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9 NICOLE SHAVER, and all others similarly situated

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF SAN BERNARDINO**

12 **(UNLIMITED JURISDICTION)**

13 NICOLE SHAVER, on behalf of herself, all
14 others similarly situated, and the general public,
15 and as an “aggrieved employee” on behalf of
16 other “aggrieved employees” under the Labor
Code Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19 G AND C SWAN, INC., a California
20 corporation; and DOES 1–50, inclusive,

21 *Defendant(s).*

Case No. CIVSB2103630

**PLAINTIFF NICOLE SHAVER’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: June 17, 2024

Hearing Time: 1:30 p.m.

Hearing Dept.: S-17, The Honorable
Joseph T. Ortiz

Action filed: February 17, 2021

Trial Date: Not Set



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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Nicole Shaver (“Plaintiff”) submits this memorandum of points and authorities
5 in support of her unopposed motion for preliminary approval of the Class Action and PAGA
6 Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
7 Settlement Amount: (“GSA”) of \$650,000.00 in compromise of all disputed claims on behalf of
8 all of Defendant’s hourly, non-exempt California employees and interns during the period of
9 February 17, 2017 through the date of the Court’s preliminary approval of the Settlement or the
10 date the Class Work Weeks reach 19,924, whichever is earlier (the “Class Period”). Through this
11 Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-defined
12 Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve
13 the Settlement; (3) preliminarily appoint Plaintiff as Class Representative; (4) appoint David
14 Spivak of The Spivak Law Firm and Walter L. Haines of United Employees Law Group as Class
15 Counsel; (5) approve the proposed notice procedures and related forms; and (6) schedule a final
16 approval hearing.

17 This Court should grant Plaintiff’s motion because: (1) for settlement purposes, the
18 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
19 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
20 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
21 Representative; (4) Plaintiff’s attorneys are adequate to serve as Class Counsel; (5) the proposed
22 notice procedures, and related forms, fully comport with due process and adequately apprise Class
23 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
24 Class Members an opportunity to be heard regarding the Settlement and to give it finality.
25 Accordingly, for the reasons detailed below, this Court should grant Plaintiff’s Motion in its
26 entirety and preliminarily approve the Settlement.

27 ///

28 ² The Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of David Spivak (“DS”),
which is submitted herewith under a separate cover.



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1 **II. BACKGROUND**

2 Defendant owns and operates substance abuse rehabilitation facilities. DS, ¶ 11.
3 Defendant employed Plaintiff in California as support staff from about May 21, 2020 until
4 September 7, 2020. *Id.*

5 **A. The Claims and Procedural History**

6 On December 11, 2020, Plaintiff notified Defendant and the California Labor and
7 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
8 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
9 Code violations committed by Defendant. DS, ¶ 12, Ex. 2.

10 On February 17, 2021, Plaintiff filed a Class Action Complaint in the San Bernardino
11 County Superior Court, Case No. CIVSB2103630, against Defendant on behalf of herself and
12 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Provide
13 Rest Breaks (Lab. Code §§ 226.7 and 1198); (2) Failure to Provide Meal Periods (Lab. Code §§
14 226.7, 512, and 1198); (3) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§
15 510, 1194, 1197, and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
16 Statement Penalties (Lab. Code § 226); (6) Waiting Time Penalties (Lab. Code §§ 201-203); (7)
17 Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*); and (8) Civil Penalties (Lab. Code §§
18 2698, *et seq.*). DS, ¶ 13, Ex. 3. On March 18, 2022, Defendant filed an answer to Plaintiff’s
19 Complaint. DS, ¶ 13, Ex. 4. Defendant denies all of Plaintiff’s allegations and strongly contends
20 that its wage and hour policies, practices, and procedures are fully compliant with all applicable
21 laws. DS, ¶ 13.

22 **B. Sampling**

23 On September 10, 2021, Plaintiff requested that Defendant informally disclose documents
24 and data to enable Plaintiff to prepare for settlement discussions, including the number of putative
25 class members and aggrieved employees and the number of paychecks and workweeks for the
26 various limitations periods applicable to Plaintiff’s claims. DS, ¶ 14. Plaintiff also requested a
27 reasonable, randomly selected sample of Defendant’s time, payroll, and expense records, and
28 related personnel records. *Id.* Finally, Plaintiff requested Defendant’s written policies applicable
to the claims at hand and asked Defendant to identify any and all comparable claims against it.

The Parties thereafter engaged in an informal, voluntary exchange of information in the
context of privileged settlement discussions to facilitate an early mediation. Defendant produced
Plaintiff’s entire personnel file (including policies and agreements she signed and acknowledged)



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1 and copies of its relevant company written policies. DS, ¶ 16.

2 The Defendant disclosed that there are no comparable claims against it. DS, ¶ 20.

3 Defendant contends that it employed 112 putative class members during the period of July
4 03, 2017 to August 03, 2023. Defendant produced the records of 36.61% of the putative class
5 members for the period of July 03, 2017 to May 3, 2022. There were records for 41 employees in
6 the sample. Defendant chose the sample. The sample was randomly selected. The sample
7 consisted of printed excel time sheets and paystubs from ADP TotalSource, Barret, and Paychex,
8 and related records. DS, ¶ 16.

9 Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Plaintiff also
10 employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to
11 determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004)
12 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative
13 margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin
14 of error of 43.3 percent was unacceptable. Using a margin of error of 32%, a confidence level of
15 95%, and a population size of 112, the Raosoft Sample Size Calculator recommended a sample
16 of 9. DS, ¶ 17, **Exhibit 5** (Raosoft Sample Size Calculator results print-out). Thus, the sample
17 population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

18 **C. Mediation**

19 On February 03, 2022, following much of the foregoing informal discovery and exchange
20 of information, the Parties participated in a mediation session presided over by Mediator Hon.
21 Jay Gandhi (Ret.), an experienced class action mediator. The case did not settle at that time. On
22 August 03, 2023, the Parties participated in a second mediation session presided over by Mediator
23 Hon. Daniel J. Buckley (Ret.), an experienced class action mediator. During the mediations, the
24 Parties had two full days of productive negotiations and reached agreement on a class-wide
25 settlement after the second mediation session. During the mediation sessions, each side,

26 ³ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the
27 Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software
28 programs for information gathering and analysis. The family of survey software supports data
collection and reporting for any form-based data. Support is for web-surveys and forms, email
distribution, diskette, PDA, laptop or pen-based: all types of distribution." The Raosoft webpage
advertises that is it "database web survey software for gathering information."
<http://www.raosoft.com/> . It also advertises, "The parameters of the sample size calculation are
something that you choose." <http://www.raosoft.com/suggestreading.html>.



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1 represented by her / its respective counsel, recognized the risk of an adverse result in the Action
2 and agreed to settle the Action and all other matters covered by this Agreement pursuant to the
3 terms and conditions of this Agreement. DS, ¶ 18.

4 **D. Defendant's Financial Condition**

5 At the mediation, it became clear that Defendant had insufficient resources to cover the
6 full extent of liability. DS ¶ 19. As part of the settlement negotiations, Defendant disclosed its tax
7 returns and related information for 2019, 2020, and 2021. *Id.* Plaintiff's Counsel has reviewed the
8 financial records without the aid of an accountant. *Id.* The information provided was sufficient to
9 demonstrate the financial condition of the Defendant and that it will unlikely be able to afford
10 payment of a larger amount than the Settlement amount. Based on such records, Plaintiff, on her
11 own behalf and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set
12 forth in the Settlement. *Id.*

13 **III. OVERVIEW OF THE SETTLEMENT**

14 **A. Settlement Class and Aggrieved Employees Definition**

15 The Settlement defines the Settlement Class as all of Defendant's hourly, non-exempt
16 California employees and interns during the Class Period. Settlement, ¶ 1.5. The Class Period is
17 February 17, 2017 through the date of the Court's preliminary approval of the Settlement or the
18 date the Class Work Weeks reaches 19,924, whichever is earlier. Settlement, ¶ 1.12. The
19 "Aggrieved Employees" are every person employed by Defendant in California and classified as
20 an hourly, non-exempt employee who worked for Defendant during the PAGA Period.
21 Settlement, ¶ 1.4. The "PAGA Period" begins December 11, 2019 and ends the date of the Court's
22 preliminary approval of the Settlement or the date the Class Work Weeks reaches 19,924,
23 whichever is earlier. *Id.*, ¶ 1.32.

24 **B. Monetary Terms**

25 Defendant promises to pay \$650,000.00 and no more as the Gross Settlement Amount and
26 to separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual
27 Class Payments. Defendant has no obligation to pay the Gross Settlement Amount (or any payroll
28 taxes) prior to the deadline stated in Paragraph 6.1 of the Settlement. The Administrator will
disburse the entire Gross Settlement Amount without asking or requiring Participating Class
Members or Aggrieved Employees to submit any claim as a condition of payment. None of the
Gross Settlement Amount will revert to Defendant. Settlement, ¶ 3.1.



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1 The Administrator will make and deduct the following payments from the Gross
2 Settlement Amount, in the amounts specified by the Court in the Final Approval:

3 The Administrator will make and deduct from the Gross Settlement Amount a Class
4 Representative Service Payment to the Class Representative of not more than \$20,000.00 (in
5 addition to any Individual Class Payment and any Individual PAGA Payment the Class
6 Representative is entitled to receive as a Participating Class Member). Defendant will not oppose
7 Plaintiff's request for a Class Representative Service Payment that does not exceed this amount.
8 As part of the motion for Class Counsel Fees Payment and Class Litigation Expenses Payment,
9 Plaintiff will seek Court approval for any Class Representative Service Payments no later than 16
10 court days prior to the Final Approval Hearing. If the Court approves a Class Representative
11 Service Payment less than the amount requested, the Administrator will retain the remainder in
12 the Net Settlement Amount. The Administrator will pay the Class Representative Service
13 Payment using IRS Form 1099. Plaintiff assumes full responsibility and liability for employee
14 taxes owed on the Class Representative Service Payment. Settlement, ¶ 3.2.1.

15 The Administrator will make and deduct from the Gross Settlement Amount a Class
16 Counsel Fees Payment of not more than 33.33%, which is currently estimated to be \$216,666.64,
17 and a Class Counsel Litigation Expenses Payment of not more than \$40,000.00. Defendant will
18 not oppose requests for these payments provided that they do not exceed these amounts. Payment
19 of Class Counsel Fees comes directly from the Gross Settlement Amount. Plaintiff and/or Class
20 Counsel will file a motion for Class Counsel Fees Payment and Class Litigation Expenses
21 Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a
22 Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses Payment less than the
23 amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount.
24 Released Parties shall have no liability to Class Counsel or any other Plaintiff's Counsel arising
25 from any claim to any portion any Class Counsel Fee Payment and/or Class Counsel Litigation
26 Expenses Payment. The Administrator will pay the Class Counsel Fees Payment and Class
27 Counsel Expenses Payment using one or more IRS 1099 Forms. Class Counsel assumes full
28 responsibility and liability for taxes owed on the Class Counsel Fees Payment and the Class
Counsel Litigation Expenses Payment and holds Defendant harmless, and indemnifies Defendant,
from any dispute or controversy regarding any division or sharing of any of these Payments.
Settlement, ¶ 3.2.2.



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1 The Administrator will make and deduct from the Gross Settlement Amount an
2 Administrator Expenses Payment not to exceed \$10,000.00 except for a showing of good cause
3 and as approved by the Court. To the extent the Administration Expenses are less or the Court
4 approves payment less than \$10,000.00, the Administrator will retain the remainder in the Net
Settlement Amount. Settlement, ¶ 3.2.3.

5 The Administrator will make and deduct from the Gross Settlement Amount to each
6 Participating Class Member an Individual Class Payment calculated by (a) dividing the Net
7 Settlement Amount by the total number of Work Weeks worked by all Participating Class
8 Members during the Class Period and (b) multiplying the result by each Participating Class
9 Member's Work Weeks. Settlement, ¶ 3.2.4.

10 With respect to tax allocation of Individual Class Payments, 33.33% of each Participating
11 Class Member's Individual Class Payment will be allocated to settlement of wage claims (the
12 "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an
13 IRS W-2 Form. The 66.67% of each Participating Class Member's Individual Class Payment will
14 be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The
15 Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms.
16 Participating Class Members assume full responsibility and liability for any employee taxes owed
on their Individual Class Payments. Settlement, ¶ 3.2.4.1.

17 Non-Participating Class Members will not receive any Individual Class Payments. The
18 Administrator will retain amounts equal to their Individual Class Payments in the Net Settlement
19 Amount for distribution to Participating Class Members on a pro rata basis. Settlement, ¶ 3.2.4.2.

20 The Administrator will make and deduct from the Gross Settlement Amount the following
21 payments to the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$4,000.00
22 to be paid from the Gross Settlement Amount, with 75% (\$3,000.00) allocated to the LWDA
23 PAGA Payment and 25% (\$1,000.00) allocated to the Individual PAGA Payments. Settlement, ¶
3.2.5.

24 The Administrator will calculate each Individual PAGA Payment by (a) dividing the
25 amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$1,000.00) by the total
26 number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
27 Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods.
28



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1 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
2 Individual PAGA Payments. Settlement, ¶ 3.2.5.1.

3 If the Court approves PAGA Penalties of less than the amount requested, the
4 Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will
5 report the Individual PAGA Payments on IRS 1099 Forms. Settlement, ¶ 3.2.5.2.

6 **C. Timing of Payments**

7 Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts
8 necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the
9 Administrator no later than 30 days after the Effective Date. Settlement, ¶ 4.3.

10 Within 14 days after Defendant funds the Gross Settlement Amount, the Administrator
11 will mail checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA
12 PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the
13 Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment.
14 Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses
15 Payment, and the Class Representative Service Payment shall not precede disbursement of
16 Individual Class Payments and Individual PAGA Payments. Settlement, ¶ 4.4.

17 **D. Calculation of Settlement Shares**

18 "Individual Class Payment" means the Participating Class Member's pro rata share of the
19 Net Settlement Amount calculated according to the number of Work Weeks worked during the
20 Class Period. Settlement, ¶ 1.23.

21 "Individual PAGA Payment" means the Aggrieved Employee's pro rata share of 25% of
22 the PAGA Penalties calculated according to the number of Work Weeks worked during the PAGA
23 Period. Settlement, ¶ 1.24.

24 **E. Apportionment of Settlement Shares**

25 With respect to tax allocation of Individual Class Payments, 33.33% of each Participating
26 Class Member's Individual Class Payment will be allocated to settlement of wage claims (the
27 "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an
28 IRS W-2 Form. The 66.67% of each Participating Class Member's Individual Class Payment will
be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The
Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms.
Participating Class Members assume full responsibility and liability for any employee taxes owed
on their Individual Class Payments. Settlement, ¶ 3.2.4.1.



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1 **F. The Releases**

2 Effective on the date when Defendant fully funds the entire Gross Settlement Amount and
3 funds all employer payroll taxes owed on the Wage Portion of the Individual Class Payments,
4 Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as
5 follows:

6 “Plaintiff’s Release” is defined as follows: Plaintiff and her respective former and present
7 spouses, representatives, agents, attorneys, heirs, administrators, successors, and assigns
8 generally, release and discharge Released Parties from all claims, transactions, or occurrences
9 that occurred during the Class Period, including, but not limited to: (a) all claims that were, or
10 reasonably could have been, alleged, based on the facts contained, in the Operative Complaint
11 and (b) all PAGA claims that were, or reasonably could have been, alleged based on facts
12 contained in the Operative Complaint, Plaintiff’s PAGA Notice, or ascertained during the Action
13 and released under paragraph 6.2 of the Settlement. Plaintiff’s Release does not extend to any
14 claims or actions to enforce this Agreement, or to any claims for vested benefits, unemployment
15 benefits, disability benefits, social security benefits, workers’ compensation benefits that arose at
16 any time, or based on occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff
17 may discover facts or law different from, or in addition to, the facts or law that Plaintiff now
18 knows or believes to be true but agrees, nonetheless, that Plaintiff’s Release shall be and remain
19 effective in all respects, notwithstanding such different or additional facts or Plaintiff’s discovery
20 of them. Settlement, ¶ 6.1.

21 For purposes of Plaintiff’s Release, Plaintiff expressly waives and relinquishes the
22 provisions, rights, and benefits, if any, of section 1542 of the California Civil Code, which reads:

23 **A general release does not extend to claims that the creditor or releasing party does**
24 **not know or suspect to exist in his or her favor at the time of executing the release,**
25 **and that if known by him or her would have materially affected his or her settlement**
26 **with the debtor or Released Party.**

27 Settlement, ¶ 6.1.1.

28 All Participating Class Members, on behalf of themselves and their respective former and
present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release



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Released Parties from all claims stated in the Operative Complaint and those based solely upon the facts alleged in the Operative Complaint. Except as set forth in Section 6.3 of the Settlement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. Settlement, ¶ 6.2.

With respect to the release of the PAGA Claim, Plaintiff releases all claims for civil penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter to the LWDA; Plaintiff does not release the claim for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a Participating Class Member. Settlement, ¶ 6.3.

G. Notice and Claims Process and Procedures

Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service ("USPS") mail, the Notice Packet with Spanish translation, if applicable, substantially in the forms attached to this Agreement as **Exhibits A, B, C, and D**. The first page of the Class Notice shall prominently estimate the dollar amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and the number of Work Weeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses using the National Change of Address database. Settlement, ¶ 8.4.2.

Not later than three (3) business days after the Administrator's receipt of any Notice Packet returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet using any forwarding address provided by the USPS. If the USPS does not provide a forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail the Notice Packet to the most current address obtained. The Administrator has no obligation to make further attempts to locate or send a Notice Packet to Class Members whose Notice Packet is returned by the USPS a second time. Settlement, ¶ 8.4.3.

1. Disputes

The deadlines for Class Members' written objections, Challenges to Work Weeks and/or Pay Periods (disputes), and Requests for Exclusion will be extended an additional 14 days beyond the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-



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1 mailed. The Administrator will inform the Class Member of the extended deadline with the re-
2 mailed Notice Packet. Settlement, ¶ 8.4.4.

3 If the Administrator, Defendant, or Class Counsel are contacted by or otherwise discover
4 any persons who believe they should have been included in the Class Data and should have
5 received the Notice Packet, the Parties will expeditiously meet and confer in person or by
6 telephone, and in good faith, in an effort to agree on whether to include them as Class Members.
7 If the Parties agree, such persons will be Class Members entitled to the same rights as other Class
8 Members, and the Administrator will send, via email or overnight delivery, a Class Notice
9 requiring them to exercise options under this Agreement not later than 14 days after receipt of
10 Class Notice, or the deadline dates in the Class Notice, whichever are later. Settlement, ¶ 8.4.5.

11 Each Class Member shall have 60 days after the Administrator mails the Notice Packet
12 (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge
13 the number of Class Work Weeks and PAGA Pay Periods (if any) allocated to the Class Member
14 in the Class Notice. This is also known as a dispute. A Work Week Dispute form, attached as
15 Exhibit C, may be used for this purpose but is not required. The Class Member may challenge the
16 allocation by communicating with the Administrator via fax, email, or mail. The Administrator
17 must encourage the challenging Class Member to submit supporting documentation. In the
18 absence of any contrary documentation, the Administrator is entitled to presume that the Work
19 Weeks contained in the Class Notice are correct so long as they are consistent with the Class Data.
20 The Administrator's determination of each Class Member's allocation of Work Weeks and/or Pay
21 Periods shall be final and not appealable or otherwise susceptible to challenge. The Administrator
22 shall promptly provide copies of all challenges to calculation of Work Weeks and/or Pay Periods
23 to Defense Counsel and Class Counsel and the Administrator's determination regarding the
24 challenges. Settlement, ¶ 8.6.

25 Only Participating Class Members may object to the class action components of the
26 Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or
27 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
28 Payment, and/or Class Representative Service Payment. Settlement, ¶ 8.7.1.

Participating Class Members may send written objections to the Administrator, by fax,
email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A



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1 Participating Class Member who elects to send a written objection to the Administrator must do
2 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
3 14 days for Class Members whose Notice Packet was re-mailed). The Objection form attached as
4 Exhibit D to the Settlement may be used for this purpose but is not required. Settlement, ¶ 8.7.2.

5 Non-Participating Class Members have no right to object to any of the class action
6 components of the Settlement. Settlement, ¶ 8.7.3.

7 2. Opting Out

8 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
9 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later
10 than 60 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class
11 Members whose Notice Packet is re-mailed). A Request for Exclusion is a letter from a Class
12 Member or his/her representative that reasonably communicates the Class Member's election to
13 be excluded from the Settlement and includes the Class Member's name, address, and email
14 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
15 or postmarked by the Response Deadline. An Election Not to Participate in Settlement form,
16 attached as Exhibit B to the Settlement, may be used for this purpose but is not required.
17 Settlement, ¶ 8.5.1.

18 The Administrator may not reject a Request for Exclusion as invalid because it fails to
19 contain all the information specified in the Class Notice. The Administrator shall accept any
20 Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the
21 person as a Class Member and the Class Member's desire to be excluded. The Administrator's
22 determination shall be final and not appealable or otherwise susceptible to challenge. If the
23 Administrator has reason to question the authenticity of a Request for Exclusion, the
24 Administrator may demand additional proof of the Class Member's identity. The Administrator's
25 determination of authenticity shall be final and not appealable or otherwise susceptible to
26 challenge. Settlement, ¶ 8.5.2.

27 Every Class Member who does not submit a timely and valid Request for Exclusion is
28 deemed to be a Participating Class Member under this Agreement, entitled to all benefits and
bound by all terms and conditions of the Settlement, including the Participating Class Members'
Releases under Paragraphs 6.2 and 6.3 of the Settlement, regardless of whether the Participating
Class Member actually receives the Class Notice or objects to the Settlement. Settlement, ¶ 8.5.3.



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1 Every Class Member who submits a valid and timely Request for Exclusion is a Non-
2 Participating Class Member and shall not receive an Individual Class Payment or have the right
3 to object to the class action components of the Settlement. Aggrieved Employees are eligible for
4 an Individual PAGA Payment. Settlement, ¶ 8.5.4.

5 **3. Objecting**

6 Only Participating Class Members may object to the class action components of the
7 Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or
8 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
9 Payment, and/or Class Representative Service Payment. Settlement, ¶ 8.7.1.

10 Participating Class Members may send written objections to the Administrator, by fax,
11 email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
12 attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
13 Participating Class Member who elects to send a written objection to the Administrator must do
14 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
15 14 days for Class Members whose Notice Packet was re-mailed). The Objection form attached as
16 Exhibit D to the Settlement may be used for this purpose but is not required. Settlement, ¶ 8.7.2.

17 Non-Participating Class Members have no right to object to any of the class action
18 components of the Settlement. Settlement, ¶ 8.7.3.

19 **H. Uncashed Checks**

20 For any Class Member whose Individual Class Payment check or Individual PAGA
21 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
22 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
23 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
24 California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶ 4.4.3.

25 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

26 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
27 and its members are too numerous for joinder to be practical; (2) the representative and absent
28 class members share a community of interest and questions of law and fact common to the class
predominate over questions unique to individual class members; (3) the representative's claims
are typical of the class's claims; and (4) the representative will fairly and adequately represent the
class's interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
in the settlement context, the Court can use a lesser standard to determine the appropriateness of



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1 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
2 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

3 **A. The Settlement Class Is Objectively Ascertainable**

4 A class is ascertainable when it may be readily identified without unreasonable expense
5 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
6 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
7 defined Class is ascertainable because its members may be identified by reference to Defendant's
8 records and Defendant has agreed to share the relevant information from its records to facilitate
9 the settlement process. DS, ¶ 22. Therefore, the Settlement Class is ascertainable.

10 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

11 The Settlement Class has sufficiently numerous members to render joinder impractical.
12 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
13 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 112 Class
14 Members. DS, ¶ 16. Plaintiff maintains that it would be impractical and economically inefficient
15 to require each Class Member to separately maintain an individual action or be joined as a named
16 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
17 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
18 the Settlement Class's membership is sufficiently numerous. DS, ¶ 23. *See Daar v. Yellow Cab*
19 *Co.* (1967) 67 Cal.2d 695.

20 **C. Class Members Share a Well-Defined Community of Interest**

21 The community of interest requirement "embodies three factors: (1) predominant common
22 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
23 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
24 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
25 uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
26 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and
27 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
28 renders class certification appropriate." *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

To justify certification, the class proponent "must show ... that questions of law or fact
common to the class predominate over the questions affecting the individual members" *See,*
Arenas v. El Torito Rests., Inc. (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank,*
FA v. Superior Court (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for

1 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
2 the claims of the Class Members all stem from the same sources. DS, ¶ 36.

3 In this case, Plaintiff asserts all Class Members were subject to the same or similar
4 operations and employment policies, practices, and procedures. The claims arise from
5 Defendant's alleged policy-driven failure to pay wages, unauthorized and unlawful wage
6 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to
7 indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
8 wages, failure to maintain required payroll records, and related labor law violations, all of which
9 Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff
10 asserts that common questions include, but are not limited to: (1) Whether Defendant failed to
11 pay all wages earned to Class Members for all hours worked at the correct rates of pay; (2)
12 Whether Defendant failed to provide the class with all meal and rest periods in compliance with
13 California law; (3) Whether Defendant failed to pay the class one additional hour of pay on
14 workdays it failed to provide the class with one or more meal or rest periods in compliance with
15 California law; (4) Whether Defendant failed to indemnify the class for all necessary business
16 expenditures incurred during the discharge of their duties; (5) Whether Defendant knowingly and
17 intentionally failed to provide the class with accurate wage statements; (6) Whether Defendant
18 willfully failed to provide the class with timely final wages; and (7) Whether Defendant engaged
19 in unfair competition within the meaning of Business and Professions Code section 17200, *et*
20 *seq.*, with respect to the class. DS, ¶ 24. Therefore, common questions predominate.

21 **D. Plaintiff Is Typical of the Settlement Class**

22 The class representative must be similarly situated to the rest of the purported class. *See*
23 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating "it has never been the law in California
24 that the class representative must have identical interests with the class members. The only
25 requirements are ... that the class representative be *similarly* situated") (emphasis in original); *See*
26 *also* Newberg, § 3:29 (typicality "focuses on whether there exists a relationship between the
27 Plaintiff's claims and the claims alleged on behalf of the class"). Plaintiff contends that her claims
28 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent
Class Members, was subject to the same relevant policies and procedures governing her
compensation, hours of work, and meal and rest periods. Because Plaintiff contends that she was
subject to the same general course of conduct as absent Class Members, resolving the common



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1 questions as they apply to Plaintiff will determine Defendant's *prima facie* liability to all Class
2 Members. Moreover, Plaintiff's claims could potentially be subject to the same primary
3 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical
4 of the Class. DS, ¶ 25.

5 **E. Plaintiff Will Adequately Represent the Settlement Class**

6 The adequacy requirement is met where the plaintiff is represented by counsel qualified
7 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
8 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
9 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
10 conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 20.

11 First, Class Counsel have supplied the Court with declarations to show that they are
12 adequate to represent the Settlement Class and that they have significant experience in
13 employment litigation generally, and wage and hour and employment-related class action
14 litigation specifically. *See* DS, ¶¶ 28 - 35; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
15 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

16 Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the
17 Class Members have strong and co-extensive interests in this litigation because they all worked
18 for Defendant during the relevant time period, allegedly suffered the same alleged injuries from
19 the same alleged course of conduct, and there is no evidence of any conflict of interest between
20 Plaintiff and the Class Members. DS, ¶ 63. Moreover, Plaintiff has demonstrated her commitment
21 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
22 with documents and extensively speaking with them to assist in identifying the claims asserted in
23 this case, assisting them in identifying witnesses, as well as exposing herself to the risk of
24 attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 63. Thus,
25 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
26 find that Plaintiff and her counsel are adequate to represent the Settlement Class as required under
27 Code of Civil Procedure § 382.

28 **F. Class Action Treatment Is the Superior Means for Resolving the Claims of the Class Members**

Plaintiff further contends that a class action is also superior to other means of adjudicating
the issues in this action. The predominance of common legal and factual questions shows that this
Court could fairly adjudicate the claims of Class Members through a single class action. In view

1 of the *theoretical* alternatives that proposed class members could potentially utilize—
2 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
3 claims through the Division of Labor Standards Enforcement (where there would be relatively
4 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
5 superior to all of them. Thus, this consideration supports conditional class action treatment for
6 purposes of this Settlement only. DS, ¶ 36.

7 **V. INTRODUCTION: THE COURT SHOULD GRANT PRELIMINARY**
8 **APPROVAL BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND**
9 **REASONABLE**

10 **A. Legal Standard**

11 A class action settlement requires court approval. California Rules of Court (“CRC”),
12 Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
13 written motion for preliminary approval, the proposed class settlement, and the proposed class
14 notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval
15 hearing where class members may be heard regarding the settlement, and at which evidence and
16 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
17 The decision to approve or reject a class settlement is committed to the Court’s broad discretion.
18 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
19 class settlement may be reversed only upon a showing of “clear abuse of discretion.” *Id.*

20 **B. The Settlement Is Presumptively Fair**

21 In assessing preliminary approval, a court evaluates if the settlement process has certain
22 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
23 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
24 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
25 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
26 48 Cal.App.4th at 1794.

27 The class settlement here satisfies all of these factors. DS, ¶ 37. The Settlement resulted
28 from thorough, arms’ length negotiations between experienced counsel with the assistance of
respected mediators after sufficient discovery was exchanged to assess the relative strengths and
weaknesses of their respective cases and Defendant’s estimated exposure. *Id.*

Plaintiff prepared “damages” estimates in advance of the mediation. DS, ¶ 38, Ex. 6.
Plaintiff determined Defendant’s maximum possible exposure for restitution and penalties to be
approximately \$16,081,629.39 (consisting of \$762,834.61 in unpaid wages, \$762,834.61 in



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1 liquidated damages, \$505,772.89 in missed meal period premium wages, \$505,772.89 in missed
2 rest break premium wages, \$197,432.86 in unreimbursed expenses, \$461,700.00 for wage
3 statement penalties, \$313,931.52 for waiting time penalties, and \$12,571,350.00 for civil under
4 PAGA. Plaintiff calculated the damages based on the number of workweeks and pay periods
5 provided by Defendant, Plaintiff's reports, and the sample data. *Id.*

6 Plaintiff also considered the possibility that Defendant could launch a *Pick Up Stix*
7 campaign and pursue individual release agreements from the Class Members. Plaintiff's Counsel
8 applied discounts to the maximum possible exposure to account for all other risks discussed
9 below. While it is difficult to assign anything but crudely-determined percentages of risk to any
10 of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery
11 for such employees is substantial and alone justifies a significant discount because Defendant
12 would likely by trial have gathered releases from the majority of the Class Members.

13 Plaintiff is aware of only two significant awards under the PAGA in a contested
14 proceeding, both issued by federal district courts.⁴ DS, ¶ 53. PAGA penalty awards are often
15 small even for egregious, intentional violations of the Labor Code.⁵ *Id.* For instance, on October

16 ⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
17 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
18 \$18,695,692.58. In this regard, the district court stated,

19 The plain language of PAGA provides that “a court may award a lesser amount than the
20 maximum civil penalty amount specified by this part if, *based on the facts and*
21 *circumstances of the particular case*, to do otherwise would result in an award that is
22 unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code s 2699(e)(2) (emphasis
23 added). The relationship between the amount of total damages and the amount of
24 maximum PAGA penalties is certainly a “circumstance” of the case under the term's
25 ordinary meaning. The weight given to that circumstance is greater in this case because
26 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
27 individual claims except for one. As a general matter, it would be excessively punitive
28 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
the damages caused by that injury or set of injuries.

Id., fn. 9. The district court further stated, “Virgin ‘has not presented any evidence that the full
penalty would be excessive in relation to its ability to pay,’ the weight of this factor is lessened.”
Id.

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
comply with the requirements of California Labor Code section 226.

⁵ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The



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1 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
2 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
3 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
4 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
5 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
6 result could occur here. *Id.*

7 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
8 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
9 \$650,000.00 is fair and reasonable. *Id.*

10 **C. The Settlement Satisfies the Kullar Factors for Approval**

11 The *Kullar* case sets forth several factors a court should consider in determining whether
12 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
13 risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining
14 class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
15 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
16 of a governmental participant; and (8) the reaction of the class members to the proposed
17 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
18 factors.

19 **1. Evaluation of Plaintiff's Case**

20 **a. Risks Associated with Defendant's Financial Condition**

21 Defendant's financial condition was the key factor in reaching this Settlement. DS, ¶ 41.
22 Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, she may
23 never recover the damages due to the risk of insolvency. A very large class action judgment would
24 almost certainly put the company out of business and/or would interfere with the company's
25 ability to carry out its contractual obligations. *Id.* In short, the "poor financial health of [the
26 defendant will] seriously increase [] the chance that Plaintiffs would be left with nothing if they
27 continued to litigate their claims." *Torrison v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
28 1376 (the financial condition of defendant predominated in assessing the reasonableness of
settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty

plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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1 concerning defendant's financial stability "strongly supports the reasonableness of the
2 settlement"); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at
3 *11 (finding potential insolvency to be additional risk that favors approval of a class action
4 settlement). Accordingly, Defendant's financial distress supports this settlement. *Id.*

5 **b. Risks Associated with the Unpaid Wages Claim**

6 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
7 best, largely because Defendant's written policies throughout the relevant time period prohibited
8 off-the-clock work. DS, ¶ 42. Off-the-clock claims are difficult where a defendant requires in its
9 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
10 *Hospital* (2014) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
11 be compensable). *Id.* In its written employment policies, Defendant mandates that employees
12 must record all time worked accurately on their time records and strictly prohibit employees from
13 performing any work off-the-clock. DS, ¶ 42. Moreover, while Defendant disputes that off-the-
14 clock work occurred, it contends that any time spent off the clock was *de minimis*. The California
15 Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular
16 and minute periods of time may still be subject to a *de minimis* defense even if compensable.
17 (Stating that "We do not decide whether there are circumstances where compensable time is so
18 minute or irregular that it is unreasonable to expect the time to be recorded."). Following *Troester*,
19 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
20 clock was minute and insignificant. Accordingly, a large award of penalties seems unlikely with
21 respect to this claim. *Id.*

22 The difficulty inherent in proving that off-the-clock work occurred poses a significant
23 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
24 Generally, a court will not certify a class unless it can determine an appropriate classwide
25 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
26 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
27 the lack of records indicating when such off-the-clock work may have taken place. Individualized
28 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
in fact worked "minutes" off-the-clock on a "regular" basis. Accordingly, there is a significant
risk that the Court would consider this evidentiary showing insufficient as a classwide
methodology. DS, ¶ 43.



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1 **c. Risks Associated with the Meal Period Claims**

2 There are risks to Plaintiff's meal period claim. DS, ¶ 44. Defendant contends that, to
3 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
4 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
5 "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal
6 breaks and ensure no work thereafter is performed." *Id.* at 1040-41. *Id.* Instead, a plaintiff must
7 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
8 or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard
9 to the meal break claim is the reason that a particular employee may have failed to take a meal
10 break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

11 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
12 from taking their meal or rest periods. DS, ¶ 45. Defendant's policies mandate that employees
13 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
14 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
15 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
16 taken the vast majority of the time. *Id.* Of the time records that show a late, short, or no lunch,
17 individualized evidence may be necessary to determine whether they occurred due to conduct of
18 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
19 the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

20 **d. Risks Associated with the Rest Break Claims**

21 There are risks to Plaintiff's rest period claim. DS, ¶ 46. Employers are not required to
22 record rest periods and such periods are paid. *Id.* Defendant contends it provided non-exempt
23 employees the opportunity to take rest periods in accordance with California law. Further,
24 Defendant's written policies on meal and rest periods are consistent with the Wage Order. *Id.*
25 Thus, unlike meal periods, where there are often records showing whether an employee clocked
26 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
27 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
28 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
(2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
certification, it may be possible to manage individual issues through the use of surveys and



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1 statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
2 *Corporation v. Behrend* (2013) 133 S.Ct. 1426.

3 **e. Risks Associated with the Failure to Indemnify Claim**

4 There is a risk that the Court may consider Plaintiff’s claims as to Defendant’s alleged
5 failure to indemnify for business expenses to be individual in nature and thus decline to certify
6 the class. DS, ¶ 47. Plaintiff alleges that Defendant required Plaintiff and the Class Members to
7 use their personal items, including cellular phones and personal vehicles, and failed to indemnify
8 them for these business expenses. *Id.* Defendant presented evidence that it has supplied its
9 employees with equipment and other supplies and had an expense reimbursement policy. As such,
10 there is a risk that the Court may consider Plaintiff’s claims to be individual in nature and unfit
11 for classwide resolution. *Id.*

12 **f. Risks Associated with the Waiting Time Penalty Claims**

13 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
14 PAGA penalties. Under Labor Code section 226, wage statements must include various
15 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
16 DS, ¶ 48.

17 Here, Plaintiff’s wage statement claim has the same underlying risks as the above claims,
18 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply
19 with the requirements of Labor Code § 226. DS, ¶ 48.

20 **g. Risks Associated with the Waiting Time Penalty Claims.**

21 Without proof of willful behavior, Plaintiff will be unable to recover these penalties.

22 **h. Risks Associated With the PAGA Claim**

23 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
24 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
25 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid
26 defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations. Thus, the PAGA
27 claims likewise face significant uncertainty. DS, ¶ 51. There is a risk that the Court would
28 consider the maximum civil penalty available to be confiscatory. This is particularly the case
considering Defendant’s financial condition. *Id.* Moreover, the COVID-19 pandemic could
motivate the Court to further reduce the penalty award to avoid what it may consider a
confiscatory taking. *Id.*

This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and required a



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1 significant discount for settlement purposes. DS, ¶ 52. For mediation purposes, Plaintiff's counsel
2 estimated a maximum possible exposure of approximately \$12,571,350.00 in civil penalties. This
3 estimate did not take into account any of the risks discussed above and assumed a violation for
4 every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay
5 period for the same alleged violations of different Labor Code provisions and derivative
6 violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties
7 in this fashion may be appropriate to determine the amount in controversy for purposes of removal
8 jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs
9 multiple PAGA penalties for the same violation for the same pay period under different Labor
10 Code provisions. *Id.* This may be because the PAGA does not provide for what many employers
characterize as claim splitting and not merely stacking. *Id.*

11 **i. Risks Associated with a Pick Up Stix Campaign**

12 An employer enjoys the right to settle a putative class member's disputed wage claims
13 individually, without the consent or involvement of class counsel. DS, ¶ 55. (See *Chindarah v.*
14 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendant may launch a
15 "pick off" settlement campaign to pursue individual release agreements from the Class Members,
16 thereby potentially narrowing the size of the Settlement Class – 112 members – until it is no
17 longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient number
18 of employees to represent. This led to a significant reduction of claim value in settlement
negotiations. *Id.*

19 While the evidence gathered through Plaintiff's discovery supports the merits of the
20 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
21 presents significant risks that support a downward departure from Defendant's estimated liability
22 exposure. DS, ¶ 56. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
23 amount of damages, monetary penalties, or other relief that the Class could reasonably expect to
24 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
25 It also represents a fair, adequate, and reasonable compromise amount for these claims and
26 warrants preliminary approval. *Id.*, *Torrise v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
27 1376 (the financial condition of defendant predominated in assessing the reasonableness of
28 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
concerning defendant's financial stability "strongly supports the reasonableness of the



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1 settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
2 WL 2465049, * 3.

3 **2. Allocation of the PAGA Payment**

4 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
5 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
6 appropriate under the circumstances. DS, ¶ 58. The Parties negotiated a good faith amount for
7 PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
8 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
9 “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount
10 was the result of self-interest at the expense of other Class Members,” such amounts are generally
11 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
12 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
13 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
14 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
15 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
16 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
17 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
18 courts. *See, e.g., Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
19 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
20 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
21 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
22 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
23 settlement of 0.3% or \$1,500); *see Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
24 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
25 approved settlements for \$20,000 or less. *See, e.g., Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
26 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
27 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
28 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
(approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*



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1 **3. Presence of Governmental Participant**

2 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
3 settlement to the LWDA with the filing and service of this motion. DS, ¶ 107, Ex. 20.

4 **4. Reaction of Class Members to Proposed Settlement**

5 If the settlement is preliminarily approved, Class Members will be provided with the Class
6 Notice (attached as Exhibit At the Settlement) and an opportunity to object. DS, ¶ 87. The Parties'
7 proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will
8 allow Class Members to make informed responses to the proposed settlement. *Id.*

9 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
10 **COMPENSATES CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
11 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
12 **COMPARED TO OTHER CLASS MEMBERS**

13 The Individual Settlement Payments will be paid to each Class Member based on his or
14 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 71. Because this method
15 compensates Class Members based on the extent of their potential injuries, in that Class Members
16 who worked for Defendant longer would have been subject to more alleged violations, it is fair,
17 adequate, and reasonable. *Id.*

18 Plaintiff estimates that there are 19,924 Work Weeks for the Class Period. So, each Work
19 Week has a value of approximately \$18.04 (\$359,333.36 Net Settlement Amount / 19,924 Work
20 Weeks = \$18.04). Plaintiff had 14 Work Weeks during the Class Period. Based on this, it is
21 anticipated that Plaintiff Nicole Shaver will receive an Individual Settlement Payment of
22 approximately \$252.56 as a participating Class Member (14 Work Weeks x \$18.04 = \$252.56)
23 while the average estimated Individual Settlement Payment to participating Class Members will
24 be approximately \$3,208.33. Some Class Members – those who worked more Work Weeks during
25 the Class Period – will receive more, and some less. The highest possible Individual Settlement
26 Payment to a participating Class Member (i.e., to those who qualify for all Work Weeks in the
27 Class Period) will be approximately \$6,143.43. The lowest possible Individual Settlement
28 Payment to a participating Class Member (i.e., to those who qualify for only one Work Week in
the Class Period) will be approximately \$18.04. *See* DS, ¶ 78.

 It is anticipated that the average Aggrieved Employee's Individual PAGA Payment
will be \$18.52. *Id.* Plaintiff's Individual PAGA Payment, her individual share of 25% of the
PAGA Penalties, will be less than that of some absent Aggrieved Employees. Under the
Settlement, each Aggrieved Employee will receive a *pro rata* distribution of 25% of the PAGA



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1 Penalties proportionate to the number of paychecks he or she had with Defendant during the
2 PAGA Period, compared to the total of all paychecks of all Aggrieved Employees during the
3 PAGA Period, as reflected by Defendant's records. Plaintiff estimates that there are 5,099
4 Aggrieved Employee paychecks for the PAGA Period. So, each Aggrieved Employee
5 paycheck from the PAGA Period has a value of approximately \$0.20 (25% of \$4,000.00 in PAGA
6 Penalties / 5,099 Aggrieved Employees paychecks = \$0.20). It is anticipated that Plaintiff Nicole
7 Shaver will receive an Individual PAGA Payment of approximately \$1.40 as an Aggrieved
8 Employees (7 paychecks during the PAGA Period x \$0.20 paycheck value = \$1.40) while the
9 average estimated Individual PAGA Payment to an Aggrieved Employee will be approximately
10 \$18.52 (\$1,000.00, 25% of PAGA Penalties / Aggrieved Employees paychecks during the PAGA
11 Period = \$18.52 Individual PAGA Payment). Some Aggrieved Employees – those who had more
12 paychecks during the PAGA Period – will receive more, and some less. The highest possible
13 Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for all paychecks
14 in the PAGA Period) will be approximately \$97.16. The lowest possible Individual PAGA
15 Payment to an Aggrieved Employee (i.e., to those who qualify for only one paycheck in the
16 PAGA Period) will be approximately \$0.20. *See* DS, ¶ 78.

17 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'**
18 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE**

19 The Settlement states Class Counsel may seek attorneys' fees of up to one-third of the
20 GSA and up to \$40,000.00 for actual reasonable litigation costs and expenses incurred in
21 prosecuting the Action. Settlement § 3.2.2. These amounts are reasonable, given the facts and
22 circumstances of the case. DS, ¶¶ 59 -62.

23 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
24 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
25 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
26 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
27 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
28 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee
awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*



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(9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel took in bringing the case, (2) the extensive time, effort, and expense dedicated to the case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned down to devote time to this matter. DS, ¶ 60. Class Counsel interviewed and obtained information from putative class members, met and conferred with Defendant's counsel on numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided by Defendant and obtained through other sources, researched applicable law, and provided estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

Class Counsel have borne all the risks and costs of litigation and will receive no compensation until recovery is obtained. DS, ¶ 61. Class Counsel are well-experienced in wage-and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.* Considering the amount of the attorney fees requested, the work performed, and the risks incurred, the requested fees and costs are reasonable and should be awarded. *Id.*

VIII. THE CLASS REPRESENTATIVE SERVICE PAYMENT TO PLAINTIFF SHOULD BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative Service Payment of \$20,000.00. This amount is entirely reasonable given Plaintiff's efforts in this action and the risks she undertook on behalf of Class Members. DS, ¶ 63; Declaration of Nicole Shaver ("Plaintiff decl."), generally. Plaintiff has devoted many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other things, retaining experienced counsel, providing them with information about her work history with Defendant and Defendant's policies and practices with respect to the wage and hour claims at issue, participating in mediation,



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1 and being actively involved in the settlement process to ensure a fair result for the Settlement
2 Class as a whole. In doing this, Plaintiff has been exposed to significant risks, including the risk
3 of an order to pay Defendant's attorneys' fees and costs if this action had been unsuccessful (*See*
4 Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the
5 Settlement Class shows that the proposed Class Representative Service Payment is fair, adequate,
and reasonable, and thus warrants preliminary approval. DS, ¶ 63; Plaintiff decl., generally.

6 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
7 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE,**
8 **AND REASONABLE**

9 With regard to the settlement administration costs ("Administration Expenses Payment")
10 provision, it is reasonable. Before agreeing to ILYM Group, Inc. ("Administrator") and its bid of
11 \$6,250.00, the Parties sought and reviewed bids from other reputable third-party administrators.
12 The bid provided by Administrator was competitive. DS, ¶ 100 -101, Exs. 16, 17, 18 and 19.
Thus, the settlement administration costs provision should be given preliminary approval.

13 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
14 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
15 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
16 **EXERCISE THEIR RIGHTS**

17 This Court should approve the proposed plans for giving notice to the Settlement Class
18 and administering the Settlement. The standard for determining the adequacy of notice is whether
19 the notice has "a reasonable chance of reaching a substantial percentage of the class members."
20 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
21 measures to ensure that as many Class Members as practicable receive actual notice of the
22 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
23 the Notice by First Class U.S. mail only. Settlement, ¶ 8.4.2. Although there are current employee
24 Class Members, it is uncertain whether Defendant's records of their contact information include
25 email addresses, and Class Members, who perform much of their work away from a desk, are not
26 in a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
27 DS, ¶ 87.

28 With respect to its content, "[The] notice given to the class must fairly apprise the class
members of the terms of the proposed compromise and of the options open to dissenting class
members." *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
The purpose of the notice in class settlement context is to give class members sufficient



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1 information to decide whether they should accept the benefits offered, opt out and pursue their
2 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
3 Class Members with all pertinent information that they need to fully evaluate their options and
4 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
5 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
6 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
7 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
8 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
9 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
10 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
11 the Notice should be approved because it describes the Settlement with sufficient clarity and
12 specificity to explain to Class Members what this action is about, their rights under the Settlement,
13 and how to exercise those rights. DS, ¶ 87.

14 **XI. CONCLUSION**

15 For the reasons stated above, this Court should grant Plaintiff's Motion in its entirety and
16 adopt the proposed order submitted concurrently herewith.

17 Respectfully submitted,

18 THE SPIVAK LAW FIRM

19 Dated: May 3, 2024

20 By: 

21 DAVID G. SPIVAK
22 LAUREN R. DAVIS, Attorneys for
23 Plaintiff, NICOLE SHAVER, and all
24 others similarly situated



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