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of himself and others similarly situated
7
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**
11

12 RAYMOND L. SMITH, on behalf of himself
and others similarly situated,

13
14 Plaintiff,

15 v.

16 CAMILO LOPEZ, INC. dba C.L. CONCRETE, a
California corporation; and DOES 1 through 100,
17 inclusive,

18 Defendants.
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Case No.: 20STCV47555

Assigned for all purposes to:
Hon. David S. Cunningham, Dept. 11

CLASS ACTION

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

[Declarations of Jennifer L. Connor and
Raymond Smith and Proposed Order
submitted concurrently herewith]

Preliminary Approval Hearing

Date: June 1, 2022
Time: 10:00 a.m.
Dept. 11

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

2 **NOTICE IS HEREBY GIVEN** that, on June 01, 2022 at 10:00 a.m., or as soon thereafter
3 as the matter may be heard, in Courtroom 11 of the above-entitled Superior Court of California,
4 County of Los Angeles, located at 312 North Spring Street, Los Angeles, California 90012 before
5 the Honorable David S. Cunningham, pursuant to Code of Civil Procedure § 382 and California
6 Rules of Court, Rule 3.769(c), Plaintiff Raymond L. Smith (“Plaintiff”) individually, and on behalf
7 of all others similarly situated, will and hereby does move this Court for an entry of an Order
8 granting preliminary approval of the proposed settlement.

- 9 1. Preliminarily certifying the Class for purposes of settlement;
- 10 2. Preliminarily approving Plaintiff Raymond L. Smith as Class Representative for
11 purposes of settlement;
- 12 3. Preliminarily appointing Counsel One, PC as Class Counsel for purposes of
13 settlement;
- 14 4. Preliminarily approving the settlement as fair, adequate, and reasonable based upon
15 the terms set forth in the Stipulation of Class Action and PAGA Settlement (“Settlement
16 Agreement”), including payment by Defendant Camilo Lopez, Inc. dba C.L. Concrete (“Defendant”
17 or “C.L. Concrete”) of the non-reversionary Maximum Settlement Amount totaling \$325,000 for a
18 putative class of approximately 95 current and former non-exempt employees who are or were
19 employed by Defendant in California from December 14, 2016 to January 03, 2022 (“Class
20 Period”);
- 21 5. Preliminarily approving Class Counsel’s request for up to thirty-five percent of the
22 Gross Settlement Amount as attorneys’ fees (i.e., up to \$113,750), plus reimbursement of actual
23 litigation costs up to \$15,000;
- 24 6. Appointing CPT Group, Inc. as the third-party Settlement Administrator for mailing
25 notices and for settlement administration, and approving up to \$15,000 be deducted from the
26 Maximum Settlement Amount for the costs of settlement administration;
- 27 7. Approving the proposed Notice of Pendency of Class and Representative Action
28 Settlement (“Class Notice”), along with an individualized Information Form and Exclusion Form
(collectively, “Notice Packet”), and ordering they be distributed to Class Members; and

1 8. The scheduling of a hearing to consider whether the Settlement should be finally
2 approved and award amounts for the Individual Settlement Payments, Class Counsel Award,
3 Settlement Administration Costs, Class Representative Service Award to Plaintiff, and the Private
4 Attorneys General Act (“PAGA”) Payment to the California Labor and Workforce Development
5 Agency.

6 This Motion is based upon the supporting Memorandum of Points and Authorities, the
7 Declaration of Jennifer L. Connor, Declaration of Raymond L. Smith, the long-form Settlement
8 Agreement, along with the proposed Class Notice, Information Sheet, and Exclusion Form, and the
9 [Proposed] Order filed concurrently herewith, along with such supplemental filings and exhibits as
10 are required and described *infra*, evidence and argument of counsel may be presented at the hearing,
11 and such additional matters as the Court may consider at the time of hearing. Finally, given the
12 multiplicity of issues addressed in this motion, Plaintiff respectfully believes that there is good cause
13 to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and respectfully
14 requests that the Court consider Plaintiff’s memorandum of points and authorities, which is 34 pages
15 in length.

16
17 Dated: April 4, 2022

Respectfully submitted,

COUNSELONE, PC

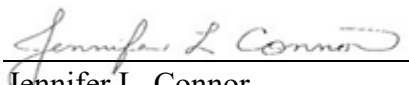
19 By: 
20 Jennifer L. Connor
21 Anthony J. Orshansky
22 Attorneys for Plaintiff, putative Class
23 Members, and aggrieved employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Raymond L. Smith (“Plaintiff” or “Class Representative”), on behalf of himself and
4 on behalf of a putative state class of current and former non-exempt employees,¹ seeks preliminary
5 approval of the settlement agreement entered with defendant, Camilo Lopez, Inc. dba C.L. Concrete
6 (“Defendant” or “C.L. Concrete”). The contemplated Stipulation of Class Action and PAGA
7 Settlement (“Stipulation,” “Settlement,” or “Settlement Agreement”) between Plaintiff and
8 Defendant (collectively, the “Parties”), if approved, will resolve all claims of the Plaintiff and
9 Participating Class Members in exchange for Defendant’s agreement to pay a maximum settlement
10 amount of *Three Hundred and Twenty-Five Thousand Dollars (\$325,000)* into a *non-reversionary*
11 common settlement fund that will be available for distribution to Participating Class Members.
12 Based upon the information received from Defendant, there are approximately 95 Class Members
13 who worked in non-exempt positions, consisting of no more than 5,000 workweeks in California
14 during the Class Period.

15 This wage and hour class action alleges that Defendant C.L. Concrete (“Defendant”) failed
16 to pay employees all minimum wages for all hours worked; failed to pay all overtime wages owed;
17 failed to provide meal periods or compensation in lieu thereof; failed to provide rest breaks or
18 compensation in lieu thereof; failed to provide complete, accurate wage statements; violated the
19 Private Attorneys General Act of 2004 (“PAGA”), and engaged in unfair business practices under
20 California’s Business and Professions Code §§ 17200 *et seq.* Plaintiff’s lawsuit seeks to recover
21 unpaid wages and overtime compensation, wages and premiums for improper meal and rest breaks,
22 restitution, damages, liquidated damages, statutory penalties, civil penalties, injunctive and other
23 equitable relief, prejudgment interest, and attorneys’ fees and costs.

24 After engaging in substantial informal exchange of information, records, and investigation
25 and after a private mediation with Honorable Peter D. Lichtman (Ret.) of Signature Resolution, a

26 _____
27 ¹ “Class” or “Class Members” is defined as: all current and former non-exempt employees who
28 worked for Defendant Camilo Lopez, Inc. dba C.L. Concrete in the State of California at any time
during the Class Period. Further, the “Class Period” is defined as the period beginning on December
14, 2016 and ending on January 03, 2022. (Settlement Agreement ¶¶ 5, 7.)

1 highly experienced mediator in complex litigation, including wage and hour class actions, the Parties
2 agreed to settle Plaintiff's and Class Members' claims alleged in the action for *non-reversionary*
3 sum of *Three Hundred and Twenty-Five Thousand Dollars (\$325,000)* ("Maximum Settlement
4 Amount"). After deducting for Court-approved attorneys' fees and costs to Class Counsel, a service
5 payment to the Class Representative, Settlement Administration Costs, penalties recoverable
6 pursuant to PAGA, the remaining Net Settlement Amount ("Net Settlement Amount") of an
7 estimated *\$158,750* will be distributed to Participating Class Members. The entire Net Settlement
8 Amount must be paid out as this is a non-reversionary settlement.

9 The Settlement is fair, reasonable, and adequate, and in the best interests of the Class
10 Members. Consequently, Plaintiff, with the consent of Defendant, hereby moves for an order: (1)
11 conditionally certifying the Class for settlement purposes; (2) granting preliminary approval of the
12 Settlement Agreement; (3) approving the proposed Notice of Pendency of Class Action and PAGA
13 Settlement ("Class Notice"), along with an individualized Information Form and Exclusion Form
14 (collectively, "Notice Packet"), in English and Spanish, to be sent to Class Members; and (4) setting
15 a hearing for final approval of the Settlement.

16 **II. STATUS OF THE LITIGATION**

17 This litigation arises out of Plaintiff's allegations that Defendant Camilo Lopez, Inc. dba
18 C.L. Concrete failed to comply with numerous California wage and hour laws and protections
19 applicable to him and other similarly situated non-exempt employees. Established in 1966,
20 Defendant Camilo Lopez, Inc. doing business as C.L. Concrete is a licensed general building and
21 construction contractor that provides concrete and pavement related sidewalk, curb, gutter, and
22 structural work for public and private projects. Plaintiff Raymond L. Smith worked as a non-exempt,
23 hourly paid general laborer for C.L. Concrete for twenty-two years until taking disability leave as
24 of November 1, 2019. As a general laborer, Plaintiff had a wide variety of job duties on projects,
25 including loading and unloading wood forms from trucks, unloading and picking up iron stakes, and
26 pouring concrete out of a concrete truck. During Plaintiff's employment, he was subject to
27 Defendant's wage and hour policies and business practices whereby Defendant failed to pay all
28

1 minimum and overtime wages, meal and rest break premiums, and penalties owed under California
2 laws. (*See* Declaration of Raymond L. Smith (“Smith Decl.”) ¶ 3.)

3 Specifically, Plaintiff alleges that he was not paid all minimum and overtime wages because
4 of uncompensated time arising from time spent traveling between designated meeting location and
5 jobsites. Along with his fellow employees, Plaintiff was required to meet and travel between
6 Defendant’s yard in Azusa and various client job sites throughout Los Angeles, San Bernardino,
7 and Orange counties without pay. Additionally, Plaintiff was not paid for all hours worked when he
8 performed labor and tasks during pre-/post-shifts, along with off-the-clock work during purported
9 lunch breaks. Further, Plaintiff did not receive all legally compliant meal breaks - most of which
10 were on-duty – and otherwise late, short, and/or subject to interruption. Rest breaks were also non-
11 compliant as, in practice, they depended on workload and operational demands. Defendant did not
12 pay Plaintiff and the other non-exempt employees’ meal or rest period premiums on all of those
13 days of non-compliant meal and rest breaks. Finally, as a result of these violations, Plaintiff did not
14 receive accurate and complete itemized wage statement, along with giving rise to assessments of
15 statutory and civil penalties under the PAGA, liquidated damages, and allegations for restitution and
16 equitable relief for unfair business practices. (*See* Smith Decl. ¶¶ 4-5, 7.)

17 **A. Procedural History.**

18 On December 14, 2020, Plaintiff filed his Complaint in the Los Angeles County Superior
19 Court, on behalf of himself and other similarly situated employees, alleging: (1) Failure to Pay
20 Minimum Wages (Labor Code §§ 1194, 1194.2, 1197, and 1197.1); (2) Failure to Pay Overtime
21 Compensation (Labor Code §§ 510, 1194, and 1198); (3) Meal Period Liability (Labor Code §§
22 226.7 and 512); (4) Rest Break Liability (Labor Code § 226.7); (5) Failure to Provide Accurate
23 Itemized Wage Statements (Labor Code § 226); (6) Penalties per the Private Attorneys General Act
24 of 2004 (“PAGA”) (Labor Code § 2698, *et seq.*); and (7) Unfair Competition (Business &
25 Professions Code §§ 17200 *et seq.*). (*See* Declaration of Jennifer L. Connor (“Connor Decl.”), filed
26 concurrently herewith, at ¶ 27.)

27 In advance of filing the operative Complaint, on August 12, 2020, Plaintiff submitted notice
28 to the California Labor & Workforce Development Agency (“LWDA”) seeking authority to pursue

1 penalties under the Private Attorneys General Act (“PAGA”) for the above-identified alleged
2 violations of California law. The LWDA did not provide notice of its intent to investigate the alleged
3 violations within 65 calendar days of the submission, thereby, entitling Plaintiff to commence a
4 representative action under PAGA. (Connor Decl. ¶ 29.) Plaintiff’s sixth cause of action thus asserts
5 a PAGA representative action claim on behalf of Plaintiff and similarly situated aggrieved
6 employees under California Labor Code § 2698. (Connor Decl. ¶ 29.)

7 Defendant denies Plaintiff’s allegations of wrongdoing and, on March 15, 2020, filed its
8 Answer asserting a general denial and raising sixty-nine (69) affirmative defenses. (Connor Decl. ¶
9 30.) One defense raised at the threshold was that Plaintiff’s claims were subject to mandatory
10 arbitration under the LiUNA collective bargaining agreement, Southern California Master Labor
11 Agreement of 2018-2022 (“MLA”), plus a Laborers’ Short-Form Agreement (collectively “the
12 CBAs”). Having failed to resolve their differences during meet and confer, on July 30, 2021,
13 Defendant filed its Notice of Motion to Compel Arbitration, Dismiss PAGA, and to Stay Action
14 Pending Completion of Arbitration (“Motion to Compel Arbitration”). On August 27, 2021, Plaintiff
15 filed his Opposition to Defendant’s Motion to Compel Arbitration and argued in his opposition brief,
16 Defendant’s motion to compel arbitration should be denied because Defendant C.L. Concrete
17 invokes *three* conflicting arbitration provisions, across *two* collective bargaining agreements, and
18 failed to produce that Plaintiff Smith was party to even *one* of them. On September 17, 2021,
19 Defendant filed its Reply in Support of Motion to Compel Arbitration. The matter was fully briefed
20 by Parties in advance of their November 2, 2021 mediation, yet hearing on the matter was set for
21 November 15, 2021. (Connor Decl. ¶ 30.) Thus, both sides were fully aware of each other’s legal
22 and factual perspective and arguments in advance of mediation.

23 Defendant does not believe that any liability to Plaintiff or Class Members or PAGA Group
24 Members exist, or that Plaintiff or Class Members or PAGA Group Members are entitled to any
25 recovery. (Settlement Agreement ¶ 50.) Defendant remains steadfast in its position that, absent
26 settlement, Plaintiff’s claims would be adjudicated in an arbitration rather than judicial forum. In
27 settling, Defendant does not admit liability with respect to the alleged claims made by Plaintiff and
28 makes no admission regarding any facts or law related to the lawsuit. (Settlement Agreement ¶ 50.)

1 **B. Discovery and Investigation.**

2 Prior to initiating this Action, counsel for Plaintiff, CounselOne, P.C., thoroughly
3 investigated the claims and considered the facts and circumstance underlying the pertinent issues
4 and applicable law. (*See* Connor Decl. ¶ 26.) This required thorough discussions and interviews with
5 Plaintiff as well as research into the various legal issues – including the unique convergence of
6 collective bargaining agreements and construction industry special interest carve-outs - involved in
7 this case. (Connor Decl. ¶ 26.) After conducting their initial investigation, Class Counsel determined
8 that the claims were well suited for class action adjudication owing to what appeared to be a common
9 course of conduct affecting a similarly situated group of employees. (Connor Decl. ¶ 26.)

10 Given the relatively small putative class size and that Defendant had sold many of its assets
11 and ceased operations by May 2021, the Parties advised the Court of their intention to explore early
12 resolution. Nonetheless, Class Counsel conducted a thorough investigation in advance of mediation.
13 Specifically, Class Counsel conducted informal discovery which yielded information and
14 substantial documentation concerning the claims, including, Defendant’s policies, procedures, and
15 terms of purportedly governing collective bargaining agreements, the payment of wages, the
16 provision of meal and rest breaks, time keeping records of hours, and issuance of wage statements,
17 along with Certified Public Accountant compilation pertaining to Defendant’s financial records.
18 (Connor Decl. ¶ 31.) Class Counsel also spoke with several putative class members about their day-
19 to-day experiences and began gathering declarations from same. Defendant also provided composite
20 data for the Class including: total number of putative class members; mix of current versus former
21 non-exempt employees; total number of pay periods; and average hourly rate in effect. (Connor
22 Decl. ¶ 32.) Specifically, Defendant produced a *random sampling of time records for 15% (i.e., 14*
23 *out of 95 employees) putative class members,² which consisted of approximately 1,482 pay*
24 *periods, plus individualized payroll history for non-exempt employees between January 2017 to*

25 _____
26 ² Notwithstanding the pragmatic reality that Defendant’s time records were handwritten hardcopies
27 instead of electronic records, such constitutes a statistically significant sample as courts have found
28 the use of similar percentage samples appropriate. (*See e.g., Brum v. MarketSource, Inc.* (E.D. Cal.
2018) 2018 WL 3861558, at *5 [10% sample]; *Talavera v. Sun Maid Growers of California* (E.D.
Cal. 2017) 2017 WL 495635, at *4 [10% sample]; *Kaminske v. JP Morgan Chase Bank N.A.* (C.D.
Cal. 2010) 2010 WL 5782995, at *5 [10% sample].)

1 **May 2021.** (Connor Decl. ¶ 32.) Class Counsel analyzed the documents and data produced to
2 determine Defendant’s degree of liability and potential amounts due in damages. (Connor Decl. ¶
3 33.)

4 **C. Meditation and Settlement.**

5 Thereafter, the Parties participated in a private mediation where they debated and discussed
6 their respective positions. (Connor Decl. ¶ 34.) The Parties’ mediation session was facilitated by the
7 Honorable Peter D. Lichtman (Ret.) of Signature Resolution. Judge Lichtman has a legal and judicial
8 career spanning over forty (40) years, including as one of the founders of the Los Angeles County
9 Superior Court’s Complex Litigation program, and is well-experienced in mediating complex
10 general litigation, labor and employment claims, class actions, and PAGA cases, among others.
11 (Connor Decl. ¶ 34.) During the mediation, the Parties exchanged further information and discussed
12 all aspects of the case, including the risks and delays of litigation and the risk to both Parties of
13 proceeding with a ruling on the pending motion to compel arbitration, the anticipated motion for
14 class certification and liability under the claims asserted, along with the potential for PAGA
15 penalties to be asserted. (Connor Decl. ¶ 35.) These were contentious issues because of the factual
16 and legal complexity of the case. (Connor Decl. ¶ 35.)

17 With the assistance of the Hon. Peter Lichtman and pursuant to a mediator’s proposal, the
18 Parties agreed to resolve the matter and reached the terms of this proposed arm’s-length Settlement.
19 (Connor Decl. ¶ 36; Settlement Agreement ¶ 47.) The Parties subsequently memorialized these
20 terms in the long-form Settlement Agreement as set forth in the Stipulation of Class Action and
21 PAGA Settlement, dated April 2, 2022 (along with the internal exhibits), attached as **Exhibit “1”**
22 to the Connor Declaration filed concurrently herewith.

23 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
24 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
25 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
26 adequate taking into consideration the amounts received in other wage and hour class and
27 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
28 each Class Members’ claim to the settlement award he or she will receive. (Connor Decl. ¶ 39.)

1 Class Counsel believe that the Settlement serves the best interests of Class Members. (*Ibid.*) Further,
2 and based on the settlement negotiations, which were hard fought and conducted in good faith and
3 at arm's length between attorneys with substantial experience litigating class actions, representative
4 actions, and wage and hour cases, the Settlement was the product of a non-collusive settlement
5 process in which the Parties were forced to make significant compromises in the interest of reaching
6 a full and complete settlement of the action. (Connor Decl. ¶ 37.) Accordingly, the Parties have
7 concluded that it is in their best interests to compromise, settle, and accept the terms of the
8 Settlement Agreement. (Settlement Agreement ¶¶ 49-50.)

9 **III. SUMMARY OF THE SETTLEMENT TERMS**

10 Under the terms of the settlement, Defendant agrees to pay a non-reversionary amount of
11 ***Three Hundred Twenty-Five Thousand Dollars (\$325,000)*** to settle the claims asserted in the
12 Action. (*See* Settlement Agreement ¶¶ 21, 57.) This amount shall be inclusive of all Individual
13 Settlement Payments to all Participating Class Members who do not request exclusion/opt-out, the
14 Service Award to the Class Representative, Settlement Administration Costs to the Settlement
15 Administrator, CPT Group, Inc., Class Counsel Award of attorneys' fees and costs, and LWDA
16 Payment allocated from the PAGA Settlement Amount, but exclusive of employer federal and state
17 payroll taxes. The amount available for distribution to Participating Class Members is determined
18 by deducting the following from the Maximum Settlement Amount:

- 19 • Up to thirty-five (35%) of the Maximum Settlement Amount in attorneys' fees (*i.e.*,
20 \$113,750) and litigation expenses up to \$15,000 to Class Counsel ("Class Counsel Award");
- 21 • Up to \$7,500 to the Class Representative as a Service Award Payment and in exchange for
22 a broader release of claims ("Class Representative Service Award");
- 23 • Up to \$15,000 to the Settlement Administrator, CPT Group, Inc. to notify members of the
24 Class and administer the Settlement ("Settlement Administration Costs"); and
- 25 • \$15,000 to the LWDA – which is 75% of the \$20,000 allocated to the civil penalties pursuant
26 to Labor Code §§ 2698 *et seq.* ("PAGA Payment").

27 The amount remaining after the foregoing deductions, approximately \$158,750 is called the "Net
28 Settlement Amount" or "NSA." (Settlement Agreement ¶ 22.) As non-reversionary, the entire Net

Settlement Amount will be paid out. Participating Class Members will automatically receive payments *without the need to submit a claim form*, and PAGA Group Members shall receive their individual Qualified PAGA Pay Period share of the eligible PAGA Payment irrespective of whether or not they opt-out. (Settlement Agreement ¶¶ 26, 56(b)-57(b).)

A. The Settlement Provides for Reasonable Monetary Payments.

If all the approximately 95 Class Members participate (*i.e.*, do not request exclusion/opt-out), and assuming hypothetically that distribution was on an individual *pro rata* basis then each individual settlement payment would be an estimated \$1,671.05 per Participating Class Member. (Connor Decl. ¶ 12.) In actuality, each Participating Class Member will receive a proportional share of the Net Settlement Amount based on his or her Qualified Pay Periods during the Class Period. (Settlement Agreement ¶ 57(a)(i).) The Settlement Administrator will determine each Participating Class Member's Individual Settlement Payment as follows: First, dividing the Net Settlement Amount by the Total Qualified Pay Periods; and then, Second, multiplying each Participating Class Member's number of Qualified Pay Periods by that prior result (*i.e.*, *pro rata* Qualified Pay Period value) to obtain the amount of each Participating Class Member's Individual Settlement Payment. (Settlement Agreement ¶¶ 34, 57(a)(i).) Finally, in addition, all PAGA Group Members will receive a proportional share of the 25% of the PAGA Payment based on his or her own Qualified PAGA Pay Periods during the PAGA Period, defined as the period beginning from December 14, 2019 through January 3, 2022. (Settlement Agreement ¶¶ 26-29, 34, 57(b)(i).)

After reduction for the employee's share of taxes on the wage portion,³ the net payment to each Participating Class Member will be the sum of his or her Individual Settlement Payment, plus his or her share of the eligible PAGA Payment, if applicable. (Settlement Agreement ¶ 57(a)-(b).) As a result of the distribution formula, the consideration paid to each Participating Class Member is tailored to the impact of Defendant's alleged violations as well as to the claims he or she is releasing. (Connor Decl. ¶ 11; Settlement Agreement ¶ 56(a)((iii)-(iv).) Finally, any Class Member who

³ The Parties agreed to allocate twenty percent (20%) of each Individual Settlement Payment to wages to be reported on a W-2 Form, along with forty percent (40%) as non-wage penalties and forty percent (40%) as non-wage interest to be reported on IRS Form 1099. (Settlement Agreement ¶ 57(a).)

1 prefers to preserve his or her right to pursue relief or seek an alternative recovery may request
2 exclusion. (Settlement Agreement ¶ 56(b).)⁴ Settlement checks will remain valid for 180-days with
3 a reminder postcard to be sent to Participating Class Members within 60-days from the mailing.
4 (Settlement Agreement ¶ 57(a)(iv).) Thereafter, any uncashed checks will be voided, and the
5 associated funds distributed by the Settlement Administrator to the California State Controller's
6 Office Unclaimed Property Fund in the name of the Participating Class Members. (Settlement
7 Agreement ¶ 57(a)(iv).)

8 **B. Class Representative Service Award, Attorneys' Fees, and Costs.**

9 As part of the Settlement, Plaintiff will apply for a service award payment at the time of
10 seeking final approval in the amount of \$7,500 for services to the Class and a broader release of
11 claims against Defendant. (Settlement Agreement ¶¶ 8, 57(d); Connor Decl. ¶ 13.) "[I]ncentive
12 awards are fairly typical in class action cases...and are intended to compensate class representatives
13 for work done on behalf of the class [and] to make up for financial or reputational risk undertaken
14 in bringing the action." *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-
15 1394. Plaintiff's requested Service Award is intended to recognize the significant benefits conferred
16 upon the Class and be proportional to the respective time and effort that Plaintiff expended on behalf
17 of the Class and the PAGA Group Members, including, providing factual information and
18 documents to Class Counsel, discussing the claims and theories at issue in the case with Class
19 Counsel, identifying potential witness and reviewing documents, reviewing the Settlement
20 Agreement, as well as the significant financial and reputational risks Plaintiff undertook by agreeing
21 to serve as named plaintiff, and the fact that Plaintiff agreed to a broader release of claims than the
22 other Participating Class Members. (See Settlement Agreement ¶ 57(d); Connor Decl. ¶¶ 13-14;
23 Smith Decl. ¶¶ 12-19.)

24 Class Counsel will apply for an attorneys' fees award of thirty-five percent (35%) of the
25 Maximum Settlement Amount: *to wit*, \$113,750, and reimbursement of litigation costs in an amount
26 up to \$15,000. (Settlement Agreement ¶ 57(e); Connor Decl. ¶ 15.) Plaintiff submits that the

27 _____
28 ⁴ Again, if approved, all Class Members will receive their individual *pro rata* PAGA Payment
irrespective of whether they opt-out of the Class. (Settlement Agreement ¶ 56(b).)

1 requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming
2 litigation on a purely contingent fee basis. (Connor Decl. ¶ 92.) Class Counsel has devoted
3 substantial attorney time to: pre-filing investigation; analyzing Plaintiff’s claims; conducting legal
4 research and analysis; drafting and filing the operative Complaint and Plaintiff’s Opposition to
5 Motion to Compel Arbitration; requesting and meeting and conferring over informal discovery;
6 examining of pages of pre-mediation information and data (including 15% [*i.e.*, 14 out of 95
7 employees] sampling of time records and payroll); policies and procedures regarding C.L.
8 Concrete’s wage and hour practices *vis-à-vis* three versions of purportedly applicable collective
9 bargaining agreements, wage statements, engaging a consultant and building a damages model;
10 reviewing Defendant’s certified public accounting financial records (*i.e.* balance sheets, asset lists,
11 income statements, tax projections); preparing, briefing, and attending mediation; preparing and
12 submitting notice to the LWDA; negotiating, preparing, and/or revising the Memorandum of
13 Understanding, long-form Settlement Agreement, Class Notice, Information Sheet, and Exclusion
14 Form; preparing this motion for preliminary approval; and otherwise litigating this case. (Connor
15 Decl. ¶¶ 15-16.)

16 Both California and federal courts have recognized that an appropriate method for awarding
17 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of
18 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the
19 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*
20 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and
21 “lodestar/multiplier” methods].) Historically, courts have awarded percentage fees in the range of
22 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6
23 (4th Ed. 2013) [“No general rule can be articulated on what is a reasonable percentage of a common
24 fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in
25 order to assure that the fees do not consume a disproportionate part of the recovery obtained for the
26 class, although somewhat larger percentages are no unprecedented.”].)

27 Class Counsel submit that their request for attorneys’ fees is reasonable when viewed as an
28 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 litigation. (Connor Decl. ¶ 17.) 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 the 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-defined community of interest in the questions of law and fact involving the parties to be represented. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805-809; *Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal.App.4th 467, 471; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341.) These criteria are met here for the reasons set forth below.

A. There Is an Ascertainable and Sufficiently Numerous Class.

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

Here, the class definition is "precise, objective and presently ascertainable." (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of: "All current and

former non-exempt employees who worked for Defendant Camilo Lopez, Inc. dba C.L. Concrete in the State of California at any time during the Class Period” – which is explicitly defined as the timeframe from December 14, 2016 through January 03, 2022. (Settlement Agreement ¶¶ 5, 7.) Defendant is required to and does maintain employment records of such persons, including contact information and social security numbers. Pre-mediation documents and information exchanged resulted in Defendant’s estimate that between December 14, 2016 and May 1, 2021, the Parties understood the Class Member count to be 95 individuals comprising no more than 5,000 Workweeks. (Settlement Agreement ¶ 56(d).)

As a result, the proposed Class satisfies the ascertain ability and numerosity requirements. (See, e.g., *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 [stating that “[n]o set number is required as a matter of law for the maintenance of a class action” and citing examples where classes as little as 10 (*Bowles v. Superior Court* (1955) 44 Cal.2d 574) and 28 (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017) were upheld]; see also *Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers sufficiently numerous].)

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

A community of interest is established by the preponderance of common issues of law and fact. (See *Vasquez, supra*, 4 Cal.3d at p. 811.) “The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claim or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

1. Common Issues of Law and Fact Predominate.

The Court should grant class certification when questions of law and fact common to all Class Member predominate over any questions affecting only individual Class Members. The predominant inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. (See, e.g., *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128.)

In the matter sub judice, common issues of fact and law predominate as to each of the claims alleged by Plaintiff and Class Members. Here, litigation is predicated on uniform policies and

1 systemic top-down business practices revolving principally around Defendant’s time and pay
2 practices – *e.g.*, off-the-clock work attributed to travel time between meeting location and client job
3 sites, along with pre-shift/post-shift duties, failure to pay meal and rest break premiums despite that
4 said break were on-duty and/or otherwise non-compliant, inaccurate wage statements, and
5 derivative UCL and PAGA claims arising therefrom. (Settlement Agreement ¶ 46; Connor Decl. ¶
6 101.)

7 Because Plaintiff alleged a single top-down compensation scheme, “the relevant proof [does]
8 not vary among class members” and “clearly presents a common question fundamental to all class
9 members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D.
10 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D.
11 493, 518].) California courts show “no hesitancy” in inferring class-wide causation, class-wide
12 injury, and class-wide damages when a common course of action has been shown. (*B.W.I. Custom*
13 *Kitchens, supra*, 191 Cal.App.3d at p. 1350 [granting class certification in a manufacturing defect
14 case when a common course of action had been proven].) This inference “eliminates the need for
15 each class member to prove individually the consequences of the defendants’ actions to him or her.”
16 (*Id.* at p. 1351.) Thus, the outcome of this matter depends upon questions that are common to
17 members of the Class. These types of claims are commonly held to be proper for class certification.
18 (*See, e.g., Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period
19 claim]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying
20 meal period claim]; Connor Decl. ¶ 102.)

21 **2. Plaintiff’s Claims Are Typical of The Claims of The Class.**

22 The typicality requirement is satisfied where class representatives have claims that are
23 typical of the rest of the class. (*B.W.I. Custom Kitchens, supra*, 191 Cal.App.3d at p. 1347.) Here,
24 Plaintiff’s claims are typical of those held by members of the proposed Class. Like all other Class
25 Members, Plaintiff was a non-exempt employee working for C.L. Concrete in California during the
26 Class Period. (Smith Decl. ¶¶ 3, 10.) Like Class Members, Plaintiff was not paid for all hours worked
27 due to off-the-clock work (*i.e.*, travel between Defendant’s yard in Azusa and client job sites and
28 tasks performed during pre-/post-shift hours), was not paid all overtime wages owed, neither

1 received timely and duty-free meal and rest breaks, nor was paid premiums for non-compliant
2 breaks, and did not receive accurate itemized wage statements. (Smith Decl. ¶¶ 4-7; Connor Decl. ¶
3 103.) Plaintiff was therefore impacted by the same challenged policies and practices that allegedly
4 injured the Class as a whole and subject to the same defenses raised by Defendant as to the Class
5 and is therefore typical.

6 **3. Plaintiff and His Counsel Meet the Adequacy Requirements.**

7 The adequacy of representation requirement examines conflicts of interest between named
8 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
9 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
10 adequately represent the Class, as there are no conflicts between the Plaintiff and the Class he seeks
11 to represent. (Smith Decl. ¶¶ 8-9; Connor Decl. ¶ 104; *McGhee v. Bank of Bank of America* (1976)
12 60 Cal.App.3d 442, 450 [finding adequacy satisfied where there was no indication that plaintiff's
13 counsel were not qualified and the named plaintiff had no interests antagonistic to those of the
14 proposed class].) Class Counsel also have extensive experience in wage and hour litigation. (See
15 Connor Decl. ¶¶ 85-89.)

16 **C. A Class Action Is Superior to A Multiplicity of Litigation.**

17 In making its class certification decision, the court must determine that a class action would
18 be superior to alternative means for the fair and efficient adjudication of the litigation. By
19 consolidating nearly one hundred possible individual actions into a single proceeding, this Court's
20 use of the class action device enables it to manage this litigation in a manner that serves the
21 efficiency interests of the litigants and the judicial system. Absent class treatment, the only
22 alternative would be to force numerous employees to file individual actions. (*Sav-On Drug Stores,*
23 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, fn. 10 [stating "[t]he relevant comparison lies
24 between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and
25 benefits of proceeding by numerous separate actions – not between the complexity of a class suit
26 that must accommodate some individualized inquires and the absence of any remedial proceeding
27 whatsoever."].) Finally, in the context of settlement, the superiority concerns are essentially non-
28 existent. (Connor Decl. ¶ 105.)

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

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

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

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

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

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

21 As a matter of public policy, courts both encourage the use of the class action device and
22 favor settlement over continued litigation. (*See, e.g., Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th
23 429, 434 ["Courts have long acknowledged the importance of class actions as a means to prevent a
24 failure of justice in our judicial system."]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471;
25 *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d 1268, 1276 ["[S]trong judicial policy...favors
26 settlements, particularly where complex class action litigation is concerned."]; Newberg, § 11.41.)
27 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior*
28 *Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 ["The

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

To summarize, the Settlement here is fair because it offers payment to each Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the Settlement proceeds whereby the Net Settlement Amount is allocated to Participating Class Members proportionally based on his or her respective number of eligible Qualified Pay Periods worked during the Class Period, along with proportionally eligible Qualified PAGA Pay Periods to PAGA Group Members who worked during the PAGA Period, where applicable. (Connor Decl., *passim*.)

A. The Settlement Is Entitled to A Presumption of Fairness.

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

1. Negotiations Were at Arm’s-Length Before a Respected Mediator.

Here, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm’s-length, and informed by substantial factual and legal investigations. (Connor Decl. ¶¶ 26-37, 42.) The Parties participated in private mediation before Hon. Peter D. Lichtman (Ret.) of Signature Resolution. (Connor Decl. ¶ 34.) Judge Lichtman is a well-respected and experienced mediator in complex litigation, including employment and wage and hour class action matters, and with whose help the Parties agreed to resolve this case according to the terms set forth

1 in the Settlement Agreement. (Connor Decl. ¶ 34.) On the one hand, Plaintiff and his counsel believe
2 that the alleged claims asserted have merit. On the other hand, Plaintiff and his counsel recognize
3 and acknowledge the uncertainty of litigation through trial and appeals, the question of certification,
4 and the possible defenses. (Connor Decl. ¶ 40.) This case is exceptionally complex because, in
5 addition to its class and representative nature, it further involves issues at the intersection of
6 collective bargaining agreement rights (procedurally in terms of adjudicatory forum and
7 substantively in terms of defenses to liability), statutes and regulations unique to the construction
8 industry, and a variety of special Labor Code carve-outs. There were also contentious issues because
9 of the factual and legal complexity of the case (*i.e.*, evidentiary difficulty of proving off-the-clock
10 claims and entitlement to travel time pay at corresponding contractual and/or minimum wage rates)
11 as well as the legal uncertainty regarding many of the central issues of the litigation (*i.e.*,
12 certification, liability, and devising a theory that properly measures monetary recover, especially
13 given overlap of penalties and arguments against stacking). (Connor Decl. ¶ 41.) Such also
14 presupposes that the case remains in the judicial forum which was hotly contested considering pre-
15 mediation, fully-briefed pending motion to compel arbitration. (Connor Decl. ¶ 41.) Finally, the
16 penultimate concern is the fact that, in April and May 2021, Defendant terminated its entire
17 workforce, ceased operations and its financial records, shared between the Parties and Judge
18 Lichtman, raised ability to pay concerns should the matter not settle. (Connor Decl. ¶ 41.)

19 **2. Investigation Was Sufficient to Allow Counsel to Act Intelligently.**

20 Prior to filing the lawsuit, Class Counsel investigated the claims by interviewing Plaintiff at
21 length and on repeated occasions, researching California law, and upon finding it suitable for class
22 treatment, filing a wage and hour putative class action. (Connor Decl. ¶ 26.) Class Counsel thereafter
23 devoted a considerable amount of time to the prosecution of this case, including, but not limited to:
24 reviewing the at-issue collective bargaining agreements and legal research regarding their effects;
25 meeting and conferring with defense counsel regarding the arbitrability of claims; drafting
26 Plaintiff's Opposition to Defendant's Motion to Compel Arbitration; interviewing putative class
27 members and drafting declarations; reviewing policies and practices regarding the payment of
28 wages, the provision of meal and rest breaks, time keeping records of hours, and issuance of wage

1 statements, along with a compilation of Defendant’s financial records; conferring with an accountant
2 to verify and gain clarity regarding Defendant’s financial condition based on its records; reviewing
3 and analyzing Class Members’ time and pay records; engaging a consultant to assist with creation
4 of a damages model; drafting a mediation brief; preparing for and attending mediation; and
5 negotiating, drafting, and finalizing settlement and related documents. (Connor Decl. ¶ 15.) Class
6 Counsel reviewed over 1,500 pages of documents, including, but not limited to: approximately 98-
7 pages of Plaintiff’s personnel file and payroll history, along with a random of sampling of 15% (14
8 out of 95 individuals) of the putative class employees’ time and payroll records and consisting of
9 approximately 1,482 pay periods, plus individualized payroll history for non-exempt employees
10 between January 2017 to May 2021. (Settlement Agreement ¶ 48; Connor Decl. ¶ 32.)

11 **3. Class Counsel Are Experienced in Similar Litigation**

12 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
13 of the Class Members. (Connor Decl. ¶ 39.) Although the recommendations of counsel proposing
14 the class settlement are not conclusive, the Court can properly take the recommendations into
15 account, particularly if counsel have been involved in litigation for some period of time, appear to
16 be competent, have experience with this type of litigation, and significant discovery has been
17 completed. (*See Newberg*, § 11.47.) Here, Plaintiff is represented by competent and experienced
18 counsel who possess extensive experience litigating wage and hour class actions and have been
19 appointed as class counsel in numerous cases alleging similar claims. (Connor Decl. ¶¶ 85-89.)

20 **B. The Settlement Is Fair, Reasonable, and Adequate**

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

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

2 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
3 model for Defendant’s liability. (Connor Decl. ¶ 40.) Although Plaintiff steadfastly maintains that
4 his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
5 proceeding with the motion to compel arbitration, the anticipated motion for class certification, any
6 motions for adjudication on the merits, trial, and possible appeal. (*Ibid.*) As explained in further
7 detail in Section VII.B.4 *infra*, Defendant presented numerous defenses to Plaintiff’s claims.
8 (Connor Decl. ¶ 41.) First and foremost, Defendant’s best defense is to avoid having to answer
9 Plaintiff’s allegations: a strategy which is adopted *vis-à-vis* the pending motion to compel
10 arbitration. Plaintiff maintains that the collective bargaining agreements are unenforceable because
11 the competing arbitration provisions are so inherently contradictory and inconsistent that it cannot
12 be concluded that the Parties agreed to arbitrate. (Connor Decl. ¶ 30.) Of course, Plaintiff must
13 acknowledge that there exist liberal policies favoring enforcement of employment arbitration
14 agreements and that, if the Court did compel this matter to arbitration, the likely effect would be to
15 obliterate the procedurally representative nature of the case.

16 Substantively, Defendant defended against minimum and overtime wage claims, along with
17 the meal and rest breaks, by arguing that the Labor Code and Wage Orders provide for exemptions
18 where collective bargaining agreements provide for wage, hours of work, and working conditions.
19 (Connor Decl. ¶¶ 30, 54.) Defendant also argued that, factually, any travel time that occurred was
20 not mandatory, did not affect all employees and truck drivers were paid 30 mins for their travel time,
21 and that any pre-shift/post-shift activities were *de minimis*. From an evidentiary standpoint, off-the-
22 clock hours are notoriously difficult to prove, and such would be the same here where travel time
23 entails accounting for varying job site locations, driver routes, and traffic conditions on any
24 particular day. Defendant contended that such variation in circumstances raised highly
25 individualized questions of fact. (Connor Decl. ¶¶ 53-56.) After Plaintiff’s lawsuit was filed and in
26 response thereto, Defendant corrected its meal break practices in late 2020 by either providing
27 timely breaks and/or paying premiums. Defendant was also quick to point out that, in 2018,
28 construction industry special interest groups pushed Assembly Bill 1654 through which resulted in

1 enactment of Labor Code § 2699.6: a proviso that, notwithstanding *Iskanian* and progeny, expressly
2 permits arbitration for employees in the construction industry with a valid collective bargaining
3 agreement that meets certain requirements. (Connor Decl. ¶ 76.) Finally, again, by April and May
4 2021, C.L. Concrete ceased operations thereby altering what any legal victory would mean. (Connor
5 Decl. ¶¶ 31, 41.)

6 Although Plaintiff was prepared to litigate his claims through the pending motion to compel
7 arbitration, class certification, and, ultimately, through trial, given the amount offered in settlement,
8 Class Counsel predicted that it was far from certain that Plaintiff would be able to recover a greater
9 amount, particularly considering the increased litigation costs that would accrue in challenging the
10 wrongdoings of a company no longer in operation. (Connor Decl. ¶ 45.) Thus, this factor supports
11 preliminary approval of the Settlement.

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

13 While Plaintiff conducted extensive investigation and informal discovery prior to mediation,
14 the Parties agreed to explore early settlement efforts before launching further into hotly contested
15 litigation. (Connor Decl. ¶ 42.) Therefore, absent settlement, the Parties would have needed to
16 conduct substantial discovery, such as numerous depositions of percipient witnesses and experts,
17 production of voluminous time and pay records (many available only in hardcopy format) and
18 prepare the case for class certification and trial. (*Ibid.*) The Parties would have had to depose a
19 number of people such as C.L. Concrete's owner, crew supervisors, human resource representatives,
20 and employees in order to establish liability. (Connor Decl. ¶ 42.) Discovery disputes would have
21 been in the offing and liability likely would have entailed a battle of experts. This settlement avoids
22 the considerable time, attorneys' fees and costs, and party resources associated with conducting
23 additional discovery, moving for class certification and potentially summary judgment or
24 adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued
25 litigation on the Court. (Connor Decl. ¶ 42.) Thus, this factor supports preliminary approval of the
26 Settlement.

27 ///

28 ///

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

2 Here, settlement was reached prior to class certification and the result was a successful
3 outcome for the Class. (Connor Decl. ¶ 43.) Yet, class certification was by no means a foregone
4 conclusion. The availability of class and representative action status was largely dependent on
5 surviving Defendant’s Motion to Compel Arbitration. Although Plaintiff believes that this case
6 qualifies as one of the rare instances where a collective bargaining agreement is so convoluted and
7 lacking in foundation that the Court will be reluctant to compel, the stakes were high at the outset.
8 (*Ibid.*) Moreover, Class Members worked at different job sites, travel times varying by distance and
9 traffic, and/or performed different job duties. As a result, Defendant contended there was variation
10 to the circumstances that could allegedly cause the employees to work off-the-clock and/or be
11 deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this
12 variation in circumstances raised highly individualized questions of fact. (Connor Decl. ¶ 43.)
13 Defendant further disputed Plaintiff’s characterization of working conditions, liability, and
14 damages, and possessed documentary and testimonial evidence rebutting Plaintiff’s allegations. If
15 the Court either compelled arbitration, denied class certification, or later decertified it, the Class
16 would recover nothing, and Class Members would be forced to retain their own counsel and proceed
17 on the basis of individual claims only. (Connor Decl. ¶ 44.) Here, Class Members may avoid each
18 of the risks described and receive substantial monetary benefits, which also weighs in favor of
19 preliminary approval.

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

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

1 Plaintiff carefully estimated the settlement recovery as a reasonable percentage of possible
2 damages recoverable at trial. Based on data received in mediation efforts, Plaintiff's damages
3 analysis shows that the Settlement reflects an estimated **17% to 27%** of the maximum-to-realistic
4 possible damages recoverable at trial. (Connor Decl. ¶ 46.) Utilizing a class-wide damages study to
5 assess the nature and magnitude of the claims in question, *see Kullar v. Foot Locker Retail, Inc.*
6 (2008) 168 Cal.App.4th 116, 123, this case clearly meets the requirements that the class settlement
7 is within the "ballpark" of reasonableness.

8 **Unpaid Minimum and Overtime Wages**

9 Plaintiff alleges that he and other hourly-paid employees were regularly required to work
10 off-the-clock, including during meal breaks and pre-shift and post-shift duties such as: meeting with
11 foreman, gathering materials and supplies (*i.e.*, metal stakes, backs, and planks) for the job, loading
12 and unloading the company truck, and compulsory travel time spent commuting from the reporting
13 location at Defendant's yard to customer jobsite. (Connor Decl. ¶ 48.) For example, after loading
14 up the company truck(s), Plaintiff and employees would travel together from Defendant's Azusa
15 yard to job site locations ranging from downtown Los Angeles, Ontario, Whittier, City of Industry,
16 Hawthorne, Santa Ana, Van Nuys, etc. At the end of the job shift, Plaintiff and employees would
17 undertake the return trip and travel together from the job site back to the Azusa yard. This off-the-
18 clock travel ranged anywhere from one to four hours per day, depending on the distance to the job
19 location and traffic conditions. (Connor Decl. ¶ 49.) Given that for at least twenty-five percent of
20 the shifts, the average number of hours was greater than 8 hours in length, it is inevitable that some
21 of portion of the off-the-clock hours will result in unpaid overtime under Labor Code §§ 510, 1198.
22 (Connor Decl. ¶ 49.)

23 Here, C.L. Concrete faces a situation near analogous to the well-established Ninth Circuit
24 opinion, *Burnside v. Kiewit Pacific Corp.* (2007) 491 F.3d 1053, acknowledging employees'
25 entitlement to compulsory travel time pay from their daily initial reporting place to their jobsites
26 and back. In *Burnside*, the California Supreme Court recognized an employee's state law right to be
27 compensated for time spent travelling from a designated meeting point to the jobsite and from the
28 jobsite back to the meeting point whenever the employer requires this travel. (*See Morillion v. Royal*

1 *Packing Co.* (2000) 22 Cal.4th 575, 578.) Such right is also conferred by Wage Order 16-2001 and
2 independent of collective bargaining agreements. (*Burnside, supra*, 491 F.3d at p. 1070 [analyzing
3 identical collective bargaining agreement language]; Connor Decl. ¶ 50.)

4 Class Counsel analyzed the documents and data produced by Defendant and, in consultation
5 with Plaintiff and interviews with putative class members, determined Defendant's degree of
6 liability and amounts due in damages – specifically, the incidence and amount of purported off-the-
7 clock activity. (Connor Decl. ¶ 51.) Notwithstanding the obvious evidentiary challenge of
8 quantifying off-the-clock unrecorded hours, Plaintiff estimates that Defendant is liable for
9 approximately one hour of unpaid straight time per workday, thus, an aggregate of 21,433 hours of
10 off-the-clock work attributed to uncompensated time. (Connor Decl. ¶ 52.) At the average hourly
11 rate of \$28.21, the straight-time wages owed for all hours worked is \$604,625. Further, assuming
12 that 25% of those off-the-clock hours are in excess of eight hours per day, there is an additional
13 \$14.11 overtime premium owed with respect to 5,358 hours; such yields an estimated damages
14 amount of \$680,226. (*Ibid.*) Thus, the estimated total of owed minimum and overtime wages is
15 \$680,226, without discounting for risks associated with certification or merits. (Connor Decl. ¶ 52.)

16 In opposition, however, Defendant contended that Plaintiff's claim for off-the-clock work is
17 not amenable to class treatment, because travel time was not mandatory and some employees chose
18 to use their own vehicles (*i.e.*, distinguishing ordinary commute versus compensatory compulsory
19 travel), travel times varied based on the route taken, job site locations, and traffic conditions, and
20 certain employees (*i.e.*, drivers) were compensated for thirty minutes of travel time. (Connor Decl.
21 ¶ 53.) Procedurally, Defendant argued against the viability of certification because it would require
22 an unmanageable series of mini-trials to determine how much time was spent without pay. (Connor
23 Decl. ¶ 54.) Substantively, in terms of merit defenses, Defendant vigorously disagreed with
24 Plaintiff's theories regarding applicability of state minimum and overtime regulations in the context
25 of the CBAs and how much off-the-clock work occurred in reality and the credibility of those
26 claimed hours. (Connor Decl. ¶ 54.) Here, the failure to track all hours poses evidentiary difficulties
27 because it is hotly contested how much off-the-clock work actually occurred. (Connor Decl. ¶ 55.)
28 For Plaintiff to establish the quantity of specific disputed and unrecorded work activities – especially

1 over multiple job sites, worked by different crews of employees - would have been costly, time-
2 consuming, and daunting. (Connor Decl. ¶ 55.)

3 Defendant further responded that any pre-shift/post-shift incidences off-the-clock time is *de*
4 *minimis*. Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*
5 (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis*
6 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
7 performed off-the-clock. What is not clear, however, is to what extent the *de minimis* defense would
8 apply where the uncaptured hours were associated with an occasionally recurring activity. (Connor
9 Decl. ¶ 56.) In light of these considerations – especially the evidentiary difficulties of demonstrating
10 off-the-clock work on a class wide basis - Class Counsel acknowledged a fifty percent discount –
11 yielding **\$340,113** in unpaid minimum and overtime wages - that incorporated the risks of non-
12 certification (either due to compelled arbitration or loss of a contested certification motion) and
13 being unsuccessful on the merits. (Connor Decl. ¶ 57.)

14 **Meal and Rest Period Violations**

15 Plaintiff argues that Defendant’s meal period policies and practices violate Labor Code
16 sections 226, 512 and Wage Order No. 16, section 10. (*See* Labor Code §§ 226, 512(a) [“An
17 employer may not employ an employee for a work period of more than five hours per day without
18 providing the employee with a meal period of not less than 30 minutes...An employer may not
19 employ an employee for a work period of more than 10 hours per day without providing the
20 employee with a second meal period of not less than 30 minutes.”]; Wage Order No. 16, § 10 [same];
21 *see also Brinker Rest. Corp. v. Superior Court*. (2012) 53 Cal.4th 1004, 1041, 1049 [stating “an
22 employer may not undermine a formal policy of providing meal breaks by pressuring employees to
23 perform their duties in ways that omit breaks”]; Connor Decl. ¶ 58.) Defendant, however,
24 vehemently argued that it complied with the requirements articulated by *Brinker*. Specifically,
25 Defendant maintained that it provided employees with a reasonable opportunity to take timely meal
26 periods of at least 30 minutes, relieved employees of all duties during meal periods, and relinquished
27 control over employees’ activities. (Connor Decl. ¶ 59.)

1 As a matter of policy is the issue of whether Plaintiff and Employees were provided a meal
2 break in the first instance. In terms of C.L. Concrete’s written meal period policies, there are none.
3 While Plaintiff acknowledges that during his employment with Defendant he was a member of the
4 Laborers International Union of North America (“LiUNA” or “the Union”), the CBAs containing
5 meal break provisos were not distributed to Plaintiff or other employees. If Defendant never
6 communicated entitlement to meal breaks, Plaintiff will argue that such meal breaks were never
7 provided in the first instance as a matter of business policy. (*See, e.g., Brinker Rest. Corp., supra*,
8 53 Cal.4th 1004; *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 338, 410
9 [holding that a meal and rest policy must specifically advise employees of the proper timing of meal
10 and rest breaks]; Connor Decl. ¶ 60.)

11 As a matter of practice, Plaintiff does not believe that Defendant’s time records will survive
12 scrutiny for meal break recordkeeping. Until August 2020, Defendant did not record or maintain
13 timesheets to track lunch times, yet presumed that compliant meal breaks were taken which is a
14 common issue which can be adjudicated as to the entire class. (*See Jaimez v. Daiohs USA, Inc.*
15 (2010) 181 Cal.App.4th 1286, 1304 [finding that the defendant’s policy and practice of deducting
16 30 minutes per shift for each of the class members, regardless of whether the class member took a
17 meal break, raised common legal and factual issues]; Connor Decl. ¶ 61.)

18 In terms of violation rate(s), however, the absence of reliable records will likely result in
19 battle of narratives between the Parties as to whether operations ceased at the job sites. This will be
20 a credibility issue for the fact-finder and, to the extent operations did cease, Defendant had an
21 obligation to maintain accurate time records and record meal break times. (*See Donohue v. AMN*
22 *Services, LLC* (Feb. 25, 2021) Sup. Court Case No. S253677 [prohibiting California employers from
23 rounding time punches for meal periods and holding that time records of non-compliant meal
24 periods raise a rebuttable presumption of liability].) Plaintiff insists that the default practice was that
25 Defendant demanded that Plaintiff and employees either forego eating entirely and/or take their
26 meal periods on-duty. But even assuming *arguendo* that the meal breaks were duty-free, due to the
27 pre-shift and compulsory travel, such purported lunch breaks would most often be “late.”
28 Consequently, Plaintiff alleges that Defendant violated Labor Code §§ 226.7, 512, and the

1 applicable Wage Order by failing to compensate Plaintiff and Class Members for short, late,
2 interrupted, and missed meal periods. (Connor Decl. ¶¶ 62-63.)

3 Based upon analysis of Class Member time and payroll records, and taking into account
4 Plaintiff's assessment that 75% of eligible shifts were the subject of unique violations for missed,
5 late, or short meal periods (*i.e.*, 16,104 unique meal period violations) Plaintiff calculated the
6 potential maximum exposure of this claim to be \$454,294. However, to account for the above-
7 described certification and liability risks, Plaintiff took a twenty-five percent discount for associated
8 risks to yield **\$340,721** as the realistic exposure. (Connor Decl. ¶ 64.)

9 Here, Plaintiff also alleges that hourly employees did not receive timely and compliant rest
10 breaks, nor did Defendant relinquish control over how employees spent their 10-minute rest periods.
11 (*See Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257, 260.) Specifically, Plaintiff will
12 testify that employee rest breaks, when they occurred, were dependent on workflow and operational
13 demands. Workload related pressures, *e.g.*, project time constraints and cement truck flow needs,
14 meant that Plaintiff and employees were generally not free to take duty-free rest breaks. Further,
15 Plaintiff neither received a rest period premium, nor is there evidence that Defendant ever made a
16 premium payment for a non-compliant rest break to Class Members. Thus, Plaintiff alleges that
17 Defendant did not provide premium pay for each non-compliant rest break as required under Labor
18 Code § 226.7. (Connor Decl. ¶¶ 65-66.)

19 Here again, Defendant disputes liability and damages. Defendant maintained that it
20 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
21 of four hours worked as required by Labor Code § 226.7. (Connor Decl. ¶ 67.) Defendant explained
22 that Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*) As with
23 meal breaks, Defendant argued that any Class Member who failed to take a rest break, or took a
24 short or late rest period, did so voluntarily and that all applicable rest periods were still authorized
25 and provided. (Connor Decl. ¶ 67.) Thus, Defendant argued that it did not act unlawfully to deprive
26 Class Members of rest breaks. (*Ibid.*)

27 Class Counsel recognizes that, unlike meal periods, rest breaks need not be recorded and
28 thus establishing Defendant's exertion of pressure, control, and resulting violations is likely to be

1 more difficult. (Connor Decl. ¶ 68.) As such, and based on the narrative of Plaintiff, Class Counsel
2 applied violation rate for Class Members' rest breaks that is 50% of the eligible shifts, *i.e.*, 10,736
3 unique rest break violations: thus, yielding a rest break maximum exposure rate of \$302,863.
4 (Connor Decl. ¶ 68.) For settlement purposes and to account for the difficulties of certifying and
5 proving unrecorded rest break violations, however, a fifty percent reduction from that maximum
6 exposure was and is warranted for a realistic recovery amount of **\$151,432**. (Connor Decl. ¶ 68.)

7 **Wage Statement Violations**

8 Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendant's failure
9 to provide accurate itemized wage statements. (Connor Decl. ¶ 69.) Failure to comply with the
10 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
11 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
12 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*
13 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because
14 if Defendant did not provide minimum and overtime wages for all hours worked, owes premiums
15 for non-compliant meal and rest breaks, and so forth, then the wage statements were inevitably
16 inaccurate.

17 Defendant contended, however, that Labor Code section 226(e) penalties are not automatic.
18 (Connor Decl. ¶ 70.) Rather, the employee must show that Defendant's noncompliance was
19 "knowing and intentional." (*Ibid.*) Defendant suggested that any noncompliance was not knowing
20 and intentional. (*Ibid.*) Moreover, Defendant argued that meal and rest period violations cannot
21 support derivative wage statement penalties. (*See Naranjo v. Spectrum Security Service, Inc.*
22 (September 20, 2019) 40 Cal.App.5th 444, 474 [holding that violations of Labor Code's meal break
23 provisions do not entitle employees to pursue the derivative wage statement penalties], *c.f.*, but
24 *review granted, Naranjo v. Spectrum Security Services, Inc.* (Cal. Sup. Ct. No. S258966) (2020)
25 455 P.3d 704 [257 Cal.Rptr.3d 188].)

26 Because the damages for this cause of action are penalties, the statute of limitations is only
27 one year prior to the filing of the original complaint. (*See Code Civ. Proc. § 340.*) The Parties
28 discussed these issues and, based on the more conservative \$50 initial violation penalty rate across

1 a qualifying 2,007 pay periods, Plaintiff estimates the total maximum wage statement exposure to
2 be \$100,350. (Connor Decl. ¶ 71.) However, if Plaintiff deducts for risks such as loss on the merits
3 of the underlying derivative claim(s) and/or an adverse Supreme Court ruling in *Naranjo, supra*,
4 then a twenty-five percent reduction yields the realistic recovery amount of **\$75,263**. (Connor Decl.
5 ¶ 71.)

6 Waiting Time Violations

7 Plaintiff did not allege a Labor Code § 203 claim because, at the time of filing the operative
8 Complaint, he was a current employee, for purposes of mediation, and Plaintiff anticipated that
9 Defendant would want such claim encompassed within the scope of any settlement release. Thus,
10 Plaintiff evaluated the dollar value of a cause of action against Defendant for failure to timely pay
11 all wages due employees at separation. (See Labor Code §§ 201-203.) As with other claims,
12 Defendant vigorously disagrees that it engaged in any conduct giving rise to liability or entitlement
13 to recovery of penalties. (Connor Decl. ¶ 72.)

14 Defendant argued that waiting time penalties are not appropriate because it attempted to pay
15 employees all final wages owed in good faith upon their separation, thereby precluding a finding of
16 willfulness necessary to obtain waiting time penalties. (Connor Decl. ¶ 73.) Moreover, Defendant
17 maintained that no waiting time penalties were recoverable from alleged meal or rest period
18 violations. (*Ibid.*) Defendant raised the Second Appellate District's decision in *Naranjo, et al. v.*
19 *Spectrum Services, Inc.* (2019) 40 Cal.App.5th 444 to argue that meal and rest break violations
20 trigger neither wage statement, nor waiting time penalties. Yet the *Naranjo* decision is currently
21 pending before the California Supreme Court, *see, Naranjo, supra, review granted*, Supreme Court
22 Case No. S258966, 455 P.3d 704 (January 02, 2020), and although fully briefed and submitted, the
23 outcome of this important case remains to be seen.⁵ (Connor Decl. ¶ 73.)

24
25 ⁵ The "Issues Presented" in the Case Summary of the Appellate Courts Case Information webpage
26 (<https://appellatecases.courtinfo.ca.gov/>) reads: "This case presents the following issues: (1) Does a
27 violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest
28 period violations, give rise to claims under Labor Code sections 203 and 226 when the employer
does not include the premium wages in the employee's wage statements but does include the wages
earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium
wages owed under Labor Code section 226.7?"

1 Based on the count of 50 former employees at the time of mediation, Class Counsel
2 appraised the maximum value of the waiting time claim as \$338,520. (Connor Decl. ¶ 74.) But after
3 the Parties discussed the above risks, Class Counsel factored in a reduction of twenty-five percent -
4 Plaintiff believes that the combined potential derivative liability makes the claim relatively
5 recoverable - and posits **\$253,890** as a realistic exposure value. (*Ibid.*)

6 **Derivative PAGA Penalties**

7 Plaintiff notified Defendant and the LWDA of the alleged violations on August 12, 2020,
8 and having waited the requisite administrative exhaustion timeframe, Plaintiff included a
9 representative PAGA claim in the operative Complaint. The success of Plaintiff's PAGA claim is
10 heavily dependent upon the success of the underlying claims occurring within the one-year statute
11 of limitations applicable to the PAGA. (Connor Decl. ¶ 75.) In response, Defendant contended that,
12 *first*, PAGA claims cannot be brought given the existence of construction industry context and CBA
13 involved; and *second*, these penalties are derived from the underlying wage and hour violations
14 discussed above, which Defendant disputes. (*Ibid.*)

15 With respect to PAGA, Plaintiff recognizes the unique construction industry special interest
16 carve out in Labor Code Section 2699.6 to the otherwise *Iskanian* prohibition against waivers of
17 PAGA representative actions. For the most part, Plaintiff's reply is derivative of his arguments
18 against Defendant's motion to compel arbitration: if the Court agrees with Plaintiff that there is no
19 enforceable agreement to arbitrate, then Defendant cannot meet the prerequisites necessary to
20 invoke Labor Code § 2699.6 and, thus, Plaintiff's PAGA claim would remain with the Court. (*See*
21 Labor Code § 2699.6(1)(2) [requiring that there exists a grievance and binding arbitration procedure
22 to redress violations and that any waiver is express and in clear and unambiguous terms]; Connor
23 Decl. ¶ 76.) Further, due to the law enforcement representative nature of PAGA, an employee can
24 pursue penalties affecting other employees, although the employee was not affected by those
25 violations affecting other employees. (*Huff v. Securitas v. Sec. Services USA, Inc.* (2018) 23 Cal.5th
26 745.) Thus, with only one Labor Code violation, Plaintiff may pursue penalties on behalf of the
27 LWDA for violations that he himself did not experience, but that were suffered by other aggrieved
28 employees arising out of Defendant's practices. (Connor Decl. ¶ 77.)

1 Defendant maintained and continues to maintain that it had legally compliant employment
2 policies and practices throughout the statutory period. (Connor Decl. ¶ 78.) Defendant denied and
3 continues to deny that it ever violated any provision of the California Labor Code and argued that,
4 even assuming such violations occurred, Defendant will not be treated as having engaged in
5 subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendant argues
6 that heightened civil penalties for subsequent violations would not be assessed unless it could be
7 shown that Defendant had notice that it was violating the law, *e.g.*, it had been cited by a labor
8 agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g., Amaral v. Cintas Corp.* (2008) 163
9 Cal.4th 1157, 1209.) Thus, Defendant contended that, at best, even if a violation giving rise to a
10 penalty was shown for each pay period, only the lower civil penalty associated with initial violations
11 would apply. (Connor Decl. ¶ 78.)

12 Under Labor Code § 2699(f)(2), Defendant is subject to a civil penalty of \$100 for the initial
13 violation of the underlying Labor Code violations, and \$200 for each subsequent pay period where
14 the violation occurred. Extrapolating the one-year statutory PAGA period from the date of filing
15 through mediation, Plaintiff estimated 2,007 pay periods at issue. (Connor Decl. ¶ 79.) Although,
16 strictly speaking, class certification requirements are not required to be satisfied in order to
17 adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a
18 PAGA claim is uncertain.⁶ (Connor Decl. ¶ 80.) Thus, Class Counsel applied discounts for the risks

20 ⁶ Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but
21 rather to facilitate the enforcement of the labor laws. (*See, e.g., Williams v. Superior Court* (2017)
22 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Lab. Code § 2699(i).) In
23 assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount which the
24 LWDA and the aggrieved employees are to receive formally in the form of monetary civil penalties
25 but instead whether the total settlement amount achieves the PAGA's objectives. "When PAGA
26 claims are settled, courts "consider whether the proposed PAGA settlement is fair and adequate in
27 view of the purposes and policies of the statute[]" and "[t]hose purposes and policies include
28 benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging compliance
with California Labor Code provisions, and deterring noncompliance." (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132-33, 1135.) A "[c]ourt does not review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine whether it is fundamentally fair, reasonable and adequate, with primary consideration for the interests of absent class members." (LWDA's Comments on Proposed PAGA Settlement in *O'Connor v. Uber Techs.* (N.D. Cal. July 29, 2016) No. 13-CV-03826-EMC, Docket No. 736, at 4:17-19.) "PAGA penalties must be evaluated in terms of their public policy objective and not just through the prism of what private relief has been sought or obtained." (*Id.* at 4:14-16.)

1 in establishing manageability and possible bifurcation of discovery and/or trial, the risks regarding
2 success on the merits and establishing liability, and the risks with proving the extent of penalties
3 that are warranted and possible discretionary reduction of penalties by the Court. (Connor Decl. ¶
4 80.) As a result, Plaintiffs used the “initial” \$100 per pay period violation (as opposed to the \$200
5 subsequent per violation rate) to calculate a realistic estimate of \$200,700 in potential PAGA penalty
6 exposure—of which, by statute, only 25%, or **\$50,175**—would be recoverable by aggrieved
7 employees. (Connor Decl. ¶ 81.)

8 Summary

9 Using the estimated figures for each of the claims described above, Plaintiff predicted that
10 approximately \$1,926,428 would be the maximum possible recovery in damages available to Class
11 Members. Without any discount for risks for certification or liability, the proposed recovery to the
12 Class of \$325,000 thus represents **17% of the maximum possible exposure** to Defendant. (Connor
13 Decl. ¶ 83.) As described above, however, Plaintiff assumed multiple discounts tailored to the
14 various claims and, together, Plaintiff estimates approximately \$1,211,594 would be the realistic
15 value of Class Members’ claims for which \$325,000 therefore represents **27% of the realistic**
16 **possible exposure** to Defendant. (Connor Decl. ¶ 83.) In sum, the data coupled with factual and
17 legal analysis shows that the Settlement reflects an estimated range of **17%-27% of the potential**
18 **maximum/realistic damages** recoverable at trial. (Connor Decl. ¶ 83.)

19 The foregoing factors each indicate that the interests of Class Members are best served by a
20 settlement of this action in the manner and upon the terms set forth in the Settlement Agreement.
21 Given the relatively small size of the Class as compared to, for example, larger nationwide
22 corporate, consumer, or securities class actions, coupled with the financial uncertainties faced by
23 businesses amidst a public health crisis, this Settlement confers a substantial benefit of \$325,000.
24 (Connor Decl. ¶ 84.) Moreover, each Class Member will be given the opportunity to request
25 exclusion/opt-out of the Settlement, allowing those who feel they have claims that are greater than
26 the benefits they can receive under this Settlement, to pursue their own claims. (Connor Decl. ¶ 84.)
27 Finally, Settlement awards for each participating Class Member will be tailored to the extent to
28 which he or she was affect by Defendant’s alleged wage-and-hour violations based on his or her

1 eligible pay periods. (Connor Decl. ¶ 11.) After analyzing the claims in this matter, Plaintiff and
2 Class Counsel have concluded that the value of this Settlement is fair, reasonable, and adequate.

3 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE OF THE CLASS**

4 This Court should order distribution of the proposed Notice of Pendency of Class and
5 Representative Action Settlement (“Class Notice”), along with an individualized Information Form
6 and Exclusion Form (collectively, “Notice Packet”), to the current and former employees, *see*
7 respective internal exhibits to the Settlement Agreement, attached at **Exhibit “1”** to the Connor
8 Declaration, to the Class by first class mail, postage prepaid, using the last known mailing address
9 information provided by Defendant. The Notice Packets shall be printed in both English and
10 Spanish. (Settlement Agreement ¶ 56(a).) This manner of giving notice is the “best notice
11 practicable” under the circumstances because it provides “individual notice to all members who can
12 be identified though reasonable effort.” (*Eisen v. Carlisle and Jacqueline* (1974) 417 U.S. 156, 173.)
13 Here, the Parties propose that the settlement be administered by CPT Group, Inc. (“CPT Group”),
14 an experienced class action settlement administrator. (Settlement Agreement ¶¶ 43, 56.) Class
15 Members’ addresses will be ascertainable through Defendant’s personnel and payroll records, which
16 Defendant will provide to CPT Group within twenty-four (24) calendar days after preliminary
17 approval of the settlement. (Settlement Agreement ¶ 56(a)(i).) Under the Settlement, CPT will run
18 all addresses through the National Change of Address database and, to the extent that any notices
19 are returned, will conduct further skip traces to obtain current address information and re-mail, if
20 applicable. (Settlement Agreement ¶ 56(a)(ii).) Class Members who are sent a re-mailed Notice
21 Packet shall have their Response Deadline extended by fifteen (15) calendar days from the date the
22 Settlement Administrator re-mails the Notice Packet. (*Ibid.*) CPT shall also maintain a static case-
23 specific dedicated website for hosting relevant documents, including a copy of the Class Notice,
24 Settlement Agreement, and any Notice of Final Judgment.

25 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
26 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
27 the key terms of the settlement, the uniform 45-day deadline to submit a Qualifying Pay Period
28 and/or Qualifying PAGA Pay Period dispute, Exclusion Form/opt-out, or object to the Settlement

1 and the procedure by which to do so, and explains the recovery formula and credited number of
2 Qualifying Pay Periods and/or Qualifying PAGA Pay Periods for each Class Member and/or PAGA
3 Group Member, when applicable. The proposed notice will also notify Class Members of the final
4 approval hearing date, provide the contact information for Class Counsel, and advise Class Members
5 that they may enter an appearance through counsel if they wish. This manner of giving notice
6 satisfies California Rules of Court, Rule 3.766(e) as the “best notice practicable” under the
7 circumstances because it provides “individual notice to all members who can be identified through
8 reasonable effort.” (*Eisen v. Carlisle and Jacquelin* (1974) 417 U.S. 156, 173.) Thus, the proposed
9 method of notice is reasonably calculated to reach Class Members by the best means practicable and
10 should be approved.

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

12 Finally, this Court should set a hearing for final approval of the Settlement on a date
13 appropriately scheduled to follow the deadline by which Class Members must submit any Exclusion
14 Forms/opt-outs, Qualifying Pay Period/Qualifying PAGA Pay Period disputes, or object to the
15 Settlement. (*See* California Rules of Court, Rule 3.769.)

16 **IX. CONCLUSION**

17 Based upon the foregoing, and because the proposed Settlement is fair, reasonable, and
18 advantageous to the Class Members, Plaintiff respectfully requests that the Court enter an Order:

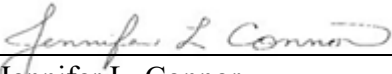
- 19 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 20 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
21 Representative Action Settlement (“Class Notice”), along with an individualized Information Form
22 and Exclusion Form (collectively, “Notice Packet”), attached as internal exhibits to the Settlement
23 Agreement;
- 24 3. Provisionally certifying the Settlement Agreement’s proposed Class comprised of
25 the Class Members identified during the Class Period under Civil Code section 382 for settlement
26 purposes only;
- 27 4. Approving and appointing Plaintiff Raymond L. Smith as the Class Representative;
- 28 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: April 4, 2022

Respectfully submitted,

COUNSELONE, PC

By: 
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Anthony J. Orshansky
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Members, and aggrieved employees