

1 DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

2 LAUREN DAVIS (SBN 294115)

lauren@spivaklaw.com

3 THE SPIVAK LAW FIRM

4 8605 Santa Monica Bl

PMB 42554

5 West Hollywood, CA 90069

Telephone: (213) 725-9094

6 Facsimile: (213) 634-2485

7 Attorneys for Plaintiff(s),

8 CHARLES MIKICH, JONATHON GORDON, and all others similarly situated

9 (Additional attorneys for Plaintiff(s) on following page)

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

11 **FOR THE COUNTY OF SAN FRANCISCO**

12 **(UNLIMITED JURISDICTION)**

13 CHARLES MIKICH and JONATHON
14 GORDON, on behalf of themselves, all others
15 similarly situated, the general public, and as
16 “aggrieved employees” on behalf of other
17 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

18 *Plaintiff(s),*

19 vs.

20 SAYEH PETROLEUM, INC., a California
21 corporation; HEDIA PETROLEUM, INC., a
22 California corporation; HADAD ENTERPRISE,
23 INC., a California corporation; HADAD
24 PETROLEUM, INC., a California corporation;
BAY AREA AUTO CARE, INC., a California
25 corporation; HOUTAN PETROLEUM, INC., a
26 California corporation; ALI BOZORGHADAD,
a natural person; GREEN PLANET GAS, INC.,
a California corporation; and DOES 1–50,
inclusive,

27 *Defendant(s).*
28

Case No. CGC-20-582385 to be
consolidated with CGC-21-594289

**PLAINTIFFS CHARLES MIKICH
AND JONATHON GORDON’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: March 27, 2024

Hearing Time: 9:30 a.m.

Hearing Dept.: 302, The Honorable
Garrett L. Wong

Action filed: January 22, 2020

Trial Date: Not Set



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Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
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Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 JONATHON GORDON on behalf of himself
2 and all others similarly situated, and as an
3 “aggrieved employee” on behalf of other
4 “aggrieved employees” under the Labor Code
Private Attorney General Act of 2004,

5 *Plaintiff(s),*

6 vs.

7 SAYEH PETROLEUM, INC., a California
8 corporation; HEDIA PETROLEUM, INC., a
9 California corporation; HADAD
10 ENTERPRISE, INC., a California corporation;
11 HADAD PETROLEUM, INC., a California
12 corporation; BAY AREA AUTO CARE, INC.,
13 a California corporation; HOUTAN
14 PETROLEUM, INC. a California corporation;
15 GREEN PLANET GAS, INC., a California
16 corporation; ALI BOZORGHADAD (also
known as ED BOZORGHADAD also known as
ED HADAD), an individual; and DOES 1-50,
inclusive,

17 *Defendant(s).*

Case No.: CGC-21-594289

Action Filed: 08/04/2021
Dept: 610, Hon. Garrett L.
Wong



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22 Mail:
23 8605 Santa Monica Bl
PMB 42554
24 West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

25 Office:
26 1801 Century Park East
27 25th Fl
28 Los Angeles, CA 90067

ADDITIONAL ATTORNEYS FOR PLAINTIFF(S)

WALTER L. HAINES (SBN 71075)

walter@uelglaw.com

UNITED EMPLOYEES LAW GROUP

8605 Santa Monica Blvd., PMB 63354

West Hollywood, CA 90069

Telephone: (562) 256-1047

Facsimile: (562) 256-1006

Attorneys for Plaintiff(s),

CHARLES MIKICH, JONATHON GORDON, and all others similarly situated



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Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
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Office:
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiffs Charles Mikich, Jonathon Gordon, and all others similarly situated (collectively
5 “Plaintiffs”) submit this memorandum of points and authorities in support of their unopposed
6 motion for preliminary approval of the First Amended Joint Stipulation of Class Action
7 Settlement and Release of Claims (the “Settlement”)², which provides for a Gross Settlement
8 Amount (“GSA”) of \$2,000,000.00 in compromise of all disputed claims on behalf of all persons
9 hourly, non-exempt in California of Defendants Sayeh Petroleum, Inc., Hedia Petroleum, Inc.,
10 Hadad Enterprise, Inc., Hadad Petroleum, Inc., Bay Area Auto Care, Inc., Houtan Petroleum, Inc.,
11 Ali Bozorghadad, and Green Planet Gas, Inc. (collectively “Defendants”) in California at any
12 time between January 22, 2016 to October 31, 2022. Through this Motion, Plaintiffs respectfully
13 request for this Court to (1) provisionally certify the below-defined Class for settlement purposes
14 only under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3)
15 preliminarily appoint Plaintiffs as Class Representatives; (4) appoint David Spivak of The Spivak
16 Law Firm and Walter L. Haines of United Employees Law Group as Class Counsel; (5) approve
17 the proposed notice procedures and related forms; (6) direct that notice be mailed to the proposed
18 Settlement Class; and (7) schedule a final approval hearing.

19 This Court should grant Plaintiffs’ motion because: (1) for settlement purposes, the
20 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
21 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
22 reasonableness, and adequacy; (3) for settlement purposes, Plaintiffs are adequate to serve as
23 Class Representatives; (4) Plaintiffs’ attorneys are adequate to serve as Class Counsel; (5) the
24 proposed notice procedures, and related forms, fully comport with due process and adequately
25 apprise Class Members of their rights; and (6) a final approval hearing must be scheduled to allow
26 Settlement Class members an opportunity to be heard regarding the Settlement and to give it
27 finality. Accordingly, for the reasons detailed below, this Court should grant Plaintiffs’ Motion
28

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



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1 in its entirety and preliminarily approve the Settlement.

2 **II. BACKGROUND**

3 Defendants operate gas stations DS, ¶ 4. Defendants employed Plaintiffs as gas station
4 attendants. *Id.*

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

6 On January 16, 2020, Plaintiff Mikich notified Defendants and the California Labor and
7 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
8 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
9 Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

10 On January 22, 2020, Plaintiff Mikich filed a Class Action Complaint in the San Francisco
11 County Superior Court, Case No. CGC-20-582385, against Defendants on behalf of himself and
12 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All
13 Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to
14 Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab.
15 Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
16 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
17 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3.

18 On May 11, 2020, Plaintiff Mikich filed his First Amended Complaint adding a claim
19 under PAGA. DS, ¶ 6, Ex. 4. On November 4, 2021, Defendants filed an answer to Plaintiff
20 Mikich’s First Amended Complaint. DS, ¶ 6, Ex. 5. Defendants deny all of Plaintiffs’ allegations
21 and strongly contend that their wage and hour policies, practices and procedures are fully
22 compliant with all applicable laws. DS, ¶ 6.

23 On February 11, 2021, Plaintiff Gordon notified Defendants and the LWDA, pursuant to
24 PAGA, of alleged Labor Code violations committed by Defendants. DS, ¶ 7, Ex. 6.

25 On August 4, 2021, Plaintiff Gordon filed a Class and Representative Action in the San
26 Francisco County Superior Court, Case No. CGC-21-594289, against Defendants on behalf of
27 himself and others similarly situated, alleging causes of action on a class-wide basis for: (1)
28 Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and
1198); (2) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide



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Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§ 201-203); (7) Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.); and (8) Civil Penalties under PAGA. DS, ¶ 8, Ex. 7.

B. Mediation

The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. Defendants produced each Plaintiff's entire personnel file (including policies and agreements he signed and acknowledged), copies of their relevant company written policies, time-keeping records, email messages, and paycheck data and records for the putative class, and more detailed time and payroll data for a random sample of putative class members specifically selected by Plaintiffs' counsel. DS, ¶ 9.

On January 31, 2022, and May 6, 2022, following much of the foregoing informal discovery and exchange of information, the Parties participated in mediation sessions presided over by Mediator Michael J. Loeb, an experienced class action mediator. During the second mediation, the Parties had a full day of productive negotiations and reached agreement on a class-wide settlement. During the mediation sessions, each side, represented by his/their respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the Action and all other matters covered by a classwide settlement. DS, ¶ 10.

C. Consolidation

On May 6, 2021, Plaintiff Mikich through a fictitious name amendment, and having discovered the true names of the Doe Defendants, added the remaining Defendants to his lawsuit in place of the first seven Doe Defendants (HEDIA PETROLEUM, INC., HADAD ENTERPRISE, INC., HADAD PETROLEUM, INC., BAY AREA AUTO CARE, INC., HOUTAN PETROLEUM, INC., GREEN PLANET GAS, INC., and ALI BOZORGHADAD). Whereas both the Mikich and Gordon matters are assigned to the same judge (Honorable Judge Garrett L. Wong in Department 610 of the above-entitled Court) and allege the same violations against the same Defendants, the parties requested for the Court to consolidate the matters for settlement purposes. On July 28, 2022, the Court ordered the consolidation of the Mikich and



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8605 Santa Monica Bl
PMB 42554
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(213) 725-9094 Tel
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Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 Gordon matters for settlement purposes. DS, ¶ 11, Ex. 8.

2 **D. The Prior Settlement Agreement**

3 On August 4, 2022, the Parties executed the original Joint Stipulation of Class Action
4 Settlement and Release of Claims (the “Original Settlement”). It provided for a gross settlement
5 amount of \$1,600,000.00 for all of Defendants’ hourly, non-exempt California employees for the
6 period of January 22, 2016 through preliminary approval or September 3, 2022, whichever is
7 earlier. DS, ¶ 12, Ex. 9. Defendants estimated there to be 1,200 Class Members. *Id.*, II.B.

8 **1. The Escalation Clause**

9 The Original Settlement contained the following escalation clause:

10 Defendants estimated for purposes of mediation that there are 27,498 workweeks worked
11 by the Class Members for the period of January 22, 2016 through May 6, 2022. For the avoidance
12 of doubt, the term “workweeks” shall mean weeks during which Class Members actually
13 performed work for or on behalf of Defendants. These numbers would be expected to increase
14 proportionately for the passage of time between that date and the time of court approval. Before
15 the Parties seek or a Party seeks court approval of the Settlement, the Settlement Administrator
16 will advise Plaintiffs’ counsel of Defendants’ report of the total number of workweeks worked.
17 The Settlement Administrator shall determine the total number of workweeks worked by Class
18 Members by counting the number of paychecks issued by Defendants during the Class Period, as
19 evidenced by Defendants’ payroll records, a sampling of which was provided to EmployStats in
20 connection with the Parties’ mediation efforts, and multiplying that figure by two. If the
21 workweeks worked as of the date the Court approves the settlement exceed 28,960 workweeks
22 worked by more than 10.00%, the Gross Settlement Amount will increase proportionally
23 according to the number of additional workweeks worked. For example, if the number of
24 workweeks as of the date the Court approves the settlement exceeds 28,960 by 11%, the Gross
25 Settlement Amount shall increase by 1%. If the workweeks worked as of the date the Court
26 approves the settlement exceeds 28,960 workweeks by more than 20.00%, Defendants shall have
27 the option to (a) vacate the Parties’ settlement and this Memorandum of Understanding shall be
28 null and void or (b) to cap the Class Period as of the date that the number of workweeks reaches
but does not exceed 31,856.



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Office:
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25th Fl
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1 DS, ¶ 12, Ex. 9, ¶ III.B.

2 **E. The Motion for Preliminary Approval of the Original Settlement**

3 On September 30, 2022, Plaintiffs moved for preliminary Court approval of the Original
4 Settlement. DS, ¶ 13, Ex. 10. The Court granted preliminary approval on October 27, 2022. DS,
5 ¶ 13, Ex. 11. By operation of the Original Settlement, the Class Period and PAGA Period end
6 date became September 3, 2022. DS, ¶ 13, Ex. 9, ¶¶ I.F. and I.R.

7 **F. Application for the Escalation Clause**

8 Following the order preliminarily approving the Original Settlement but before notice of
9 the Original Settlement to the Class, Defendants produced the Class Members' Data to the
10 Settlement Administrator, CPT Group, Inc. On May 27, 2023, the Settlement Administrator
11 notified the Parties that, according to the Class Members' Data, Defendants had overestimated
12 the number of Class Members by 219. DS, ¶ 14, Ex. 12. On May 28, 2023, the Settlement
13 Administrator also notified the Parties on that date that there were 46,844 workweeks during the
14 Class Period. DS, ¶ 14, Ex. 13. By application of the Escalation Clause, Defendants had three
15 options: (1) Agree to an earlier Class Period and PAGA Period end date of January 10, 2020, over
16 2 ½ years before the anticipated end date of September 3, 2022; (2) Increase the gross settlement
17 amount from \$1,600,000.00 to \$2,429,155.49 (an amount 51.82% higher than the original
18 minimum gross settlement amount); or (3) Elect to vacate the Original Settlement. DS, ¶ 14, Ex.
19 9, ¶ III.B.

20 **G. Negotiations Following Notice of The Settlement Administrator's Workweeks**
21 **Total**

22 Following receipt of the Settlement Administrator's workweeks total, Defendants notified
23 Plaintiffs that they could not afford to pay more than \$2,000,000.00 without terminating the
24 employment of Class Members Defendants currently employed. DS, ¶ 15, Ex. 14 (Hadad
25 declaration), ¶ 8. Defendant Ed Hadad, the owner of the other named Defendants, made financial
26 disclosures under penalty of perjury to Plaintiffs to support this assertion. *Id.* As evidenced by
27 those disclosures, in order to pay more than \$2 million to settle this litigation, Defendants'
28 financial situation would have necessitated workforce reductions that would have adversely
affected Class Members. DS, ¶ 15, Exs. 15-16 (Hadad declaration), ¶ 8. Similarly, Defendants
could not risk the option of an earlier Class Period and PAGA Period end date of January 10,



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25th Fl
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2020 because it predates Plaintiff Mikich’s original lawsuit. Such a short release period would leave Defendants open to additional lawsuits by other Class Members who had already received notice of the litigation during the *Belaire-West* process. Defendants asserted that the only option available to them would be to renegotiate the settlement terms to fit their financial limitations or continue to litigate the claims. *Id.* However, Plaintiffs determined that, in view of Defendants’ financial limitations, resuming the litigation is a less favorable option to the Class than the First Amended Settlement. DS, ¶ 15. Thus, on January 22, 2024, the Parties agreed to the (First Amended) Settlement which provides for a Gross Settlement Amount of \$2,000,000.00, the terms of which are discussed below.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the Class as all persons Defendants employed in California as hourly, non-exempt employees during the Class Period, which is the period of time from January 22, 2016 to October 31, 2022.

B. Monetary Terms

Subject to the terms and conditions of this Agreement, the Gross Settlement Amount of Two Million Dollars and Zero Cents (\$2,000,000.00), plus Defendants’ employer share of payroll taxes, is the maximum amount payable by Defendants, subject to the provisions of Settlement ¶

III.B.

1. Escalation Clause

The Parties obtained from the Settlement Administrator for purposes of further settlement negotiations that there are 46,844 Work Weeks worked by the Class Members for the period of January 22, 2016 through September 3, 2022. For the avoidance of doubt, the term “Work Weeks” shall mean weeks during which Class Members actually performed work for or on behalf of Defendants. These numbers would be expected to increase proportionately for the passage of time between September 3, 2022 and October 31, 2022. Before the Parties seek or a Party seeks court approval of the Settlement, the Settlement Administrator will advise Plaintiffs’ counsel of the total number of Work Weeks worked through October 31, 2022. The Settlement Administrator shall determine the total number of Work Weeks worked by Class Members by counting the number of paychecks issued by Defendants during the Class Period, as evidenced by Defendants’



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PMB 42554
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1801 Century Park East
25th Fl
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1 payroll records, a sampling of which was provided to EmployStats in connection with the Parties'
2 mediation efforts and multiplying that figure by two. If the Work Weeks worked as of October
3 31, 2022 exceed 46,844 Work Weeks worked by more than 10.00%, the Gross Settlement Amount
4 will increase proportionally according to the number of additional Work Weeks worked. For
5 example, if the number of Work Weeks as of October 31, 2022 exceeds 46,844 by 11%, the Gross
6 Settlement Amount shall increase by 1%. If the Work Weeks worked as of October 31, 2022
7 exceed 46,844 Work Weeks by more than 10.00%, Defendants shall have the option to (a) vacate
8 the Parties' settlement and deem it null and void or (b) cap the Class Period as of the date the
9 number of workweeks reaches but does not exceed 51,528 Work Weeks. Settlement ¶ III.B.

10 **2. Payments to Plaintiffs and Class Counsel and Others.**

11 Subject to the terms and conditions of the Agreement, the Settlement Administrator will
12 make the following payments out of the Gross Settlement Amount as follows:

13 In addition to their Settlement Shares, each Plaintiff will apply to the Court for an award
14 of not more than Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00) as a Class
15 Representative Payment. Defendants will not oppose a Class Representative Payment of not more
16 than \$25,000.00. The Plaintiffs will receive no other payment other than their Settlement Share
17 and Class Representative Payment, and acknowledge that they are aware of no other facts or
18 circumstances related to their employment with Defendants that could give rise to any additional
19 entitlement to any further payments. The Settlement Administrator will pay the Class
20 Representative Payment approved by the Court out of the Gross Settlement Amount. Payroll
21 taxes, withholdings, and deductions will not be taken from the Class Representative Payment, and
22 instead a Form 1099 will be issued to Plaintiffs with respect to that payment. Each Plaintiff agrees
23 to assume all responsibility and liability for the payment of taxes due on the Class Representative
24 Payment. The Class Representative Payment is in exchange for the release of Released Claims
25 against the Released Parties, the general Release of Claims by Plaintiffs, and for the Plaintiffs'
26 time, effort and risk in bringing and prosecuting the Action. Any adjustments made by the Court
27 to the requested Class Representative Payment shall not be deemed a material modification of
28 this Settlement Agreement. In the event that the Court reduces or does not approve the requested



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1 Class Representative Payment, the Settlement Agreement remains in full force and effect, shall
2 not have the right to revoke the Settlement for that reason, it shall remain binding, and any portion
3 of the Class Representative Payment not awarded to Plaintiffs will not revert to Defendants, but
4 instead shall be returned to the Net Settlement Amount.

5 Class Counsel will apply to the Court for an award of not more than six hundred sixty-six
6 thousand six hundred sixty-six dollars and zero cents (\$666,666.00) (which is 33 and 1/3% of the
7 Gross Settlement Amount) as their Class Counsel Fees Payment and an amount not more than
8 thirty-five thousand dollars and zero cents (\$35,000.00) as their Class Counsel Litigation
9 Expenses Payment, and Defendants will not oppose this request. The Settlement Administrator
10 will pay the amount approved by the Court (but not more than six hundred sixty-six thousand six
11 hundred sixty-six dollars and zero cents (\$666,666.00) in fees and not more than thirty-five
12 thousand dollars and zero cents (\$35,000.00) in expenses) out of the Gross Settlement Amount.
13 Withholding and deductions will not be taken from the Class Counsel Fees and Litigation
14 Expenses Payment and one or more Forms 1099 will be issued to Class Counsel with respect to
15 those payments.

16 The Settlement Administrator will be paid from the Gross Settlement Amount its
17 reasonable fees and expenses as approved by the Court in an amount currently estimated to not
18 exceed thirty-two thousand dollars and zero cents (\$32,000.00).

19 The Parties will jointly apply to the Court for approval of a settlement of claims under the
20 Private Attorneys General Act ("PAGA"), California Labor Code section 2698, et seq., for fifty
21 thousand dollars and zero cents (\$50,000.00), of which, payment from the Gross Settlement
22 Amount to the LWDA will be made in the amount of thirty-seven thousand five hundred dollars
23 and zero cents (\$37,500.00), which is 75% of the PAGA settlement. Twelve thousand five
24 hundred dollars and zero cents (\$12,500.00), 25% of the PAGA settlement, will remain in the Net
25 Settlement Amount for distribution and will be distributed to PAGA Members on a pro rata basis
26 based on the total number of Individual Work Weeks (full or partial) worked by each PAGA
27 Member during the PAGA Period. Partial Work Weeks shall be rounded up to the nearest whole
28 integer. PAGA Members shall receive their portion of the PAGA Penalties regardless of their



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1 decision to submit a request for exclusion to opt out of the Settlement. Settlement paras. III.B and
2 C.

3 **A. Timing of Payments**

4 Defendants will pay the Gross Settlement Amount to the Settlement Administrator for
5 the PAGA settlement and for Class Members who do not opt-out. Any amount attributed to the
6 share of class members who opt-out shall be redistributed to participating class members on a
7 pro-rata basis, and the Settlement Administrator will then be responsible for making appropriate
8 deductions, reporting obligations, and issuing the individual settlement awards. Defendants shall
9 deposit one half of the Gross Settlement Amount with the Settlement Administrator within 30
10 days of the Court's granting preliminary approval of the Settlement. Defendants shall deposit the
11 remaining half of the Gross Settlement Amount with the Settlement Administrator within 365
12 days of their having deposited the first half of the Gross Settlement Amount. Settlement ¶ 4.J.

12 There will be two distributions of the Gross Settlement Amount as follows:

13 Within fourteen (14) calendar days of the Effective Date, or within ten (10) calendar days
14 of the deadline for the Defendants' first installment payment (whichever is later), the Settlement
15 Administrator shall distribute, pro rata, the portion of the Gross Settlement Amount Defendants
16 paid by that date, including pro rata portions of the PAGA payment, Class Representative
17 Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and
18 the Settlement Administrator's payment.

19 Within ten (10) calendar days of the Defendants' second Installment Payment, the
20 Settlement Administrator shall distribute, pro rata, the portion of the Gross Settlement Amount
21 Defendants paid since the first distribution, including pro rata portions of the PAGA payment,
22 Class Representative Payment, the Class Counsel Fees Payment, the Class Counsel Litigation
23 Expenses Payment, and the Settlement Administrator's payment. Settlement ¶ 4.K.

24 **B. Calculation of Settlement Shares**

25 The Settlement Administrator shall assign to each Class Member a "Settlement Ratio,"
26 which shall be a fractional number comprised of (a) that Class Member's Individual Work Weeks
27 as the numerator, and (b) the aggregate total of all Class Members' Individual Work Weeks as
28 the denominator. The Settlement Administrator shall assign to each Class Member the



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25th Fl
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1 “Settlement Share” which shall be calculated by multiplying that Class Member’s Settlement
2 Ratio by amount allocated to Class Members from the Net Settlement Amount.

3 PAGA Portion of Settlement Ratio Calculation: The Settlement Administrator shall
4 assign to each Class Member a “Settlement Ratio,” which shall be a fractional number comprised
5 of (a) that PAGA Member’s Individual Work Weeks during the PAGA Period as the numerator,
6 and (b) the aggregate total of all PAGA Members’ Individual Work Weeks during the PAGA
7 Period as the denominator. The Settlement Administrator shall assign to each PAGA Member
8 the “Settlement Share” which shall be calculated by multiplying that PAGA Member’s
9 Settlement Ratio by amount allocated to PAGA Members from the Net Settlement Amount.
10 Settlement ¶ 3.D.b.

11 **1. Comparison of Settlement Shares Under the Original Settlement and The First**
Amended Settlement

12 The average Individual Class Payment under the First Amended Settlement is
13 significantly higher than the Original Settlement. Under the Original Settlement, Defendants
14 were obligated to pay no more than \$1,600,000.00 without triggering the Escalation Clause. DS,
15 ¶ 32, Ex. 9, ¶ III.B. Defendants estimated there to be 1,200 Class Members. DS, ¶ 32, Ex. 9, ¶
16 I.B. More than 31,856 workweeks were necessary to trigger the Escalation Clause. *Id.* The Net
17 Settlement Amount under the Original Settlement was estimated to be \$899,666.67. The average
18 Individual Class Payment was estimated to be \$749.72 (\$899,666.67 NSA / 1,200 Class Members
19 = \$749.72 Individual Class Payment). DS, ¶ 32, Ex. 17 (Settlement Comparison Spreadsheet). In
20 contrast, under the First Amended Settlement, Defendants are obligated to pay \$2,000,000
21 without triggering the Escalation Clause. DS, ¶ 32, Ex. 1, ¶ III.B. The Settlement Administrator
22 has determined there to be 981 Class Members with 46,844 workweeks. DS, ¶ 32, Ex. 12, ¶ I.B.
23 The Net Settlement Amount under the First Amended Settlement is estimated to be
24 \$1,166,133.33. The average Individual Class Payment is estimated to be \$1,188.92
25 (\$1,166,133.33 NSA / 981 Class Members = \$1,188.92 Individual Class Payment). DS, ¶ 32, Ex.
26 17 (Settlement Comparison Spreadsheet). This is an increase of almost 60% (\$1,188.92 / \$749.72
27 = 158.58%). While the Work Week value under the First Amended Settlement has declined, the
28 difference is small: \$28.24 under the Original Settlement and \$24.90 under the First Amended



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1 Settlement, for a difference of \$3.44 per workweek. DS, ¶ 32, Ex. 17 (Settlement Comparison
2 Spreadsheet).

3 **C. Apportionment of Settlement Shares**

4 The settlement shares are allocated 33.33% to wages (for which employment taxes will
5 be deducted and W-2s issued) and 66.66% to penalties and interest (for which 1099s will be
6 issued). Settlement ¶ 3.D.a.

7 **D. The Releases**

8 The Parties agree that it is their intent that the resolution set forth in this Settlement will
9 release and discharge the Released Claims by way of any further attempt, by lawsuit,
10 administrative claim or action, arbitration, demand, or other action of any kind by each and all of
11 the Settlement Class Members (including participation to any extent in any representative or
12 collective action) against the Released Parties. This release will not take effect until Defendants
13 have paid the Gross Settlement Amount in full per this Settlement Agreement. All PAGA
14 Members, regardless of whether they submit timely and valid requests for exclusion from the
15 Settlement, will release all Released Claims under PAGA against the Released Parties. The State
16 of California will also release all Released Claims under PAGA against the Released Parties.

17 Upon the Effective Date, and only after Defendants pay the entirety of the Gross
18 Settlement Amount, each Plaintiff will be deemed to have released the Released Parties of and
19 from all of the Released Claims during the Class Period. These claims include all claims alleged
20 or could have been alleged based on the facts, circumstances, and/or primary rights at issue in the
21 Complaint and any amendments thereto. They include without limitation: (1) all claims for failure
22 to pay wages earned, including minimum wages, and overtime wages; (2) all claims for failure to
23 provide rest periods and claims for rest period premium pay; (3) all claims for failure to provide
24 meal periods and claims for meal period premium pay; (4) all claims for failure to provide
25 accurate wage statements and related penalties; (5) all claims for failure to timely pay wages
26 during employment and at termination; (6) all claims for violation of California Business and
27 Professions Code §§ 17200, et seq., to the extent such claims are predicated on the other claims
28 released herein; and (7) all claims for violation of PAGA and all related claims for penalties, to
the extent such claims are predicated on the other claims released herein. Each Plaintiff's release



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25th Fl
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1 set forth herein shall include a waiver of all rights under California Civil Code §1542, which
2 includes a release of all known and unknown claims against the Released Parties during the Class
3 Period. Civil Code section 1542 provides:

4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
5 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
6 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR
7 HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH
8 THE DEBTOR.

9
10 Upon the Effective Date, each Plaintiff will be deemed to have waived his rights under
11 Civil Code §1542 during the Class Period, as set forth above. Each Plaintiff's release excludes
12 any claim for worker's compensation. It also includes his claims, if any, for harassment,
13 discrimination, wrongful termination, negligent infliction of emotional distress and intentional
14 infliction of emotional distress and related prayers for compensatory and punitive damages,
15 interest, attorney fees and costs. Settlement ¶ V.B.

16 **E. Notice and Claims Process and Procedures**

17 After the Court enters its order granting Preliminary Approval of the Settlement, every
18 Class Member will be provided with a "Class Notice."

19 Within fourteen (14) days after the Court grants Preliminary Approval of the Settlement,
20 Defendants shall provide to the Settlement Administrator: (a) An electronic database of all Class
21 Members, last known mailing address, and Social Security number (if available) ("Class
22 Members' Data"). (b) Corresponding to each Class Member's name, Defendants shall provide a
23 figure indicating the total number of Work Weeks during the Class Period in which that Class
24 Member was employed by Defendants as a Class Member and during which they actually
25 performed work for Defendants. That number of Work Weeks shall be referred to as that Class
26 Member's "Individual Work Weeks." (c) If any of the Class Members' Data are unavailable to
27 Defendants, Defendants will so inform Class Counsel and the Parties will make their best efforts
28 to reconstruct or otherwise agree upon the Class Members' Data prior to when it must be



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Office:
1801 Century Park East
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PMB 42554
West Hollywood, CA 90069
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1 submitted to the Settlement Administrator. Class Members' Data will otherwise remain
2 confidential and will not be disclosed to anyone, except as necessary to applicable taxing
3 authorities, or pursuant to Defendants' express written authorization or by order of the Court.

4 Within fourteen (14) days after receiving the Class Members' Data, or as soon thereafter
5 as it can do so, the Settlement Administrator will mail the Class Notice to all identified Class
6 Members via first-class U.S. mail using the mailing address information provided by Defendants,
7 unless modified by any updated address information that the Settlement Administrator obtains in
8 the course of administration of the Settlement.

9 If a Class Notice is returned because of an incorrect address, the Settlement Administrator
10 will promptly, and not later than ten (10) days from receipt of the returned Class Notice, search
11 for a more current address for the Class Member and re-mail the Class Notice to the Class
12 Member. The Settlement Administrator will use the Class Members' Data and otherwise work
13 with Defendants' Counsel and Class Counsel to find a more current address. The Settlement
14 Administrator will be responsible for taking reasonable steps, consistent with its agreed-upon job
15 parameters, court orders, and fee, to trace the mailing address of any Class Member for whom a
16 Class Notice is returned as undeliverable by the U.S. Postal Service. These reasonable steps shall
17 include the tracking of all undelivered mail; performing address searches for all mail returned
18 without a forwarding address; and promptly re-mailing to Class Members for whom new
19 addresses are found. If the Class Notice is re-mailed, the Settlement Administrator will note for
20 its own records and notify Class Counsel and Defendants' Counsel of the date and address of each
21 such re-mailing as part of a weekly status report provided to the Parties. Settlement ¶ 4.B.

1. Class Member Disputes

22 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
23 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
24 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
25 disputes and supporting documents must be postmarked by the Response Deadline. A Class
26 Member may use the Work Weeks Dispute form (Exhibit C to this Settlement), though a Class
27 Member is not obligated to do so to dispute information in the Class Notice. Absent evidence
28

1 rebutting Defendants' records, Defendants' records will be presumed determinative. However, if
2 a Class Member produces evidence contrary to Defendants' records by the Response Deadline,
3 the Settlement Administrator shall notify Class Counsel and Defense Counsel to discuss and
4 resolve the dispute, including providing all available relevant information to all counsel. The
5 Parties will resolve all disputes jointly, and such resolution shall be final and binding on any Class
6 Member disputes, and shall thereafter instruct the Settlement Administrator how to proceed in
7 processing the dispute. If the Parties cannot reach an agreement, the dispute shall be submitted to
8 the Court for final determination. All such disputes are to be resolved or submitted to the Court
9 not later than fourteen (14) calendar days after the Response Deadline. Settlement ¶ IV.C.

10 **2. Opting Out**

11 Requests for Exclusion from Settlement; and Objections to Settlement. Class Members
12 may submit requests to be excluded from the effect of the Settlement, or objections to the
13 Settlement, pursuant to the following procedures:

14 A Class Member may request to be excluded from the effect of this Agreement, and any
15 payment of amounts under this Agreement, by timely mailing a letter to the Settlement
16 Administrator stating that the Class Member wants to be excluded from this Action. This letter
17 must include the Class Member's name, address, telephone number, signature, and a clear
18 statement requesting to be excluded from the settlement of the class claims, as set forth on the
19 Request for Exclusion form or similar to the following: "I wish to exclude myself from the class
20 settlement reached in the matter of Mikich, et al. v. Sayeh Petroleum, Inc. I understand that by
21 excluding myself, I will not receive money from the settlement of my individual claims." To be
22 valid and timely, the request to be excluded must be postmarked by the Response Deadline and
23 received by the Settlement Administrator. A Class Member may use the Exclusion Request form
24 (Exhibit B to this Settlement), though a Class Member is not obligated to do so to request
25 exclusion from the Settlement. A Class Member who properly submits a valid and timely request
26 to be excluded from the Action shall not receive any payment of any kind in connection with this
27 Agreement or this Action, shall not be bound by or receive any benefit of this Agreement, and
28 shall have no standing to object to the Settlement, except that the request for exclusion shall not



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1 be effective as to the release of claims arising under PAGA and shall not preclude the Class
2 Member from receiving their share of the PAGA Penalties. A request for exclusion must be
3 mailed to the Settlement Administrator at the address provided on the Class Notice. Settlement ¶
4 IV.D.1.

5 **3. Objecting**

6 The Class Notice will provide that any Class Member who does not request exclusion
7 from the Action and who wishes to object to the Settlement should submit an objection in writing
8 to the Settlement Administrator. To be valid, an objection must be postmarked by the Response
9 Deadline and received by the Settlement Administrator. The written objection to the Settlement
10 should set forth the grounds for the objection and the other information required by this paragraph.
11 The objection should be mailed to the Settlement Administrator at the address provided on the
12 Class Notice. The written objection should state the objecting Class Member's full name, address,
13 and the approximate dates of his or her employment with Defendants. The written objection
14 should state the basis for each specific objection and any legal support in clear and concise terms.
15 The written objection also should state whether the Class Member intends to formally intervene
16 and become a party of record in the action, and upon formally intervening, appear and argue at
17 the Final Approval Hearing. Regardless of whether an objecting Class Member complies with the
18 objection procedure encouraged above, the Court will provide a Class Member with the
19 opportunity to speak at the final approval hearing regardless of whether he or she has filed an
20 appearance or submitted a written opposition beforehand. If the objecting Class Member does not
21 formally intervene in the action and/or the Court rejects the Class Member's objection, the Class
22 Member will still be bound by the terms of this Agreement. Settlement ¶ IV.D.2.¶

23 **F. Uncashed Checks**

24 Any check issued by the Settlement Administrator to Class Members who do not timely
25 and validly opt out shall be negotiable for one hundred and eighty (180) calendar days. Those
26 funds represented by checks returned as undeliverable and those checks remaining un-cashed for
27 more than 180 days after issuance (collectively, "Voided Settlement Checks"), plus any interest
28 that has accrued on those funds, will be paid to the California Unclaimed Property Fund.
Settlement ¶ IV.M.



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25th Fl
Los Angeles, CA 90067

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

2 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
3 and its members are too numerous for joinder to be practical; (2) the representative and absent
4 class members share a community of interest and questions of law and fact common to the class
5 predominate over questions unique to individual class members; (3) the representative's claims
6 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
7 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
8 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
9 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
10 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

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

12 A class is ascertainable when it may be readily identified without unreasonable expense
13 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
14 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiffs maintain that the above-
15 defined Class is ascertainable because its members may be identified by reference to Defendants'
16 records and Defendants have agreed to share the relevant information from their records to
17 facilitate the settlement process. DS, ¶ 12; Settlement, § I.B., III.D.2., IV.B.1 Therefore, the
18 Settlement Class is ascertainable.

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

20 The Settlement Class has sufficiently numerous members to render joinder impractical.
21 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
22 (1972) 28 Cal.App.3d 1017, 1030. The Settlement Administrator has determined that there are
23 981 Class Members. DS, ¶ 13. Plaintiffs maintain that it would be impractical and economically
24 inefficient to require each Class Member to separately maintain an individual action or be joined
25 as a named plaintiff in this action. The California Supreme Court has upheld a class of as few as
26 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these
27 considerations, the Settlement Class' membership is sufficiently numerous. DS, ¶ 13. *See Daar*
28 *v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

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

The community of interest requirement "embodies three factors: (1) predominant common



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1 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
2 (3) class representatives who can adequately represent the class.” *Sav-On Drug Stores, Inc. v.*
3 *Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have
4 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
5 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
6 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
7 renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

8 To justify certification, the class proponent “‘must show ... that questions of law or fact
9 common to the class predominate over the questions affecting the individual members’” *See,*
10 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*
11 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for
12 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
13 the claims of the Class Members all stem from the same sources. DS, ¶ 14.

14 In this case, Plaintiffs assert all class members were subject to the same or similar
15 operations and employment policies, practices, and procedures. The claims arise from
16 Defendants’ alleged policy-driven failure to pay wages, unauthorized and unlawful wage
17 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to
18 indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
19 wages, failure to maintain required payroll records, and related labor law violations, all of which
20 Plaintiffs claim constitute unfair business practices and give rise to PAGA penalties. Plaintiffs
21 assert that common questions include, but are not limited to: (1) Whether Defendants failed to
22 pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether
23 Defendants failed to provide the class with all meal and rest periods in compliance with California
24 law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays they
25 failed to provide the class with one or more meal or rest periods in compliance with California
26 law; (4) Whether Defendants failed to indemnify the class for all necessary business expenditures
27 incurred during the discharge of their duties; (5) Whether Defendants knowingly and intentionally
28 failed to provide the class with accurate wage statements; (6) Whether Defendants willfully failed



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1 to provide the class with timely final wages; and (7) Whether Defendants engaged in unfair
2 competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
3 respect to the class. DS, ¶ 14. Therefore, common questions predominate.

4 **D. Each Plaintiff is Typical of the Settlement Class**

5 The class representative must be similarly situated to the rest of the purported class. *See*
6 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
7 that the class representative must have identical interests with the class members. The only
8 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
9 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
10 Plaintiffs’ claims and the claims alleged on behalf of the class”). Plaintiffs contend that their
11 claims are typical for the purposes of certifying the Settlement Class. Plaintiffs asserts that they,
12 like absent Class Members was subject to the same relevant policies and procedures governing
13 their compensation, hours of work and meal and rest periods. Because Plaintiffs contend that they
14 were subject to the same general course of conduct as absent Class Members, resolving the
15 common questions as they apply to Plaintiffs will determine Defendants’ *prima facie* liability to
16 all Class Members. Moreover, Plaintiffs’ claims could potentially be subject to the same primary
17 affirmative defenses as those of absent Class Members. Accordingly, Plaintiffs’ claims are typical
18 of the Class. DS, ¶ 15.

19 **E. Each Plaintiff Will Adequately Represent the Settlement Class**

20 The adequacy requirement is met where the plaintiff is represented by counsel qualified
21 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
22 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
23 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
24 conflicts of interest that might hinder the plaintiff’s ability to represent the class. DS, ¶ 16.

25 First, Class Counsel have supplied the Court with declarations to show that they are
26 adequate to represent the Settlement Class and that they have significant experience in
27 employment litigation generally, and wage and hour and employment-related class action
28 litigation specifically. *See* DS, ¶¶ 18-25; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
Thus, Plaintiffs’ counsel are adequate to serve as Class Counsel.



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1 Second, each Plaintiff contends that he is an adequate class representative. Each Plaintiff
2 and the Class Members have strong and co-extensive interests in this litigation because they all
3 worked for Defendants during the relevant time period, allegedly suffered the same alleged
4 injuries from the same alleged course of conduct, and there is no evidence of any conflict of
5 interest between any Plaintiff and the Class Members. DS, ¶ 21. Moreover, each Plaintiff has
6 demonstrated his commitment to the Settlement Class by, among other things, retaining
7 experienced counsel, providing counsel with documents and extensively speaking with them to
8 assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as
9 well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit
10 had been unsuccessful. DS, ¶ 21. Thus, each Plaintiff is adequate to serve as settlement class
11 representative. Accordingly, this Court should find that Plaintiffs and their counsel are adequate
12 to represent the Settlement Class as required under Code of Civil Procedure § 382.

13 **F. Class Action Treatment Is the Superior Means For Resolving The Claims Of The**
14 **Class Members**

15 Plaintiffs further contend that a class action is also superior to other means adjudicating
16 the issues in this action. The predominance of common legal and factual questions shows that this
17 Court could fairly adjudicate the claims of Class Members through a single class action. In view
18 of the *theoretical* alternatives that proposed class members could potentially utilize—
19 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
20 claims through the Division of Labor Standards Enforcement (where there would be relatively
21 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
22 superior to all of them. Thus, this consideration supports conditional class action treatment for
23 purposes of this Settlement only. DS, ¶ 30.

24 **V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL BECAUSE THE**
25 **SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

26 **A. Legal Standard**

27 A class action settlement requires court approval. California Rules of Court ("CRC"),
28 Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
written motion for preliminary approval, the proposed class settlement, and the proposed class
notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval



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1 hearing where class members may be heard regarding the settlement, and at which evidence and
2 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
3 The decision to approve or reject a class settlement is committed to the Court's broad discretion.
4 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
5 class settlement may be reversed only upon a showing of "clear abuse of discretion." *Id.*

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

7 In assessing preliminary approval, a court evaluates if the settlement process has certain
8 indicia of fairness. A "presumption of fairness exists where (1) the settlement is reached through
9 arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
10 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
11 of objectors is small." *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
12 48 Cal.App.4th at 1794.

13 The class settlement here satisfies all of these factors. DS, ¶ 31. The Settlement resulted
14 from thorough, arms' length, negotiations between experienced counsel with the assistance of a
15 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
16 weaknesses of their respective cases and Defendants' estimated exposure. *Id.*

17 Plaintiffs prepared "damages" estimates in advance of the mediation sessions that led to
18 the Original Settlement. DS, ¶ 33, Ex. 18. In advance of the mediation sessions and based on an
19 estimate of 26,064 workweeks, Plaintiffs determined Defendants' maximum exposure for
20 restitution and penalties to be approximately \$10,731,169.55 (consisting of \$146,975.94 in unpaid
21 wages, \$910,175.92 in missed meal period premium wages, \$1,475,394.34 in missed rest break
22 premium wages, \$722,000.00 for wage statement penalties, \$2,615,796.86 for waiting time
23 penalties, and \$4,026,000.00 for civil penalties). Plaintiffs calculated the damages based on the
24 number of workweeks and pay periods provided by Defendants, Plaintiffs' reports, and the sample
25 data. *Id.*

26 Plaintiffs prepared estimates in support of the First Amended Settlement. DS, ¶ 34, Ex.
27 19. Plaintiffs determined Defendants' maximum exposure for restitution and penalties to be
28 approximately \$21,072,278.67 (consisting of \$264,155.19 in unpaid wages, \$1,636,817.77 in



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missed meal period premium wages, \$2,653,280.12 in missed rest break premium wages, \$1,992,500.00 for wage statement penalties, \$2,615,796.86 for waiting time penalties, and \$11,013,750.00 for civil penalties). Plaintiffs calculated the damages based on the number of workweeks and pay periods provided by the Settlement Administrator, Defendants, Plaintiffs' reports, and the sample data. *Id.*

Plaintiffs also considered the possibility that Defendants could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class Members. Plaintiffs' Counsel applied discounts to the maximum exposure to account for all other risks discussed below. While it is difficult to assign anything but crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone justifies a significant discount because Defendants would likely by trial have gathered releases from the majority of the Class Members. A settlement for approximately 15.00% of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned by existing case law.³ *Id.* Defendants also represent that all Class Members employed at any time since December 31, 2021 have signed arbitration agreements.

Plaintiffs are aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts.⁴ DS, ¶ 61. PAGA penalty awards are often

³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998) (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum potential recovery asserted by either party.”).

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

The plain language of PAGA provides that “a court may award a lesser amount than the maximum civil penalty amount specified by this part 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.” Cal. Lab. Code s 2699(e)(2) (emphasis



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

8 Plaintiffs' estimates do not realistically account for the risks outlined below or the risk
9 that a class will not be certified. *Id.* Therefore, Plaintiffs believe a class settlement for
10 \$2,000,000.00 is fair and reasonable. *Id.*

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

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

18 added). The relationship between the amount of total damages and the amount of
19 maximum PAGA penalties is certainly a "circumstance" of the case under the term's
20 ordinary meaning. The weight given to that circumstance is greater in this case because
21 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
22 individual claims except for one. As a general matter, it would be excessively punitive
23 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
24 the damages caused by that injury or set of injuries.

25 *Id.*, fn. 9. The district court further stated, "Virgin "has not presented any evidence that the full
26 penalty would be excessive in relation to its ability to pay," the weight of this factor is lessened."
27 *Id.*

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

⁵ In 2012, Plaintiffs' Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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1 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
2 factors.

3 **1. Evaluation of Plaintiffs' Case**

4 **a. Defendants' Financial Condition**

5 After the Settlement Administrator discovered that the number of Work Weeks triggered
6 the Escalation Clause, Defendants' owner made disclosures about his financial condition.
7 According to those disclosures, Defendants have insufficient resources to pay more than
8 \$2,000,000.00. DS ¶ 15, Ex. 14 (Hadad declaration). Based on such disclosures, Plaintiffs, on
9 their own behalf and on behalf of the Class Members, have agreed to settle the lawsuit on the
10 terms set forth in the Settlement. *Id.*

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

12 There is a risk that Plaintiffs' recovery for unpaid wages would be extremely limited at
13 best, largely because Defendants' written policies throughout the relevant time period prohibited
14 off-the-clock work. DS, ¶ 37. Off-the-clock claims are difficult where a defendant requires in its
15 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
16 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
17 be compensable). *Id.* In their written employment policies, Defendants mandate that employees
18 must record all time worked accurately on their time records and strictly prohibit employees from
19 performing any work off-the-clock. DS, ¶ 37. Moreover, while Defendants dispute that off-the-
20 clock work occurred, they contend that any time spent off the clock was *de minimis*. The
21 California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested
22 that irregular and minute periods of time may still be subject to a *de minimis* defense even if
23 compensable. (Stating that "We do not decide whether there are circumstances where
24 compensable time is so minute or irregular that it is unreasonable to expect the time to be
25 recorded."). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here
26 because the time spent off the clock were minute and insignificant. Accordingly, a large award of
27 penalties seems unlikely with respect to this claim. *Id.*

28 The difficulty inherent in proving that off-the-clock work occurred poses a significant
hurdle to Plaintiffs. Plaintiffs will rely on declarations and witness statements to prove this claim.



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1 Generally, a court will not certify a class unless it can determine an appropriate classwide
2 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiffs
3 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
4 the lack of records indicating when such off-the-clock work may have taken place. Individualized
5 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
6 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
7 risk that the Court would consider this evidentiary showing insufficient as a classwide
8 methodology. DS, ¶ 38.

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

10 There are risks to Plaintiffs’ meal period claim. DS, ¶ 39. According to Defendants,
11 Plaintiffs’ description of Defendants’ scheduling practices accurately describes only a tiny
12 fraction of Putative Class members: those who worked for stations that were staffed by a single
13 employee (“Single- Employee Stations”) during morning and afternoon shifts. Further, every
14 employee who worked these shifts, including both named Plaintiffs, signed enforceable on-duty
15 meal period agreements. Defendants contend that every other Putative Class Member either
16 worked in a station with coworkers (“Multi-Employee Stations”), where employees were
17 permitted and encouraged to take their meal breaks, or worked at a Single-Employee Station
18 during the graveyard shift, when the policy requiring the station to remain open did not apply.
19 Time records show Defendants instructed Putative Class Members to take meal and rest breaks
20 and provided them the opportunity to do so. In other words, other than limited potential damages
21 associated with unpaid premiums for rest breaks not taken by Putative Class Members working
22 at Single-Employee Stations during the afternoon and graveyard shifts, Defendants contend they
23 face no liability whatsoever with regard to Plaintiffs’ first cause of action.

24 Defendants contend that even for this group, however, there is no evidence that
25 employees, whose job responsibilities were limited in light of the automation implemented at gas
26 stations, were unable to take off-duty rest breaks. While it is true that Defendants required
27 Putative Class Members to remain on premises throughout operating hours, this fact does not
28 necessarily result in liability for Defendants. *See, e.g. Schmidtberger v. W. Refining Retail, LLC,*



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2021 WL 5024714, at *19 (C.D. Cal. Sept. 28, 2021) (“The Court . . . rejects Plaintiff’s contention that a policy of requiring employees stay on the premises is invalid facially”) (citing *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016)). Rather, whether Defendants exercised such control over Putative Class Members throughout their shifts such that they failed to provide off-duty rest breaks is a matter for determination by individualized inquiry, and cannot be resolved on a class-wide basis. *Id.* at *25 (“the evidence [including the policy requiring station attendants to remain on premises at all times] does not show [that Putative Class Members] remainder under Defendant’s control during breaks pursuant to a uniform policy”). *Id.*

The law governing Plaintiffs’ first cause of action is well-settled, and the dispute regarding the provision of meal periods and rest breaks is not likely to turn on questions of law, except with regard to the enforceability of the on-duty meal period agreements. As noted above, all Putative Class Members, including both named Plaintiffs, executed on-duty meal period agreements at the outset of their employment with Defendants. These agreements foreclose Plaintiffs’ theory of liability regarding unpaid meal period premiums.

On-duty meal period agreements are enforceable when the “nature of the work prevents an employee from being relieved of all duty” during their meal period. Industrial Welfare Commission Wage Order No. 7, 11(c). Like most gas stations, Defendants’ stations are franchises of larger entities, such as Chevron, AMPM, Arco, 76, and Valero. Franchisors exert significant control over the operations of franchisee stations: they dictate branding practices (including employee uniforms), hours of operation, the types of services offered by the stations, and other matters. In general, these requirements are set forth in the franchise agreement, though they are sometimes set forth in branding agreements that mimic franchise agreements. For each of the Single-Employee Stations, the relevant agreement requires Defendants to keep the station open during daytime operating hours (i.e., whenever the station is open, other than during the “graveyard” shift). Since it would not make financial sense to staff these stations with multiple employees during these times, Defendants require employees to sign on-duty meal period agreements to account for the fact that they must eat their lunches while working.

The nature of the work performed by Putative Class Members working daytime shifts at



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1 Single-Employee Stations meets the criteria for enforceability of on-duty meal period agreements.
2 While there does not appear to be any precedent directly addressing employees working alone as
3 gas stations, two DLSE opinion letters, the Wage Order's plain language, the Ninth Circuit's
4 opinion in *Abdullah v. U.S. Sec. Associates, Inc.*, and the Department of Industrial Relations'
5 informational publications regarding meal periods all support the enforceability of Defendants'
6 on-duty meal period agreements. In the first opinion letter, issued in 1994, the DLSE opined that
7 on-duty meal period agreements are enforceable "where the employee is the only person
8 employed in the establishment and closing the business would work an undue hardship on the
9 employer." DLSE Opinion Letter 1994.09.28, at 2. This language clearly applies to the Putative
10 Class Members working in Single-Employee Stations during daytime shifts, when allowing
11 employees to close the station to take an off-duty meal period would have violated Defendants'
12 franchise agreements, leading to potentially disastrous consequences for Defendants.

13 Similarly, the DLSE opined in 2003 that on-duty meal period agreements are enforceable
14 with regard to employees working at isolated gas stations in which only a single employee is
15 present. DLSE Opinion Letter, 2003.11.03, at 3. The 9th Circuit cited this opinion letter
16 approvingly in 2013 in *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 960 (9th Cir. 2013)
17 ("DLSE has . . . found that the 'nature of the work' exception would apply to an 'isolated' gas
18 station 'in which only a single employee is present'"). In *Abdullah*, the Ninth Circuit explained
19 that "we can characterize the instances in which DLSE has found that the 'nature of the work'
20 exception applies into two categories: (1) where the work has some particular, external force that
21 requires the employee to be on duty at all times, and (2) where the employee is the sole employee
22 of a particular employer." *Id.* at 959. Rather than focusing solely on whether a station is "isolated,"
23 then, the standard for determining enforceability of on-duty meal period agreements takes into
24 consideration all the circumstances relating to the employee's working environment. Further, as
25 the Ninth Circuit itself noted, "the DLSE opinion letters do not provide a definite metric for
26 deciding in what circumstances a lone employee may be permitted to take an on- duty meal break
27 – for example, it is not clear if an employee must be (1) the sole employee on duty at a particular
28 time, (2) the sole employee staffed at a particular location, or (3) the sole employee working for

1 the employer in order to qualify for the ‘nature of the work exception.’” Id. at 964, n. 18. However,
2 as the DIR’s FAQs regarding the exception imply, it appears that the DLSE interprets the
3 exception to apply in all three of Abdullah’s scenarios, as evidenced by the FAQs’ offering the
4 following examples of when the exception does apply: “a sole worker in a coffee kiosk, a sole
5 worker in an all-night convenience store, and a security guard stationed alone at a remote site.”
6 See Dep’t of Indus. Relations, Meal Periods FAQs,
7 https://www.dir.ca.gov/dlse/faq_mealperiods.htm (last accessed January 25, 2022).

8 According to Defendants, Putative Class Members working daytime shifts at Single-
9 Employee Stations clearly meet this standard because the need to keep those stations open
10 throughout daytime operating hours is a contractual requirement imposed on the Entity
11 Defendants by their franchise and branding partners (who have considerably greater bargaining
12 power than Defendants). Further, as the DIR’s FAQs make clear, economic realities requiring
13 employers to single-staff convenience stores and other service sector operations create conditions
14 under which the nature of the work exception applies, rendering the on- duty meal period
15 agreements enforceable. While Defendants anticipate that Plaintiffs will attempt to distinguish
16 the convenience stores and coffee shops mentioned in the DIR’s FAQs, that distinction may be a
17 distinction without a difference.

18 By contrast, the DLSE also found that these agreements are not enforceable with regard
19 to a night-shift manager at a fast-food restaurant because other employees are on duty and could
20 cover for the manager. DLSE Opinion Letter 2002.09.04, at 2-3. The negative implication of this
21 finding is that the absence of other employees would render the agreements enforceable. Taken
22 together, these authorities may establish the enforceability of the on-duty meal period agreements
23 signed by all Putative Class Members who worked at Single-Employee Stations.

24 Accordingly, Defendants argue, the only potential liability Defendants face in connection
25 with Plaintiffs’ first cause of action is for rest breaks missed by dayshift employees working at
26 Single-Employee Stations. However, Defendants opine, this claim is likely incapable of class-
27 wide resolution. As such, while Defendants did not pay rest break premiums to these employees,
28 Defendants believe that the settlement value of these unpaid premiums is significantly lower than



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25th Fl
Los Angeles, CA 90067

1 the potential maximum exposure.

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

11 Defendants contend they did not impede or discourage Plaintiffs, or any other employees,
12 from taking their meal or rest periods. DS, ¶ 48. Defendants’ policies mandate that employees
13 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
14 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
15 sample Defendants produced to Plaintiffs for purposes of mediation show that meal periods were
16 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
17 individualized evidence may be necessary to determine whether they occurred due to conduct of
18 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
19 the value of Plaintiffs’ meal period claim would be substantially reduced at trial. *Id.*

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

21 There are risks to Plaintiffs’ rest period claim. DS, ¶ 49. Plaintiffs face many of the same
22 risks to their rest period claim that they do to their meal period claims. Defendants produced
23 evidence that many of the shifts are staffed with at least two employees so one can cover for the
24 other to take a ten-minute duty-free rest period. The time records may show that Defendants
25 instructed Putative Class Members to take rest breaks and provided them the opportunity to do
26 so. Defendants also provide evidence that the shifts the employees worked are largely duty free
27 with employees sitting and waiting for customers most of the time. Employers are not required to
28 record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt



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1 employees the opportunity to take rest periods in accordance with California law. Further,
2 Defendants' written policies on meal and rest periods are consistent with the Wage Order. *Id.*
3 Thus, unlike meal periods, where there are often records showing whether an employee clocked
4 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
5 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
6 Plaintiffs will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
7 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
8 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*
9 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
10 certification, it may be possible to manage individual issues through the use of surveys and
11 statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
12 *Corporation v. Behrend* (2013) 133 S.Ct. 1426.

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

14 There is a risk that the Court may consider Plaintiffs' claims as to Defendants' alleged
15 failure to indemnify for business expenses to be individual in nature and thus decline to certify
16 the class. DS, ¶ 50. In their third cause of action, Plaintiffs allege that Defendants failed to
17 reimburse two business-related expenses they allege Putative Class Members incurred in
18 connection with their work for Defendants: deductions from employee pay made by Defendants
19 as deposits for the return of uniforms and cell phone-related expenses incurred by Putative Class
20 Members.

21 With regard to deductions taken as deposits for the return of Defendant-provided
22 uniforms, Defendants argue Plaintiffs cannot recover any damages on this theory. Payroll records
23 show uniform deposit returns upon termination. They also show that some employees did not
24 have uniform deductions in the first place.

25 Regarding the cell phone reimbursement claim, defendants argue neither the nature of
26 their work nor the nature of Defendants' operations appears to have involved any use of their cell
27 phones. As such, Defendants do not believe they face any liability on Plaintiffs' third cause of
28 action. Plaintiffs allege that Defendants required Plaintiffs and the Class Members to use their



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1 personal items including cellular phones, computers and other electronic devices, vehicles, and
2 tools, and failed to indemnify them for these business expenses. *Id.* Defendants presented
3 evidence that they have supplied their employees with tools, equipment, and other supplies and
4 had an expense reimbursement policy. As such, there is a risk that the Court may consider
5 Plaintiffs' claims to be individual in nature and unfit for class wide resolution. *Id.*

6 **f. Risks Associated with the Statutory "Wage Statement" Penalty**
7 **Claims**

8 Plaintiffs also assert claims for wage statement violations, untimely wage violations, and
9 PAGA penalties. Plaintiffs' fourth cause of action alleges that, as a result of Defendants' other
10 alleged Labor Code violations (i.e., the unpaid meal and break premiums, unpaid wages, and
11 unreimbursed expenses), Defendants issued Putative Class Members deficient wage statements.
12 Plaintiffs do not allege that the wage statements Defendants issued were deficient because they
13 failed to include one of the enumerated categories of information required by the California Labor
14 Code, only that the information included was rendered inaccurate because of the alleged
underlying violations. This claim fails for multiple reasons.

15 First Defendants argue, derivative wage statement claims such as Plaintiffs are legally
16 deficient as "California Labor Code § 226 requires employers to show employees what they were
17 in fact paid, not what employee allege they should have been (but were not) paid." *Madeira v.*
18 *Converse, Inc.*, 2022 WL 109365, at *11 (C.D. Cal. Jan. 11, 2022) (citing *Maldonado v. Epsilon*
19 *Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018)); see also *Sagastume v. Psychemedic Corp.*,
20 2020 WL 8175597, at *5 (C.D. Cal. Nov. 30, 2020), *Hines v. Constellis Integrated Risk Mgmt.*
21 *Servs.*, 2020 WL 5764400, at *6 (C.D. Cal. Sept. 25, 2020) (dismissing wage statement claims
22 because 'Plaintiff appears to allege only that the amount he was paid was incorrect, not that the
23 wage statements inaccurately reflected the wages he was paid'), and *Sherman v. Schneider Nat'l*
24 *Carriers, Inc.*, 2019 WL 32200585, at *5 (C.D. Cal. Mar. 6, 2019) (same). This principle could
25 impair Plaintiffs' recovery on their wage statement cause of action.

26 Next Defendants argue, even if Plaintiffs' theory of wage statement liability were legally
27 sound, whether the wage statements issued by Defendants to Putative Class Members working
28 daylight shifts at Single-Employee Stations were rendered deficient by Defendants' failure to pay



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1 premiums for miss rest breaks cannot be resolved on a class-wide basis. It is well established that
2 “inaccurate wage statements alone do not justify penalties; the plaintiffs must establish injury
3 flowing from the inaccuracy.” *Maldonado*, 22 Cal. App. 5th at 1334. However, “[u]nder
4 *Maldonado*, any failure of wage statements to reflect premium pay that should have been paid,
5 but was not paid, implicates only the requirements to show wages earned, which do not support
6 a statutory presumption of injury.” *Kazi v. PNC Bank, N.A.*, 2021 WL 965372, at *21 (N.D. Cal.
7 Mar. 15, 2021). Because these injuries are not subject to the presumption of injury, they may be
8 inappropriate for resolution on a class basis because resolving the claim “would require
9 individualized showings of actual harm to each [Putative Class Member], in a manner unsuitable
10 for class resolution.” *Id.*

11 Additionally, Defendants argue, they did not fail to pay Putative Class Members for all
12 hours worked and, thus, the wage statements they issued were entirely accurate with regard to the
13 number of hours worked. They also paid overtime as appropriate and accurately represented these
14 overtime payments on the wage statements issued to Putative Class Members. To the degree any
15 Putative Class Members worked off-the-clock, they did so without Defendants’ knowledge,
16 precluding any recovery premised on the theory that the wage statements Defendants issued failed
17 to account for this time. See *Arroyo v. Int’l Paper Co.*, 2020 WL 887771, at *10-12 (N.D. Cal.
18 Feb. 24, 2020) (“[l]iability arises under § 226(e) only where an employee suffers ‘injury as a
19 result of a knowing and intentional failure by an employer to comply with subdivision (a)’ . . . an
20 employer’s good faith belief that it is in compliance with § 226 precludes liability under the
21 statute”) (emphasis in original) (citing Cal. Lab. Code § 226(e)(1)).

22 Defendants do not believe they face any liability in connection with Plaintiffs’ claim for
23 inaccurate wage statements. Under Labor Code section 226, wage statements must include
24 various information, including the applicable rates of pay, corresponding hours worked, and gross
25 pay. DS, ¶ 57.

26 Here, Defendants contend, Plaintiffs’ wage statement claim has the same underlying risks
27 as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by
28 Defendants may comply with the requirements of Labor Code § 226.

1 **g. Risks Associated with The Waiting Time Penalties Claim**

2 Plaintiffs' claim for untimely wages is predicated on Labor Code section 201 to 203. Like
3 the claim under Labor Code sec. 226, Plaintiffs must establish that the late payments were willful.
4 The evidence of good faith Defendants put forth may defeat this claim. Like their wage statement
5 cause of action, Defendants argue, Plaintiffs' claim for waiting time penalties is derivative of
6 Plaintiffs' other allegations of Labor Code violations and it, too, is meritless. While Plaintiff
7 Mikich's final paycheck was untimely Defendants admit, they state this was the result of an
8 administrative issue related to his sudden, unexpected termination for disciplinary issues. They
9 further argue that Plaintiffs do not identify any policy or practice that caused Defendants' alleged
10 failure to timely pay final wages, except by virtue of alleging that the other alleged Labor Code
11 violations automatically give rise to waiting time penalties.

12 **h. Risks Associated with the PAGA Claim**

13 Defendants contend that neither the alter ego doctrine nor the single-enterprise rule applies
14 to Defendants. As such, Plaintiffs can assert PAGA claims only against those entities for whom
15 the named Plaintiffs worked, Sayeh Petroleum and Green Planet Gas. *Magadia*, supra, 999 F.3d
16 at 678 (PAGA claim dismissed because plaintiff lacked Article III standing because "he himself
17 did not suffer injury"). Further, PAGA's statute of limitations is only one year, rendering the
18 relevant claims period from January 16, 2019 onwards. Accordingly, in light of the weaknesses
19 in Plaintiffs' theories of liability discussed above, PAGA's per pay-period method of calculating
20 damages results in a maximum exposure of \$173,600.00.

21 However, Defendants believe that the value of Plaintiffs' PAGA claim is less than
22 \$173,600. PAGA explicitly gives courts have nearly unlimited discretion to limit PAGA
23 penalties, or even eliminate them entirely. Cal. Lab. Code § 2699(e)(2) (providing that "a court
24 may award a lesser amount than the maximum civil penalty . . . if, based on the facts and
25 circumstances of the particular case, to do otherwise would result in an award that is unjust,
26 arbitrary and oppressive, or confiscatory"). This is especially relevant here, as both the United
27 States Department of Labor and the California Department of Labor Standards Enforcement
28 ("DLSE") initiated investigations into Defendants' operations and, after collecting various
documents and communicating with management, both dropped their investigations without



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Office:
1801 Century Park East
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1 reaching findings. Further, Defendants have never previously been the subject of either an agency
2 finding or a successful class, or even individual, wage & hour action. Finally, given that 75% of
3 any PAGA recovery must be provided to the DLSE, Defendants argue it would be illogical to
4 award that agency the maximum penalties allowed under the statute when that very agency
5 investigated the same claims at issue in the Action and decided against pursuing them. Regarding
6 PAGA, a court has discretion to award a lesser amount than the maximum penalty. Lab. Code §
7 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135
8 (reducing PAGA award). As set forth above, Defendants have posed valid defenses to the Labor
9 Code claims underlying Plaintiffs' PAGA allegations. Thus, the PAGA claims likewise face
10 significant uncertainty. DS, ¶ 52. There is a risk that the Court would consider the maximum civil
11 penalty available to be confiscatory. This is particularly the case considering Defendants'
12 financial condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to
13 further reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

14 This uncertainty increases Plaintiffs' risk of pursuing the PAGA claims and required a
15 significant discount for settlement purposes. DS, ¶ 53. For mediation purposes, Plaintiffs' counsel
16 estimated a maximum exposure of approximately \$4,026,000.00 in civil penalties. This estimate
17 did not take into account any of the risks discussed above and assumed a violation for every single
18 pay period. *Id.* Plaintiffs' counsel also assessed multiple penalties for the same pay period for the
19 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
20 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
21 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
22 Plaintiffs' counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
23 penalties for the same violation for the same pay period under different Labor Code provisions.
24 *Id.* This may be because the PAGA does not provide for what many employers characterize as
25 claim splitting and not merely stacking. *Id.*

26 **i. Risks Associated With A Pick-Up Stix Campaign**

27 An employer enjoys the right to settle a putative class member's disputed wage claims
28 individually, without the consent or involvement of class counsel. DS, ¶ 56. (See *Chindarah v.*

1 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
2 a “pick off” settlement campaign to pursue individual release agreements from the Class
3 Members, thereby potentially narrowing the size of the Settlement Class until it is no longer
4 numerous enough for class certification. *Id.* Plaintiffs, then, may not have sufficient number of
5 employees to represent. This could lead to a significant reduction of claim value in settlement
6 negotiations. *Id.*

7 While the evidence gathered through Plaintiffs’ discovery supports the merits of the
8 claims asserted in this lawsuit, Plaintiffs and their counsel recognize that continued litigation
9 presents significant risks that support a downward departure from Defendants’ estimated liability
10 exposure. DS, ¶ 64. In view of the risks, the Settlement reflects Plaintiffs’ estimate of the total
11 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
12 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
13 It also represents a fair, adequate, and reasonable compromise amount for these claims and
14 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
15 1376 (the financial condition of defendant predominated in assessing the reasonableness of
16 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
17 concerning defendant’s financial stability “strongly supports the reasonableness of the
18 settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
19 WL 2465049, * 3. Additionally, in the wake of this lawsuit, Defendants began requiring
20 employees to execute arbitration agreements.

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

22 The settlement of PAGA penalties in the sum of \$50,000.00, of which 75% (\$37,500.00)
23 will be paid to the LWDA and 25% (\$12,500.00) will be distributed to the Class, is reasonable
24 and appropriate under the circumstances. DS, ¶ 65. The Parties negotiated a good faith amount
25 for PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the
26 LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where
27 settlements “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that
28 this amount was the result of self-interest at the expense of other Class Members,” such amounts



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are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The amount to be paid to the LWDA comports with PAGA settlement amounts approved by other courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

3. Presence of Governmental Participant

As required under Labor Code section 2699(1)(2), Plaintiffs will provide notice of this settlement to the LWDA. DS, ¶ 74, Ex. 25.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Notice of Proposed Class Action Settlement and Hearing Date for Court Approval (attached as Exhibits A and C to the Settlement) and an opportunity to object. DS, ¶ 71. The parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed settlement. *Id.*

1 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
2 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
3 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
4 **COMPARED TO OTHER CLASS MEMBERS**

5 The Individual Settlement Payments will be paid to each Class Member based on his or
6 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 70, Settlement § III.B.
7 Because this method compensates Class Members based on the extent of their potential injuries,
8 in that Class Members who worked for Defendants longer would have been subject to more
9 alleged violations, it is fair, adequate, and reasonable. *Id.*

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

12 The Settlement states Class Counsel may seek attorneys' fees of \$666,666.00 (one-third
13 of the GSA) and up to \$35,000.00 for actual reasonable litigation costs and expenses incurred in
14 prosecuting the Action. Settlement § III.C.2. These amounts are reasonable, given the facts and
15 circumstances of the case. DS, ¶¶ 66-68.

16 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
17 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
18 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
19 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
20 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
21 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
22 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
23 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
24 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
25 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
26 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
27 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
28 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the



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1 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
2 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
3 down to devote time to this matter. DS, ¶ 67. Class Counsel interviewed and obtained information
4 from putative class members, met and conferred with Defendants' counsel on numerous
5 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
6 Defendants and obtained through other sources, researched applicable law, and provided
7 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

8 Class Counsel have borne all the risks and costs of litigation and will receive no
9 compensation until recovery is obtained. DS, ¶ 68. Class Counsel are well-experienced in wage-
10 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
11 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
12 the requested fees and costs are reasonable and should be awarded. *Id.*

13 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO EACH PLAINTIFF SHOULD**
14 **BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
15 **REASONABLE**

16 Courts routinely approve incentive awards to compensate named plaintiffs for the services
17 they provide and the risks they incur during class action litigation, often in much higher amounts
18 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
19 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
20 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000.00
21 enhancement award). The Settlement provides that each Plaintiff may seek a Class Representative
22 Payment of \$25,000.00. This amount is entirely reasonable given Plaintiffs' efforts in this action
23 and the risks he undertook on behalf of Class Members. DS, ¶ 69. Each Plaintiff has devoted
24 many hours advancing the interests of the Settlement Class. Each Plaintiff has done this by,
25 among other things, retaining experienced counsel, providing them with information about his
26 work history with Defendants and Defendants' policies and practices with respect to the wage
27 and hour claims at issue, participating in mediation, and being actively involved in the settlement
28 process to ensure a fair result for the Settlement Class as a whole. In doing this, each Plaintiff has
been exposed to significant risks, including the risk of an order to pay Defendants' attorneys' fees



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 and costs if this action had been unsuccessful (See Labor Code §§ 218.5-218.6). The efforts and
2 risks that each Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
3 Representative Payment is fair, adequate, and reasonable, and thus warrants preliminary approval.
4 DS, ¶ 69.

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

8 With regard to the settlement administration costs provision, it is reasonable. Before
9 agreeing to CPT Group, Inc. and its bid of \$32,000.00, the Parties sought and reviewed bids from
10 other reputable third-party administrators which provided higher bids. DS, ¶ 72-73, Exs. 22, 23,
11 and 24. Thus, the settlement administration costs provision should be given preliminary approval.

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

16 This Court should approve the proposed plans for giving notice to the Settlement Class
17 and administering the Settlement. The standard for determining the adequacy of notice is whether
18 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
19 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
20 measures to ensure that as many Class Members as practicable receive actual notice of the
21 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
22 the Notice by First Class U.S. mail only. Settlement, § IV.B.2. Although there are current
23 employee Class Members, it is uncertain whether Defendants’ records of their contact information
24 include email addresses and Class Members, who perform all of their work away from a desk, are
25 not in a position to check their emails. As such, notice by mail alone is fair, adequate, and
26 reasonable. DS, ¶ 71.

27 With respect to its content, “[The] notice given to the class must fairly apprise the class
28 members of the terms of the proposed compromise and of the options open to dissenting class
members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
The purpose of the notice in class settlement context is to give class members sufficient
information to decide whether they should accept the benefits offered, opt out and pursue their



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own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides Class Members with all pertinent information that they need to fully evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the individual Settlement Class Member's estimated payment. Additionally, the Class Notice will include the number of Work Weeks a Class Member had during the Class Period. Accordingly, the Notice should be approved because it describes the Settlement with sufficient clarity and specificity to explain to Class Members what this action is about, their rights under the Settlement, and how to exercise those rights. DS, ¶ 71.

XI. CONCLUSION

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: 02 / 29 / 2024

By:



DAVID G. SPIVAK, Attorneys for
Plaintiff(s), CHARLES MIKICH,
JONATHON GORDON, and all others
similarly situated



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EMPLOYEE RIGHTS

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