

1 ANTHONY J. ORSHANSKY (SBN 199364)  
anthony@counselonegroup.com  
2 JENNIFER L. CONNOR (SBN 241480)  
jennifer@counselonegroup.com  
3 JUSTIN KACHADOORIAN (SBN 260356)  
justin@counselonegroup.com  
4 **COUNSELONE, PC**  
9301 Wilshire Boulevard, Suite 650  
5 Beverly Hills, California 90210  
Telephone: (310) 277-9945  
6 Facsimile: (424) 277-3727

7 Attorneys for Plaintiff Jose Rosaliano Velez, on behalf  
of himself and others similarly situated  
8  
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF MERCED**  
12

13 JOSE ROSALIANO VELEZ, on behalf of  
himself and others similarly situated,

14  
15 Plaintiff,

16 v.

17 LA FORTALEZA, INC.; and DOES 1 through  
18 100, inclusive,

19 Defendants.  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No.: 21CV-03310

Assigned for all purposes to:  
Hon. Brian McCabe

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

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

Preliminary Approval Hearing

Date: March 9, 2022  
Time: 8:15 a.m.  
Courtroom: 8

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

2 **PLEASE TAKE NOTICE** that, pursuant to Rule 3.769 of the California Rules of Court, on  
3 March 9, 2022 at 8:15 a.m. before the Honorable Brian McCabe in Department 8 of the above-  
4 entitled Court, located at 627 West 21<sup>st</sup> Street, Merced, California 95340, plaintiff Jose Rosaliano  
5 Velez (“Plaintiff” or “Class Representative”) individually and on behalf of all others similarly  
6 situated, will and hereby does move this Court for:

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

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

11 **Class Members** - All current and former non-exempt, hourly-paid employees who  
12 worked for Defendant in the State of California during the Class Period (the “Class”  
or “Class Members”).<sup>1</sup>

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.

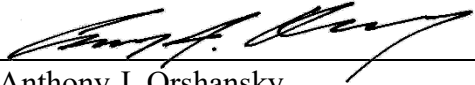
24 This motion is based on this notice of motion, the attached memorandum of points and  
25 authorities, the declaration of Anthony J. Orshansky filed concurrently herewith, and the exhibits  
26 attached thereto, the pleadings and other papers filed in this action, and on any further oral or

27 \_\_\_\_\_  
28 <sup>1</sup> “Settlement Class” or “Settlement Class Members” means all Class Members who do not opt out  
of this settlement. (Settlement Agreement ¶ 33.)

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

5  
6 Dated: February 11, 2022

Respectfully submitted,  
COUNSELONE, PC

8  
9 By:   
10 Anthony J. Orshansky  
11 Jennifer L. Connor  
12 Justin Kachadoorian  
13 Attorneys for Plaintiff  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **TABLE OF CONTENTS**

|      |                                                                                                   |    |
|------|---------------------------------------------------------------------------------------------------|----|
| I.   | INTRODUCTION.....                                                                                 | 1  |
| II.  | THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS .....                                        | 2  |
| A.   | Discovery and Investigation.....                                                                  | 2  |
| B.   | Mediation and Settlement.....                                                                     | 4  |
| III. | SUMMARY OF BASIC SETTLEMENT TERMS .....                                                           | 5  |
| A.   | The Settlement Provides for Reasonable Monetary Payments .....                                    | 6  |
| B.   | Class Representative Enhancement Payment, Attorneys' Fees, and Expenses.....                      | 7  |
| IV.  | CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE.....                                         | 9  |
| A.   | There Is an Ascertainable and Sufficiently Numerous Class .....                                   | 9  |
| B.   | There Is a Well-Defined Community of Interest.....                                                | 10 |
| C.   | The Claims of the Named Plaintiff Are Typical .....                                               | 11 |
| D.   | Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the Settlement Class ..... | 11 |
| E.   | A Class Action is Superior to a Multiplicity of Litigation .....                                  | 12 |
| V.   | THE TWO-STEP APPROVAL PROCESS .....                                                               | 12 |
| VI.  | THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.....                                             | 13 |
| A.   | The Settlement Is Entitled to a Presumption of Fairness .....                                     | 13 |
| B.   | Negotiations Were at Arm's-Length before a Respected Mediator .....                               | 14 |
| C.   | Investigation Was Sufficient to Allow Counsel to Act Intelligently .....                          | 14 |
| D.   | Class Counsel Are Experienced in Similar Litigation .....                                         | 15 |
| E.   | The Settlement Is Fair, Reasonable, and Adequate.....                                             | 15 |
| 1.   | The Strength of Plaintiff's Case.....                                                             | 15 |
| 2.   | Risk, Expense, Complexity, and Duration of Further Litigation.....                                | 16 |
| 3.   | Risk of Maintaining Class Action Status.....                                                      | 17 |
| 4.   | Amount Offered in Settlement Given Realistic Value of Claims.....                                 | 17 |

|    |                                                                  |    |
|----|------------------------------------------------------------------|----|
| 1  | VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS ..... | 25 |
| 2  | VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING.....         | 26 |
| 3  | IX. CONCLUSION .....                                             | 26 |
| 4  |                                                                  |    |
| 5  |                                                                  |    |
| 6  |                                                                  |    |
| 7  |                                                                  |    |
| 8  |                                                                  |    |
| 9  |                                                                  |    |
| 10 |                                                                  |    |
| 11 |                                                                  |    |
| 12 |                                                                  |    |
| 13 |                                                                  |    |
| 14 |                                                                  |    |
| 15 |                                                                  |    |
| 16 |                                                                  |    |
| 17 |                                                                  |    |
| 18 |                                                                  |    |
| 19 |                                                                  |    |
| 20 |                                                                  |    |
| 21 |                                                                  |    |
| 22 |                                                                  |    |
| 23 |                                                                  |    |
| 24 |                                                                  |    |
| 25 |                                                                  |    |
| 26 |                                                                  |    |
| 27 |                                                                  |    |
| 28 |                                                                  |    |

## **TABLE OF AUTHORITIES**

### **Cases**

|                                                                                                         |        |
|---------------------------------------------------------------------------------------------------------|--------|
| <i>Altamirano v. Shaw Industries, Inc.</i> (N.D. Cal. 2015)<br>2015 WL 4512372 .....                    | 25     |
| <i>Amaral v. Cintas Corp.</i> (2008)<br>163 Cal.4th 1157 .....                                          | 23     |
| <i>Arias v. Superior Court</i> (2009)<br>46 Cal.4th 969 .....                                           | 24     |
| <i>Augustus v. ABM Security Service, Inc.</i> (2016)<br>2 Cal.5th 257 .....                             | 20, 21 |
| <i>B.W.I. Custom Kitchen v. Owens-Illinois, Inc.</i> (1987)<br>191 Cal.App.3d 1341 .....                | 9, 11  |
| <i>Benton v. Telecom Network Specialists, Inc.</i> (2013)<br>220 Cal.App.4th 701 .....                  | 11     |
| <i>Bluford v. Safeway, Inc.</i> (2013)<br>216 Cal.App.4th 864 .....                                     | 11     |
| <i>Brinker Restaurant Corp. v. Superior Court</i> (2012)<br>53 Cal.4th 1004 .....                       | 20     |
| <i>Capital People First v. Department of Developmental Services</i> (2007)<br>155 Cal.App.4th 676 ..... | 11     |
| <i>In re Cellphone Fee Termination Cases</i> (2010)<br>186 Cal.App.4th 1380 .....                       | 7      |
| <i>In re Chicken Antitrust Litigation</i> (N.D. Ga. 1980)<br>560 F.Supp. 957 .....                      | 13     |
| <i>Class Plaintiffs v. City of Seattle</i> (1992)<br>955 F.2d 1268 .....                                | 13     |
| <i>Collins v. Rocha</i> (1972)<br>7 Cal.3d 232 .....                                                    | 10     |
| <i>Daar v. Yellow Cab Company</i> (1967)<br>67 Cal.2d 695 .....                                         | 9      |
| <i>Daniels v. Centennial Capital Group</i> (1993)<br>16 Cal.App.4th 467 .....                           | 9      |

|    |                                                                                       |        |
|----|---------------------------------------------------------------------------------------|--------|
| 1  | <i>Donohue v. AMN Services, LLC</i> (2021)                                            |        |
| 2  | 11 Cal.5th 58 .....                                                                   | 19     |
| 3  | <i>Dunk v. Ford Motor Co.</i> (1986)                                                  |        |
| 4  | 48 Cal.App.4th 1794 .....                                                             | 15     |
| 5  | <i>Duran v. U.S. Bank National Association</i> (2014)                                 |        |
| 6  | 59 Cal.4th 1 .....                                                                    | 20     |
| 7  | <i>Kullar v. Foot Locker Retail, Inc.</i> (2008)                                      |        |
| 8  | 168 Cal.App.4th 116 .....                                                             | 17     |
| 9  | <i>Laffitte v. Robert Half International, Inc.</i> (2016)                             |        |
| 10 | 1 Cal.5th 480 .....                                                                   | 8      |
| 11 | <i>Linder v. Thrifty Oil Co.</i> (2000)                                               |        |
| 12 | 23 Cal.4th 429 .....                                                                  | 9, 13  |
| 13 | <i>Linney v. Cellular Alaska Partnership</i> (9th Cir. 1998)                          |        |
| 14 | 151 F.3d 1234.....                                                                    | 25     |
| 15 | <i>Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.</i> (7th Cir. |        |
| 16 | 1987)                                                                                 |        |
| 17 | 834 F.2d 677.....                                                                     | 14     |
| 18 | <i>McGhee v. Bank of America</i> (1976)                                               |        |
| 19 | 60 Cal.App.3d 442 .....                                                               | 11     |
| 20 | <i>Miller v. Woods</i> (1983)                                                         |        |
| 21 | 148 Cal.App.3d 862 .....                                                              | 9      |
| 22 | <i>Naranjo v. Spectrum Security Service, Inc.</i> (2019)                              |        |
| 23 | 40 Cal.App.5th 444 .....                                                              | 22     |
| 24 | <i>Naranjo v. Spectrum Security Services, Inc.</i> (Cal., Jan. 02, 2020, No. S258966) |        |
| 25 | 455 P.3d 704, 257 Cal.Rptr.3d 188.....                                                | 22, 23 |
| 26 | <i>In Re NASDAQ Market-Makers Antitrust Litigation</i> (S.D.N.Y. 1997)                |        |
| 27 | 169 F.R.D. 493 .....                                                                  | 10     |
| 28 | <i>In Re NASDAQ Market-Makers Antitrust Litigation</i> (S.D.N.Y. 1997)                |        |
|    | 172 F.R.D. 119 .....                                                                  | 10     |
|    | <i>North County Contractor's Assn., Inc. v. Touchstone Ins. Services</i> (1994)       |        |
|    | 27 Cal.App.4th 1085 .....                                                             | 12     |
|    | <i>O'Connor v. Uber Techns.</i> (N.D. Cal. July 29, 2016)                             |        |
|    | No. 13-CV-03826-EMC, Docket No. 736 .....                                             | 24     |

|    |                                                                  |           |
|----|------------------------------------------------------------------|-----------|
| 1  | <i>O'Connor v. Uber Techs., Inc.</i> (N.D. Cal. 2016)            |           |
| 2  | 201 F.Supp.3d 1110 .....                                         | 24        |
| 3  | <i>Priddy v. Edelman</i> (6th Cir. 1989)                         |           |
| 4  | 883 F.2d 438.....                                                | 13, 14    |
| 5  | <i>Prince v. CLS Transp., Inc.</i> (2004)                        |           |
| 6  | 118 Cal.App.4th 1320 .....                                       | 9         |
| 7  | <i>Reyes v. Board of Supervisors of San Diego County</i> (1987)  |           |
| 8  | 196 Cal.App.3d 1263 .....                                        | 9         |
| 9  | <i>Richard v. Dart Industries, Inc.</i> (1981)                   |           |
| 10 | 29 Cal.3d 462 .....                                              | 9         |
| 11 | <i>Rodriguez v. West Publ. Corp.</i> (C.D. Cal. August 10, 2007) |           |
| 12 | 2007 U.S. Dist. LEXIS 74767 .....                                | 13, 14    |
| 13 | <i>Sav-On Drug Stores v. Super. Ct.</i> (2004)                   |           |
| 14 | 34 Cal.4th 319 .....                                             | 12        |
| 15 | <i>Sevidal v. Target Corp.</i> (2010)                            |           |
| 16 | 189 Cal.App.4th 905 .....                                        | 9         |
| 17 | <i>Stamburgh v. Superior Court</i> (1976)                        |           |
| 18 | 62 Cal.App.3d 231 .....                                          | 13        |
| 19 | <i>State v. Levi Strauss &amp; Co.</i> (1986)                    |           |
| 20 | 41 Cal.3d 460 .....                                              | 13        |
| 21 | <i>Troester v. Starbucks Corp.</i> (2018)                        |           |
| 22 | 5 Cal.5th 829 .....                                              | 19        |
| 23 | <i>Vasquez v. Superior Court</i> (1971)                          |           |
| 24 | 4 Cal.3d 800 .....                                               | 9, 10     |
| 25 | <i>Wershba v. Apple Computer, Inc.</i> (2001)                    |           |
| 26 | 91 Cal.App.4th 224 .....                                         | 8, 15, 17 |
| 27 | <i>Williams v. Superior Court</i> (2017)                         |           |
| 28 | 3 Cal.5th 531, 546 .....                                         | 24        |
|    | <b>Statutes</b>                                                  |           |
|    | Bus. & Prof. Code §§ 17200, <i>et seq.</i> .....                 | 22        |
|    | Civil Code § 382 .....                                           | 27        |
|    | Civil Code § 1542 .....                                          | 7         |

|    |                                                                     |            |
|----|---------------------------------------------------------------------|------------|
| 1  | Code Civ. Proc. § 340 .....                                         | 22         |
| 2  | Labor Code § 226(a) .....                                           | 21         |
| 3  | Labor Code § 226(e) .....                                           | 21, 22     |
| 4  | Labor Code § 226.7 .....                                            | 20, 21, 23 |
| 5  | Labor Code § 512 .....                                              | 20         |
| 6  | Labor Code § 1194.2 .....                                           | 18         |
| 7  | Labor Code § 1197 .....                                             | 18         |
| 8  | Labor Code §§ 2698, <i>et seq.</i> .....                            | 3          |
| 9  | Labor Code § 2699 .....                                             | 3          |
| 10 | Labor Code § 2699(i) .....                                          | 24         |
| 11 | Labor Code § 2699e(2) .....                                         | 24         |
| 12 |                                                                     |            |
| 13 | <b>Rules</b>                                                        |            |
| 14 | California Rules of Court, Rule 3.766(d) .....                      | 26         |
| 15 | California Rules of Court, Rule 3.766(e) .....                      | 26         |
| 16 | California Rules of Court, Rule 3.769 .....                         | 26         |
| 17 |                                                                     |            |
| 18 | <b>Other Authorities</b>                                            |            |
| 19 | 4 Newberg on Class Actions § 11.25 (4th Ed. 2013) .....             | 12         |
| 20 | 4 Newberg on Class Actions § 11.41 (4th Ed. 2013) .....             | 13         |
| 21 | 4 Newberg on Class Actions § 11.47 (4th Ed. 2013) .....             | 15         |
| 22 | 4 Newberg on Class Actions § 11.51 (4th Ed. 2013) .....             | 13         |
| 23 | 4 Newberg on Class Actions § 14.6 (4th Ed. 2013) .....              | 8          |
| 24 | Federal Manual for Complex Litigation (Second) (1985) § 30.44 ..... | 12, 13     |
| 25 |                                                                     |            |
| 26 |                                                                     |            |
| 27 |                                                                     |            |
| 28 |                                                                     |            |

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jose Rosaliano Velez (“Plaintiff” or “Class Representative”), individually and on  
4 behalf of all others similarly situated,<sup>2</sup> seeks preliminary approval of the Stipulation of Class and  
5 Representative Action Settlement (“Settlement Agreement”) entered into with defendant La  
6 Fortaleza, Inc. (“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 *Nine*  
9 *Hundred Eighty Six Thousand Seven Hundred Forty Six Dollars (\$986,746) into a non-*  
10 *reversionary common settlement fund.*<sup>3</sup> There are approximately 497 Class Members employed as  
11 hourly, non-exempt employees during the Class Period.

12 By way of this class and representative lawsuit, Plaintiff pursued his rights against Defendant  
13 for abusing its hourly-paid, 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 Marc J.  
20 Feder, Esq. of Frank & Feder, the Parties agreed to settle the Settlement Class Members’ and PAGA  
21 Group Members’ claims alleged in this litigation for the non-reversionary sum of Nine Hundred  
22 Eighty Six Thousand Seven Hundred Forty Six Dollars (\$986,746) (“Gross Settlement Amount”).

23  
24 <sup>2</sup> “Class Members” are defined as all current and former hourly-paid, non-exempt employees who  
25 worked for Defendant in the State of California during the Class Period. (Settlement Agreement ¶  
26 4.) The “Class Period” is defined as the period beginning on February 1, 2017 and ending on  
27 November 14, 2021. (Settlement Agreement ¶ 7.)

26 <sup>3</sup> “Settlement Class” or “Settlement Class Members” means all Class Members who do not opt out  
27 of this settlement. (Settlement Agreement ¶ 33.) “PAGA Group Members” are defined as all Class  
28 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 5, 2020 and ending on November 14, 2021. (Settlement  
Agreement ¶ 25.)

1 A true and correct copy of the fully executed Settlement Agreement is attached as **Exhibit 1** to  
2 Declaration of Anthony J. Orshansky (“Orshansky Decl.”), filed concurrently herewith. After  
3 deductions for Attorneys’ Fees and Costs to Class Counsel, Enhancement Payment to the Class  
4 Representatives, Administration Costs to the Settlement Administrator, and the PAGA Payment, the  
5 remaining amount (the “Net Settlement Amount”) of approximately \$500,385 will be distributed to  
6 Settlement Class Members. (Settlement Agreement ¶¶ 20, 46.) The entire Net Settlement Amount  
7 will be paid out to Settlement Class Members. Settlement Class Members shall automatically  
8 receive payments without the need to submit a claim form, and PAGA Group Members shall receive  
9 PAGA payments irrespective of whether they opt out. (Settlement Agreement ¶¶ 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 Class Counsel provided pre-filing written notice to the LWDA and by certified mail to  
2 Defendant of the above-identified allegations on behalf of Plaintiff and similarly situated aggrieved  
3 employees in accord with the PAGA, California Labor Code § 2698, *et seq.* (*Id.* at ¶ 26.)

4 Plaintiff filed the Class and Representative Action Complaint for Damages (the “Complaint”)  
5 asserting the following claims: (1) Violation of California Labor Code §§ 1194, 1194.2, 1197,  
6 1197.1, and 1199 (Failure to Pay Minimum Wages); (2) Violation of California Labor Code §§ 510,  
7 1198, and 1199 (Failure to Pay All Overtime Wages); (3) Violation of California Labor Code §§  
8 226.7 and 512(a) (Meal Period Liability); (4) Violation of California Labor Code § 226.7 (Rest  
9 Break Liability); (5) Violation of California Labor Code § 246 (Failure to Provide Paid Sick Leave);  
10 (6) Violation of California Labor Code § 226(a) (Failure to Provide Accurate Itemized Wage  
11 Statements); (7) Violation of California Labor Code §§ 201-204 (Failure to Pay All Wages Owed  
12 Timely and Upon Separation of Employment); (8) Violation of California Labor Code Section  
13 1174(d) (Failure to Maintain Accurate Payroll Records); (9) Violation of California Business and  
14 Professions Code Sections 17200, *et seq.* (Unfair Business Practices); and (10) Penalties Pursuant  
15 to Labor Code Section 2699 (Private Attorneys General Act).

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 The Parties entered into a tolling agreement prior to the filing of the complaint. (Orshansky  
21 Decl. ¶ 30.) Class Counsel engaged in extensive informal discovery and investigation in advance of  
22 filing the complaint. (*Ibid.*) In advance of mediation, the Parties agreed to an informal exchange of  
23 information and documents. (*Ibid.*) Defendant produced information and documentation concerning  
24 the alleged violations, such as Defendant’s written policies concerning those claims, including  
25 Defendant’s employee handbooks, policies and procedures regarding the payment of wages, the  
26 provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage  
27 statements, and providing all wages at separation, as well as composite data regarding the number  
28 of Class Members and the mix of current versus former employees, total number of pay periods,

1 total number of workweeks, and the average hourly rate in effect. (*Ibid.*) Defendant also produced  
2 time and pay records for Class Members. Counsel met and conferred at length regarding the  
3 information and documents produced. (*Ibid.*) Class Counsel interviewed Class Members, analyzed  
4 the documents and data produced, and spent significant time consulting with an expert, to determine  
5 Defendant's degree of liability and potential amounts due in damages. (*Id.* at ¶ 31.)

#### 6 **B. Mediation and Settlement**

7 After having performed extensive investigation and analysis of the legal and factual issues  
8 and risks, the Parties participated in a full day mediation before mediator Marc J. Feder, Esquire of  
9 Frank & Feder, where they debated and discussed their respective position in an attempt to resolve  
10 the lawsuit. (Orshansky Decl. ¶ 32.) Mr. Feder is experienced in mediating complex general  
11 litigation, labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*)  
12 During the mediation, the Parties exchanged further information and discussed all aspects of the  
13 case, including the risks and delays of litigation and the risk to both Parties for proceeding with a  
14 motion for class certification, liability under the claims asserted, and the implications of a PAGA  
15 representative action. (*Ibid.*) Pursuant to the mediator's proposal, the Parties came to an agreement  
16 on all material terms of settlement. (*Id.* at ¶ 33.)

17 From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks  
18 and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class  
19 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and  
20 adequate taking into consideration the amounts received in other wage and hour class and  
21 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of  
22 each Class Members' claim to the settlement award he or she will receive. (Orshansky Decl. ¶ 35.)  
23 Class Counsel believe that the settlement serves the best interests of Class Members. (*Ibid.*) Further,  
24 and based on the settlement negotiations, which were hard fought and conducted in good faith and  
25 at arm's length between attorneys with substantial experience litigating class actions, representative  
26 actions, and wage and hour cases, the settlement was the product of a non-collusive settlement  
27 process in which the Parties were forced to make significant compromises in the interest of reaching  
28 a full and complete settlement of the Action. (*Id.* at ¶ 34.) The Parties have concluded that it is in

1 their best interests to compromise, settle, and accept the terms of the Settlement Agreement. (See  
2 Settlement Agreement ¶ 40; Orshansky Decl. ¶ 35.)

### 3 **III. SUMMARY OF BASIC SETTLEMENT TERMS**

4 Under the terms of the Settlement Agreement, Defendant has agreed to pay a non-  
5 reversionary amount of Nine Hundred Eighty Six Thousand Seven Hundred Forty Six Dollars  
6 (\$986,746) into a common fund to settle the specific wage and hour claims of the Settlement Class  
7 Members and PAGA Group Members; this amount is called the “Gross Settlement Amount.”  
8 (Settlement Agreement ¶¶ 16, 46.) This Gross Settlement Amount shall be inclusive of all settlement  
9 payments to Settlement Class Members, the Enhancement Payment to the Class Representative, the  
10 Administration Costs to the Settlement Administrator, the Attorneys’ Fees and Costs to Class  
11 Counsel, and the Private Attorneys General Act (“PAGA”) Payment, including payment to PAGA  
12 Group Members and to the California Labor and Workforce Development Agency (“LWDA”) for  
13 civil penalties pursuant to statute. (*Ibid.*)

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

- 16 • Up to \$345,361 – which is 35% of the Gross Settlement Amount – and up to \$15,000 in  
17 litigation costs to Class Counsel (the “Attorneys’ Fees and Costs”);
- 18 • Up to \$10,000 to the Class Representative as an Enhancement Payment – as a service  
19 award and in exchange for a general release of claims;
- 20 • Up to \$100,000 allocated as a PAGA Payment – of which 75% of the PAGA Payment is  
21 allocated for payment to the LWDA for civil penalties pursuant to statute and 25% of the  
22 PAGA Payment is to be distributed to PAGA Group Members; and
- 23 • Up to \$16,000 to the Settlement Administrator for Administration Costs to notify Class  
24 Members and administer the settlement.

25 The amount remaining after the foregoing deductions, approximately \$500,385, is called the “Net  
26 Settlement Amount.” (Settlement Agreement ¶¶ 20, 46.) The entire Net Settlement Amount shall be  
27 paid out to Settlement Class Members. Settlement Class Members shall automatically receive  
28

1 payments without the need to submit a claim form, and PAGA Group Members shall receive PAGA  
2 payments irrespective of whether they opt out. (*Id.* at ¶¶ 44, 46(d), 50.)

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

4 Although exact recovery amounts depend on each Settlement Class Members' relative  
5 number of qualifying workweeks, for estimation purposes only, if all of the approximately 497 Class  
6 Members participate in the settlement, then the average Individual Settlement Share would be an  
7 estimated \$1,006.81 per Class Member. (Orshansky Decl. ¶ 11.) Of course, any Class Member who  
8 prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out. (*Ibid.*;  
9 Settlement Agreement ¶ 53.)

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

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

25 After reduction for the employee's share of taxes on the wage portion,<sup>4</sup> the net payment to  
26 each Settlement Class Member/PAGA Group Member will be the sum of his or her Individual

27 \_\_\_\_\_  
28 <sup>4</sup> The Parties agreed to allocate twenty percent (20%) of each Individual Settlement Share to wages  
and eighty percent (80%) of each Individual Settlement Share to interest, penalties, and other non-

1 Settlement Share plus, if applicable, the Individual PAGA Payment (collectively, “Individual  
2 Settlement Payment”). (Settlement Agreement ¶ 46(f); Orshansky Decl. ¶ 10.) As a result of the  
3 distribution formulas, the consideration paid to each Settlement Class Member/PAGA Group  
4 Member is tailored to the impact of Defendant’s alleged violations as well to the claims he or she is  
5 releasing. (Orshansky Decl. ¶ 10.) Further, a Settlement Class Member may submit a written letter  
6 to the Settlement Administrator disputing the number of workweeks credited if he or she believes  
7 that count is inaccurate. (Settlement Agreement ¶ 51.) Finally, any Class Member who prefers to  
8 preserve his or her right to pursue relief or seek an alternative recovery may opt out.<sup>5</sup> (*Id.* at ¶ 53.)

9 **B. Class Representative Enhancement Payment, Attorneys’ Fees, and Expenses**

10 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of  
11 seeking final approval in the amount of \$10,000 for services to the Settlement Class and a general  
12 release of all claims against Defendant. (Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl. ¶  
13 12.) “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate  
14 class representatives for work done on behalf of the class [and] to make up for financial or  
15 reputational risk undertaken in bringing the action.” (*In re Cellphone Fee Termination Cases* (2010)  
16 186 Cal.App.4th 1380, 1393-1394.) Plaintiff’s requested enhancement payment is intended to  
17 recognize the significant benefits conferred upon the Settlement Class and be proportional to the  
18 time and effort that Plaintiff expended on behalf of the Class including, providing factual  
19 information and documents to Class Counsel, discussing the claims and theories at issue in the case  
20 with Class Counsel, identifying potential witnesses, reviewing the Settlement Agreement, as well  
21 as the significant risks Plaintiff undertook by agreeing to serve as a named plaintiff, and the fact that  
22 Plaintiff agreed to a general release of all claims subject to a waiver of Civil Code § 1542. (*See*  
23 Settlement Agreement ¶¶ 28, 45, 46(c); Orshansky Decl. ¶ 13.)

24 Class Counsel will apply for an attorneys’ fees award of no more than thirty-five percent  
25 (35%) of the Gross Settlement Amount, and reimbursement of litigation costs in an amount up to

26 \_\_\_\_\_  
27 wage damages. Individual PAGA Payments will be allocated as one hundred percent (100%)  
28 penalties. (Settlement Agreement ¶ 48(a).)

<sup>5</sup> Again, if approved, PAGA Group Members will receive their Individual PAGA Payment  
irrespective of whether they opt out of the settlement. (Settlement Agreement ¶ 46(d).)

1 \$15,000. (Settlement Agreement ¶¶ 2, 46(a); Orshansky Decl. ¶ 14.) Plaintiff submits that the  
2 requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming  
3 litigation on a purely contingent fee basis. (Orshansky Decl. ¶ 14.) Class Counsel have incurred  
4 substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiff’s claims,  
5 conducting legal research and analysis, conducting discovery, meeting and conferring with defense  
6 counsel, interviewing putative class members, analyzing documents produced by Defendant,  
7 including corporate policies and employee time and payroll records, consulting with an expert,  
8 building damages models, preparing for and attending mediation, routine case updates and  
9 consultations with the client, and negotiating and preparing the long-form Settlement Agreement,  
10 Notice of Pendency of Class and Representative Action Settlement, and this motion for preliminary  
11 approval and supporting documents. (*Ibid.*) Class Counsel will also expend future attorney time in  
12 attending the hearing on this Motion, overseeing the notice and administration process, drafting the  
13 Final Approval Motion, and supporting documents, and attending the Final Approval hearing,  
14 among other tasks, such as addressing questions from Class Members. (*Id.* at ¶ 15.)

15 Both California and federal courts have recognized that an appropriate method for awarding  
16 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of  
17 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the  
18 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*  
19 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and  
20 “lodestar/multiplier” methods].) Historically, courts have awarded percentage fees in the range of  
21 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6  
22 (4th Ed. 2013) [“No general rule can be articulated on what is a reasonable percentage of a common  
23 fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in  
24 order to assure that the fees do not consume a disproportionate part of the recovery obtained for the  
25 class, although somewhat larger percentages are not unprecedented.”].)

26 Class Counsel submit that their request for attorneys’ fees is reasonable when viewed as an  
27 overall percentage of the settlement amount in light of the substantial risks and significant work  
28 undertaken, the excellent results obtained for the Class Members, and the efficiency with which the

1 Parties have conducted the litigation. (Orshansky Decl. ¶ 16.) Assuming that the Court grants  
2 preliminary approval, Class Counsel will seek an award of attorneys' fees and litigation costs at the  
3 time of seeking final approval of this settlement.

#### 4 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

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

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

##### 20 **A. There Is an Ascertainable and Sufficiently Numerous Class**

21 Whether a class is ascertainable is determined by examining the class definition, the size of  
22 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at  
23 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,  
24 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are "ascertainable" where  
25 they may be readily identified without unreasonable expense or time.

26 Here, the class definition is "precise, objective and presently ascertainable." (*Sevidal v.*  
27 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and  
28 former non-exempt, hourly-paid employees who worked for Defendant in the State of California

1 during the Class Period. (Settlement Agreement ¶ 4.) Further, the Class Period is defined as the  
2 period between February 1, 2017 through November 14, 2021. (*Id.* at ¶ 7.) Thus, all Class Members  
3 are of a specific type (non-exempt, hourly-paid employees) employed within California. Defendant  
4 is required to and does maintain employment records of such persons, including contact information  
5 and Social Security numbers. (Orshansky Decl. ¶ 81.) Documents and information exchanged reflect  
6 a class of approximately 497 current and former hourly, non-exempt employees working in  
7 California during the Class Period. (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and  
8 numerosity requirements. (*See e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm  
9 workers sufficiently numerous].)

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

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

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

18 (*Id.* at p. 809.) The instant litigation is predicated on uniform company policies and systemic top-  
19 down business practices revolving principally around Defendant's timekeeping and pay practices –  
20 *e.g.*, off-the-clock work attributed to understaffing, unreasonable workloads, and/or inequitable  
21 rounding, and failure to pay meal and rest break premiums. (Orshansky Decl. ¶ 82.) These  
22 allegations have given rise to the following claims: failure to pay minimum and overtime wages;  
23 meal period liability; rest break liability; and derivative claims arising therefrom. (*Ibid.*)

24 Because Plaintiff has alleged a single top-down compensation scheme where “the relevant  
25 proof [does] not vary among class members” and “clearly present[] a common question fundamental  
26 to all class members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)  
27 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)  
28 169 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation,

1 class-wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I.*  
2 *Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class  
3 certification in a manufacturing defect case when a common course of action had been proven].)  
4 This inference “*eliminates* the need for each class member to prove individually the consequences  
5 of the defendants’ actions to him or her.” (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of  
6 this matter depends upon questions that are common to members of the Class. (Orshansky Decl. ¶  
7 83.) These types of claims are commonly held to be proper for class certification. (*Ibid.*; *see, e.g.*,  
8 *Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period claim];  
9 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal  
10 period claim].)

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

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

14 Here, Plaintiff’s claims are typical of those held by the members of the Class. (Orshansky  
15 Decl. ¶ 84.) Like all other Class Members, Plaintiff was a non-exempt hourly employee working for  
16 Defendant in California during the Class Period. (*Ibid.*) As alleged, Plaintiff was not compensated  
17 for all hours he worked, and not provided with legally compliant meal and rest breaks. (*Ibid.*)  
18 Plaintiff was therefore impacted by the same challenged policies that allegedly injured the Class as  
19 a whole and subject to the same defenses forwarded by Defendant as to the Class, thus his claims  
20 are therefore typical. (*Ibid.*)

21 **D. Named Plaintiff and Class Counsel Will Fairly and Adequately Represent the**  
22 **Settlement Class**

23 The adequacy of representation requirement examines conflicts of interest between named  
24 parties and the class(es) they seek to represent. (*Capital People First v. Department of*  
25 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will  
26 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class  
27 he seeks to represent. (Orshansky Decl. ¶ 85; *McGhee v. Bank of America* (1976) 60 Cal.App.3d  
28 442, 450 [finding adequacy satisfied where there was no indication that plaintiff’s counsel were not

1 qualified and the named plaintiff had no interests antagonistic to those of the proposed class].) Class  
2 Counsel also have extensive experience in wage and hour litigation. (Orshansky Decl. ¶¶ 75-79, 85.)

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

4 In making its class certification decision, the court must determine that a class action would  
5 be superior to alternative means for the fair and efficient adjudication of the litigation. By  
6 consolidating hundreds of individual actions into a single proceeding, this Court’s use of the class  
7 action device enables it to manage this litigation in a manner that serves the efficiency interests of  
8 the litigants and the judicial system. (Orshansky Decl. ¶ 86.) Absent class treatment, the only  
9 alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores v.*  
10 *Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating “[t]he relevant comparison lies between the  
11 costs and benefits of adjudicating Plaintiff’s claims in a class action and the costs and benefits of  
12 proceeding by numerous separate actions – not between the complexity of a class suit that must  
13 accommodate some individualized inquires and the absence of any remedial proceeding  
14 whatsoever.”].) Finally, in the context of settlement, the superiority concerns are essentially non-  
15 existent.

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

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

21 A two-step process is followed when considering class settlements...If the proposed  
22 settlement appears to be the product of serious, informed, non-collusive negotiations,  
23 has no obvious deficiencies, does not improperly grant preferential treatment to class  
24 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.

25 See Federal Manual for Complex Litigation (Second) (1985) (“MCL 2d”) at § 30.44. The  
26 preliminary approval of the class action settlement by the trial court is simply a conditional finding  
27 that the settlement appears to be within the range of acceptable settlements. (See, e.g., Newberg, §  
28 11.25; *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th

1 1085, 1094-1095; MCL 2d § 30.44 [“Preliminary approval is appropriate if the agreement is ‘fair,  
2 reasonable, and adequate under the circumstances’”].) Thus, the preliminary approval of the class  
3 action settlement by the Court is simply a conditional finding that the settlement appears to be within  
4 the range of acceptable settlements. A review of the preliminary approval criteria demonstrates a  
5 substantial basis for granting the preliminary approval requested by this Motion and proceeding to  
6 a full settlement hearing.

## 7 **VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

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

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

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

25 Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement  
26 unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were  
27 conducted in good faith. (*See* Newberg, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. August  
28 10, 2007) 2007 U.S. Dist. LEXIS 74767, \*24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980)

1 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v.*  
2 *Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.) Courts do not  
3 substitute their judgment for that of the proponents, particularly when settlement has been reached  
4 by experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767  
5 at \*24.) As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the  
6 settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's  
7 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

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

9 The Parties engaged in a full day mediation session with Marc J. Feder, Esquire of Frank &  
10 Feder. (Orshansky Decl. ¶ 32.) Mr. Feder is experienced in resolving complex general litigation,  
11 labor and employment claims, class actions, and PAGA cases, among others. (*Ibid.*) Pursuant to the  
12 mediator's proposal, the Parties came to an agreement on all material terms of settlement. (*Id.* at ¶  
13 33.) The settlement negotiations were hard fought and conducted in good faith and at arm's length  
14 between attorneys with substantial experience litigating class actions, representative actions, and  
15 wage and hour cases. (*Id.* at ¶ 34.) The settlement was the product of a non-collusive settlement  
16 process in which the Parties were forced to make significant compromises in the interest of reaching  
17 a full and complete settlement of the Action. (*Ibid.*)

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

19 Throughout this case, Class Members have been represented by counsel who have years of  
20 experience in employment class action litigation. (Orshansky Decl. ¶¶ 75-79.) Class Counsel  
21 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,  
22 conducting pre-filing investigation and research; conducting discovery; reviewing Defendant's  
23 written policies concerning the claims set forth in the action, including Defendant's policies and  
24 procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping  
25 policies, such as rounding and recording hours, issuance of wage statements, and providing all  
26 wages at separation; reviewing and analyzing time and pay records; meeting and conferring  
27 regarding the information and documents produced; interviewing Class Members; drafting  
28 pleadings; researching California law; preparing damages models; consulting with an expert;

1 preparing for and attending mediation; and negotiating and finalizing the settlement and related  
2 documents. (Orshansky Decl. ¶¶ 14, 25, 30-31.)

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

4 Class Counsel believe that the settlement is fair and reasonable and serves the best interests  
5 of the Class Members. (See Settlement Agreement ¶ 40; Orshansky Decl. ¶ 35.) Although the  
6 recommendations of counsel proposing the class settlement are not conclusive, the Court can  
7 properly take the recommendations into account, particularly if counsel have been involved in  
8 litigation for some period of time, appear to be competent, have experience with this type of  
9 litigation, and significant discovery has been completed. (See Newberg § 11.47.) Here, Plaintiff is  
10 represented by competent and experienced counsel who possess extensive experience litigating  
11 wage and hour class actions and have been appointed as class counsel in numerous cases alleging  
12 similar claims. (Orshansky Decl. ¶¶ 75-79.)

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

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

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

23 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages  
24 model for Defendant’s liability. (Orshansky Decl. ¶ 36.) Although Plaintiff steadfastly maintains  
25 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in  
26 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4  
27 *infra*, Defendant presented numerous defenses to Plaintiff’s claims, both on the merits and with  
28 respect to class certification. (*Ibid.*) For example, Defendant defended against the minimum and

overtime wage claims by relying on policies that explicitly prohibited Class Members from engaging in off-the-clock work. (Orshansky Decl. ¶ 37.) Defendant also argued that 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 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.*) Additionally, Defendant started to make premium payments for non-compliant meal periods in 2021. (*Ibid.*)

Although Plaintiff was prepared to litigate these claims through class certification and, ultimately, through trial, given the substantial amount offered in settlement, Class Counsel predicted that it was far from certain that Plaintiff would be able to recover a greater amount at trial, particularly after considering the increased litigation costs that would accrue. (*Id.* at ¶ 40.) Thus, this factor supports preliminary approval of the settlement.

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

Although Plaintiff conducted informal discovery and investigated the claims prior to settlement, the Parties agreed to focus on exhausting early settlement efforts before launching into full-fledged and hotly contested litigation. (Orshansky Decl. ¶ 38.) 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.

///

///

1                                   **3.       Risk of Maintaining Class Action Status**

2           Here, settlement was reached prior to class certification and the result was a successful  
3 outcome for the Class. (Orshansky Decl. ¶ 39.) Yet, class certification was by no means a foregone  
4 conclusion. (*Ibid.*) For example, Class Members worked in different job positions and had different  
5 managers, and that, as a result, Defendant contended there was variation to the circumstances that  
6 could allegedly cause the employees to work off the clock and/or be deprived of the opportunity to  
7 take legally compliant, duty-free meal and rest periods, and this variation in circumstances raised  
8 highly individualized questions of fact. (*Ibid.*) Defendant disputed Plaintiff’s characterization of  
9 working conditions, liability, and damages, and possessed documentary and testimonial evidence  
10 rebutting Plaintiff’s allegations. (*Ibid.*)

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

13                                   **4.       Amount Offered in Settlement Given Realistic Value of Claims**

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

21           Plaintiff’s estimate of the settlement recovery is a reasonable percentage of possible  
22 recoverable damages at trial. Plaintiff’s damages analysis shows that the settlement reflects an  
23 estimated 24% of the maximum realistic potential damages recoverable at trial. (Orshansky Decl. ¶  
24 41.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims in  
25 question, *see Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly  
26 meets requirements establishing that the class settlement is within the “ballpark” of reasonableness.  
27 The settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed  
28 claims.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

21  
22  
23  
24  
25  
26  
27  
28

multiple Class Member interviews, for Plaintiff to establish the quantity of specific disputed and unrecorded work activities – especially over multiple job titles, at differing pay rates – would have been costly, time-consuming, and daunting. (*Ibid.*)

Defendant further responded that any off-the-clock time is *de minimis*. (*Id.* ¶ 49.) Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis* defense to insulate Starbucks from having to pay employees for small amounts of work regularly performed off-the-clock. (Orshansky Decl. ¶ 49.) What is not clear, however, is to what extent the *de minimis* defense would apply where the uncaptured hours were associated with an occasionally recurring activity. (*Ibid.*)

In light of these considerations – especially the evidentiary difficulties of demonstrating off-the-clock work on a class-wide basis – Class Counsel applied a discount that incorporated the risks of non-certification and being unsuccessful on the merits. (*Id.* at ¶ 50.)

#### **Meal and Rest Period Violations**

Plaintiff asserted that there are compliance issues *vis-à-vis* meal breaks—some are late, missed, short, or interrupted. (Orshansky Decl. ¶ 51.)

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

Although Defendant started making premium payments for non-compliant meal periods in 2021, significantly, there is no indication that Defendant made any payments of a meal period premium for “missed,” “short,” or “late” meal periods to employees prior to 2021. *C.f.* Wage Order Nos. 1-2001 and 5-2001, § 11(b). (Orshansky Decl. ¶ 53.) Consequently, Plaintiff alleged that

1 Defendant violated Labor Code §§ 226.7, 512, and applicable Wage Orders by failing to compensate  
2 Plaintiff and Class Members for short, late, interrupted, and missed meal periods. (Orshansky Decl.  
3 ¶ 53.)

4 Defendant, however, contended that it had practices, policies, and procedures to provide  
5 meal and rest breaks every workday to their employees that fully complied with the law. (*Id.* at ¶  
6 54.) Defendant vehemently argued that it complied with the requirements articulated by the  
7 California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.  
8 (*Ibid.*) Specifically, Defendant maintained that it “provides” employees with a reasonable  
9 opportunity to take timely meal periods of at least 30 minutes, relieves employees of all duties during  
10 meal periods, and relinquishes control over employees’ activities, including the ability to leave the  
11 premises during meal periods. (*Ibid.*)

12 Like most employers facing meal period litigation, Defendant argued that employees were  
13 apprised of their right to take meal periods and provided compliant meal periods, but some may  
14 voluntarily have waived them. (*Id.* at ¶ 55.) Defendant contended that the issue of voluntary waiver  
15 would necessarily devolve into a series of individualized mini-trials, precluding class certification.  
16 (*Ibid.*; see *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25 [holding that the  
17 defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on  
18 individual questions].)

19 Based upon the analysis of Class Members’ time and payroll records and, in conjunction  
20 with interviews of Plaintiff and Class Members, Plaintiff determined that 56% of eligible shifts were  
21 the subject of unique violations for missed, short, or late meal periods, and calculated the potential  
22 exposure of this claim to be \$874,004.34. (Orshansky Decl. ¶ 56.)

23 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required  
24 whereby employers “relinquish control over how employees spend their time and relieve employees  
25 of all duties.” (Orshansky Decl. ¶ 57; *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257,  
26 260.) Due to Defendant’s work demands and inadequate staffing, Plaintiff and Class Members did  
27 not receive timely and compliant rest breaks, nor did Defendant relinquish control over how  
28 employees spent their 10-minute rest periods. (Orshansky Decl. ¶ 57.) As with the meal periods,

1 Plaintiff did not receive rest break premium payments for non-compliant rest breaks, nor is there  
2 evidence that Defendant made rest break premium payments to Class Members. (Orshansky Decl. ¶  
3 59.) Thus, Plaintiff alleged that Defendant did not provide premium pay for each non-compliant rest  
4 break as required under Labor Code § 226.7. (*Id.* at ¶ 58.)

5 Here again, Defendant disputed liability and damages. Defendant maintained that it  
6 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction  
7 of four hours worked as required by Labor Code § 226.7. (*Id.* at ¶ 59.) Defendant explained that  
8 Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*) As with meal  
9 periods, Defendant argued that any Class Member who failed to take a rest break, or took a short or  
10 late rest break, did so voluntarily and that all applicable rest breaks were still authorized and  
11 provided. (*Ibid.*) Defendant also attempted to distinguish *Augustus, supra*, which involved security  
12 guards who were required to monitor a pager, phone, or other device as having an added constraint  
13 that is not present in the matter *sub judice*. (*Ibid.*)

14 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendant's  
15 exertion of pressure, control, and resulting violations is likely to be more difficult. (*Id.* at ¶ 60.) Thus,  
16 Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and other Class  
17 Members for a maximum exposure rate of \$312,144.41. (*Ibid.*) For settlement purposes, and to  
18 account for the difficulties of certifying and proving unrecorded rest break violations, a downward  
19 departure from that maximum exposure was and is warranted. (*Ibid.*)

#### 20 **Wage Statement Violations**

21 Plaintiff alleged a cause of action under Labor Code § 226(a) for Defendant's failure to  
22 provide accurate itemized wage statements. (Orshansky Decl. ¶ 61.) Failure to comply with the  
23 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the  
24 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a  
25 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*  
26 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because  
27 if Defendant did not provide wages for all hours worked, meal and rest breaks, and so forth, then  
28 the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 61.)

Defendant contended, however, that Labor Code § 226(e) penalties are not automatic. (Orshansky Decl. ¶ 62.) Rather, the employee must show that Defendant’s non-compliance was “knowing and intentional.” (*Ibid.*) Defendant suggested that any non-compliance was not knowing and intentional. (*Ibid.*) Moreover, Defendant argued that meal and rest period violations cannot support derivative wage statement penalties. (*Ibid.*; see *Naranjo v. Spectrum Security Service, Inc.* (2019) 40 Cal.App.5th 444, 474 [holding that violations of Labor Code’s meal break provisions do not entitle employees to pursue the derivative wage statement penalties]; *c.f.*, but *review granted*, *Naranjo v. Spectrum Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257 Cal.Rptr.3d 188.)

Because the damages for this cause of action are penalties, the statute of limitations is only one year prior to the filing of the original complaint. (*See* Code Civ. Proc. § 340.) The Parties discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent violation rates, Plaintiff estimates the total maximum wage statement exposure to be \$768,100. (Orshansky Decl. ¶ 63.)

### **Derivative Waiting Time and UCL Claims**

Plaintiff further asserted causes of action against Defendant for failure to timely pay all wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business practices. (Orshansky Decl. ¶ 64; see Labor Code § 203, Cal. Business and Professions Code §§ 17200, *et seq.*) As with other claims, Defendant vigorously disagreed that it engaged in any conduct giving rise to liability or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 64.)

Defendant argued that waiting time penalties are not appropriate because it attempted to pay employees all final wages owed in good faith upon their separation, thereby precluding a finding of willfulness necessary to obtain waiting time penalties. (*Id.* at ¶ 65.) Moreover, Defendant maintained that no waiting time penalties were recoverable from alleged meal or rest period violations. (*Ibid.*) Defendant raised the Second Appellate District’s decision in *Naranjo*, *supra*, 40 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage statement nor waiting time penalties. (*Ibid.*) Yet the *Naranjo* decision is currently pending before the California Supreme Court,

1 *see, Naranjo, supra, review granted*, Supreme Court Case No. S258966, 455 P.3d 704 (January 02,  
2 2020), and although fully briefed, the outcome of this important case remains to be seen.<sup>6</sup> (*Ibid.*)  
3 Finally, Defendant argued that adequate remedies at law exist to render the action unsuitable for  
4 equitable remedies, and again contended that the allegations underlying the unfair competition claim  
5 lacked merit. (*Id.* at ¶ 66.)

6 Based on the count of 363 former employees, Class Counsel calculated the maximum value  
7 of the waiting time claim to be \$1,301,572.80. (*Id.* at ¶ 67.) However, to account for the uncertainty  
8 of proving the underlying claims and risk of an adverse decision in *Naranjo*, Class Counsel made a  
9 realistic allowance with the agreed upon settlement dollar figure. (*Ibid.*)

### 10 **PAGA Penalties**

11 The success of Plaintiff's PAGA claim is wholly dependent upon the success of his  
12 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.  
13 (Orshansky Decl. ¶ 68.) Defendant maintained and continues to maintain it had legally compliant  
14 employment policies and practices throughout the statutory period. (*Id.* at ¶ 69.) Defendant denied  
15 and continues to deny that it ever violated any provision of the California Labor Code and argued  
16 that, even assuming such violations occurred, Defendant will not be treated as having engaged in  
17 subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendant argued  
18 that heightened civil penalties for subsequent violations would not be assessed unless it could be  
19 shown that Defendant had notice that it was violating the laws, *e.g.*, it had been cited by a labor  
20 agency or adjudged by a court to have done so. (*Ibid.*; *see, e.g., Amaral v. Cintas Corp.* (2008) 163  
21 Cal.4th 1157, 1209.) Thus, Defendant contended that, at best, even if a violation giving rise to a  
22 penalty was shown for each pay period, only the lower civil penalty associated with initial violations  
23 would apply. (Orshansky Decl. ¶ 69.)

24  
25 <sup>6</sup> The "Issues Presented" in the Case Summary of the Appellate Courts Case Information webpage  
26 (<https://appellatecases.courtinfo.ca.gov/>) reads: "This case presents the following issues: (1) Does a  
27 violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest  
28 period violations, give rise to claims under Labor Code sections 203 and 226 when the employer  
does not include the premium wages in the employee's wage statements but does include the wages  
earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium  
wages owed under Labor Code section 226.7?"

Moreover, Defendant asserted that, before a PAGA claim could be tried, under existing law, the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently “manageable” so as not to interfere with Defendant’s right to due process. (*Id.* at ¶ 70.) Defendant reiterated how hourly employees’ job duties and work hours varied. (*Id.* at ¶ 71.) Defendant contended that there was variation as to the circumstances that could allegedly cause employees to work off-the-clock or to be deprived of the opportunity to take legally compliant, duty-free meal and/or rest periods. (*Ibid.*) Defendant further opined that these issues presented challenges not only to liability but also challenges to Plaintiff’s ability to show that a PAGA claim could be efficiently and manageably adjudicated without abridging Defendant’s due process rights. (*Ibid.*)

Finally, Defendant maintained that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. (*See* Labor Code § 2699e(2) [the Court may “award a lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”]; Orshansky Decl. ¶ 72.)

Although, strictly speaking, class certification requirements are not required to be satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a PAGA claim is uncertain.<sup>7</sup> (Orshansky Decl. ¶ 73.) Thus, Class Counsel applied

---

<sup>7</sup> Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but rather to facilitate the enforcement of the labor laws. (*Ibid.*; *see, e.g., Williams v. Superior Court* (2017) 3 Cal.5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986; Labor Code § 2699(i).) In assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount which the LWDA and the aggrieved employees are to receive formally in the form of monetary civil penalties but instead whether the total settlement amount achieves the PAGA’s objectives. “When PAGA claims are settled, courts “consider whether the proposed PAGA settlement is fair and adequate in view of the purposes and policies of the statute[]” and “[t]hose purposes and policies 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 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or  
2 trial, the risks regarding success on the merits and establishing liability, and the risks with proving  
3 the extent of penalties that are warranted and possible discretionary reduction of penalties by the  
4 Court. (*Ibid.*) As a result, Plaintiff used the “initial” \$100 per pay period violation (as opposed to the  
5 \$200 subsequent per violation rate) to calculate a realistic estimate of \$779,800 in potential PAGA  
6 penalty exposure – of which, by statute, only 25%, or \$194,950 – would be recoverable by aggrieved  
7 employees. (*Ibid.*)

### 8 Summary

9 After Class Counsel calculated the realistic possible recovery to Class Members for each of  
10 the above claims, the aggregate dollar amount result is \$4,195,641.65 in realistic total damages and  
11 penalties. (Orshansky Decl. ¶ 74.) Thus, the proposed settlement amount to Class Members of  
12 \$986,746 represents an approximate 24% of Plaintiff’s potential maximum realistic recovery, while  
13 avoiding the further expense and serious risk of proceeding toward class certification and trial.  
14 (*Ibid.*) “The fact that a proposed settlement may only amount to a fraction of the potential recovery  
15 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be  
16 disapproved.” (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal  
17 quotations omitted]; *see, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL  
18 4512372, at \*9 [preliminarily approving wage and hour class action settlement stating, “[a]lthough  
19 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that  
20 figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff’s  
21 claims.”].) Taking into account the risk of non-certification, failure to prevail on the merits, and the  
22 Court’s power to reduce the civil penalties, the proposed settlement falls within the realm of being  
23 fair, reasonable, and adequate. (Orshansky Decl. ¶ 74.)

### 24 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS**

25 This Court should order distribution of the proposed Notice of Pendency of Class and  
26 Representative Action Settlement, *see* Exhibit 1 to the Settlement Agreement (Exhibit 1 to the  
27 Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known  
28 mailing address information provided by Defendant. (Orshansky Decl. ¶ 87.) Here, Plaintiff

1 proposes that the settlement be administered by CPT Group, Inc. (“CPT”), an experienced class  
2 action settlement administrator. (Settlement Agreement ¶¶ 32, 49(a); Orshansky Decl. ¶ 88.) Class  
3 Members’ addresses will be ascertainable through Defendant’s personnel and payroll records, which  
4 Defendant will provide to CPT within fourteen (14) calendar days after preliminary approval of the  
5 settlement. (Settlement Agreement ¶ 49(b); Orshansky Decl. ¶ 88.) To the extent that any notices  
6 are returned, CPT will run those addresses through the National Change of Address database and/or  
7 conduct skip traces to obtain current address information. (Settlement Agreement ¶ 49(e);  
8 Orshansky Decl. ¶ 88.)

9       The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because  
10 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,  
11 the key terms of the Settlement Agreement, the uniform 45-day deadline to submit a dispute, opt-  
12 out, or objection to the class settlement and the procedure by which to do so, and explains the  
13 recovery formula and credited number of workweeks and pay periods for each Class Member.  
14 (Orshansky Decl. ¶ 89.) The proposed notice will also notify Class Members of the final approval  
15 hearing date, provide the contact information for Class Counsel, and advise Settlement Class  
16 Members that they may enter an appearance through counsel if they wish. (*Id.* at ¶ 90.) This manner  
17 of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable and cost-  
18 effective method of reaching Class Members. Thus, the proposed method of notice is reasonably  
19 calculated to reach Class Members by the best means practicable and should be approved. (*Ibid.*)

## 20 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

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

## 24 **IX. CONCLUSION**

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

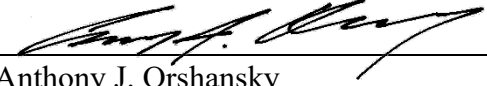
- 27       1.       Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;

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

11  
12 Dated: February 11, 2022

Respectfully submitted,

COUNSELONE, PC

13  
14 By: 

15 Anthony J. Orshansky  
16 Jennifer L. Connor  
17 Justin Kachadoorian  
18 Attorneys for Plaintiff  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28