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8 RAMONA SILVA-HEREDIA, and all others similarly situated

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF LOS ANGELES**

11 **(UNLIMITED JURISDICTION)**

12
13 RAMONA SILVA-HEREDIA, on behalf of
14 herself, all others similarly situated, the general
15 public, and as an “aggrieved employee” on
16 behalf of other “aggrieved employees” under the
Labor Code Private Attorneys General Act of
2004,

17 *Plaintiff(s),*

18 vs.

19 TACOS LOS DESVELADOS, a California
20 corporation; TACOS LOS DESVELADOS
21 GLENDALE, INC., a California corporation;
22 TACOS LOS DESVELADOS WEST COVINA,
INC., a California corporation; TACOS LOS
23 DESVELADOS WHITTIER, INC., a California
24 corporation; ADOLFO VALENZUELA, an
individual; and DOES 1–50, inclusive,

25 *Defendant(s).*

Case No. 21STCV11103

**PLAINTIFF RAMONA SILVA-
HEREDIA’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Date: May 15, 2023

Hearing Time: 9:00 a.m.

Hearing Dept.: 17, The Honorable
Maren E. Nelson

Action filed: March 19, 2021

Trial Date:



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2 **Other**

3 *Alba Conte & Herbert B. Newberg*, Newberg on Class Actions § 3:2913

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

3 **I. INTRODUCTION**

4 Plaintiff Ramona Silva-Heredia (“Plaintiff”) submits this memorandum of points and
5 authorities in support of her unopposed motion for preliminary approval of the Class Action and
6 PAGA Settlement Agreement and Class Notice (the “Settlement” or the “Settlement
7 Agreement”), which provides for a Gross Settlement Amount (“GSA”) of \$200,000.00 in
8 compromise of all disputed claims on behalf of all persons hourly, non-exempt in California
9 employed by Defendants Tacos Los Desvelados, Tacos Los Desvelados Glendale, Inc., Tacos
10 Los Desvelados West Covina, Inc., Tacos Los Desvelados Whittier, Inc., and Adolfo Valenzuela,
11 (collectively “Defendants”) in California at any time between March 19, 2017 through May 31,
12 2022. Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally
13 certify the below-defined Class for settlement purposes only under Code of Civil Procedure §
14 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class
15 Representative; (4) appoint David Spivak of The Spivak Law Firm and of as Class counsel; (5)
16 approve the proposed notice procedures and related forms; and (6) schedule a final approval
17 hearing.

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

28 **II. BACKGROUND**

The Defendants are owners and operators of restaurants. DS, ¶ 4. Defendants employed
Plaintiff as an hourly, non-exempt cook from about March of 2016 until March 21, 2020. *Id.*



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

2 On March 8, 2021, Plaintiff notified Defendants and the California Labor and Workforce
3 Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of
4 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations
5 committed by Defendants. DS, ¶ 5, Ex. 2.

6 On March 19, 2021, Plaintiff filed a Class Action Complaint in the Los Angeles County
7 Superior Court, Case No. 21STCV11103, against Defendants on behalf of herself and others
8 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
9 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
10 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
11 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
12 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
13 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On
14 June 18, 2021, Plaintiff filed her First Amended Complaint adding a claim under PAGA. DS, ¶
15 6, Ex. 4. On January 7, 2022, Defendants filed an answer to Plaintiff’s First Amended Complaint.
16 DS, ¶ 6, Ex. 5. Defendants deny all of Plaintiff’s allegations and strongly contend that their wage
17 and hour policies, practices and procedures are fully compliant with all applicable laws. DS, ¶ 6.

16 **B. Mediation**

17 On January 20, 2022, the Parties participated in a mediation session presided over by
18 Mediator Steve Cerveris, an experienced class action mediator. During the session, the Parties
19 had a full day of negotiations but did not reach a settlement at mediation. The Parties thereafter
20 engaged in a voluntary exchange of information in the context of privileged settlement
21 discussions to facilitate reaching a class settlement. Defendants produced copies of their relevant
22 company written policies, financial reports, time-keeping records, and paycheck data and records
23 for the putative class, and more detailed time and payroll data for a random sample of putative
24 class members specifically selected by Plaintiff’s counsel. DS, ¶ 7.

25 Following the settlement discussions, the Parties ultimately agreed to settle the Action and
26 all other matters covered by this Agreement pursuant to the terms and conditions of this
27 Agreement. DS, ¶ 8.

27 **C. Defendants’ Financial Condition**

28 At the mediation, it became clear that that Defendants had insufficient resources to cover
the full extent of liability. DS ¶ 9. As part of the settlement negotiations, Defendants disclosed



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1 copies of their tax returns for the last three years, the owner's personal tax returns for the last 3
2 years, and bank statements for all three locations for the past three months. *Id.* Plaintiff's Counsel
3 has reviewed the financial records with the aid of a forensic economist. *Id.* The information
4 provided was sufficient to demonstrate the financial condition of the company and its owners.
5 Based on such records, Plaintiff, on her own behalf and on behalf of the Class Members, has
6 agreed to settle the lawsuit on the terms set forth in the Settlement. *Id.*

7 **III. OVERVIEW OF THE SETTLEMENT**

8 **A. Settlement Class Definition**

9 The Settlement defines the class as all persons employed by Defendants in California and
10 classified as hourly, non-exempt employees who worked for Defendants at any time between
11 March 19, 2017 through May 31, 2022. (Settlement Agreement, § 1.5)

12 **B. Monetary Terms**

13 **Gross Settlement Amount.** Defendants promise to pay \$200,000.00 as the Gross
14 Settlement Amount and to separately pay any and all employer-side payroll taxes owed on the
15 Wage Portions of the Individual Class Payments.

16 **Payments from the Gross Settlement Amount.** The Administrator will make and deduct
17 the following payments from the Gross Settlement Amount, in the amounts specified by the Court
18 in the Final Approval:

19 To Plaintiff: Class Representative Service Payment to the Class Representative of not
20 more than \$5,000.00 (in addition to any Individual Class Payment and any Individual PAGA
21 Payment the Class Representative is entitled to receive as a Participating Class Member or
22 Aggrieved Employee). Defendants will not oppose Plaintiff's request for a Class Representative
23 Service Payment that does not exceed this amount. As part of the motion for Class Counsel Fees
24 Payment and Class Litigation Expenses Payment, Plaintiff will seek Court approval for any Class
25 Representative Service Payments no later than 16 court days prior to the Final Approval Hearing.
26 If the Court approves a Class Representative Service Payment less than the amount requested, the
27 Administrator will retain the remainder in the Net Settlement Amount. The Administrator will
28 pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full
responsibility and liability for employee taxes owed on the Class Representative Service Payment.

To Class Counsel: A Class Counsel Fees Payment of not more than 33.33%, which is
currently estimated to be \$66,666.00 and a Class Counsel Litigation Expenses Payment of not
more than \$15,000.00. Defendants will not oppose requests for these payments provided that they



do not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any division or sharing of any of these Payments.

To the Administrator: An Administrator Expenses Payment not to exceed \$12,500.00 except for a showing of good cause and as approved by the Court. To the extent the Administration Expenses are less or the Court approves payment less than \$12,500.00, the Administrator will retain the remainder in the Net Settlement Amount.

To Each Participating Class Member: An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks.

Ten percent (10%) of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. Ninety percent (90%) of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment.

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



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To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$4,000.00 to be paid from the Gross Settlement Amount, with 75% (\$3,000) allocated to the LWDA PAGA Payment and 25% (\$1,000) allocated to the Individual PAGA Payments.

The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties \$1,000 by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. If the Court approves PAGA Penalties of less than the amount requested, the Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will report the Individual PAGA Payments on IRS 1099 Forms. (Settlement Agreement, § 3)

C. Timing of Payments

Defendants shall pay the Gross Settlement Amount in three installments as follows: (1) \$66,666.00 due within 60 days of the Court's order giving final approval of the Settlement or the Effective Date, whichever comes later, (2) \$66,667.00 due within one year of the Court's order giving final approval of the Settlement or the Effective Date, whichever comes later, and (3) \$66,667 due within 2 years of the Court's order giving final approval of the Settlement or the Effective Date, whichever comes later. There will be a distribution within 60 days of each installment payment. (Settlement Agreement, § 1.22)

D. Calculation of Settlement Shares

The Administrator will calculate Individual Class Payments by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members, and (b) multiplying the result by the number of Workweeks worked by each individual Participating Class Member. (Settlement Agreement, § 3.2.4)

E. Apportionment of Settlement Shares

Ten percent (10%) of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. Ninety percent (90%) of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume



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1 full responsibility and liability for any employee taxes owed on their Individual Class Payment.
2 (Settlement Agreement, § 3.2.4.1)

3 **F. The Releases**

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

8 Plaintiff's Release. In addition to the Released Class Claims and Released PAGA Claims
9 described below, Plaintiff and her respective former and present spouses, representatives, agents,
10 attorneys, heirs, administrators, successors, and assigns generally, release and discharge Released
11 Parties from all claims, demands, rights, liabilities and causes of action of every nature and
12 description whatsoever, whether known or unknown, asserted or that might have been asserted,
13 whether in tort, contract, or for violation of any state or federal statute, rule, law or regulation
14 arising out of, relating to, or in connection with any act or omission of the Released Parties
15 through the date of full execution of this Settlement Agreement in connection with his or her
16 employment or the termination thereof. Plaintiff's Release does not extend to any claims or
17 actions to enforce this Agreement, or to those rights that as a matter of law cannot be waived,
18 including, but not limited to any claims for vested benefits, unemployment benefits, disability
19 benefits, social security benefits, or workers' compensation benefits that arose at any time.
20 Plaintiff acknowledges that Plaintiff may discover facts or law different from, or in addition to,
21 the facts or law that Plaintiff now knows or believes to be true but agrees, nonetheless, that
22 Plaintiff's Release shall be and remain effective in all respects, notwithstanding such different or
23 additional facts or Plaintiff's discovery of them. (Settlement Agreement, § 6.1)

24 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of
25 Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits,
26 if any, of section 1542 of the California Civil Code, which reads:

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

(Settlement Agreement, § 6.1.1)



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1 Release Class Claims by Participating Class Members: All Participating Class Members, on
2 behalf of themselves and their respective former and present representatives, agents, attorneys,
3 heirs, administrators, successors, and assigns, release Released Parties from all claims that were
4 alleged, or reasonably could have been alleged, in the Operative Complaint, and ascertained in
5 the course of the Action, that arose during the Class Period including with respect to the following
6 claims: (a) failure to pay all overtime wages owed; (b) failure to pay minimum wages owed; (c)
7 failure to provide meal periods, or premium pay for non-compliant meal periods; (d) failure to
8 authorize and permit rest periods, or premium pay for non-compliant rest periods; (e) failure to
9 issue accurate, itemized wage statements and maintain payroll records; (f) failure to pay all wages
10 due upon separation of employment; (g) failure to reimburse for necessary business expenses; (h)
11 all claims under California Business & Professions Code § 17200 for unfair business practices
12 that could have been premised on the facts, claims, causes of action or legal theories described
13 above; (i) violation of or claims under the following sections of the California Labor Code
14 sections 201, 202, 203, 204, 206, 218.6, 226, 226.3, 226.7, 510, 512, 1174, 1182.12, 1194,
15 1194.2, 1197, 1197.1, 1198, 2802; and (j) violation of the California Industrial Wage Orders that
16 could have been premised on the facts, claims, causes of action or legal theories described above,
17 as well as any potential penalties, interest or attorneys' fees associated with all of such causes of
18 action under California law. ("Released Class Claims"). Except as set forth in Section 6.3 of this
19 Agreement, Participating Class Members do not release any other claims, including claims for
20 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
unemployment insurance, disability, social security, workers' compensation, or claims based on
facts occurring outside the Class Period. (Settlement Agreement, § 6.2)

21 Release PAGA Claims by Aggrieved Employees: All Class Members who are Aggrieved
22 Employees, regardless of whether they are Participating Class Members or Non Participating
23 Class Members, are deemed to release, on behalf of themselves and their respective former and
24 present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the
25 Released Parties from all claims demands, rights, liabilities and causes of action under the
26 California Labor Code Private Attorneys General Act that were alleged, or reasonably could have
27 been alleged, based on the claims asserted in the Operative Complaint, the PAGA Notice and
28 ascertained in the course of the Action arising during or with respect to the PAGA Period.
("Released PAGA Claims"). The foregoing release shall be binding on Plaintiff, the Aggrieved



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1 Employees, and the State of California, and shall bar by res judicata any claim under the PAGA
2 brought by any person, including the Aggrieved Employees, on behalf of the State of California,
3 as to any claims predicated on the Released PAGA Claims. (Settlement Agreement, § 6.3)

4 **G. Notice and Claims Process and Procedures**

5 No later than three (3) business days after receipt of the Class Data, the Administrator
6 shall notify Class Counsel that the list has been received and state the number of Class Members,
7 PAGA Members, Workweeks, and Pay Periods in the Class Data. Using best efforts to perform
8 as soon as possible, and in no event later than 14 days after receiving the Class Data, the
9 Administrator will send to all Class Members identified in the Class Data, via first-class United
10 States Postal Service (“USPS”) mail, the Class Notice with Spanish translation, substantially in
11 the form attached to the Settlement Agreement as Exhibit A. The first page of the Class Notice
12 shall prominently estimate the dollar amounts of any Individual Class Payment and/or Individual
13 PAGA Payment payable to the Class Member, and the number of Workweeks and PAGA Pay
14 Periods (if applicable) used to calculate these amounts. Before mailing Class Notices, the
15 Administrator shall update Class Member addresses using the National Change of Address
16 database. Not later than 3 business days after the Administrator’s receipt of any Class Notice
17 returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any
18 forwarding address provided by the USPS. If the USPS does not provide a forwarding address,
19 the Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to
20 the most current address obtained. The Administrator has no obligation to make further attempts
21 to locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a
22 second time. The deadlines for Class Members’ written objections, challenges to Workweeks
23 and/or Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond
24 the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-
25 mailed. The Administrator will inform the Class Member of the extended deadline with the re-
26 mailed Class Notice. If the Administrator, any of the Defendants, Defense Counsel or Class
27 Counsel is contacted by or otherwise discovers any persons who believe they should have been
28 included in the Class Data and should have received Class Notice, the Parties will expeditiously
meet and confer in person or by telephone, and in good faith, in an effort to agree on whether to
include them as Class Members. If the Parties agree, such persons will be Class Members entitled
to the same rights as other Class Members, and the Administrator will send, via email or overnight



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1 delivery, a Class Notice requiring them to exercise options under the Agreement not later than 14
2 days after receipt of Class Notice, or the deadline dates in the Class Notice, which ever are later.
3 (Settlement Agreement, § 8.4)

4 **1. Class Member Disputes**

5 Each Class Member shall have 60 days after the Administrator mails the Class Notice
6 (plus an additional 14 days for Class Members whose Class Notice is re-mailed) to challenge the
7 number of Class Workweeks and PAGA Pay Periods (if any) allocated to the Class Member in
8 the Class Notice. The Class Member may challenge the allocation by communicating with the
9 Administrator via fax, email or mail. The Administrator must encourage the challenging Class
10 Member to submit supporting documentation. In the absence of any contrary documentation, the
11 Administrator is entitled to presume that the Workweeks contained in the Class Notice are correct
12 so long as they are consistent with the Class Data. The Administrator's determination of each
13 Class Member's allocation of Workweeks and/or Pay Periods shall be final and not appealable or
14 otherwise susceptible to challenge. The Administrator shall promptly provide copies of all
15 challenges to calculation of Workweeks and/or Pay Periods to Defense Counsel and Class
16 Counsel and the Administrator's determination of the challenges. (Settlement Agreement, § 8.6)

17 **2. Opting Out**

18 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
19 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion no later
20 than 60 days after the Administrator mails the Class Notice (plus an additional 14 days for Class
21 Members whose Class Notice is re-mailed). A Request for Exclusion is a letter from a Class
22 Member or his/her representative that reasonably communicates the Class Member's election to
23 be excluded from the Settlement and includes the Class Member's name, address and email
24 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
25 or postmarked by the Response Deadline. The Administrator may not reject a Request for
26 Exclusion as invalid because it fails to contain all the information specified in the Class Notice.
27 The Administrator shall accept any Request for Exclusion as valid if the Administrator can
28 reasonably ascertain the identity of the person as a Class Member and the Class Member's desire
to be excluded. The Administrator's determination shall be final and not appealable or otherwise
susceptible to challenge. If the Administrator has reason to question the authenticity of a Request
for Exclusion, the Administrator may demand additional proof of the Class Member's identity.
The Administrator's determination of authenticity shall be final and not appealable or otherwise



1 susceptible to challenge. Every Class Member who does not submit a timely and valid Request
2 for Exclusion is deemed to be a Participating Class Member under the Settlement Agreement,
3 entitled to all benefits and bound by all terms and conditions of the Settlement, including the
4 Participating Class Members' Releases under Paragraphs 6.2 and 6.3 of the Settlement
5 Agreement, regardless whether the Participating Class Member actually receives the Class Notice
6 or objects to the Settlement. Every Class Member who submits a valid and timely Request for
7 Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment
8 or have the right to object to the class action components of the Settlement. Because future PAGA
9 claims are subject to claim preclusion upon entry of the Judgment, Non-Participating Class
10 Members who are Aggrieved Employees are deemed to release the claims identified in Paragraph
11 6.4 of this Agreement and are eligible for an Individual PAGA Payment. (Settlement Agreement,
§ 8.5)

12 **3. Objecting**

13 Only Participating Class Members may object to the class action components of the
14 Settlement Agreement including contesting the fairness of the Settlement, and/or amounts
15 requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment
16 and/or Class Representative Service Payment. Participating Class Members may send written
17 objections to the Administrator, by fax, email, or mail. In the alternative, Participating Class
18 Members may appear in Court (or hire an attorney to appear in Court) to present verbal objections
19 at the Final Approval Hearing. A Participating Class Member who elects to send a written
20 objection to the Administrator must do so not later than 60 days after the Administrator's mailing
21 of the Class Notice (plus an additional 14 days for Class Members whose Class Notice was re-
mailed). Non-Participating Class Members have no right to object to any of the class action
components of the Settlement. (Settlement Agreement, § 8.7)

22 **H. Uncashed Checks**

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

28 ///



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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). Plaintiff maintains 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, ¶ 10; Settlement, § 4.2. Therefore, the Settlement Class is
18 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. Defendants estimate that there are approximately 127 Class
23 Members. DS, ¶ 11. Plaintiff maintains that it would be impractical and economically inefficient
24 to require each Class Member to separately maintain an individual action or be joined as a named
25 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
26 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
27 the Settlement Class' membership is sufficiently numerous. DS, ¶ 11. *See Daar v. Yellow Cab*
28 *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
questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
(3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*



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

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

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

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

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

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

17 The adequacy requirement is met where the plaintiff is represented by counsel qualified
18 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
19 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
20 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
21 conflicts of interest that might hinder the plaintiff’s ability to represent the class. DS, ¶ 14.

22 First, Class counsel have supplied the Court with declarations to show that they are
23 adequate to represent the Settlement Class and that they have significant experience in
24 employment litigation generally, and wage and hour and employment-related class action
25 litigation specifically. *See* DS, ¶¶ 16 - 23. Thus, Plaintiff’s counsel are adequate to serve as Class
26 counsel.

27 Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the
28 Class Members have strong and co-extensive interests in this litigation because they all worked
29 for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
30 the same alleged course of conduct, and there is no evidence of any conflict of interest between
31 Plaintiff and the Class Members. DS, ¶ 15. Moreover, Plaintiff has demonstrated her commitment
32 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel



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1 with documents and extensively speaking with them to assist in identifying the claims asserted in
2 this case, assisting them in identifying witnesses, as well as exposing herself to the risk of
3 attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 15. Thus,
4 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
5 find that Plaintiff and her counsel are adequate to represent the Settlement Class as required under
6 Code of Civil Procedure § 382.

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

9 Plaintiff further contends that a class action is also superior to other means adjudicating
10 the issues in this action. The predominance of common legal and factual questions shows that this
11 Court could fairly adjudicate the claims of Class Members through a single class action. In view
12 of the *theoretical* alternatives that proposed class members could potentially utilize—
13 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
14 claims through the Division of Labor Standards Enforcement (where there would be relatively
15 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
16 superior to all of them. Thus, this consideration supports conditional class action treatment for
17 purposes of this Settlement only. DS, ¶ 24.

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

20 **A. Legal Standard**

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

B. The Settlement Is Presumptively Fair

In assessing preliminary approval, a court evaluates if the settlement process has certain
indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the



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1 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
2 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
3 48 Cal.App.4th at 1794.

4 The class settlement here satisfies all of these factors. DS, ¶ 25. The Settlement resulted
5 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
6 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
7 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.*

8 At issue in this class and PAGA action is a restaurant employer’s liability to its non-
9 exempt hourly employees for its failures to (1) pay all overtime at time-and-a-half or double time,
10 as applicable; (2) pay regular and overtime pay for all hours worked; (3) provide timely,
11 uninterrupted, duty-free 30-minute meal periods or pay premium wages in lieu thereof; (4)
12 provide timely, uninterrupted, duty-free 10-minute rest period or pay premium wages in lieu
13 thereof, and (5) reimburse all necessary business expenses, including, without limitation, mileage
14 reimbursement for errands required by Defendants. DS, ¶ 26. Plaintiff prepared “damages”
15 estimates in advance of the mediation. DS, ¶ 26, Ex. 6. In advance of the mediation, Plaintiff
16 determined Defendants’ maximum exposure for restitution and penalties to be approximately
17 \$1,922,002.17 (consisting of \$19,136.15 in unpaid wages, \$104,379.00 in missed meal period
18 premium wages, \$104,379.00 in missed rest break premium wages, \$184,210.00 for wage
19 statement penalties, \$265,650.00 for waiting time penalties, and \$1,689,860.00 for civil
20 penalties). Plaintiff calculated the damages based on the number of workweeks and pay periods
21 provided by Defendants, Plaintiff’s reports, and the sample data. *Id.* Plaintiff also considered the
22 possibility that Defendants could launch a *Pick Up Stix* campaign and pursue individual release
23 agreements from the Class Members. Plaintiff’s Counsel applied discounts to the maximum
24 exposure to account for all other risks discussed below. While it is difficult to assign anything but
25 crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that a
26 *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone
27 justifies a significant discount because Defendants would likely by trial have gathered releases
28 from the majority of the Class Members. A settlement for approximately 10.41% of the potential
recovery is a proportion substantially in excess of recovery proportions sanctioned by existing



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1 case law.² *Id.*

2 Plaintiff is aware of only two significant awards under the PAGA in a contested
3 proceeding, both issued by federal district courts.³ DS, ¶ 40. PAGA penalty awards are often
4 small even for egregious, intentional violations of the Labor Code.⁴ *Id.* For instance, on October
5 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
6 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
7 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
8 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
9 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar

10 ² See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
11 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
12 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
13 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
14 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
15 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
16 of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
17 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
18 potential recovery asserted by either party.”).

19 ³ In *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
20 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
21 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
22 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
23 suffered a particularly sizeable injury – the court found that the defendant's policies caused
24 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
25 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to
26 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
27 compensate its flight attendants for work performed outside of “block time” (time during which
28 the aircraft is moving), including time spent participating in pre-flight briefings, boarding
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

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.

⁴ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
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 result could occur here. DS, ¶ 41.

2 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
3 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
4 \$200,000.00 is fair and reasonable. *Id.*

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

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

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

15 **a. Risks Associated with Defendants' Financial Condition**

16 Defendants' financial condition was the key factor in reaching this Settlement. DS, ¶ 29.
17 At the mediation, it became clear that that Defendants had insufficient resources to cover the full
18 extent of liability. DS, ¶ 29. As part of the settlement negotiations, Defendants disclosed copies
19 of their tax returns for the last three years, the owner's personal tax returns for the last 3 years,
20 and bank statements for all three locations for the past three months. *Id.* Plaintiff's Counsel has
21 reviewed the financial records with the aid of a forensic economist. *Id.* The information provided
22 was sufficient to demonstrate the financial condition of the company and its owners. Based on
23 such records, Plaintiff, on her own behalf and on behalf of the Class Members, has agreed to settle
24 the lawsuit on the terms set forth in the Settlement. *Id.*

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



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1 1244, 1256 (uncertainty concerning defendant’s financial stability “strongly supports the
2 reasonableness of the settlement”); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S.
3 App. LEXIS 10259 at *11 (finding potential insolvency to be additional risk that favors approval
4 of a class action settlement). Accordingly, Defendants’ financial distress supports this settlement.
5 *Id.*

6 **b. Risks Associate with Holding Defendant Adolfo Valenzuela**
7 **Liable**

8 Plaintiff’s counsel concluded that it would be difficult to establish personal liability of
9 Defendant Adolfo Valenzuela under Labor Code § 558.1 because the proof that he was
10 responsible for the Labor Code violations, many of which he was not physically present to
11 observe, is inconclusive. DS, ¶ 30. Three cases have recently interpreted Labor Code § 558.1:
12 *Usher v. White* (2021) 64 Cal.App.5th 883, *Espinoza v. Hepa Run, Inc.*(2022) 74 Cal.App.5th 44
13 and *Seviour-Iloff v. Lapille* (2022) 80 Cal.App.5th 427. The court in *Usher* held that an alleged
14 employer was not personally liable under Labor Code § 558.1 because the undisputed evidence
15 showed that she was not personally involved in the determination to classify plaintiffs as
16 independent contractors and because it also showed that she lacked sufficient participation in the
17 operation and management of the employer to create a triable issue of material fact that she
18 caused the wage and hour violations. *Usher*, 64 Cal.App.5th at 883.

19 In *Seviour-Iloff*, the court interpreted whether “may” was used to reference the court (the
20 court “may” hold an individual liable) or plaintiff (plaintiff “may” seek to hold an individual
21 liable). The court concluded that “may” referred to plaintiff – plaintiff “may” allege a claim and
22 seek to hold the employer liable, but for limited purpose – the circumstance that plaintiff’s
23 employer was factually not able to pay plaintiff’s wages:

24 We find a similar interpretation of the word “may” is appropriate as to section
25 558.1. In the event an employer attempts to avoid a judgment arising from a
26 wage violation, the employee or the Labor Commissioner is entitled to enforce
27 such liability against those individuals who “violate[s], or cause[s] to be
28 violated” the minimum wage laws. (See § 558.1, subd. (a).) However, such
liability may not be necessary if the employee is able to collect his or her unpaid
wages from the employer.

This interpretation also is in accord with the Legislative Counsel’s Digest
describing Senate Bill 588. That digest states the “bill would provide that any
employer or other person acting on behalf of an employer ... who violates, or causes
to be violated, any provision regulating minimum wages ... is *authorized* to be held
liable as the employer for such violation.” (Legis. Counsel’s Dig., Sen. Bill 588,
italics added.) Our interpretation also is supported by the purpose of Senate Bill 588.



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Senate Bill 588 “targets individual officers who are involved in the failure to pay wages” and “sought to “discourage [such individuals] from rolling up their operations and walking away from their debts to workers and starting a new company.”” (*Usher v. White* (2021) 64 Cal.App.5th 883, 894 [279 Cal. Rptr. 3d 281].)

Id. at 430 (emphasis added). Accordingly, it is doubtful that liability under Labor Code § 558.1 would be established.

c. Risks Associated with the Unpaid Wages Claim

There is a risk that Plaintiff’s recovery for unpaid wages would be extremely limited at best, largely because Defendants’ written policies throughout the relevant time period prohibited off-the-clock work. DS, ¶ 31. Off-the-clock claims are difficult where a defendant requires in its written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to be compensable). *Id.* In their written employment policies, Defendants mandate that employees must record all time worked accurately on their time records and strictly prohibit employees from performing any work off-the-clock. DS, ¶ 31. Moreover, while Defendants dispute that off-the-clock work occurred, they contend that any time spent off the clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and minute periods of time may still be subject to a *de minimis* defense even if compensable. (Stating that “We do not decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here because the time spent off the clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with respect to this claim. *Id.*

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



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1 risk that the Court would consider this evidentiary showing insufficient as a classwide
2 methodology. DS, ¶ 32.

3 There are also risks that Plaintiff will not recover an award for her unpaid wages claim
4 based on the withheld premium pay for overtime hours. The unpaid wage claim arose primarily
5 from Plaintiff's claim that Defendants failed to pay premium overtime wages of at least one and
6 half times their hourly rates for all hours in excess of forty (40) in a week, all hours in excess of
7 eight (8) in a day, and all hours on the seventh (7th) day worked in a workweek. Defendants deny
8 all of Plaintiff's allegations and strongly contend that their wage and hour policies, practices and
9 procedures fully complied with all applicable laws. *Id.* Defendants contend that Plaintiff and the
10 Class Members did not work any overtime hours, but if so, it did not occur very often and any
11 judgement against them would be worthless because Defendants would file for bankruptcy
12 protection. This claim could also be susceptible to a *de minimis* defense. Accordingly, a large
award of penalties seems unlikely with respect to this claim. *Id.*

13 **d. Risks Associated with the Meal Period Claims**

14 There are risks to Plaintiff's meal period claim. DS, ¶ 33. Defendants contend that, to
15 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
16 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
17 "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal
18 breaks and ensure no work thereafter is performed." *Id.* at 1040-41. *Id.* Instead, a plaintiff must
19 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
20 or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard
to the meal break claim is the reason that a particular employee may have failed to take a meal
break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

21 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
22 from taking their meal or rest periods. DS, ¶ 34. Defendants' policies mandate that employees
23 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
24 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
25 sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
26 taken a large part of the time. *Id.* Of the time records that show a late, short or no lunch,
27 individualized evidence may be necessary to determine whether they occurred due to conduct of
28



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the Defendants or each of the employees concerned. Accordingly, there is a significant risk that the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

e. Risks Associated with the Rest Break Claims

There are risks to Plaintiff's rest period claim. DS, ¶ 34. Employers are not required to record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt employees the opportunity to take rest periods in accordance with California law. Further, Defendants' written policies on meal and rest periods are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

f. Risks Associated with the Failure to Indemnify Claim

There is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged failure to indemnify for business expenses to be individual in nature and thus decline to certify the class. DS, ¶ 35. Plaintiff alleges that Defendants required Plaintiff and the Class Members to run business errands and failed to indemnify them with mileage reimbursement. *Id.* Defendants presented evidence that they have reimbursed Plaintiff for mileage expenses and had an expense reimbursement policy. As such, there is a risk that the Court may consider Plaintiff's claims to be individual in nature and unfit for class wide resolution. *Id.*

g. Risks Associated with the Statutory "Wage Statement" Penalty Claims

Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA penalties. Under Labor Code section 226, wage statements must include various information, including the applicable rates of pay, corresponding hours worked, and gross pay. DS, ¶ 36.

Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,



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1 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
2 with the requirements of Labor Code § 226.

3 **h. Risks Associated with The Waiting Time Penalties Claim**

4 Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 203. Like
5 the claim under Labor Code § 226, Plaintiff must establish that the late payments were willful.
6 The evidence of good faith Defendants put forth will defeat this claim. DS, ¶ 37.

7 **i. Risks Associated With the PAGA Claim**

8 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
9 penalty. Lab. Code § 2699 (e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
10 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
11 valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the
12 PAGA claims likewise face significant uncertainty. DS, ¶ 38. There is a risk that the Court would
13 consider the maximum civil penalty available to be confiscatory. This is particularly the case
14 considering Defendants' financial condition. *Id.* Moreover, the current COVID-19 pandemic
15 could motivate the Court to further reduce the penalty award to avoid what it may consider a
16 confiscatory taking. *Id.*

17 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
18 significant discount for settlement purposes. DS, ¶ 39. For mediation purposes, Plaintiff's counsel
19 estimated a maximum exposure of approximately \$1,689,860.00 in civil penalties. This estimate
20 did not take into account any of the risks discussed above and assumed a violation for every single
21 pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the
22 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
23 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
24 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
25 Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
26 penalties for the same violation for the same pay period under different Labor Code provisions.
27 *Id.* This may be because the PAGA does not provide for what many employers characterize as
28 claim splitting and not merely stacking. *Id.*

29 **j. Risks Associated With A Pick-Up Stix Campaign**

30 An employer enjoys the right to settle a putative class member's disputed wage claims
31 individually, without the consent or involvement of class counsel. DS, ¶ 42. (See *Chindarah v.*
32 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch



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1 a “pick off” settlement campaign to pursue individual release agreements from the Class
2 Members, thereby potentially narrowing the size of the Settlement Class – 69 members - until it
3 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
4 number of employees to represent. This led to a significant reduction of claim value in settlement
5 negotiations. *Id.*

6 While the evidence gathered through Plaintiff’s discovery supports the merits of the
7 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
8 presents significant risks that support a downward departure from Defendants’ estimated liability
9 exposure. DS, ¶ 43. In view of the risks, the Settlement reflects Plaintiff’s estimate of the total
10 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
11 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
12 It also represents a fair, adequate, and reasonable compromise amount for these claims and
13 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
14 1376 (the financial condition of defendant predominated in assessing the reasonableness of
15 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
16 concerning defendant’s financial stability “strongly supports the reasonableness of the
17 settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
18 WL 2465049, * 3.

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

20 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
21 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
22 appropriate under the circumstances. DS, ¶ 44. The Parties negotiated a good faith amount for
23 PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
24 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
25 “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount
26 was the result of self-interest at the expense of other Class Members,” such amounts are generally
27 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
28 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
29 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
30 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
31 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming



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1 trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
2 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
3 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
4 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
5 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
6 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
7 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
8 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
9 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
10 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D.
11 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
12 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
13 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
14 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
15 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

16 **3. Presence of Governmental Participant**

17 As required under Labor Code section 2699(l)(2), Plaintiffs will provide notice of this
18 settlement to the LWDA. DS, ¶ 53, Ex. 12.

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

20 If the settlement is preliminarily approved, Class Members will be provided with the Class
21 Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 50. The
22 parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
23 will allow Class Members to make informed responses to the proposed settlement. *Id.*

24 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
25 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
26 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
27 **COMPARED TO OTHER CLASS MEMBERS**

28 The Individual Settlement Payments will be paid to each Class Member based on his or
her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 49, Settlement § 3.2.4.
Because this method compensates Class Members based on the extent of their potential injuries,
in that Class Members who worked for Defendants longer would have been subject to more
alleged violations, it is fair, adequate, and reasonable. *Id.*



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1 **VII. ALLOCATION FOR CLASS COUNSEL’S FEE AWARD AND ATTORNEYS’**
2 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS**
3 **APPROPRIATE**

4 The Settlement states Class counsel may seek attorneys’ fees of \$66,666.00 (one-third of
5 the GSA) and up to \$15,000.00 for actual reasonable litigation costs and expenses incurred in
6 prosecuting the Action. Settlement § 46. These amounts are reasonable, given the facts and
7 circumstances of the case.

8 Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their
9 decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v.*
10 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced
11 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
12 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
13 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
14 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
15 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
16 of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee
17 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
18 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
19 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
20 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

21 The amount of fees and costs requested are commensurate with (1) the risk Class counsel
22 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
23 skill and determination Class counsel has shown, (4) the results Class counsel achieved, (5) the
24 value of the Class counsel achieved for the class, and (6) the other cases Class counsel turned
25 down to devote time to this matter. DS, ¶ 46. Class counsel interviewed and obtained information
26 from putative class members, met and conferred with Defendants’ counsel on numerous
27 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
28 Defendants and obtained through other sources, researched applicable law, and provided
estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

Class counsel have borne all the risks and costs of litigation and will receive no
compensation until recovery is obtained. DS, ¶ 47. Class counsel are well-experienced in wage-
and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*



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1 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
2 the requested fees and costs are reasonable and should be awarded. *Id.*

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

6 Courts routinely approve incentive awards to compensate named plaintiffs for the services
7 they provide and the risks they incur during class action litigation, often in much higher amounts
8 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
9 (upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van*
10 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
11 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
12 Service Payment of \$5,000.00. This amount is entirely reasonable given Plaintiff’s efforts in this
13 action and the risks she undertook on behalf of Class Members. DS, ¶ 48. Plaintiff has devoted
14 many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among
15 other things, retaining experienced counsel, providing them with information about her work
16 history with Defendants and Defendants’ policies and practices with respect to the wage and hour
17 claims at issue, participating in mediation, and being actively involved in the settlement process
18 to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
19 to significant risks, including the risk of an order to pay Defendants’ attorneys’ fees and costs if
20 this action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that
21 Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
22 Representative Service Payment is fair, adequate, and reasonable, and thus warrants preliminary
23 approval. DS, ¶ 48.

24 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
25 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE,**
26 **AND REASONABLE**

27 With regard to the settlement administration costs provision, it is reasonable. Before
28 agreeing to Administrator and its bid of \$1,152.57, the Parties sought and reviewed bids from
other reputable third-party administrators which provided comparable bids. DS, ¶¶ 51-52, Exs. 9,
10, and 11. Thus, the settlement administration costs provision should be given preliminary
approval.

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1 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
2 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
3 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
4 **EXERCISE THEIR RIGHTS**

5 This Court should approve the proposed plans for giving notice to the Settlement Class
6 and administering the Settlement. The standard for determining the adequacy of notice is whether
7 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
8 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
9 measures to ensure that as many Class Members as practicable receive actual notice of the
10 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
11 the Notice by First Class U.S. mail only. Settlement, § 4.4.1. Although there are current employee
12 Class Members, it is uncertain whether Defendants’ records of their contact information include
13 email addresses and Class Members, who perform all of their work away from a desk, are not in
14 a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
15 DS, ¶ 50.

16 With respect to its content, “[The] notice given to the class must fairly apprise the class
17 members of the terms of the proposed compromise and of the options open to dissenting class
18 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
19 The purpose of the notice in class settlement context is to give class members sufficient
20 information to decide whether they should accept the benefits offered, opt out and pursue their
21 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
22 Class Members with all pertinent information that they need to fully evaluate their options and
23 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
24 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
25 Class counsel will be paid; (4) how to submit an exclusion request not to be bound by the
26 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
27 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
28 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, ¶ 50.



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1 **XI. CONCLUSION**

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

4 Respectfully submitted,

5 THE SPIVAK LAW FIRM

6 

7 Dated: January 19, 2023

8 By:

9 DAVID G. SPIVAK, Attorney for
10 Plaintiff, RAMONA SILVA-
11 HEREDIA, and all others similarly
12 situated
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