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himself and others similarly situated
8
9

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

13 ANTONIO CAMACHO, on behalf of himself
14 and others similarly situated,

15 Plaintiff,

16 v.
17

18 BEL-AIR COUNTRY CLUB, a California
19 corporation; and DOES 1 through 100, inclusive,

20 Defendants.
21
22

Case No. 21STCV07052

Assigned for all purposes to the Honorable
Elihu M. Berle

**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 Camacho, and [Proposed] Order
submitted concurrently herewith]

Preliminary Approval Hearing

Date: March 28, 2022

Time: 10:00 a.m.

Department: 6

Complaint Filed: February 23, 2021

FAC Filed: March 10, 2021

Trial Date: None set

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 28, 2022 at 10:00 a.m. in Department 6 of the above-entitled Court, located at 312 N. Spring
4 Street, Los Angeles, California 90012, plaintiff Antonio Camacho (“Plaintiff” or “Class
5 Representative”) individually and on behalf of all others similarly situated, will and hereby does
6 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
12 who worked for Defendant and/or its predecessor or merged entities, within the State
of California at any time during the Class Period (the “Class” or “Class Members”).¹

13 3. Preliminary appointment of Plaintiff Antonio Camacho 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 Camacho filed concurrently
26 herewith, and the exhibits attached thereto, the pleadings and other papers filed in this action, and

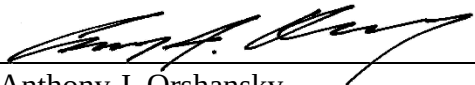
27 _____
28 ¹ “Settlement Class” or “Settlement Class Members” means all Class Members who do not opt out
of the settlement. (Settlement Agreement ¶ 36.)

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

5
6 Dated: February 15, 2022

Respectfully submitted,

COUNSELONE, PC

8
9 By: 

Anthony J. Orshansky

Jennifer L. Connor

Justin Kachadoorian

Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Antonio Camacho (“Plaintiff” or “Class Representative”), individually and on
4 behalf of all others similarly situated,² seeks preliminary approval of the Stipulation of Class and
5 Representative Action Settlement (“Settlement Agreement”) entered with defendant Bel-Air
6 Country Club (“Defendant”). The Settlement Agreement between Plaintiff and Defendant (together,
7 the “Parties”), if approved, will resolve specific claims of the Settlement Class Members and PAGA
8 Group Members in exchange for Defendant’s agreement to pay ***Seven Hundred Ninety Thousand***
9 ***Dollars (\$790,000) into a non-reversionary common settlement fund.*** There are approximately 253
10 Class Members employed as hourly, non-exempt employees during the Class Period.

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

18 After engaging in substantial independent investigation and after mediation with Steve J.
19 Rottman, Esquire, the Parties agreed to settle the Settlement Class Members’ and PAGA Group
20 Members’ claims alleged in this litigation for the non-reversionary sum of Seven Hundred Ninety
21 Thousand Dollars (\$790,000) (“Gross Settlement Amount”).³ A true and correct copy of the fully
22 executed Settlement Agreement is attached as **Exhibit 1** to Declaration of Anthony J. Orshansky
23

24 ² “Class Members” are defined as current and former hourly-paid or non-exempt employees who
25 worked for Defendant and/or its predecessor or merged entities, within the State of California at any
26 time during the Class Period. (Settlement Agreement ¶ 4.) “Settlement Class” or “Settlement Class
27 Members” means all Class Members who do not opt out of this settlement. (*Id.* at ¶ 36.) “PAGA
28 Group Members” are defined as all Class Members who worked for Defendant any time during the
PAGA Period. (*Id.* at ¶ 24.)

³ Payment of Defendant’s share of employer payroll taxes for payments on the Individual Settlement
Shares allocated as wages shall be separately funded (*i.e.*, outside of the settlement fund) by
Defendant. (*Id.* at ¶ 50.)

1 (“Orshansky Decl.”), filed concurrently herewith. After deductions for Attorneys’ Fees and Costs
2 to Class Counsel, Enhancement Payment to the Class Representative, Administration Costs to the
3 Settlement Administrator, and the PAGA Total Payment, the remaining amount (the “Net
4 Settlement Amount”) of approximately \$388,500.00 will be distributed to the Settlement Class
5 Members. (Settlement Agreement ¶¶ 20, 50(a)-(d).) The entire Net Settlement Amount will be paid
6 out to Settlement Class Members. Settlement Class Members shall automatically receive payments
7 without the need to submit a claim form, and the PAGA Group Members shall receive PAGA
8 payments irrespective of whether or not they opt-out. (*Id.* at ¶ 50(d).)

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

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

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

19 On February 23, 2021, Plaintiff filed a Class and Representative Action Complaint asserting
20 putative class action wage and hour claims, along with representative action claims under the
21 PAGA.⁴ (*Id.* at ¶ 27.)

23 ⁴ Plaintiff alleged the following claims: (1) failure to pay minimum wages pursuant to Labor Code
24 §§ 1194, 1197, and 1197.1 and the Industrial Welfare Commission (“IWC”) Wage Orders; (2)
25 failure to pay overtime wages pursuant to Labor Code §§ 510 and 1198 and the IWC Wage Orders;
26 (3) failure to provide compliant meal periods and/or pay premiums owed thereon in violation of
27 Labor Code §§ 226.7 and 512(a) and the IWC Wage Orders; (4) failure to provide compliant rest
28 breaks and/or pay premiums owed thereon in violation of Labor Code § 226.7 and the IWC Wage
Orders; (5) failure to provide accurate and compliant itemized wage statements in violation of Labor
Code § 226(a) and the IWC Wage Orders; (6) failure to pay all wages owed timely during
employment and upon separation in violation of Labor Code §§ 201-204 and the IWC Wage Orders;
(7) failure to maintain requisite payroll records in violation of Labor Code § 1174(d) and the IWC
Wage Orders; (8) violations of California Business and Professions Code §§ 17200, *et seq.*; and (9)

1 On March 10, 2021, Plaintiff filed his First Amended Complaint that perfected his PAGA
2 claim to allege exhaustion of his administrative agency obligations after awaiting the requisite sixty-
3 five (65) days' notice period. (*Id.* at ¶ 28.)

4 Defendant filed its Answer pleading general denial of wrongdoing and asserting 62
5 affirmative defenses. (*Id.* at ¶ 29.)

6 Defendant denies Plaintiff's allegations of wrongdoing; Defendant does not believe that any
7 liability to Plaintiff or other Class Members exists, or that Plaintiff or Class Members are entitled to
8 any recovery. (Settlement Agreement ¶¶ 44, 46; Orshansky Decl. ¶ 30.)

9 **A. Discovery and Investigation**

10 Here, the Parties engaged in informal discovery and investigation—exchanging information,
11 documents and reviewing and analyzing extensive data made available by Defendant—which
12 enabled the Parties to thoroughly evaluate Plaintiff's claims, the claims of Class Members, and
13 PAGA Group Members' PAGA claim, along with Defendant's affirmative defenses, and the likely
14 outcomes, risks, and expense of pursuing litigation.

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

22 Class Counsel analyzed information and documentation concerning the alleged violations,
23 such as, Defendant's written policies concerning those claims, including Defendant's employee
24 handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest
25 breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing
26 all wages at separation, as well as composite data regarding the number of Class Members and the

27 _____
28 violation of the Private Attorneys General Act of 2004 ("PAGA"), codified in Labor Code §§ 2698,
et seq. (Orshansky Decl. ¶ 27.)

1 mix of current versus former employees, total number of pay periods, total number of workweeks,
2 and the average hourly rate in effect. (See Settlement Agreement ¶ 41; Orshansky Decl. ¶ 31.)
3 Defendant also produced a sample of time and pay records for Class Members. (*Ibid.*) Counsel met
4 and conferred at length regarding the information and documents produced. (*Ibid.*)

5 The sample size was a random sample of 25% of the time and pay records.⁵ (Orshansky
6 Decl. ¶ 32.) To ensure that the sample was randomized and representative of the entire Class, the
7 entire hourly-paid or non-exempt employee workforce employed by Defendant in California during
8 the Class Period—not limited by department or title—was listed by alphabetized last name and
9 every fourth employee selected. (*Ibid.*) There were no noticeable disproportionalities in the data
10 culled (*i.e.*, small number of employees comprising a majority of workweeks, etc.). (*Ibid.*) The
11 payroll data likewise corresponded with the time records so that Class Counsel could compare and
12 analyze for violations. (*Ibid.*) Class Counsel also conducted interviews of Plaintiff and Class
13 Members to verify what was evidenced on the time and payroll records, along with quantifying off-
14 the-clock work. (*Ibid.*) These interviews allowed Class Counsel to confirm the estimated violation
15 rates obtained from the sample. Thus, Class Counsel was able to assess liability across a random
16 sample of the Class across the Class Period. (*Ibid.*)

17 Class Counsel interviewed Class Members, analyzed the documents and data produced, and
18 spent significant time consulting with an expert, to determine Defendant’s degree of liability and
19 potential amounts due in damages. (*Id.* at ¶ 33.)

20 **B. Mediation and Settlement**

21 The Parties participated in a full-day mediation with Steve J. Rottman, Esquire, where they
22 debated and discussed their respective positions. (Orshansky Decl. ¶ 34.) Mr. Rottman is
23 experienced in mediating complex general litigation, labor and employment claims, class actions,
24 and PAGA cases, among others. (*Ibid.*) During the mediation, the Parties exchanged further
25

26 ⁵ Courts have found that the use of similar percentage samples is appropriate. See *e.g.*, *Brum v.*
27 *MarketSource, Inc.* (E.D. Cal., 2018) 2018 WL 3861558 at *5 [10% sample]; *Talavera v. Sun Maid*
28 *Growers of California* (E.D. Cal., 2017) 2017 WL 495635 at *4 [10% sample]; *Kaminske v. JP*
Morgan Chase Bank N.A. (C.D. Cal., 2010) 2010 WL 5782995 at *5 [10% sample].)

1 information and discussed all aspects of the case, including the risks and delays of litigation and the
2 risk to both Parties for proceeding with a motion for class certification, liability under the claims
3 asserted, and the implications of a PAGA representative action. (*Id.* at ¶ 35.) These were contentious
4 issues because of the factual and legal complexity of the case. (*Ibid.*)

5 The case did not settle at mediation. (*Id.* at ¶ 36.) However, after a couple of weeks, the
6 Parties accepted the mediator’s proposal. (*Ibid.*) Thereafter, the Parties engaged in extensive
7 negotiations to draft the Settlement Agreement, along with the Notice of Pendency of Class and
8 Representative Action Settlement. (*Ibid.*)

9 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
10 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
11 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
12 adequate taking into consideration the amounts received in other wage and hour class and
13 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
14 each Class Members’ claim to the settlement award he or she will receive. (*Id.* at ¶ 38.) Class
15 Counsel believe that the settlement serves the best interests of Class Members. (*Ibid.*) Further, and
16 based on the settlement negotiations, which were hard fought and conducted in good faith and at
17 arm’s length between attorneys with substantial experience litigating class actions, representative
18 actions, and wage and hour cases, the settlement was the product of a non-collusive settlement
19 process in which the Parties were forced to make significant compromises in the interest of reaching
20 a full and complete settlement of the action. (*Id.* at ¶ 37.) The Parties have concluded that it is in
21 their best interests to compromise, settle, and accept the terms of the Settlement Agreement. (*See*
22 Settlement Agreement ¶ 43; Orshansky Decl. ¶¶ 36-38.)

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

24 Under the terms of the Settlement Agreement, Defendant has agreed to pay a non-
25 reversionary amount of Seven Hundred Ninety Thousand Dollars (\$790,000) into a common fund
26 to settle the specific wage and hour claims of Settlement Class Members and PAGA Group
27 Members; this amount is called the “Gross Settlement Amount.” (Settlement Agreement ¶¶ 16, 50.)
28 This Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class

Members, the Enhancement Payment to the Class Representative, the Administration Costs to the Settlement Administrator, the Attorneys' Fees and Costs to Class Counsel, and the Private Attorneys General Act ("PAGA") Total Payment, including payment to PAGA Group Members and to the California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to statute. (*Ibid.*) The only monies excluded from the Gross Settlement Amount is that amount to be paid by Defendant as the employer's share of payroll taxes with respect to the wage portion of the settlement payments to Settlement Class Members, which shall be paid separately. (*Ibid.*)

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

- Up to \$276,500 in attorneys' fees—which is 35% of the Gross Settlement Amount—and up to \$20,000 in litigation costs to Class Counsel (the "Attorneys' Fees and Costs");
- Up to \$10,000 to the Class Representative as an Enhancement Payment;
- Up to \$80,000 allocated as a PAGA Total Payment—of which 75% is allocated for payment to the LWDA for civil penalties pursuant to statute and 25% is allocated for payment to PAGA Group Members on a *pro rata* basis; and
- Up to \$15,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$388,500.00, is called the "Net Settlement Amount." (Settlement Agreement ¶¶ 20, 50(a)-(d).) 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 ¶ 50(d).)

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 253 Class Members participate in the settlement, then the average Individual Settlement Share would be an estimated \$1,535.57 per Settlement Class Member. (Orshansky Decl. ¶ 11.) Of course, any Class

1 Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may
2 opt out. (*Ibid.*; Settlement Agreement ¶ 57.)

3 The Net Settlement Amount will be the amount that is available for distribution to Settlement
4 Class Members on a *pro rata* basis, based on workweeks during the Class Period. (Settlement
5 Agreement ¶¶ 17, 50(e).) Each Individual Settlement Share shall be calculated as follows: The Net
6 Settlement Amount shall be divided by the total of all Workweeks of Settlement Class Members
7 during the Class Period in order to yield the “Workweek Value.” (*Id.* at ¶ 50(e).) The Individual
8 Settlement Share to each Settlement Class Member shall be calculated by multiplying his or her
9 individual Workweeks by the Workweek Value. (*Ibid.*)

10 In addition, each PAGA Group Member will receive a proportional share of the PAGA Pro
11 Rata Payment based on pay periods he or she worked during the PAGA Period. (*Id.* at ¶¶ 26, 50(d).)
12 Specifically, the PAGA Pro Rata Payment (*i.e.*, \$20,000) shall be divided by the total of all pay
13 periods worked by PAGA Group Members during the PAGA Period in order to establish the value
14 of each pay period. Each PAGA Group Member’s PAGA payment shall be calculated by
15 multiplying the value of a pay period by the number of pay periods worked by the PAGA Group
16 Member during the PAGA Period, and irrespective of whether he or she is a Settlement Class
17 Member. (*Id.* at ¶ 50(d).)

18 After reduction for the employee’s share of taxes on the wage portion,⁶ the net payment to
19 each Settlement Class Member/PAGA Group Member will be the sum of his or her Individual
20 Settlement Share plus, if applicable, the individual PAGA payment (collectively, “Individual
21 Settlement Payment”). (Settlement Agreement ¶ 50(f); Orshansky Decl. ¶ 10.) As a result of the
22 distribution formulas, the consideration paid to each Settlement Class Member/PAGA Group
23 Member is tailored to the impact of Defendant’s alleged violations as well to the claims he or she is
24 releasing. (Orshansky Decl. ¶ 10.) Further, a Settlement Class Member may submit a written letter
25 to the Settlement Administrator disputing the number of workweeks credited if he or she believes
26

27 ⁶ The Parties agreed to allocate twenty percent (20%) of each Individual Settlement Share to wages
28 and eighty percent (80%) of each Individual Settlement Share to interest, penalties, and other non-
wage damages. (Settlement Agreement ¶ 52(a).)

1 that count is inaccurate. (Settlement Agreement ¶ 55.) Finally, any Class Member who prefers to
2 preserve his or her right to pursue relief or seek an alternative recovery may opt out.⁷ (*Id.* at ¶ 57.)

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

4 As part of the settlement, Plaintiff will apply for an enhancement payment at the time of
5 seeking final approval in the amount of \$10,000 for services to the Settlement Class. (Settlement
6 Agreement ¶ 50(c); Orshansky Decl. ¶ 12.) “[I]ncentive awards are fairly typical in class action
7 cases . . . and are intended to compensate class representatives for work done on behalf of the class
8 [and] to make up for financial or reputational risk undertaken in bringing the action.” (*In re*
9 *Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-1394.) Plaintiff’s requested
10 enhancement payment is intended to recognize the significant benefits conferred upon the
11 Settlement Class and be proportional to the time and effort that Plaintiff expended on behalf of the
12 Class including, providing factual information and documents to Class Counsel, discussing the
13 claims and theories at issue in the case with Class Counsel, identifying potential witnesses,
14 reviewing the Settlement Agreement, as well as the significant risks Plaintiff undertook by agreeing
15 to serve as a named plaintiff. (See Settlement Agreement ¶¶ 12, 48, 50(c); Orshansky Decl. ¶ 13.)

16 Class Counsel will apply for an attorneys’ fees award of no more than 35% of the Gross
17 Settlement Amount, and reimbursement of litigation costs in an amount up to \$20,000. (Settlement
18 Agreement ¶¶ 2, 50(a); Orshansky Decl. ¶ 14.) Plaintiff submits that the requested fee is fair
19 compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely
20 contingent fee basis. (Orshansky Decl. ¶ 14.) Class Counsel have incurred substantial attorneys’
21 fees conducting pre-filing investigation, analyzing Plaintiff’s claims, conducting legal research and
22 analysis, conducting informal discovery, meeting and conferring with defense counsel, interviewing
23 putative class members, analyzing documents produced by Defendant, including corporate policies
24 and employee time and payroll records, consulting with an expert, building damages models,
25 preparing for and attending mediation, routine case updates and consultations with the client, and
26 negotiating and preparing the Settlement Agreement, Notice of Pendency of Class and

27
28 ⁷ Again, if approved, PAGA Group Members will receive their individual PAGA payment
irrespective of whether they opt-out of the class settlement. (Settlement Agreement ¶ 50(d).)

1 Representative Action Settlement, and this motion for preliminary approval and supporting
2 documents. (*Ibid.*) Class Counsel will also expend future attorney time in attending the hearing on
3 this Motion, overseeing the notice and administration process, drafting the Final Approval Motion,
4 and supporting documents, and attending the Final Approval hearing, among other tasks, such as
5 addressing questions from Class Members. (*Id.* at ¶ 15.)

6 Both California and federal courts have recognized that an appropriate method for awarding
7 attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of
8 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 ["the
9 percentage of fund method survives in California class action cases..."]; *Wershba v. Apple*
10 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the "percentage of recovery" and
11 "lodestar/multiplier" methods].) Historically, courts have awarded percentage fees in the range of
12 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6
13 (4th Ed. 2013) ["No general rule can be articulated on what is a reasonable percentage of a common
14 fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in
15 order to assure that the fees do not consume a disproportionate part of the recovery obtained for the
16 class, although somewhat larger percentages are not unprecedented."].)

17 Class Counsel submit that their request for attorneys' fees is reasonable when viewed as an
18 overall percentage of the settlement amount in light of the substantial risks and significant work
19 undertaken, the excellent results obtained for the Class Members, and the efficiency with which the
20 Parties have conducted the litigation. (Orshansky Decl. ¶ 16.) Assuming that the Court grants
21 preliminary approval, Class Counsel will seek an award of attorneys' fees and litigation costs at the
22 time of seeking final approval of this settlement.

23 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

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

1 a class is purely a procedural one and should be based on the allegations in the operative complaint,
2 and not in the perceived factual or legal merit of the class claims. (*Linder v. Thrifty Oil Co.* (2000)
3 23 Cal.4th 429, 439-441.)

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

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

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

17 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
18 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and
19 former hourly-paid or non-exempt employees who worked for Defendant and/or its predecessor or
20 merged entities, within the State of California during the Class Period. (Settlement Agreement ¶ 4.)
21 Further, the Class Period is defined as the period from January 04, 2017 and ending on February 22,
22 2022. (*Id.* at ¶ 7.) Thus, all Class Members are of a specific type (hourly-paid or non-exempt
23 employees) employed within California. (*Id.* at ¶ 4.) Defendant is required to and does maintain
24 employment records of such persons, including contact information and Social Security numbers.
25 (Orshansky Decl. ¶ 82.) Documents and information exchanged reflect a class of approximately 253
26 current and former hourly, non-exempt employees working in California during the Class Period.
27 (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and numerosity requirements. (*See e.g.,*
28 *Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers sufficiently numerous].)

B. There Is a Well-Defined Community of Interest

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

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

(*Id.* at p. 809.) Here, 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, as well as failure to pay meal and rest break premiums. (Orshansky Decl. ¶ 83.) 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. ¶ 84.) 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];

1 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal
2 period claim].)

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

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

6 Here, Plaintiff's claims are typical of those held by the members of the Class. (Orshansky
7 Decl. ¶ 85.) Like all other Class Members, Plaintiff was a non-exempt hourly employee working for
8 Defendant in California during the Class Period. (*Ibid.*) As alleged, Plaintiff was not compensated
9 for all hours he worked and not provided with legally compliant meal and rest breaks. (*Ibid.*)
10 Plaintiff was therefore impacted by the same challenged policies that allegedly injured the Class as
11 a whole and subject to the same defenses forwarded by Defendant as to the Class, thus his claims
12 are therefore typical. (*Ibid.*)

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

15 The adequacy of representation requirement examines conflicts of interest between named
16 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
17 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiff and Class Counsel will
18 adequately represent the Class as there are no conflicts between the named Plaintiff and the Class
19 he seeks to represent. (Orshansky Decl. ¶ 86; *McGhee v. Bank of America* (1976) 60 Cal.App.3d
20 442, 450 [finding adequacy satisfied where there was no indication that plaintiff's counsel were not
21 qualified and the named plaintiff had no interests antagonistic to those of the proposed class].) Class
22 Counsel also have extensive experience in wage and hour litigation. (Orshansky Decl. ¶¶ 76-80, 86.)

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

24 In making its class certification decision, the court must determine that a class action would
25 be superior to alternative means for the fair and efficient adjudication of the litigation. By
26 consolidating almost three hundred individual actions into a single proceeding, this Court's use of
27 the class action device enables it to manage this litigation in a manner that serves the efficiency
28 interests of the litigants and the judicial system. (Orshansky Decl. ¶ 87.) Absent class treatment, the

1 only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores*
2 *v. Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating “[t]he relevant comparison lies between the
3 costs and benefits of adjudicating Plaintiff’s claims in a class action and the costs and benefits of
4 proceeding by numerous separate actions – not between the complexity of a class suit that must
5 accommodate some individualized inquires and the absence of any remedial proceeding
6 whatsoever.”].) Finally, in the context of settlement, the superiority concerns are essentially non-
7 existent.

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

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

13 A two-step process is followed when considering class settlements...If the proposed
14 settlement appears to be the product of serious, informed, non-collusive negotiations,
15 has no obvious deficiencies, does not improperly grant preferential treatment to class
16 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.

17 See Federal Manual for Complex Litigation (Second) (1985) (“MCL 2d”) at § 30.44. The
18 preliminary approval of the class action settlement by the trial court is simply a conditional finding
19 that the settlement appears to be within the range of acceptable settlements. (See, e.g., Newberg, §
20 11.25; *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
21 1085, 1094-1095; MCL 2d § 30.44 [“Preliminary approval is appropriate if the agreement is ‘fair,
22 reasonable, and adequate under the circumstances’”].) Thus, the preliminary approval of the class
23 action settlement by the Court is simply a conditional finding that the settlement appears to be within
24 the range of acceptable settlements. A review of the preliminary approval criteria demonstrates a
25 substantial basis for granting the preliminary approval requested by this Motion and proceeding to
26 a full settlement hearing.

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

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

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

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

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

1 settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's
2 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

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

4 The Parties engaged in a mediation session with Steve J. Rottman, Esquire. (Orshansky Decl.
5 ¶ 34.) Mr. Rottman is experienced in resolving complex general litigation, labor and employment
6 claims, class actions, and PAGA cases, among others. (*Ibid.*) As noted above, the case did not settle
7 at mediation; however, after a couple of weeks, the Parties accepted the mediator's proposal. (*Id.* at
8 ¶ 36.) Thereafter, the Parties engaged in extensive negotiations to draft the long-form Settlement
9 Agreement, along with the Notice of Pendency of Class and Representative Action Settlement.
10 (*Ibid.*) The settlement negotiations were hard fought and conducted in good faith and at arm's length
11 between attorneys with substantial experience litigating class actions, representative actions, and
12 wage and hour cases. (*Id.* at ¶ 37.) The settlement was the product of a non-collusive settlement
13 process in which the Parties were forced to make significant compromises in the interest of reaching
14 a full and complete settlement of the action. (*Ibid.*)

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

16 Throughout this case, Class Members have been represented by counsel who have years of
17 experience in employment class action litigation. (Orshansky Decl. ¶¶ 76-80.) Class Counsel
18 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,
19 conducting pre-filing investigation and research; conducting informal discovery; reviewing
20 Defendant's written policies concerning the claims set forth in the action, including Defendant's
21 policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time
22 keeping policies, issuance of wage statements, and providing all wages at separation; reviewing and
23 analyzing time and pay records; meeting and conferring regarding the information and documents
24 produced; interviewing Class Members; drafting pleadings; researching California law; preparing
25 damages models; consulting with an expert; preparing for and attending mediation; and negotiating
26 and finalizing the settlement and related documents. (*Id.* at ¶¶ 14, 25-36.)

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

2 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
3 of the Class Members. (See Settlement Agreement ¶ 43; Orshansky Decl. ¶ 38.) Although the
4 recommendations of counsel proposing the class settlement are not conclusive, the Court can
5 properly take the recommendations into account, particularly if counsel have been involved in
6 litigation for some period of time, appear to be competent, have experience with this type of
7 litigation, and significant discovery has been completed. (See Newberg § 11.47.) Here, Plaintiff is
8 represented by competent and experienced counsel who possess extensive experience litigating
9 wage and hour class actions and have been appointed as class counsel in numerous cases alleging
10 similar claims. (Orshansky Decl. ¶¶ 76-80.)

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

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

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

21 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
22 model for Defendant’s liability. (Orshansky Decl. ¶ 39.) Although Plaintiff steadfastly maintains
23 that his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
24 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4
25 *infra*, Defendant presented numerous defenses to Plaintiff’s claims, both on the merits and with
26 respect to class certification. (*Ibid.*) For example, Defendant defended against the minimum and
27 overtime wage claims by relying on policies that prohibited Class Members from engaging in off-
28 the-clock work. (*Id.* at ¶ 40.) In addition, Defendant contended that it had practices, policies, and

1 procedures to provide meal and rest breaks every workday to its employees that fully complied with
2 the California law. (*Ibid.*) Defendant also argued that Class Members worked in different job
3 positions and had different managers, and that, as a result, Defendant contended there was variation
4 to the circumstances that could allegedly cause employees to be deprived of the opportunity to take
5 legally compliant, duty-free meal and rest breaks, and this variation in circumstances raised highly
6 individualized questions of fact. (*Ibid.*) These risks justify a downward departure from the maximum
7 monetary exposure that each claim carries. (*Ibid.*)

8 Although Plaintiff was prepared to litigate these claims through class certification and,
9 ultimately, through trial, given the substantial amount offered in settlement, Class Counsel predicted
10 that it was far from certain that Plaintiff would be able to recover a greater amount at trial,
11 particularly after considering the increased litigation costs that would accrue. (*Id.* at ¶ 44.) Thus, this
12 factor supports preliminary approval of the settlement.

13 2. Risk, Expense, Complexity, and Duration of Further Litigation

14 Although Plaintiff conducted informal discovery and investigation prior to settlement, the
15 Parties agreed to focus on exhausting early settlement efforts before launching into full-fledged and
16 hotly contested litigation. (Orshansky Decl. ¶ 41.) Therefore, absent settlement, the Parties would
17 have needed to conduct substantial additional discovery, such as the production of voluminous
18 records and numerous depositions of experts and percipient witnesses and prepare the case for class
19 certification and trial. (*Ibid.*) The Parties would have had to depose a number of people such as
20 managers, supervisors, human resource representatives, and employees in order to establish liability.
21 (*Ibid.*) Discovery disputes would have been in the offing and liability likely would have entailed a
22 battle of experts. (*Ibid.*) This settlement avoids the considerable time, attorneys' fees and costs, and
23 party resources associated with conducting additional discovery, moving for class certification and
24 potentially summary judgment or adjudication, and ultimately, trial, as well as the risks and the
25 accompanying burden of continued litigation on the Court. (*Ibid.*) Thus, this factor supports
26 preliminary approval of the settlement.

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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. ¶ 42.) 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, 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. (*Ibid.*) Even if Plaintiff prevailed and certified a class action, there is no guarantee Defendant would not later move for and obtain decertification. (*Ibid.*) If the Court either denied class certification or later decertified it, the Class would recover nothing, and Class Members would be forced to retain their own counsel and proceed on the basis of individual claims only. (*Ibid.*) 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 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives in the interest of avoiding litigation."].)

Plaintiff's estimate of the settlement recovery is a reasonable percentage of possible recoverable damages at trial. Plaintiff's damages analysis shows that the settlement reflects an estimated 28.4% of the maximum realistic potential damages recoverable at trial. (Orshansky Decl. ¶ 44.) Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question, *see Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 123, this case clearly

meets requirements establishing that the class settlement is within the “ballpark” of reasonableness. The settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed claims.

Unpaid Minimum and Overtime Wages

Plaintiff, along with other hourly non-exempt employees, performed pre- and post- shift off-the-clock work to minimize the incidence of overtime. (Orshansky Decl. ¶ 46.) Plaintiff contended that all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its employees no less than the minimum wage for all hours worked, *see* Labor Code § 1197, thus, Plaintiff sought to recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that amount under Labor Code § 1194.2. (*Ibid.*)

Class Counsel analyzed the documents and data produced by Defendant and, in conjunction with interviews of Plaintiff and Class Members, determined Defendant’s degree of liability and amounts due in damages—specifically, the incidence and amount of purported off-the-clock activity. (*Id.* at ¶ 47.)

Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-clock hours, Plaintiff estimated that Defendant is liable for an aggregate of approximately twenty (20) minutes of unpaid straight and overtime pay per workweek. (*Id.* at ¶ 48.) Based on Defendant’s records, Plaintiff determined that 68.9% of Class Members’ shifts qualified for overtime rate of pay. (*Ibid.*) At the average straight time hourly rate of \$16.17 and the average overtime hourly rate of \$24.26, such yields an estimated damages amount of \$286,595.00, without discounting for risks associated with certification or merits. (*Ibid.*)

In opposition to certification, Defendant contended that Plaintiff’s claim for off-the-clock work is not amenable to class treatment, because employees worked in a variety of departments with different requirements, and it would require an unmanageable series of mini-trials to determine how much time was spent without pay. (*Id.* at ¶ 49.)

Further, in terms of merit defenses, Defendant vigorously disagreed with Plaintiff’s theories regarding how much off-the-clock work occurred in reality and the credibility of those claimed hours given Defendant’s policies to the contrary. (*Id.* at ¶ 50.) The failure to track all hours poses

1 evidentiary difficulties because it is hotly contested how much off-the-clock work actually occurred.
2 (*Id.* at ¶ 51.) Although Class Counsel conducted multiple Class Member interviews, for Plaintiff to
3 establish the quantity of specific disputed and unrecorded work activities—especially over multiple
4 job titles, at differing pay rates—would have been costly, time-consuming, and daunting. (*Ibid.*)

5 Defendant further responded that any off-the-clock time is *de minimis*. (*Id.* at ¶ 52.) Plaintiff
6 countered that such defense lacks viability in light of *Troester v. Starbucks Corp.* (2018) 5 Cal.5th
7 829, given that the California Supreme Court refused to allow the *de minimis* defense to insulate
8 Starbucks from having to pay employees for small amounts of work regularly performed off-the-
9 clock. What is not clear, however, is to what extent the *de minimis* defense would apply where the
10 uncaptured hours were associated with an occasionally recurring activity. (Orshansky Decl. ¶ 52.)

11 In light of these considerations—especially the evidentiary difficulties of demonstrating off-
12 the-clock work on a class-wide basis—Class Counsel applied a discount that incorporated the risks
13 of non-certification and being unsuccessful on the merits. (*Id.* at ¶ 53.)

14 **Meal and Rest Period Violations**

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

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

25 Employee time records depict a sizeable number of violations. Specifically, Plaintiff’s
26 consultant found a 30.9% unique meal break violation rate for shifts greater than five (5) hours
27 analyzed in the data sample. (Orshansky Decl. ¶ 56.) However, Defendant failed to make the
28 corresponding equivalent of meal period premiums of a meal period premium for “missed,” “short,”

1 or “late” meal periods to employees. *C.f.* Wage Order 5-2001, § 11(b). (Orshansky Decl. ¶ 56.)
2 Consequently, Plaintiff alleged that Defendant violated Labor Code §§ 226.7, 512, and applicable
3 Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and
4 missed meal periods. (Orshansky Decl. ¶ 56.)

5 Defendant, however, contended that it had practices, policies, and procedures to provide meal
6 and rest breaks every workday to its employees that fully complied with the law. (*Id.* at ¶ 57.)
7 Defendant vehemently argued that it complied with the requirements articulated by the California
8 Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. (*Ibid.*)
9 Specifically, Defendant maintained that it “provides” employees with a reasonable opportunity to
10 take timely meal periods of at least 30 minutes, relieves employees of all duties during meal periods,
11 and relinquishes control over employees’ activities, including the ability to leave the premises during
12 meal periods. (*Ibid.*) Thus, Defendant argued, the failure of an employee to take a full meal period
13 cannot be a fault of company policy.

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

21 Based upon the analysis of Class Members’ time and payroll records and, in conjunction
22 with interviews of Plaintiff and Class Members, Plaintiff determined that 30.9% of eligible shifts
23 were the subject of unique violations for missed, short, or late meal periods, and calculated the
24 potential exposure of this claim to be \$579,627.46. (*Id.* at ¶ 59.)

25 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required
26 whereby employers “relinquish control over how employees spend their time and relieve employees
27 of all duties.” (*Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257, 260.) Due to
28 Defendant’s work demands and inadequate staffing, Plaintiff and Class Members did not receive

1 timely and compliant rest breaks, nor did Defendant relinquish control over how employees spent
2 their 10-minute rest breaks. (Orshansky Decl. ¶ 60.) Plaintiff alleged that Defendant did not provide
3 premium pay for each non-compliant rest break as required under Labor Code § 226.7. (*Ibid.*)

4 Here again, Defendant disputed liability and damages. (*Id.* at ¶ 61.) Defendant maintained
5 that it authorized and permitted duty-free rest breaks of not less than ten minutes for every major
6 fraction of four hours worked as required by Labor Code § 226.7. (*Ibid.*) Defendant explained that
7 Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*) As with meal
8 periods, Defendant argued that any Class Member who failed to take a rest break, or took a short or
9 late rest break, did so voluntarily and that all applicable rest breaks were still authorized and
10 provided. (*Ibid.*) Defendant also attempted to distinguish *Augustus, supra*, which involved security
11 guards who were required to monitor a pager, phone, or other device as having an added constraint
12 that is not present in the matter *sub judice*. (*Ibid.*)

13 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendant's
14 exertion of pressure, control, and resulting violations is likely to be more difficult. (*Id.* at ¶ 62.) Thus,
15 Class Counsel applied a 20% violation rate based on the narratives of Plaintiff and other Class
16 Members for a maximum exposure of \$426,322.05. (*Ibid.*) For settlement purposes, and to account
17 for the difficulties of certifying and proving unrecorded rest break violations, a downward departure
18 from that maximum exposure was and is warranted. (*Ibid.*)

19 **Wage Statement Violations**

20 Plaintiff alleged a cause of action under Labor Code § 226(a) for Defendant's failure to
21 provide accurate itemized wage statements. (Orshansky Decl. ¶ 63.) Failure to comply with the
22 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
23 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a
24 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). (*See*
25 Labor Code § 226(e).) This cause of action is derivative of the foregoing causes of action because if
26 Defendant did not provide wages for all hours worked, premiums for non-compliant meal and rest
27 breaks, and so forth, then the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 63.)

1 Defendant contended, however, that Labor Code § 226(e) penalties are not automatic. (*Id.* at
2 ¶ 64.) Rather, the employee must show that Defendant’s non-compliance was knowing and
3 intentional. (*Ibid.*) Defendant suggested that any non-compliance was not knowing and intentional.
4 (*Ibid.*) Moreover, Defendant argued that meal and rest period violations cannot support derivative
5 wage statement penalties. (*See Naranjo v. Spectrum Security Service, Inc.* (2019) 40 Cal.App.5th
6 444, 474 [holding that violations of Labor Code’s meal break provisions do not entitle employees to
7 pursue the derivative wage statement penalties]; *c.f.*, but *review granted, Naranjo v. Spectrum*
8 *Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257 Cal.Rptr.3d 188.)
9 (Orshansky Decl. ¶ 64.)

10 Because the damages for this cause of action are penalties, the statute of limitations is only
11 one year prior to the filing of the original complaint. (*See* Code Civ. Proc. § 340.) The Parties
12 discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent
13 violation rates, Plaintiff estimates the total maximum wage statement exposure to be \$472,250.00.
14 (Orshansky Decl. ¶ 65.)

15 **Derivative Waiting Time and UCL Claims**

16 Plaintiff further asserted causes of action against Defendant for failure to timely pay all
17 wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business
18 practices. (*See* Labor Code § 203; Cal. Business and Professions Code §§ 17200, *et seq.*) As with
19 other claims, Defendant vigorously disagreed that it engaged in any conduct giving rise to liability
20 or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 66.)

21 Defendant argued that waiting time penalties are not appropriate because it attempted to pay
22 employees all final wages owed in good faith upon their separation, thereby precluding a finding of
23 willfulness necessary to obtain waiting time penalties. (*Id.* at ¶ 67.) Moreover, Defendant maintained
24 that no waiting time penalties were recoverable from alleged meal or rest period violations. (*Ibid.*)
25 Defendant raised the Second Appellate District’s decision in *Naranjo, supra*, 40 Cal.App.5th 444,
26 to argue that meal and rest break violations trigger neither wage statement, nor waiting time
27 penalties. (*Ibid.*) Yet the *Naranjo* decision is currently pending before the California Supreme Court,
28 *see Naranjo, supra, review granted*, Supreme Court Case No. S258966, 455 P.3d 704 (January 02,

2020), and although fully briefed, the outcome of this important case remains to be seen. (*Ibid.*) Finally, Defendant argued that adequate remedies at law exist to render the action unsuitable for equitable remedies, and again contended that the allegations underlying the unfair competition claim lacked merit. (*Ibid.*)

Based on the count of 150 former employees, Class Counsel calculated the maximum value of the waiting time claim to be \$582,120.00. (*Id.* at ¶ 68.) However, to account for the uncertainty of proving the underlying claims and risk of an adverse decision in *Naranjo*, Class Counsel made a realistic allowance with the agreed upon settlement dollar figure. (*Ibid.*)

PAGA Penalties

The success of Plaintiff's PAGA claim is wholly dependent upon the success of his underlying claims occurring within the one-year statute of limitations applicable to the PAGA. (Orshansky Decl. ¶ 69.) Defendant maintained and continues to maintain that it had legally compliant employment policies and practices throughout the statutory period. (*Id.* at ¶ 70.) Defendant denied and continues to deny that it ever violated any provision of the California Labor Code and argued that, even assuming such violations occurred, Defendant will not be treated as having engaged in subsequent violations giving rise to heightened penalties. (*Ibid.*) In other words, Defendant argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendant had notice that it was violating the law, *e.g.*, it had been cited by a labor agency or adjudged by a court to have done so. (*See, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal.4th 1157, 1209.) Thus, Defendant contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply. (Orshansky Decl. ¶ 70.)

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 ¶ 71.) Defendant reiterated how hourly employees' job duties and work hours varied. (*Id.* at ¶ 72.) Defendant contended that there was variation as to the circumstances that could allegedly cause

1 employees to work off the clock or to be deprived of the opportunity to take legally compliant, duty-
2 free meal and/or rest periods. (*Ibid.*) Defendant further opined that these issues presented challenges
3 not only to liability but also challenges to Plaintiff’s ability to show that a PAGA claim could be
4 efficiently and manageably adjudicated without abridging Defendant’s due process rights. (*Ibid.*)

5 Defendant maintained that the Court has discretion to reduce any award of PAGA penalties
6 where it views it as duplicative. (See Labor Code § 2699e(2) [the Court may “award a lesser amount
7 than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and
8 circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary
9 and oppressive, or confiscatory.”].) (Orshansky Decl. ¶ 73.)

10 Although, strictly speaking, class certification requirements are not required to be satisfied
11 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
12 valuation of a PAGA claim is uncertain.⁸ (*Id.* at ¶ 74.) Thus, Class Counsel applied discounts for
13 the risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks
14 regarding success on the merits and establishing liability, and the risks with proving the extent of
15 penalties that are warranted and possible discretionary reduction of penalties by the Court. (*Ibid.*)
16 As a result, Plaintiff used the “initial” \$100 per pay period violation (as opposed to the \$200
17 subsequent per violation rate) to calculate a realistic estimate of \$434,100.00 in potential PAGA
18
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 Techns. (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 penalty exposure—of which, by statute, only 25%, or \$108,525.00—would be recoverable by
2 aggrieved employees. (*Ibid.*)

3 Summary

4 After Class Counsel calculated the realistic possible recovery to Class Members for each of
5 the above claims, the aggregate dollar amount result is \$2,781,014.51 in total damages and penalties.
6 (Orshansky Decl. ¶ 75.) Thus, the proposed settlement amount of \$790,000.00 represents an
7 approximate 28.4% of Plaintiff’s potential maximum realistic recovery, while avoiding the further
8 expense and serious risk of proceeding toward class certification and trial. (*Ibid.*) “The fact that a
9 proposed settlement may only amount to a fraction of the potential recovery does not, in and of
10 itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*Linney*
11 *v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted];
12 *see, e.g., Altamirano v. Shaw Industries, Inc.* (N.D. Cal. 2015) 2015 WL 4512372, at *9
13 [preliminarily approving wage and hour class action settlement stating, “[a]lthough 15% represents
14 a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is
15 sufficient for the Court to grant preliminary approval given the merits of Plaintiff’s claims.”].)
16 Taking into account the risk of non-certification, failure to prevail on the merits, and the Court’s
17 power to reduce the civil penalties, the proposed settlement falls within the realm of being fair,
18 reasonable, and adequate.

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

20 This Court should order distribution of the proposed Notice of Pendency of Class and
21 Representative Action Settlement, *see* Exhibit A to the Settlement Agreement (Exhibit 1 to the
22 Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known
23 mailing address information provided by Defendant. (Orshansky Decl. ¶ 88.) Here, Plaintiff
24 proposes that the settlement be administered by CPT Group, Inc. (“CPT”), an experienced class
25 action settlement administrator. (Settlement Agreement ¶¶ 35, 53(a); Orshansky Decl. ¶ 89.) Class
26 Members’ addresses will be ascertainable through Defendant’s personnel and payroll records, which
27 Defendant will provide to CPT within ten (10) calendar days after preliminary approval of the
28 settlement. (Settlement Agreement ¶ 53(b); Orshansky Decl. ¶ 89.) To the extent that any notices

1 are returned, CPT will run those addresses through the National Change of Address database and/or
2 conduct skip traces to obtain current address information. (Settlement Agreement ¶ 53(e);
3 Orshansky Decl. ¶ 89.)

4 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
5 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
6 the key terms of the Settlement Agreement, the uniform 45-day deadline to submit a dispute, opt-
7 out, or objection to the class settlement and the procedure by which to do so, and explains the
8 recovery formula and credited number of workweeks and pay periods for each Class Member/PAGA
9 Group Member. (Orshansky Decl. ¶ 90.) The proposed notice will also notify Class Members of the
10 final approval hearing date, provide the contact information for Class Counsel, and advise
11 Settlement Class Members that they may appear at the final approval hearing. (*Id.* at ¶ 91.) This
12 manner of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable and
13 cost-effective method of reaching Class Members. (*Ibid.*) Thus, the proposed method of notice is
14 reasonably calculated to reach Class Members by the best means practicable and should be
15 approved. (*Ibid.*) The proposed notice will be provided in both English and Spanish. (*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:

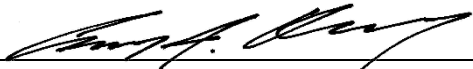
- 23 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 24 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
25 Representative Action Settlement, attached as Exhibit A to the Settlement Agreement;
- 26 3. Provisionally certifying 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 Camacho 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: February 15, 2022

Respectfully submitted,

COUNSELONE, PC

By: 

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Justin Kachadoorian

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