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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

KIM ALDRIDGE, individually, and on behalf
of other members of the general public
similarly situated,

Plaintiff,

v.

LUTH RESEARCH LLC, an unknown
business entity; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: 37-2019-00011479-CU-OE-CTL

Honorable Katherine A. Bacal
Department C-69

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

Preliminary Approval Hearing

Date: January 22, 2021

Time: 1:30 p.m.

Dept.: C-69

Complaint Filed: February 28, 2019

PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of
Court, on January 22, 2021 at 1:30 p.m. in Department C-69 of the above-entitled Court,
located at 330 West Broadway, San Diego, California 92101, plaintiff Kim Aldridge

1 ("Plaintiff" or "Class Representative") individually and on behalf of all others similarly
2 situated, will and 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 and Representative 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 period from February 28,
2015 through May 31, 2020 ("Class" or "Class Members").

12 4. Preliminary appointment of Plaintiff Kim Aldridge as Class Representative;

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

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

16 7. The scheduling of a hearing to consider whether the settlement should be finally
17 approved and award amounts for Class Counsel's Attorneys' Fees, Litigation Costs and
18 Expenses, PAGA Payment to the LWDA, Settlement Administration Expenses, and Class
19 Representative Enhancement; and

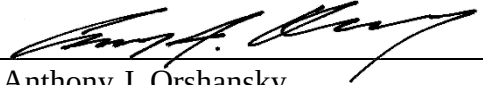
20 8. Approval of the Notice of Pendency of Putative Class Action, Proposed
21 Settlement and Hearing Date for Court Approval and entry of the proposed Order instructing
22 the notice to be disseminated to the Class as provided in the settlement.

23 This motion is based on this notice of motion, the attached memorandum of points and
24 authorities, and the declarations of Kim Aldridge, 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
4 Dated: December 29, 2020

Respectfully submitted,
COUNSELONE, PC

6
7 By: 

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Kim Aldridge (“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 Luth Research Services (“Defendant”). The Class Action Settlement
6 Agreement (“Settlement Agreement”) between Plaintiff and Defendant (together, the “Parties”),
7 if approved, will resolve specific claims of the Plaintiff and Settlement Class Members in
8 exchange for Defendant’s agreement to pay ***seven hundred thousand dollars (\$700,000) into a***
9 ***non-reversionary common settlement fund*** that will be available for distribution to Settlement
10 Class Members. Based upon the data received from Defendant, there are approximately 799 Class
11 Members employed as non-exempt hourly employees during the Settlement Period.

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

20 After engaging in substantial independent investigation and after mediation with Louis
21 Marlin, Esquire, the Parties agreed to settle Plaintiff’s and the Settlement Class Members’ claims
22 alleged in the action for the non-reversionary sum of seven hundred thousand dollars (\$700,000)
23 (“Gross Settlement Fund”). After deductions for Class Counsel’s Attorneys’ Fees, Litigation
24 Costs and Expenses, PAGA payment to the Labor & Workforce Development Agency
25 (“LWDA”), Settlement Administration Expenses, and Class Representative Enhancement, the
26 remaining amount (the “Net Settlement Fund”) of approximately \$390,500 will be distributed to

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 period from February 28, 2015 through May 31, 2020.
“Settlement Class” members are defined as Class Members who have not submitted a timely and valid
request for exclusion. (Settlement Agreement § II. 24.)

1 the Settlement Class.² The entire Net Settlement Fund must be paid out to Settlement Class
2 Members. Settlement Class Members will automatically receive payments ***without the need to***
3 ***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 Pendency of
8 Putative Class Action, Proposed Settlement and Hearing Date for Court Approval; and (4)
9 setting a hearing for final approval of the settlement.

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

11 **A. Discovery and Investigation**

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

21 As a result, on February 28, 2019, Plaintiff filed this wage and hour class action alleging
22 that Defendant: (1) failed to pay employees overtime wages owed; (2) failed to provide timely
23 and compliant duty-free meal periods and pay premiums thereon; (3) failed to provide timely and
24 compliant duty-free rest breaks and pay premiums owed thereon; (4) failed to pay all minimum
25 wages for all hours worked including, but not limited to, those resulting from off-the-clock work;
26 (5) failed to pay all final wages owed upon separation; (6) failed to timely pay wages during
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 §§ II. 9., III. 2.)

1 employment; (7) failed to furnish accurate itemized wage statements; (8) failed to maintain
2 accurate itemized wage statements; (9) failed to reimburse all necessary business expenses
3 incurred; and, based on the foregoing allegations, (10) engaged in unfair business practices under
4 California’s Business & Professions Code § 17200. (Orshansky Decl. ¶ 23.)

5 The Parties have also agreed to the form and content of the proposed First Amended
6 Class Action Complaint for Damages and Enforcement under the Private Attorneys General Act
7 (“PAGA”), Cal. Labor Code § 2698, *et seq.* (“First Amended Complaint”), which is attached as
8 “Exhibit A” to the [Proposed] Order Granting Preliminary Approval of Class and Representative
9 Action Settlement, filed concurrently herewith, to assert, in addition to the claims asserted in
10 the original complaint, a cause of action for violation of PAGA (Labor Code § 2698, *et seq.*) on
11 behalf of Plaintiff and aggrieved employees. (Orshansky Decl. ¶ 24.)

12 Plaintiff’s lawsuit seeks recovery of unpaid wages, including minimum wages and
13 overtime compensation, wages and premiums for improper meal and rest breaks, reimbursement
14 of business expenses, restitution, damages, liquidated damages, statutory penalties, civil
15 penalties, injunctive and other equitable relief, prejudgment interest, and attorneys’ fees and
16 costs. (Id. at ¶ 25.)

17 On May 1, 2019, Defendant filed its Answer raising numerous affirmative defenses and
18 denying Plaintiff’s allegations of wrongdoing. (Id. at ¶ 26.) Defendant does not believe that any
19 liability to Plaintiff or Class Members exists, or that Plaintiff or Class Members are entitled to
20 any recovery. (Ibid.) In settling, Defendant does not admit liability with respect to the alleged
21 claims made by Plaintiff and makes no admissions regarding any facts or law related to the
22 lawsuit. (Ibid.) Defendant also disputes that Plaintiff would be able to certify a class outside of
23 the settlement context because, *inter alia*, Plaintiff’s claims on the merits would require a series
24 of individualized mini-trials; Defendant agreed to a settlement class only. (Ibid.)

25 Plaintiff conducted formal and informal discovery and investigation, including but not
26 limited to propounding multiple sets of written discovery requests, and noticing the depositions
27 of Defendant’s person most knowledgeable designee. (Id. at ¶ 27; Aiwazian Decl. ¶ 10.) Some
28 of the discovery was hotly contested and resulted in objections. (Ibid.) Thereafter, counsel for

1 the Parties undertook the meet and confer process. (Ibid.)

2 Defendant produced a substantial amount (*i.e.*, over 20,000 pages) of documentation for
3 Class Counsel's review including, but not limited to the following: Plaintiff's personnel file,
4 Defendant's employee handbooks, written policies and procedures regarding its timekeeping
5 protocol (including time-tracking practices), payment of wages, provision and tracking of meal
6 and rest breaks, and reimbursement of business expenses, along with actual employee time
7 records, payroll information, and wage statements. (Id. at ¶ 28; Aiwazian Decl. ¶ 11.)

8 Class Counsel reviewed Class Members' time and pay records to determine violation
9 rates. (Orshansky Decl. ¶ 29; Aiwazian Decl. ¶ 11.) Defendant also provided composite data for
10 the Class including the number of putative Class Members and the mix of current versus former
11 employees, the average number of hours per shift, the median rate of pay, the number of
12 workweeks and pay periods in aggregate, along with other relevant data counts. (Orshansky
13 Decl. ¶ 29.) Class Counsel analyzed the documents produced by Defendant and Class Members
14 to determine Defendant's degree of potential liability on the alleged causes of action and
15 estimate the amount of damages. (Id. at ¶ 29; Aiwazian Decl. ¶ 11.)

16 **B. Mediation and Settlement**

17 Thereafter, the Parties participated in a full-day mediation, where they debated and
18 discussed their positions. (Orshansky Decl. ¶ 30.) The Parties participated in a lengthy mediation
19 session with Louis Marlin, Esquire. (Ibid.) Mr. Marlin is a highly respected neutral in California
20 who is experienced in mediating complex labor and employment matters. (Ibid.; Aiwazian Decl.
21 ¶ 13.) During the mediation, the Parties exchanged further information and discussed all aspects
22 of the case, including the risks and delays of litigation and the risk to both Parties for proceeding
23 with a motion for class certification, liability under the claims asserted, and the implications of
24 a PAGA representative action. (Orshansky Decl. ¶ 31; Aiwazian Decl. ¶ 13.) These were
25 contentious issues because of the factual and legal complexity of the case. (Orshansky Decl. ¶
26 31.)

27 The case did not settle at mediation. (Id. at ¶ 32.) The Parties continued to negotiate with
28 the assistance of Mr. Marlin for several weeks. (Ibid.) At all times the settlement discussions

were conducted at arm's length. (Ibid.) After extensive negotiations and much effort, the Parties accepted the mediator's proposal to settle the action. (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.)

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. (Id. at ¶ 34.)

III. SUMMARY OF BASIC SETTLEMENT TERMS

Under the terms of the settlement, Defendant agrees to pay a non-reversionary amount of \$700,000 to settle the claims asserted in the action. (*See, Settlement Agreement* § II. 9.) This amount shall be inclusive of all Settlement Payments to Settlement Class Members, Class Counsel's Attorneys' Fees, Litigation Costs and Expenses, PAGA Payment to the LWDA, Settlement Administration Expenses, and Class Representative Enhancement. The amount available for distribution to Settlement Class Members is determined by deducting the following from the Gross Settlement Fund:

- Up to thirty-five percent (35%) of the GSF in attorneys' fees (*i.e.*, \$245,000) and litigation expenses up to \$20,000 to Class Counsel;
- Up to \$7,500 to the Class Representative as a service award and in exchange for a general release of claims;
- \$15,000 – which is 75% of the \$20,000 allocated – to the LWDA for civil penalties pursuant to statute; and

- Up to \$22,000 to the Settlement Administrator to notify members of the Class and administer the Settlement.

The amount remaining after the foregoing deductions, approximately \$390,500, is called the “Net Settlement Fund.” (Settlement Agreement § II. 13.) The entire Net Settlement Fund will be paid out to Settlement Class Members. Settlement Class Members will automatically receive payments without the need to submit claim forms.

A. The Settlement Provides for Reasonable Monetary Payments

If all of the approximately 799 Class Members participate (*i.e.*, remain in the Settlement Class), and assuming hypothetically that distribution was on an individual *pro rata* basis, then the average individual Settlement Payment would be an estimated \$488.74 per Settlement Class Member. (Orshansky Decl. ¶ 8.) Of course, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out. (Ibid.)

In actuality, each Settlement Class Member will receive a proportional share of the Net Settlement Fund based on his or her number of workweeks during the Settlement Period, *to wit*, February 28, 2015 through May 31, 2020. (Id. at ¶ 7.) The Net Settlement Fund will be allocated among Settlement Class Members according to each Settlement Class Member’s workweeks during the Settlement Period as a *pro rata* portion of the total combined workweeks of all the Settlement Class Members during the Settlement Period. (Settlement Agreement § III. 4.) As a result, the consideration paid to Settlement Class Members is tailored to the impact of Defendant’s alleged violation as well as the claims he or she is releasing if he or she does not opt out of the Settlement. (Orshansky Decl. ¶ 7.)

B. Attorneys’ Fees, Costs, and Representative Enhancement Payment

As part of the settlement, Plaintiff will apply for an enhancement payment at the time of seeking final approval of the settlement in the amount of \$7,500 for her services to the Settlement Class and a general release of all claims against Defendant. (Settlement Agreement §§ III. 3.(a), III. 14.(e); Orshansky Decl. ¶ 10.) “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone*

1 *Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393-1394. Plaintiff's requested
2 enhancement payment is intended to recognize the significant benefits conferred upon the Class
3 due to the time and effort that Plaintiff expended on behalf of the Class, including providing
4 factual information and documents to Class Counsel, discussing the claims and theories at issue
5 in the case with Class Counsel, identifying potential witnesses, reviewing documents, reviewing
6 discovery requests, reviewing the Settlement Agreement, as well as the significant risks Plaintiff
7 undertook by agreeing to serve as the named plaintiff in this case, and the fact that Plaintiff agreed
8 to a general release of all claims subject to a waiver of Civil Code section 1542. (*See, Declaration*
9 *of Kim Aldridge, passim; Settlement Agreement* § III. 7.; *Aiwazian Decl.* ¶ 14.)

10 Class Counsel will apply for an attorneys' fees award of 35 percent of the Gross
11 Settlement Fund, and up to \$20,000 in costs. (*Settlement Agreement* § III. 3(a); *Orshansky Decl.*
12 ¶ 11.) Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky,
13 expensive, and time-consuming litigation on a purely contingent fee basis. (*Orshansky Decl.* ¶
14 11.) Class Counsel has devoted substantial attorneys' time to: conducting pre-filing investigation;
15 analyzing Plaintiff's claims; conducting legal research and analysis; propounding multiple sets
16 of written discovery; reviewing more than 20,000 pages of documents, including policies and
17 procedures regarding Defendant's timekeeping protocol (including its time-tracking practices),
18 payment of wages, provision and tracking of meal and rest breaks, and reimbursement of business
19 expenses, along with actual employee time records, payroll information, and wage statements;
20 meeting and conferring with defense counsel; building a damages model; preparing, briefing, and
21 attending mediation; negotiating and preparing the long-form Settlement Agreement; preparing
22 this motion for preliminary approval; and otherwise litigating the case. (*Ibid.*; *Aiwazian Decl.* ¶¶
23 9-13.) Class Counsel will also expend future attorney time in attending the hearing on this
24 Motion, overseeing the notice and administration process, drafting the Final Approval Motion
25 and supporting documents, and attending the Final Approval hearing, among other tasks, such as
26 addressing questions from Class Members. (*Orshansky Decl.* ¶ 12.)

27 Both California and federal courts have recognized that an appropriate method for
28 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created

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

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

IV. REQUEST FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

To effectuate the terms of the Settlement Agreement and intent of the Parties, the Parties agree that leave should be granted for Plaintiff to file an amended complaint to add a cause of action for violation of PAGA (Labor Code section 2698, *et seq.*) on behalf of Plaintiff and aggrieved employees, for the purposes of resolution of the action. As such, Plaintiff respectfully requests leave to file the First Amended Complaint so that the operative complaint in this action formally asserts the causes of action and allegations that have been investigated, litigated, mediated, and ultimately settled, by the Parties, and so that the terms of the settlement may be effectuated.

V. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Express judicial policy favors maintaining wage and hour actions as class actions. *Prince v. CLS Transp., Inc.* (2004) 118 Cal. App. 4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981)

29 Cal. 3d 462 (finding that California public policy “encourages the use of the class action device”). Any doubt as to the appropriateness of class treatment should be resolved in favor of class certification, subject to later modification if necessary. *Id.* at 473-475. The decision to certify a class is purely a procedural one and should be based on the allegations in the operative complaint, and not in the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 439-441.

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

A. There Is an Ascertainable and Sufficiently Numerous Class

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

Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v. Target Corp.* (2010) 189 Cal. App. 4th 905, 919. Class Members are comprised of all persons employed in California by Defendant as hourly paid or non-exempt employees at any time during the period from February 28, 2015 through May 31, 2020. Thus, all Class Members are of a specific type (hourly paid or non-exempt employees) employed within California. Defendant is required to and does maintain a record of each such person, including contact information and Social Security numbers. (Orshansky Decl. ¶ 94.) Documents and information exchanged reflect a class of approximately 799 current and former hourly non-exempt employees working in California during the Settlement Period. (Ibid.) Thus, the Settlement

1 Class satisfies the ascertainability and numerosity requirements. *See e.g., Collins v. Rocha*
2 (1972) 7 Cal. 3d 232 (finding a class of 44 farm workers sufficiently numerous).

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

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

6 [D]oes not depend upon an identical recovery, and the fact that each member of the class
7 must prove his separate claim to a portion of any recovery by the class is only one factor
8 to be considered...The mere fact that separate transactions are involved does not of itself
9 preclude a finding of the requisite community of interest so long as every member of the
10 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. *Id.* at 809.

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

28 ///

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

2 The typicality requirement is satisfied where class representatives have claims that are
3 typical of those of the rest of the class. *B.W.I Custom Kitchen, supra*, 191 Cal. App. 3d at 1347.
4 Plaintiff's claims are typical of those held by the members of the Class. (Orshansky Decl. ¶ 96.)
5 Like Class Members, Plaintiff was not paid for all wages, including overtime, did not receive
6 timely and duty-free meal and rest breaks, was not paid premiums for non-compliant breaks,
7 incurred business expenses necessary to job duties without reimbursement, and did not receive
8 all wages and premiums upon termination of the business relationship. (Ibid.) Plaintiff was
9 therefore impacted by the same challenged policies and practices that allegedly injured the Class
10 as a whole and subject to the same defenses raised by Defendant as to the Class and is therefore
11 typical. (Ibid.)

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

14 The adequacy of representation requirement examines conflicts of interest between
15 named parties and the class(es) they seek to represent. *Capital People First v. Department of*
16 *Developmental Services* (2007) 155 Cal. App. 4th 676, 697. Here, Plaintiff and Class Counsel
17 will adequately represent the Class, as there are no conflicts between the named Plaintiff and
18 the Class she seeks to represent. (Orshansky Decl. ¶ 97); *McGhee v. Bank of America* (1976) 60
19 Cal. App. 3d 442, 450 (finding adequacy satisfied where there was no indication that plaintiff's
20 counsel were not qualified and the named plaintiff had no interests antagonistic to those of the
21 proposed class). Class Counsel also have extensive experience in wage and hour litigation.
22 (Orshansky Decl. ¶¶ 78-82, 97; Aiwazian Decl. ¶¶ 6-7.)

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

24 In making its class certification decision, the court must determine that a class action
25 would be superior to alternative means for the fair and efficient adjudication of the litigation. By
26 consolidating almost eight hundred individual actions into a single proceeding, this Court's use
27 of the class action device enables it to manage this litigation in a manner that serves the efficiency
28 interests of the litigants and the judicial system. Absent class treatment, the only alternative

would be to force these employees to file individual actions. *Sav-on Drug Stores v. Super. Ct.* (2004) 34 Cal. 4th 319, 339, fn. 10 (stating “[t]he relevant comparison lies between the costs and 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.

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1 **VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

2 As a matter of public policy, courts both encourage the use of the class action device and
3 favor settlement over continued litigation. *See, e.g. Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th
4 429, 434 (“Courts have long acknowledged the importance of class actions as a means to prevent
5 a failure of justice in our judicial system.”); *State v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460,
6 471; *Class Plaintiffs v. City of Seattle* (1992) 955 F. 2d 1268, 1276 (“[S]trong judicial
7 policy...favors settlements, particularly where complex class action litigation is concerned.”);
8 Newberg, § 11.41. Settlement is favored, and settlement agreements are realistically assessed.
9 *Stamburgh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989)
10 883 F. 2d 438, 447 (“The fact that plaintiff might have received more if the case had been fully
11 litigated is no reason not to approve the settlement.”)

12 To summarize, the settlement here is fair because it offers payment to each Settlement
13 Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a
14 fair and adequate distribution of the settlement proceeds whereby the funds are allocated to
15 individual Settlement Class Members proportionally based on the respective number of
16 workweeks that they worked during the Settlement Period. (Orshansky Decl., *passim*.)

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

18 Moreover, courts presume the absence of fraud or collusion in the negotiation of a
19 settlement unless evidence to the contrary is offered. In short, there is a presumption that the
20 negotiations were conducted in good faith. *See, Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.*
21 (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25; *In re Chicken Antitrust*
22 *Litigation* (N.D. Ga. 1980) 560 F. Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F. 2d
23 438, 447; *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.* (7th Cir. 1987)
24 834 F. 2d 677, 681. Courts do not substitute their judgment for that of the proponents, particularly
25 when settlement has been reached by experienced counsel familiar with the litigation. *Rodriguez*,
26 *supra*, 2007 U.S. Dist. LEXIS 74767 at 24. As detailed at length in the accompanying Declaration
27 of Anthony J. Orshansky, the settlement is the result of extensive settlement negotiations between
28 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 Louis Marlin, Esquire. (Orshansky Decl. ¶ 30.) Mr. Marlin is experienced in resolving complex wage and hour class actions. (Ibid.; Aiwazian Decl. ¶13.) The settlement negotiations were hard-fought and the settlement is the product of an adversarial, 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. (Orshansky Decl., *passim*; Aiwazian Decl. ¶13.)

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

Throughout this case, Settlement Class Members have been represented by counsel who have years of experience in employment class action litigation. (Id. at ¶¶ 78-82; Aiwazian Decl. ¶¶ 6-7.) Class Counsel devoted a considerable amount of time to the prosecution of this case, including, but not limited to, interviewing Plaintiff and other Class Members; reviewing Defendant's written policies concerning the claims set forth in the action, including Defendant's 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 Class Members' time and pay records; meeting and conferring regarding the information and documents produced; drafting pleadings; researching California law, preparing for and attending mediation; and negotiating and finalizing the settlement and related documents. (Orshansky Decl. ¶¶ 22-32; Aiwazian Decl. ¶¶ 9-13.) Class Counsel reviewed more than 20,000 pages of documents. (Orshansky Decl. ¶ 28; Aiwazian Decl. ¶ 11.)

3) *Class Counsel Are Experienced in Similar Litigation*

Class Counsel believe that the settlement is fair and reasonable and serves the best interests of the Settlement Class Members. (Orshansky Decl. ¶¶ 33, 74.) 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.* ¶¶ 78-82; *Aiwazian Decl.* ¶¶ 6-7.)

B. The Settlement Is Fair, Reasonable, and Adequate

To make a fairness determination, the Court should consider several factors, including “the strength of plaintiffs’ 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.” *Wershba, supra*, 91 Cal. App. 4th 224, 245. As discussed below, the proposed settlement is fair, adequate, and reasonable in light of the overall factors in this case.

1) The Strength of Plaintiff’s Case

Class Counsel carefully vetted the claims at issue, reviewed a significant amount of written policy documentation, wage statements, payroll data, and timekeeping information, and conducted a detailed analysis to arrive at a comprehensive damages model for Defendant’s liability. (*Orshansky Decl.* ¶ 35.) Although Plaintiff steadfastly maintains that her claims are meritorious, she acknowledges that there were substantial risks and uncertainty in proceeding with class certification and trial. (*Ibid.*) Defendant presented numerous defenses to Plaintiff’s claims, both on the merits and with respect to class certification. (*Ibid.*) For example, Plaintiff would face significant hurdles to certification given that Defendant argued that there are individualized issues as to whether a given employee was provided a specific meal period on a specific shift, or whether a meal period was waived. (*Id.* at ¶ 37.) Defendant further disputes Plaintiff’s characterization of working conditions, liability, and damages, and possesses documentary and testimonial evidence rebutting Plaintiff’s allegations. (*Ibid.*) Although Plaintiff was prepared to litigate these claims through class certification and, ultimately, through trial,

1 given the substantial amount offered in settlement, Plaintiff predicted that it was far from certain
2 that Plaintiff would be able to recover a greater amount at trial, particularly after considering the
3 increased litigation costs that would accrue. (*Id.* at ¶ 38; *Aiwazian Decl.* ¶13.) Thus, this factor
4 supports preliminary approval of the settlement.

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

6 Although Plaintiff conducted extensive discovery prior to mediation, the Parties agreed
7 to focus on exhausting early settlement efforts at mediation before launching into full-fledged
8 and hotly contested litigation. (*Orshansky Decl.* ¶ 36.) Therefore, absent settlement, the Parties
9 would need to conduct further formal written discovery and take depositions of managers,
10 supervisors, and employees to prepare the case for class certification and trial. (*Ibid.*) Discovery
11 disputes would have been in the offing and liability likely would have entailed a battle of experts.
12 (*Ibid.*) This settlement avoids the considerable time, attorneys' fees and costs, and party resources
13 associated with conducting additional discovery, moving for class certification and potentially
14 summary judgment or adjudication, and ultimately trial, as well as the risks and the
15 accompanying burden of continued litigation on the Court. (*Ibid.*) Thus, this factor supports
16 preliminary approval of the settlement.

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

18 Here, settlement was reached prior to class certification and the result was a successful
19 outcome for the Class. (*Id.* at ¶ 37.) Yet, class certification was by no means a foregone
20 conclusion. (*Ibid.*) For example, Plaintiff would face significant hurdles to certification given
21 that Defendant argued that there are individualized issues as to whether a given employee was
22 provided a specific meal period on a specific shift, or whether a meal period was waived. (*Ibid.*)
23 Defendant disputes Plaintiff's characterization of working conditions, liability, and damages, and
24 possesses documentary and testimonial evidence rebutting Plaintiff's allegations. (*Ibid.*) If the
25 Court either denied class certification or later decertified it, the Class would recover nothing and
26 Class Members would be forced to retain their own counsel and proceed on the basis of individual
27 claims only. (*Ibid.*) Here, Settlement Class Members are presented a great opportunity to avoid
28 those risks and receive substantial monetary benefits, thereby also weighing in favor of

preliminary approval.

4) Amount Offered in Settlement Given Realistic Value of Claims

A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages to be fair and reasonable. *Wershba, supra*, 91 Cal. App. 4th 224, 246, 250 (acknowledging that “Compromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives in the interest of avoiding litigation.”) The proposed settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face of disputed claims.

Plaintiff carefully estimated the settlement recovery as a reasonable percentage of possible damages recoverable at trial. Plaintiff’s damages analysis shows that the settlement reflects **40.22% of the realistic possible recovery to Class Members** recoverable at trial. (*Orshansky Decl.* ¶¶ 39, 75.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question, *see, Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 123, this case clearly meets the requirements that the settlement is within the “ballpark” of reasonableness. This settlement is especially favorable to Plaintiff and Settlement Class Members in light of Defendant’s precarious financial condition which requires Defendant to obtain third-party funding and make installment payments over time until completed. (*Orshansky Decl.* ¶¶ 39, 77.)

Unpaid Wages

Plaintiff, along with other hourly non-exempt employees, preformed pre- and post-shift off-the-clock work to minimize the incidence of overtime. (*Orshansky Decl.* ¶ 40.) Class Members were required to perform work tasks off the clock, such as answering phones from supervisors and co-workers, assisting customers, performing assigned work tasks, and activating or deactivating Defendant’s security systems and alarms when required. (*Ibid.*) Plaintiff contends that all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its employees no

1 less than the minimum wage for all hours worked, *see*, Labor Code § 1197; thus, Plaintiff sought
2 to recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that
3 amount under Labor Code § 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 ¶ 41; *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.* at ¶ 42.) At the average overtime hourly rate of
11 \$22.17, this yields an estimated damages amount of \$349,119.84, without discounting associated
12 risks of certification or merits. (*Ibid.*)

13 Defendant vigorously disagrees with Plaintiff's theories regarding how much off-the-
14 clock work occurred in reality and the credibility of those claimed hours given Defendant's
15 policies to the contrary. (*Id.* at ¶ 43.)

16 Defendant contends that any off-the-clock time is *de minimis*. (*Id.* at ¶ 44.) Plaintiff
17 counters that such defense lacks viability in light of *Troester v. Starbucks Corp* (2018) 5 Cal. 5th
18 829 given that the California Supreme Court refused to allow the *de minimis* defense to insulate
19 Starbucks from paying employees for small amounts of work regularly performed off the clock.
20 (*Ibid.*) What is not clear, however, is to what extent the *de minimis* defense would apply where
21 the uncaptured hours were associated with an occasionally recurring activity. (*Ibid.*) Finally,
22 Plaintiff's off-the-clock work for the remaining tasks suffer the usual evidentiary proof
23 difficulties associated with these claims; namely, the challenge of proving their existence and
24 duration in the absence of recordkeeping. (*Ibid.*)

25 Defendant also contends that Plaintiff's claim for off-the-clock work is not amenable to
26 class treatment because employees worked in a variety of departments with different
27 requirements, and it would require an unmanageable series of mini-trials to determine how much
28 time was spent without pay. (*Id.* at ¶ 45.)

1 The failure to track all hours poses evidentiary difficulties because it is hotly contested
2 how much off-the-clock work actually occurred. (*Id.* at ¶ 46.) Although Class Counsel conducted
3 multiple employee interviews, for Plaintiff to establish the quantity of specific disputed and
4 unrecorded work activities – especially over multiple job titles, at differing pay rates - would
5 have been costly, time-consuming, and daunting. (*Ibid.*) In light of these considerations, Class
6 Counsel applied appropriate discounts for the risk of non-certification and being unsuccessful on
7 the merits. (*Ibid.*)

8 Moreover, Plaintiff contends that Defendant failed to incorporate shift differential pay,
9 non-discretionary bonuses, non-discretionary performance pay, and similar earnings into Class
10 Members’ regular rates of pay for purposes of calculating their overtime compensation. (*Id.* at ¶
11 47.) As a result, Defendant failed to fully compensate Class Members for all overtime hours
12 worked. (*Ibid.*) Plaintiff calculated the maximum potential exposure of overtime wages owed
13 from Defendant’s failure to correctly calculate the regular rate for overtime purposes to be
14 approximately \$59,726.25. (*Ibid.*) Defendant contends this amount is inflated because most
15 bonuses are discretionary since Defendant retains freedom to decide the amount and timing of
16 payment, and bonuses are not tied to meeting specific goals. (*Ibid.*)

17 Meal and Rest Period Violations

18 Plaintiff contends Class Members were required to suffer missed, short, late, or
19 interrupted meal and rest breaks due to answering questions from supervisors and co-workers,
20 assisting customers, and performing assigned work tasks, such as conducting interviews,
21 listening to recordings of phone interviews, and editing and reviewing reports of interviews and
22 customer comments. (*Id.* at ¶ 48.) As a result, Class Members were not provided compliant meal
23 and rest breaks. (*Ibid.*)

24 Defendant contends that it had practices, policies, and procedures to provide meal and
25 rest breaks every workday to its employees that fully complied with the law. (*Id.* at ¶ 49.)
26 Defendant vehemently argues that it complied with the requirements articulated by the California
27 Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004. (*Ibid.*)
28 Specifically, Defendant maintains it “provides” employees with a reasonable opportunity to take

1 timely meal periods of at least 30 minutes, relieves employees of all duties during meal periods,
2 and relinquishes control over employees' activities, including the ability to leave the premises
3 during meal periods. (*Ibid.*) Defendant also maintains that it provided duty-free rest breaks of not
4 less than ten minutes for every major fraction of four hours worked as required by Labor Code §
5 226.7. (*Ibid.*) Defendant obtained declarations from employees attesting to this practice of
6 providing compliant breaks. (*Ibid.*) Defendant argues that it provided all required meal and rest
7 breaks in a legally compliant manner and that any late, short, or missed breaks were not the result
8 of any overarching policy/practice. (*Ibid.*) To the extent that Class Members failed to take their
9 meal and rest breaks or took a short or late meal or rest period, Defendant contends that they did
10 so voluntarily and that all applicable meal and rest periods were still provided to them. (*Ibid.*)
11 Thus, Defendant argues that it did not act unlawfully to deprive Class Members of meal and rest
12 periods. (*Ibid.*) Defendant contends that the issue of voluntary waiver would necessarily devolve
13 into a series of individualized mini-trials, precluding class certification. *See, Duran v. U.S. Bank*
14 *National Association* (2014) 59 Cal. 4th 1, 25 (holding that the defendant must be provided an
15 opportunity to litigate affirmative defenses, even when they turn on individual questions). (*Ibid.*)

16 Defendant contends that there are multiple individual issues that would pose challenges
17 to certification, including and not limited to, (a) whether any meal and rest periods were non-
18 compliant, and (b) why they were non-compliant. Defendant argues that no common evidence
19 can establish *why* any employees clocked in early from and/or late for a break. (*Id.* at ¶ 50.)
20 Further, Defendant contends that Class Members worked in different job positions and had
21 different managers, and that as a result, there was variation to the circumstances that could
22 allegedly cause employees to be deprived of the opportunity to take legally compliant, duty-free
23 meal and rest periods, and this variation in circumstances raised highly individualized questions
24 of fact. (*Ibid.*)

25 Defendant vehemently contends that its written policies are facially compliant, an
26 obstacle to both certification and success on the merits of the claim. (*Id.* at ¶ 51.) Plaintiff
27 responds that Defendant's rest break policy is facially non-compliant; Defendant's policy does
28 not allow Class Members to leave the workplace during rest breaks in violation of *Augustus v.*

1 *ABM Security Service, Inc.* (2016) 2 Cal. 5th 257, 260. (*Ibid.*) In addition, a second meal period
2 of not less than thirty (30) minutes is required if an employee works more than ten (10) hours per
3 day, except that if the total hours worked is no more than twelve (12) hours, the second meal
4 period may be waived by mutual consent of the employer and employee only if the first meal
5 period was not waived. *See*, Labor Code § 512. However, Plaintiff contends Defendant does not
6 have a written policy for second meal periods. (*Orshansky Decl.* ¶ 51.)

7 Nonetheless, Defendant maintains that it did provide rest breaks. (*Id.* at ¶ 52.) Defendant
8 explains that Class Members had ample opportunity to take, and did take, regular rest breaks.
9 (*Ibid.*) Defendant also attempts to distinguish *Augustus, supra*, which involved security guards
10 who were required to monitor a pager, phone, or other device as having an added constraint that
11 is not present in the matter *sub judice*. (*Ibid.*)

12 Class Counsel considered the risk of further litigating the case, including the significant
13 additional costs that would be incurred by both sides if the matter did not settle, as litigating a
14 class action through class certification, trial, and/or appeals is very expensive. (*Id.* at ¶ 53.)
15 Litigating meal and rest period claims is inherently difficult because an employer's records, as is
16 the case here, do not usually indicate when a meal period is interrupted and when a rest period is
17 short, late, interrupted, or missed entirely. (*Ibid.*) While Class Counsel disagreed with
18 Defendant's arguments and factual contentions, Class Counsel recognized the circumstances and
19 realities of the case, applicable case law and regulations, costs and expenses of further litigation
20 and certification, and risks to recovery, and applied appropriate discounts for them. (*Ibid.*)

21 Defendant disputes Plaintiff's characterization of working conditions, liability, and
22 damages, and possesses documentary and testimonial evidence rebutting Plaintiff's allegations.
23 (*Id.* at ¶ 54.) Notwithstanding the strength of Defendant's defenses to certification and merits,
24 based on Class Counsel's investigation and discovery evidencing a violation rate of 34.20% for
25 non-compliant meal breaks and 20% for non-compliant rest breaks, the estimated valuations are
26 \$795,811.67 and \$465,386.94, respectively, without discounting associated risks of certification
27 or merits. (*Ibid.*)

28 ///

Unreimbursed Expenses

Plaintiff alleges a cause of action under Labor Code § 2802(a) which states that an employer must reimburse employees for all necessary expenditures that employees incur in discharging their duties. (*Id.* at ¶ 55.) Here, Class Members were required to use their personal cell phones to communicate with supervisors and co-workers for reasons related to work, yet Defendant failed to reimburse for these necessary business expenses. (*Ibid.*)

Defendant contends that it has a policy and practice of reimbursing employees for necessary business-related expenses. (*Id.* at ¶ 56.) Defendant also contends that, with respect to the alleged expenses for which Plaintiff and Class Members never requested reimbursement from Defendant, Defendant did not know and had no reason to know that the alleged business-related expenses were incurred. (*Ibid.*) Defendant maintains that employees were able to use phones at the workplace to communicate with supervisors and co-workers for reasons related to work and that it was rare, if ever, that employees were required to use their personal cell phones for business purposes. (*Ibid.*) Moreover, to the extent it occurred, Defendant asserts that this claim is not suitable for class treatment as it would require individualized determinations as to whether each employee used a personal cell phone for work-related purposes and, if so, how much of that use was a reasonable percentage of his or her individual monthly phone bill. (*Ibid.*)

Defendant also contends that the California Labor Code only requires reimbursement of “necessary” expenses—as opposed to any expense that is incurred in the course of performing work—and argued that distinguishing a necessary expense from an unnecessary one would require individualized inquiry. *See*, Labor Code § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554. (*Orshansky Decl.* ¶ 57.) Furthermore, whether an expense was necessary would depend in part on the reasonableness of the employee’s choice and would thus have to be established by way of extensive individual factual inquiry and/or statistical evidence. *Cochran v. Schwan’s Home Services, Inc.* (2014) 228 Cal. App. 4th 1137. (*Orshansky Decl.* ¶ 57.)

For the foregoing reasons and taking into account the variety of telephone plans, providers and costs which creates evidentiary complexities on an individual basis, let alone class-wide, Plaintiff assigns a *de minimis* (i.e., under \$50,000 class-wide) value to this claim. (*Id.* at ¶ 58.)

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This cause of action is derivative of the foregoing causes of action because if Defendant did not provide all wages, meal periods, rest breaks, unreimbursed business expenses, and so forth, then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 60.) Based on the \$50 initial violation, plus the \$100 per pay period subsequent violation rates, Plaintiff estimates the total wage statement exposure to be \$489,100. (Ibid.)

Moreover, Defendant argues that meal and rest period violations cannot support derivative wage statement penalties. *See, Jones v. Spherion Staffing, Inc.* (C.D. Cal. Aug. 7, 2012) Case No. LA CV11-06462, 2012 WL 3264081 at *8-9 (granting defendant’s motion for judgment on the pleadings because plaintiffs “cannot advance a claim for noncompliant wage statements or failure to pay wages due upon termination based solely on alleged violations of section 226.7.”) (Orshansky Decl. ¶ 62.) Finally, because the damages for this cause of action are penalties, the statute of limitations is only one year prior to the filing of the original complaint. *See, Cal. Civ. Pro. § 340. See also, Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094.

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1 The Parties discussed the above risks, and in light of these considerations, Class Counsel
2 factored in a further reduction of liability and damages to reflect a more realistic exposure.
3 (Orshansky Decl. ¶ 63.)

4 Derivative Waiting Time, PAGA Penalties, and UCL Claims

5 Plaintiff further asserts causes of action against Defendant for failure to timely pay all
6 wages due employees at separation, for civil penalties under PAGA, and for engaging in unfair,
7 unlawful and fraudulent business practices. *See*, Labor Code §§ 203, 2699, *et seq.* and Cal.
8 Business and Professions Code § 17200, *et seq.* (Orshansky Decl. ¶ 64.) As with other claims,
9 Defendant vigorously disagrees that it engaged in any conduct giving rise to liability or
10 entitlement to recovery of penalties or equitable relief. (Ibid.)

11 Defendant argues that waiting time penalties are not appropriate because it attempted to
12 pay employees all final wages owed in good faith upon their separation, thereby precluding a
13 finding of willfulness necessary to obtain waiting time penalties. (Id. at ¶ 65.) Moreover,
14 Defendant maintains that no waiting time penalties were recoverable from alleged meal or rest
15 period violations. *See, Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal. App. 4th 1242,
16 1261 (holding that waiting time penalties are not recoverable as a result of unpaid meal and rest
17 period premiums). (Orshansky Decl. ¶ 65.) To the extent that Plaintiff's waiting time penalty
18 claim is derivative of the off-the-clock work or the incorrect calculation of the regular rate for
19 overtime purposes, Defendant argues that it is overstated because not all of the former employees
20 could be proven to have experienced an underpayment of wages. (Ibid.)

21 The success of Plaintiff's PAGA claim is wholly dependent upon the success of her
22 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
23 Defendant contends that these penalties are derived from the underlying wage and hour
24 violations discussed above, which Defendant disputed. *See e.g., Green v. Lawrence Service Co.*
25 (C.D. Cal. 2013) 2013 WL 3907506, *5, n.5 (explaining that a PAGA claim's success was
26 determined by the merits of its underlying claims). (Orshansky Decl. ¶ 66.) Defendant argues
27 that it had legally compliant employment policies and practices throughout the statutory period.
28 Defendant denies that it ever violated any provision of the California Labor Code and argues

1 that, even assuming *arguendo* that such violations occurred, Defendant will not be treated as
2 having engaged in subsequent violations giving rise to heightened penalties. (*Ibid.*) In other
3 words, Defendant argues that heightened civil penalties for subsequent violations would not be
4 assessed unless it could be shown that Defendant had notice that it was violating the law, e.g.,
5 it had been cited by a labor agency or adjudged by a court to have done so. *See, e.g., Amaral v.*
6 *Cintas Corp.* (2008) 163 Cal. 4th 1157, 1209. (*Orshansky Decl.* ¶ 66.) Thus, Defendant contends
7 that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the
8 lower civil penalty associated with initial violations would apply. (*Ibid.*)

9 Importantly, to prevail on the PAGA claim, Defendant contends that some courts have
10 required a plaintiff to show at the outset that he or she has suffered injury, in order to establish
11 standing, and that Plaintiff would also have to prove all requisite elements to prove violations
12 of the underlying California Labor Code provisions, in order to show that Defendant’s conduct
13 gives rise to penalties. (*Id.* at ¶ 67.) The unpaid wages and meal and rest period allegations are
14 fundamental to this action; however, for the reasons discussed above, there were substantial
15 challenges to showing liability and exposure for these claims. (*Ibid.*) Defendant argues that
16 Plaintiff would not be able to establish violations of the underlying California Labor Code
17 provisions and the fundamental allegations regarding unpaid wages and meal and rest periods.
18 (*Ibid.*) Defendant also contends that multiple individualized issues vitiated the manageability of
19 representative adjudication of PAGA penalties. (*Ibid.*)

20 Defendant asserts that, before a PAGA claim could be tried, under existing law, the court
21 of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of
22 uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently
23 “manageable” so as not to interfere with Defendant’s right to due process. (*Id.* at ¶ 68.)
24 Defendant alleges that Class Members’ job duties and work hours varied. (*Ibid.*) Defendant
25 contends that there was variation as to the circumstances that could allegedly cause employees
26 to work off the clock or to be deprived of the opportunity to take legally compliant, duty-free
27 meal and/or rest periods. (*Ibid.*) Defendant further contends that these issues presented
28 challenges not only to liability but also challenges to Plaintiff’s ability to show that a PAGA

1 claim could be efficiently and manageably adjudicated without abridging Defendant's due
2 process rights. (Ibid.)

3 Moreover, Defendant maintains that the Court has discretion to reduce any award of
4 PAGA penalties where it views them as duplicative. *See*, § 2699e(2) (the Court may "award a
5 lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based on the
6 facts and circumstances of the particular case, to do otherwise would result in an award that is
7 unjust, arbitrary and oppressive, or confiscatory."). (Orshansky Decl. at ¶ 69.)

8 Defendant also points to case law demonstrating that courts have attributed little separate
9 value to PAGA claims, for example, allowing them to be resolved for \$0 where the other
10 underlying California Labor Code claims are being resolved. *See, e.g., Matter of Nordstrom*
11 *Commission Cases* (2010) 186 Cal. App. 4th 576, 588-590 (holding no abuse of discretion by
12 the trial court in approving the allocation of \$0 toward PAGA penalties, where PAGA claim is
13 resolved as a part of an overall resolution of the underlying California Labor Code violations);
14 *Franco v. Ruiz Food Prods, Inc.* (E.D. Cal. Nov. 27, 2012) No. 1:10-cv-02354-SKO, 2012 WL
15 5941801, at *14 (approving allocation of \$10,000, out of the settlement of \$2.5 million, toward
16 the settlement of the PAGA claim); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) No.
17 1:10-CV-0324-AWI-SKO, 2012 WL 5364655, at *3 (approving the allocation of \$10,000, out
18 of the settlement of \$3.7 million, toward the settlement of the PAGA claim); *Chu v. Wells Fargo*
19 *Investments, LLC* (N.D. Cal. Feb. 16, 2011) No. C 05-4526 MHP, C 0647924 MHP, 2011 WL
20 672645, at *1 (approving the allocation of \$10,000, out of the settlement of \$6.9 million, toward
21 the settlement of the PAGA claim); *Jack v. Hartford Ins. Co.* (S.D. Cal. Oct. 13, 2011) No. 3:09-
22 cv-1683-MMA (JMA), 2011 WL 4899942, at *18 (approving the allocation of \$3,000, out of
23 the settlement of \$1.2 million, toward the settlement of the PAGA claim); *Schiller v. David's*
24 *Bridal, Inc.* (E.D. Cal. June 11, 2012) 2012 WL 2117001, at *14 (approving the allocation of
25 \$10,000, out of the settlement of \$518,245, toward settlement of the PAGA claim). (Orshansky
26 Decl. ¶ 70.)

27 Plaintiff estimates approximately \$1,830,340.80 in waiting time penalties and
28 \$978,200.00 in PAGA penalty exposure (using the "initial" \$100 per pay period violation as

opposed to the \$200 subsequent per violation rate). (Id. at ¶ 71.)

Class Counsel applied discounts to assess the likely recovery of waiting time penalties. Class Counsel considered the likelihood of prevailing on each of the underlying claims, with the additional hurdles required to establish waiting time penalties, such as the difficulty of proving the “willful” prong of Labor Code § 203. (Id. at ¶ 72.) Additionally, Class Counsel weighed applicable case law, the costs and expenses associated with further litigation and certification, the circumstances and realities of the case, and risks to recovery, and applied appropriate discounts for them. (Ibid.)

For the PAGA claim, Class Counsel applied discounts for the risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks regarding success on the merits and establishing liability, and the risks with proving the extent of penalties that are warranted and possible discretionary reduction of penalties by the Court. (Id. at ¶ 73.)

Summary

After Class Counsel calculated that the maximum possible recovery in damages to Class Members, counsel discounted the maximum figure by a variable 50% for class certification and a 25% reduction across all claims for establishing liability on the merits, which yields a potential recovery of \$1,496,057.06. (Id. at ¶ 75.) Further, the PAGA claim should realistically be reduced because to prevail on it would result only in a 25% recovery to aggrieved employees (and 75% to the LWDA) resulting in a true value of \$244,550.00. (Ibid.) Together, Plaintiff estimates approximately \$1,740,607.06 would be the realistic value of Class Members’ claims for which \$700,000.00 therefore represents **40.22% of the realistic possible recovery to Class Members** recoverable at trial, while avoiding the further expense and serious risk of proceeding toward class certification and trial. (Ibid.) “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F. 3d 1234, 1242 (internal quotations omitted). *See, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9 (preliminarily approving wage and hour class action settlement stating, “[a]lthough 15% represents a modest fraction of the

1 hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to
2 grant preliminary approval given the merits of Plaintiff's claims). (Note that \$1.2 million is 15%
3 of \$8 million.) Taking into account the risk of non-certification, failure to prevail on the merits,
4 and the Court's power to reduce the civil penalties, the proposed settlement falls within the
5 realm of being fair, reasonable, and adequate. (Orshansky Decl. ¶ 75.)

6 Given the relative size of the Class as compared to, for example, larger nationwide
7 corporate, consumer, or securities class actions, coupled with the financial uncertainties faced
8 by businesses amidst a public health crisis, this settlement confers a substantial benefit of
9 \$700,000.00. (Orshansky Decl. ¶ 76.) Moreover, each Class Member will be given the
10 opportunity to opt out of the settlement, allowing those who feel they have claims that are greater
11 than the benefits they can receive under this settlement to pursue their own claims. (Ibid.)
12 Indeed, settlement awards for each Settlement Class Member will be tailored to the extent to
13 which he or she was affected by Defendant's alleged wage-and-hour violations based on his or
14 her workweeks. (Ibid.)

15 Finally, the settlement amount achieved becomes even more significant in light of
16 Defendant's financial condition. (Id. at ¶ 77.) As previously alluded to herein, this settlement is
17 quite favorable to Plaintiff and Settlement Class Members when taking into account Defendant's
18 precarious financial condition, for which Defendant would have to obtain a loan and make
19 installment payments over time until the settlement amount is fully satisfied. (Ibid.)

20 **VIII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS**

21 This Court should order distribution of the proposed Notice of Pendency of Putative
22 Class Action, Proposed Settlement and Hearing Date for Court Approval, *see*, exhibit "A" to
23 the Settlement Agreement attached at Exhibit "1" to Orshansky Decl., to the Class by first class
24 mail, postage prepaid, using the last known mailing address information provided by Defendant.
25 This manner of giving notice is the "best notice practicable" under the circumstances because it
26 provides "individual notice to all members who can be identified though reasonable effort." *Eisen*
27 *v. Carlisle and Jacqueline* (1974) 417 U.S. 156, 173. Here, Plaintiff proposes that the settlement
28 be administered by CPT Group, Inc. ("CPT"), an experienced class action settlement

1 administrator. (Settlement Agreement § I. 23.) Class Members' addresses will be ascertainable
2 through Defendant's personnel and payroll records, which Defendant will provide to CPT within
3 fifteen (15) business days after preliminary approval of the settlement. (Id. at § III. 13(c)(i).) To
4 the extent that any notices are returned, CPT will run those addresses through the National
5 Change of Address database and/or conduct skip traces to obtain current address information.
6 (Id. at § III. 13(c)(i), (ii), (iii).)

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

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

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

22 **X. CONCLUSION**

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

26 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and
27 adequate;

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2. Preliminarily approving the form and content of the Notice of Pendency of Putative Class Action, Proposed Settlement and Hearing Date for Court Approval, attached as Exhibit “A” to the Settlement Agreement;

3. Provisionally certifying the Settlement Class under Cal. Civ. Code section 382 for settlement purposes only;

4. Approving and appointing Plaintiff Kim Aldridge as the Class Representative;

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

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

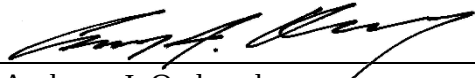
7. Setting a date for the Final Approval Hearing; and

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

Dated: December 29, 2020

Respectfully submitted,

COUNSELONE, PC

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