues, and that such issues would preclude certification. (Kick Decl., ¶ 17(a).) Defendant may argue that the Class is uncertifiable due to hundreds of individual inquiries as to each Class Member's experience with supposedly working off the clock and logging time worked. (*Id.*)

No Derivative Penalties. Plaintiff also faced the risk Defendant would successfully argue Plaintiff's claims for wage statement and waiting time penalties claims are entirely derivative of Plaintiff's rest period and wage claims, and therefore suffered from not only the same litigation risks as the rest break claims, but also additional risks unique to these claims. For example, with respect to Plaintiff's waiting time penalty claim, Plaintiff would also be required to establish Defendant's *willfulness*. However, Defendant denies any willful failure to pay any alleged compensation. (*Id.*, ¶ 17(b).) Moreover, "an employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468.

With respect to Plaintiff's wage statement claim, even if non-certification was not a bar to recovery, Plaintiff faced the risk Defendant could rely on *Maldonado, et al. v. Epsilon Plastics, Inc.*, 22 Cal.App.5th

1308, 1334-37 (April 18, 2018) where the Court reversed an award for penalties for inaccurate wage statements because the Court found that inaccurate wage statements alone based on derivative Labor Code violations do not justify penalties, and that the plaintiff arguably might need to establish injury from the inaccuracy and independent inaccuracies different from underpayments or derivative claims. This defense could call into question whether the Class could recover derivative penalties under Labor Code §§ 201-203 and 226 based on underlying rest break premium claims. While Plaintiff remains confident and prepared to zealously pursue the claims, she recognizes the possible risks of losing on the merits. (Kick Decl., ¶ 17(b).)

Other Risk Factors. Plaintiff also had to take into account other risks, including, without limitation, the risks of losing on appeal, the possibility of the law changing, the time value of money, and the inability to collect on a large judgment, among other things. (*Id.*, ¶ 17(c).)

Costs. The Action clearly involves complex legal issues, including class certification. With regard to expected duration, litigating Plaintiff's claims through trial could last two or more years if the proposed settlement is not approved. This would be expensive for all parties and delay or jeopardize what is now a certain recovery for the putative class. (*Id.*, ¶ 17(d).)

Discretionary PAGA Penalties. Under Labor Code § 2699(e)(2), a court may award a lesser amount than the maximum civil penalty specified under PAGA, if based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive or confiscatory. Courts have exercised their discretion to reduce the amount of PAGA penalties awarded to as little as \$5.00 per pay period. *See e.g., Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties by 82%).

2. Discounts Applied

Plaintiff believes it is reasonable when assessing the value of the settlement to consider applying the following discounts: 35% discount for the risk of non-certification; 30% discount on penalty claims under *Maldonado*; and 50% discount on PAGA claims for the Court's discretion on reducing penalties and underlying risks. (Kick Decl., ¶ 18.) If one applies only the discount for class certification, this reduces the maximum possible damages and penalties to \$2,070,504.12, as summarized below.

Claim	Max. Exposure	Discounts		Risk-Adjusted
Maximum Total Damages	\$1,414,245.61	35%		\$919,259.65
Maximum Total PAGA Penalties	\$1,855,002.60	35%	50%	\$602,875.85
Maximum Total Statutory Penalties	\$878,728.88	35%	30%	\$399,038.48
		Total		\$1,921,173.98

1 The negotiated gross settlement amount (“GSA”) of **\$827,500.00** thus represents about **43%** of the realistic
2 risk adjusted exposure. Considering the potential risks and rewards inherent in any case and, in particular,
3 in this matter, this Settlement represents a considerable recovery. (*Id.*, ¶ 18.)

4 3. Payment Plan Terms

5 Defendant has represented that, due to its financial condition, it needs a payment plan in order to
6 fund the GSA. The Settlement states the payment plan terms at Paragraph 4.3, which provide that Defendant
7 will make a total of five transfers to the Settlement Administrator to fund the GSA, beginning 21 days after
8 the Effective Date. (SA, ¶ 4.3.) Further, the Administrator will make two distributions, as set forth in
9 Paragraph 4.3. The first distribution will be within 15 days after Defendant funds the first half of the GSA,
10 and the second distribution will be with 15 days after the Defendant funds the second half of the GSA. (SA,
11 ¶ 4.4.) As shown in the publicly available documents attached to the Kick Declaration, Defendant’s
12 EBITDA for the period ending September 30, 2022, was negative \$27.95 million, its cash was \$15.83
13 million, and its total debt was \$74.49 million. (*See* Kick Decl., ¶¶ 27-34, Ex. 7-9.) Further, Defendant’s
14 operating cashflow for 2021 was reported to be negative \$21 million and free cashflow was negative \$23
15 million. (*Id.*) Its stock price in the last year has gone from \$11.51 per share to \$.61 today. (*Id.*)

16 g. **If Approval of the Settlement of Class Claims is Requested Together with Approval of**
17 **Non-Class Claims (Such as Claims Under PAGA) Discuss Why the Amount Allocated to**
18 **the Non-Class Claims is Fair to Those Affected.**

18 When PAGA claims are settled, the trial court must “review and approve” the settlement. Labor
19 Code § 2699(l). In so doing, the court must consider whether the proposed “PAGA settlement is fair and
20 adequate in view of the purposes and policies of the statute.” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp.
21 3d 1110, 1135 (N.D. Cal. 2016). The \$25,000.00 amount allocated towards PAGA penalties here is fair and
22 reasonable given the nature of the PAGA claims, which has a limited 1-year statute of limitations. Further,
23 as discussed above, the availability of PAGA penalties here rely on contested factual issues. Moreover, the
24 PAGA statute provides the Court with broad discretion to adjust and reduce the amount of penalties
25 awarded, if any. Courts “repeatedly approve[] PAGA allocations of both smaller amounts and that
26 comprised a smaller portion of the total settlement consideration in the agreements at issue.” *See Davis v.*
27 *Cox Commc’ns California, LLC*, No. 16cv989 BAS (BLM), 2017 WL 1496407, at *1 (S.D. Cal. Apr. 26,
28 2017 (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int’l,*
29 *LLC*, No. 12cv1551 LAB (NLS), 2014 WL 12571448, at *5 (S.D. Cal. Jan. 22, 2014) (approving \$2,500
30 PAGA allocation when attorneys’ fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*,

No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, No. 08cv821 IEG (BLM), 2010 WL 2196104, at *2 (S.D. Cal. June 1, 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement). The proposed PAGA allocation is well within a fair and reasonable range.

C. CLASS CERTIFICATION

California Rule of Court 3.769(d) provides that the Court may make an order approving certification of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts should use a “lesser standard of scrutiny” for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) at 1807 n.19. The reasons include that no trial is anticipated in a settlement class, so the case management issues inherent in determining if the class should be certified need not be confronted; and the trial court’s fairness review of the settlement protects the interests of the non-representative Class Members. (*Id.*); *see also Officers for Justice*, 690 F.2d at 633 (“Th[e] relationship between the certification determination and the merits of the case is further attenuated within the context of the settlement evaluation process ... [C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987)(“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.”) As discussed below, for the purposes of this settlement only, the parties ask this Court to provisionally certify the Class, as defined above, under Cal. Civ. Proc. Code § 382.

a. Numerosity

Numerosity is met if a proposed class is so large that joinder of all members would be impracticable. Code Civ. Proc. § 382. Numerosity is readily satisfied here because there are approximately 232 Class Members. (Kick Decl., ¶ 5.) *See, Vasquez v. Superior Court*, 4 Cal.App.3d 800, 811 (1971); *Newberg on Class Actions*, § 3.5 (4th Ed. 2004) (40 class members is sufficient to satisfy numerosity).

b. Ascertainability

A test for ascertainability is whether the class definition “identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 541-42. In this case,

1 although ascertainability does not require it, Defendant has already identified members of the Settlement
2 Class from its records. (Kick Decl., ¶ 5.) This far exceeds the requirement for ascertainability.

3 **c. Community of Interest**

4 The community of interest requirement has three essential elements: “(1) predominant questions of
5 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives
6 who can adequately represent the class.” *Linder v. Thrifty Oil Co.*, 23 Cal.App.4th 429, 435 (2000). As
7 shown below, these elements are met.

8 **1. Commonality**

9 To justify certification, the class proponent must show that questions of law or fact common to the
10 class predominate over the questions affecting the individual members. *See Arenas v. El Torito Rests., Inc.*,
11 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913
12 (2001)). Here, all Class Members were subject to common policies and practices. (Kick Decl., ¶ 19.)

13 **2. Plaintiff’s Claims Are Typical of the Class**

14 Typicality “focuses on whether there exists a relationship between the plaintiff’s claims and the
15 claims alleged on behalf of the class.” *Newberg and Rubenstein on Class Actions*, § 3:29. Plaintiff is not
16 aware of any characteristics that do not satisfy this. Plaintiff is a member of the proposed class, and was
17 subject to the same employment policies and practices as all other Class Members. Typicality is satisfied.

18 **3. Plaintiff Adequately Represents the Class**

19 Class representatives must establish that they will adequately represent the proposed class. *See*,
20 *Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009). This adequacy analysis
21 focuses on any conflicts that would appear between the named Plaintiff and putative class members.
22 *Richmond v. Dart Industries*, 29 Cal.App.3d 462, 470 (1981). The Court must also consider the competency
23 of Plaintiff’s counsel in determining whether to certify a class. *Cal. Pak Delivery v. United Parcel Service,*
24 *Inc.* 52 Cal.App.4th 1, 12 (1997); *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-8, n. 13 (1982). Class
25 counsel and the class representative meet the adequacy requirement.

26 Here, the claims of the Class Members and the named Plaintiff are coextensive and there is no
27 conflict between Plaintiff and her counsel, on the one hand, and any other Class Member. (Kick Decl., ¶ 19.)
28 In this case, not only is there not any conflict, but Plaintiff’s interests are essentially identical, if not entirely
29 identical, to the interests of all the members of the Settlement Class. (*Id.*) Therefore, Plaintiff is adequate.

1 4. Superiority

2 Certification of the Class for settlement purposes also is superior here because there will be a global
3 resolution of all claims at once, which fosters judicial economy. Class certification is also vastly superior to
4 litigation of numerous individual claims because most of the claims are too small to litigate outside of the
5 class context. *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 469. Thus, the superiority of proceeding
6 through the class action mechanism is demonstrable in this case because, through the class action device,
7 Plaintiff's counsel was able to negotiate a global Settlement with Defendant that, if approved, will provide
8 a sizeable Class with immediate monetary relief.

9 d. Adequacy

10 To satisfy the requirement that a class representative and his or her counsel fairly and adequately
11 represent absent class members, the named plaintiff must be represented by counsel experienced and
12 qualified to conduct the pending litigation, and the named plaintiff's interests cannot be antagonistic to those
13 of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. The adequacy requirement is
14 clearly satisfied on both counts. Class Counsel, The Kick Law Firm, APC, has significant experience in
15 complex litigation, including wage and hour class actions, and has been diligent in representing the putative
16 Settlement Class. (Kick Decl., ¶¶ 3-6, 19.) The Settlement itself speaks to Class Counsel's adequacy,
17 evidencing the arm's-length negotiating by which Class Counsel secured a favorable proposed settlement
18 that provides substantial benefits to absent Class Members without incurring unnecessary costs or risking
19 the delays and uncertainty of further, protracted litigation.

20 Plaintiff Yazmin Gonzalez, the proposed Class Representative, has participated actively at all stages
21 of the litigation, and her interests are not in conflict with the absent class members. (Kick Decl., ¶¶ 19-20;
22 Gonzalez Decl., ¶¶ 7-8.) Plaintiff agreed to act as Class Representative and understands her responsibility
23 to assist Class Counsel in prosecuting the action on behalf of the Class. (*Id.*)

24 **D. CLAIM REQUIREMENT (IF APPLICABLE)**

25 Not applicable. Class Members will not be required to submit a claim to receive compensation.

26 **E. MISCELLANEOUS**

27 a. **If Appropriate, Explain Why the Settlement Includes Terms That Are Outside the Scope**
28 **of the Operative Complaint. (Trotsky v. Los Angeles Fed. Savings & Loan Assn. (1975) 48**
29 **Cal.App.3d 134, 148.) If Approval of Settlement of a PAGA Claim is Requested Provide**
30 **a Copy of Plaintiff's Notice Letter to the LWDA.**

 The Settlement does not include terms that are outside the scope of the operative complaint. A copy
of the Notice Letter to the LWDA is attached as **Exhibit 3** to the Kick Declaration.

1 **b. If Notice Will Be Given in English Only, Explain Why this is Sufficient**

2 Not applicable, as the Settlement provides Notice will be given in English and Spanish. (SA, ¶ 7.4.2.)

3 **c. A Statement of Any Affirmative Obligations to Be Undertaken by the Class Member or**
4 **Class Counsel and the Reason for Such Obligations**

5 Other than fulfilling their duties as Class representative and Class Counsel, the Settlement does not
6 create any affirmative obligations to be undertaken by them.

7 **d. Provide Information Regarding Any Fee Splitting Agreement and Whether the Client**
8 **Has Given Written Approval. (Mark v. Spencer (2008) 166 Cal.App.4th 219; Rules Prof.**
9 **Conduct, rule 1.5.1; Cal. Rules of Court, rule 3.769.)**

10 Not applicable, as no fee splitting agreement is at issue here. (Kick Decl., ¶ 22.) Pursuant to the
11 Settlement, Class Counsel will request, and Defendant will not oppose, attorneys' fees in the amount of
12 \$275,833.33, or one-third (1/3) of the GSA, and reimbursement of necessary litigation costs not to exceed
13 \$65,000. (*Id.*; SA, ¶ 3.2.2.)

14 **e. Any Agreement That Has Injunctive Relief Against a Class Representative or Absent**
15 **Class Member Generally Is Not Appropriate in a Class Action Case. Provide the**
16 **Authority and Factual Reasons Why this Case is an Exception**

17 Not applicable, as the Settlement does not provide for any such injunctive relief.

18 **f. Explain Why Any Proposed Class Representative Enhancement is Reasonable,**
19 **Including What the Class Representative Did Beyond the Expected Services of Any**
20 **Class Representative**

21 The Settlement provides a proposed service award of \$10,000 to Plaintiff, (SA, ¶ 3.2.1), which is
22 intended to recognize the time, effort, and risk that Plaintiff undertook in bringing this case and helping to
23 secure the relief obtained for the members of the Class. *See Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th
24 715, 726 (2004) (upholding "service payment" to named plaintiff for his efforts in bringing class
25 case); *Rodriguez v. West Publishing*, 563 F.3d 948, 959 (9th Cir. 2009) (stating that incentive awards are
26 "intended to compensate class representatives for work done on behalf of the class, to make up for financial
27 or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act
28 as a private attorney general.") To determine the propriety of a service award, courts consider the actions
29 protecting class interests, the benefit provided to the class based on those actions, and the amount of time
30 and effort expended by the plaintiff. *Staton v. Boeing Co.*, 327 F.3d 938, 976-7 (9th Cir. 1993).

 Here, Plaintiff should be compensated for the significant contributions provided to the Class, the
 reputational risks Plaintiff undertook, the time and efforts expended on behalf of the Class, Plaintiff's
 entering into a broader waiver of claims outside of the scope of the Class claims released by the Class in the
 Settlement, and the significant accomplishments of this case. (Kick Decl., ¶¶ 19-20.) Among other things,

1 Plaintiff stepped forward with willingness to serve the Class, provided essential information for the
2 prosecution of this action, gathered and provided pertinent documents, took time to participate in phone calls
3 with counsel, was available during the all-day mediation, and reviewed the settlement documents. (*Id.*) At
4 no time did Plaintiff ever have a guarantee of any personal benefit as a result of this case. (*Id.*) The proposed
5 service award also falls well within the range of reasonable payments awarded to Class Representatives in
6 similar class actions. Other courts in California also regularly award service awards higher than those
7 requested here. *See e.g. Ross v. US Bank National Association*, No. C 07-02951 SI, 2010 WL 3833922, at
8 *2 (N.D. Cal. Sept. 29, 2010) (approving **\$20,000** enhancement award to Class Representative in California
9 wage-and-hour class action settlement); *Louie v. Kaiser Found. Health Plan, Inc.*, CASE NO. 08cv0795
10 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008) (approving “**\$25,000** incentive
11 award for each Class Representative” in wage and hour settlement); *Garner v. State Farm Mut. Auto. Ins.*
12 *Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) (“Numerous
13 courts in the Ninth Circuit and elsewhere have approved incentive awards of **\$20,000** or more where, as
14 here, the class representative has demonstrated a strong commitment to the class”).

15 Finally, at the time of the filing of the Motion for Final Approval, Plaintiff intends to file further
16 detail for this Court’s consideration regarding the time and effort she expended on behalf of the absent class
17 members as a result of having stepped forward to be the class representative.

18 **F. THE SETTLEMENT AGREEMENT**

19 The second half of the Checklist indicates a number of items that the Settlement Agreement itself
20 should address. (*See* Checklist II, pp. 4-8.) Rather than copy and paste each section header here, Class
21 Counsel has gone through all items in the Checklist and confirmed that each exist in the proposed Settlement
22 and Notice, including the Class definition (SA, ¶¶ 1.5, 1.9), Class Period (SA, ¶ 1.12), release terms (SA,
23 ¶¶ 1.41, 5.1-5.5), monetary terms (SA, ¶ 3), notice administration terms (SA, ¶¶ 7.1-7.8), and *cy pres* terms
24 (SA, ¶ 4.4.3). (Kick Decl., ¶ 23.) Moreover, the proposed Settlement and Notice are based on the Model
25 Class Action and PAGA Settlement Agreement and Class Notice (LACIV296) provided by the LA County
26 Superior Court in June 2022. (*Id.*) Exhibit 2 to the Kick Decl. is a redlined copy of the Settlement, showing
27 the changes made to the LASC Model.

28 **G. ATTORNEYS’ FEES AND COSTS**

29 Pursuant to Labor Code section 1194 and Code of Civil Procedure section 1021.5, Class Counsel
30 will request, and Defendant will not oppose, attorneys’ fees in the amount of \$275,833.33, or one-third (1/3)

of the GSA, and reimbursement of necessary litigation costs not to exceed \$65,000. (SA, ¶ 3.2.2.) Although applying pursuant to the percentage of benefit approach rather than a lodestar approach, Class Counsel can represent that the lodestar to date actually already far exceeds the requested fees. (Kick Decl., ¶ 22.) Considering both the risks and the potential value of the litigation, the request, calculated as a percentage of the common fund, is reasonable, as the amounts are well-within the range of fees generally sought and approved in similar class action cases. *Chavez v. Netflix* (2008) 162 Cal.App.4th 43, 66 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used fee awards in class actions average around one-third of the recovery.”)

“[T]he court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.” *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal. 5th 480, 503. In *Laffitte*, a \$19 million employment class action case involving an objection to a one-third percent-based recovery, the California Supreme Court held that “the trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . [and] also *retain the discretion to forego a lodestar cross-check* and use other means to evaluate the reasonableness of a requested percentage fee.” *Id.* at 506 (emphasis added). The percentage approach is preferable to the lodestar calculation approach because it “more accurately reflects the results achieved.” *Id.* at 504 (quoting *Rawlings v. Prudential-Bach Properties* (1993) 9 F.3d 513, 516). In fact, “[a] task force commissioned by the Third Circuit concluded that the lodestar approach ... is a cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar and recommended a return to the percentage of the recovery fee formula in cases involving a settlement fund.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 29 (citations and quotation marks omitted). Regardless, should this Court wish to perform a lodestar cross-check, Class Counsel will also provide its lodestar and detail of the work constituting the lodestar at the time of final approval. Although this was a contingent case with much risk, deserving of a substantial lodestar multiplier, the lodestar multiplier required to get to the one-third fee request is actually a negative multiplier.

H. EXHIBITS TO THE DECLARATION OF TARAS KICK

- **Exhibit 1** is the Settlement, and **Exhibit A** to the Settlement is the Class Notice.
- **Exhibit 2** is a redlined copy of the Settlement, showing changes to LASC Model.
- **Exhibit 3** is a copy of the PAGA Notice Letter to the LWDA.
- **Exhibit 4** is a copy of the Settlement Administration bid from Simpluris, Inc.
- **Exhibit 5** is a Proposed Judgment not including a dismissal pursuant to CRC 3.769.

- **Exhibits 6-9** are publicly available financial documents showing Defendant's financial condition.
- **Exhibit 10** to the Kick Decl. is proof of submission of the Settlement to the LWDA.

I. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the approval process is the formal hearing, whereby proponents of the settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the Settlement. Plaintiff proposes the following schedule, subject to the convenience of the Court's calendar:

Last day for Defendant to deliver Class Data to the Settlement Administrator	April 31, 2023
Last day for Settlement Administrator to send Notice by First-Class Mail	May 15, 2023
Last day for Plaintiff to file Motion for Final Approval / Fee Motion	June 30, 2023
Last day for Class Members to submit written objections, challenges to Workweeks and/or Pay Periods, and Requests for Exclusion ("Response Deadline")	July 14, 2023
Last day for Parties to respond to objections	July 18, 2023
Hearing on Motion for Final Approval / Fee Motion	July 25, 2023, at _____ a.m./p.m.
Last day to file Final Accounting	February 12, 2024

J. CONCLUSION

For the stated reasons, Plaintiff's unopposed motion for preliminary approval should be granted.

Dated: February 16, 2023

Respectfully submitted,
THE KICK LAW FIRM, APC

By: /s/ Taras Kick
Taras Kick
Greg Taylor
Attorneys for Plaintiff and all others similarly situated

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to this action. My business address is 815 Moraga Drive, Los Angeles, California 90049. On the date of execution below, I served the following document or documents:

- **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;**
- **DECLARATION OF TARAS KICK IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL; EXHIBITS**
- **DECLARATION OF YAZMIN GONZALEZ IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL.**

☒ **By electronic service (via electronic filing service provider.)** I caused the documents to be electronically transmitted to Case Anywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Electronic Case Management Order governing the matter and mandating electronic service to person(s) at the address(es) listed below. The transmission was reported as complete and without error to the addressees as stated below.

Tom T. Nagashima tnagashima@grsm.com GORDON REES SCULLY MANSUKHANI, LLP 633 West Fifth Street, 52nd Floor Los Angeles, California 90071 Telephone: (213) 576-5000 Facsimile: (213) 680-4470	Attorneys for Defendant BRANDED ONLINE, INC.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **February 16, 2023**.

/s/ Dariane Rose
Dariane Rose