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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

KRISTA OZUNA, individually and on
behalf of other members of the general
public similarly situated and on behalf of
other aggrieved employees pursuant to the
California Private Attorneys General Act,

Plaintiff,

v.

CMRE FINANCIAL SERVICES, INC., a
California corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No.: 30-2019-01087365-CU-OE-CXC

Honorable William D. Claster
Department CX104

CLASS ACTION

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

Reservation Number: 73429309

Preliminary Approval Hearing

Date: January 22, 2021
Time: 9:00 a.m.
Dept.: CX104

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court,
on January 22, 2021, at 9:00 a.m. in Department CX104 of the above-entitled Court, located at
751 West Santa Ana Boulevard, Santa Ana, California 92701, plaintiff Krista Ozuna ("Plaintiff"

1 or “Class Representative”), individually and on behalf of all others similarly situated, will and
2 hereby does move this Court for:

3 1. Granting Plaintiff leave to file the [Proposed] First Amended Class Action
4 Complaint for Damages and Enforcement under the Private Attorneys General Act, Cal. Labor
5 Code § 2698, *et seq.* which is attached as “Exhibit A” to the [Proposed] Order Granting
6 Preliminary Approval of Class Action Settlement;

7 2. Preliminary approval of the proposed settlement of this lawsuit;

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

10 **Class Members** - All persons employed in California by Defendant as hourly-
11 paid or non-exempt employees at any time during the time period from August 1,
2015 to August 1, 2020 (the “Class” or “Class Members”).

12 4. Preliminary appointment of Plaintiff Krista Ozuna as Class Representative;

13 5. Preliminary appointment of Lawyers *for* Justice, P.C. and CounselOne, P.C. as
14 Class Counsel;

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

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

20 8. Approval of the proposed Notice of Class Action Settlement and entry of the
21 proposed Order instructing the notice to be disseminated to the Class as provided in the
22 settlement.

23 This motion is based on this notice of motion, the attached memorandum of points and
24 authorities, and the declarations of Krista Ozuna, Edwin Aiwanian and Anthony J. Orshansky
25 filed concurrently herewith, and the exhibits attached thereto, the pleadings and other papers filed
26 in this action, and on any further oral or documentary evidence or argument presented at the time
27 of hearing. Finally, given the multiplicity of issues addressed in this Motion, Plaintiff respectfully
28 believes there is good cause to exceed the 20-page limit set forth in California Rule of Court

1 3.764(c)(2), and respectfully requests that the Court consider Plaintiff's memorandum of points
2 and authorities.

3 Dated: December 17, 2020

Respectfully submitted,
COUNSELONE, PC

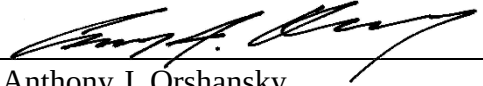
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6 By: 
7 Anthony J. Orshansky
8 Justin Kachadoorian
9 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Krista Ozuna (“Plaintiff” or “Class Representative”), individually and on behalf
4 of all others similarly situated,¹ seeks preliminary approval of the settlement agreement entered
5 into with defendant CMRE Financial Services, Inc. (“Defendant”). The Class Action and PAGA
6 Settlement Agreement and Stipulation (“Settlement Agreement”) between Plaintiff and
7 Defendant (together, the “Parties”), if approved, will resolve specific claims of the Plaintiff and
8 Settlement Class Members in exchange for Defendant’s agreement to pay a maximum amount
9 of ***nine hundred thousand dollars (\$900,000) into a non-reversionary common settlement fund***
10 that will be available for distribution to Settlement Class Members. Based upon the data received
11 from Defendant, there are approximately 978 Class Members employed as non-exempt hourly
12 employees during the Class Period.

13 This is a class and representative action against Defendant for abusing its non-exempt
14 and hourly paid employees by violating wage-and-hour laws under the California Labor Code
15 and Business and Professions Code. Plaintiff’s lawsuit seeks to recover unpaid wages and
16 overtime, premiums for improper meal and rest breaks, reimbursement of business expenses,
17 restitution, liquidated damages, penalties for improper wage statements, waiting time penalties,
18 wages, civil penalties pursuant to the Private Attorneys General Act (“PAGA”), injunctive and
19 other equitable relief, prejudgment interest, and attorneys’ fees and costs.

20 After engaging in substantial independent investigation and after mediation with T.
21 Warren Jackson, Esquire of Signature Resolution, the Parties agreed to settle Plaintiff’s and the
22 Settlement Class Members’ claims alleged in the action for the non-reversionary sum of nine
23 hundred thousand dollars (\$900,000) (“Gross Settlement Amount”). After deductions for
24 attorneys’ fees and costs to Class Counsel, enhancement payment to the Class Representative,
25 Settlement Administrator costs, and the PAGA payment to the Labor & Workforce Development
26 Agency (“LWDA”), the remaining amount (the “Net Settlement Amount”) of approximately

27 ¹ “Class Members” are defined as all persons employed in California by Defendant as hourly-paid or non-
28 exempt employees at any time during the time period from August 1, 2015 to August 1, 2020. (Settlement Agreement §§ 3, 6.) “Settlement Class” members are defined as Class Members who have not submitted a timely and valid Request for Exclusion. (Settlement Agreement § 27.)

1 \$495,500 will be distributed to the Settlement Class.² The entire Net Settlement Amount must be
2 paid out to Settlement Class Members. Settlement Class Members will automatically receive
3 payments *without the need to submit claim forms*.

4 The settlement is fair, reasonable, and adequate, and in the best interests of Class
5 Members. Consequently, Plaintiff, with the consent and approval of Defendant, hereby moves
6 for an order: (1) conditionally certifying the Class for settlement purposes; (2) granting
7 preliminary approval of the Settlement Agreement; (3) approving the Notice of Class Action
8 Settlement; and (4) setting a hearing for final approval of the settlement.

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

10 **A. Discovery and Investigation**

11 Prior to initiating this lawsuit, counsel for Plaintiff (herein, “Class Counsel”) thoroughly
12 investigated the claims and considered the facts and circumstances underlying the pertinent
13 issues and applicable law. (Declaration of Anthony J. Orshansky (“Orshansky Decl.”) ¶ 22 filed
14 concurrently herewith). This required thorough discussions and interviews with Plaintiff and
15 several other Class Members as well as research into the various legal issues involved in the
16 case. (*Ibid.*) After conducting their initial investigation, Class Counsel determined that the
17 claims were well suited for class action adjudication owing to what appeared to be a common
18 course of conduct affecting a similarly situated group of employees. (*Ibid.*; Declaration of Edwin
19 Aiwazian (“Aiwazian Decl.”) ¶ 9, filed concurrently herewith.)

20 As a result, Plaintiff filed this wage and hour class and representative action alleging the
21 following claims: (1) failure to pay overtime pursuant to Labor Code §§ 510 and 1198; (2)
22 failure to provide meal period premiums in violation of Labor Code §§ 226.7 and 512(a); (3)
23 failure to provide rest period premiums in violation of Labor Code § 226.7; (4) failure to pay
24 minimum wages pursuant to Labor Code §§ 1194, 1197, and 1197.1; (5) failure to pay timely
25 wages upon termination in violation of Labor Code §§ 201 and 202; (6) failure to timely pay
26 wages during employment in violation of Labor Code § 204; (7) failure to provide accurate and

27
28 ² Payment of Defendant’s share of employer payroll taxes for payments to Settlement Class Members
allocated as wages shall be separately funded (*i.e.*, outside of the settlement fund) by Defendant.
(Settlement Agreement §§ 15, 36.)

1 itemized wage statements in violation of Labor Code § 226(a); (8) failure to keep requisite
2 payroll records in violation of Labor Code § 1174(d); (9) failure to reimburse business expenses
3 in violation of Labor Code §§ 2800 and 2802; (10) violations of California Business and
4 Professions Code § 17200, *et seq.*; and (11) penalties pursuant to California’s Private Attorneys
5 General Act (Labor Code § 2698, *et seq.*). (Orshansky Decl. ¶ 23.)

6 Plaintiff’s lawsuit seeks recovery of unpaid wages and overtime, premiums for improper
7 meal and rest breaks, reimbursement of business expenses, restitution, liquidated damages,
8 penalties for improper wage statements, waiting time penalties, wages, civil penalties pursuant
9 to the Private Attorneys General Act (“PAGA”), injunctive and other equitable relief,
10 prejudgment interest, and attorneys’ fees and costs. (Id. at ¶ 24.)

11 Defendant denies Plaintiff’s allegations of wrongdoing. Defendant does not believe that
12 any liability to Plaintiff or other Class Members exist, or that Plaintiff or Class Members are
13 entitled to any recovery. (Id. at ¶ 25.) In settling, Defendant does not admit liability with respect
14 to the alleged claims made by Plaintiff and makes no admissions regarding any facts or law
15 related to the lawsuit. (Ibid.) Defendant also disputes that Plaintiff would be able to certify a
16 class outside of the settlement context because, *inter alia*, Plaintiff’s claims on the merits would
17 require a series of individualized mini-trials; Defendant agreed to a settlement class only. (Ibid.)

18 Class Counsel conducted discovery which yielded information and documentation
19 concerning the claims set forth in the action, such as Defendant’s written policies concerning
20 the claims set forth in the action, including Defendant’s policies and procedures regarding the
21 payment of wages, the provision of meal and rest breaks, time keeping policies, such as
22 recording hours, issuance of wage statements, and providing all wages at separation, as well as
23 information regarding the number of Class Members and the mix of current versus former
24 employees, the average number of hours worked, the wage rates in effect, and length of
25 employment for the average Class Member. (Id. at ¶ 26; Aiwazian Decl. ¶ 10.)

26 Defendant produced a substantial amount of documentation for Class Members,
27 including time and pay records and the employee handbooks, as well as composite data for the
28 Class. Counsel met and conferred at length regarding the information and documents produced.

(Orshansky Decl. ¶ 27; Aiwazian Decl. ¶ 10.)

Class Counsel analyzed the documents produced to determine Defendant's degree of liability and amounts due in damages. (Orshansky Decl. ¶ 28; Aiwazian Decl. ¶ 11.)

B. Mediation and Settlement

Thereafter, the Parties participated in a full-day mediation, where they debated and discussed their positions. (Orshansky Decl. ¶ 29.) The Parties participated in a lengthy mediation session with T. Warren Jackson, Esquire of Signature Resolution. Mr. Jackson is experienced in resolving complex general litigation, labor, employment, education, and civil rights cases. (Ibid.) During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. (Id. at ¶ 30; Aiwazian Decl. ¶ 13.) These were contentious issues because of the factual and legal complexity of the case. (Orshansky Decl. ¶ 30.)

The case did not settle at mediation. The Parties continued to negotiate with the assistance of Mr. Jackson. (Id. at ¶ 31.) After several weeks, the Parties agreed to resolve the matter. Thereafter, the Parties engaged in extensive negotiations to draft the Memorandum of Understanding and the Settlement Agreement, along with the Notice of Class Action Settlement. (Ibid.)

From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class Counsel believe that the recovery being made available to Settlement Class Members is fair, reasonable, and adequate taking into consideration the amounts received in other wage and hour class actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Settlement Class Members' claim to the settlement award he or she will receive. (Id. at ¶ 33.) Class Counsel believe that the settlement serves the best interests of Settlement Class Members. (Ibid.) Further, and based on the settlement negotiations, which were hard fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class actions and wage and hour cases, the settlement was the product of a non-

collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the action. (Id. at ¶ 32.)

Defendant has likewise concluded that, because of the substantial expense of defending this action, the length of time necessary to resolve the issues presented therein, the inconvenience involved, and the concomitant disruption to its business operations, it is in its best interest to accept the terms of the Settlement Agreement. (Settlement Agreement § 32.)

III. SUMMARY OF BASIC SETTLEMENT TERMS

Under the terms of the settlement, Defendant agrees to pay a non-reversionary amount of \$900,000 to settle the claims asserted in the action. (*See*, Settlement Agreement § 15.) This amount shall be inclusive of all settlement payments to Settlement Class Members, the enhancement award to the Class Representative, all expenses and costs to the Settlement Administrator, CPT Group, Inc., all attorneys' fees and costs to Class Counsel, and payment to the California LWDA for civil penalties pursuant to statute. The amount available for distribution to Settlement Class Members is determined by deducting the following from the Gross Settlement Amount:

- Up to 35 percent of the Gross Settlement Amount in attorneys' fees to Class Counsel;
- Up to \$20,000 in litigation costs to Class Counsel;
- Up to \$10,000 to the Class Representative as an enhancement and in exchange for a general release of claims;
- \$37,500 – which is 75% of the \$50,000 allocated – to the LWDA for civil penalties pursuant to statute; and
- Up to \$22,000 to the Settlement Administrator to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$495,500, is called the “Net Settlement Amount.” (Settlement Agreement § 19.) The entire Net Settlement Amount will be paid out to Settlement Class Members. Settlement Class Members will automatically receive payments without the need to submit claim forms.

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

2 If all of the approximately 978 Class Members participate in the settlement, then the
3 average Individual Settlement Payment would be an estimated \$506.65 per Settlement Class
4 Member. Of course, any Class Member who prefers to preserve his or her right to pursue relief
5 or seek an alternative recovery may opt out. (Orshansky Decl. ¶ 9.)

6 In actuality, a Settlement Class Member will receive a proportional share of the Net
7 Settlement Amount based on his or her workweeks. (Settlement Agreement § 36e.) The sum of
8 all Settlement Class Members' individual workweeks will be the "Total Workweeks." (Ibid.) The
9 Net Settlement Amount will be divided by the Total Workweeks to yield the "Workweek Value."
10 Each Settlement Class Member's Individual Settlement Share will be determined by multiplying
11 his or her individual workweeks by the Workweek Value. (Ibid.) After reduction of employee
12 taxes from each Settlement Class Member's Individual Settlement Share, the net result will yield
13 his or her Individual Settlement Payment. (Ibid.) As a result, the consideration paid to each
14 Settlement Class Member is tailored to the impact of Defendant's alleged violations as well as
15 the claims he or she is releasing if he or she does not opt out of the settlement. (Orshansky Decl.
16 ¶ 8.) Of course, any Settlement Class Member who prefers to preserve his or her right to pursue
17 relief or seek an alternative recovery may opt out. (Settlement Agreement § 43.)

18 **B. Attorneys' Fees, Costs, and Representative Enhancement Payments**

19 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of
20 seeking final approval of the settlement in the amount of \$10,000 for her services to the
21 Settlement Class and a general release of all claims against Defendant. (Settlement Agreement §
22 36c.); (Orshansky Decl. ¶ 10.) "[I]ncentive awards are fairly typical in class action cases . . . and
23 are intended to compensate class representatives for work done on behalf of the class [and] to
24 make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee*
25 *Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393-1394. Plaintiff's requested enhancement
26 payment is intended to recognize the significant benefits conferred upon the Class due to the time
27 and effort that Plaintiff expended on behalf of the Class, including providing factual information
28 and documents to Class Counsel, discussing the claims and theories at issue in the case with

1 Class Counsel, identifying potential witnesses, reviewing documents, reviewing discovery
2 requests, reviewing the Settlement Agreement, as well as the significant risks Plaintiff undertook
3 by agreeing to serve as the named plaintiff in this case, and the fact that Plaintiff agreed to a
4 general release of all claims subject to a waiver of Civil Code section 1542. (*See, Declaration of*
5 *Krisa Ozuna, passim; Settlement Agreement* §§ 35, 36c; *Aiwazian Decl.* ¶ 14.)

6 Class Counsel will apply for an attorneys' fees award of 35 percent of the Gross
7 Settlement Amount, and up to \$20,000 in costs. (*Settlement Agreement* § 36a.); (*Orshansky Decl.*
8 ¶ 11.) Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,
9 expensive, and time-consuming litigation on a purely contingent fee basis. (*Orshansky Decl.* ¶
10 11.) Class Counsel have incurred substantial attorneys' fees conducting pre-filing investigation,
11 analyzing Plaintiff's claims, conducting legal research and analysis, conducting discovery,
12 meeting and conferring with defense counsel, interviewing putative class members, reviewing
13 documents produced by Defendant, including corporate policies, employee time and payroll
14 records, building damages models, preparing for and attending mediation, routine case updates
15 and consultations with the client, negotiating and preparing the Memorandum of Understanding,
16 long-form Settlement Agreement, Notice of Class Action Settlement, and this motion for
17 preliminary approval and supporting documents. (*Ibid.*; *Aiwazian Decl.* ¶¶ 9-13.) Class Counsel
18 will also expend future attorney time in attending the hearing on this Motion, overseeing the
19 notice and administration process, drafting the Final Approval Motion and supporting
20 documents, and attending the Final Approval hearing, among other tasks, such as addressing
21 questions from Settlement Class Members. (*Orshansky Decl.* ¶ 12.)

22 Both California and federal courts have recognized that an appropriate method for
23 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
24 as a result of the settlement. *See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal. 5th 480,
25 506 ("the percentage of fund method survives in California class action cases..."); *Wershba v.*
26 *Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 (recognizing both the "percentage of
27 recovery" and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees
28 in the range of 20% to 50%, depending on the circumstances of the case. *See 4 Newberg on Class*

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

6 Class Counsel submit that their request for attorneys’ fees is reasonable when viewed as
7 an overall percentage of the settlement in light of the substantial risks and significant work
8 undertaken, the results obtained for the Settlement Class, and the efficiency with which the
9 Parties have conducted the litigation. (Orshansky Decl. ¶ 13.) Assuming that the Court grants
10 preliminary approval, Class Counsel will seek an award of attorneys’ fees and litigation costs at
11 the time of seeking final approval of the settlement.

12 **IV. REQUEST FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

13 To effectuate the terms of the Settlement Agreement and intent of the Parties, the Parties
14 agree that leave should be granted for Plaintiff to file an amended complaint to add a cause of
15 action for violation of PAGA (Labor Code section 2698, *et seq.*) on behalf of Plaintiff and
16 aggrieved employees, for the purposes of resolution of the Action. As such, Plaintiff respectfully
17 requests leave to file the First Amended Class Action Complaint for Damages and Enforcement
18 under the Private Attorneys General Act, Cal. Labor Code § 2698, *et seq.* (“First Amended
19 Complaint”) so that the operative complaint in this Action formally asserts the causes of action
20 and allegations that have been investigated, litigated, mediated, and ultimately settled, by the
21 Parties, and so that the terms of the settlement may be effectuated.

22 **V. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

23 Express judicial policy favors maintaining wage and hour actions as class actions. *Prince*
24 *v. CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981)
25 29 Cal. 3d 462 (finding that California public policy “encourages the use of the class action
26 device”). Any doubt as to the appropriateness of class treatment should be resolved in favor of
27 class certification, subject to later modification if necessary. *Id.* at 473-475. The decision to
28 certify a class is purely a procedural one and should be based on the allegations in the operative

1 complaint, and not in the perceived factual or legal merit of the class claims. *Linder v. Thrifty*
2 *Oil Co.* (2000) 23 Cal. 4th 429, 439-441.

3 To certify a settlement class, the trial court must find the two primary requirements for
4 maintaining a class action: (1) there must be an ascertainable class and (2) there must be a well-
5 defined community of interest in the questions of law and fact involving the parties to be
6 represented. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 805-809; *Daar v. Yellow Cab*
7 *Company* (1967) 67 Cal. 2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal. App.
8 4th 467, 471; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341. These
9 criteria are met here for the reasons set forth below.

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

11 Whether a class is ascertainable is determined by examining the class definition, the size
12 of the class and the means available for identifying class members. *See, Vasquez, supra*, 4 Cal.
13 3d at 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal. App. 3d 1263,
14 1271; *Miller v. Woods* (1983) 148 Cal. App. 3d 862, 873. Class members are “ascertainable”
15 where they may be readily identified without unreasonable expense or time.

16 Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v.*
17 *Target Corp.* (2010) 189 Cal. App. 4th 905, 919. Class Members are comprised of all persons
18 employed in California by Defendant as hourly paid or non-exempt employees at any time
19 during the time period from August 1, 2015 to August 1, 2020. (Settlement Agreement §§ 3,
20 6.) Thus, all Class Members are of a specific type (hourly paid or non-exempt employees)
21 employed within California. Defendant is required to and does maintain a record of each such
22 person, including contact information and Social Security numbers. (Orshansky Decl. ¶ 76.)
23 Documents and information exchanged reflect a class of approximately 978 current and former
24 hourly non-exempt employees working in California during the Class Period. (*Ibid.*) Thus, the
25 Settlement Class satisfies the ascertainability and numerosity requirements. *See e.g., Collins v.*
26 *Rocha* (1972) 7 Cal. 3d 232 (finding a class of 44 farm workers sufficiently numerous).

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28 ///

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

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

4 [D]oes not depend upon an identical recovery, and the fact that each member of the class
5 must prove his separate claim to a portion of any recovery by the class is only one factor
6 to be considered...The mere fact that separate transactions are involved does not of itself
7 preclude a finding of the requisite community of interest so long as every member of the
8 alleged class would not be required to litigate numerous and substantial questions to
9 determine his individual right to recover subsequent to the rendering of any class
10 judgment which determined in plaintiffs' favor whatever questions were common to the
11 class. *Id.* at 809.

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

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

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

1 Plaintiff's claims are typical of those held by the members of the Class. (Orshansky Decl. ¶ 78.)
2 Like all other Class Members, Plaintiff was a non-exempt hourly employee working for
3 Defendant in California during the Class Period. (Ibid.) Plaintiff was not compensated for all of
4 the hours she worked, was not provided with legally compliant meal and rest breaks, and was
5 required to incur business expenses necessary to perform her job duties without reimbursement.
6 (Ibid.) Plaintiff was therefore impacted by the same challenged policies that allegedly injured the
7 Class as a whole and was subject to the same defenses forwarded by Defendant as to the Class
8 and is therefore typical. (Ibid.)

9 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent**
10 **the Settlement Class**

11 The adequacy of representation requirement examines conflicts of interest between
12 named parties and the class(es) they seek to represent. *Capital People First v. Department of*
13 *Developmental Services* (2007) 155 Cal. App. 4th 676, 697. Here, Plaintiff and Class Counsel
14 will adequately represent the Class, as there are no conflicts between the named Plaintiff and
15 the Class she seeks to represent. (Orshansky Decl. ¶ 79); *McGhee v. Bank of America* (1976) 60
16 Cal. App. 3d 442, 450 (finding adequacy satisfied where there was no indication that plaintiff's
17 counsel were not qualified and the named plaintiff had no interests antagonistic to those of the
18 proposed class). Class Counsel also have extensive experience in wage and hour litigation.
19 (Orshansky Decl. ¶¶ 70-74, 79; Aiwazian Decl. ¶¶ 6-7.)

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

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

proceeding by numerous separate actions – not between the complexity of a class suit that must accommodate some individualized inquires and the absence of any remedial proceeding whatsoever.”) Finally, in the context of settlement, the superiority concerns are essentially non-existent.

VI. THE TWO-STEP APPROVAL PROCESS

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

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

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

VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

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

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

To summarize, the settlement here is fair because it offers payment to each Settlement Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the settlement proceeds whereby the funds are allocated to individual Settlement Class Members proportionally based on the respective number of workweeks that they worked during the Class Period. (Orshansky 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 Anthony J. Orshansky, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm’s length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*; Aiwazian Decl. ¶¶ 9-13.)

1) Negotiations Were at Arm’s-Length before a Respected Mediator

The Parties engaged in a mediation session with T. Warren Jackson, Esquire of Signature Resolution. (Orshansky Decl. ¶ 29.) Mr. Jackson is experienced in resolving complex general

1 litigation, labor, employment, education and civil rights cases, and an experienced and well-
2 regarded mediator of complex wage and hour class actions. (Ibid.; Aiwazian Decl. ¶13.) The
3 settlement negotiations were hard-fought and the settlement is the product of an adversarial, non-
4 collusive settlement process in which the Parties were forced to make significant compromises
5 in the interest of reaching a full and complete settlement of the action. (Orshansky Decl. ¶ 32;
6 Aiwazian Decl. ¶13.)

7 **2) Investigation Was Sufficient to Allow Counsel to Act Intelligently**

8 Throughout this case, Settlement Class Members have been represented by counsel who
9 have years of experience in employment class action litigation. (Id. at ¶¶ 70-74; Aiwazian Decl.
10 ¶¶ 6-7.) Class Counsel devoted a considerable amount of time to the prosecution of this case,
11 including, but not limited to, interviewing Plaintiff and other Class Members; reviewing
12 Defendant's written policies concerning the claims set forth in the action, including Defendant's
13 policies and procedures regarding the payment of wages, the provision of meal and rest breaks,
14 time keeping policies, such as recording hours, issuance of wage statements, and providing all
15 wages at separation; reviewing and analyzing Class Members' time and pay records; meeting
16 and conferring regarding the information and documents produced; drafting pleadings;
17 researching California law, preparing for and attending mediation; and negotiating and finalizing
18 the settlement and related documents. (Orshansky Decl. ¶¶ 26-31; Aiwazian Decl. ¶¶ 9-13.)

19 **3) Class Counsel Are Experienced in Similar Litigation**

20 Class Counsel believe that the settlement is fair and reasonable and serves the best
21 interests of the Settlement Class Members. (Orshansky Decl. ¶ 33.) Although the
22 recommendations of counsel proposing the class settlement are not conclusive, the Court can
23 properly take the recommendations into account, particularly if counsel have been involved in
24 litigation for some period of time, appear to be competent, have experience with this type of
25 litigation, and significant discovery has been completed. *See, Newberg*, § 11.47. Here, Plaintiff
26 is represented by competent and experienced counsel who possess extensive experience litigating
27 wage and hour class actions and have been appointed as class counsel in numerous cases alleging
28 similar claims. (Orshansky Decl. ¶¶ 70-74; Aiwazian Decl. ¶¶ 6-7.)

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

2 To make a fairness determination, the Court should consider several factors, including
3 “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further
4 litigation, the risk of maintaining class action status through trial, the amount offered in
5 settlement, the extent of discovery and the stage of proceedings, [and] the experience and views
6 of counsel.” *Dunk v. Ford Motor Co.* (1986) 48 Cal. App. 4th 1794, 1801. “The list of factors is
7 not exclusive and the court is free to engage in a balancing and weighing of factors depending
8 on the circumstance of each case.” *Wershba, supra*, 91 Cal. App. 4th 224, 245. As discussed
9 below, the proposed settlement is fair, adequate, and reasonable in light of the overall factors in
10 this case.

11 **1) The Strength of Plaintiff’s Case**

12 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
13 model for Defendant’s liability. (Orshansky Decl. ¶ 35.) Although Plaintiff steadfastly maintains
14 that her claims are meritorious, she acknowledges that there were substantial risks and
15 uncertainty in proceeding with class certification and trial. (Ibid.) Defendant presented numerous
16 defenses to Plaintiff’s claims, both on the merits and with respect to class certification. (Ibid.)
17 For example, Class Members worked in different job positions and had different managers, and
18 that, as a result, Defendant contended there was variation to the circumstances that could
19 allegedly cause the employees to be deprived of the opportunity to take legally compliant, duty-
20 free meal and rest periods, and this variation in circumstances raised highly individualized
21 questions of fact. (Id. at ¶ 37.) In addition, Plaintiff would face significant hurdles to certification
22 given that more than one third of the Class Members signed arbitration agreements with class
23 action waivers as a condition of their employment. *See, Epic Sys. Corp. v. Lewis* (2018) 138 S.
24 Ct. 1612 (class action waivers in arbitration agreements are enforceable). (Orshansky Decl. ¶
25 37.) Although Plaintiff was prepared to litigate these claims through class certification and,
26 ultimately, through trial, given the substantial amount offered in settlement, Plaintiff predicted
27 that it was far from certain that Plaintiff would be able to recover a greater amount at trial,
28 particularly after considering the increased litigation costs that would accrue. (Id. at ¶ 38;

1 Aiwazian Decl. ¶13.) Thus, this factor supports preliminary approval of the settlement.

2 **2) Risk, Expense, Complexity, and Duration of Further Litigation**

3 Although Plaintiff conducted extensive discovery prior to mediation, the Parties agreed
4 to focus on exhausting early settlement efforts at mediation before launching into full-fledged
5 and hotly contested litigation. (Orshansky Decl. ¶ 36.) Therefore, absent settlement, the Parties
6 would have needed to conduct substantial additional discovery, such as the production of
7 voluminous records and numerous depositions of experts and percipient witnesses, and prepare
8 the case for class certification and trial. (Ibid.) The Parties would have had to depose a number
9 of people such as managers, supervisors, and employees in order to establish liability. (Ibid.)
10 Discovery disputes would have been in the offing. (Ibid.) This settlement avoids the considerable
11 attorneys' fees and costs associated with conducting gargantuan and costly supplemental
12 discovery, moving for class certification and potentially summary judgment or adjudication, and
13 ultimately, trial, as well as the risks and the accompanying burden of continued litigation on the
14 Court. (Ibid.) Thus, this factor supports preliminary approval of the settlement.

15 **3) Risk of Maintaining Class Action Status**

16 Here, settlement was reached prior to class certification and the result was a successful
17 outcome for the Class. (Id. at ¶ 37.) Yet, class certification was by no means a foregone
18 conclusion. (Ibid.) For example, Class Members worked in different job positions and had
19 different managers, and that, as a result, Defendant contended there was variation to the
20 circumstances that could allegedly cause the employees to be deprived of the opportunity to take
21 legally compliant, duty-free meal and rest periods, and this variation in circumstances raised
22 highly individualized questions of fact. (Ibid.) In addition, Plaintiff would face significant hurdles
23 to certification given that more than one third of the Class Members signed arbitration agreements
24 with class action waivers as a condition of their employment. *See, Epic Sys. Corp. v. Lewis* (2018)
25 138 S. Ct. 1612 (class action waivers in arbitration agreements are enforceable). If Defendant's
26 arbitration agreement defense is successful, it would severely limit the potential relief available
27 to those Class Members who signed arbitration agreements with class action waivers. (Ibid.)
28 Even if Plaintiff prevailed and certified a class action as to them, there is no guarantee Defendant

1 would not later move for and obtain decertification. (*Ibid.*) If the Court either denied class
2 certification or later decertified it, those Class Members would recover nothing and would be
3 forced to retain their own counsel and proceed on the basis of individual claims only. (*Ibid.*)
4 Here, Settlement Class Members are presented a great opportunity to avoid those risks and
5 receive substantial monetary benefits, thereby also weighing in favor of preliminary approval.

6 **4) Amount Offered in Settlement Given Realistic Value of Claims**

7 A settlement is not judged against what might have been recovered had a plaintiff
8 prevailed at trial, nor does the settlement have to provide 100% of the damages to be fair and
9 reasonable. *Wershba, supra*, 91 Cal. App. 4th 224, 246, 250 (acknowledging that “Compromise
10 is inherent and necessary in the settlement process ... even if the relief afforded by the proposed
11 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
12 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
13 settlement in which each side gives in the interest of avoiding litigation.”) The proposed
14 settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face
15 of disputed claims. Moreover, some Class Members executed arbitration agreements with class
16 action waivers which if enforced would preclude them from obtaining any relief on a class-wide
17 basis.

18 Plaintiff’s estimate of the settlement recovery is a reasonable percentage of possible
19 recoverable damages at trial. Plaintiff’s damages analysis shows that the settlement reflects an
20 estimated 48.94% of the maximum possible damages recoverable at trial. (*Orshansky Decl.* ¶¶
21 39, 69.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims
22 in question, *see, Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 123, this case
23 clearly meets requirements establishing that the class settlement is within the “ballpark” of
24 reasonableness.

25 Unpaid Wages

26 Plaintiff, along with other hourly non-exempt employees, preformed pre- and post-shift
27 off the clock work to minimize the incidence of overtime. (*Orshansky Decl.* ¶ 41.) Plaintiff
28 contends that all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its

1 employees no less than the minimum wage for all hours worked, *see*, Labor Code § 1197, thus,
2 Plaintiff sought to recover at least the minimum wage for all off-the-clock work, plus liquidated
3 damages in that amount under Labor Code section 1194.2. (*Ibid.*)

4 Class Counsel analyzed the documents produced by Defendant in conjunction with
5 interviews of Plaintiff and Class Members to determine Defendant's degree of liability and
6 amounts due in damages – specifically, the incidence and amount of off-the-clock activity. (*Id.*
7 at ¶ 42; *Aiwazian Decl.* ¶11.)

8 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-
9 clock hours, Plaintiff estimates that Defendant is liable for a total of approximately thirty minutes
10 of unpaid time per workweek. (*Orshansky Decl.* ¶ 43.) At the average overtime hourly rate of
11 \$22.17, this yields an estimated damages amount of \$663,104.70, without discounting associated
12 risks of certification or merits. (*Ibid.*)

13 In terms of merit disputes, Defendant vigorously disagrees with Plaintiff's theories
14 regarding how much off-the-clock work occurred in reality and the credibility of those claimed
15 hours given Defendant's policies to the contrary. (*Id.* at ¶ 44.)

16 The failure to track all hours poses evidentiary difficulties because it is hotly contested
17 how much off-the-clock work actually occurred. (*Id.* at ¶ 45.) Although Class Counsel conducted
18 multiple employee interviews, for Plaintiff to establish the quantity of specific disputed and
19 unrecorded work activities – especially over multiple job titles, at differing pay rates - would
20 have been costly, time-consuming, and daunting. (*Ibid.*) In light of these considerations, Class
21 Counsel applied appropriate discounts for the risk of non-certification and being unsuccessful on
22 the merits. (*Ibid.*)

23 Further, as with all of Plaintiff's claims, Defendant contends that any potential exposure
24 was subject to arbitration agreements which preclude class-wide recovery. (*Id.* at ¶ 46.)
25 Notwithstanding the arbitration agreements, Defendant contends that Plaintiff's claim for off-
26 the-clock work is not amenable to class treatment, because employees worked in a variety of
27 departments with different requirements, and it would require an unmanageable series of mini-
28 trials to determine how much time was spent without pay. (*Ibid.*)

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1 and rest periods, and this variation in circumstances raised highly individualized questions of
2 fact. (Ibid.)

3 Finally, as with Plaintiff's other claims, Defendant argues that meal and rest break claims
4 are subject to binding arbitration agreements. (Id. at ¶ 49.) In addition, even absent the
5 arbitration agreements, Defendant vehemently contends that its written policies are facially
6 compliant under *Brinker v. Superior Court* (2012) 53 Cal. 4th 1004, an obstacle to both
7 certification and success on the merits of the claim. (Orshansky Decl. at ¶ 49) Defendant argues
8 that no common evidence can establish *why* any employees clocked in early from and/or late for
9 a break. (Ibid.) Assuming *arguendo* that the class action waiver did not apply, Defendant
10 maintains that certification would be difficult because individualized inquiries regarding the
11 timing and extent of deviations from ordinary meal and rest break policies would significantly
12 predominate. (Ibid.)

13 Class Counsel considered the risk of further litigating the case, including the significant
14 additional costs that would be incurred by both sides if the matter did not settle, as litigating a
15 class action through class certification, trial, and appeals is very expensive. (Id. at ¶ 50.)
16 Litigating meal and rest period claims is inherently difficult as an employer's records, as is the
17 case here, do not usually indicate when a meal period is interrupted and when a rest period is
18 short, late, interrupted, or missed entirely. (Ibid.) While Class Counsel disagreed with
19 Defendant's arguments and factual contentions, Class Counsel recognized the circumstances
20 and realities of the case, applicable case law and regulations, costs and expenses of further
21 litigation and certification, and risks to recovery, and applied appropriate discounts for them.
22 (Ibid.)

23 Defendant disputes Plaintiff's characterization of working conditions, liability, and
24 damages, and possesses documentary and testimonial evidence rebutting Plaintiff's allegations.
25 (Id. at ¶ 51.) Notwithstanding the strength of Defendant's defenses to certification and merits,
26 based on Class Counsel's investigation and discovery evidencing a violation rate of 9.63% for
27 non-compliant meal breaks and 20% for non-compliant rest breaks, the estimated valuations are
28 \$425,713.22 and \$884,139.60, respectively, without discounting associated risks of certification

1 or merits. (Ibid.)

2 Unreimbursed Expenses

3 Plaintiff alleges a cause of action under Labor Code section 2802(a) which states that an
4 employer must reimburse employees for all necessary expenditures that employees incur in
5 discharging their duties. (Id. at ¶ 52.) Here, Class Members were required to use their personal
6 cell phones to communicate with supervisors and coworkers for reasons related to work, yet
7 Defendant failed to reimburse for these necessary business expenses. (Ibid.)

8 Defendant contends that it has a policy and practice of reimbursing employees for
9 necessary business-related expenses. (Id. at ¶ 53.) Defendant also contends that, with respect to
10 the alleged expenses for which Plaintiff and other Class Members never requested reimbursement
11 from Defendant, Defendant did not know and had no reason to know that the alleged business-
12 related expenses were incurred. (Ibid.) Defendant maintains that employees were able to use
13 phones at the workplace to communicate with supervisors and coworkers for reasons related to
14 work and that it was rare, if ever, that employees were required to use their personal cell phones
15 for business purposes. (Ibid.) Moreover, to the extent it occurred, Defendant asserts that this
16 claim is not suitable for class treatment as it would require individualized determinations as to
17 whether each employee used a personal cell phone for work-related purposes and, if so, how
18 much of that use was a reasonable percentage of his or her individual monthly phone bill. (Ibid.)

19 Defendant also contends that the California Labor Code only requires reimbursement of
20 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
21 work—and argued that distinguishing a necessary expense from an unnecessary one would
22 require individualized inquiry. (Id. at ¶ 54.) *See* Cal. Lab. Code § 2802; *Gattuso v. Harte-Hanks*
23 *Shoppers, Inc.* (2007) 42 Cal. 4th 554. Furthermore, whether an expense was necessary would
24 depend in part on the reasonableness of the employee’s choice and would thus have to be
25 established by way of extensive individual factual inquiry and/or statistical evidence. *Cochran v.*
26 *Schwan’s Home Services, Inc.* (2014) 228 Cal. App. 4th 1137. (Orshansky Decl. ¶ 54)

27 For the foregoing reasons and taking into account the wide variety of telephone plans,
28 providers and costs which creates evidentiary complexities on an individual basis, let alone class-

1 wide, Plaintiff assigns a *de minimis* value to this claim. (*Id.* at ¶ 55.)

2 Wage Statement Violations

3 Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendant's failure
4 to provide accurate itemized wage statements. (*Id.* at ¶ 56.) Failure to comply with the statute
5 entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the initial
6 pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
7 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000).
8 *See*, Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action
9 because if Defendant did not provide wages for all hours worked, meal and rest breaks, and so
10 forth, then the wage statements were inevitably inaccurate. Based on the \$50 initial violation,
11 plus the \$100 per pay period subsequent violation rates, Plaintiff estimates the total wage
12 statement exposure to be \$808,350.00. (*Orshansky Decl.* ¶ 56.)

13 Defendant contends, however, that Labor Code section 226(e) penalties are not
14 automatic. (*Id.* at ¶ 57.) Rather, the employee must show that Defendant's noncompliance was
15 "knowing and intentional." (*Ibid.*) Defendant suggests that any noncompliance was not knowing
16 and intentional. (*Ibid.*) Moreover, Defendant argues that meal and rest period violations cannot
17 support derivative wage statement penalties. *See Jones v. Spherion Staffing, Inc.* (C.D. Cal. Aug.
18 7, 2012) Case No. LA CV11-06462, 2012 WL 3264081 at *8-9 (granting defendant's motion for
19 judgment on the pleadings because plaintiffs "cannot advance a claim for noncompliant wage
20 statements or failure to pay wages due upon termination based solely on alleged violations of
21 section 226.7.") Finally, because the damages for this cause of action are penalties, the statute of
22 limitations is only one year prior to the filing of the original complaint. *See*, Code Civ. Proc.
23 § 340. The Parties discussed these issues and, in light of these considerations, Class Counsel
24 factored in a reduction of liability and damages for this cause of action. (*Orshansky Decl.* ¶ 57.)

25 Derivative Waiting Time, PAGA Penalties, and UCL Claims

26 Plaintiff further asserts causes of action against Defendant for failure to timely pay all
27 wages due employees at separation, for civil penalties under the PAGA, and for engaging in
28 unfair, unlawful, and fraudulent business practices. *See*, Labor Code §§ 203, 2699, *et seq.* and

1 Cal. Business and Professions Code § 17200, *et seq.* As with other claims, Defendant vigorously
2 disagrees that it engaged in any conduct giving rise to liability or entitlement to recovery of
3 penalties or equitable relief. (Orshansky Decl. ¶ 58.)

4 Defendant argues that waiting time penalties are not appropriate because it attempted to
5 pay employees all final wages owed in good faith upon their separation, thereby precluding a
6 finding of willfulness necessary to obtain waiting time penalties. (Id. at ¶ 59.) Moreover,
7 Defendant maintains that no waiting time penalties were recoverable from alleged meal or rest
8 period violations. (Ibid.) See *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal. App. 4th
9 1242, 1261 (holding that waiting time penalties are not recoverable as a result of unpaid meal
10 and rest period premiums). To the extent that Plaintiff's waiting time penalty claim is derivative
11 of the off-the-clock work, Defendant argues that it is overstated because not all of the former
12 employees could be proven to have experienced an underpayment of wages. (Orshansky Decl.
13 ¶ 59.)

14 The success of Plaintiff's PAGA claim is wholly dependent upon the success of her
15 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
16 (Id. at ¶ 60.) Defendant contends that these penalties are derived from the underlying wage and
17 hour violations discussed above, which Defendant disputed. (Ibid.) See *e.g., Green v. Lawrence*
18 *Service Co.* (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's
19 success was determined by the merits of its underlying claims). Defendant maintained and
20 continues to maintain that it had legally compliant employment policies and practices
21 throughout the statutory period. (Orshansky Decl. ¶ 60.) Defendant denied and continues to
22 deny that it ever violated any provision of the California Labor Code and argued that, even
23 assuming such violations occurred, Defendant will not be treated as having engaged in
24 subsequent violations giving rise to heightened penalties. (Ibid.) In other words, Defendant
25 argues that heightened civil penalties for subsequent violations would not be assessed unless it
26 could be shown that Defendant had notice that it was violating the law, *e.g.*, it had been cited by
27 a labor agency or adjudged by a court to have done so. (Ibid.) See, *e.g., Amaral v. Cintas Corp.*
28 (2008) 163 Cal. 4th 1157, 1209. Thus, Defendant contends that, at best, even if a violation

1 giving rise to a penalty was shown for each pay period, only the lower civil penalty associated
2 with initial violations would apply. (Orshansky Decl. ¶ 60.)

3 Importantly, to prevail on the PAGA claim, Defendant contends that some courts have
4 required a plaintiff to show at the outset that he or she has suffered injury, in order to establish
5 standing, and that Plaintiff would also have to prove all requisite elements to prove violations
6 of the underlying California Labor Code provisions, in order to show that Defendant’s conduct
7 gives rise to penalties. (Id. at ¶ 61.) The unpaid wages and meal and rest period allegations are
8 fundamental to this action; however, for the reasons discussed above, there were substantial
9 challenges to showing liability and exposure for these claims. (Ibid.) Defendant argues that
10 Plaintiff would not be able to establish violations of the underlying California Labor Code
11 provisions and the fundamental allegations regarding unpaid wages and meal and rest periods.
12 (Ibid.) Defendant also contends that multiple individualized issues vitiate the manageability of
13 representative adjudication of PAGA penalties. (Ibid.)

14 Defendant asserts that, before a PAGA claim could be tried, under existing law, the court
15 of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of
16 uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently
17 “manageable” so as not to interfere with Defendant’s right to due process. (Id. at ¶ 62.)
18 Defendant alleges that Class Members’ job duties and work hours varied. (Ibid.) Defendant
19 contends that there was variation as to the circumstances that could allegedly cause the
20 employees to work off the clock or to be deprived of the opportunity to take legally compliant,
21 duty-free meal and/or rest periods. (Ibid.) Defendant further contends that these issues presented
22 challenges not only to liability but also challenges to Plaintiff’s ability to show that a PAGA
23 claim could be efficiently and manageably adjudicated without abridging Defendant’s due
24 process rights. (Ibid.)

25 Moreover, Defendant maintains that the Court has discretion to reduce any award of
26 PAGA penalties where it views them as duplicative. *See*, Labor Code § 2699e(2) (the Court may
27 “award a lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based
28 on the facts and circumstances of the particular case, to do otherwise would result in an award

1 that is unjust, arbitrary and oppressive, or confiscatory.”). (Orshansky Decl. ¶ 63.)

2 Defendant also points to case law demonstrating that courts have attributed little separate
3 value to PAGA claims, for example, allowing them to be resolved for \$0 where the other
4 underlying California Labor Code claims are being resolved. *See, e.g., Matter of Nordstrom*
5 *Commission Cases* (2010) 186 Cal. App. 4th 576, 588-590 (holding no abuse of discretion by
6 the trial court in approving the allocation of \$0 toward PAGA penalties, where PAGA claim is
7 resolved as a part of an overall resolution of the underlying California Labor Code violations);
8 *Franco v. Ruiz Food Prods, Inc.* (E.D. Cal. Nov. 27, 2012) No. 1:10-cv-02354-SKO, 2012 WL
9 5941801, at *14 (approving allocation of \$10,000, out of the settlement of \$2.5 million, toward
10 the settlement of the PAGA claim); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) No.
11 1:10-CV-0324-AWI-SKO, 2012 WL 5364655, at *3 (approving the allocation of \$10,000, out
12 of the settlement of \$3.7 million, toward the settlement of the PAGA claim); *Chu v. Wells Fargo*
13 *Investments, LLC* (N.D. Cal. Feb. 16, 2011) No. C 05-4526 MHP, C 0647924 MHP, 2011 WL
14 672645, at *1 (approving the allocation of \$10,000, out of the settlement of \$6.9 million, toward
15 the settlement of the PAGA claim); *Jack v. Hartford Ins. Co.* (S.D. Cal. Oct. 13, 2011) No. 3:09-
16 cv-1683-MMA (JMA), 2011 WL 4899942, at *18 (approving the allocation of \$3,000, out of
17 the settlement of \$1.2 million, toward the settlement of the PAGA claim); *Schiller v. David’s*
18 *Bridal, Inc.* (E.D. Cal. June 11, 2012) 2012 WL 2117001, at *14 (approving the allocation of
19 \$10,000, out of the settlement of \$518,245, toward settlement of the PAGA claim). (Orshansky
20 Decl. ¶ 64.)

21 Plaintiff calculated an estimate of approximately \$1,287,633.60 in waiting time penalties
22 and \$835,500.00 in PAGA penalty exposure (using the “initial” \$100 per pay period violation as
23 opposed to the \$200 subsequent per violation rate). (Id. at ¶ 65.)

24 Class Counsel applied discounts to assess the likely recovery of waiting time penalties.
25 (Id. at ¶ 66.) Class Counsel also considered the likelihood of prevailing on each of the underlying
26 claims, with the additional hurdles required to establish waiting time penalties, such as the
27 difficulty of proving the “willful” prong of section 203. (Ibid.) Additionally, Class Counsel
28 weighed applicable case law, the costs and expenses associated with further litigation and

1 certification, the circumstances and realities of the case, and risks to recovery, and applied
2 appropriate discounts for them. (Ibid.)

3 For the PAGA claim, Class Counsel applied discounts for the risks in establishing
4 manageability and possible bifurcation of discovery and/or trial, the risks regarding success on
5 the merits and establishing liability, and the risks with proving the extent of penalties that are
6 warranted and possible discretionary reduction of penalties by the Court. (Id. at ¶ 67.) Although,
7 strictly speaking, class certification requirements are not required to be satisfied in order to
8 adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a
9 PAGA claim is uncertain. (Id. at ¶ 68) Instead, what is clear is that the purpose of the PAGA is
10 not to generate revenue for the State but rather to facilitate the enforcement of the labor laws.
11 (Ibid.) See, e.g., *Williams v. Superior Court* (2017) 3 Cal. 5th 531, 546; *Arias v. Superior Court*
12 (2009) 46 Cal. 4th 969, 986; Cal. Lab. Code § 2699(i). In assessing the adequacy of the recovery
13 under a PAGA claim, the focus is not the amount which the LWDA and the aggrieved employees
14 are to receive formally in the form of monetary civil penalties but instead whether the total
15 settlement amount achieves the PAGA’s objectives. (Orshansky Decl. ¶ 68.) “When PAGA
16 claims are settled, courts “consider whether the proposed PAGA settlement is fair and adequate
17 in view of the purposes and policies of the statute[]” and “[t]hose purposes and policies include
18 benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging
19 compliance with California Labor Code provisions, and deterring noncompliance.” *O’Connor v.*
20 *Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1132-33 and 1135. A “[c]ourt does not
21 review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to
22 determine whether it is fundamentally fair, reasonable and adequate, with primary consideration
23 for the interests of absent class members.” LWDA’s Comments on Proposed PAGA Settlement
24 in *O’Connor v. Uber Techns.* (N.D. Cal. July 29, 2016) No. 13-CV-03826-EMC, Docket No.
25 736, at 4:17-19. “PAGA penalties must be evaluated in terms of their public policy objective and
26 not just through the prism of what private relief has been sought or obtained.” *Id.* at 4:14-16.

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1 provide to CPT within fifteen (15) calendar days after preliminary approval of the settlement.
2 (Id. at § 39b.) To the extent that any notices are returned, CPT will run those addresses through
3 the National Change of Address database and/or conduct skip traces to obtain current address
4 information. (Id. at § 39e.)

5 The content of the proposed notice satisfies California Rule of Court 3.766(d) because
6 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
7 the key terms of the settlement, the uniform 60-day deadline to submit a dispute, opt out or
8 object to the settlement and the procedure by which to do so, and explains the recovery formula
9 and expected recovery amount for each Settlement Class Member. The proposed notice will also
10 notify Class Members of the final approval hearing date, provide the contact information for
11 Class Counsel, and advise Settlement Class Members that they may enter an appearance through
12 counsel if they wish. This manner of giving notice satisfies California Rule of Court 3.766(e) as
13 the most reliable and cost-effective method of reaching Class Members. Thus, the proposed
14 method of notice is reasonably calculated to reach Class Members by the best means practicable
15 and should be approved.

16 **IX. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

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

20 **X. CONCLUSION**

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

- 24 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and
25 adequate;
- 26 2. Preliminarily approving the form and content of the Notice of Class Action
27 Settlement, attached as Exhibit “1” to the Settlement Agreement;
- 28 3. Provisionally certifying the Settlement Class under Cal. Civ. Code section 382 for

1 settlement purposes only;

2 4. Approving and appointing Plaintiff Krista Ozuna as the Class Representative;

3 5. Approving and appointing the law firms of CounselOne, P.C. and Lawyers *for*
4 Justice, P.C. as Class Counsel;

5 6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;

6 7. Setting a date for the Final Approval Hearing; and

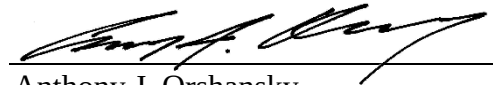
7 8. Any further relief the Court deems just and proper.

8 Dated: December 17, 2020

Respectfully submitted,

9 COUNSELONE, PC

10
11 By:



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