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7 Attorneys for Plaintiff Gregorio Rodriguez, on behalf
of himself and others similarly situated
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF MERCED**
12

13 GREGORIO RODRIGUEZ, on behalf of
himself and others similarly situated,

14
15 Plaintiff,

16 v.

17 CAVT, LLC, a Delaware limited liability
company, doing business as Cerritos Nissan;
18 BWNVT Motors, a Delaware limited liability
company, doing business as Serramonte Ford;
19 FFBH Motors, LLC, a Delaware limited liability
company, doing business as Frontier Ford;
20 MVVT Motors, LLC a Delaware limited liability
company, doing business as South County Lexus;
21 and DOES 1 through 100, inclusive,

22 Defendants.
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Case No. 21CV-03890

Assigned for all purposes to:
Hon. Brian L. McCabe, Dept. 8

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

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

Preliminary Approval Hearing

Date: May 4, 2022
Time: 8:15 a.m.
Dept.: 8

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

2 **PLEASE TAKE NOTICE** that, pursuant to Rule 3.769 of the California Rules of Court, on
3 May 4, 2022, at 8:15 a.m. before the Honorable Brian L. McCabe in Department 8 of the above-
4 entitled Court, located at 627 West 21st Street, Merced, California 95340, plaintiff Gregorio
5 Rodriguez (“Plaintiff” or “Class Representative”), individually and on behalf of all others similarly
6 situated, will and hereby does move this Court for:

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

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

11 **Class Members** - All current and former non-exempt employees, including
12 employees paid hourly and employees paid, in whole or part, on a commission basis,
13 who worked for Defendants and/or their predecessors or merged entities, within the
State of California during the Class Period (the “Class” or “Class Members”).¹

14 3. Preliminary appointment of Plaintiff as Class Representative;

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

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

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

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

25 ///

26 _____
27 ¹ “Class Period” is defined as the period beginning on November 24, 2017 and ending on March 31,
28 2022. (See Settlement Agreement ¶¶ 7, 44.) “Settlement Class” or “Settlement Class Members” are
defined as all Class Members who do not opt out of this settlement. (See Settlement Agreement ¶
33.)

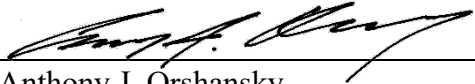
1 This motion is based on this notice of motion, the attached memorandum of points and
2 authorities, the declaration of Anthony J. Orshansky filed concurrently herewith, and the exhibits
3 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
4 documentary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

8
9 Dated: April 6, 2022

Respectfully submitted,

10 COUNSELONE, PC

11 By:



12 Anthony J. Orshansky
13 Jennifer L. Connor
14 Justin Kachadoorian
15 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Gregorio Rodriguez (“Plaintiff” or “Class Representative”), individually and on
4 behalf of all others similarly situated,² seeks preliminary approval of the Stipulation of Class and
5 Representative Action Settlement (“Settlement Agreement”) entered into with defendants CAVT,
6 LLC, BWNVT Motors, FFBH Motors, LLC, and MVVT Motors, LLC (collectively, “Defendants”).
7 The Settlement Agreement between Plaintiff and Defendants (together, the “Parties”), if approved,
8 will resolve specific claims of the Settlement Class Members and PAGA Group Members in
9 exchange for Defendants’ agreement to pay the amount of ***One Million Eight Hundred Thousand***
10 ***Dollars (\$1,800,000) into a non-reversionary common settlement fund.***³ There are approximately
11 1,351 Class Members employed as non-exempt employees during the Class Period.

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

19 After engaging in substantial independent investigation and after mediation with the Hon.
20 Carl J. West (Ret.) of JAMS, the Parties agreed to settle the Settlement Class Members’ and PAGA
21 Group Members’ claims alleged in this litigation for the non-reversionary sum of One Million Eight
22

23 ² “Class Members” are defined as all current and former non-exempt employees, including
24 employees paid hourly and employees paid, in whole or in part, on a commission basis, who worked
25 for Defendants and/or their predecessors or merged entities in the State of California during the
26 Class Period. (See Settlement Agreement ¶ 4.) “Class Period” is defined as the period beginning on
27 November 24, 2017 and ending on March 31, 2022. (See Settlement Agreement ¶¶ 7, 44.)

28 ³ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who do not
opt out of this settlement. (See Settlement Agreement ¶ 33.) “PAGA Group Members” are defined
as all Class Members, whether or not they submit a request for exclusion from the Settlement Class,
employed by Defendants during the PAGA Period. (See Settlement Agreement ¶ 22.) The “PAGA
Period” is defined as the period beginning on October 23, 2019 and ending March 31, 2022. (See
Settlement Agreement ¶¶ 25, 44.)

1 Hundred Thousand Dollars (\$1,800,000) (“Gross Settlement Amount”). A true and correct copy of
2 the fully executed Settlement Agreement is attached as **Exhibit A** to the Declaration of Anthony J.
3 Orshansky (“Orshansky Decl.”), filed concurrently herewith. After deductions for Attorneys’ Fees
4 and Costs to Class Counsel, the Enhancement Payment to the Class Representative, Administration
5 Costs to the Settlement Administrator, and the PAGA Payment, the remaining amount (the “Net
6 Settlement Amount”) of approximately \$920,000 will be distributed to Settlement Class Members.
7 (Settlement Agreement ¶¶ 20, 46.) The entire Net Settlement Amount will be paid out to Settlement
8 Class Members. Settlement Class Members shall automatically receive payments without the need
9 to submit a claim form, and PAGA Group Members shall receive PAGA payments irrespective of
10 whether they opt out. (*Id.* at ¶¶ 44, 46(d), 50.)

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

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

17 **A. Discovery and Investigation**

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

23 Prior to initiating the lawsuit, as early as October 2020, counsel for Plaintiff, CounselOne,
24 P.C., independently and thoroughly investigated the claims and considered the facts and
25 circumstances underlying the pertinent issues and applicable law. (Orshansky Decl. ¶ 25.) This
26 required thorough discussions and interviews with Plaintiff and other Class Members as well as
27 research into the various legal issues involved in the case. (*Ibid.*) After conducting their initial
28 investigation, Class Counsel determined that the claims were well suited for class action

1 adjudication owing to what appeared to be a common course of conduct affecting a similarly situated
2 group of employees. (*Ibid.*)

3 On October 23, 2020, Class Counsel provided pre-filing written notice to the LWDA and by
4 certified mail to Defendants of the above-identified allegations on behalf of Plaintiff and similarly
5 situated aggrieved employees in accord with the PAGA, California Labor Code § 2698, *et seq.*
6 (Orshansky Decl. ¶ 26.)

7 Plaintiff filed the Class and Representative Action Complaint for Damages (the “Complaint”)
8 asserting the following claims: (1) Violation of California Labor Code §§ 1194, 1194.2, 1197,
9 1197.1 (Failure to Pay Minimum Wages); (2) Violation of California Labor Code §§ 510 and 1198
10 (Failure to Pay All Overtime Wages); (3) Violation of California Labor Code §§ 226.7 and 512
11 (Meal Period Liability); (4) Violation of California Labor Code § 226.7 (Rest Break Liability); (5)
12 Violation of California Labor Code §§ 226 and 226.3 (Failure to Provide Accurate Itemized Wage
13 Statements); (6) Violation of California Labor Code §§ 201-204 and 210 (Failure to Pay All Wages
14 Owed Timely and Upon Separation of Employment); (7) Violation of California Labor Code §§
15 2800 and 2802 (Failure to Reimburse Business Expenses); (8) Violation of California Labor Code
16 Section 1174(d) (Failure to Maintain Accurate Payroll Records); (9) Violation of California
17 Business and Professions Code Sections 17200, *et seq.* (Unfair Business Practices); and (10)
18 Penalties Pursuant to Labor Code Section 2699 (Private Attorneys General Act). (Orshansky Decl.
19 ¶ 27.)

20 Defendants deny Plaintiff’s allegations of wrongdoing; Defendants make no admissions
21 regarding any facts or law related to the lawsuit. (Orshansky Decl. ¶ 29.) Defendants do not believe
22 that any liability to Plaintiff or other Class Members exists, or that Plaintiff or Class Members are
23 entitled to any recovery. (Orshansky Decl. ¶ 29; Settlement Agreement ¶¶ 41, 43.)

24 Defendants produced information and documentation concerning the alleged violations, such
25 as Defendants’ written policies concerning those claims, including Defendants’ employee
26 handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest
27 breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing
28 all wages at separation, as well as composite data regarding the number of Class Members and the

1 mix of current versus former employees, total number of pay periods, total number of workweeks,
2 and the average hourly rate in effect. (Orshansky Decl. ¶ 30.)

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

7 **B. Mediation and Settlement**

8 After having performed extensive investigation and analysis of the legal and factual issues
9 and risks, the Parties participated in a full day mediation before the Hon. Carl J. West (Ret.) of
10 JAMS, where they debated and discussed their respective position in an attempt to resolve the
11 lawsuit. (Orshansky Decl. ¶ 33.) Judge West is experienced in mediating complex general litigation,
12 labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) During the
13 mediation, the Parties exchanged further information and discussed all aspects of the case, including
14 the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class
15 certification, liability under the claims asserted, and the implications of a PAGA representative
16 action. (*Ibid.*) Pursuant to the mediator's proposal, the Parties came to an agreement on all material
17 terms of the settlement. (*Id.* at ¶ 34.)

18 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks
19 and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class
20 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
21 adequate taking into consideration the amounts received in other wage and hour class and
22 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
23 each Class Members' claim to the settlement award he or she will receive. (Orshansky Decl. ¶ 36.)
24 Class Counsel believe that the settlement serves the best interests of Class Members and PAGA
25 Group Members. (*Ibid.*) Further, and based on the settlement negotiations, which were hard fought
26 and conducted in good faith and at arm's length between attorneys with substantial experience
27 litigating class actions, representative actions, and wage and hour cases, the settlement was the
28 product of a non-collusive settlement process in which the Parties were forced to make significant

1 compromises in the interest of reaching a full and complete settlement of the Action. (*Id.* at ¶ 35.)
2 The Parties have concluded that it is in their best interests to compromise, settle, and accept the
3 terms of the Settlement Agreement. (*See* Settlement Agreement ¶ 40.)

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

5 Under the terms of the Settlement Agreement, Defendants have agreed to pay a non-
6 reversionary amount of One Million Eight Hundred Thousand Dollars (\$1,800,000) into a common
7 fund to settle the specific wage and hour claims of the Settlement Class Members and PAGA Group
8 Members; this amount is called the “Gross Settlement Amount.” (Settlement Agreement ¶¶ 16, 46.)
9 This Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class
10 Members, the Enhancement Payment to the Class Representative, the Administration Costs to the
11 Settlement Administrator, the Attorneys’ Fees and Costs to Class Counsel, and the Private Attorneys
12 General Act (“PAGA”) Payment, including payment to PAGA Group Members and to the
13 California Labor and Workforce Development Agency (“LWDA”) for civil penalties pursuant to
14 statute. (*Ibid.*)

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

- 17 • Up to \$630,000—which is 35% of the Gross Settlement Amount—in attorneys’ fees and
18 up to \$20,000 in litigation costs to Class Counsel (the “Attorneys’ Fees and Costs”);
- 19 • Up to \$10,000 to the Class Representative as an Enhancement Payment—as a service
20 award and in exchange for a general release of claims;
- 21 • Up to \$200,000 allocated as a PAGA Payment—of which 75% is allocated for payment
22 to the LWDA for civil penalties pursuant to statute and 25% is allocated to PAGA Group
23 Members; and
- 24 • Up to \$20,000 to the Settlement Administrator for Administration Costs to notify Class
25 Members and administer the settlement.

26 The amount remaining after the foregoing deductions, approximately \$920,000, is called the “Net
27 Settlement Amount.” (Settlement Agreement ¶¶ 20, 46; Orshansky Decl. ¶ 7.) The entire Net
28 Settlement Amount shall be paid out to Settlement Class Members. Settlement Class Members shall

1 automatically receive payments without the need to submit a claim form, and PAGA Group
2 Members shall receive PAGA payments irrespective of whether they opt out. (Settlement
3 Agreement ¶¶ 44, 46(d), 50; Orshansky Decl. ¶ 7.)

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

5 Although exact recovery amounts depend on each Settlement Class Members' relative
6 number of qualifying workweeks, for estimation purposes only, if all of the approximately 1,351
7 Class Members participate in the settlement, then the average Individual Settlement Share would be
8 an estimated \$680.98 per Class Member. (Orshansky Decl. ¶ 11.) Of course, any Class Member who
9 prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out. (*Ibid.*;
10 Settlement Agreement ¶ 52.)

11 The Net Settlement Amount will be the amount that is available for distribution to Settlement
12 Class Members on a *pro rata* basis, based on workweeks during the Class Period. (Settlement
13 Agreement ¶ 46(e); Orshansky Decl. ¶ 8.) Each Individual Settlement Share shall be calculated as
14 follows: The Net Settlement Amount will be divided by the total of all Workweeks of Settlement
15 Class Members during the Class Period in order to yield the "Workweek Value." (Settlement
16 Agreement ¶ 46(e); Orshansky Decl. ¶ 8.) The Individual Settlement Share to each Settlement Class
17 Member will be determined by multiplying his or her individual Workweeks by the Workweek
18 Value. (*Ibid.*)

19 In addition, each PAGA Group Member will receive a proportional share of the 25% of the
20 PAGA Payment based on his or her pay periods during the PAGA Period. (Settlement Agreement ¶
21 46(d); Orshansky Decl. ¶ 9.) Specifically, 25% of the PAGA Payment (or \$50,000) shall be divided
22 by the total of all pay periods worked by PAGA Group Members during the PAGA Period in order
23 to establish the value of each pay period. (Settlement Agreement ¶ 46(d); Orshansky Decl. ¶ 9.) The
24 individual PAGA payment to be made to each PAGA Group Member shall be calculated by
25 multiplying the value of a pay period by the number of pay periods worked by the PAGA Group
26 Member during the PAGA Period, and irrespective of whether he or she is a Settlement Class
27 Member. (Settlement Agreement ¶ 46(d); Orshansky Decl. ¶ 9.)

28 ///

1 After reduction for the employee's share of taxes on the wage portion,⁴ the net payment to
2 each Settlement Class Member/PAGA Group Member will be the sum of his or her Individual
3 Settlement Share plus, if applicable, the individual PAGA payment (collectively, "Individual
4 Settlement Payment"). (Settlement Agreement ¶ 46(f); Orshansky Decl. ¶ 10.) As a result of the
5 distribution formulas, the consideration paid to each Settlement Class Member/PAGA Group
6 Member is tailored to the impact of Defendants' alleged violations as well to the claims he or she is
7 releasing. (Orshansky Decl. ¶ 10.) Further, a Settlement Class Member may submit a written letter
8 to the Settlement Administrator disputing the number of workweeks credited if he or she believes
9 that count is inaccurate. (Settlement Agreement ¶ 51.) Finally, any Class Member who prefers to
10 preserve his or her right to pursue relief or seek an alternative recovery may opt out.⁵ (*Id.* at ¶ 52.)

11 **B. Class Representative Enhancement Payment, Attorneys' Fees, and Expenses**

12 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of
13 seeking final approval in the amount of \$10,000 for services to the Settlement Class and a general
14 release of all claims against Defendants. (Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl.
15 ¶ 12.) "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate
16 class representatives for work done on behalf of the class [and] to make up for financial or
17 reputational risk undertaken in bringing the action." (*In re Cellphone Fee Termination Cases* (2010)
18 186 Cal.App.4th 1380, 1393-1394.) Plaintiff's requested enhancement payment is intended to
19 recognize the significant benefits conferred upon the Settlement Class and be proportional to the
20 time and effort that Plaintiff expended on behalf of the Class including, providing factual
21 information and documents to Class Counsel, discussing the claims and theories at issue in the case
22 with Class Counsel, identifying potential witnesses, reviewing the Settlement Agreement, as well
23 as the significant risks Plaintiff undertook by agreeing to serve as a named plaintiff, and the fact that

24
25
26 ⁴ The Parties agreed to allocate twenty percent (20%) of each Individual Settlement Share to wages
27 and eighty percent (80%) of each Individual Settlement Share to interest, penalties, and other non-
28 wage damages. (Settlement Agreement ¶ 48(a).)

⁵ Again, if approved, PAGA Group Members will receive their individual PAGA payments
irrespective of whether they opt out of the settlement. (Settlement Agreement ¶ 46(d).)

1 Plaintiff agreed to a general release of all claims subject to a waiver of Civil Code § 1542. (*See*
2 Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl. ¶ 13.)

3 Class Counsel will apply for an attorneys’ fees award of no more than thirty-five percent
4 (35%) of the Gross Settlement Amount, and reimbursement of litigation costs in an amount up to
5 \$20,000. (Settlement Agreement ¶¶ 2, 46(a); Orshansky Decl. ¶ 14.) Plaintiff submits that the
6 requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming
7 litigation on a purely contingent fee basis. (Orshansky Decl. ¶ 14.) Class Counsel have incurred
8 substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims,
9 conducting legal research and analysis, conducting informal discovery, meeting and conferring with
10 defense counsel, interviewing putative class members, analyzing documents produced by
11 Defendants, including corporate policies and employee time and payroll records, consulting with an
12 expert, building damages models, preparing for and attending mediation, routine case updates and
13 consultations with the client, and negotiating and preparing the Settlement Agreement, Notice of
14 Pendency of Class and Representative Action Settlement, and this motion for preliminary approval
15 and supporting documents. (*Ibid.*) Class Counsel will also expend future attorney time in attending
16 the hearing on this Motion, overseeing the notice and administration process, drafting the Final
17 Approval Motion, and supporting documents, and attending the Final Approval hearing, among
18 other tasks, such as addressing questions from Class Members. (*Id.* at ¶ 15.)

19 Both California and federal courts have recognized that an appropriate method for awarding
20 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of
21 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the
22 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*
23 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and
24 “lodestar/multiplier” methods].) Historically, courts have awarded percentage fees in the range of
25 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6
26 (4th Ed. 2013) [“No general rule can be articulated on what is a reasonable percentage of a common
27 fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in

1 order to assure that the fees do not consume a disproportionate part of the recovery obtained for the
2 class, although somewhat larger percentages are not unprecedented.”].)

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

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

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

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

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

26 Whether a class is ascertainable is determined by examining the class definition, the size of
27 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at
28 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,

1 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are “ascertainable” where
2 they may be readily identified without unreasonable expense or time.

3 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
4 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and
5 former non-exempt employees, including employees paid hourly and employees paid, in whole or
6 part, on a commission basis, who worked for Defendants and/or their predecessors or merged
7 entities in the state of California during the Class Period. (Settlement Agreement ¶ 4.) Further, the
8 Class Period is defined as the period beginning on November 24, 2017 and ending on March 31,
9 2022. (*See id.* at ¶ 7; Orshansky Decl. ¶ 88.) Thus, all Class Members are of a specific type (non-
10 exempt employees) employed within California. Defendants are required to and do maintain
11 employment records of such persons, including contact information and Social Security numbers.
12 (Orshansky Decl. ¶ 88.) Documents and information exchanged reflect a class of approximately
13 1,351 current and former non-exempt employees working in California during the Class Period.
14 (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and numerosity requirements. (*See e.g.,*
15 *Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers sufficiently numerous].)

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

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

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

24 (*Id.* at p. 809.) The instant litigation is predicated on uniform company policies and systemic top-
25 down business practices revolving principally around Defendants’ timekeeping and pay practices –
26 *e.g.*, off-the-clock work attributed to understaffing, unreasonable workloads, and failure to pay meal
27 and rest break premiums. (Orshansky Decl. ¶ 89.) These allegations have given rise to the following

1 claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; failure
2 to reimburse business expenses; and derivative claims arising therefrom. (*Ibid.*)

3 Because Plaintiff has alleged a single top-down compensation scheme where “the relevant
4 proof [does] not vary among class members” and “clearly present[] a common question fundamental
5 to all class members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
6 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
7 169 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation,
8 class-wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I.*
9 *Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class
10 certification in a manufacturing defect case when a common course of action had been proven].)
11 This inference “*eliminates* the need for each class member to prove individually the consequences
12 of the defendants’ actions to him or her.” (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of
13 this matter depends upon questions that are common to members of the Class. (Orshansky Decl. ¶
14 90.) These types of claims are commonly held to be proper for class certification. (*Ibid.*; *see, e.g.,*
15 *Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period claim];
16 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal
17 period claim].)

18 C. The Claims of the Named Plaintiff Are Typical

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

21 Here, Plaintiff’s claims are typical of those held by the members of the Class. (Orshansky
22 Decl. ¶ 91.) Like all other Class Members, Plaintiff was a non-exempt employee working for
23 Defendants in California during the Class Period. (*Ibid.*) As alleged, Plaintiff was shorted wages,
24 not reimbursed for business expenses, and not provided with legally compliant meal and rest breaks.
25 (*Ibid.*) Plaintiff was therefore impacted by the same challenged policies that allegedly injured the
26 Class as a whole and subject to the same defenses forwarded by Defendants as to the Class, thus his
27 claims are therefore typical. (*Ibid.*)

28 ///

1 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
2 **Settlement Class**

3 The adequacy of representation requirement examines conflicts of interest between named
4 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
5 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
6 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class
7 he seeks to represent. (Orshansky Decl. ¶ 92; *see McGhee v. Bank of America* (1976) 60 Cal.App.3d
8 442, 450 [finding adequacy satisfied where there was no indication that plaintiff's counsel were not
9 qualified and the named plaintiff had no interests antagonistic to those of the proposed class].) Class
10 Counsel also have extensive experience in wage and hour litigation. (Orshansky Decl. ¶¶ 82-86, 92.)

11 **E. A Class Action is Superior to a Multiplicity of Litigation**

12 In making its class certification decision, the court must determine that a class action would
13 be superior to alternative means for the fair and efficient adjudication of the litigation. By
14 consolidating more than one thousand individual actions into a single proceeding, this Court's use
15 of the class action device enables it to manage this litigation in a manner that serves the efficiency
16 interests of the litigants and the judicial system. (Orshansky Decl. ¶ 93.) Absent class treatment, the
17 only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores*
18 *v. Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating "[t]he relevant comparison lies between the
19 costs and benefits of adjudicating Plaintiff's claims in a class action and the costs and benefits of
20 proceeding by numerous separate actions – not between the complexity of a class suit that must
21 accommodate some individualized inquires and the absence of any remedial proceeding
22 whatsoever."].) Finally, in the context of settlement, the superiority concerns are essentially non-
23 existent.

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

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

1 A two-step process is followed when considering class settlements...If the proposed
2 settlement appears to be the product of serious, informed, non-collusive negotiations,
3 has no obvious deficiencies, does not improperly grant preferential treatment to class
4 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.

5 See Federal Manual for Complex Litigation (Second) (1985) (“MCL 2d”) at § 30.44. The
6 preliminary approval of the class action settlement by the trial court is simply a conditional finding
7 that the settlement appears to be within the range of acceptable settlements. (See, e.g., Newberg, §
8 11.25; *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
9 1085, 1094-1095; MCL 2d § 30.44 [“Preliminary approval is appropriate if the agreement is ‘fair,
10 reasonable, and adequate under the circumstances’”].) Thus, the preliminary approval of the class
11 action settlement by the Court is simply a conditional finding that the settlement appears to be within
12 the range of acceptable settlements. A review of the preliminary approval criteria demonstrates a
13 substantial basis for granting the preliminary approval requested by this Motion and proceeding to
14 a full settlement hearing.

15 VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

16 As a matter of public policy, courts both encourage the use of the class action device and
17 favor settlement over continued litigation. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th
18 429, 434 [“Courts have long acknowledged the importance of class actions as a means to prevent a
19 failure of justice in our judicial system.”]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471;
20 *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d 1268, 1276 [“[S]trong judicial policy...favors
21 settlements, particularly where complex class action litigation is concerned.”]; Newberg, § 11.41.)
22 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior*
23 *Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
24 fact that plaintiff might have received more if the case had been fully litigated is no reason not to
25 approve the settlement.”].)

26 To summarize, the settlement here is fair because it offers payment to each Settlement Class
27 Member/PAGA Group Member for releasing his or her claims, extinguishes the risk of litigation,
28 and provides a fair and adequate distribution of the settlement proceeds whereby the funds are

1 allocated proportionally based on the respective number of workweeks/pay periods that he or she
2 worked during the relevant periods. (Orshansky Decl., *passim*.) For all of the foregoing reasons, the
3 proposed settlement should be preliminarily approved.

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

5 Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement
6 unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were
7 conducted in good faith. (See Newberg, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. August
8 10, 2007) 2007 U.S. Dist. LEXIS 74767, *24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980)
9 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v.*
10 *Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.) Courts do not
11 substitute their judgment for that of the proponents, particularly when settlement has been reached
12 by experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767
13 at *24.) As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the
14 settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's
15 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

16 **B. Negotiations Were at Arm's-Length before a Respected Mediator**

17 The Parties engaged in a full day mediation session with the Hon. Carl J. West (Ret.) of
18 JAMS. (Orshansky Decl. ¶ 33.) Judge West is experienced in resolving complex general litigation,
19 labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) Pursuant to the
20 mediator's proposal, the Parties came to an agreement on all material terms of settlement. (*Id.* at ¶
21 34.) The settlement negotiations were hard fought and conducted in good faith and at arm's length
22 between attorneys with substantial experience litigating class actions, representative actions, and
23 wage and hour cases. (*Id.* at ¶ 35.) The settlement was the product of a non-collusive settlement
24 process in which the Parties were forced to make significant compromises in the interest of reaching
25 a full and complete settlement of the Action. (*Ibid.*)

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

27 Throughout this case, Class Members have been represented by counsel who have years of
28 experience in employment class action litigation. (Orshansky Decl. ¶¶ 82-86.) Class Counsel

devoted a considerable amount of time to the prosecution of this case, including, but not limited to, conducting pre-filing investigation and research; conducting informal discovery; reviewing Defendants' written policies concerning the claims set forth in the action, including Defendants' policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing all wages at separation; reviewing and analyzing time and pay records; meeting and conferring regarding the information and documents produced; interviewing Class Members; drafting pleadings; researching California law; preparing damages models; consulting with an expert; preparing for and attending mediation; and negotiating and finalizing the settlement and related documents. (Orshansky Decl. ¶¶ 14, 25-27, 30-33.)

D. Class Counsel Are Experienced in Similar Litigation

Class Counsel believe that the settlement is fair and reasonable and serves the best interests of Class Members and PAGA Group Members. (*See* Settlement Agreement ¶ 40; Orshansky Decl. ¶ 36.) Although the recommendations of counsel proposing the class settlement are not conclusive, the Court can properly take the recommendations into account, particularly if counsel have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and significant discovery has been completed. (*See* Newberg § 11.47.) Here, Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions and have been appointed as class counsel in numerous cases alleging similar claims. (Orshansky Decl. ¶¶ 82-86.)

E. The Settlement Is Fair, Reasonable, and Adequate

To make a fairness determination, the Court should consider several factors, including “the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery and the stage of proceedings, [and] the experience and views of counsel.” (*Dunk v. Ford Motor Co.* (1986) 48 Cal.App.4th 1794, 1801.) “The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstance of each case.”

1 (*Wershba, supra*, 91 Cal.App.4th at p. 245.) As discussed below, the proposed settlement is fair,
2 adequate, and reasonable in light of the overall factors in this case.

3 **1. The Strength of Plaintiff's Case**

4 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
5 model for Defendants' liability. (Orshansky Decl. ¶ 37.) Although Plaintiff steadfastly maintains
6 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
7 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4
8 *infra*, Defendants presented numerous defenses to Plaintiff's claims, both on the merits and with
9 respect to class certification. (*Ibid.*) For example, Defendants defended against the minimum and
10 overtime wage claims by relying on policies that explicitly prohibited Class Members from engaging
11 in off-the-clock work. (*Id.* at ¶ 38.) Defendants also argued that Class Members worked in different
12 job positions and had different managers at four different dealerships, and, as a result, Defendants
13 contended there was variation to the circumstances that could allegedly cause the employees to be
14 deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this
15 variation in circumstances raised highly individualized questions of fact. (*Ibid.*) Further, Defendants
16 contended Plaintiff would face significant hurdles to certification given that Class Members signed
17 arbitration agreements with class action waivers as a condition of their employment, which if
18 enforceable would convert a putative class action (with the potential for class-wide damages) into
19 an individual dispute and action—effectively forcing Class Members to retain their own counsel and
20 proceed on the basis of individual claims only. (*Ibid.*) These risks justify a downward departure from
21 the maximum monetary exposure that each claim carries.

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

27 ///

28 ///

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

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

3. Risk of Maintaining Class Action Status

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

In addition, Plaintiff would face significant hurdles to certification given that Class Members signed arbitration agreements with class action waivers as a condition of their employment. (Orshansky Decl. ¶ 41; *see Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612 [class action waivers in arbitration agreements are enforceable].) If Defendants' arbitration agreement defense is successful,

1 it would severely limit the potential relief available to those Class Members who signed arbitration
2 agreements with class action waivers. (Orshansky Decl. ¶ 41) Even if Plaintiff prevailed and
3 certified a class action as to them, there is no guarantee Defendants would not later move for and
4 obtain decertification. (*Ibid.*) If the Court either denied class certification or later decertified it, the
5 Class would recover nothing, and Class Members would be forced to retain their own counsel and
6 proceed on the basis of individual claims only. (*Ibid.*)

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

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

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

17 Based on discovery and their investigation, Class Counsel determined Defendants’ degree
18 of liability, prepared an exposure analysis, and forecasted the expected recovery for each claim.
19 (Orshansky Decl. ¶ 43.) After calculating the possible recovery to Class Members for each claim,
20 in light of the arguments and defenses advanced by Defendants, Plaintiff discounted Defendants’
21 maximum damages exposure by 50% to account for the risk of non-certification, and by 25% for
22 the risk of being unsuccessful on the merits, yielding total damages of \$3,685,050.17. (*Ibid.*) With
23 PAGA penalties added of \$2,853,000, the aggregate dollar amount result is \$6,538,050.17 in total
24 damages and penalties. (*Ibid.*) Hence, the total settlement amount of \$1,800,000 represents
25 approximately 27.53% of Plaintiff’s potential realistic recovery, while avoiding the further expense
26 and serious risk of proceeding toward class certification and trial. (*Ibid.*) Utilizing a class-wide
27 damages study to assess the nature and magnitude of the claims in question, *see Kullar v. Foot*
28 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly meets requirements

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

4 **Unpaid Minimum and Overtime Wages**

5 Plaintiff, along with other non-exempt employees, performed pre- and post- shift off the
6 clock work to minimize the incidence of overtime. (Orshansky Decl. ¶ 44.) Plaintiff contended that
7 all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its employees no less
8 than the minimum wage for all hours worked, *see* Labor Code § 1197, thus, Plaintiff sought to
9 recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that
10 amount under Labor Code § 1194.2. (*Ibid.*) Additionally, Plaintiff contended that certain non-
11 discretionary pay was not included in employees’ regular rate of pay. (*Ibid.*)

12 Class Counsel analyzed the documents and data produced by Defendants and, in conjunction
13 with interviews of Plaintiff and Class Members, determined Defendants’ degree of liability and
14 amounts due in damages—specifically, the incidence and amount of purported off the clock activity.
15 (Orshansky Decl. ¶ 45.)

16 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off the clock
17 hours, Plaintiff estimated that Defendants are liable for an aggregate of approximately fifteen (15)
18 minutes of unpaid time per workweek. (Orshansky Decl. ¶ 46.) At the average hourly rate of \$28,
19 such yields an estimated damages amount of \$641,531.49, without discounting for risks associated
20 with certification or merits. (*Ibid.*)

21 In opposition to certification, Defendants contended that Plaintiff’s claim for off-the-clock
22 work is not amenable to class treatment, because employees worked in a variety of departments with
23 different requirements at four dealerships, and it would require an unmanageable series of mini-
24 trials to determine how much time was spent without pay. (Orshansky Decl. ¶ 47.) Further, in terms
25 of merit defenses, Defendants vigorously disagreed with Plaintiff’s theories regarding how much
26 off-the-clock work occurred in reality, and the credibility of those claimed hours given Defendants’
27 policies to the contrary. (*Id.* at ¶ 48.) The failure to track all hours poses evidentiary difficulties
28 because it is hotly contested how much off-the-clock work actually occurred. (*Id.* at ¶ 49.) Although

1 Class Counsel conducted multiple Class Member interviews, for Plaintiff to establish the quantity
2 of specific disputed and unrecorded work activities—especially over multiple job titles, at differing
3 pay rates, and across four dealerships —would have been costly, time-consuming, and daunting.
4 (*Ibid.*)

5 Defendants further responded that any off-the-clock time is *de minimis*. (Orshansky Decl. ¶
6 50.) Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*
7 (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis*
8 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
9 performed off-the-clock. (*Ibid.*) What is not clear, however, is to what extent the *de minimis* defense
10 would apply where the uncaptured hours were associated with an occasionally recurring activity.
11 (*Ibid.*)

12 Additionally, in response to Plaintiff’s allegation that overtime was underpaid because
13 Defendants incorrectly calculated the regular rate by failing to include non-discretionary forms of
14 pay, Defendants vigorously disputed the discretionary nature of certain payments, and the degree to
15 which they were required to be included in calculating the regular rate of pay. (Orshansky Decl. ¶
16 51.)

17 In light of these considerations—especially the evidentiary difficulties of demonstrating off-
18 the-clock work on a class-wide basis—Class Counsel applied a discount that incorporated the risks
19 of non-certification and being unsuccessful on the merits. (Orshansky Decl. ¶ 52.)

20 **Meal and Rest Period Violations**

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

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

1 employees, the California Supreme Court emphasized that meal periods are part of the remedial
2 worker protection framework to protect the health and safety of employees.

3 Although Defendants made some premium payments for non-compliant meal periods, those
4 payments are merely a portion of what should have been paid pursuant to code. *C.f.* Wage Order
5 Nos. 4-2001 and 7-2001, § 11(b). (Orshansky Decl. ¶ 55.) Consequently, Plaintiff alleged that
6 Defendants violated Labor Code §§ 226.7, 512, and applicable Wage Orders by failing to
7 compensate Plaintiff and Class Members for short, late, interrupted, and missed meal periods. (*Ibid.*)

8 Defendants, however, contended that they had practices, policies, and procedures to provide
9 meal and rest breaks every workday to their employees that fully complied with the law. (Orshansky
10 Decl. ¶ 56.) Defendants vehemently argued that they complied with the requirements articulated by
11 the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th
12 1004. (*Ibid.*) Specifically, Defendants maintained that they “provide” employees with a reasonable
13 opportunity to take timely meal periods of at least 30 minutes, relieve employees of all duties during
14 meal periods, and relinquish control over employees’ activities, including the ability to leave the
15 premises during meal periods. (*Ibid.*)

16 Like most employers facing meal period litigation, Defendants argued that employees were
17 apprised of their right to take meal periods and provided compliant meal periods, but some may
18 voluntarily have waived them. (Orshansky Decl. ¶ 57.) Defendants contended that the issue of
19 voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding
20 class certification. (*Ibid.*; see *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25
21 [holding that the defendant must be provided an opportunity to litigate affirmative defenses, even
22 when they turn on individual questions].)

23 Based upon the analysis of Class Members’ time and payroll records and, in conjunction
24 with interviews of Plaintiff and Class Members, Plaintiff determined that 33.5% of eligible shifts
25 were the subject of unique violations for missed, short, or late meal periods, and calculated the
26 potential exposure of this claim to be \$3,872,462.18. (Orshansky Decl. ¶ 58.)

27 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required
28 whereby employers “relinquish control over how employees spend their time and relieve employees

1 of all duties.” (Orshansky Decl. ¶ 59; *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257,
2 260.) Due to Defendants’ work demands and inadequate staffing, Plaintiff and Class Members did
3 not receive timely and compliant rest breaks, nor did Defendants relinquish control over how
4 employees spent their 10-minute rest periods. (Orshansky Decl. ¶ 59.) Plaintiff did not receive rest
5 break premium payments for non-compliant rest breaks, nor is there evidence that Defendants made
6 rest break premium payments to Class Members at any time (unlike non-compliant meal periods, for
7 which Defendants made some premium payments, as noted above). (*Id.* at ¶ 60.) Thus, Plaintiff
8 alleged that Defendants did not provide premium pay for each non-compliant rest break as required
9 under Labor Code § 226.7. (*Ibid.*)

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

19 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendants’
20 exertion of pressure, control, and resulting violations is likely to be more difficult. (Orshansky Decl.
21 ¶ 62.) Thus, Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and other
22 Class Members for a maximum exposure rate of \$2,350,091.80. (*Ibid.*) For settlement purposes, and
23 to account for the difficulties of certifying and proving unrecorded rest break violations, a downward
24 departure from that maximum exposure was and is warranted. (*Ibid.*)

25 **Unreimbursed Expenses**

26 Plaintiff alleged a cause of action under Labor Code § 2802(a), which states that an employer
27 must reimburse employees for all necessary expenditures that employees incur in discharging their
28 duties. (Orshansky Decl. ¶ 63.) Here, Plaintiff and Class Members were required to use their personal

1 cell phones to communicate with supervisors and coworkers for reasons related to work, yet
2 Defendants failed to reimburse for these necessary business expenses. (*Ibid.*)

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

12 Defendants also argued that the California Labor Code only requires reimbursement of
13 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
14 work—and argued that distinguishing a necessary expense from an unnecessary one would require
15 individualized inquiry. (Orshansky Decl. ¶ 65; see Labor Code § 2802; *Gattuso v. Harte-Hanks*
16 *Shoppers, Inc.* (2007) 42 Cal.4th 554.) Furthermore, whether an expense was necessary would
17 depend in part on the reasonableness of the employee’s choice and would thus have to be established
18 by way of extensive individual factual inquiry and/or statistical evidence. (*Cochran v. Schwan’s*
19 *Home Services, Inc.* (2014) 228 Cal.App.4th 1137.)

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

23 **Wage Statement Violations**

24 Plaintiff alleged a cause of action under Labor Code § 226(a) for Defendants’ failure to
25 provide accurate itemized wage statements. (Orshansky Decl. ¶ 67.) Failure to comply with the
26 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
27 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
28 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*

1 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because
2 if Defendants did not provide wages for all hours worked, premiums for non-compliant meal and
3 rest breaks, and so forth, then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶
4 67.)

5 Defendants contended, however, that Labor Code § 226(e) penalties are not automatic.
6 (Orshansky Decl. ¶ 68.) Rather, the employee must show that Defendants’ non-compliance was
7 “knowing and intentional.” (*Ibid.*) Defendants suggested that any non-compliance was not knowing
8 and intentional. (*Ibid.*) Moreover, Defendants argued that meal and rest period violations cannot
9 support derivative wage statement penalties. (*Ibid.*; see *Naranjo v. Spectrum Security Service, Inc.*
10 (2019) 40 Cal.App.5th 444, 474 [holding that violations of Labor Code’s meal break provisions do
11 not entitle employees to pursue the derivative wage statement penalties]; *c.f.*, but *review granted*,
12 *Naranjo v. Spectrum Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257
13 Cal.Rptr.3d 188.) Further, because the damages for this cause of action are penalties, the statute of
14 limitations is only one year prior to the filing of the original complaint. (See Code Civ. Proc. § 340;
15 Orshansky Decl. ¶ 69.) Given the derivative nature of this cause of action and the risk and difficulty
16 of establishing the other causes of action upon which the derivative wage statement violations are
17 based, for settlement purposes, Plaintiff applied a discount of 50% to the maximum potential
18 recovery, yielding a damages amount of \$429,275. (Orshansky Decl. ¶ 70.)

19 **Derivative Waiting Time and UCL Claims**

20 Plaintiff further asserted causes of action against Defendants for failure to timely pay all
21 wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business
22 practices. (Orshansky Decl. ¶ 71; see Labor Code § 203; Business and Professions Code §§ 17200,
23 *et seq.*) As with other claims, Defendants vigorously disagreed that they engaged in any conduct
24 giving rise to liability or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶
25 71.)

26 Defendants argued that waiting time penalties are not appropriate because they attempted to
27 pay employees all final wages owed in good faith upon their separation, thereby precluding a finding
28 of willfulness necessary to obtain waiting time penalties. (Orshansky Decl. ¶ 72.) Moreover,

1 Defendants maintained that no waiting time penalties were recoverable from alleged meal or rest
2 period violations. (*Ibid.*) Defendants raised the Second Appellate District’s decision in *Naranjo*,
3 *supra*, 40 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage
4 statement nor waiting time penalties. (Orshansky Decl. ¶ 72.) Yet the *Naranjo* decision is currently
5 pending before the California Supreme Court, *see, Naranjo, supra, review granted*, Supreme Court
6 Case No. S258966, 455 P.3d 704 (January 02, 2020), and although fully briefed, the outcome of this
7 important case remains to be seen.⁶ (Orshansky Decl. ¶ 72.) Finally, Defendants argued that
8 adequate remedies at law exist to render the action unsuitable for equitable remedies, and again
9 contended that the allegations underlying the unfair competition claim lacked merit. (*Id.* at ¶ 73.)

10 Class Counsel calculated the value of the waiting time claim based on the count of 754
11 former employees. (Orshansky Decl. ¶ 74.) However, because of its derivative nature, Plaintiff had
12 to account for the difficulty and uncertainty of proving the underlying claims and the risk of an
13 adverse decision in *Naranjo*. Accordingly, the maximum potential value of the waiting time claim
14 warranted a 50% discount for settlement purposes, yielding the amount of \$2,533,440. (*Ibid.*)

15 PAGA Penalties

16 The success of Plaintiff’s PAGA claim is wholly dependent upon the success of his
17 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
18 (Orshansky Decl. ¶ 75.) Defendants maintained and continue to maintain they had legally compliant
19 employment policies and practices throughout the statutory period. (*Id.* at ¶ 76.) Defendants denied
20 and continue to deny that they ever violated any provision of the California Labor Code and argued
21 that, even assuming such violations occurred, Defendants will not be treated as having engaged in
22 subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendants argued
23 that heightened civil penalties for subsequent violations would not be assessed unless it could be

24
25 ⁶ 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 shown that Defendants had notice that they were violating the law, *e.g.*, they had been cited by a
2 labor agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g., Amaral v. Cintas Corp.* (2008)
3 163 Cal.4th 1157, 1209.) Thus, Defendants contended that, at best, even if a violation giving rise to
4 a penalty was shown for each pay period, only the lower civil penalty associated with initial
5 violations would apply. (Orshansky Decl. ¶ 76.)

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

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

21 Although, strictly speaking, class certification requirements are not required to be satisfied
22 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
23 valuation of a PAGA claim is uncertain.⁷ (Orshansky Decl. ¶ 80.) Thus, Class Counsel applied

24
25 ⁷ Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but
26 rather to facilitate the enforcement of the labor laws. (*Ibid.*; *see, e.g., Williams v. Superior Court*
27 (2017) 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Labor Code §
28 2699(i).) In assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount
which the LWDA and the aggrieved employees are to receive formally in the form of monetary civil
penalties but instead whether the total settlement amount achieves the PAGA’s objectives. “When
PAGA claims are settled, courts “consider whether the proposed PAGA settlement is fair and
adequate in view of the purposes and policies of the statute[]” and “[t]hose purposes and policies

1 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or
2 trial, the risks regarding success on the merits and establishing liability, and the risks with proving
3 the extent of penalties that are warranted and possible discretionary reduction of penalties by the
4 Court. (*Ibid.*) As a result, Plaintiff used the “initial” \$100 per pay period violation (as opposed to the
5 \$200 subsequent per violation rate) to calculate a realistic estimate of \$2,853,000 in potential PAGA
6 penalty exposure—of which, by statute, only 25%, or \$713,250—would be recoverable by aggrieved
7 employees. (*Ibid.*)

8 Summary

9 After Class Counsel calculated the possible recovery to Class Members for each of the above
10 claims, in light of Defendants’ arguments and defenses, Plaintiff discounted Defendants’ maximum
11 damages exposure by 50% to account for the risk of non-certification, and by 25% for the risk of
12 being unsuccessful on the merits, yielding total damages of \$3,685,050.17. (Orshansky Decl. ¶ 81.)
13 With PAGA penalties added of \$2,853,000, the aggregate dollar amount result is \$6,538,050.17 in
14 total damages and penalties. (*Ibid.*) Hence, the total settlement amount of \$1,800,000 represents
15 approximately 27.53% of Plaintiff’s potential realistic recovery, while avoiding the further expense
16 and serious risk of proceeding toward class certification and trial. (*Ibid.*) “The fact that a proposed
17 settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean
18 that the proposed settlement is grossly inadequate and should be disapproved.” (*Linney v. Cellular*
19 *Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted]; *see, e.g.,*
20 *Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 [preliminarily
21 approving wage and hour class action settlement stating, “[a]lthough 15% represents a modest
22 fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for

23
24 include benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging
25 compliance with California Labor Code provisions, and deterring noncompliance.” (*O’Connor v.*
26 *Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132-33 and 1135.) A “[c]ourt does not
27 review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine
28 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 p. 4:14-16.)

1 the Court to grant preliminary approval given the merits of Plaintiff's claims."].) Taking into
2 account the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce
3 the civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and
4 adequate. (Orshansky Decl. ¶ 81.)

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

6 This Court should order distribution of the proposed Notice of Pendency of Class and
7 Representative Action Settlement, *see* Exhibit 1 to the Settlement Agreement (Exhibit A to the
8 Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known
9 mailing address information provided by Defendants. (Orshansky Decl. ¶ 94.) Here, Plaintiff
10 proposes that the settlement be administered by CPT Group, Inc. ("CPT"), an experienced class
11 action settlement administrator. (Settlement Agreement ¶¶ 32, 49(a); Orshansky Decl. ¶ 95.) Class
12 Members' addresses will be ascertainable through Defendants' personnel and payroll records, which
13 Defendants will provide to CPT within ten (10) calendar days after preliminary approval of the
14 settlement. (Settlement Agreement ¶ 49(b); Orshansky Decl. ¶ 95.) To the extent that any notices
15 are returned, CPT will run those addresses through the National Change of Address database and/or
16 conduct skip traces to obtain current address information. (Settlement Agreement ¶ 49(e);
17 Orshansky Decl. ¶ 95.)

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

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

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

5 **IX. CONCLUSION**

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

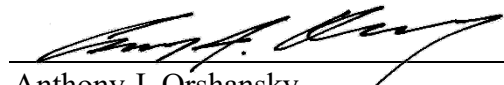
- 8 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
9 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
10 Representative Action Settlement, attached as Exhibit 1 to the Settlement Agreement;
11 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the
12 Class Members identified during the Class Period under Civil Code § 382 for settlement purposes
13 only;
14 4. Approving and appointing Plaintiff Gregorio Rodriguez as the Class Representative;
15 5. Approving and appointing the law firm of CounselOne, P.C. as Class Counsel;
16 6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;
17 7. Setting a date for the Final Approval Hearing; and
18 8. Any further relief the Court deems just and proper.

19
20 Dated: April 6, 2022

Respectfully submitted,

21 COUNSELONE, PC

22 By:



23 Anthony J. Orshansky
24 Jennifer L. Connor
25 Justin Kachadoorian
26 Attorneys for Plaintiff
27
28