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and others similarly situated
8
9

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

13 JAIME CORONA, on behalf of himself and
others similarly situated,

14 Plaintiff,

15 v.

16 FAIRVIEW FORD SALES, INC., a California
17 corporation; FAIRWAY FORD SALES, INC., a
California corporation; and DOES 1 through 100,
18 inclusive,

19 Defendants.
20
21
22
23
24

Case No. CIVSB2124446

Assigned for all purposes to Hon. David
Cohn, Dept. S26

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

[Declaration of Anthony J. Orshansky and
[Proposed] Order submitted concurrently
herewith]

Preliminary Approval Hearing

Date: May 3, 2022

Time: 10:00 a.m.

Department: S26

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

2 **PLEASE TAKE NOTICE** that, pursuant to Rule 3.769 of the California Rules of Court, on
3 May 3, 2022 at 10:00 a.m. in Department S26 of the above-entitled Court, located at 247 West Third
4 Street, San Bernardino, California 92415, plaintiff Jaime Corona (“Plaintiff” or “Class
5 Representative”) individually and on behalf of all others similarly situated, will and hereby does
6 move this Court for:

7 1. Preliminary approval of the proposed Class and Representative Action Settlement
8 Agreement;

9 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional
10 certification of the following Class defined as follows:

11 **Class Members** – All salespersons, finance managers, and service writers who are
12 employed or have been employed by Defendants in the State of California as non-
exempt employees during the Class Period (the “Class” or “Class Members”).¹

13 3. Preliminary appointment of Plaintiff Jaime Corona as the representative of the
14 provisionally certified class (“Class Representative”);

15 4. Preliminary appointment of CounselOne, P.C. as Class Counsel;

16 5. The scheduling of a hearing to consider whether the settlement should be finally
17 approved and award amounts to the Class Representative as an enhancement payment,
18 administration costs to the Settlement Administrator, the Private Attorneys General Act payment to
19 the California Labor and Workforce Development Agency, as well as attorneys’ fees and costs to
20 Class Counsel;

21 6. Appointment of CPT Group, Inc. as the third-party Settlement Administrator; and

22 7. Approval of the proposed Notice of Proposed Class and Representative Action
23 Settlement and entry of the proposed Order instructing the notice to be disseminated to the Class as
24 provided in the settlement.

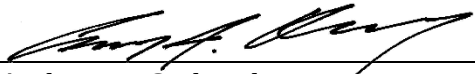
25 _____
26 ¹ “Settlement Class” or “Settlement Class Members” means all Class Members who do not opt out
27 of this settlement. (Settlement Agreement ¶ 5.) “Aggrieved Employees” are defined as all Class
28 Members who are employed or have been employed during the PAGA Period. (Settlement
Agreement ¶ 2.) “Aggrieved Employees” and “PAGA Group Members” are used interchangeably
throughout.

1 This motion is based on this notice of motion, the attached memorandum of points and
2 authorities, the declaration of Anthony J. Orshansky filed concurrently herewith, and the exhibits
3 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
4 documentary evidence or argument presented at the time of hearing. Finally, given the multiplicity
5 of issues addressed in this Motion, Plaintiff respectfully submits there is good cause to exceed the
6 20-page limit set forth in California Rules of Court, Rule 3.764(c)(2), and respectfully requests that
7 the Court consider the attached Memorandum of Points and Authorities.

8
9 Dated: February 17, 2022

Respectfully submitted,

COUNSELONE, PC

11 By: 

12 Anthony J. Orshansky
13 Jennifer L. Connor
14 Justin Kachadoorian
Attorneys for Plaintiff

TABLE OF CONTENTS

I. INTRODUCTION	1
II. THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS.....	2
A. Discovery and Investigation.....	3
B. Mediation and Settlement.....	4
III. SUMMARY OF BASIC SETTLEMENT TERMS	5
A. The Settlement Provides for Reasonable Monetary Payments	6
B. Class Representative Enhancement Payment, Attorneys' fees, and Expenses	8
IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE	9
A. There Is an Ascertainable and Sufficiently Numerous Class	10
B. There Is a Well-Defined Community of Interest	10
C. The Claims of the Named Plaintiff Are Typical	12
D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the Settlement Class	12
E. A Class Action Is Superior to a Multiplicity of Litigation.....	12
V. THE TWO-STEP APPROVAL PROCESS.....	13
VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE	13
A. The Settlement Is Entitled to a Presumption of Fairness	14
B. Negotiations Were at Arm's Length before a Respected Mediator	14
C. Investigation Was Sufficient to Allow Counsel to Act Intelligently	15
D. Class Counsel Are Experienced in Similar Litigation	15
E. The Settlement Is Fair, Reasonable, and Adequate.....	16
1. The Strength of Plaintiff's Case	16
2. Risk, Expense, Complexity, and Duration of Further Litigation	17
3. Risk of Maintaining Class Action Status	17
4. Amount Offered in Settlement Given Realistic Value of Claims	18

1	VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS	27
2	VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING	28
3	IX. CONCLUSION	28
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Altamirano v. Shaw Industries, Inc.</i> (N.D. Cal. 2015) 2015 WL 4512372.....	27
<i>Amaral v. Cintas Corp.</i> (2008) 163 Cal.4th 1157.....	25
<i>Armenta v. Osmose, Inc.</i> (2005) 135 Cal.App.4th 314.....	20
<i>Augustus v. ABM Security Service, Inc.</i> (2016) 2 Cal.5th 257.....	22
<i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> (1987) 191 Cal.App.3d 1341	10, 11, 12
<i>Balasanyan v. Nordstrom</i> (S.D. Cal. 2012) 913 F.Supp.2d 1001	19
<i>Benton v. Telecom Network Specialists, Inc.</i> (2013) 220 Cal.App.4th 701.....	11
<i>Bluford v. Safeway, Inc.</i> (2013) 216 Cal.App.4th 864.....	11, 20
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004.....	21
<i>Capital People First v. Department of Developmental Services</i> (2007) 155 Cal.App.4th 676.....	12
<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal.App.4th 1380.....	8
<i>In re Chicken Antitrust Litigation</i> (N.D. Ga. 1980) 560 F.Supp. 957	14
<i>Class Plaintiffs v. City of Seattle</i> (1992) 955 F.2d 1268	14
<i>Cochran v. Schwan's Home Services, Inc.</i> (2014) 228 Cal.App.4th 1137.....	23
<i>Collins v. Rocha</i> (1972) 7 Cal.3d 232.....	10

1	<i>Daar v. Yellow Cab Company</i>	
2	(1967) 67 Cal.2d 695.....	10
3	<i>Daniels v. Centennial Capital Group</i>	
4	(1993) 16 Cal.App.4th 467.....	10
5	<i>Donohue v. AMN Services, LLC</i>	
6	(2021) 11 Cal.5th 58.....	20
7	<i>Dunk v. Ford Motor Co.</i>	
8	(1986) 48 Cal.App.4th 1794.....	16
9	<i>Duran v. U.S. Bank National Association</i>	
10	(2014) 59 Cal.4th 1.....	21
11	<i>Epic Sys. Corp. v. Lewis</i>	
12	(2018) 138 S.Ct. 1612	18
13	<i>Gattuso v. Harte-Hanks Shoppers, Inc.</i>	
14	(2007) 42 Cal.4th 554.....	23
15	<i>Kullar v. Foot Locker Retail, Inc.</i>	
16	(2008) 168 Cal.App.4th 116.....	18
17	<i>Laffitte v. Robert Half International, Inc.</i>	
18	(2016) 1 Cal.5th 480.....	9
19	<i>Linder v. Thrifty Oil Co.</i>	
20	(2000) 23 Cal.4th 429.....	9, 13
21	<i>Linney v. Cellular Alaska Partnership</i>	
22	(9th Cir. 1998) 151 F.3d 1234.....	27
23	<i>Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.</i>	
24	(7th Cir. 1987) 834 F.2d 677	14
25	<i>McGhee v. Bank of America</i>	
26	(1976) 60 Cal.App.3d 442	12
27	<i>Miller v. Woods</i>	
28	(1983) 148 Cal.App.3d 862.....	10
	<i>Naranjo v. Spectrum Security Service, Inc.</i>	
	(2019) 40 Cal.App.5th 444.....	24, 25
	<i>In Re NASDAQ Market-Makers Antitrust Litigation</i>	
	(S.D.N.Y. 1997) 172 F.R.D. 119.....	11
	<i>North County Contractor’s Assn., Inc. v. Touchstone Ins. Services</i>	
	(1994) 27 Cal.App.4th 1085.....	13

1	<i>Priddy v. Edelman</i>	
2	(6th Cir. 1989) 883 F.2d 438.....	14
3	<i>Prince v. CLS Transp., Inc.</i>	
4	(2004) 118 Cal.App.4th 1320.....	9
5	<i>Reyes v. Board of Supervisors of San Diego County</i>	
6	(1987) 196 Cal.App.3d 1263.....	10
7	<i>Richard v. Dart Industries, Inc.</i>	
8	(1981) 29 Cal.3d 462.....	9
9	<i>Rodriguez v. West Publ. Corp.</i>	
10	(C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767	14
11	<i>Sav-On Drug Stores v. Super. Ct.</i>	
12	(2004) 34 Cal.4th 319.....	12
13	<i>Sevidal v. Target Corp.</i>	
14	(2010) 189 Cal.App.4th 905.....	10
15	<i>Stamburgh v. Superior Court</i>	
16	(1976) 62 Cal.App.3d 231	14
17	<i>State v. Levi Strauss & Co.</i>	
18	(1986) 41 Cal.3d 460.....	14
19	<i>Vaquero v. Stoneledge Furniture, LLC</i>	
20	(2017) 9 Cal.App.5th 98.....	19, 20
21	<i>Vasquez v. Superior Court</i>	
22	(1971) 4 Cal.3d 800.....	10, 11
23	<i>Wershba v. Apple Computer, Inc.</i>	
24	(2001) 91 Cal.App.4th 224.....	9, 16, 18
25	Statutes	
26	California Business & Professions Code § 17200, <i>et seq.</i>	3, 24
27	California Civil Code § 382	28
28	Cal. Code Civ. Proc. § 340.....	24
	California Labor Code § 201.....	3
	California Labor Code § 203.....	24
	California Labor Code § 204.....	3

1	California Labor Code § 226.....	3, 23, 24
2	California Labor Code § 226.7.....	2, 3, 21, 22
3	California Labor Code § 510.....	2
4	California Labor Code § 512.....	2, 21
5	California Labor Code § 1174.....	3
6	California Labor Code § 1194.....	2
7	California Labor Code § 1197.....	2
8	California Labor Code § 1197.1.....	2
9	California Labor Code § 1198.....	2
10	California Labor Code § 2698, <i>et seq.</i>	<i>passim</i>
11	California Labor Code § 2699.....	26
12	California Labor Code § 2800.....	3
13	California Labor Code § 2802.....	3, 23
14	Other Authorities	
15	California Rules of Court, Rule 3.766.....	28
16	California Rules of Court, Rule 3.769.....	28
17	IWC Wage Order No. 4-2001	21
18	IWC Wage Order No. 7-2001	20, 21
19		
20		
21		
22		
23		
24		
25		
26		
27		
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jaime Corona (“Plaintiff” or “Class Representative”), individually and on behalf of
4 all others similarly situated,² seeks preliminary approval of the Class and Representative Action
5 Settlement Agreement (“Settlement Agreement”) entered with defendants Fairview Ford Sales, Inc.
6 and Fairway Ford Sales, Inc. (collectively, “Defendants”). The Settlement Agreement between
7 Plaintiff and Defendants (together, the “Parties”), if approved, will resolve specific claims of the
8 Settlement Class Members and Aggrieved Employees in exchange for Defendants’ agreement to
9 pay ***Two Hundred Forty Thousand Dollars (\$240,000) into a non-reversionary common***
10 ***settlement fund***. There are approximately 161 Class Members employed during the Class Period.

11 By way of this class and representative lawsuit, Plaintiff pursued his rights against
12 Defendants for allegedly violating wage-and-hour laws under the California Labor Code
13 and Business and Professions Code. Plaintiff’s lawsuit thus sought to recover unpaid wages and
14 overtime, premiums for improper meal and rest breaks, reimbursement of business expenses,
15 restitution, liquidated damages, penalties for improper wage statements, waiting time penalties, civil
16 penalties pursuant to the Private Attorneys General Act (“PAGA”), injunctive and other equitable
17 relief, prejudgment interest, and attorneys’ fees and costs.

18 After substantial investigation followed by mediation with Jill R. Sperber, Esquire of
19 Judicate West, the Parties agreed to accept the mediator’s proposal to resolve Settlement Class
20 Members’ and PAGA Group Members’ claims alleged in this litigation; an agreement was reached
21 for resolution at the non-reversionary sum of Two Hundred Forty Thousand Dollars (\$240,000)
22
23

24 ² “Class Members” are defined as all salespersons, finance managers, and service writers who are
25 employed or have been employed by Defendants in the State of California as non-exempt employees
26 during the Class Period. (Settlement Agreement ¶ 5.) The “Class Period” is defined as the period
27 from August 18, 2016 through June 30, 2021. (*Id.* at ¶ 7.) “Settlement Class” or “Settlement Class
28 Members” are defined as all Class Members who do not opt out of this settlement. (*Id.* at ¶ 5.)
“Aggrieved Employees” are defined as all Class Members who are employed or have been
employed during the PAGA Period. (*Id.* at ¶ 2.) “Aggrieved Employees” and “PAGA Group
Members” are used interchangeably throughout. The “PAGA Period” is defined as the period from
August 18, 2019 through June 30, 2021. (*Id.* at ¶ 23.)

1 (“Gross Settlement Amount”).³ A true and correct copy of the fully executed Settlement Agreement
2 is attached as **Exhibit 1** to Declaration of Anthony J. Orshansky (“Orshansky Decl.”), filed
3 concurrently herewith. After deductions for the attorneys’ fees and costs to Class Counsel, the
4 enhancement payment to the Class Representative, the administration costs to the Settlement
5 Administrator, and payments under PAGA, including payment to PAGA Group Members and to
6 the California Labor and Workforce Development Agency (“LWDA”) for civil penalties pursuant
7 to statute, the remaining amount (the “Net Settlement Amount”) of approximately \$109,000 will be
8 distributed to the Settlement Class Members. (Settlement Agreement ¶¶ 19, 48(f).) The entire Net
9 Settlement Amount will be paid out to Settlement Class Members. Settlement Class Members shall
10 automatically receive payments without the need to submit a claim form, and PAGA Group
11 Members shall receive PAGA Payments irrespective of whether they opt out. (*Id.* at ¶ 55(a).)

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

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

18 On August 18, 2020, Class Counsel provided pre-filing written notice to the LWDA and by
19 certified mail to Defendants of the above-identified allegations on behalf of Plaintiff and similarly
20 situated aggrieved employees in accord with the PAGA, California Labor Code § 2698, *et seq.*
21 (Orshansky Decl. ¶ 26.)

22 On September 24, 2021, Plaintiff Jaime Corona commenced the Action by filing a Class and
23 Representative Action Complaint (the “Complaint”) asserting the following claims: (1) Violation of
24 California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (2) Violation of
25 California Labor Code §§ 510 and 1198 (Unpaid Overtime); (3) Violation of California Labor Code

27 ³ Payment of Defendants’ share of employer payroll taxes for payments on the amount allocated as
28 wages shall be separately funded (*i.e.*, outside of the settlement fund) by Defendants. (Settlement
Agreement ¶¶ 15, 16.)

1 §§ 226.7 and 512(a) (Unpaid Meal Period Premiums); (4) Violation of California Labor Code §
2 226.7 (Unpaid Rest Period Premiums); (5) Violation of California Labor Code §§ 2800 and 2802
3 (Unreimbursed Business Expenses); (6) Violation of California Labor Code § 226(a) (Non-
4 Compliant Wage Statements); (7) Violation of California Labor Code §§ 201-204 (Failure to Pay
5 All Wages Owed Timely and Upon Separation of Employment); (8) Violation of California Labor
6 Code § 1174(d) (Failure to Keep Requisite Payroll Records); (9) Violation of California Business &
7 Professions Code § 17200, *et seq.*; and (10) Violation of the Private Attorneys General Act of 2004
8 (“PAGA”), codified in Labor Code §§ 2698, *et seq.*⁴ (Orshansky Decl. ¶ 27.)

9 Plaintiff’s lawsuit thus sought to recover unpaid wages and overtime, premiums for improper
10 meal and rest breaks, reimbursement of business expenses, restitution, liquidated damages, penalties
11 for improper wage statements, waiting time penalties, civil penalties pursuant to the PAGA,
12 injunctive and other equitable relief, prejudgment interest, and attorneys’ fees and costs. (*Id.* at ¶
13 28.)

14 Defendants deny Plaintiff’s allegations of wrongdoing. Defendants do not believe that any
15 liability to Plaintiff or other Class Members exists, or that Plaintiff or Class Members are entitled to
16 any recovery. (Settlement Agreement ¶¶ 39, 41, 44; Orshansky Decl. ¶ 29.)

17 **A. Discovery and Investigation**

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

23 Prior to initiating the lawsuit, as early as August 2020, counsel for Plaintiff, CounselOne,
24 P.C., thoroughly investigated the claims and considered the facts and circumstances underlying the
25 pertinent issues and applicable law. (Orshansky Decl. ¶ 25.) This required thorough discussions and
26 interviews with Plaintiff and other Class Members as well as research into the various legal issues

27 ⁴ The Parties entered into a tolling agreement prior to the filing of the Complaint that extends the
28 putative class period back to August 18, 2016.

involved in the case. (*Ibid.*) After conducting their initial investigation, Class Counsel determined that the claims were well suited for class action adjudication owing to what appeared to be a common course of conduct affecting a similarly situated group of employees. (*Ibid.*)

Class Counsel analyzed information and documents concerning the alleged violations, such as Defendants' written policies concerning those claims, including Defendants' employee handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, 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. (*Id.* at ¶ 30.) Defendants also produced time and pay records for Class Members. (*Ibid.*) Counsel met and conferred at length regarding the information and documents produced. (*Ibid.*) Class Counsel interviewed Class Members, analyzed the documents and data produced, and spent significant time consulting with an expert, to determine Defendant's degree of liability and potential amounts due in damages. (*Id.* at ¶ 31.)

B. Mediation and Settlement

Thereafter, the Parties participated in a full-day mediation with Jill R. Sperber, Esquire, of Judicate West. (Orshansky Decl. ¶ 32.) Ms. Sperber 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. (*Id.* at ¶ 33.) These were contentious issues because of the factual and legal complexity of the case. (*Ibid.*) Ms. Sperber made a mediator's proposal for a settlement, which was ultimately accepted by the Parties. (*Id.* at ¶ 34.) The Parties subsequently embodied the agreement in a Memorandum of Understanding. (*Ibid.*) The Parties then engaged in extensive negotiations to draft the Settlement Agreement, along with the Notice of Proposed Class and Representative Action Settlement. (*Ibid.*)

///

1 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
2 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
3 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
4 adequate taking into consideration the amounts received in other wage and hour class and
5 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
6 each Class Members’ claim to the settlement award he or she will receive. (*Id.* at ¶ 37.) Class Counsel
7 believe that the settlement serves the best interests of Class Members. (*Ibid.*) Further, and based on
8 the settlement negotiations, which were hard fought and conducted in good faith and at arm’s length
9 between attorneys with substantial experience litigating class actions, representative actions, and
10 wage and hour cases, the settlement was the product of a non-collusive settlement process in which
11 the Parties were forced to make significant compromises in the interest of reaching a full and
12 complete settlement of the action. (*Id.* at ¶ 35.) The Parties have concluded that it is in their best
13 interests to compromise, settle, and accept the terms of the Settlement Agreement. (*See* Settlement
14 Agreement ¶ 41; Orshansky Decl. ¶ 35.)

15 **III. SUMMARY OF BASIC SETTLEMENT TERMS**

16 Under the terms of the Settlement Agreement, Defendants have agreed to pay a ***non-***
17 ***reversionary amount of Two Hundred Forty Thousand Dollars (\$240,000)*** into a common fund to
18 settle the specific wage and hour claims of the Settlement Class Members and PAGA Group
19 Members; this amount is called the “Gross Settlement Amount.” (Settlement Agreement ¶ 16.) The
20 Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class
21 Members, the enhancement payment to the Class Representative, the administration costs to the
22 Settlement Administrator, the attorneys’ fees and costs to Class Counsel, and payments under
23 PAGA, including payment to PAGA Group Members and to the LWDA for civil penalties pursuant
24 to statute. (Orshansky Decl. ¶ 6.) The only monies excluded from the Gross Settlement Amount are
25 the amount to be paid by Defendants as the employer’s share of payroll taxes with respect to the
26 wage portion of the settlement payments to Settlement Class Members, which shall be paid
27 separately. (Settlement Agreement ¶¶ 15, 16.)

28 ///

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

- 3 • Up to \$84,000 – which is 35 percent of the Gross Settlement Amount in attorneys’ fees
4 to Class Counsel;
- 5 • Up to \$12,000 in litigation costs to Class Counsel;
- 6 • Up to \$5,000 to the Class Representative as an enhancement payment;
- 7 • Up to \$20,000 allocated as a PAGA payment – of which 75% is to be distributed to the
8 LWDA for civil penalties pursuant to statute and 25% is to be distributed to PAGA Group
9 Members; and
- 10 • Up to \$10,000 to the Settlement Administrator for administration costs to notify Class
11 Members and administer the settlement.

12 The amount remaining after the foregoing deductions, approximately \$109,000, is called the
13 “Net Settlement Amount.” (Settlement Agreement ¶¶ 19, 48(f).) The entire Net Settlement Amount
14 shall be paid out to Settlement Class Members. Settlement Class Members shall automatically
15 receive payments without the need to submit a claim form, and the PAGA Group Members shall
16 receive PAGA Payments with no opportunity to opt out. (*Id.* at ¶ 55(a).)

17 **A. The Settlement Provides for Reasonable Monetary Payments**

18 Although exact recovery amounts depend on each Settlement Class Members’ relative
19 number of qualifying workweeks, for estimation purposes only, if all of the approximately 161 Class
20 Members participate in the settlement, then the average settlement payment would be an estimated
21 \$677.02 per Class Member. (Orshansky Decl. at ¶ 11.) Of course, any Class Member who prefers
22 to preserve his or her right to pursue relief or seek an alternative recovery may opt out of the
23 non-PAGA settlement. (*Ibid.*)

24 The Net Settlement Amount will be the amount that is available for distribution to Settlement
25 Class Members on a *pro rata* basis, based on workweeks during the Class Period. (Settlement
26 Agreement ¶ 36.) The Workweek Rate shall mean the amount yielded from dividing the Net
27 Settlement Amount by the total of all Workweeks Worked credited to all Settlement Class Members.
28 (*Ibid.*) Each Settlement Class Member’s Settlement Payment is equal to the Workweek Rate

1 multiplied by his or her individual Workweeks Worked for Defendants as a non-exempt salesperson,
2 finance manager, and/or service writer during the Class Period. (*Ibid.*) Therefore, the amount of
3 each Settlement Class Member's Settlement Payment is tied to the number of Workweeks Worked
4 that each Settlement Class Member worked for Defendants in the State of California during the
5 Class Period in comparison to all Workweeks Worked by all Class Members in the State of
6 California during the Class Period. (*Ibid.*)

7 In addition, each PAGA Group Member will receive a PAGA Payment on a *pro rata* basis,
8 based on workweeks during the PAGA Period. (*Id.* at ¶ 24.) The PAGA Workweek Rate is \$5,000
9 (i.e., the remainder after subtracting the \$15,000 allocated to the LWDA from the \$20,000 total
10 amount of this settlement allocated to PAGA) divided by the total number of PAGA Workweeks
11 Worked credited to all PAGA Group Members. (*Ibid.*) Each PAGA Group Member's PAGA
12 Payment is equal to the PAGA Workweek Rate multiplied by his or her individual PAGA
13 Workweeks Worked. (*Ibid.*) Therefore, the amount of each PAGA Group Member's PAGA
14 Payment is tied to the number of PAGA Workweeks Worked that each PAGA Group Member
15 worked for Defendants in the State of California during the PAGA Period in comparison to all
16 PAGA Workweeks Worked by all PAGA Group Members working for Defendants in the State of
17 California during the PAGA Period. (*Ibid.*)

18 As a result of the distribution formulas, the consideration paid to each Settlement Class
19 Member/PAGA Group Member is tailored to the impact of Defendants' alleged violations as well
20 as to the claims he or she is releasing. (Orshansky Decl. at ¶ 10.) Further, a Settlement Class Member
21 may submit a written letter to the Settlement Administrator disputing the number of workweeks
22 credited if he or she believes that count is inaccurate. (Settlement Agreement ¶ 55(c).) Finally, any
23 Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery
24 may opt out.⁵ (*Id.* at ¶ 55(d).)

25 ///

26 ///

27 _____
28 ⁵ Again, if approved, PAGA Group Members will receive their individual PAGA Payments
irrespective of whether they opt out of the Class. (See Settlement Agreement ¶ 55(a).)

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 \$5,000 for services to the Settlement Class. (Settlement Agreement ¶ 48(d); 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 Class including providing factual information and documents to Class Counsel, discussing the claims and theories at issue in the case with Class Counsel, identifying potential witnesses and reviewing documents, reviewing the Settlement Agreement, as well as the significant risks Plaintiff undertook by agreeing to serve as a named plaintiff. (Orshansky Decl. ¶ 13.)

Class Counsel will apply for an attorneys’ fees award of thirty five percent (35%) of the Gross Settlement Amount plus reimbursement of up to \$12,000 in litigation costs. (*Id.* at ¶ 14.) Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. (*Ibid.*) Class Counsel have incurred substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal research and analysis, conducting discovery, meeting and conferring with defense counsel, interviewing putative class members, analyzing documents produced by Defendants, including corporate policies and employee time and payroll records, consulting with an expert, building damages models, preparing for and attending mediation, routine case updates and consultations with the client, and negotiating and preparing the Settlement Agreement, Notice of Proposed Class and Representative Action Settlement, and this motion for preliminary approval and supporting documents. (*Ibid.*) Class Counsel will also expend future attorney time in attending the hearing on this motion, overseeing the notice and administration process, drafting the final approval motion and supporting documents, and attending the final approval hearing, among other tasks, such as addressing questions from Class Members. (*Id.* at ¶ 15.)

Both California and federal courts have recognized that an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 ["the percentage of fund method survives in California class action cases..."]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the "percentage of recovery" and "lodestar/multiplier" methods].) Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013) ["No general rule can be articulated on what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented."].)

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

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

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

To certify a settlement class, the trial court must find the two primary requirements for maintaining a class action: (1) there must be an ascertainable class and (2) there must be a well-

1 defined community of interest in the questions of law and fact involving the parties to be
2 represented. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805-809; *Daar v. Yellow Cab*
3 *Company* (1967) 67 Cal.2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal.App.4th
4 467, 471; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341.) These criteria
5 are met here for the reasons set forth below.

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

7 Whether a class is ascertainable is determined by examining the class definition, the size of
8 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at
9 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,
10 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are “ascertainable” where
11 they may be readily identified without unreasonable expense or time.

12 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
13 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all salespersons,
14 finance managers, and service writers who are employed or have been employed by Defendants in
15 the State of California as non-exempt employees during the Class Period. (Settlement Agreement ¶
16 4.) Further, the Class Period is defined as the period from August 18, 2016 through June 30, 2021.
17 (Settlement Agreement ¶ 7.) Thus, all Class Members are of a specific type (salespersons, finance
18 managers, and service writers) employed within California. (Orshansky Decl. ¶ 88.) Defendants are
19 required to and do maintain employment records of such persons, including contact information and
20 Social Security numbers. (*Ibid.*) Documents and information exchanged reflect a class of
21 approximately 161 current and former salespersons, finance managers, and service writers working
22 in California during the Class Period. (*Ibid.*) Thus, the proposed Class satisfies the ascertainability
23 and numerosity requirements. (*See, e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44
24 farm workers sufficiently numerous].)

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

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

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

9 (Id. at p. 809.) The instant litigation is predicated on uniform company policies and systemic top-
10 down business practices revolving principally around Defendants' timekeeping and pay practices –
11 e.g., failure to pay all wages, failure to pay meal and rest break premiums, as well as business
12 expense reimbursements, or lack thereof. These allegations have given rise to the following claims:
13 failure to pay minimum and overtime wages; meal period liability; rest break liability; failure to
14 reimburse for business expenses; and derivative claims arising therefrom. (Orshansky Decl. ¶ 89.)

15 Because Plaintiff has alleged a single top-down compensation scheme where “the relevant
16 proof [does] not vary among class members” and “clearly present[] a common question fundamental
17 to all class members.” (See *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
18 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
19 169 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation,
20 class-wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I.*
21 *Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class
22 certification in a manufacturing defect case when a common course of action had been proven].)
23 This inference “eliminates the need for each class member to prove individually the consequences
24 of the defendants' actions to him or her.” (Id. at p. 1351 [emphasis added].) Thus, the outcome of
25 this matter depends upon questions that are common to members of the Class. (Orshansky Decl. ¶
26 90.) These types of claims are commonly held to be proper for class certification. (*Ibid.*; see, e.g.,
27 *Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period claim];
28 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal
period claim].)

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

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

4 Here, Plaintiff’s claims are typical of those held by the members of the Class. (Orshansky
5 Decl. ¶ 91.) Plaintiff was a salesperson working for Defendants in California during the Class
6 Period. (*Ibid.*) As alleged, Plaintiff was not paid all wages, not provided with legally compliant meal
7 and rest breaks, and required to incur business expenses necessary to perform his job duties without
8 reimbursement. (*Ibid.*) Plaintiff was therefore impacted by the same challenged policies that
9 allegedly injured the Class as a whole and subject to the same defenses forwarded by Defendants as
10 to the Class, thus his claims are therefore typical. (*Ibid.*)

11 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
12 **Settlement Class**

13 The adequacy of representation requirement examines conflicts of interest between named
14 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
15 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
16 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class
17 he seeks to represent. (Orshansky Decl. ¶ 92; *McGhee v. Bank of America* (1976) 60 Cal.App.3d
18 442, 450 [finding adequacy satisfied where there was no indication that plaintiff’s counsel were not
19 qualified and the named plaintiff had no interests antagonistic to those of the proposed class].) Class
20 Counsel also have extensive experience in wage and hour litigation. (Orshansky Decl. ¶¶ 82-86, 92.)

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

22 In making its class certification decision, the court must determine that a class action would
23 be superior to alternative means for the fair and efficient adjudication of the litigation. By
24 consolidating approximately 161 individual actions into a single proceeding, this Court’s use of the
25 class action device enables it to manage this litigation in a manner that serves the efficiency interests
26 of the litigants and the judicial system. (Orshansky Decl. ¶ 93.) Absent class treatment, the only
27 alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores v.*
28 *Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating “[t]he relevant comparison lies between the

1 costs and benefits of adjudicating Plaintiff's claims in a class action and the costs and benefits of
2 proceeding by numerous separate actions – not between the complexity of a class suit that must
3 accommodate some individualized inquires and the absence of any remedial proceeding
4 whatsoever.”].) Finally, in the context of settlement, the superiority concerns are essentially non-
5 existent.

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

7 Any settlement of class action litigation must be reviewed and approved by a court. This is
8 accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a detailed
9 review after the notice has been distributed to the class members for their comments or objections.
10 In this regard, the Federal Manual for Complex Litigation (Second) explains:

11 A two-step process is followed when considering class settlements...If the proposed
12 settlement appears to be the product of serious, informed, non-collusive negotiations,
13 has no obvious deficiencies, does not improperly grant preferential treatment to class
14 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.

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

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

26 As a matter of public policy, courts both encourage the use of the class action device and
27 favor settlement over continued litigation. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th
28 429, 434 [“Courts have long acknowledged the importance of class actions as a means to prevent a

1 failure of justice in our judicial system.”]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471;
2 *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d 1268, 1276 “[S]trong judicial policy...favors
3 settlements, particularly where complex class action litigation is concerned.”]; Newberg, § 11.41.)
4 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior*
5 *Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
6 fact that plaintiff might have received more if the case had been fully litigated is no reason not to
7 approve the settlement.”].)

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

14 **A. The Settlement Is Entitled to a Presumption of Fairness**

15 Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement
16 unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were
17 conducted in good faith. (See Newberg, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. August
18 10, 2007) 2007 U.S. Dist. LEXIS 74767, *24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980)
19 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v.*
20 *Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.) Courts do not
21 substitute their judgment for that of the proponents, particularly when settlement has been reached
22 by experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767
23 at *24.) As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the
24 settlement is the result of extensive settlement negotiations between the Parties, conducted at arm’s
25 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

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

27 The Parties engaged in a mediation session with Jill R. Sperber, Esquire of Judicate West
28 (Orshansky Decl. ¶ 32.) Ms. Sperber is experienced in mediating complex general litigation, labor

1 and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) As noted above, Ms.
2 Sperber made a mediator's proposal for a settlement, which was ultimately accepted by the Parties.
3 (*Id.* at ¶ 34.) The Parties subsequently embodied the agreement in a Memorandum of Understanding.
4 (*Ibid.*) Thereafter, the Parties engaged in extensive negotiations to draft the Settlement Agreement,
5 along with the Notice of Proposed Class and Representative Action Settlement. (*Ibid.*) The
6 settlement negotiations were hard fought and conducted in good faith and at arm's length between
7 attorneys with substantial experience litigating class actions, representative actions, and wage and
8 hour cases. (*Id.* at ¶ 35.) The settlement was the product of a non-collusive settlement process in
9 which the Parties were forced to make significant compromises in the interest of reaching a full and
10 complete settlement of the action. (*Ibid.*)

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

12 Throughout this case, Class Members have been represented by counsel who have years of
13 experience in employment class action litigation. (Orshansky Decl. ¶¶ 82-86.) Class Counsel
14 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,
15 conducting pre-filing investigation and research; conducting discovery; reviewing Defendants'
16 written policies concerning the claims set forth in the Action, including Defendants' policies and
17 procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping
18 policies, such as recording hours, reimbursement of expenses, issuance of wage statements, and
19 providing all wages at separation; reviewing and analyzing time and pay records; meeting and
20 conferring regarding the information and documents produced; interviewing Class Members;
21 drafting pleadings; researching California law; preparing damages models; consulting with an
22 expert; preparing for and attending mediation; and negotiating and finalizing the settlement and
23 related documents. (Orshansky Decl. ¶¶ 14, 25-34.)

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

25 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
26 of the Class Members. (Settlement Agreement ¶ 41; Orshansky Decl. ¶ 37.) Although the
27 recommendations of counsel proposing the class settlement are not conclusive, the Court can
28 properly take the recommendations into account, particularly if counsel have been involved in

1 litigation for some period of time, appear to be competent, have experience with this type of
2 litigation, and significant discovery has been completed. (*See Newberg* § 11.47.) Here, Plaintiff is
3 represented by competent and experienced counsel who possess extensive experience litigating
4 wage and hour class actions and have been appointed as class counsel in numerous cases alleging
5 similar claims. (Orshansky Decl. ¶¶ 82-86.)

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

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

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

16 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
17 model for Defendants’ liability. (Orshansky Decl. ¶ 38.) Although Plaintiff steadfastly maintains
18 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
19 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4
20 *infra*, Defendants presented numerous defenses to Plaintiff’s claims, both on the merits and with
21 respect to class certification. (*Ibid.*) For example, Defendants contended that all work performed by
22 Class Members was “directly related” to the activities that were being compensated via
23 commissions, and therefore they did not need to be separately compensated for any “non-productive”
24 time. (*Id.* at ¶ 39.) Defendants also argued that Class Members worked in different job positions and
25 had different managers, and that, as a result, Defendants contended there was variation to the
26 circumstances that could allegedly cause employees to be deprived of the opportunity to take legally
27 compliant, duty-free meal and rest periods, and this variation in circumstances raised highly
28 individualized questions of fact. (*Ibid.*) Further, Defendants contended Plaintiff would face

1 significant hurdles to certification given that Class Members signed arbitration agreements with class
2 action waivers as a condition of their employment, which if enforceable would convert a putative
3 class action (with the potential for class-wide damages) into an individual dispute and action—
4 effectively forcing Class Members to retain their own counsel and proceed on the basis of individual
5 claims only. These risks justify a downward departure from the maximum monetary exposure that
6 each claim carries. (*Ibid.*)

7 Although Plaintiff was prepared to litigate these claims through class certification and,
8 ultimately, through trial, given the substantial amount offered in settlement, Class Counsel predicted
9 that it was far from certain that Plaintiff would be able to recover a greater amount at trial,
10 particularly after considering the increased litigation costs that would accrue. (Orshansky Decl. ¶
11 43.) Thus, this factor supports preliminary approval of the settlement.

12 2. Risk, Expense, Complexity, and Duration of Further Litigation

13 Although Plaintiff conducted informal discovery and investigated the claims prior to
14 settlement, the Parties agreed to focus on exhausting early settlement efforts before launching into
15 full-fledged and hotly contested litigation. (Orshansky Decl. ¶ 41.) Therefore, absent settlement, the
16 Parties would have needed to conduct substantial additional discovery, such as the production of
17 voluminous records and numerous depositions of experts and percipient witnesses and prepare the
18 case for class certification and trial. (*Ibid.*) The Parties would have had to depose a number of people
19 such as managers, supervisors, human resource representatives, and employees in order to establish
20 liability. (*Ibid.*) Discovery disputes would have been in the offing and liability likely would have
21 entailed a battle of experts. (*Ibid.*) This settlement avoids the considerable time, attorneys' fees and
22 costs, and party resources associated with conducting additional discovery, moving for class
23 certification and potentially summary judgment or adjudication, and ultimately, trial, as well as the
24 risks and the accompanying burden of continued litigation on the Court. (*Ibid.*)

25 3. Risk of Maintaining Class Action Status

26 Here, settlement was reached prior to class certification and the result was a successful
27 outcome for the Class. (Orshansky Decl. ¶ 41.) Yet, class certification was by no means a foregone
28 conclusion. (*Ibid.*) For example, Class Members worked in different job positions and had different

1 managers, and, as a result, Defendants contended there was variation to the circumstances that could
2 allegedly cause the employees to be deprived of the opportunity to take legally compliant, duty-free
3 meal and rest periods, and this variation in circumstances raised highly individualized questions of
4 fact. (*Ibid.*) Defendants disputed Plaintiff's characterization of working conditions, liability, and
5 damages, and possessed documentary evidence rebutting Plaintiff's allegations. (*Ibid.*)

6 In addition, Plaintiff would face significant hurdles to certification given that Class Members
7 signed arbitration agreements with class action waivers as a condition of their employment. (*Id.* at
8 ¶ 42; see *Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612 [class action waivers in arbitration
9 agreements are enforceable].) If Defendants' arbitration agreement defense is successful, it would
10 severely limit the potential relief available to those Class Members who signed arbitration
11 agreements with class action waivers. (Orshansky Decl. ¶ 42.) Even if Plaintiff prevailed and
12 certified a class action as to them, there is no guarantee Defendants would not later move for and
13 obtain decertification. (*Ibid.*)

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

16 4. Amount Offered in Settlement Given Realistic Value of Claims

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

24 Plaintiff's estimate of the settlement recovery is a reasonable percentage of possible
25 recoverable damages at trial. Plaintiff's damages analysis shows that the settlement reflects an
26 estimated 46.43% of the maximum realistic potential damages recoverable at trial. (Orshansky Decl.
27 ¶ 44.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims in
28 question, see *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly

1 meets requirements establishing that the class settlement is within the “ballpark” of reasonableness.
2 The settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed
3 claims.

4 **Unpaid Wages**

5 Plaintiff contended that Defendants did not fully compensate Plaintiff and Class Members
6 for “non-productive” time (i.e., non-sales activity). (Orshansky Decl. ¶ 46.) Non-sales activity is
7 compensable time. *See Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98; *Balasanyan*
8 *v. Nordstrom* (S.D. Cal. 2012) 913 F.Supp.2d 1001.

9 Class Counsel analyzed the documents and data produced by Defendants and, in conjunction
10 with interviews of Plaintiff and Class Members, determined Defendants’ degree of liability and
11 amounts due in damages – specifically, the incidence and amount of purported non-sales activity.
12 (Orshansky Decl. ¶ 47.)

13 Plaintiff estimated that Defendants are liable for an aggregate of approximately sixty (60)
14 minutes of non-sales activity performed per workweek. (*Id.* at ¶ 48.) At the average overtime hourly
15 rate of \$30.06, such yields an estimated damages amount of \$216,372, without discounting for risks
16 associated with certification or merits. (*Ibid.*)

17 In opposition to certification, Defendants contended that Plaintiff’s claim for unpaid wages
18 stemming from non-sales activity is not amenable to class treatment, because employees worked in
19 a variety of departments with different requirements, and it would require an unmanageable series
20 of mini-trials to determine how much time was spent performing non-sales activity. (*Id.* at ¶ 49.)
21 Further, in terms of merit defenses, Defendants vigorously disagreed with Plaintiff’s theories
22 regarding how much non-sales activity occurred in reality and the credibility of those claimed hours.
23 (*Id.* at ¶ 50.)

24 In light of these considerations, Class Counsel applied a discount that incorporated the risks
25 of non-certification and being unsuccessful on the merits. (*Id.* at ¶ 51.)

26 **Stoneledge Rest Period Violations**

27 Plaintiff argued that his commission pay plan is the functional equivalent of the commission
28 pay plan found to be unlawful in *Stoneledge*. (Orshansky Decl. ¶ 52.) In *Stoneledge*, sales associates

1 who worked for Ashley Furniture Store were paid on a commission pay plan, which guaranteed a
2 minimum hourly rate as an advance against commission earned in later pay periods. The *Stoneledge*
3 court held the commission pay plan was unlawful because it failed to ***separately*** compensate sales
4 associates for rest breaks in weeks where the employee was paid on a commission basis. In essence,
5 the reasoning of the *Stoneledge* court was a natural extension of its prior holding in *Bluford v.*
6 *Safeway, Inc.* (2013) 216 Cal.App.4th 864, 872, which held that “under the rule of *Armenta v.*
7 *Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323, rest periods must be separately compensated in a
8 piece-rate system.” *See also, Stoneledge, supra*, 9 Cal.App.5th at p. 110 (“We agree with *Bluford*
9 that Wage Order 7 requires employers to separately compensate employees for rest periods if an
10 employer’s compensation plan does not already include a minimum hourly wage for such time.”).
11 Plaintiff asserted that Defendants failed to separately compensate Class Members for rest breaks as
12 held in *Stoneledge*. (Orshansky Decl. ¶ 52.)

13 Plaintiff contended Class Members are entitled to rest period premium pay for every rest
14 period not *separately* compensated for by Defendants. (*Id.* at ¶ 53.) Defendants argued that they are
15 not liable for rest period premiums, but that they are only liable for the missed and unpaid rest period
16 minutes at most. (*Ibid.*)

17 In light of these considerations, Plaintiff discounted the *Stoneledge* rest break valuation to
18 20 minutes of unpaid time per shift during weeks Plaintiff and Class Members earned commissions,
19 resulting in estimated damages in the amount of \$120,200, without discounting for risks associated
20 with certification or merits. (*Id.* at ¶ 54.)

21 **Meal and Rest Period Violations**

22 Plaintiff asserted that there are compliance issues *vis-à-vis* meal breaks—some are late,
23 missed, short, or interrupted. (Orshansky Decl. ¶ 55.)

24 On February 25, 2021, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the
25 California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1)
26 employers are not permitted to round time records when determining if employees are entitled to
27 meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods were
28 provided to employees if the time records show otherwise. Using this opportunity to echo its long

1 stance that California liberally construes the Labor Code and wage orders to favor protection of
2 employees, the California Supreme Court emphasized that meal periods are part of the remedial
3 worker protection framework to protect the health and safety of employees.

4 Employee time records depict a sizeable number of violations. Specifically, Plaintiff's
5 consultant found a 32.8% unique meal break violation rate for shifts greater than 5 hours analyzed
6 in the data sample. (Orshansky Decl. ¶ 57.) However, Defendants failed to make the corresponding
7 equivalent of meal period premiums of a meal period premium for "missed," "short," or "late" meal
8 periods to employees. *C.f.* Wage Order Nos. 4-2001 and 7-2001, § 11(b). (Orshansky Decl. ¶ 57.)
9 Consequently, Plaintiff alleged that Defendants violated Labor Code §§ 226.7, 512, and applicable
10 Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and
11 missed meal periods. (Orshansky Decl. ¶ 57.)

12 Defendants, however, contended that they had practices, policies, and procedures to provide
13 meal and rest breaks every workday to their employees that fully complied with the law. (Orshansky
14 Decl. ¶ 58.) Defendants vehemently argued that they complied with the requirements articulated by
15 the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.
16 (Orshansky Decl. ¶ 58.) Specifically, Defendants maintained that they "provide" employees with a
17 reasonable opportunity to take timely meal periods of at least 30 minutes, relieve employees of all
18 duties during meal periods, and relinquish control over employees' activities, including the ability
19 to leave the premises during meal periods. (*Ibid.*)

20 Like most employers facing meal period litigation, Defendants argued that employees were
21 apprised of their right to take meal periods and provided compliant meal periods, but some may have
22 voluntarily waived them. (*Id.* at ¶ 59.) Defendants contended that the issue of voluntary waiver
23 would necessarily devolve into a series of individualized mini-trials, precluding class certification.
24 (*See Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25 [holding that the defendant
25 must be provided an opportunity to litigate affirmative defenses, even when they turn on individual
26 questions].) (Orshansky Decl. ¶ 59.)

27 Based upon the analysis of Class Members' time and payroll records and, in conjunction
28 with interviews of Plaintiff and Class Members, Plaintiff determined that 32.8% of eligible shifts

1 were the subject of unique violations for missed, short, or late meal periods, and calculated the
2 potential exposure of this claim to be \$236,412. (Orshansky Decl. ¶ 60.)

3 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required
4 whereby employers “relinquish control over how employees spend their time and relieve employees
5 of all duties.” (*Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257, 260.) (Orshansky Decl.
6 ¶ 61.) Due to Defendants’ work demands and inadequate staffing, Plaintiff and Class Members did
7 not receive timely and compliant rest breaks, nor did Defendants relinquish control over how
8 employees spent their 10-minute rest breaks. (Orshansky Decl. ¶ 61.)

9 As with the meal periods, Plaintiff did not receive rest break premium payments for non-
10 compliant rest breaks, nor is there evidence that Defendants made rest break premium payments to
11 Class Members. (*Id.* at ¶ 62.) Thus, Plaintiff alleged that Defendants did not provide premium pay
12 for each non-compliant rest break as required under Labor Code § 226.7. (*Ibid.*)

13 Here again, Defendants disputed liability and damages. Defendants maintained that they
14 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
15 of four hours worked as required by Labor Code § 226.7. (*Id.* at ¶ 63.) Defendants explained that
16 Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*) As with meal
17 periods, Defendants argued that any Class Member who failed to take a rest break, or took a short
18 or late rest break, did so voluntarily and that all applicable rest breaks were still authorized and
19 provided. (*Ibid.*) Defendants also attempted to distinguish *Augustus, supra*, which involved security
20 guards who were required to monitor a pager, phone, or other device as having an added constraint
21 that is not present in the matter *sub judice*. (*Ibid.*)

22 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendants’
23 exertion of pressure, control, and resulting violations is likely to be more difficult. (*Id.* at ¶ 64.) Thus,
24 Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and other Class
25 Members for a maximum exposure of \$144,248. (*Ibid.*) For settlement purposes, and to account for
26 the difficulties of certifying and proving unrecorded rest break violations, a downward departure
27 from that maximum exposure was and is warranted. (*Ibid.*)

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Plaintiff alleged a cause of action under Labor Code § 2802(a), which states that an employer must reimburse employees for all necessary expenditures that employees incur in discharging their duties. (Orshansky Decl. ¶ 65.) Here, Plaintiff and Class Members were required to use their personal cell phones to communicate with supervisors and coworkers for reasons related to work, yet Defendants failed to reimburse for these necessary business expenses. (*Ibid.*)

Defendants contended that they have a policy and practice of reimbursing employees for necessary business-related expenses. (*Id.* at ¶ 66.) Defendants also contended that, with respect to the alleged expenses for which Plaintiff and other Class Members never requested reimbursement from Defendants, Defendants did not know and had no reason to know that the alleged business-related expenses were incurred. (*Ibid.*) Moreover, to the extent it occurred, Defendants asserted that this claim is not suitable for class treatment as it would require individualized determinations as to whether each employee used a personal cell phone for work-related purposes and, if so, how much of that use was a reasonable percentage of his or her individual monthly phone bill. (*Ibid.*)

Defendants also argued that the California Labor Code only requires reimbursement of “necessary” expenses—as opposed to any expense that is incurred in the course of performing work—and argued that distinguishing a necessary expense from an unnecessary one would require individualized inquiry. (See Labor Code § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554.) (Orshansky Decl. ¶ 67.) Furthermore, whether an expense was necessary would depend in part on the reasonableness of the employee’s choice and would thus have to be established by way of extensive individual factual inquiry and/or statistical evidence. (*Cochran v. Schwan’s Home Services, Inc.* (2014) 228 Cal.App.4th 1137.)

For the foregoing reasons, and taking into account the wide variety of telephone plans, providers and costs which creates evidentiary complexities on an individual basis, let alone class-wide, Plaintiff assigned *de minimis* value to this claim. (Orshansky Decl. ¶ 68.)

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Plaintiff alleged a cause of action under Labor Code § 226(a) for Defendants' failure to provide accurate itemized wage statements. (Orshansky Decl. ¶ 69.) Failure to comply with the

1 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
2 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
3 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*
4 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because if
5 Defendants did not provide all wages, premiums for non-compliant meal and rest breaks, and so
6 forth, then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 69.)

7 Defendants contended, however, that Labor Code § 226(e) penalties are not automatic. (*Id.*
8 at ¶ 70.) Rather, the employee must show that Defendants’ non-compliance was “knowing and
9 intentional.” (*Ibid.*) Defendants suggested that any non-compliance was not knowing and intentional.
10 (*Ibid.*) Moreover, Defendants argued that meal and rest period violations cannot support derivative
11 wage statement penalties. (*See Naranjo v. Spectrum Security Service, Inc.* (2019) 40 Cal.App.5th
12 444, 474 [holding that violations of Labor Code’s meal break provisions do not entitle employees to
13 pursue the derivative wage statement penalties]; *c.f.*, but *review granted, Naranjo v. Spectrum*
14 *Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257 Cal.Rptr.3d 188.)
15 (Orshansky Decl. ¶ 70.)

16 Because the damages for this cause of action are penalties, the statute of limitations is only
17 one year prior to the filing of the original complaint. (*See Code Civ. Proc. § 340.*) The Parties
18 discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent
19 violation rates, Plaintiff estimated the total maximum wage statement exposure to be \$136,100.
20 (Orshansky Decl. ¶ 71.)

21 **Derivative Waiting Time and UCL Claims**

22 Plaintiff further asserted causes of action against Defendants for failure to timely pay all
23 wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business
24 practices. (*See Labor Code § 203; Cal. Business and Professions Code §§ 17200, et seq.*) (Orshansky
25 Decl. ¶ 72.) As with other claims, Defendants vigorously disagreed that they engaged in any conduct
26 giving rise to liability or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶
27 72.)

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1 Defendants argued that waiting time penalties are not appropriate because they attempted to
2 pay employees all final wages owed in good faith upon their separation, thereby precluding a finding
3 of willfulness necessary to obtain waiting time penalties. (*Id.* at ¶ 73.) Moreover, Defendants
4 maintained that no waiting time penalties were recoverable from alleged meal or rest period
5 violations. (*Ibid.*) Defendants raised the Second Appellate District’s decision in *Naranjo, supra*, 40
6 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage statement nor
7 waiting time penalties. (*Ibid.*) Yet the *Naranjo* decision is currently pending before the California
8 Supreme Court, *see Naranjo, supra, review granted*, Supreme Court Case No. S258966, 455 P.3d
9 704 (January 02, 2020), and although fully briefed, the outcome of this important case remains to be
10 seen. (*Ibid.*) Finally, Defendants argued that adequate remedies at law exist to render the action
11 unsuitable for equitable remedies, and again contended that the allegations underlying the unfair
12 competition claim lacked merit. (*Ibid.*)

13 Based on the count of 80 former employees, Class Counsel calculated the maximum value
14 of the waiting time claim to be \$384,768. (*Id.* at ¶ 74.) However, to account for the uncertainty of
15 proving the underlying claims and risk of an adverse decision in *Naranjo*, Class Counsel made a
16 realistic allowance with the agreed upon settlement dollar figure. (*Ibid.*)

17 **PAGA Penalties**

18 The success of Plaintiff’s PAGA claim is wholly dependent upon the success of his
19 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
20 (Orshansky Decl. ¶ 75.)

21 Defendants maintained and continue to maintain that they had legally compliant employment
22 policies and practices throughout the statutory period. (*Id.* at ¶ 76.) Defendants denied and continue
23 to deny that they ever violated any provision of the California Labor Code and argued that, even
24 assuming such violations occurred, Defendants will not be treated as having engaged in subsequent
25 violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendants argued that
26 heightened civil penalties for subsequent violations would not be assessed unless it could be shown
27 that Defendants had notice that they were violating the law, *e.g.*, they had been cited by a labor
28 agency or adjudged by a court to have done so. (*See, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal.4th

1 1157, 1209.) (Orshansky Decl. ¶ 76.) Thus, Defendants contended that, at best, even if a violation
2 giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with
3 initial violations would apply. (Orshansky Decl. ¶ 76.)

4 Moreover, Defendants asserted that, before a PAGA claim could be tried, under existing law,
5 the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a
6 theory of uniform wage and hour practices relating to a large group of aggrieved employees, is
7 sufficiently “manageable” so as not to interfere with Defendants’ right to due process. (*Id.* at ¶ 77.)
8 Defendants reiterated how employees’ job duties and work hours varied. Defendants contended that
9 there was variation as to the circumstances that could allegedly cause employees to perform non-
10 sales activity or to be deprived of the opportunity to take legally compliant, duty-free meal and/or
11 rest periods. (*Id.* at ¶ 78.) Defendants further opined that these issues presented challenges not only
12 to liability but also challenges to Plaintiff’s ability to show that a PAGA claim could be efficiently
13 and manageably adjudicated without abridging Defendants’ due process rights. (*Ibid.*)

14 Defendants maintained that the Court has discretion to reduce any award of PAGA penalties
15 where it views it as duplicative. (See Labor Code § 2699e(2) [the Court may “award a lesser amount
16 than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and
17 circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary
18 and oppressive, or confiscatory.”].) (Orshansky Decl. ¶ 79.)

19 Although, strictly speaking, class certification requirements are not required to be satisfied
20 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
21 valuation of a PAGA claim is uncertain. (Orshansky Decl. ¶ 80.) Thus, Class Counsel applied
22 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or
23 trial, the risks regarding success on the merits and establishing liability, and the risks with proving
24 the extent of penalties that are warranted and possible discretionary reduction of penalties by the
25 Court. (*Ibid.*) As a result, Plaintiff used the “initial” \$100 per pay period violation (as opposed to the
26 \$200 subsequent per violation rate) to calculate a realistic estimate of \$140,200 in potential PAGA
27 penalty exposure – of which, by statute, only 25%, or \$35,050 – would be recoverable by aggrieved
28 employees. (*Ibid.*)

Summary

After Class Counsel calculated the realistic possible recovery to Class Members for each of the above claims, the aggregate dollar amount result is \$1,378,300 in total damages and penalties. (Orshansky Decl. ¶ 81.) Plaintiff discounted the maximum figure by a variable of 50% for class certification and a 25% reduction across all claims for establishing liability on the merits, which yields a possible recovery of \$516,862.50. (*Ibid.*) Thus, the proposed settlement amount of \$240,000 represents an approximate 46.43% of Plaintiff's potential maximum realistic recovery, while avoiding the further expense and serious risk of proceeding toward class certification and trial. (*Ibid.*) "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted]; see, e.g., *Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 [preliminarily approving wage and hour class action settlement stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims."].) Taking into account the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce the civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and adequate. (Orshansky Decl. ¶ 81.)

VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS

This Court should order distribution of the proposed Notice of Proposed Class and Representative Action Settlement, see Exhibit A to the Settlement Agreement (Exhibit 1 to the Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known mailing address information provided by Defendants. (Settlement Agreement ¶ 54; Orshansky Decl. ¶ 94.) Here, the Parties propose that the settlement be administered by CPT Group, Inc. ("CPT"), an experienced class action settlement administrator. (Settlement Agreement ¶ 29; Orshansky Decl. ¶ 95.) Class Members' addresses, which are ascertainable through Defendants' personnel and payroll records, will be provided by Defendants to CPT within ten (10) calendar days after preliminary approval of the settlement. (Settlement Agreement ¶ 64(b); Orshansky Decl. ¶ 95.) To

1 the extent that any notices are returned, CPT will run those addresses through the National Change
2 of Address database and/or conduct skip traces to obtain current address information. (Settlement
3 Agreement ¶ 54(d)(ii); Orshansky Decl. ¶ 95.)

4 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
5 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
6 the key terms of the Settlement Agreement, the uniform 45-day deadline to submit a dispute, opt-
7 out, or objection to the class settlement and the procedure by which to do so, and explains the
8 recovery formula and credited number of workweeks for each Class Member. (Orshansky Decl. ¶
9 96.) The proposed notice will also notify Class Members of the final approval hearing date, provide
10 the contact information for Class Counsel, and advise Settlement Class Members that they may enter
11 an appearance through counsel if they wish. (*Id.* at ¶ 97.) This manner of giving notice satisfies
12 California Rules of Court, Rule 3.766(e) as the most reliable and cost-effective method of reaching
13 Class Members. (*Ibid.*) Thus, the proposed method of notice is reasonably calculated to reach Class
14 Members by the best means practicable and should be approved. (*Ibid.*)

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:

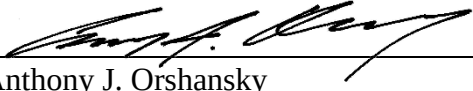
- 22 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 23 2. Preliminarily approving the form and content of the Notice of Proposed of Class and
24 Representative Action Settlement, attached as Exhibit A to the Settlement Agreement;
- 25 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the
26 Class Members identified during the Class Period under Civil Code § 382 for settlement purposes
27 only;
- 28 4. Approving and appointing Plaintiff Jaime Corona 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: February 17, 2022

Respectfully submitted,

COUNSELONE, PC

By: 
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Jennifer L. Connor
Justin Kachadoorian
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