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of himself and others similarly situated
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ORANGE**
12

13 ANTONIO DELGADO, on behalf of himself
and others similarly situated,

14
15 Plaintiff,

16 v.

17 INTENSE LIGHTING, LLC; and DOES 1
through 100, inclusive,

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19 Defendants.
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Case No.: 30-2021-01219686-CU-OE-CXC

Assigned for all purposes to:
Hon. James J. Di Cesare, Dept. C16

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

[Declarations of Anthony J. Orshansky and
Antonio Delgado; and Proposed Order
submitted concurrently herewith]

Preliminary Approval Hearing

Date: May 27, 2022

Time: 9:30 a.m.

Dept. C16

Reservation No.: 73713579

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

2 **PLEASE TAKE NOTICE** that, pursuant to Rule 3.769 of the California Rules of Court on
3 May 27, 2022, at 9:30 a.m. before the Honorable James J. Di Cesare in Department C16 of the
4 above-entitled Court, located at 700 Civic Center Drive West, Santa Ana, CA 92701, plaintiff
5 Antonio Delgado (“Plaintiff” or “Class Representative”), individually and on behalf of all others
6 similarly situated, will and hereby does move this Court for:

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

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

11 **Class Members** - All current and former hourly paid or non-exempt employees who
12 worked for Defendant and/or its predecessors or merged entities, within the State of
California during the Class Period (the “Class” or “Class Members”).¹

13 3. Preliminary appointment of Plaintiff as Class Representative;

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

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

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

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

24 This motion is based on this notice of motion, the attached memorandum of points and
25 authorities, the declarations of Anthony J. Orshansky and Antonio Delgado filed concurrently

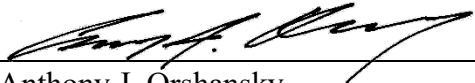
26 _____
27 ¹ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who do not
28 opt out of this settlement. (Settlement Agreement ¶ 33.) “Class Period” is defined as the period
beginning on January 11, 2017 and ending on October 18, 2021. (See Settlement Agreement ¶¶ 7,
39.)

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

6
7 Dated: March 7, 2022

Respectfully submitted,

8 COUNSELONE, PC

9 By: 

10 Anthony J. Orshansky

11 Jennifer L. Connor

12 Justin Kachadoorian

13 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Antonio Delgado (“Plaintiff” or “Class Representative”), individually and on behalf
4 of all others similarly situated,² seeks preliminary approval of the Stipulation of Class and
5 Representative Action Settlement (“Settlement Agreement”) entered into with defendant Intense
6 Lighting, LLC (“Defendant”). The Settlement Agreement between Plaintiff and Defendant
7 (together, the “Parties”), if approved, will resolve specific claims of the Settlement Class Members
8 and PAGA Group Members in exchange for Defendant’s agreement to pay the amount of ***Eight***
9 ***Hundred Thousand Dollars (\$800,000) into a non-reversionary common settlement fund.***³ There
10 are approximately 234 Class Members employed as hourly-paid or non-exempt employees during
11 the Class Period.

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

19 After engaging in substantial independent investigation and after mediation with the Hon.
20 Peter D. Lichtman of Signature Resolution, the Parties agreed to settle the Settlement Class
21 Members’ and PAGA Group Members’ claims alleged in this litigation for the non-reversionary
22 sum of Eight Hundred Thousand Dollars (\$800,000) (“Gross Settlement Amount”). A true and

23 _____
24 ² “Class Members” are defined as all current and former hourly-paid or non-exempt employees who
25 worked for Defendant and/or its predecessors or merged entities in the State of California during
the Class Period. (Settlement Agreement ¶ 4.) “Class Period” is defined as the period beginning on
January 11, 2017 and ending on October 18, 2021. (Settlement Agreement ¶¶ 7, 39.)

26 ³ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who do not
27 opt out of this settlement. (Settlement Agreement ¶ 33.) “PAGA Group Members” are defined as all
28 Class Members, whether or not they submit a request for exclusion from the Settlement Class,
employed by Defendant during the PAGA Period. (Settlement Agreement ¶ 22.) The “PAGA
Period” is defined as the period beginning on January 11, 2020 and ending October 18, 2021. (See
Settlement Agreement ¶¶ 25, 39.)

1 correct copy of the fully executed Settlement Agreement is attached as **Exhibit 1** to Declaration of
2 Anthony J. Orshansky (“Orshansky Decl.”), filed concurrently herewith. After deductions for
3 Attorneys’ Fees and Costs to Class Counsel, Enhancement Payment to the Class Representative,
4 Administration Costs to the Settlement Administrator, and the PAGA Payment, the remaining
5 amount (the “Net Settlement Amount”) of approximately \$392,000 will be distributed to Settlement
6 Class Members. (Settlement Agreement ¶¶ 20, 46.) The entire Net Settlement Amount will be paid
7 out to Settlement Class Members. Settlement Class Members shall automatically receive payments
8 without the need to submit a claim form, and PAGA Group Members shall receive PAGA payments
9 irrespective of whether they opt out. (*Id.* at ¶¶ 44, 46(d), 50.)

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

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

16 **A. Discovery and Investigation**

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

22 Prior to initiating the lawsuit, as early as July 2020, counsel for Plaintiff, CounselOne, P.C.,
23 independently and thoroughly investigated the claims and considered the facts and circumstances
24 underlying the pertinent issues and applicable law. (Orshansky Decl. ¶ 25.) This required thorough
25 discussions and interviews with Plaintiff and other Class Members as well as research into the
26 various legal issues involved in the case. (*Ibid.*) After conducting their initial investigation, Class
27 Counsel determined that the claims were well suited for class action adjudication owing to what
28 appeared to be a common course of conduct affecting a similarly situated group of employees. (*Ibid.*)

1 On January 11, 2021, Class Counsel provided pre-filing written notice to the LWDA and by
2 certified mail to Defendant of the above-identified allegations on behalf of Plaintiff and similarly
3 situated aggrieved employees in accord with the PAGA, California Labor Code § 2698, *et seq.*
4 (Orshansky Decl. ¶ 26.)

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

16 Defendant denies Plaintiff’s allegations of wrongdoing; Defendant makes no admissions
17 regarding any facts or law related to the lawsuit. (Orshansky Decl. ¶ 29.) Defendant does not believe
18 that any liability to Plaintiff or other Class Members exists, or that Plaintiff or Class Members are
19 entitled to any recovery. (Orshansky Decl. ¶ 29; Settlement Agreement ¶¶ 41, 43.)

20 Class Counsel engaged in extensive informal discovery and investigation in advance of filing
21 the complaint. (Orshansky Decl. ¶ 30.) In advance of mediation, the Parties agreed to an informal
22 exchange of information and documents. (*Ibid.*) Defendant produced information and
23 documentation concerning the alleged violations, such as Defendant’s written policies concerning
24 those claims, including Defendant’s employee handbooks, policies and procedures regarding the
25 payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording
26 hours, issuance of wage statements, and providing all wages at separation, as well as composite data

27 _____
28 ⁴ The Parties entered into a tolling agreement prior to the filing of the Complaint that extends the
putative class period back to January 11, 2017.

1 regarding the number of Class Members and the mix of current versus former employees, total
2 number of pay periods, total number of workweeks, and the average hourly rate in effect. (*Ibid.*)
3 Defendant also produced a 25% sample of time and pay records for Class Members. Courts have
4 found that the use of similar percentage samples is appropriate. (*See e.g., Brum v. MarketSource,*
5 *Inc.* (E.D. Cal. 2018) 2018 WL 3861558, at *5 [10% sample]; *Talavera v. Sun Maid Growers of*
6 *California* (E.D. Cal. 2017) 2017 WL 495635, at *4 [10% sample]; *Kaminske v. JP Morgan Chase*
7 *Bank N.A.* (C.D. Cal. 2010) 2010 WL 5782995, at *5 [10% sample].)

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

12 **B. Mediation and Settlement**

13 After having performed extensive investigation and analysis of the legal and factual issues
14 and risks, on August 19, 2021, the Parties participated in a full day mediation before mediator the
15 Hon. Peter D. Lichtman (Ret.) of Signature Resolution, where they debated and discussed their
16 respective position in an attempt to resolve the lawsuit. (Orshansky Decl. ¶ 33.) Judge Lichtman is
17 experienced in mediating complex general litigation, labor and employment claims, class actions,
18 and PAGA cases, among others. (*Ibid.*) During the mediation, the Parties exchanged further
19 information and discussed all aspects of the case, including the risks and delays of litigation and the
20 risk to both Parties for proceeding with a motion for class certification, liability under the claims
21 asserted, and the implications of a PAGA representative action. (*Ibid.*) Pursuant to the mediator's
22 proposal, the Parties came to an agreement on all material terms of settlement. (*Id.* at ¶ 34.)

23 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks
24 and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class
25 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
26 adequate taking into consideration the amounts received in other wage and hour class and
27 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
28 each Class Members' claim to the settlement award he or she will receive. (Orshansky Decl. ¶ 36.)

1 Class Counsel believe that the settlement serves the best interests of Class Members. (*Ibid.*) Further,
2 and based on the settlement negotiations, which were hard fought and conducted in good faith and
3 at arm's length between attorneys with substantial experience litigating class actions, representative
4 actions, and wage and hour cases, the settlement was the product of a non-collusive settlement
5 process in which the Parties were forced to make significant compromises in the interest of reaching
6 a full and complete settlement of the Action. (*Id.* at ¶ 35.) The Parties have concluded that it is in
7 their best interests to compromise, settle, and accept the terms of the Settlement Agreement. (*See*
8 Settlement Agreement ¶ 40.)

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

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

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

- 21 • Up to \$280,000—which is 35% of the Gross Settlement Amount—in attorneys' fees and
22 up to \$20,000 in litigation costs to Class Counsel (the "Attorneys' Fees and Costs");
- 23 • Up to \$10,000 to the Class Representative as an Enhancement Payment—as a service
24 award and in exchange for a general release of claims;
- 25 • Up to \$80,000 allocated as a PAGA Payment—of which 75% is allocated for payment to
26 the LWDA for civil penalties pursuant to statute and 25% is allocated to PAGA Group
27 Members; and

28 ///

- Up to \$18,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$392,000, is called the “Net Settlement Amount.” (Settlement Agreement ¶¶ 20, 46; Orshansky Decl. ¶ 7.) The entire Net Settlement Amount shall be paid out to Settlement Class Members. Settlement Class Members shall automatically receive payments without the need to submit a claim form, and PAGA Group Members shall receive PAGA payments irrespective of whether they opt out. (Settlement Agreement ¶¶ 44, 46(d), 50; Orshansky Decl. ¶ 7.)

A. The Settlement Provides for Reasonable Monetary Payments

Although exact recovery amounts depend on each Settlement Class Members’ relative number of qualifying workweeks, for estimation purposes only, if all of the approximately 234 Class Members participate in the settlement, then the average Individual Settlement Share would be an estimated \$1,675.21 per Class Member. (Orshansky Decl. ¶ 11.) 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.*; Settlement Agreement ¶ 53.)

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

In addition, each PAGA Group Member will receive a proportional share of the 25% of the PAGA Payment based on his or her pay periods during the PAGA Period. (Settlement Agreement ¶ 46(d); Orshansky Decl. ¶ 9.) Specifically, 25% of the PAGA Payment (or \$25,000) shall be divided by the total of all pay periods worked by PAGA Group Members during the PAGA Period in order to establish the value of each pay period. (Settlement Agreement ¶ 46(d); Orshansky Decl. ¶ 9.) The

1 individual PAGA payment to be made to each PAGA Group Member shall be calculated by
2 multiplying the value of a pay period by the number of pay periods worked by the PAGA Group
3 Member during the PAGA Period, and irrespective of whether he or she is a Settlement Class
4 Member. (Settlement Agreement ¶ 46(d); Orshansky Decl. ¶ 9.)

5 After reduction for the employee's share of taxes on the wage portion,⁵ the net payment to
6 each Settlement Class Member/PAGA Group Member will be the sum of his or her Individual
7 Settlement Share plus, if applicable, the individual PAGA payment (collectively, "Individual
8 Settlement Payment"). (Settlement Agreement ¶ 46(f); Orshansky Decl. ¶ 10.) As a result of the
9 distribution formulas, the consideration paid to each Settlement Class Member/PAGA Group
10 Member is tailored to the impact of Defendant's alleged violations as well to the claims he or she is
11 releasing. (Orshansky Decl. ¶ 10.) Further, a Settlement Class Member may submit a written letter
12 to the Settlement Administrator disputing the number of workweeks credited if he or she believes
13 that count is inaccurate. (Settlement Agreement ¶ 51.) Finally, any Class Member who prefers to
14 preserve his or her right to pursue relief or seek an alternative recovery may opt out.⁶ (*Id.* at ¶ 53.)

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

16 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of
17 seeking final approval in the amount of \$10,000 for services to the Settlement Class and a general
18 release of all claims against Defendant. (*See* Declaration of Antonio Delgado ("Delgado Decl."),
19 *passim*, filed concurrently herewith; Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl. ¶ 12.)
20 "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class
21 representatives for work done on behalf of the class [and] to make up for financial or reputational
22 risk undertaken in bringing the action." (*In re Cellphone Fee Termination Cases* (2010) 186
23 Cal.App.4th 1380, 1393-1394.) Plaintiff's requested enhancement payment is intended to recognize
24 the significant benefits conferred upon the Settlement Class and be proportional to the time and
25

26 ⁵ The Parties agreed to allocate twenty percent (20%) of each Individual Settlement Share to wages
27 and eighty percent (80%) of each Individual Settlement Share to interest, penalties, and other non-
28 wage damages. (Settlement Agreement ¶ 48(a).)

⁶ Again, if approved, PAGA Group Members will receive their individual PAGA payments
irrespective of whether they opt out of the settlement. (Settlement Agreement ¶ 46(d).)

1 effort that Plaintiff expended on behalf of the Class including, providing factual information and
2 documents to Class Counsel, discussing the claims and theories at issue in the case with Class
3 Counsel, identifying potential witnesses, reviewing the Settlement Agreement, as well as the
4 significant risks Plaintiff undertook by agreeing to serve as a named plaintiff, and the fact that
5 Plaintiff agreed to a general release of all claims subject to a waiver of Civil Code § 1542. (*See*
6 Delgado Decl, *passim*; Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl. ¶ 13.)

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

23 Both California and federal courts have recognized that an appropriate method for awarding
24 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of
25 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the
26 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*
27 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and
28 “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 amount in light of the substantial risks and significant work undertaken, the excellent results obtained for the Class Members, and the efficiency with which the Parties have conducted the litigation. (Orshansky Decl. ¶ 16.) 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 this settlement.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

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

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

///

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

2 Whether a class is ascertainable is determined by examining the class definition, the size of
3 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at
4 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,
5 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are “ascertainable” where
6 they may be readily identified without unreasonable expense or time.

7 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
8 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and
9 former hourly-paid or non-exempt employees who worked for Defendant (and/or its predecessors
10 or merged entities) in the State of California during the Class Period. (Settlement Agreement ¶ 4.)
11 Further, the Class Period is defined as the period beginning on January 11, 2017 and ending on
12 October 18, 2021. (*See id.* at ¶ 7; Orshansky Decl. ¶ 84.) Thus, all Class Members are of a specific
13 type (hourly-paid or non-exempt employees) employed within California. Defendant is required to
14 and does maintain employment records of such persons, including contact information and Social
15 Security numbers. (Orshansky Decl. ¶ 84.) Documents and information exchanged reflect a class of
16 approximately 234 current and former hourly, non-exempt employees working in California during
17 the Class Period. (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and numerosity
18 requirements. (*See e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers
19 sufficiently numerous].)

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

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

23 [D]oes not depend upon an identical recovery, and the fact that each member of the
24 class must prove his separate claim to a portion of any recovery by the class is only
25 one factor to be considered...The mere fact that separate transactions are involved
26 does not of itself preclude a finding of the requisite community of interest so long as
27 every member of the alleged class would not be required to litigate numerous and
28 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 p. 809.) The instant litigation is predicated on uniform company policies and systemic top-down business practices revolving principally around Defendant’s timekeeping and pay practices – *e.g.*, off-the-clock work attributed to understaffing, unreasonable workloads, and/or inequitable rounding, and failure to pay meal and rest break premiums. (Orshansky Decl. ¶ 85.) These allegations have given rise to the following claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; and derivative claims arising therefrom. (*Ibid.*)

Because Plaintiff has alleged a single top-down compensation scheme where “the relevant proof [does] not vary among class members” and “clearly present[] a common question fundamental to all class members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation, class-wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class certification in a manufacturing defect case when a common course of action had been proven].) This inference “*eliminates* the need for each class member to prove individually the consequences of the defendants’ actions to him or her.” (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of this matter depends upon questions that are common to members of the Class. (Orshansky Decl. ¶ 86.) These types of claims are commonly held to be proper for class certification. (*Ibid.*; *see, e.g., Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period claim]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal period claim].)

C. The Claims of the Named Plaintiff Are Typical

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

Here, Plaintiff’s claims are typical of those held by the members of the Class. (Orshansky Decl. ¶ 87.) Like all other Class Members, Plaintiff was a non-exempt hourly employee working for Defendant in California during the Class Period. (*Ibid.*) As alleged, Plaintiff was not compensated for all hours he worked, and not provided with legally compliant meal and rest breaks. (*Ibid.*)

1 Plaintiff was therefore impacted by the same challenged policies that allegedly injured the Class as
2 a whole and subject to the same defenses forwarded by Defendant as to the Class, thus his claims
3 are therefore typical. (*Ibid.*)

4 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the**
5 **Settlement Class**

6 The adequacy of representation requirement examines conflicts of interest between named
7 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
8 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
9 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class
10 he seeks to represent. (Delgado Decl. ¶ 10; Orshansky Decl. ¶ 85; *McGhee v. Bank of America*
11 (1976) 60 Cal.App.3d 442, 450 [finding adequacy satisfied where there was no indication that
12 plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to those
13 of the proposed class].) Class Counsel also have extensive experience in wage and hour litigation.
14 (Orshansky Decl. ¶¶ 75-79, 85.)

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

16 In making its class certification decision, the court must determine that a class action would
17 be superior to alternative means for the fair and efficient adjudication of the litigation. By
18 consolidating more than two hundred individual actions into a single proceeding, this Court's use
19 of the class action device enables it to manage this litigation in a manner that serves the efficiency
20 interests of the litigants and the judicial system. (Orshansky Decl. ¶ 89.) Absent class treatment, the
21 only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores*
22 *v. Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating "[t]he relevant comparison lies between the
23 costs and benefits of adjudicating Plaintiff's claims in a class action and the costs and benefits of
24 proceeding by numerous separate actions – not between the complexity of a class suit that must
25 accommodate some individualized inquires and the absence of any remedial proceeding
26 whatsoever."].) Finally, in the context of settlement, the superiority concerns are essentially non-
27 existent.

28 ///

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

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

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

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

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

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

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

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

To summarize, the settlement here is fair because it offers payment to each Settlement Class Member/PAGA Group Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the settlement proceeds whereby the funds are allocated proportionally based on the respective number of workweeks/pay periods that he or she worked during the relevant periods. (Orshansky Decl., *passim*.) For all of the foregoing reasons, the proposed settlement should be preliminarily approved.

A. The Settlement Is Entitled to a Presumption of Fairness

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

B. Negotiations Were at Arm’s-Length before a Respected Mediator

The Parties engaged in a full day mediation session with the Hon. Peter D. Lichtman (Ret.) of Signature Resolution. (Orshansky Decl. ¶ 33.) Judge Lichtman is experienced in resolving complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) Pursuant to the mediator’s proposal, the Parties came to an agreement on all material terms of settlement. (*Id.* at ¶ 34.) The settlement negotiations were hard fought and conducted in good faith and at arm’s length between attorneys with substantial experience litigating class actions, representative actions, and wage and hour cases. (*Id.* at ¶ 35.) The settlement was the product of a

1 non-collusive settlement process in which the Parties were forced to make significant compromises
2 in the interest of reaching a full and complete settlement of the Action. (*Ibid.*)

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

4 Throughout this case, Class Members have been represented by counsel who have years of
5 experience in employment class action litigation. (Orshansky Decl. ¶¶ 78-82.) Class Counsel
6 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,
7 conducting pre-filing investigation and research; conducting informal discovery; reviewing
8 Defendant's written policies concerning the claims set forth in the action, including Defendant's
9 policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time
10 keeping policies, such as rounding and recording hours, issuance of wage statements, and providing
11 all wages at separation; reviewing and analyzing time and pay records; meeting and conferring
12 regarding the information and documents produced; interviewing Class Members; drafting
13 pleadings; researching California law; preparing damages models; consulting with an expert;
14 preparing for and attending mediation; and negotiating and finalizing the settlement and related
15 documents. (Orshansky Decl. ¶¶ 14, 25, 30-32.)

16 **D. Class Counsel Are Experienced in Similar Litigation**

17 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
18 of the Class Members and PAGA Group Members. (*See* Settlement Agreement ¶ 40; Orshansky
19 Decl. ¶ 36.) Although the recommendations of counsel proposing the class settlement are not
20 conclusive, the Court can properly take the recommendations into account, particularly if counsel
21 have been involved in litigation for some period of time, appear to be competent, have experience
22 with this type of litigation, and significant discovery has been completed. (*See* Newberg § 11.47.)
23 Here, Plaintiff is represented by competent and experienced counsel who possess extensive
24 experience litigating wage and hour class actions and have been appointed as class counsel in
25 numerous cases alleging similar claims. (Orshansky Decl. ¶¶ 78-82.)

26 **E. The Settlement Is Fair, Reasonable, and Adequate**

27 To make a fairness determination, the Court should consider several factors, including "the
28 strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the

1 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
2 discovery and the stage of proceedings, [and] the experience and views of counsel.” (*Dunk v. Ford*
3 *Motor Co.* (1986) 48 Cal.App.4th 1794, 1801.) “The list of factors is not exclusive and the court is
4 free to engage in a balancing and weighing of factors depending on the circumstance of each case.”
5 (*Wershba, supra*, 91 Cal.App.4th at p. 245.) As discussed below, the proposed settlement is fair,
6 adequate, and reasonable in light of the overall factors in this case.

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

8 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
9 model for Defendant’s liability. (Orshansky Decl. ¶ 37.) Although Plaintiff steadfastly maintains
10 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
11 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4
12 *infra*, Defendant presented numerous defenses to Plaintiff’s claims, both on the merits and with
13 respect to class certification. (*Ibid.*) For example, Defendant defended against the minimum and
14 overtime wage claims by relying on policies that explicitly prohibited Class Members from engaging
15 in off-the-clock work. (*Id.* at ¶ 38.) Defendant also argued that Class Members worked in different
16 job positions and had different managers, and that, as a result, Defendant contended there was
17 variation to the circumstances that could allegedly cause the employees to be deprived of the
18 opportunity to take legally compliant, duty-free meal and rest periods, and this variation in
19 circumstances raised highly individualized questions of fact. (*Ibid.*) Additionally, Defendant made
20 some premium payments for non-complaint meal periods, totaling \$29,137. (*Ibid.*)

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

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

27 Although Plaintiff investigated the claims prior to settlement, the Parties agreed to focus on
28 exhausting early settlement efforts before launching into full-fledged and hotly contested litigation.

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

3. Risk of Maintaining Class Action Status

Here, settlement was reached prior to class certification and the result was a successful outcome for the Class. (Orshansky Decl. ¶ 40.) Yet, class certification was by no means a foregone conclusion. (*Ibid.*) For example, Class Members worked in different job positions and had different managers, and that, as a result, Defendant contended there was variation to the circumstances that could allegedly cause the employees to work off the clock and/or be deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this variation in circumstances raised highly individualized questions of fact. (*Ibid.*) Defendant disputed Plaintiff's characterization of working conditions, liability, and damages, and possessed documentary and testimonial evidence rebutting Plaintiff's allegations. (*Id.* at ¶ 41.)

Here, Class Members may avoid each of the risks described and receive substantial monetary benefits, which also weighs 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 at pp. 246, 250 [acknowledging that "Compromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed settlement is

1 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to
2 a class settlement because the public interest may indeed be served by a voluntary settlement in
3 which each side gives in the interest of avoiding litigation.”].)

4 Plaintiff’s estimate of the settlement recovery is a reasonable percentage of possible
5 recoverable damages at trial. Plaintiff’s damages analysis shows that the settlement reflects an
6 estimated 30% of the maximum realistic potential damages recoverable at trial. (Orshansky Decl. ¶
7 43.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims in
8 question, *see Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly
9 meets requirements establishing that the class settlement is within the “ballpark” of reasonableness.
10 The settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed
11 claims.

12 **Unpaid Minimum and Overtime Wages**

13 Plaintiff, along with other hourly non-exempt employees, performed pre- and post- shift off
14 the clock work to minimize the incidence of overtime. (Orshansky Decl. ¶ 45.) Plaintiff contended
15 that all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its employees no less
16 than the minimum wage for all hours worked, *see* Labor Code § 1197, thus, Plaintiff sought to
17 recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that
18 amount under Labor Code § 1194.2. (*Ibid.*)

19 Class Counsel analyzed the documents and data produced by Defendant and, in conjunction
20 with interviews of Plaintiff and Class Members, determined Defendant’s degree of liability and
21 amounts due in damages—specifically, the incidence and amount of purported off the clock activity.
22 (Orshansky Decl. ¶ 46.) As noted above, Defendant produced a 25% sample of time and pay records
23 for Class Members. Courts have found that the use of similar percentage samples is appropriate.
24 (*See e.g., Brum v. MarketSource, Inc.* (E.D. Cal. 2018) 2018 WL 3861558, at *5 [10% sample];
25 *Talavera v. Sun Maid Growers of California* (E.D. Cal. 2017) 2017 WL 495635, at *4 [10%
26 sample]; *Kaminske v. JP Morgan Chase Bank N.A.* (C.D. Cal. 2010) 2010 WL 5782995, at *5 [10%
27 sample].)

1 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off the clock
2 hours, Plaintiff estimated that Defendant is liable for an aggregate of approximately fifteen (15)
3 minutes of unpaid straight and overtime pay per workweek. (Orshansky Decl. ¶ 47.) Based on
4 Defendant's records, Plaintiff determined that 59.2% of Class Members' shifts qualified for
5 overtime rate of pay. At the average straight time hourly rate of \$16.19 and the average overtime
6 hourly rate of approximately \$24.29, such yields an estimated damages amount of \$139,007.34.
7 (*Ibid.*) Additionally, Plaintiff concluded that the employees' yearly bonuses were not correctly
8 included in their regular rate of pay, resulting in additional estimated damages in the amount of
9 \$19,317.00. (*Ibid.*) Finally, Plaintiff concluded that inequitable rounding occurred with a net loss of
10 456.3 hours being unpaid to employees, thus resulting in additional estimated damages in the
11 amount of \$9,574.20. Thus, the estimated total of unpaid straight and unpaid overtime wages is
12 \$167,898.54, without discounting for risks associated with certification or merits. (*Ibid.*)

13 In opposition to certification, Defendant contended that Plaintiff's claim for off-the-clock
14 work is not amenable to class treatment, because employees worked in a variety of departments with
15 different requirements, and it would require an unmanageable series of mini-trials to determine how
16 much time was spent without pay. (Orshansky Decl. at ¶ 48.) Further, in terms of merit defenses,
17 Defendant vigorously disagreed with Plaintiff's theories regarding how much off-the-clock work
18 occurred in reality, and the credibility of those claimed hours given Defendant's policies to the
19 contrary. (*Id.* at ¶ 49.) The failure to track all hours poses evidentiary difficulties because it is hotly
20 contested how much off-the-clock work actually occurred. (*Id.* at ¶ 50.) Although Class Counsel
21 conducted multiple Class Member interviews, for Plaintiff to establish the quantity of specific
22 disputed and unrecorded work activities—especially over multiple job titles, at differing pay rates—
23 would have been costly, time-consuming, and daunting. (*Ibid.*)

24 Defendant further responded that any off-the-clock time is *de minimis*. (Orshansky Decl. ¶
25 51.) Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*
26 (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis*
27 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
28 performed off-the-clock. (*Ibid.*) What is not clear, however, is to what extent the *de minimis* defense

1 would apply where the uncaptured hours were associated with an occasionally recurring activity.
2 (*Ibid.*)

3 Additionally, in response to Plaintiff's allegation that overtime was underpaid because
4 Defendant incorrectly calculated the regular rate by failing to include non-discretionary forms (*i.e.*,
5 yearly bonuses), Defendant vigorously disputed the discretionary nature of the yearly bonuses, and
6 the degree to which they were required to be included in calculating the regular rate of pay.
7 (Orshansky Decl. ¶ 52.)

8 In light of these considerations—especially the evidentiary difficulties of demonstrating off-
9 the-clock work on a class-wide basis—Class Counsel applied a discount that incorporated the risks
10 of non-certification and being unsuccessful on the merits. (Orshansky Decl. ¶ 53.)

11 **Meal and Rest Period Violations**

12 Plaintiff asserted that there are compliance issues *vis-à-vis* meal breaks—some are late,
13 missed, short, or interrupted. (Orshansky Decl. ¶ 54.)

14 On February 25, 2021, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the
15 California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1)
16 employers are not permitted to round time records when determining if employees are entitled to
17 meal premium pay, and (2) it is the employer's burden to show that compliant meal periods were
18 provided to employees if the time records show otherwise. Using this opportunity to echo its long
19 stance that California liberally construes the Labor Code and wage orders to favor protection of
20 employees, the California Supreme Court emphasized that meal periods are part of the remedial
21 worker protection framework to protect the health and safety of employees.

22 Although Defendant made some premium payments totaling \$29,137, that amount is only a
23 portion of what should have been paid pursuant to code. *C.f.* Wage Order No. 16-2001, § 11(b).
24 (Orshansky Decl. ¶ 56.) Consequently, Plaintiff alleged that Defendant violated Labor Code §§
25 226.7, 512, and applicable Wage Orders by failing to compensate Plaintiff and Class Members for
26 short, late, interrupted, and missed meal periods. (*Ibid.*)

27 Defendant, however, contended that it had practices, policies, and procedures to provide
28 meal and rest breaks every workday to their employees that fully complied with the law. (Orshansky

Decl. ¶ 57.) Defendant vehemently argued that it complied with the requirements articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (*Ibid.*) Specifically, Defendant maintained that it “provides” employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieves employees of all duties during meal periods, and relinquishes control over employees’ activities, including the ability to leave the premises during meal periods. (*Ibid.*)

Like most employers facing meal period litigation, Defendant argued that employees were apprised of their right to take meal periods and provided compliant meal periods, but some may voluntarily have waived them. (Orshansky Decl. ¶ 58.) Defendant contended that the issue of voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding class certification. (*Ibid.*; see *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25 [holding that the defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on individual questions].)

Based upon the analysis of Class Members’ time and payroll records and, in conjunction with interviews of Plaintiff and Class Members, Plaintiff determined that 24% of eligible shifts were the subject of unique violations for missed, short, or late meal periods, and calculated the potential exposure of this claim to be \$444,517.64. (Orshansky Decl. ¶ 59.)

Plaintiff also alleged that Class Members did not receive authorized rest breaks as required whereby employers “relinquish control over how employees spend their time and relieve employees of all duties.” (Orshansky Decl. ¶ 60; *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257, 260.) Due to Defendant’s work demands and inadequate staffing, Plaintiff and Class Members did not receive timely and compliant rest breaks, nor did Defendant relinquish control over how employees spent their 10-minute rest periods. (Orshansky Decl. ¶ 60.) Plaintiff did not receive rest break premium payments for non-compliant rest breaks, nor is there evidence that Defendant made rest break premium payments to Class Members at any time (unlike non-compliant meal periods, for which Defendant made some premium payments totaling \$29,137, as noted above). (*Id.* at ¶ 61.) Thus, Plaintiff alleged that Defendant did not provide premium pay for each non-compliant rest break as required under Labor Code § 226.7. (*Ibid.*)

1 Here again, Defendant disputed liability and damages. Defendant maintained that it
2 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
3 of four hours worked as required by Labor Code § 226.7. (Orshansky Decl. at ¶ 62.) Defendant
4 explained that Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*)
5 As with meal periods, Defendant argued that any Class Member who failed to take a rest break, or
6 took a short or late rest break, did so voluntarily and that all applicable rest breaks were still
7 authorized and provided. (*Ibid.*) Defendant also attempted to distinguish *Augustus, supra*, which
8 involved security guards who were required to monitor a pager, phone, or other device as having an
9 added constraint that is not present in the matter *sub judice*. (*Ibid.*)

10 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendant's
11 exertion of pressure, control, and resulting violations is likely to be more difficult. (Orshansky Decl.
12 ¶ 63.) Thus, Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and other
13 Class Members for a maximum exposure rate of \$394,712.20. (*Ibid.*) For settlement purposes, and
14 to account for the difficulties of certifying and proving unrecorded rest break violations, a downward
15 departure from that maximum exposure was and is warranted. (*Ibid.*)

16 **Wage Statement Violations**

17 Plaintiff alleged a cause of action under Labor Code § 226(a) for Defendant's failure to
18 provide accurate itemized wage statements. (Orshansky Decl. ¶ 64.) Failure to comply with the
19 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
20 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
21 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*
22 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because
23 if Defendant did not provide wages for all hours worked, meal and rest breaks, and so forth, then
24 the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 64.)

25 Defendant contended, however, that Labor Code § 226(e) penalties are not automatic.
26 (Orshansky Decl. ¶ 65.) Rather, the employee must show that Defendant's non-compliance was
27 "knowing and intentional." (*Ibid.*) Defendant suggested that any non-compliance was not knowing
28 and intentional. (*Ibid.*) Moreover, Defendant argued that meal and rest period violations cannot

1 support derivative wage statement penalties. (*Ibid.*; see *Naranjo v. Spectrum Security Service, Inc.*
2 (2019) 40 Cal.App.5th 444, 474 [holding that violations of Labor Code’s meal break provisions do
3 not entitle employees to pursue the derivative wage statement penalties]; *c.f.*, but *review granted*,
4 *Naranjo v. Spectrum Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257
5 Cal.Rptr.3d 188.)

6 Because the damages for this cause of action are penalties, the statute of limitations is only
7 one year prior to the filing of the original complaint. (*See* Code Civ. Proc. § 340.) The Parties
8 discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent
9 violation rates, Plaintiff estimates the total maximum wage statement exposure to be \$639,600.
10 (Orshansky Decl. ¶ 66.)

11 **Derivative Waiting Time and UCL Claims**

12 Plaintiff further asserted causes of action against Defendant for failure to timely pay all
13 wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business
14 practices. (Orshansky Decl. ¶ 67; *see* Labor Code § 203; Business and Professions Code §§ 17200,
15 *et seq.*) As with other claims, Defendant vigorously disagreed that it engaged in any conduct giving
16 rise to liability or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 67.)

17 Defendant argued that waiting time penalties are not appropriate because it attempted to pay
18 employees all final wages owed in good faith upon their separation, thereby precluding a finding of
19 willfulness necessary to obtain waiting time penalties. (Orshansky Decl. ¶ 68.) Moreover, Defendant
20 maintained that no waiting time penalties were recoverable from alleged meal or rest period
21 violations. (*Ibid.*) Defendant raised the Second Appellate District’s decision in *Naranjo, supra*, 40
22 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage statement nor
23 waiting time penalties. (*Ibid.*) Yet the *Naranjo* decision is currently pending before the California
24 Supreme Court, *see, Naranjo, supra, review granted*, Supreme Court Case No. S258966, 455 P.3d
25 704 (January 02, 2020), and although fully briefed, the outcome of this important case remains to
26 be seen.⁷ (*Ibid.*) Finally, Defendant argued that adequate remedies at law exist to render the action

27
28 ⁷ The “Issues Presented” in the Case Summary of the Appellate Courts Case Information webpage
(<https://appellatecases.courtinfo.ca.gov/>) reads: “This case presents the following issues: (1) Does a

1 unsuitable for equitable remedies, and again contended that the allegations underlying the unfair
2 competition claim lacked merit. (*Id.* at ¶ 69.)

3 Based on the count of 157 former employees, Class Counsel calculated the maximum value
4 of the waiting time claim to be \$610,039.20. (*Id.* at ¶ 70.) However, to account for the uncertainty
5 of proving the underlying claims and risk of an adverse decision in *Naranjo*, Class Counsel made a
6 realistic allowance with the agreed upon settlement dollar figure. (*Ibid.*)

7 PAGA Penalties

8 The success of Plaintiff’s PAGA claim is wholly dependent upon the success of his
9 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
10 (Orshansky Decl. ¶ 71.) Defendant maintained and continues to maintain it had legally compliant
11 employment policies and practices throughout the statutory period. (*Id.* at ¶ 72.) Defendant denied
12 and continues to deny that it ever violated any provision of the California Labor Code and argued
13 that, even assuming such violations occurred, Defendant will not be treated as having engaged in
14 subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendant argued
15 that heightened civil penalties for subsequent violations would not be assessed unless it could be
16 shown that Defendant had notice that it was violating the laws, *e.g.*, it had been cited by a labor
17 agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g., Amaral v. Cintas Corp.* (2008) 163
18 Cal.4th 1157, 1209.) Thus, Defendant contended that, at best, even if a violation giving rise to a
19 penalty was shown for each pay period, only the lower civil penalty associated with initial violations
20 would apply. (Orshansky Decl. ¶ 72.)

21 Moreover, Defendant asserted that, before a PAGA claim could be tried, under existing law,
22 the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a
23 theory of uniform wage and hour practices relating to a large group of aggrieved employees, is
24 sufficiently “manageable” so as not to interfere with Defendant’s right to due process. (*Id.* at ¶ 73.)

25
26 violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest
27 period violations, give rise to claims under Labor Code sections 203 and 226 when the employer
28 does not include the premium wages in the employee’s wage statements but does include the wages
earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium
wages owed under Labor Code section 226.7?”

1 Defendant reiterated how hourly employees' job duties and work hours varied. (*Id.* at ¶ 74.)
2 Defendant contended that there was variation as to the circumstances that could allegedly cause
3 employees to work off-the-clock or to be deprived of the opportunity to take legally compliant, duty-
4 free meal and/or rest periods. (*Ibid.*) Defendant further opined that these issues presented challenges
5 not only to liability but also challenges to Plaintiff's ability to show that a PAGA claim could be
6 efficiently and manageably adjudicated without abridging Defendant's due process rights. (*Ibid.*)

7 Finally, Defendant maintained that the Court has discretion to reduce any award of PAGA
8 penalties where it views them as duplicative. (*See* Labor Code § 2699e(2) [the Court may "award a
9 lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based on the facts
10 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
11 arbitrary and oppressive, or confiscatory."]; Orshansky Decl. ¶ 75.)

12 Although, strictly speaking, class certification requirements are not required to be satisfied
13 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
14 valuation of a PAGA claim is uncertain.⁸ (Orshansky Decl. ¶ 76.) Thus, Class Counsel applied
15 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or
16 trial, the risks regarding success on the merits and establishing liability, and the risks with proving
17 the extent of penalties that are warranted and possible discretionary reduction of penalties by the
18 Court. (*Ibid.*) As a result, Plaintiff used the "initial" \$100 per pay period violation (as opposed to the
19

20 ⁸ Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but
21 rather to facilitate the enforcement of the labor laws. (*Ibid.*; *see, e.g., Williams v. Superior Court*
22 (2017) 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Labor Code §
23 2699(i).) In assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount
24 which the LWDA and the aggrieved employees are to receive formally in the form of monetary civil
25 penalties but instead whether the total settlement amount achieves the PAGA's objectives. "When
26 PAGA claims are settled, courts "consider whether the proposed PAGA settlement is fair and
27 adequate in view of the purposes and policies of the statute[]" and "[t]hose purposes and policies
28 include benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging
compliance with California Labor Code provisions, and deterring noncompliance." (*O'Connor v.*
Uber Techs., Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132-33 and 1135.) A "[c]ourt does not
review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine
whether it is fundamentally fair, reasonable and adequate, with primary consideration for the
interests of absent class members." (LWDA's Comments on Proposed PAGA Settlement in
O'Connor v. Uber Techs. (N.D. Cal. July 29, 2016) No. 13-CV-03826-EMC, Docket No. 736, at
4:17-19.) "PAGA penalties must be evaluated in terms of their public policy objective and not just
through the prism of what private relief has been sought or obtained." (*Id.* at p. 4:14-16.)

1 \$200 subsequent per violation rate) to calculate a realistic estimate of \$450,000 in potential PAGA
2 penalty exposure—of which, by statute, only 25%, or \$112,500—would be recoverable by aggrieved
3 employees. (*Ibid.*)

4 Summary

5 After Class Counsel calculated the realistic possible recovery to Class Members for each of
6 the above claims, the aggregate dollar amount result is \$2,706,767.58 in total damages and penalties.
7 (Orshansky Decl. ¶ 77.) Thus, the proposed settlement amount to Class Members of \$800,000
8 represents an approximate 30% of Plaintiff’s potential maximum realistic recovery, while avoiding
9 the further expense and serious risk of proceeding toward class certification and trial. (*Ibid.*) “The
10 fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in
11 and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”
12 (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations
13 omitted]; *see, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9
14 [preliminarily approving wage and hour class action settlement stating, “[a]lthough 15% represents
15 a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is
16 sufficient for the Court to grant preliminary approval given the merits of Plaintiff’s claims.”].)
17 Taking into account the risk of non-certification, failure to prevail on the merits, and the Court’s
18 power to reduce the civil penalties, the proposed settlement falls within the realm of being fair,
19 reasonable, and adequate. (Orshansky Decl. ¶ 77.)

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

21 This Court should order distribution of the proposed Notice of Pendency of Class and
22 Representative Action Settlement, *see* Exhibit 1 to the Settlement Agreement (Exhibit 1 to the
23 Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known
24 mailing address information provided by Defendant. (Orshansky Decl. ¶ 90.) Here, Plaintiff
25 proposes that the settlement be administered by CPT Group, Inc. (“CPT”), an experienced class
26 action settlement administrator. (Settlement Agreement ¶¶ 32, 49(a); Orshansky Decl. ¶ 91.) Class
27 Members’ addresses will be ascertainable through Defendant’s personnel and payroll records, which
28 Defendant will provide to CPT within ten (10) calendar days after preliminary approval of the

1 settlement. (Settlement Agreement ¶ 49(b); Orshansky Decl. ¶ 91.) To the extent that any notices
2 are returned, CPT will run those addresses through the National Change of Address database and/or
3 conduct skip traces to obtain current address information. (Settlement Agreement ¶ 49(e);
4 Orshansky Decl. ¶ 91.)

5 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
6 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
7 the key terms of the Settlement Agreement, the uniform 45-day deadline to submit a dispute, opt-
8 out, or objection to the class settlement and the procedure by which to do so, and explains the
9 recovery formula and credited number of workweeks and pay periods for each Class Member.
10 (Orshansky Decl. ¶ 92.) The proposed notice will also notify Class Members of the final approval
11 hearing date, provide the contact information for Class Counsel, and advise Settlement Class
12 Members that they may enter an appearance through counsel if they wish. (*Id.* at ¶ 93.) This manner
13 of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable and cost-
14 effective method of reaching Class Members. Thus, the proposed method of notice is reasonably
15 calculated to reach Class Members by the best means practicable and should be approved. (*Ibid.*)

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

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

20 **IX. CONCLUSION**

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

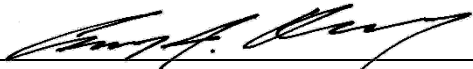
- 23 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 24 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
25 Representative Action Settlement, attached as Exhibit 1 to the Settlement Agreement;
- 26 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the
27 Class Members identified during the Class Period under Civil Code § 382 for settlement purposes
28 only;

4. Approving and appointing Plaintiff Antonio Delgado as the Class Representative;
5. Approving and appointing the law firm of CounselOne, P.C. as Class Counsel;
6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;
7. Setting a date for the Final Approval Hearing; and
8. Any further relief the Court deems just and proper.

Dated: March 7, 2022

Respectfully submitted,

COUNSELONE, PC

By: 

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