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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ**

EDGAR GUTIERREZ, individually, and on
behalf of other members of the general
public similarly situated;

Plaintiff,

vs.

ZERO MOTORCYCLES INC., an unknown
business entity; and DOES 1 through 100,
inclusive,

Defendants.

ELECTRONICALLY FILED
Superior Court of California
County of Santa Cruz
1/24/2022 8:17 PM
Alex Calvo, Clerk
By: Richard Kersten Seago, Deputy



Case No. 19-CV-03725
Hon. Timothy Volkmann / Dept. 5

CLASS ACTION

**NOTICE OF MOTION AND
PLAINTIFF'S MOTION FOR
ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHROTIES IN SUPPORT**

[Declaration of Jennifer L. Connor,
Edwin Aiwarzian, Edgar Gutierrez,
and [Proposed[Order filed concurrently
herewith]

Preliminary Approval Hearing:
Hearing Date: April 19, 2022
Time: 8:30 a.m.
CrtRm. 5

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on April 19, 2022 at 8:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled Superior Court of California, County of Santa Cruz, located at 701 Ocean Street, Santa Cruz, California 95060 before the Honorable Timothy Volkmann, pursuant to Cal. Code of Civ. Pro. § 382 and Cal. Rule of Court 3.769(c), Plaintiff Edgar Gutierrez (“Plaintiff”) individually, and on behalf of all others similarly situated, will and hereby does move this Court for an entry of an Order granting preliminary approval of the Parties’ proposed settlement.

1. Preliminarily certifying the Class for purposes of settlement;
2. Preliminarily approving Plaintiff Edgar Gutierrez as Class Representative for purposes of settlement;
3. Preliminarily appointing Lawyers *for* Justice, PC and CounselOne, PC as Class Counsel for purposes of settlement;
4. Preliminarily approving the settlement as fair, adequate, and reasonable based upon the terms set forth in the Parties’ Class Action And PAGA Settlement Agreement And Stipulation (“Settlement Agreement”), including payment by Zero Motorcycles, Inc. (“Defendant” or “Zero Motorcycles”) of the non-reversionary Gross Settlement Amount totaling \$425,000.00 for a putative class of approximately 113 current and former hourly-paid or non-exempt employees who are or were employed by Defendant in California during the Class Period;
5. Preliminarily approving Class Counsel’s request for up to thirty-five percent of the Gross Settlement Amount as attorneys’ fees (i.e., up to \$148,750.00), plus reimbursement of actual litigation costs up to \$20,000;
6. Appointing Atticus Administration, LLC as the third-party Settlement Administrator for mailing notices and for settlement administration, and approving up to \$12,000 be deducted from the Gross Settlement Amount for the costs of settlement administration;
7. Approving the proposed Notice Class Action and PAGA Settlement (“Class Notice”), along with the Share Form (collectively, “Notice Packet”), and ordering they be distributed to Class Members; and

1 8. The scheduling of a hearing to consider whether the settlement should be finally
2 approved and award amounts for the Class Representative Enhancement Payment, Administrative
3 Costs, the Private Attorneys General Act payment to the California Labor and Workforce
4 Development Agency, as well as attorneys' fees and costs to Class Counsel.

5 This Motion is based upon the supporting Memorandum of Points and Authorities, the
6 Declaration of Jennifer L. Connor, Declaration of Edwin Aiwazian; Declaration of Edgar
7 Gutierrez, the long-form Settlement Agreement, along with the proposed Notice of Class Action
8 and PAGA Settlement, along with the Share Form, and the [Proposed] Order filed concurrently
9 herewith, along with such supplemental filings and exhibits as are required and described *infra*,
10 evidence and argument of counsel may be presented at the hearing, and such additional matters as
11 the Court may consider at the time of hearing. Finally, given the multiplicity of issues addressed
12 in this motion, Plaintiff respectfully believes there is good cause to exceed the 20-page limit set
13 forth in California Rule of Court 3.764(c)(2), and respectfully requests that the Court consider
14 Plaintiff's memorandum of points and authorities, which is 30-pages in length.

15
16
17 DATED: January 24, 2022

Respectfully submitted,

COUNSELONE, PC



By

Jennifer L. Connor
Anthony J. Orshansky
Attorneys for Plaintiff, putative Class
Members, and Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Edgar Gutierrez (“Plaintiff” or “Class Representative”), on behalf of himself and
4 on behalf of a putative state class of current and former hourly-paid or non-exempt employees,¹
5 seeks preliminary approval of the settlement agreement entered with defendant, Zero Motorcycles,
6 Inc. (“Defendant” or “Zero Motorcycles”). The contemplated Class Action And PAGA Settlement
7 Agreement And Stipulation (“Stipulation,” “Settlement,” or “Settlement Agreement”) between
8 Plaintiff and Defendant (collectively, the “Parties”), if approved, will resolve all claims of the
9 Plaintiff and participating Class Members in exchange for Defendant’s agreement to pay a gross
10 settlement amount of ***Four Hundred And Twenty-Five Thousand Dollars (\$425,000)*** into a ***non-***
11 ***reversionary*** common settlement fund that will be available for distribution to participating Class
12 Members. Based upon the information received from Defendant, there are approximately ***113***
13 Class Members who worked in hourly-paid or non-exempt positions for an aggregate of
14 approximately 9,221 workweeks in California during the Class Period.

15 This wage and hour class action alleges that Defendant Zero Motorcycles, Inc. failed to
16 pay employees all minimum and overtime wages for all hours worked; failed to provide timely
17 and compliant duty-free meal periods and pay premiums owed thereon; failed to provide timely
18 and compliant duty-free rest breaks and pay premiums owed thereon; failed to maintain and furnish
19 accurate itemized wage statements; failed to timely pay wages during employment and final wages
20 owed upon separation; and, based on the foregoing allegations, engaged in unfair business
21 practices under California’s Business & Professions Code § 17200 and violated the Private
22 Attorneys General Act (“PAGA”). Plaintiff’s lawsuit seeks to recover unpaid wages and overtime
23 compensation, wages and premiums for improper meal and rest breaks, reimbursement of business
24 expenses, restitution, damages, liquidated damages, statutory penalties, civil penalties, injunctive
25 and other equitable relief, prejudgment interest, and attorneys’ fees and costs.

26 After engaging in substantial informal exchange of information, records, and investigation
27

28 ¹ “Class” or “Class Members” is defined as: All current and former hourly-paid or non-exempt employees who worked for Defendant Zero Motorcycles, Inc. within the State of California at any time during the Class Period. Further, the “Class Period” is defined as the time period between December 16, 2015 and ending on June 13, 2021.

1 and after a full-day mediation with Honorable Jeffrey A. Ross, Esq. of Employment Mediation, a
2 highly experienced mediator in wage and hour class actions, the Parties agreed to settle Plaintiff's
3 and the Settlement Class Members' claim alleged in the action for a *non-reversionary* sum of
4 ***Four Hundred And Twenty-Five Thousand Dollars (\$425,000)*** ("Gross Settlement Amount").
5 After deducting for Court-approved attorneys' fees and costs to Class Counsel, an enhancement
6 award payment to the Class Representative, Administrative Costs, and penalties recoverable
7 pursuant to PAGA, the remaining amount is the Net Settlement Amount ("Net Settlement
8 Amount") of which an estimated \$206,750 will be distributed to participating Class Members. The
9 entire Net Settlement Amount must be paid out as this is a non-reversionary settlement.

10 The Settlement is fair, reasonable, and adequate, and in the best interests of the Class
11 Members. Consequently, Plaintiff, with the consent of Defendant, hereby moves for an order: (1)
12 conditionally certifying the Class for settlement purposes; (2) granting preliminary approval of the
13 Settlement Agreement; (3) approving the Notice Of Class Action And PAGA Settlement ("Class
14 Notice"), along with the Share Form (collectively, "Notice Packet") to be sent to Class Members;
15 and (4) setting a hearing for final approval of the Settlement.

16 **II. STATUS OF THE LITIGATION**

17 This litigation arises out Plaintiff's allegations that Defendant Zero Motorcycles, Inc.
18 ignored numerous California wage and hour laws and protections applicable to him and other
19 similarly situated non-exempt hourly employees. Founded in 2006, Defendant Zero Motorcycles,
20 Inc. is an American manufacturer of electric motorcycles. Headquartered in Scotts Valley,
21 California, Zero Motorcycles makes a diverse array of 100% electric motorcycles, covering both
22 street and off-road riding, and distributes them through third-party authorized and exclusive
23 dealerships in California, the United States, and all over the world. Notwithstanding its
24 international reach, Defendant's employee workforce is almost exclusively located at its
25 warehouse located at 380 El Pueblo Road, Scotts Valley, California 95066. Plaintiff Edgar
26 Gutierrez worked for Zero Motorcycles from October 2014 to January 2018 as a material-
27 handler/crater at its Scotts Valley warehouse. Plaintiff Gutierrez was a non-exempt employee who
28 was paid hourly. Plaintiff alleges that Defendant exerted pressure on employees to complete

1 unreasonable workloads within scheduled hours thereby resulting in off-the-clock work and non-
2 compliant meal and rest breaks. *See, Declaration of Edgar Gutierrez* (“Gutierrez Decl.”) ¶ 3.

3 Specifically, Plaintiff alleges that he was subjected to uncompensated time arising from
4 non-compliant meal and rest breaks, along with hours worked off-the-clock. Plaintiff alleges that
5 he did not receive legally compliant meal periods, which were often missed, late, short, and/or
6 subject to work-related interruptions. Rest breaks were also alleged to be non-compliant as, in
7 practice, they depended on workload. Problematically, Defendant did not pay meal or rest period
8 premiums on the days that Plaintiff received such non-compliant meal and rest breaks. Plaintiff
9 further alleges that he was not properly paid for all minimum and overtime hours worked because
10 Defendant unfairly rounded employee work time in a manner that was to the detriment of
11 employees. In addition, Plaintiff also engaged in off-the-clock tasks and/or travel during pre-shift,
12 lunch, and post shift hours. Finally, Plaintiff alleges that he incurred certain business expenses
13 (*i.e.*, personal protective equipment, mileage, and cell phone use) that were not reimbursed. Such
14 alleged non-compliance also gives rise to derivative claims for inaccurate wage statements,
15 untimely wages upon separation, unfair business practices, along with assessments of statutory
16 and civil penalties, liquidated damages, and restitution. *See, (Gutierrez Decl. ¶¶ 4-5, 7.)*

17 a. **Procedural History**

18 On December 16, 2019, through his attorneys, Plaintiff filed his complaint in the Santa
19 Cruz County Superior Court, alleging: (1) failure to pay overtime pursuant to Labor Code §§ 510
20 and 1198; (2) failure to provide meal period premiums in violation of Labor Code §§ 226.7 and
21 512(a); (3) failure to provide rest period premiums in violation of Labor Code § 226.7; (4) failure
22 to pay minimum wages pursuant to Labor Code §§ 1194, 1197, and 1197.1; (5) failure to pay all
23 wages owed upon termination in violation of Labor Code §§ 201-203; (6) failure to timely pay
24 wages during employment in violation of Labor Code § 204; (7) failure to provide accurate and
25 itemized wage statements in violation of Labor Code § 226(a); (8) failure to keep requisite payroll
26 records in violation of Labor Code § 1174(d); (9) failure to reimburse business expenses in
27 violation of Labor Code §§ 2800 and 2802; and (10) violations of California Business and
28 Professions Code § 17200, *et seq.* *See, Declaration of Jennifer L. Connor* (“Connor Decl.”) ¶ 25

1 filed concurrently herewith.

2 On February 13, 2020, Defendant filed its Answer of a general denial and asserting twenty-
3 six (26) affirmative defenses. (Connor Decl. ¶ 27.) On April 26, 2020, Plaintiff submitted notice
4 to the California Labor & Workforce Development Agency (“LWDA”) seeking authority to pursue
5 penalties under the Private Attorneys General Act (“PAGA”) for violations of California law. The
6 LWDA has not provided notice of its intent to investigate the alleged violations within 65 calendar
7 days of the submission, thereby, entitling Plaintiff to commence a representative action under
8 PAGA. (Connor Decl. ¶ 28.) After obtaining leave of Court pursuant to the Parties’ stipulation,
9 on December 22, 2021, Plaintiff filed his First Amended Complaint (“FAC”) which added the
10 PAGA representative action claim allegations. On December 29, 2021, Defendant filed its Answer
11 to Plaintiff’s FAC with a general denial and asserting thirty-two (32) affirmative defenses. (Connor
12 Decl. ¶ 29.)

13 Defendant denies Plaintiff’s allegations of wrongdoing. Defendant does not believe that
14 any liability to Plaintiff or other Class Members exist, or that Plaintiff or Class Members are
15 entitled to any recovery. (Settlement Agreement ¶ B.8.) In settling, Defendant does not admit
16 liability with respect to the alleged claims made by Plaintiff and makes no admission regarding
17 any facts or law related to the lawsuit. (Connor Decl. ¶ 30.)

18 **b. Discovery And Investigation.**

19 Prior to initiating this Lawsuit, counsel for Plaintiff, Lawyers *for* Justice, P.C. and
20 CounselOne, P.C. (herein, “Class Counsel”), thoroughly investigated the claims and considered
21 the facts and circumstances underlying the pertinent issues and applicable law. *See*, (Connor Decl.
22 ¶ 24); (Declaration of Edwin Aiwazian (“Aiwazian Decl.”) ¶ 9 filed concurrently herewith). This
23 required thorough discussions and interviews with Plaintiff and other Class Members as well as
24 research into the various legal issues involved in the case. (Connor Decl. ¶ 24); (Aiwazian Decl.
25 ¶ 9.) After conducting their initial investigation, Class Counsel determined that the claims were
26 well suited for class action adjudication owing to what appeared to be a common course of
27 conduct affecting a similarly situated group of employees. (Connor Decl. ¶ 24); (Aiwazian Decl.
28 ¶ 9.)

1 In advance of mediation, Class Counsel conducted formal and informal discovery which
2 yielded information and substantial documentation concerning the claims alleged, such as,
3 Defendant's written policies concerning those claims, including, Defendant's employee
4 handbooks, policies and procedures regarding the payment of wages, the provision of meal and
5 rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and
6 providing all wages at separation. *See*, (Settlement Agreement ¶¶ B.4-5.) *See also*, (Connor Decl.
7 ¶ 31); (Aiwazian Decl. ¶¶ 10-12.) Defendant also provided composite data for the Class including:
8 total number of putative class members; mix of current versus former hourly-paid or non-exempt
9 employees; total number of pay periods; total number of workweeks; and the average hourly rate
10 in effect. (Connor Decl. ¶ 32); (Aiwazian Decl. ¶¶ 10-12.) Significantly, Defendant produced a
11 ***20% random sampling of time and wage records for putative class members, which consisted***
12 ***of approximately 7,797 shifts.*** (Connor Decl. ¶ 32.) Class Counsel analyzed the documents and
13 data produced to determine Defendant's degree of liability and potential amounts due in damages.
14 (Connor Decl. ¶ 33); (Aiwazian Decl. ¶¶ 10-12.)

15 c. **Mediation And Settlement**

16 Thereafter, the Parties participated in a full-day mediation, where they debated and
17 discussed their respective positions. (Connor Decl. ¶ 34.) The Parties' mediation session was
18 facilitated by Jeffrey A. Ross, Esq. of Employment Mediation. Mr. Ross is experienced in
19 mediating and arbitrating complex general litigation, labor and employment claims, class actions,
20 and PAGA cases, among others. (Ibid.) During the mediation, the Parties exchanged further
21 information and discussed all aspects of the case, including the risks and delays of litigation and
22 the risk to both Parties for proceeding with a motion for class certification and liability under the
23 claims asserted, along with the potential for PAGA penalties to be asserted. (Connor Decl. ¶ 35);
24 (Aiwazian Decl. ¶ 13.) These were contentious issues because of the factual and legal complexity
25 of the case. (Connor Decl. ¶ 35.) With the assistance of Mr. Ross, and pursuant to a mediator's
26 proposal, the Parties agreed to resolve the matter and reached the terms of this proposed arm's-
27 length Settlement. (Connor Decl. ¶ 35); (Settlement Agreement ¶ B.6.) The Parties subsequently
28 memorialized these terms in the long-form Settlement Agreement as set forth in the Class Action

1 And PAGA Settlement Agreement And Stipulation, dated December 17, 2021 (along with the
2 internal exhibit), attached at **Exhibit “1”** to Connor Decl. ¶ 36 filed concurrently herewith.

3 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks
4 and delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class
5 Counsel believe that the recovery being made available to Class Members is fair, reasonable, and
6 adequate taking into consideration the amounts received in other wage and hour class and
7 representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of
8 each Class Members’ claim to the settlement award he or she will receive. (Connor Decl. ¶ 38.)
9 Class Counsel believe that the Settlement serves the best interests of Class Members. (Ibid.)
10 Further, and based on the settlement negotiations, which were hard fought and conducted in good
11 faith and at arm’s length between attorneys with substantial experience litigating class actions,
12 representative actions, and wage and hour cases, the Settlement was the product of a non-collusive
13 settlement process in which the Parties were forced to make significant compromises in the
14 interest of reaching a full and complete settlement of the action. (Connor Decl. ¶ 37.) Accordingly,
15 the Parties have concluded that it is in their best interests to compromise, settle, and accept the
16 terms of the Settlement Agreement. (Settlement Agreement ¶ B.7.)

17 **III. SUMMARY OF THE SETTLEMENT TERMS**

18 Under the terms of the settlement, Defendant agrees to pay a non-reversionary amount of
19 Four Hundred Twenty-Five Thousand (\$425,000.00) to settle the claims asserted in the Lawsuit.
20 *See*, (Settlement Agreement ¶ C.4.) This amount shall be inclusive of all settlement payments to
21 all participating Class Members who do not opt out, the enhancement award to the Class
22 Representative, all expenses and costs to the Settlement Administrator, Atticus Administration,
23 LLC, all attorneys’ fees and expenses, and PAGA payment to the LWDA, but exclusive of
24 employer federal and state payroll taxes. The amount available for distribution to participating
25 Class Members is determined by deducting the following from the Gross Settlement Amount:

- 26 • Up to thirty-five (35%) of the Gross Settlement Amount in attorneys’ fees (*i.e.*, \$148,750)
27 and litigation expenses up to \$20,000 to Class Counsel;
- 28 • Up to \$7,500 to the Class Representative as an enhancement award and in exchange for a

1 general release of claims;

- 2 • Up to \$12,000 to the Settlement Administrator, Atticus Administration, LLC, to notify
- 3 members of the Class and administer the Settlement; and
- 4 • \$30,000 – which is 75% of the \$40,000 – allocated to the LWDA for civil penalties
- 5 pursuant to statute.

6 The amount remaining after the foregoing deductions, approximately \$206,750 is called the “Net
7 Settlement Amount” or “NSA.” (Settlement Agreement ¶ C.4.e.) The entire Net Settlement
8 Amount will be paid out to Class Members. Class Members will automatically receive payments
9 *without the need to submit a claim form*, and shall receive their *pro rata* share of the eligible
10 PAGA Payment irrespective of whether or not they opt-out. (Settlement Agreement ¶¶ C.4.a-e.)

11 a. **The Settlement Provides for Reasonable Monetary Payments**

12 If all of the approximately 113 Class Members participate (*i.e.*, do not submit a request for
13 exclusion/opt-out), and assuming hypothetically that distribution was on an individual *pro rata*
14 basis, then each individual settlement payment would be an estimated \$1,829.65 per Class
15 Member. (Connor Decl. ¶ 10.) In actuality, each Class Member will receive a proportional share
16 of the Net Settlement Amount based on his or her eligible workweeks during the Class Period.
17 (Settlement Agreement ¶ C.4.e.) The Settlement Administrator will determine each Class
18 Member’s individual settlement payment as follows: First, the sum of all Class Members’
19 individual Workweeks will be the “Total Workweeks.” Second, the Net Settlement Amount will
20 be divided by the Total Workweeks to yield the “Workweek Value.” Third, each Class Member’s
21 individual settlement payments will be determined by multiplying his or her individual
22 Workweeks by the Workweek Value. (Settlement Agreement ¶ C.4.e.) Finally, in addition, all
23 Class Members will receive a proportional share of the 25% of the PAGA Payment based on his
24 or her Workweeks during the PAGA Period, defined as April 26, 2020 through June 13, 2021.
25 (Settlement Agreement ¶ C.4.d.) (Connor Decl. ¶ 8.)

26 After reduction for the employee’s share of taxes on the wage portion,² the net payment to

27 _____
28 ² The Parties agreed to allocate twenty percent (20%) of each individual settlement payment to wages and eighty
percent (80%) of each individual settlement payment to interest, penalties, and other non-wage damages. (Settlement
Agreement ¶ C.6.)

1 each participating Class Member will be the sum of his or her individual settlement payment, plus
2 his or her share of the eligible PAGA Payment. As a result of the distribution formula, the
3 consideration paid to each participating Class Member is tailored to the impact of Defendant's
4 alleged violations as well to the claims he or she is releasing. (Connor Decl. ¶¶ 8-9.) Further, Class
5 Members may submit a written letter to the Settlement Administrator disputing the number of
6 Workweeks credited if he or she believes that count is inaccurate. (Settlement Agreement ¶ C.8.)
7 Finally, any Class Member who prefers to preserve his or her right to pursue relief or seek an
8 alternative recovery may opt out.³ (Settlement Agreement ¶ C.10.)

9 **b. Class Representative Enhancement Award, Attorneys' Fees, and Expenses**

10 As part of the Settlement, Plaintiff will apply for an enhancement payment at the time of
11 seeking final approval in the amount of \$7,500 for services to the Class and a general release of
12 all claims against Defendant. (Settlement Agreement ¶¶ C.3., 4.c.); (Connor Decl. ¶ X.)
13 "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class
14 representatives for work done on behalf of the class [and] to make up for financial or reputational
15 risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases* (2010) 186 Cal.
16 App. 4th 1380, 1393-1394. Plaintiff's requested enhancement award payment is intended to
17 recognize the significant benefits conferred upon the Class and be proportional to the respective
18 time and effort that Plaintiff expended on behalf of the Class and the PAGA aggrieved employees
19 including, providing factual information and documents to Class Counsel, discussing the claims
20 and theories at issue in the case with Class Counsel, identifying potential witnesses and reviewing
21 documents; reviewing the Settlement Agreement, as well as the significant risks Plaintiff
22 undertook by agreeing to serve as named plaintiff, and the fact that Plaintiff agreed to a general
23 release of all claims subject to a waiver of Civil Code § 1542. *See*, (Settlement Agreement ¶¶ C.3.,
24 4.c.); (Connor Decl. ¶ 12); (Aiwazian Decl. ¶ 14); (Gutierrez Decl. ¶¶ 12-17.)

25 Class Counsel will apply for an attorneys' fees award of thirty-five percent (35%) of the
26 Gross Settlement Amount: *to wit*, \$148,750, and reimbursement of litigation costs in an amount

27 _____
28 ³ Again, if approved, all Class Members will receive their individual *pro rata* PAGA Payment irrespective of
whether they opt-out of the Class. (Settlement Agreement ¶ C.4.d.)

up to \$20,000. (Settlement Agreement ¶ C.4.a.); (Connor Decl. ¶ 13.) Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. (Connor Decl. ¶ 13.) Class Counsel has devoted substantial attorney time to: pre-filing investigation; analyzing Plaintiff’s claims; conducting legal research and analysis; propounding multiple sets of discovery; meeting and conferring over pre-mediation information and data; reviewing policies and procedures regarding Zero Motorcycle’s timekeeping protocol, payment of wages, provision and tracking of meal and rest breaks, along with examining a 20% random sample of actual employee time records, payroll information and wage statements; building a damages model; preparing, briefing, and attending mediation; preparing and submitting notice to the LWDA; negotiating and preparing the long-form Settlement Agreement and Class Notice; amending the pleadings to incorporate a PAGA representative action and filing the operative complaint; preparing this motion for preliminary approval; and otherwise litigating the case. *See*, (Connor Decl. ¶ 13.); (Aiwazian Decl. ¶¶ 10-12.) Class Counsel will also expend future attorney time in attending the hearing on this Motion, overseeing the notice and administration process, drafting the Final Approval Motion and supporting documents, and attending the Final Approval hearing, among other tasks, such as addressing questions from Class Members. (Connor Decl. ¶ 14.)

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

unprecedented.”)

Class Counsel submit that their request for attorneys’ fees is reasonable when viewed as an overall percentage of the settlement amount in light of the substantial risks and significant work undertaken, the excellent results obtained for the Class Members, and the efficiency with which the Parties have conducted the litigation. (Connor Decl. ¶ 15.) Assuming that the Court grants preliminary approval, Class Counsel will seek an award of attorneys’ fees and litigation costs at the time of seeking final approval of the Settlement.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

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

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

a. There Is an Ascertainable and Sufficiently Numerous Class

Whether a class is ascertainable is determined by examining the class definition, the size of the class and the means available for identifying class members. *See, Vasquez, supra*, 4 Cal.3d at 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263, 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873. Class members are “ascertainable” where

1 they may be readily identified without unreasonable expense or time.

2 Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v.*
3 *Target Corp.* (2010) 189 Cal.App.4th 905, 919. Class Members are comprised of: “All current and
4 former hourly-paid or non-exempt employees who worked for Defendant within the State of
5 California at any time during the Class Period” – which is explicitly defined as the timeframe from
6 December 16, 2015 and ending on June 13, 2021. (Settlement Agreement ¶¶ A.2, A.4.) Defendant
7 is required to and does maintain employment records of such persons, including contact
8 information and social security numbers. Documents and information exchanged reflect a Class of
9 approximately *113 non-exempt hourly employees* during the relevant period. (Connor Decl. ¶
10 102.) As a result, the proposed Class satisfies the ascertainability and numerosity requirements.
11 *See, e.g. Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934, stating that “[n]o set number
12 is required as a matter of law for the maintenance of a class action” and citing examples where
13 classes as little as 10 (*Bowles v. Superior Court* (1955) 44 Cal.2d 574) and 28 (*Hebbard v.*
14 *Colgrove* (1972) 28 Cal.App.3d 1017) were upheld. *See also, Collins v. Rocha* (1972) 7 Cal.3d
15 232 (finding a class of 44 farm workers sufficiently numerous).

16 **b. There Is a Well-Defined Community of Interest**

17 A community of interest is established by the preponderance of common issues of law and
18 fact. *See, Vasquez, supra*, 4 Cal.3d at 811. “The community of interest requirement involves three
19 factors: (1) predominant common questions of law or fact; (2) class representatives with claim or
20 defenses typical of the class; and (3) class representatives who can adequately represent the class.”
21 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.

22 **(1) Common Issues of Law and Fact Predominate.**

23 The Court should grant class certification when questions of law and fact common to all
24 Class Member predominate over any questions affecting only individual Class Members. The
25 predominant inquiry tests whether proposed classes are sufficiently cohesive to warrant
26 adjudication by representation. *See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d
27 605; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128.

28 In the matter *sub judice*, common issues of fact and law predominate as to each of the

claims alleged by Plaintiff and Class Members. Here, litigation is predicated on uniform company policies and systemic top-down business practices revolving principally around Defendant's timekeeping and pay practices – e.g., off-the-clock work attributed to common job duties, unreasonable work schedule demands, and detrimental rounding, failure to pay meal and rest break premiums despite records depicting non-compliance and practices resulting in interruption, unreimbursed business expenses etc. - as well as derivative inaccurate wage statements and pay owed upon separation. These allegations have given rise to the following claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; unreimbursed business expenses; failure to pay wages timely and all final wages at termination of employment; failure to maintain and provide accurate itemized wage statements; and derivative UCL and PAGA claims arising therefrom. (Settlement Agreement ¶ B.1.); (Connor Decl. ¶ 103.)

Because Plaintiff has alleged a single top-down compensation scheme, “the relevant proof [does] not vary among class members” and “clearly presents a common question fundamental to all class members.” *See, In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123 (citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 169 F.R.D. 493, 518). California courts show “no hesitancy” in inferring class-wide causation, class-wide injury, and class-wide damages when a common course of action has been shown. *B.W.I. Custom Kitchens, supra*, 191 Cal.App.3d at 1350 (granting class certification in a manufacturing defect case when a common course of action had been proven). This inference “*eliminates* the need for each class member to prove individually the consequences of the defendants’ actions to him or her.” *Id.* at 1351. Thus, the outcome of this matter depends upon questions that are common to members of the Class. These types of claims are commonly held to be proper for class certification. *See, e.g., Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 (reversing denial of rest period claim); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 (certifying meal period claim).

(2) Plaintiff's Claims Are Typical Of The Claims Of The Settlement Class

The typicality requirement is satisfied where class representatives have claims that are typical of the rest of the class. *B.W.I. Custom Kitchens, supra*, 191 Cal.App.3d at 1347. Here,

1 Plaintiff's claims are typical of those held by members of the proposed Class. Like all other Class
2 Members, Plaintiff was an hourly-paid and non-exempt employee working for Zero Motorcycles
3 in California during the Class Period. (Gutierrez Decl. ¶ 9.) Like Class Members, Plaintiff was not
4 paid for all hours worked due to off-the-clock work (*i.e.*, pre-/post-shift duties and travel time,
5 interrupted meals, and detrimentally rounded time), neither received timely and duty-free meal and
6 rest breaks, nor was paid premiums for non-compliant breaks, incurred necessary unreimbursed
7 business expenses, and did not receive accurate wage statements and all wages and premiums
8 owed upon termination of the business relationship. (Gutierrez Decl. ¶¶ 4-5); (Connor Decl. ¶ 105.)
9 Plaintiff was therefore impacted by the same challenged policies and practices that allegedly
10 injured the Class as a whole and subject to the same defenses raised by Defendant as to the Class
11 and is therefore typical.

12 **(3) Plaintiff And His Counsel Meet The Adequacy Requirements.**

13 The adequacy of representation requirement examines conflicts of interest between named
14 parties and the class(es) they seek to represent. *Capital People First v. Department of*
15 *Developmental Services* (2007) 155 Cal.App.4th 676, 697. Here, Plaintiff and Class Counsel will
16 adequately represent the Settlement Class, as there are no conflicts between the Plaintiff and the
17 Class he seeks to represent. (Gutierrez Decl. ¶ 8); (Connor Decl. ¶ 106.) *McGhee v. Bank of Bank*
18 *of America* (1976) 60 Cal.App.3d 442, 450 (finding adequacy satisfied where there was no
19 indication that plaintiff's counsel were not qualified and the named plaintiff had no interests
20 antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage
21 and hour litigation. *See*, (Connor Decl. ¶ 106); (Aiwazian Decl. ¶¶ 2-7.)

22 **c. A Class Action Is Superior To A Multiplicity Of Litigation**

23 In making its class certification decision, the court must determine that a class action would
24 be superior to alternative means for the fair and efficient adjudication of the litigation. By
25 consolidating possibly over one hundred individual actions into a single proceeding, this Court's
26 use of the class action device enables it to manage this litigation in a manner that serves the
27 efficiency interests of the litigants and the judicial system. Absent class treatment, the only
28 alternative would be to force numerous employees to file individual actions. *Sav-On Drug Stores*,

1 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, fn. 10. (stating “[t]he relevant comparison lies
2 between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and
3 benefits of proceeding by numerous separate actions – not between the complexity of a class suit
4 that must accommodate some individualized inquires and the absence of any remedial proceeding
5 whatsoever.”) Finally, in the context of settlement, the superiority concerns are essentially non-
6 existent. (Connor Decl. ¶ 107.)

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

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

11 In this regard, the Manual for Complex Litigation (Second) explains:

12 A two-step process is followed when considering class settlements...If the
13 proposed settlement appears to be the product of serious, informed, non-collusive
14 negotiations, has no obvious deficiencies, does not improperly grant preferential
15 treatment to class representatives or segments of the class, and falls within the range
16 of possible approval, then the court should direct that notice be given to the class
17 members of a formal fairness hearing, at which evidence may be presented in
18 support of and in opposition to the settlement.

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

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

30 As a matter of public policy, courts both encourage the use of the class action device and
31 favor settlement over continued litigation. *See, e.g. Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429,

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

To summarize, the Settlement here is fair because it offers payment to each Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the Settlement proceeds whereby the Net Settlement Amount is allocated to participating Class Members proportionally based on his or her respective number of eligible weeks worked during the Class Period. (*Connor Decl., passim.*)

a. The Settlement Is Entitled To A Presumption Of Fairness

Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. *See, Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. August 10, 2007) 2007 U.S. Dist. LEXIS 74767, 24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980) 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681. Courts do not substitute their judgment for that of the proponents, particularly when settlement has been reached by experienced counsel familiar with the litigation. *Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767 at 24. As detailed at length in the accompanying Declaration of Jennifer L. Connor, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm’s length, and informed by substantial factual and legal investigations. (*Connor Decl., passim*; *Aiwazian Decl.* ¶¶ 10-13.)

(1) Negotiations Were At Arm’s-Length Before A Respected Mediator

Here, the settlement is the result of extensive settlement negotiations between the Parties,

1 conducted at arm's-length, and informed by substantial factual and legal investigations. (Connor
2 Decl. ¶¶ 31-37.) The Parties participated in a full-day mediation before Jeffrey A. Ross, Esq. of
3 Employment Mediation. (Connor Decl. ¶ 34.) Mr. Ross is an experienced mediator in employment
4 and wage and hour class action matters, and with whose help the Parties agreed to resolve this case
5 according to the terms set forth in the Settlement Agreement. (Connor Decl. ¶ 34.) On the one
6 hand, Plaintiff and his counsel believe that the alleged claims asserted have merit. On the other
7 hand, Plaintiff and his counsel recognize and acknowledge the uncertainty of litigation through
8 trial and appeals, the question of certification, and the possible defenses. (Connor Decl. ¶¶ 35, 38-
9 39.) These were contentious issues because of the factual and legal complexity of the case (*i.e.*,
10 evidentiary difficulty of proving off-the-clock claims and dearth of cases analyzing Section 7.D.
11 of the Wage Order 1-2001 mandating accessibility of time clocks to work areas) as well as the
12 legal uncertainty regarding many of the central issues of the litigation (*i.e.*, certification, liability,
13 and devising a theory that properly measures monetary recovery, especially given overlap of
14 penalties and arguments against stacking). (Connor Decl. ¶ 40.)

15 **(2) Investigation Was Sufficient To Allow Counsel To Act Intelligently**

16 Prior to filing the lawsuit, Class Counsel investigated the claims by interviewing Plaintiff
17 at length and on repeated occasions, researching California law, and upon finding it suitable for
18 class treatment, filing a wage and hour putative class action. (Connor Decl. ¶ 24.); (Aiwazian Decl.
19 ¶ 9.) Class Counsel thereafter devoted a considerable amount of time to the prosecution of this
20 case, including, but not limited to, interviewing Plaintiff, reviewing Defendant's written policies
21 concerning the claims set forth in the action, including Defendant's policies and procedures
22 regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such
23 as recording hours, issuance of wage statements, and providing all wages at separation; reviewing
24 and analyzing Class Members' time and pay records, meeting and conferring regarding the
25 information and documents produced; drafting pleadings; researching California law, preparing
26 for and attending mediation; and negotiating and finalizing the settlement and related documents.
27 (Connor Decl. ¶¶ 31-39); (Aiwazian Decl. ¶¶ 10-12.) Class Counsel reviewed more than 400 pages
28 of personnel file and policy-related documents, along with a 20% random sampling of time and

1 payroll records consisting of approximately 7,797 shifts. (Settlement Agreement ¶ 5); (Connor
2 Decl. ¶ 32.)

3 **(3) Class Counsel Are Experienced in Similar Litigation**

4 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
5 of the Class Members. (Connor Decl. ¶ 38.) Although the recommendations of counsel proposing
6 the class settlement are not conclusive, the Court can properly take the recommendations into
7 account, particularly if counsel have been involved in litigation for some period of time, appear to
8 be competent, have experience with this type of litigation, and significant discovery has been
9 completed. *See, Newberg*, § 11.47. Here, Plaintiff is represented by competent and experienced
10 counsel who possess extensive experience litigating wage and hour class actions and have been
11 appointed as class counsel in numerous cases alleging similar claims. (Connor Decl. ¶¶ 85-91);
12 (Aiwazian Decl. ¶¶ 2-7.)

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

14 To make a fairness determination, the Court should consider several factors, including “the
15 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,
16 the risk of maintaining class action status through trial, the amount offered in settlement, the extent
17 of discovery and the stage of proceedings, [and] the experience and views of counsel.” *Dunk v.*
18 *Ford Motor Co.* (1986) 48 Cal. App. 4th 1794, 1801. “The list of factors is not exclusive and the
19 court is free to engage in a balancing and weighing of factors depending on the circumstance of
20 each case.” *Wershba, supra*, 91 Cal. App. 4th 224, 245. As discussed below, the proposed
21 Settlement is fair, adequate, and reasonable in light of the overall factors in this case.

22 **(1) The Strength of Plaintiff’s Case**

23 Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages
24 model for Defendant’s liability. (Connor Decl. ¶ 39.) Although Plaintiff steadfastly maintains that
25 his claims are meritorious, he acknowledges that there are substantial risks and uncertainty in
26 proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section
27 VII.B.4 *infra*, Defendant presented numerous defenses to Plaintiff’s claims, both on the merits
28 and with respect to class certification. (Connor Decl. ¶¶ 27, 29.) For example, Defendant defended

1 against the minimum and overtime wage claims by relying on written policies that explicitly
2 prohibited Class Members from engaging in off-the-clock work. Defendant also argued that Class
3 Members worked in different job positions and had different duties, and that, as a result, Defendant
4 contended there was variation to the circumstances that raises highly individualized questions of
5 fact. (Connor Decl. ¶ 42, 52-54.)

6 Although Plaintiff was prepared to litigate these claims through class certification and,
7 ultimately, through trial, given the substantial amount offered in settlement, Class Counsel
8 predicted that it was far from certain that Plaintiff would be able to recover a greater amount at
9 trial, particularly after considering the increased litigation costs that would accrue. (Connor Decl.
10 ¶ 44); (Aiwazian Decl. ¶¶ 13, 15.) Thus, this factor supports preliminary approval of the
11 Settlement.

12 (2) **Risk, Expense, Complexity, and Duration of Further Litigation**

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

26 (3) **Risk of Maintaining Class Action Status**

27 Here, settlement was reached prior to class certification and the result was a successful
28 outcome for the Class. (Connor Decl. ¶ 42.) Yet, class certification was by no means a foregone

1 conclusion. (Ibid.) For example, Class Members worked in different job positions and had different
2 supervisors, and that, as a result, Defendant contended there was variation to the circumstances
3 that could allegedly cause the employees to work off-the-clock and/or be deprived of the
4 opportunity to take legally compliant, duty-free meal and rest periods, and this variation in
5 circumstances raised highly individualized questions of fact. (Connor Decl. ¶ 42, 52.) Defendant
6 further disputed Plaintiff’s characterization of working conditions, liability, and damages, and
7 possessed documentary and testimonial evidence rebutting Plaintiff’s allegations. If the Court
8 either denied class certification or later decertified it, the Class would recover nothing and Class
9 Members would be forced to retain their own counsel and proceed on the basis of individual claims
10 only. (Connor Decl. ¶ 43.) Here, Class Members may avoid each of the risks described and receive
11 substantial monetary benefits, which also weighs in favor of preliminary approval.

12 **(4) Amount Offered in Settlement Given Realistic Value of Claims**

13 A settlement is not judged against what might have been recovered had a plaintiff prevailed
14 at trial, nor does the settlement have to provide 100% of the damages to be fair and reasonable.
15 *Wershba, supra*, 91 Cal.App.4th 224, 246, 250 (acknowledging that “Compromise is inherent and
16 necessary in the settlement process...even if the relief afforded by the proposed settlement is
17 substantially narrower than it would be if the suits were successfully litigated, this is no bar to a
18 class settlement because the public interest may indeed be served by a voluntary settlement in
19 which each side gives in the interest of avoiding litigation.”) The proposed Settlement provides a
20 fair and reasonable monetary recovery for the Settlement Class in the face of disputed claims.

21 Plaintiff carefully estimated the settlement recovery as a reasonable percentage of possible
22 damages recoverable at trial. Based on data received in mediation efforts, Plaintiff’s damages
23 analysis shows that the Settlement reflects an estimated **26% to 46%** of the maximum-to-realistic
24 possible damages recoverable at trial. (Connor Decl. ¶ 45.) Utilizing a class-wide damages study
25 to assess the nature and magnitude of the claims in question, *see, Kullar v. Foot Locker Retail, Inc.*
26 (2008) 168 Cal.App.4th 116, 123, this case clearly meets the requirements that the class settlement
27 is within the “ballpark” of reasonableness.

28 ///

Unpaid Minimum and Overtime Wages

Plaintiff alleges that he and other employees were subjected to uncompensated time arising from pre- and post- shift duties, along with interrupted meal periods, that were worked off-the-clock due to unreasonable workloads. For example, Plaintiff contends that he and other employees were engaged in off-the-clock work activities (*i.e.*, attending to the arrival, loading/unloading, and departure of delivery trucks) or travel to/from the time clock building pre-shift, during lunches, and post-shift. As such, Plaintiff argues that these claims are susceptible to “substantial evidence of systematic company policy to pressure or require employees to work off-the-clock.” *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004. Defendant also maintained a practice of rounding employees’ work time despite that the actual time is captured on automated clock systems. Further, Plaintiff alleges that approximately 17.1% of the meal periods recorded appear to be systematized auto deductions that fail to record actual contemporaneous break times. Finally, given that over half of the shifts are greater than 8 hours in length, it is inevitable that some of portion of the off-the-clock hours will result in unpaid overtime under Labor Code §§ 510, 1198. (Connor Decl. ¶¶ 47-49.)

Class Counsel analyzed the documents and data produced by Defendant and, in consultation with Plaintiff, determined Defendant’s degree of liability and amounts due in damages – specifically, the incidence and amount of purported off-the-clock activity. (Connor Decl. ¶ 50.) Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-clock hours, Plaintiff estimates that Defendant is liable for an aggregate of approximately fifteen minutes (15) minutes of unpaid straight and overtime pay per shift (or, seventy-five (75) minutes per workweek) attributed to pre-shift/post-shift duties. (Connor Decl. ¶ 51.) At the average hourly rate of \$17.82, plus the additional overtime premium of \$8.91, such yields an estimated damages amount of \$241,105. (Ibid.) Plaintiff also concluded that inequitable rounding occurred with a net loss of 659.3 hours being unpaid to employees, thus, inclusive of interest, adding an extra \$20,577 to the off-the-clock sum. Finally, Plaintiff calculated 3,242 hours of unpaid wages attributed to auto-deduct meals, which inclusive of interest, results in a further sum of \$70,416 owed. (Ibid.) The estimated total of owed minimum and overtime wages is \$332,098, without discounting for risks

1 associated with certification or merits. (Connor Decl. ¶ 51.)

2 In opposition, however, Defendant contended that Plaintiff’s claim for off-the-clock work
3 is not amenable to class treatment, because employees worked in a variety of job positions with
4 different requirements, and it would require an unmanageable series of mini-trials to determine
5 how much time was spent without pay. (Connor Decl. ¶ 52.) Further, in terms of merit defenses,
6 Defendant vigorously disagreed with Plaintiff’s theories regarding how much off-the-clock work
7 occurred in reality and the credibility of those claimed hours given Defendant’s express written
8 policies to the contrary. (Connor Decl. ¶ 53.) Here, the failure to track all hours poses evidentiary
9 difficulties because it is hotly contested how much off-the-clock work actually occurred. (Connor
10 Decl. ¶ 54.) For Plaintiff to establish the quantity of specific disputed and unrecorded work
11 activities – especially over multiple job titles, at differing pay rates - would have been costly, time-
12 consuming, and daunting. (Connor Decl. ¶ 54.)

13 Defendant further responded that any off-the-clock time is *de minimis*. Plaintiff countered
14 that such defense lacks viability in light of *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829 given
15 that the California Supreme Court refused to allow the *de minimis* defense to insulate Starbucks
16 from having to pay employees for small amounts of work regularly performed off-the-clock. What
17 is not clear, however, is to what extent the *de minimis* defense would apply where the uncaptured
18 hours were associated with an occasionally recurring activity. (Connor Decl. ¶ 55.) In light of these
19 considerations – especially the evidentiary difficulties of demonstrating off-the-clock work on a
20 classwide basis - Class Counsel acknowledged a fifty percent discount – yielding **\$166,049** in
21 unpaid minimum and overtime wages - that incorporated the risks of non-certification and being
22 unsuccessful on the merits. (Connor Decl. ¶ 56.)

23 **Meal and Rest Period Violations**

24 Plaintiff argues that Defendant’s written meal policies are facially invalid and fail to
25 mention any timing requirements for when a meal period is to be taken and omit any reference to
26 potential entitlement to second meal periods altogether. (Connor Decl. ¶ 57.) Further, in actual
27 practice, Plaintiff’s review of the data of employee time-punches demonstrates Defendant’s non-
28 compliance. Records indicate that meal periods were often “missed,” “short,” or “late” and that

1 second meal periods for shifts worked in excess of ten (10) hours were near non-existent. (Connor
2 Decl. ¶ 58.) Significantly, there is no indication that Defendant ever made a payment of a meal
3 period premium for “missed,” “short,” or “late” meal periods prior to the lawsuits. *C.f.* Wage Order
4 1-2001, § 11(b). Consequently, Plaintiff alleges that Defendant violated Labor Code §§ 226.7, 512,
5 and applicable Wage Orders by failing to compensate Plaintiff and Class Members for short, late,
6 interrupted, and missed meal periods. (Connor Decl. ¶ 59.)

7 Defendant, however, contended that it had practices, policies, and procedures to provide
8 meal and rest breaks every workday to their employees that fully complied with the law. (Connor
9 Decl. ¶ 60.) Defendant vehemently argued that they complied with the requirements articulated
10 by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.
11 4th 1004. (Ibid.) Specifically, Defendant maintained that it provided employees with a reasonable
12 opportunity to take timely meal periods of at least 30 minutes, relieved employees of all duties
13 during meal periods, and relinquished control over employees’ activities, including the ability to
14 leave the premises during meal periods. (Ibid.)

15 Plaintiff faced significant challenges to his Labor Code § 226.7 meal period claims for two
16 reasons: *First*, a majority of the records for Class Members showed lunch breaks, even if untimely
17 and short. *Second*, like most employers facing meal period litigation, Defendant argued that
18 employees were apprised of their right to take meal periods, but voluntarily waived them. (Connor
19 Decl. ¶ 61.) Defendant contended that the issue of voluntary waiver would necessarily devolve
20 into a series of individualized mini-trials, precluding class certification. *See, Duran v. U.S. Bank*
21 *National Association* (2014) 59 Cal. 4th 1, 25 (holding that the defendant must be provided an
22 opportunity to litigate affirmative defenses, even when they turn on individual questions). Thus,
23 although Plaintiff argues that Defendant had an impermissible top-down practice of requiring
24 Class Members to work during meal breaks, in light of its written policies and other evidence
25 suggesting an intent to follow those policies, establishing the alleged unlawful business practice
26 as a rule rather than exception might prove daunting. (Connor Decl. ¶ 62.)

27 Based upon analysis of Class Member time and payroll records, and taking into account
28 Plaintiff’s assessment that 52.6% of eligible shifts were the subject of unique violations for missed,

1 short, or late meal periods, Plaintiff calculated the potential maximum exposure of this claim to be
2 \$355,562. However, to account for the above-described certification and liability risks, Plaintiff
3 took a twenty-five percent discount for associated risks to yield **\$266,671** as the realistic exposure.
4 (Connor Decl. ¶ 63.)

5 Plaintiff also alleged that hourly employees did not receive authorized rest breaks as
6 required whereby employers “relinquish control over how employees spend their time and relieve
7 employees of all duties.” *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal. 5th 257, 260. Here,
8 hourly employees did not receive timely and compliant rest breaks, nor did Defendant relinquish
9 control over how employees spent their 10-minute rest periods. (Connor Decl. ¶ 64.) Specifically,
10 Defendant conditioned the scheduling of rest breaks on workload and business flow. (Ibid.) As
11 with the meal periods, Plaintiff neither received a rest period premium, nor is there evidence that
12 Defendant ever made a premium payment for a non-compliant rest break to Class Members.
13 (Connor Decl. ¶ 65.) Thus, Plaintiff alleges that Defendant did not provide premium pay for each
14 non-compliant rest break as required under Labor Code § 226.7.

15 Here again, Defendant disputes liability and damages. Defendant maintained that it
16 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
17 of four hours worked as required by Labor Code § 226.7. (Connor Decl. ¶ 66.) Defendant explained
18 that Class Members had ample opportunity to take, and did take, regular rest breaks. (Ibid.) As
19 with meal breaks, Defendant argued that any Class Member who failed to take a rest break, or took
20 a short or late rest period, did so voluntarily and that all applicable rest periods were still authorized
21 and provided. (Connor Decl. ¶ 66.) Thus, Defendant argued that it did not act unlawfully to deprive
22 Class Members of rest breaks. (Ibid.)

23 Class Counsel recognizes that, unlike meal periods, rest breaks need not be recorded and
24 thus establishing Defendant’s exertion of pressure, control, and resulting violations is likely to be
25 more difficult. (Connor Decl. ¶ 67.) As such, and based on the narrative of Plaintiff, Class Counsel
26 applied the same violation rate for Class Members’ rest breaks that equals those of meal breaks:
27 thus, yielding a rest break maximum exposure rate of \$355,562. (Connor Decl. ¶ 67.) For
28 settlement purposes and to account for the difficulties of certifying and proving unrecorded rest

break violations, however, a fifty percent reduction from that maximum exposure was and is warranted for a realistic recovery amount of **\$177,781**. (Connor Decl. ¶ 67.)

Unreimbursed Expenses

Plaintiff alleges a cause of action under Labor Code § 2802(a) which states that an employer must reimburse employees for all necessary expenditures that employees incur in discharging their duties. (Connor Decl. ¶ 68.) Here, Plaintiff alleges Defendant's failure to reimburse non-exempt employees for necessary business expenses incurred: *to wit*, Plaintiff and Class Members incurred unreimbursed PPE for dress-code compliant footwear, unreimbursed mileage, and personal cell phone use, along with promised reimbursement of travel expenses. (Connor Decl. ¶ 68.) With recognition that this claim is difficult to certify class-wide and quantify in terms of damages, Plaintiff simply assigns a relatively nominal flat \$85 per Class Member; which results in a nominal **\$9,605** attributed to this claim. (Connor Decl. ¶ 69.)

Wage Statement Violations

Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendant's failure to provide accurate itemized wage statements. (Connor Decl. ¶ 70.) Failure to comply with the statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000). *See*, Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action because if Defendant did not provide minimum and overtime wages for all hours worked, owes premiums for non-compliant meal and rest breaks, unreimbursed expenses, and so forth, then the wage statements were inevitably inaccurate.

Defendant contended, however, that Labor Code section 226(e) penalties are not automatic. (Connor Decl. ¶ 71.) Rather, the employee must show that Defendant's noncompliance was "knowing and intentional." (Ibid.) Defendant suggested that any noncompliance was not knowing and intentional. (Ibid.) Moreover, Defendant argued that meal and rest period violations cannot support derivative wage statement penalties. *See, Naranjo v. Spectrum Security Service, Inc.*, 40 Cal.App.5th 444, 474 (Sept. 20, 2019) (holding that violations of Labor Code's meal break

provisions do not entitle employees to pursue the derivative wage statement penalties). *C.f.*, but review granted, *Naranjo v. Spectrum Security Services, Inc.*, 455 P.3d 704, 257 Cal.Rptr.3d 188 (Cal., Jan. 02, 2020) (Cal. Sup. Ct. No. S258966).

Because the damages for this cause of action are penalties, the statute of limitations is only one year prior to the filing of the original complaint. *See*, Code Civ. Proc. § 340. The Parties discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period subsequent violation rates, Plaintiff estimates the total maximum wage statement exposure to be \$197,750. (Connor Decl. ¶ 72.) However, if Plaintiff utilizes the more conservative \$50 initial violation penalty rate, such yields the realistic recovery amount of **\$100,750**. (Connor Decl. ¶ 72.)

Waiting Time Violations

Plaintiff further asserts a cause of action against Defendant for failure to timely pay all wages due employees at separation. *See*, Labor Code §§201-203. As with other claims, Defendant vigorously disagrees that it engaged in any conduct giving rise to liability or entitlement to recovery of penalties. (Connor Decl. ¶ 73.)

Defendant argued that waiting time penalties are not appropriate because it attempted to pay employees all final wages owed in good faith upon their separation, thereby precluding a finding of willfulness necessary to obtain waiting time penalties. (Connor Decl. ¶ 74.) Moreover, Defendant maintained that no waiting time penalties were recoverable from alleged meal or rest period violations. (*Ibid.*) Defendant raised the Second Appellate District’s decision in *Naranjo et al. v. Spectrum Services, Inc.* (2019) 40 Cal.App.5th 444 to argue that meal and rest break violations trigger neither wage statement, nor waiting time penalties. Yet the *Naranjo* decision is currently pending before the California Supreme Court, *see*, *Naranjo, supra*, review granted, Supreme Court Case No. S258966, 455 P.3d 704 (January 02, 2020), and although fully briefed, the outcome of this important case remains to be seen.⁴ (Connor Decl. ¶ 75.)

⁴ The “Issues Presented” in the Case Summary of the Appellate Courts Case Information webpage (<https://appellatecases.courtinfo.ca.gov/>) reads: “This case presents the following issues: (1) Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?”

1 Based on the count of 45 former employees, Class Counsel appraised the maximum value
2 of the waiting time claim as \$192,456. (Connor Decl. ¶ 76.) But after the Parties discussed the
3 above risks, Class Counsel factored in a reduction of twenty-five percent - Plaintiff believes that
4 the combined potential derivative liability makes the claim relatively recoverable - and posits
5 **\$144,342** as a more realistic exposure value. (Ibid.)

6 **Derivative PAGA Penalties**

7 Although Plaintiff did not originally plead PAGA, the Parties exchanged sufficient data
8 and information such that the potential liability and exposure to PAGA penalties could be
9 analyzed. The success of Plaintiff's PAGA claim is wholly dependent upon the success of the
10 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
11 (Connor Decl. ¶ 77.) Defendant contended that these penalties are derived from the underlying
12 wage and hour violations discussed above, which Defendant disputes. (Ibid.)

13 Defendant maintained and continues to maintain that it had legally compliant employment
14 policies and practices throughout the statutory period. (Connor Decl. ¶ 78.) Defendant denied and
15 continues to deny that it ever violated any provision of the California Labor Code and argued that,
16 even assuming such violations occurred, Defendant will not be treated as having engaged in
17 subsequent violations giving rise to heightened penalties. (Ibid.) In other words, Defendant argues
18 that heightened civil penalties for subsequent violations would not be assessed unless it could be
19 shown that Defendant had notice that it was violating the law, *e.g.*, it had been cited by a labor
20 agency or adjudged by a court to have done so. (Ibid.) *See, e.g., Amaral v. Cintas Corp.* (2008)
21 163 Cal. 4th 1157, 1209. Thus, Defendant contended that, at best, even if a violation giving rise to
22 a penalty was shown for each pay period, only the lower civil penalty associated with initial
23 violations would apply. (Connor Decl. ¶ 78.)

24 Under Labor Code § 2699(f)(2), Defendant is subject to a civil penalty of \$100 for the
25 initial violation of the underlying Labor Code violations, and \$200 for each subsequent pay
26 period where the violation occurred. Extrapolating the one-year statutory PAGA period from the
27 date of filing through mediation, Plaintiff estimated 75 aggrieved employees with approximately
28 2,015 pay periods at issue. (Connor Decl. ¶ 79.) Although, strictly speaking, class certification

requirements are not required to be satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a PAGA claim is uncertain.⁵ (Connor Decl. ¶ 80.) Thus, Class Counsel applied discounts for the risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks regarding success on the merits and establishing liability, and the risks with proving the extent of penalties that are warranted and possible discretionary reduction of penalties by the Court. (Connor Decl. ¶ 80.) As a result, Plaintiffs used the “initial” \$100 per pay period violation (as opposed to the \$200 subsequent per violation rate) to calculate a realistic estimate of \$201,500 in potential PAGA penalty exposure – of which, by statute, only 25%, or **\$50,375** - would be recoverable by aggrieved employees. (Connor Decl. ¶ 81.)

Summary

Using the estimated figures for each of the claims described above, Plaintiff predicted that approximately \$1,645,343 would be the maximum possible recovery in damages available to Class Members. Without any discount for risks for certification or liability, the proposed recovery to the Class of \$425,000 thus represents **26% of the maximum possible exposure** to Defendant. (Connor Decl. ¶ 83.) As described above, however, Plaintiff assumed multiple discounts tailored to the various claims and, together, Plaintiff estimates approximately \$915,573 would be the realistic value of Class Members’ claims for which \$425,000 therefore represents **46% of the realistic possible exposure** to Defendant. (Connor Decl. ¶ 83.) In sum, the data coupled with factual and legal analysis shows that the Settlement reflects an estimated range of

⁵ Instead, what is clear is that the purpose of the PAGA is not to generate revenue for the State but rather to facilitate the enforcement of the labor laws. *See, e.g., Williams v. Superior Court* (2017) 3 Cal. 5th 531, 546; *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986; Cal. Lab. Code § 2699(i). In assessing the adequacy of the recovery under a PAGA claim, the focus is not the amount which the LWDA and the aggrieved employees are to receive formally in the form of monetary civil penalties but instead whether the total settlement amount achieves the PAGA’s objectives. “When PAGA claims are settled, courts “consider whether the proposed PAGA settlement is fair and adequate in view of the purposes and policies of the statute[]” and “[t]hose purposes and policies include benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging compliance with California Labor Code provisions, and deterring noncompliance.” *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1132-33 and 1135. A “[c]ourt does not review the PAGA allocation in isolation, but rather reviews the settlement as a whole, to determine whether it is fundamentally fair, reasonable and adequate, with primary consideration for the interests of absent class members.” LWDA’s Comments on Proposed PAGA Settlement in *O’Connor v. Uber Techs.* (N.D. Cal. July 29, 2016) No. 13-CV-03826-EMC, Docket No. 736, at 4:17-19. “PAGA penalties must be evaluated in terms of their public policy objective and not just through the prism of what private relief has been sought or obtained.” *Id.* at 4:14-16.

1 **26%-46%** of the potential *maximum/realistic* damages recoverable at trial.

2 The foregoing factors each indicate that the interests of Class Members are best served by
3 a settlement of this action in the manner and upon the terms set forth in the Settlement Agreement.
4 Given the relatively small size of the Class as compared to, for example, larger nationwide
5 corporate, consumer, or securities class actions, coupled with the financial uncertainties faced by
6 businesses amidst a public health crisis, this Settlement confers a substantial benefit of \$425,000.
7 (Connor Decl. ¶ 84.) Moreover, each Class Member will be given the opportunity to opt-out of the
8 Settlement, allowing those who feel they have claims that are greater than the benefits they can
9 receive under this Settlement, to pursue their own claims. (Connor Decl. ¶ 84.) Finally, Settlement
10 awards for each participating Class Member will be tailored to the extent to which he or she was
11 affect by Defendant’s alleged wage-and-hour violations based on his or her eligible workweeks.
12 (Connor Decl. ¶ 9.) After analyzing the claims in this matter, Plaintiff and Class Counsel have
13 concluded that the value of this Settlement is fair, reasonable, and adequate.

14 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE OT THE CLASS**

15 This Court should order distribution of the proposed Notice of Class Action and PAGA
16 Settlement (“Class Notice”) to the current and former employees, *see*, internal exhibit “1”
17 respectively to the Settlement Agreement attached at **Exhibit “1”** to Connor Decl., to the Class by
18 first class mail, postage prepaid, using the last known mailing address information provided by
19 Defendant. This manner of giving notice is the “best notice practicable” under the circumstances
20 because it provides “individual notice to all members who can be identified though reasonable
21 effort.” *Eisen v. Carlisle and Jacqueline* (1974) 417 U.S. 156, 173. Here, Plaintiff proposes that
22 the settlement be administered by Atticus Administration, LLC (“Atticus”), an experienced class
23 action settlement administrator. (Settlement Agreement ¶ A.14.) Class Members’ addresses will
24 be ascertainable through Defendant’s personnel and payroll records, which Defendant will provide
25 to Atticus within fifteen (15) calendar days after preliminary approval of the settlement.
26 (Settlement Agreement ¶ C.7(a)-(b).) Under the Settlement, Atticus will run all addresses through
27 the National Change of Address database and, to the extent that any notices are returned, will
28 conduct further skip traces to obtain current address information. (Settlement Agreement ¶ C.7(c)-

1 (d.)

2 The content of the proposed notice satisfies California Rule of Court 3.766(d) because it
3 advises Settlement Class Members of the nature of the claims, basic contentions and denials of the
4 Parties, the key terms of the settlement, the uniform 45-day deadline to submit a workweek dispute,
5 request for exclusion/opt-out, or object to the settlement and the procedure by which to do so, and
6 explains the recovery formula and credited number of workweeks for each Class Member. The
7 proposed notice will also notify Class Members of the final approval hearing date, provide the
8 contact information for Class Counsel, and advise Class Members that they may enter an
9 appearance through counsel if they wish. This manner of giving notice satisfies California Rule of
10 Court 3.766(e) as the “best notice practicable” under the circumstances because it provides
11 “individual notice to all members who can be identified through reasonable effort.” *Eisen v.*
12 *Carlisle and Jacquelin* (1974) 417 U.S. 156, 173. Thus, the proposed method of notice is
13 reasonably calculated to reach Class Members by the best means practicable and should be
14 approved.

15 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

16 Finally, this Court should set a hearing for final approval of the Settlement on a date
17 appropriately scheduled to follow the deadline by which Settlement Class Members must submit
18 claims, opt out, or object to the Settlement. *See*, California Rule of Court 3.769.

19 **IX. CONCLUSION**

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

22 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and
23 adequate;

24 2. Preliminarily approving the form and content of the current and former employee
25 versions of the Notice of Class Action and PAGA Settlement, attached as internal exhibit “1” to
26 the Settlement Agreement;

27 3. Provisionally certifying the Settlement Agreement’s proposed Class comprised of
28 the Class Members identified during the Class Period under Cal. Civ. Code section 382 for

1 settlement purposes only;

2 4. Approving and appointing Plaintiff Edgar Gutierrez as the Class Representative;

3 5. Approving and appointing the law firms of Lawyer *for* Justice, P.C. and
4 CounselOne, P.C. as Class Counsel;

5 6. Approving and appointing Atticus Administration as the Settlement Administrator;

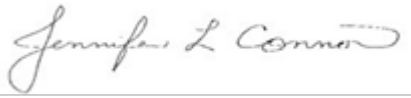
6 7. Setting a date for the Final Approval Hearing; and

7 8. Any further relief the Court deems just and proper.

8
9
10 Dated: January 24, 2022

Respectfully submitted,

11 COUNSELONE, PC

12
13
14 By: 

15 Jennifer L. Connor
16 Anthony J. Orshansky
17 Attorneys for Plaintiff, putative Class
18 Members, and aggrieved employees
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