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RENE LOPEZ, and all others similarly situated
(Additional attorneys for Plaintiff(s) on following page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

(*UNLIMITED JURISDICTION*)

RENE LOPEZ and ALYSIA FORD, on behalf of themselves and all others similarly situated, the general public, and as "aggrieved employees" on behalf of other "aggrieved employees" under the Labor Code Private Attorneys General Act of 2004,

Plaintiff(s),

vs.

BOAVIDA COMMUNITIES, LLC, a California limited Liability company; THE BOAVIDA GROUP, LP, a California limited partnership; and DOES 1–50, inclusive,

Defendant(s).

Case No. 34-2021-00299610-CU-OE-GDS

CLASS ACTION

PLAINTIFFS RENE LOPEZ AND ALYSIA FORD'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: July 29, 2022
Hearing Time: 1:30 p.m.
Hearing Dept.: Dept. 25
The Hon. Jill H. Talley

Action filed: April 28, 2021
Trial Date: Not Set

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

I. INTRODUCTION

Plaintiffs Rene Lopez and Alysia Ford (together "Plaintiffs") submit this memorandum of points and authorities in support of their unopposed motion for preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement (the "Settlement")[1], which provides for a Maximum Settlement Amount ("MSA") of $275,000.00 in compromise of all disputed claims on behalf of all persons hourly paid or non-exempt employees in California of Defendants Boavida Communities, LLC and The Boavida Group, LP (together "Defendants") in California at any time between July 1, 2019 through the date of Preliminary Approval of the Settlement by the court or 90 days from the date of the full execution of the Settlement Agreement (August 1, 2022), whichever is earlier. Through this Motion, Plaintiffs respectfully request for this Court to (1) provisionally certify the below-defined Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiffs as class representatives; (4) appoint David Spivak of The Spivak Law Firm and Justin Marquez of Wilshire Law Firm, PLC as class counsel for settlement purposes only; (5) approve the proposed notice procedures and related forms; and (6) schedule a final approval hearing.

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

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[1] The Settlement is attached as Exhibit ("Ex.") 1 to the Declaration of David Spivak ("DS"), which is submitted herewith under a separate cover.

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Accordingly, for the reasons detailed below, this Court should grant Plaintiffs' motion in its entirety and preliminarily approve the Settlement.

II. BACKGROUND

Defendants are RV park and resort owners and operators. Defendants employed Plaintiff Lopez as a resident manager from about October 19, 2019 until September 21, 2020. DS, ¶ 4. Defendants employed Plaintiff Ford as a resident manager from approximately February 2020 until approximately February 2021. Declaration of Justin Marquez ("Marquez Decl."), ¶ 2.

A. The Claims and Procedural History

On December 11, 2020, Plaintiff Lopez notified Defendants and the California Labor and Workforce Development Agency ("LWDA"), pursuant to the California Private Attorneys General Act of 2004, California Labor Code sections 2698, *et seq.* ("PAGA"), of alleged Labor Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

On February 16, 2021, Plaintiff Lopez filed a Private Attorneys General Act ("PAGA") complaint in the Los Angeles County Superior Court, Case No. 21STCV06244, against Defendants on behalf of himself and others aggrieved employees. Plaintiff Lopez's PAGA case seeks civil penalties premised on the following acts and omissions by Defendants: (1) failure to pay all wages earned at the correct rates; (2) unlawful deductions; (3) failure to provide meal periods; (4) failure to authorize and permit paid rest breaks; (5) failure to reimburse for expenses; (6) failure to issue accurate and complete wage statements; and (7) untimely payment of wages during and at the end of employment. DS, ¶ 6, Ex. 3. On March 29, 2021, Defendants filed an answer to Plaintiff Lopez's Complaint. DS, ¶ 6, Ex. 4.

On April 28, 2021, Plaintiff Ford, on behalf of herself and all others similarly situated, filed the instant putative wage and hour class action against Defendants. Plaintiff Ford alleges that Defendants: (1) failed to pay minimum and straight time wages; (2) failed to pay overtime wages; (3) failed to provide meal periods; (4) failed to authorize and permit rest periods; (5) failed to timely pay final wages at termination; (6) failed to provide accurate itemized wage statements; (7) failed to indemnify employees for expenditures; and (8) engaged in unfair business practices.

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Marquez Decl., ¶ 3. Defendants filed an answer on June 1, 2021. *Id*.

On April 30, 2021, Plaintiff Ford notified Defendants and the California Labor & Workforce Development Agency of her intent to pursue a PAGA case against Defendants. Marquez Decl., ¶ 4.

On May 9, 2022, Plaintiff Ford filed a First Amended Class Action Complaint, which added Plaintiff Lopez as an additional Plaintiff/class representative, included a claim for civil penalties under PAGA, and added counsel for Plaintiff Lopez to the Class Action Complaint. Marquez Decl., ¶ 5.

Defendants deny all of Plaintiffs' allegations and strongly contend that their wage and hour policies, practices and procedures were and are fully compliant with all applicable laws. DS, ¶ 6.

B. <u>Mediation</u>

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 Plaintiffs' entire personnel files (including policies and agreements they 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, ¶ 7; *see also* Marquez Decl., ¶¶ 8-9.

On February 4, 2022, following the foregoing informal discovery and exchange of information, the Parties participated in a mediation session presided over by Mediator Francis J. "Tripper" Ortman, an experienced class action mediator. During the mediation, the Parties had a full day of productive negotiations and reached agreement on a class-wide settlement during the mediation session. During the mediation session, each side, represented by 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 this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 8; *see also* Marquez Decl., ¶¶ 10-11.

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III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the Class as all persons hourly paid or non-exempt employees in California of Defendants Boavida Communities, LLC and The Boavida Group, LP (together "Defendants") in California at any time between July 1, 2019 through the date of Preliminary Approval of the Settlement by the court or 90 days from the date of the full execution of the Settlement Agreement (August 1, 2022), whichever is earlier. Settlement, §§ I(C) and (Q).

B. Monetary Terms

As consideration for this Agreement, Defendants will make a settlement payment that totals the Maximum Settlement Amount of $275,000.00. The payment of the Maximum Settlement Amount represents full and complete settlement of this matter. The Maximum Settlement Amount includes all attorneys' fees and costs, administration costs, enhancement awards to the class and PAGA representatives, and payment to the California Labor and Workforce Development Agency ("LWDA") for PAGA penalties. The balance after deduction of attorneys' fees and costs, administration costs, payment to the LWDA, and the enhancement awards, will be the Net Settlement Fund. Defendants' employer taxes shall be paid separately and in addition to the Maximum Settlement Amount. The Maximum Settlement Amount will be allocated as follows:

a. Third-Party Settlement Administration Costs of up to $9,000.00.

b. Plaintiffs' Counsel's request for attorneys' fees of up to one-third (1/3) of the Maximum Settlement Amount, or $91,666.67 ("Attorneys' Fees"), subject to Court approval, plus actual costs and expenses incurred by Class Counsel up to $35,000.00 ("Litigation Costs").

c. A payment to each Plaintiff in the amount of $15,000.00 each for their participation in and assistance with the Litigation ("Enhancement Payments").

d. The Parties agree to allocate $4,000.00 as penalties authorized by the PAGA ("PAGA Penalties"). Seventy-five percent (75%), which is $3,000.00 of the PAGA Penalties will be distributed to the Labor and Workforce Development Agency ("LWDA Payment") and twenty-five 25%, which is $1,000.00, of the PAGA Penalties will be distributed on pro-rata basis

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to the Settlement Class Members who worked during the PAGA period ("PAGA Payment to PAGA Group Members"). Within ten (10) calendar days following the payment funding the Settlement, the Settlement Administrator shall disburse the LWDA Payment to the LWDA, and Plaintiffs' Counsel will provide notice to the LWDA of the fact that the Settlement has been approved by the Court along with a copy of the Final Approval Order through the appropriate LWDA/DIR website.

The remaining funds (Settlement Amount minus any Court-approved award of Attorneys' Fees to Class Counsel, Litigation Costs to Class Counsel, Administration Costs to the Settlement Administrator, Enhancement Payments to Plaintiffs, and LWDA Payment to the Labor and Workforce Development Agency ("LWDA")) shall be referred to as the "Net Settlement Fund." Settlement, §§ VIII.A, IX, XIV, and XV.

C. <u>Timing of Payments</u>

Within twenty-one (21) calendar days following the Effective Date, Defendants will deposit the Settlement Payment equal to the Maximum Settlement Amount into an interest-bearing account established by the Settlement Administrator. At no time prior to the Effective Date shall Defendants be required to escrow any portion of the Settlement Amount.

The Settlement Administrator shall cause the Settlement Amount (inclusive of the Net Settlement Fund, the Court-approved Attorney's Fees and Litigation Costs to Class Counsel, Court-approved Enhancement Payments to Plaintiffs, Court-approved Administration Costs to the Settlement Administrator, the LWDA Payment, and the PAGA Payment to PAGA Group Members) to be distributed within ten (10) calendar days following the payment as detailed in Section VIII(B) of the Agreement.

If an Individual Settlement Payment check is returned to the Settlement Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a valid mailing address by performing a skip trace search and, if another address is identified, shall mail the check to the newly identified address.

Any checks issued by the Settlement Administrator to Settlement Class Members and

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PAGA Group Members will be negotiable for at least one hundred eighty (180) calendar days. If a Settlement Class Member or PAGA Group Member does not cash his or her settlement check within 180 days, the uncashed funds, subject to Court approval, shall be provided to the California Unclaimed Property Fund, pursuant to California Civil Procedure Code § 384. The Individual Settlement Payment provided to Settlement Class Members and PAGA Group Members shall prominently state the expiration date or contain a statement that the settlement check will expire in one hundred eighty (180) days, or alternatively, such a statement may be made in a letter accompanying the Individual Settlement Payment. Expired Individual Settlement Payments will not be reissued, except for good cause and as mutually agreed by the Parties in writing.

The Parties each represent that they do not have any financial interest in the California Unclaimed Property Fund or otherwise have a relationship with the California Unclaimed Property Fund that could create a conflict of interest. Settlement, §XII.

D. <u>Calculation of Settlement Shares</u>

Settlement Class Members (i.e., Class Members who do not opt out of the Settlement) will receive a lump sum payment as good and valuable consideration for the waiver and release of Released Claims set forth in Section VII(A), above, in an amount determined by the Settlement Administrator in accordance with the provisions of this Agreement.

Each Settlement Class Member's Individual Settlement Payment will be determined as follows:

1. Defendants will calculate the total number of Workweeks of each Settlement Class Member during the Settlement Period.

2. The value of each Workweek shall be determined by the Settlement Administrator by dividing the Net Settlement Fund by the total number of Workweeks of all Settlement Class Members ("Workweek Point Value").

3. Each Settlement Class Member's Workweeks will be multiplied by the Workweek Point Value to derive his or her Individual Settlement Payment. Individual Settlement

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Payments for each Settlement Class Member will be reduced by any required legal deductions for the employee's share of taxes and withholdings on the wages portion of the Individual Settlement Payments. Settlement, §XI.

E. Apportionment of Settlement Shares

For withholding tax characterization purposes and payment of taxes, the Individual Settlement Payments to Settlement Class Members shall be deemed twenty percent (20%) wages and eighty percent (80%) penalties and interest. Settlement, §XVI.

F. The Releases

Upon the date on which the Court's Final Approval Order becomes "Final" (as that term is defined in Section I(F) above), Plaintiffs and all Settlement Class Members waive, release, discharge Defendants, and their divisions, affiliates, predecessors, successors, shareholders, officers, directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns, subrogees, executors, partners, parents, subsidiaries, joint employers, insurers, clients, customers, suppliers, vendors, and related corporations ("Released Parties") of any and all wage-related claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation arising during the Settlement Period, including the following claims, under any legal theory of liability, for: (1) alleged failure to pay for all hours worked pursuant to California Labor Code sections 200, 226, 1197, and 1198 and the IWC Wage Orders; (2) alleged failure to provide meal periods pursuant to California Labor Code sections 200, 226.7 and 512 and the IWC Wage Orders; (3) alleged failure to provide rest periods pursuant to California Labor Code sections 200, 226.7, and 512 and the IWC Wage Orders; (4) alleged failure to furnish accurate itemized wages statements pursuant to California Labor Code section 226 and the IWC Wage Orders; (5) alleged failure to pay all wages owed at termination pursuant to California Labor Code sections 201-203 and the IWC Wage Orders; (6) alleged failure to pay all wages in a timely manner during employment pursuant to California Labor Code section 204 and the IWC Wage Orders; (7) alleged failure to maintain adequate payroll records pursuant to California Labor Code section 1174 and IWC Wage Orders; (8)

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alleged failure to reimburse all necessary business expenses pursuant to California Labor Code sections 2802 and 2804 and the IWC Wage Orders; (9) alleged violations of California Business & Professions Code sections 17200, *et seq*.; and (10) alleged violations of California Labor Code section 2698-2699, *et seq*. ("Released Claims").

In addition to the release made in Section VII (A), Plaintiffs make the additional following general release of all claims, known or unknown. Plaintiffs release the Released Parties from all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever, known or unknown, asserted or that might have been asserted, whether in tort, contract, or for violation of any state or federal statute, rule or regulation arising out of, relating to, or in connection with Plaintiffs' relationship with Defendants as well as any and all acts or omissions by or on the part of Defendants. (The release set forth in Paragraph B of the Agreement shall be referred to hereinafter as the "General Release.")

With respect to the General Release, Plaintiffs stipulate and agree that, upon the date on which the Court's Final Approval Order becomes "Final", Plaintiffs shall be deemed to have expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT 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.

This release specifically excludes claims for unemployment insurance, disability, social security, and workers compensation (with the exception of claims arising pursuant to California Labor Code Sections 132(a) and 4553). Accordingly, if the facts relating in any manner to this Settlement are found hereafter to be other than or different from the facts now believed to be true,

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the release of claims contained herein shall be effective as to all unknown claims. Settlement, §VII.

G. Notice and Claims Process and Procedures

As soon as practicable following preliminary approval of the Settlement, but no later than fourteen (14) calendar days after the Court enters the Order granting preliminary approval of the Settlement, Defendants will provide to the Settlement Administrator the following information for each Class Member: (1) full name; (2) last known home address; (3) last known telephone number; (4) dates of employment with Defendants as an hourly-paid or non-exempt employee, as well as hours worked and total workweeks for each class member; (5) total Workweeks during the Class Period; (6) total Workweeks during the PAGA Period; (7) Social Security number; and (8) last known email address. Defendants further agree to consult with the Settlement Administrator prior to the production date to ensure that the format will be acceptable to the Settlement Administrator. Plaintiffs' Counsel shall also receive a redacted Class List that shall only disclose an identification number attributed to each Class Member and their dates of employment, hours worked, and associated workweeks.

The Settlement Administrator shall run all the addresses provided through the United States Postal Service NCOA database (which provides updated addresses for any individual who has moved in the previous four years who has notified the U.S. Postal Service of a forwarding address) to obtain current address information, and shall mail the Notice to the Class Members via first-class U.S. Mail using the most current mailing address information available, within ten (10) calendar days of the receipt of the Class List from Defendants.

The Notice will include information regarding the nature of the Litigation; a summary of the terms of the Settlement; the definition of the Class; a statement that the Court has preliminarily approved the Settlement; the nature and scope of the claims being released; the procedure and time period for objecting to the Settlement, the date and location of the Final Approval Hearing; information regarding the opt-out procedure; the number of Workweeks credited to each Class Member, and the estimated Individual Settlement Payment for the Class Member.

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If a Notice is returned as undeliverable after the initial mailing, the Settlement Administrator will perform a skip trace in an attempt to locate a more current address. If the Settlement Administrator is successful in locating an updated address, it will re-mail the Notice to the Class Member. Further, any Notices returned with a forwarding address to the Settlement Administrator before the Response Deadline (as defined in Section X.B. of the Agreement), shall be re-mailed to the forwarding address affixed thereto. With respect to any Notice that is re-mailed, the Response Deadline for the Class Member whose Notice is re-mailed will be extended an additional fifteen (15) calendar days.

No later than twenty-five (25) days before the Final Approval Hearing, the Settlement Administrator shall provide counsel for Defendants and Class Counsel with a declaration attesting to the completion of the settlement notice administration process, including the number of attempts to obtain valid mailing addresses for and re-sending of any returned Notices, as well as the number of Workweeks Disputes, Requests for Exclusion, and objections received. Settlement, §X.A.

1. Class Member Disputes

If a Class Member disputes his or her number of Workweeks set forth in the Notice, such Class Member must submit a written Workweeks dispute ("Workweeks Dispute") that: (a) contains the case name and number of the Litigation; (b) contains the Class Member's full name, address, telephone number, signature, and last four digits of his or her Social Security number; (c) contains a statement setting forth the number of Workweeks that such Class Member believes is correct and attaches any relevant documentation in support thereof; and (d) is submitted to the Settlement Administrator by mail, postmarked no later than the Response Deadline. If a Class Member does not dispute his or her number of Workweeks, the number of Workweeks set forth in the Notice will govern the Individual Settlement Payment to the Class Member and such Class Member need not take further action to participate in the Settlement.

Upon timely receipt of any such challenge, the Settlement Administrator, in consultation with Class Counsel and counsel for Defendants, will review the pertinent records showing the

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dates the Class Member worked for Defendants in California and the number of weeks worked, which records Defendants agree to make available to the Settlement Administrator and Class Counsel.

After consulting with Class Counsel and counsel for Defendants, the Settlement Administrator shall compute the number of Workweeks to be used in computing the Class Member's pro rata share of the Net Settlement Fund. In the event that there is a disparity between the number of Workweeks a Class Member claims he or she worked during the Settlement Period and the number of Workweeks indicated by Defendants' records, Defendants' records will control unless inconsistent with records provided by the Class Member (or bona fide copies thereof), in which case the records provided by the Class Member will control. The Settlement Administrator's decision as to the total number of Workweeks shall be final and non-appealable. The Settlement Administrator shall send written notice of the decision on any such dispute to the Class Member, to Class Counsel, and counsel for Defendants within ten (10) calendar days of receipt of the Workweeks Dispute.

Should any Class Member timely submit a timely Workweeks Dispute with a deficiency, the Settlement Administrator shall, within five (5) calendar days of receipt, send a deficiency notice. The deficiency notice will provide the Class Member the later of the Response Deadline or fourteen (14) calendar days from the mailing of the deficiency notice to postmark a written response to cure all deficiencies. The failure of a Class Member to timely respond to a notice of deficiency shall invalidate the dispute unless all Parties' counsel agree to allow the dispute. Settlement, §XI.

2. <u>Opting Out</u>

In order for any Class Member to validly exclude themselves from the Settlement (i.e., to validly opt out), a written request for exclusion from the Settlement ("Request to be Excluded") must: (1) contain the case name and number of the Litigation; (2) contain the Class Member's full name, address, telephone number, and last four digits of his or her Social Security number; (3) be signed by the Class Member or his or her authorized representative; (4) contain a clear

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statement that the Class Member requests to be excluded from the Settlement; and (5) be sent to the Settlement Administrator, postmarked by no later than the Response Deadline. The Notice shall contain instructions on how to opt out.

The date of the initial mailing of the Notice, and the date the signed Request to be Excluded was postmarked, shall be conclusively determined according to the records of the Settlement Administrator. Any Class Member who timely and validly submits a Request to be Excluded will not be entitled to an Individual Settlement Payment, will not be bound by the terms and conditions of the Settlement, and will not have any right to object, appeal, or comment thereon.

Any Class Member who does not timely submit a Request to be Excluded to the Settlement Administrator will be deemed included in the Settlement in accordance with this Settlement. All PAGA Group Members, the LWDA, and State of California shall release claims arising under PAGA for the PAGA Period. All PAGA Group Members shall release claims arising under PAGA regardless of their decision to participate in the class settlement.

In the event that five percent (5%) or more of the Class Members exercise their right to exclude themselves and opt out of the Settlement, Defendants retain the exclusive right, but not the obligation, to withdraw from and terminate the Settlement and return all parties back to their same position before the Settlement was reached and the Settlement Agreement was entered into. In the event that Defendants exercise such rights under this paragraph, Plaintiffs and Defendants shall resume the Litigation through and until there is a final resolution of the Litigation. Defendants must notify Class Counsel and the Court in writing of such a decision to withdraw and terminate the Settlement no later than five (5) days prior to the date of the Final Approval Hearing. In the event of Defendants' withdrawal, no party may use the fact that the Parties agreed to the Settlement for any reason, and Defendants shall pay all administration expenses incurred through the date of its termination of the Settlement. Settlement, §X.C.

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3. **Objecting**

Any Class Member making an objection must not submit a Request to be Excluded (i.e., must not opt out). To object to the Settlement, a Settlement Class Member may send a written objection to the Settlement Administrator or appear at the Final Approval Hearing with or without submitting a written objection to the Settlement. The Settlement Class Member may appear personally or through an attorney, at his or her own expense, at the Final Approval Hearing to present his or her objection directly to the Court. However, any attorney who will represent an individual objecting to this Settlement must file a notice of appearance with the Court and serve Class Counsel and Defendants' Counsel no later than sixty (60) calendar days after the Notice was initially mailed to the Class Members ("Response Deadline"). A written objection to the Settlement must: (1) contain the case name and number of the Litigation; (2) contain the Settlement Class Member's name, address, telephone number, signature, and last four digits of his or her Social Security number; (3) clearly state the grounds for the objection; (4) state whether the Settlement Class Member intends to appear at the Final Approval Hearing; and (5) be mailed to the Settlement Administrator, postmarked no later than the Response Deadline. If a Class Member objects to the Settlement, the Class Member will remain a Settlement Class Member and if the Court approves this Agreement, the Settlement Class Member will be bound by the terms of the Settlement and Final Approval Order in the same way and to the same extent as a Settlement Class Member who does not object to the Settlement. The date of mailing of the Notice to the objecting Settlement Class Member shall be conclusively determined according to the records of the Settlement Administrator. The Court retains final authority with respect to the consideration and admissibility of any objections to the Settlement from Settlement Class Members. Settlement, §X.B.

H. **Uncashed Checks**

Any checks issued by the Settlement Administrator to Settlement Class Members and PAGA Group Members will be negotiable for at least one hundred eighty (180) calendar days. If a Settlement Class Member or PAGA Group Member does not cash his or her settlement check

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within 180 days, the uncashed funds, subject to Court approval, shall be provided to the California Unclaimed Property Fund, pursuant to California Civil Procedure Code § 384. The Individual Settlement Payment provided to Settlement Class Members and PAGA Group Members shall prominently state the expiration date or contain a statement that the settlement check will expire in one hundred eighty (180) days, or alternatively, such a statement may be made in a letter accompanying the Individual Settlement Payment. Expired Individual Settlement Payments will not be reissued, except for good cause and as mutually agreed by the Parties in writing. Settlement, §XII.C.

IV. <u>CERTIFICATION OF THE CLASS IS APPROPRIATE</u>

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

A. <u>The Settlement Class Is Objectively Ascertainable</u>

A class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiffs maintain that the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the settlement process. DS, ¶ 9; Settlement, § X(A). Therefore, the Settlement Class is ascertainable for settlement purposes.

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B. <u>The Membership of the Settlement Class Is Sufficiently Numerous</u>

The Settlement Class has sufficiently numerous members to render joinder impractical for settlement purposes. No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 198 Class Members. DS, ¶ 10. Plaintiffs maintain that it would be impractical and economically inefficient to require each Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. The California Supreme Court has upheld a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations, the Settlement Class's membership is sufficiently numerous for settlement purposes. DS, ¶ 10. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

C. <u>Class Members Share a Well-Defined Community of Interest</u>

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. Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and 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).

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

In this case, Plaintiffs assert all class members were subject to the same or similar operations and employment policies, practices, and procedures. The claims arise from

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Defendants' alleged policy-driven failure to pay wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, and related labor law violations, all of which Plaintiffs claim constitute unfair business practices and give rise to PAGA penalties. Plaintiffs assert that common questions include, but are not limited to: (1) whether Defendants failed to pay all wages earned to class members for all hours worked at the correct rates of pay; (2) whether Defendants failed to provide the class with all meal and rest periods in compliance with California law; (3) whether Defendants failed to pay the class one additional hour of pay on workdays they failed to provide the class with one or more meal or rest periods in compliance with California law; (4) whether Defendants failed to indemnify the class for all necessary business expenditures incurred during the discharge of their duties; (5) whether Defendants knowingly and intentionally failed to provide the class with accurate wage statements; (6) whether Defendants willfully failed to provide the class with timely final wages; and (7) whether Defendants engaged in unfair competition within the meaning of Business and Professions Code section 17200, *et seq*., with respect to the class. DS, ¶ 11. Therefore, common questions predominate for settlement purposes.

D. <u>Plaintiffs are Typical of the Settlement Class</u>

The class representative must be similarly situated to the rest of the purported class. *See Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating "it has never been the law in California that the class representative must have identical interests with the class members. The only requirements are .. that the class representative be *similarly* situated") (emphasis in original); *See also Newberg*, § 3:29 (typicality "focuses on whether there exists a relationship between the Plaintiffs' claims and the claims alleged on behalf of the class"). Plaintiffs contend that their claims are typical for the purposes of certifying the Settlement Class. Plaintiffs assert that they, like absent Class Members, were subject to the same relevant policies and procedures governing their compensation, hours of work and meal and rest periods. Because Plaintiffs contend that they were subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to Plaintiffs will determine Defendants' *prima facie* liability to

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all Class Members. Moreover, Plaintiffs' claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiffs' claims are typical of the Class for settlement purposes. DS, ¶ 12.

E. <u>Plaintiffs Will Adequately Represent the Settlement Class</u>

The adequacy requirement is met where the Plaintiffs are represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class's interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 13.

First, Class Counsel have supplied the Court with declarations to show that they are adequate to represent the Settlement Class and that they have significant experience in employment litigation generally, and wage and hour and employment-related class action litigation specifically. *See* DS, ¶¶ 14-22; Marquez Decl., ¶¶ 30-39. Thus, Plaintiffs' Counsel are adequate to serve as Class Counsel.

Second, Plaintiffs contend that they are adequate class representatives. Plaintiffs and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiffs and the Class Members. DS, ¶ 14. Moreover, Plaintiffs have demonstrated their commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing themselves to the risk of attorneys' fees and costs awards against them if this lawsuit had been unsuccessful. DS, ¶ 14. Thus, Plaintiffs are adequate to serve as settlement class representatives. Accordingly, this Court should find that Plaintiffs and their counsel are adequate to represent the Settlement Class as required under Code of Civil Procedure § 382.

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

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

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

A. Legal Standard

A class action settlement requires court approval. California Rules of Court ("CRC"), 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 hearing where class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented. The decision to approve or reject a class settlement is committed to the Court's broad discretion. *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 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage

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of objectors is small." *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th at 1794.

The class settlement here satisfies all of these factors. DS, ¶ 24. The Settlement resulted from thorough, arms' length negotiations between experienced counsel with the assistance of a respected mediator after sufficient discovery was exchanged to assess the relative strengths and weaknesses of their respective cases and Defendants' estimated exposure. *Id*.

At issue in this class and PAGA action is Defendants' liability to their hourly, non-exempt employees for their alleged failure to pay employees all earned wages, to provide meal periods, to authorize and permit rest periods, to indemnify for business expenses, to issue proper wage statements, to timely pay wages, and related alleged violations of the Labor Code and the applicable Wage Order. DS, ¶ 25. Plaintiffs prepared "damages" estimates in advance of the mediation. DS, ¶ 25, Ex. 5. In advance of the mediation, Plaintiffs determined Defendants' maximum exposure for restitution and penalties to be approximately $2,172,484.00 (consisting of $345,204.00 in unpaid wages, $448,430.00 in missed meal period premium wages, $635,655.00 in missed rest break premium wages, $304,000.00 for wage statement penalties, $379,265.00 for waiting time penalties, and $427,800.00 for civil penalties). Plaintiffs calculated the damages based on the number of workweeks and pay periods provided by 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. Defendants also represented that they had interviewed all of Defendants' current employees regarding Plaintiffs' claims, all of whom would provide declarations, under penalty of perjury, that were favorable to Defendants with respect to the relevant factual issues at issue in Plaintiffs' action. 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

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majority of the Class Members. A settlement for approximately 12.6% of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned by existing case law.[2] *Id*.

Plaintiffs' initial estimates do not realistically account for the risks outlined below or the risk that a class will not be certified. *Id*. Therefore, Plaintiffs believe a class settlement for $275,000.00 is fair and reasonable. *Id.*

C. <u>The Settlement Satisfies the *Kullar* Factors for Approval</u>

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

1. <u>Evaluation of Plaintiffs' Case</u>

a. <u>Risks Associated With the Arbitration Agreements</u>

The arbitration agreements entered into between Defendants on the one hand, and the Class Members, on the other, present a significant risk to the success of Plaintiffs' class action litigation. DS ¶ 27. According to Defendants, the majority of the Class entered into arbitration agreements with Defendants. *Id*. As the arbitration agreements in question restrict potential litigants from bringing class actions against Defendants, Plaintiffs would be effectively barred

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[2] *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.").

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from pursuing claims on behalf of the Class in Court. *Id*. Thus, there is a significant risk the Court could determine that those Class Members who have not entered into arbitration agreements with Defendants do not constitute a sufficiently numerous class to justify class action treatment. As such, by continuing to trial on class-wide claims, Plaintiffs would run the high risk of suffering defeat due to the existence of the arbitration agreements. Moreover, the arbitration agreements would pose a danger to any class certification motion brought by Plaintiffs. Because different defenses would apply to some Class Members and not others – i.e., the existence of signed arbitration agreements – there is a risk that the Court could determine that Plaintiffs' claims present too many individualized inquiries to justify class certification. *Id*.

b. <u>Risks Associated with the Unpaid Wages Claim</u>

There is a risk that Plaintiffs' 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, ¶ 28. 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. 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 was minute and insignificant. Accordingly, a large award of penalties seems unlikely with respect to this claim. *Id.*

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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. Generally, a court will not certify a class unless it can determine an appropriate class-wide methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiffs 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 risk that the Court would consider this evidentiary showing insufficient as a class-wide methodology. DS, ¶ 29.

c. <u>Risks Associated with the Meal Period Claim</u>

There are risks to Plaintiffs' meal period claim as well. DS, ¶ 30. Defendants contend that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, 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.*

Defendants contend they did not impede or discourage Plaintiffs, or any other employees, from taking their meal or rest periods. DS, ¶ 31. Defendants' policies mandate that employees take at least a 30-minute, uninterrupted meal period and record the beginning and ending time of their meal breaks each day on their time records. *Id*. The time records that comprise the random sample Defendants produced to Plaintiffs for purposes of mediation show that meal periods were taken the vast majority of the time. *Id*. Of the time records that show a late, short or missed meal break, individualized evidence may be necessary to determine whether they occurred due to

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

d. <u>Risks Associated with the Rest Break Claim</u>

There are risks to Plaintiffs' rest period claim. DS, ¶ 32. 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.* Plaintiffs 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.

e. <u>Risks Associated with the Failure to Indemnify Claim</u>

There is a risk that the Court may consider Plaintiffs' claims as to Defendants' alleged failure to indemnify for business expenses to be individual in nature and thus decline to certify the class. DS, ¶ 33. Plaintiffs allege that Defendants required Plaintiffs and the Class Members to use their personal items including cellular phones, computers and other electronic devices, vehicles, and tools, and failed to indemnify them for these business expenses. *Id*. Defendants presented evidence that they have supplied their employees with tools, equipment, and other supplies and had an expense reimbursement policy. As such, there is a risk that the Court may consider Plaintiffs' claims to be individual in nature and unfit for class-wide resolution. *Id.*

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f. Risks Associated with the Statutory "Wage Statement" Penalty Claim

Plaintiffs also assert a claim 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, ¶ 34.

Here, Plaintiffs' wage statement claim has the same underlying risks as the above claims, as it is derivative of them. *Id*. On their face, the wage statements issued by Defendants comply with the requirements of Labor Code § 226. Further, to the extent that Plaintiffs claim Defendants' wage statements were inaccurate because they did not include wages or premium payments that they contend Defendants should have paid, Plaintiffs' claims were subject to additional risk at the time the Parties negotiated this Settlement, as case law suggested that such premium payments were not to be considered wages, and therefore do not give rise to claims under section 203. *Id*. *See Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties based on meal period claims because "the underlying violation that gives rise to a section 226.7 [meal period] claim is not the nonpayment of wages"); *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not even cover meal period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely foreclose this claim.[3] DS, ¶ 34.

g. Risks Associated with The Waiting Time Penalties Claim

Plaintiffs' claims for untimely wages are predicated on Labor Code §§ 201, 202, and 203. Defendants can argue based on the *Jones* and *Nguyen* decisions, *supra*, that meal or rest premium pay is not a "wage" for purposes of Labor Code section 203 penalties. Further, in the recent decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App. 5th 1239, the Court of Appeal held that unlawful meal and rest periods under section 226.7 cannot serve as a basis for recovery

[3] Moreover, the Court of Appeal's decision in *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, holding that a defendant's failure to pay meal premiums does not give rise to violations of Labor Code sections 226 or 203, was pending before the California Supreme Court when the Parties reached a settlement.

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of penalties under section 203. *Id.* at 1252 ("We conclude that the administrative and legislative history of the statute indicates that . . . the Legislature intended section 226.7 first and foremost to *compensate* employees . . . .Section 226.7's additional hour of pay is a premium wage . . .not a penalty.")(internal citations and quotation marks omitted). Under the *Loews* decision, it is highly unlikely that the Court will permit untimely wage penalties for Defendants' alleged failure to provide meal and rest period penalties. DS, ¶ 35.

h. Risks Associated With the PAGA Claim

Regarding PAGA, a court has discretion to award a lesser amount than the maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed valid defenses to the Labor Code claims underlying Plaintiffs' PAGA allegations. Thus, the PAGA claims likewise face significant uncertainty. DS, ¶ 36. There is a risk that the Court would consider the maximum civil penalty available to be confiscatory. This is particularly the case considering Defendants' financial condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

This uncertainty increases Plaintiffs' risk of pursuing the PAGA claims and required a significant discount for settlement purposes. DS, ¶ 37. For mediation purposes, Plaintiffs' Counsel estimated a maximum exposure of approximately $427,800.00 in civil penalties. This estimate did not take into account any of the risks discussed above and assumed a violation for every single pay period. *Id.* Plaintiffs' Counsel also assessed multiple penalties for the same pay period for the same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in controversy for purposes of removal jurisdiction, Plaintiffs' Counsel are not aware of any California state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many employers

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characterize as claim splitting and not merely stacking. *Id.*

Plaintiffs are aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts.[4] DS, ¶ 38. PAGA penalty awards are often small even for egregious, intentional violations of the Labor Code.[5] *Id*. For instance, on October 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by very experienced counsel, civil penalties totaling only $50.00. *Shields v. Security Paving Company*, Inc., LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp*. (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a PAGA penalty of only $5 per pay period for the defendant's meal period violations. A similar result could occur here. *Id*.

Also, the United States Supreme Court announced on December 15, 2021 that it was going to hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide whether or not to overrule the California Supreme Court's decision in *Iskanian v. CLS Transportation* (2014)

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[4] In *Bernstein v. Virgin Am., Inc*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under the PAGA of approximately $25 million, representing a 25% reduction from plaintiff's claim for approximately $33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant's policies caused damages to the plaintiffs in excess of $45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court noted had received "millions of dollars from the state of California" to train their flight attendants, engaged in glaring violations of the Labor Code, such as failing to compensate its flight attendants for work performed outside of "block time" (time during which 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.

[5] In 2012, Plaintiff Lopez' 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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59 Cal.4th 348 that a private arbitration agreement cannot deprive an employee of his right to sue under PAGA in a court of law. At the time the Parties negotiated this Settlement, there was a risk that the Supreme Court could decide that Plaintiffs' PAGA claim is subject to an arbitration agreement allowing only bilateral arbitration and, consequently, inhibiting the claim altogether. DS, ¶ 39.

i. <u>Risks Associated With A Pick Up Stix Campaign</u>

An employer enjoys the right to settle a putative class member's disputed wage claims individually, without the consent or involvement of class counsel. DS, ¶ 40 (See *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. As discussed above, Defendants may launch a "pick off" settlement campaign to pursue individual release agreements from the Class Members, thereby potentially narrowing the size of the Settlement Class – 69 members - until it is no longer numerous enough for class certification. *Id.* Plaintiffs, then, may not have sufficient number of employees to represent. This led to a significant reduction of claim value in settlement negotiations. *Id.*

While the evidence gathered through Plaintiffs' discovery supports the merits of the claims asserted in this lawsuit, Plaintiffs and their counsel recognize that continued litigation presents significant risks that support a downward departure from Defendants' estimated liability exposure. DS, ¶ 41. In view of the risks, the Settlement reflects Plaintiffs' estimate of the total amount of damages, monetary penalties or other relief that the Class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.* It also represents a fair, adequate, and reasonable compromise amount for these claims and warrants preliminary approval. *Id.*, *Torrisi 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 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the reasonableness of the settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014L 2465049, * 3.

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2. <u>Allocation of the PAGA Payment</u>

The settlement of PAGA penalties in the sum of $4,000.00, of which 75% ($3,000.00) will be paid to the LWDA and 25% ($1,000.00) will be distributed to the PAGA Members, is reasonable and appropriate under the circumstances. DS, ¶ 42. The Parties negotiated a good faith amount for PAGA penalties to be paid to the LWDA and to the PAGA Members. *Id.* The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," such amounts 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 the 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

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*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(l)(2), Plaintiffs will provide notice of this settlement to the LWDA. DS, ¶¶ 51-52, Exs. 9-10.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Notice of Class Action Settlement (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 48. 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.*

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

The Individual Settlement Payments will be paid to each Class Member based on his or her eligible Workweeks compared to the total Workweeks. DS, ¶ 47, Settlement § XII. 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.*

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

The Settlement states Class Counsel may seek attorneys' fees of $91,666.67 (one-third of the MSA) and up to $35,000.00 for actual reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement § XIV. These amounts are reasonable, given the facts and circumstances of the case. DS, ¶¶ 43-45.

Trial courts have "wide latitude" in assessing the value of attorneys' fees and their decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*

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v. Moses (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3) of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises* (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust 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 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value Class Counsel achieved for the class, and (6) the other cases Class Counsel turned down to devote time to this matter. DS, ¶ 44. Class Counsel interviewed and obtained information from putative class members, met and conferred with Defendants' counsel on numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided by 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, ¶ 45. 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.* Considering the amount of the attorneys' fees requested, the work performed, and the risks incurred, the requested fees and costs are reasonable and should be awarded. *Id.*

VIII. <u>THE ENHANCEMENT PAYMENTS TO PLAINTIFFS SHOULD BE PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE, AND REASONABLE</u>

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts

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than that sought here. *See, e.g.*, *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving $50,000 enhancement award). The Settlement provides that Plaintiffs may seek Enhancement Payments of $15,000.00 each. This amount is entirely reasonable given each Plaintiff's efforts in this action and the risks s/he undertook on behalf of Class Members. DS, ¶ 46. Plaintiffs have devoted many hours advancing the interests of the Settlement Class. Plaintiffs have done this by, among other things, retaining experienced counsel, providing them with information about their work history with Defendants and Defendants' policies and practices with respect to the wage and hour claims at issue, participating in mediation, and being actively involved in the settlement process to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiffs have been exposed to significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiffs undertook on behalf of the Settlement Class show that the proposed Enhancement Payments are fair, adequate, and reasonable, and thus warrant preliminary approval. DS, ¶ 46.

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

With regard to the settlement administration costs provision, it is reasonable. Before agreeing to Phoenix Class Action Administration Solutions and its bid of $9,000.00, the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶ 49-50, Exs. 6-8. Thus, the settlement administration costs provision should be given preliminary approval.

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

This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. The standard for determining the adequacy of notice is whether

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the notice has "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures to ensure that as many Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The Settlement requires distribution of the Notice by First Class U.S. mail only. Settlement, § X(A). Although there are current employee Class Members, it is uncertain whether Defendants' records of their contact information include email addresses and Class Members, who perform all of their work away from a desk, are not in a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable. DS, ¶ 48.

With respect to its content, "[The] notice given to the class must fairly apprise the class 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 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 Workweeks a Class Member worked 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, ¶ 4.

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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: July 7, 2022

By: ____________________

DAVID G. SPIVAK, Attorneys for Plaintiff(s), RENE LOPEZ, and all others similarly situated

WILSHIRE LAW FIRM, PLC

Dated: July 7, 2022

By: ____________________

JUSTIN F. MARQUEZ , Attorneys for Plaintiff(s), ALYSIA FORD, and all others similarly situated

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