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16 *and the Putative Class*

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF LOS ANGELES**

19 **SIMIN BORJKHANI**, individually and on
20 behalf of all others similarly situated,

21 Plaintiff,

22 vs.

23 **PARLUX FRAGRANCES, INC., PARLUX**
24 **FRAGRANCES, LLC, and RANDSTAD HR**
25 **SOLUTIONS OF DELAWARE, LLC d/b/a**
26 **RANDSTAD SOURCERIGHT**, jointly and
27 severally,

28 Defendants.

Case No: 19STCV07372

**AMENDED PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO FILE THE
FIRST AMENDED COMPLAINT; CLASS
CERTIFICATION; AND PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Judge: Daniel J. Buckley
Dept.: 01
Date: June 7, 2021
Time: 10:30 a.m.

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1 **I. INTRODUCTION**

2 Plaintiff Simin Borjkhani, together with proposed plaintiff Eva Lopez Acevedo, (collectively
3 “Plaintiffs”) respectfully seek preliminary approval of their Amended Stipulation of Class Action
4 Settlement (the “Settlement Agreement” or “Settlement”) with Defendants Parlux Fragrances, LLC
5 (“Parlux”) and Randstad HR Solutions of Delaware, LLC (“Randstad,” collectively “Defendants”),
6 certification of a settlement class, and leave to file their First Amended Complaint (“FAC”). The
7 proposed First Amended complaint is concurrently file herewith.¹

8 Plaintiffs’ claims arise from Defendants’ employment of Sales Associates. Plaintiffs allege
9 that Defendants collectively employed Sales Associates, at specialty stores, national department stores
10 (including Macy’s, Niemen Marcus, Nordstrom, and Saks Fifth Avenue), and perfumeries throughout
11 California, in order to sell Parlux’ s fragrances and beauty related products. In their lawsuit, Plaintiffs
12 allege that Defendants did not pay its Sale Associates for all hours worked or overtime wages earned
13 and did not provide meal and rest premium wages, resulting in unlawful wage deductions, inaccurate
14 wage statements, and waiting time penalties under California law.

15 The proposed Settlement was only reached after an informed and thoroughly-vetted analysis
16 of Plaintiffs’ claims and arm’s length negotiations by experience counsel. Under the Settlement
17 Agreement, Defendants agree to pay \$275,000 into a non-reversionary fund to resolve Plaintiffs’
18 outstanding claims on a class and representative basis. After deducting any Court-approved attorneys’
19 fees and expenses, class representative incentive payments, administration costs, and payments to the
20 Labor & Workforce Development Agency (“LWDA”), the net settlement fund shall be distributed to
21 all qualified employees based on the number of weeks that they were employed by Defendant during
22 the relevant time period.

23 This Settlement provides substantial recovery for Defendants’ alleged wage and hour
24 violations. Plaintiffs estimate that the Settlement, if approved, would result in a **\$2,182.80 check**
25 (before tax) for the average employee. This relief is immediate, not requiring an aggrieved employee
26 to make a claim, and avoids the risk of further litigation. Accordingly, this Settlement is a fair and
27

28 ¹ Any defined terms used within this Motion are given the same meaning is established within the Settlement Agreement.

1 reasonable resolution of the parties' dispute.

2 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

3 **A. Brief Summary Plaintiffs' Lawsuit**

4 The instant action was originally filed by Simin Borjkhani on behalf of herself and "[a]ll
5 current and former hourly Sales Assistants who worked for Defendants in California at any time during
6 the four years preceding the filing of this Complaint up through and including the judgment."
7 Plaintiff's Complaint, at ¶ 81 (filed on March 4, 2019). Ms. Borjkhani alleged that Defendants, as
8 well as Parlux Fragrances, Inc., jointly employed the Sales Associates, but did not pay them for any
9 additional hours worked in excess of their scheduled hours. *Id.*, at ¶¶ 28-40. This resulted in
10 employees not being fully compensated for the additional time worked (especially overtime), which
11 could be in excess of two hours beyond their scheduled shift. *See id.*, at ¶ 39. Ms. Borjkhani further
12 alleged that Defendants did not regularly provide Sales Associates with the required meal and paid
13 rest periods due to staffing shortages. *Id.*, at ¶¶ 41-52. Therefore, Ms. Borjkhani asserted violations
14 of California Labor Code, California Industrial Welfare Commission Wage Order No. 4; and the
15 California Business & Professional Code section 17200, *et seq.* *Id.* at ¶¶ 89-146.

16 After filing the Complaint, the parties discussed the continued participation of Defendant
17 Parlux Fragrances, Inc. *See* Joint Motion for Parlux for Dismissal of Parlux Frangreances, Inc (filed
18 on June 28, 2019). Parlux Fragrances, Inc. had previously merged into Parlux Fragrances, LLC,
19 another defendant in this dispute. *Id.* The merger occurred on April 18, 2012, before the allegations
20 of the Complaint. *Id.* Therefore, the parties agreed that Parlux Fragrances, Inc. was improperly named
21 as a defendant and stipulated to its dismissal. *Id.*

22 Plaintiff served the remaining Defendants with her initial discovery requests, including
23 Requests for the Production of Documents and Special Interrogatories on May15, 2020. Declaration
24 of Trenton R. Kashima ("Kashima Decl."), concurrently filed herewith, ¶ 25. It was also at this
25 juncture that the parties discussed amending Plaintiff's Complaint to add causes of action under the
26 Private Attorneys General Act of 2004 ("PAGA") and the Fair Labor Standards Act of 1938 ("FLSA"),
27 as well as added the claims of Ms. Lopez Acevedo. *Id.* Ultimately these efforts became unnecessary
28 due to the parties' continued settlement discussions. *Id.*

1 **B. The Parties' Negotiations**

2 From the start of litigation, the parties discussed the possibility of settlement. *Id.*, at ¶ 22. The
3 parties agreed that mediation of their claims represented the best avenue of resolving the dispute. The
4 parties, accordingly, agreed to mediate their claims before Ms. Barbara Reeves, Esq., a well-respected
5 mediator with considerable experience in mediating wage and hour class actions. *Id.*, at ¶ 7, 22.² In
6 preparation for any potential mediation, Defendants agreed to exchange payroll and time records for
7 ninety-two members of the putative class with Class Counsel. *Id.*, at ¶ 8. These ninety-two individuals
8 purportedly represent all Sales Assistants, who worked for Defendants during the relevant time period
9 and did not sign an arbitration agreement. *Id.* After this exchange of information, Defendants
10 informed Class Counsel that they had located arbitration agreements for thirty additional employees,
11 reducing the Class to sixty-two individuals. *Id.*

12 This information was combined with the experiences of Plaintiffs and other members of the
13 putative Class to develop damages modeling. *Id.*, at ¶ 12. To develop their damages models, Class
14 Counsel retained the forensic accounting expert Eric Lietzow of the firm Desmond Marcello &
15 Amster, LLC. Class Counsel provided Mr. Lietzow with payroll data and time records for the Class.
16 *Id.*, at ¶ 9. Mr. Lietzow organized and combined the data to construct a damage model for Class
17 Counsel based on a series of assumptions. *Id.* Class Counsel was able to manipulate the model to
18 account for a range of theories regarding the number of average hours that each putative class member
19 worked off-the clock. *Id.*, at ¶ 14. Class Counsel's damages models also included: (1) waiting time
20 penalties pursuant to California Labor Code, section 203, for employees terminated after May 5, 2016;
21 (2) wage statement penalties pursuant to California Labor Code, section 226(e); (3) damages resulting
22 from missing meal and rest periods; and (4) interest at 10% simple annual rate through April 23, 2020.
23 *Id.*

24 Based on Class Counsel's damages modeling, it is conservatively estimated that Defendants
25 are liable for the total estimated damages for would be \$788,979.97 and \$1,289,865.76 for the putative
26 Class, or, when itemized, approximately:

- 27 • Unpaid Meal Periods: \$75,996.21

28 ² For a detail description of Ms. Reeves' qualifications can be founded on JAMS's website at <https://www.jamsadr.com/reeves/>.

- Unpaid Rest Periods: \$358,205.47
- Unpaid Rest Time: \$1,801.18 (incidents where an employee was not paid for a 15 minute break)
- Unpaid Off-the-Clock Damages (between 10 and 80 minutes): \$72,591.46 to \$573,467.50
- Waiting Time Penalties: \$256,649.15
- Wage Statement Penalties: \$23,721.28

Id., at ¶ 16.³ This represents an average total liability of between \$12,725.48 and \$20,804.28 per employee, or between \$249.78 and \$408.36 per pay period. *Id.*, at ¶ 15. Additionally, it is estimated that PAGA penalties would be at least another \$35,200 dollars in liability, assuming no stacking of PAGA violations. *Id.*, at ¶ 16. Accordingly, the total liability at trial, assuming Plaintiff was successful on all counts, would be \$824,179.75 and \$1,325,065.80. *Id.*

On April 28, 2020, the parties attended a full-day mediation session with the Ms. Reeves. *Id.*, at ¶ 22. While the parties were well prepared for mediation and negotiated in good faith, the parties were unable to resolve their claims. *Id.*, at ¶ 24. The parties, nonetheless, continued their settlement discussion through Ms. Reeves. *Id.* Over the next few weeks, Class Counsel held several conference calls with Ms. Reeves to discuss various aspects of the parties' respective claims, to provide additional evidence, and to further settlement options. *Id.* Through Ms. Reeves' efforts, the parties were ultimately able to reach agreement on the material terms of the Settlement on May 22, 2020. *Id.*, at ¶ 26.

Yet, the parties still had to finalize the settlement agreement and engage a claims administrator. This process was complicated by the continuing COVID-19 pandemic. *Id.* The parties agreed to a Memorandum of Understanding on August 19, 2020. *Id.* But the parties did not finalize the terms of the Settlement Agreement until it was fully executed by November 12, 2020. *Id.*

The parties filed this proposed Stipulation of Class Action Settlement with the Court on November 20, 2020 for preliminary approval. *Id.*, at ¶ 27. However, due to the COVID-19 pandemic, The Court was not able to hear Plaintiff's Motion for Preliminary Approval on April 23, 2021. *Id.* At that time, the Court issued a tentative ruling, continuing the hearing on Preliminary Approval so that

³ To reach these numbers, Plaintiffs' expert reviewed the time and payroll records to determine the number of violations for the sample set and damages resulting. Kashima Decl., at ¶¶ 9-15. This modeling was extrapolated to the ninety-two person putative Class. *Id.* Plaintiffs' damages model breaks down the damages, interest, and penalties associated with each of Plaintiffs' claims. *Id.*, at ¶ 15. The numbers included in this Motion represent a 32.61 percent reduction (a reduction of 30 individuals out of the 92 member class) to estimate the damages for the smaller class size.

1 the parties could address the following concerns regarding the PAGA opt-out procedures, objection
2 and exclusion procedures, and PAGA release. *Id.* The Court also requested additional information
3 regarding the Settlement. *Id.* The parties met and conferred regarding these issues and agreed upon
4 the Amended Stipulation of Class Action Settlement in late May, 2021. *Id.*, at ¶ 28, Ex. B (“Settlement
5 Agreement”). The changes to the Stipulation of Class Action Settlement can be reviewed in the
6 redlined copy of the Amended Stipulation of Class Action Settlement attached as Exhibit C to the
7 Declaration of Trenton Kashima. *Id.*, at ¶ 28, Ex. C.

8 **III. KEY TERMS OF THE SETTLEMENT AGREEMENT**

9 **A. Amendment of the Complaint**

10 In order to effectuate the Settlement, the parties agreed that Plaintiffs would seek leave of the
11 Court to amend the complaint to add the claims of Ms. Lopez Acevedo and causes of action for
12 violations of the PAGA and FLSA. Settlement Agreement, at ¶ 7; Kashima Decl., at ¶ 29. This
13 amendment was contemplated prior to the parties’ agreement to settle their claims and would allow
14 the parties to address all claims that could extend from Plaintiffs’ allegations. Consolidating Ms.
15 Lopez Acevedo’s claims into this action will prevent the need for three piecemeal settlements,
16 preserving the resources of the parties and the courts.

17 Plaintiff’s PAGA notice to the LWDA regarding the claims asserted in the First Amended
18 Complaint April 28, 2021 (LWDA Case No. LWDA-CM-830652-21). Kashima Decl., at ¶ 42, Ex.
19 D & E.

20 **B. Conditional Class Certification**

21 The parties additionally stipulated to certification of the following class of individuals (the
22 “Settlement Class”) for settlement purposes only:

23 all persons who worked as Sales Assistants for Parlux in the State of California or jobs
24 with similar titles and who were issued paystubs from Randstad from March 5, 2015
through the date of preliminary approval of the settlement.

25 Settlement Agreement, at ¶ 1(G). According to Defendant’s records, there are approximately 62
26 members of the Class that were employed for approximately 3,158 weeks. Kashima Decl., at ¶ 43 n.2.
27 Should the Settlement fail to gain the approval of the Court, or otherwise fails to become effective,
28 the conditional class certification shall be void *ab initio* and the parties will return to their previous

1 litigation positions. Settlement Agreement, at ¶ 21.

2 **C. Benefit to the Class**

3 Pursuant to the proposed Settlement, Defendant will pay a total of Two Hundred Seventy Five
4 Thousand Dollars (\$275,000) to satisfy the legal claims of the Settlement Class (the “Gross Settlement
5 Fund”) arising from the First Amended Complaint. Settlement Agreement at ¶1(U). This amount will
6 satisfy the payments to the Settlement Class, PAGA penalties, administrative costs, any incentive
7 award to Plaintiffs, litigation costs, and Plaintiffs’ attorneys’ fees. The Settlement Class is defined as
8 “all persons who worked as Sales Assistants for Parlux in the State of California or jobs with similar
9 titles and who were issued paystubs from Randstad from March 5, 2015 through the date of
10 preliminary approval of the settlement,” “who do not timely and properly opt out of the settlement
11 provided for in this settlement with respect to the state law claims and all Class Members with respect
12 to claims under the Fair Labor Standards Act (“FLSA”).” *Id.*, at ¶1(G), (TT), (UU).

13 The Gross Settlement Fund will be first distributed to satisfy the PAGA penalties due to the
14 State (“LWDA Payment”), the settlement administration costs, any incentive award to Plaintiffs
15 (“Class Representative Service Awards”), and any Plaintiffs’ attorneys’ fees and litigation costs
16 awarded. *Id.*, at ¶ 17. First, \$16,000 would be allocated from the Gross Settlement Fund for civil
17 penalties under PAGA and various other provisions of the California Labor Code (“Gross PAGA
18 Settlement Amount”). *Id.*, at ¶ 17(c). Consistent with California Labor Code, section 2699(i), seventy-
19 five percent (75%), or \$12,000, of the PAGA Settlement will be paid to the California LWDA, with
20 the remaining twenty-five (25%), or \$4,000, allocated back into the Settlement Fund for distribution
21 to the Settlement Class. *Id.*, at ¶ 17.

22 The PAGA Payment to each individual Settlement Class Member will be determined by the
23 total Qualifying PAGA Workweeks by the PAGA Net Settlement Amount to determine the PAGA
24 Payment Ratio. *Id.*, at ¶¶1 (W), (EE), (MM), ¶17(c), (d). Qualifying PAGA Workweeks are those
25 worked by the Settlement Class in the PAGA Settlement Period, March 5, 2018 until the Preliminary
26 Approval Date. *Id.*, at ¶1(DD), (GG), (MM). The PAGA Group Member’s payment will be
27 determined by multiplying the PAGA Payment Ratio by the number of PAGA Qualifying Class
28 Workweeks worked by the PAGA Group Member during the PAGA Settlement Period. *Id.*, at ¶ 17(d).

1 PAGA Group Members may not opt out of the PAGA Settlement and will release the PAGA Released
2 Claims. *Id.*, at ¶ 16(e).

3 The remaining funds will be distributed to the Settlement Class, *pro rata*, according to the
4 number of weeks that the Settlement Class Members were employed by Defendant during the Class
5 Period. *Id.*, at ¶ 17(b). The Net Class Settlement Amount (estimated at \$131,333.33) will be divided
6 by the total number of Qualifying Class Workweeks for all Settlement Class Members, resulting in
7 the Payment Ratio. *Id.*, at ¶¶ 1(I), (V), (LL), 17(b). The Settlement Class Member's payment will be
8 determined by multiplying the Payment Ratio by the number of Qualifying Class Workweeks worked
9 by the Class Member during the Class Period. *Id.*, at ¶ 17(b). Payments to the Settlement Class will
10 be distributed in a single payment, occurring within fourteen (14) days after the funding date. *Id.*, at
11 ¶ 17.

12 Based on the projected cost of settlement administration (\$10,000), PAGA Payment to the
13 LWDA (\$12,000), the requested incentive award to Plaintiffs (\$5,000 per Plaintiff, \$10,000 in total),
14 litigation costs (\$16,000), and attorneys' fees (\$91,666.67); Plaintiffs' estimated each Settlement Class
15 Member will be paid **\$41.59 per week worked** (the \$135,333.33 net value of the Settlement—or the
16 Net Class Settlement Amount estimated at \$131,333.33 plus the PAGA Payment at \$4,000—divided
17 by 3,158 workweeks). Kashima Decl., at ¶ 43. The individual recovery will likely **average**
18 approximately **\$2,182.80 per worker** (the net value of the settlement (\$135,333.33) divided between
19 the 62 Settlement Class Members). *Id.* Payment will be sent directly to Class Members; no claims
20 process is required. Any such unclaimed checks will escheat to the State of California in accordance
21 with the Unclaimed Property Law, Code of Civil Procedure, section 1500. *Id.*, at ¶ 17(a).

22 The Settlement will be administrated by the Simpluris, Inc. (the "Settlement Administrator"),
23 who will maintain the Settlement Fund until its distribution in an account(s) segregated from the assets
24 of Defendants and any person related to Defendants. *Id.*, at ¶ 33. **No portion of the Settlement Fund**
25 **will revert back to Defendants.** Settlement Agreement, at ¶ 17.

26 **D. Release of Claims**

27 In exchange for the Settlement, the Settlement Class will provide the following release of
28 claims:

1 “Class Released Claims” means any and all claims that were pled or could have been
2 pled, based on, or which arise out of the facts alleged in the complaints in the Action,
3 arising during the Class Period. This include known and unknown claims arising under
4 California Labor Code sections 201-203, 216, 221, 223, 225.5, 226, 226.7, 510, 512,
5 1174, 1182.12, 1194, 1194.2, 1197, 1198, the applicable IWC Wage Order(s), the
6 California Unfair Competition Law, Business and Professions Code section 17200 et
7 seq., and the Fair Labor Standards Act, 29 U.S.C. section 201, *et seq.* The Class
8 Released Claims will include claims under the Fair Labor Standards Act (“FLSA”) for
9 those individuals, and only those individuals, who cash a check issued pursuant to this
10 Settlement as they will be deemed to have opted into a release of related FLSA claims.
11 The release shall run for the duration of the Class Period.

12 *Id.*, at ¶ 1(NN)(a). The Class Released Claims will include claims under the Fair Labor Standards Act
13 (“FLSA”) for those individuals, and only those individuals, who cash a check issued pursuant to this
14 Settlement as they will be deemed to have opted into a release of related FLSA claims. *Id.*, *see also*
15 *Id.*, at ¶ 13(e) (The back of each settlement check will include the follow language, “My endorsing,
16 cashing, or depositing of this check constitutes my consent to join the lawsuit entitled *Simin Borjkhani*
17 *v. Parlux Fragrances, Inc. et al*, pending in the Superior Court of the State of California for the County
18 of Los Angeles, Case No. 19STCV07372, pursuant to the provisions of the Fair Labor Standards Act
19 (“FLSA”), 29 U.S.C. Section 216(b).”)

20 Additionally, Plaintiffs will release PAGA claims on behalf of the State of California:

21 “PAGA Released Claims” means all claims, demands, rights, and liabilities that were
22 asserted in the First Amended Complaint and respective LWDA notice in the in the
23 Action under California’s Labor Code Private Attorneys General Act of 2004
24 (“PAGA”) based on the factual allegations in the complaints, which include, but are
25 not limited to PAGA claims based on California Labor Code sections 201-204, 216,
26 221, 223, 225, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2,
27 1197, 1197.1, 1198, and the applicable IWC Wage Order(s). The release shall run for
28 the duration of the PAGA Settlement Period.

29 *Id.*, at ¶ 1(NN)(b). This PAGA release was revised by the parties, at directing on the Court, and is
30 limited to only the claims plead in the First Amended Complaint. Accordingly, both the Class and the
31 PAGA releases are limited to the claims addressed by the parties and is within the scope normally
32 released in representative actions. *Villacres v. ABM Indus. Inc.* (2010) 189 Cal. App. 4th 562, 588
33 (“A general release—covering ‘all claims’ that were or could have been raised in the suit—is not
34 uncommon in class action settlements.”).

35 In the revised Settlement Agreement, the release of any claims becomes effective on the
36 Effective Date, but is conditioned on the payment of the respective settlement amounts. Settlement

1 Agreement, at ¶ 13(b)-(c). Because class settlements are binding by operation of the Court's the
2 judgment (and not by virtue of contract law), it is common for the release to accrue on the date on
3 which the judgment becomes final (in this case, the "Effective Date." See NEWBERG ON CLASS
4 ACTIONS § 18:19 (5th ed. 2014) ("The process by which a class action settlement is approved has the
5 effect of turning the private settlement into a judicial ruling, a judgment. Thus, in class actions, future
6 litigation is always governed by the doctrine of preclusion and never by the settlement contract
7 directly."); *Howard v. Am. Online Inc.* (9th Cir. 2000) 208 F.3d 741, 748 (A "judicially approved
8 [class] settlement agreement is considered a final judgment on the merits.")). Nonetheless, both the
9 PAGA and Class Releases are now conditioned on payment. Therefore, the risk of non-payment will
10 not prejudice the Class in anyway. Furthermore, the Class Released Claims will only effect those
11 claims occurred during the Class Period (which ends on the Preliminary Approval Date). See
12 Settlement Agreement at ¶ 1(NN)(a). Thus, the timing of the Effective Date has no relation to the
13 scope of the Class Released Claims.

14 **E. Notice and Right to Opt Out or Object**

15 Upon preliminary approval of this Settlement, the Settlement Administrator shall mail notice
16 to each Settlement Class Member using information taken from Defendant's employment records. *Id.*,
17 at ¶ 1(F). The proposed notice, attached as Exhibit 2 to the Settlement Agreement, will be provided
18 by First Class Mail and will inform each Settlement Class Member of the nature of the dispute, the
19 estimated individual relief under the Settlement, the release of claims, the right to opt-out or object to
20 the Settlement, the need to keep the Settlement Administrator apprised of their current mailing address,
21 Settlement Administrator/Counsel's contact information, and the final approval hearing date and
22 location. *Id.*, Ex. 1. The proposed notice will state on the first page: "PLEASE READ THIS NOTICE
23 CAREFULLY. YOUR RIGHTS MAY BE AFFECTED. YOU MAY BE ENTITLED TO RECEIVE
24 MONEY FROM THIS PROPOSED SETTLEMENT." *Id.*

25 The Class Notice was revised now clearly explains the PAGA settlement, that PAGA payment
26 will be made regardless of exclusion from the Class Settlement, and the nature of the PAGA release.
27 See *id.*, at pp. 3-5. The Class Notice also now includes information regarding the Court's COVID
28 Protocols and that a Class Member need not file an actual objection to appear to the Final Approval

1 Hearing. *See id.*, at p. 7.

2 Any undeliverable or returned Notice Packets will be either re-mailed to the forwarding
3 address provided or the Settlement Administrator will attempt to determine the correct address for the
4 individual by tracing, or other search using the name, address, and/or Social Security number of the
5 Settlement Class Member involved. *Id.*, at ¶ 16(b). Settlement Class Members who received a
6 remailed Notice Packet shall have their Response Deadline extended ten (10) days from the original
7 Response Deadline. *Id.*

8 Settlement Class Members can exclude themselves by written request to the Settlement
9 Administrator by the Response Deadline, *i.e.* forty-five (45) days after the Settlement Administrator
10 mails Notice Packets to Settlement Class Members. *Id.*, at ¶ 16(e). A request for exclusion does not
11 require any particular language, but must explicitly state that the individual wishes to exclude
12 themselves from the settlement, contain identifying information, and be signed. *Id.* Similarly, any
13 Settlement Class Member can also submit a written objection to the Settlement Administrator, before
14 the Response Deadline. *Id.*, at ¶ 16(f). A written objection, however, is not a prerequisite to being
15 heard at the Final Approval Hearing. *Id.* Any disputes regarding the number of weeks worked must
16 be submitted by the same Response Deadline as objections or requests for exclusion. *Id.*, at ¶ 16(c).

17 Any exclusion and/or objections will be provided by the Settlement Administrator to the Court
18 before the Final Approval hearing. *Id.*, at ¶ 16(e), (f). Disputes about the administration of the
19 Settlement will be resolved by the Court, if the parties can resolve the issue amicably. *Id.*, at ¶ 16(d).

20 **F. Incentive Awards and Attorneys' Fees and Costs**

21 Class Counsel intends to request an award of attorneys' fees not to exceed \$91,666.67 and
22 costs not to exceed \$16,000. *Id.*, at ¶ 17(f). Additionally, Defendant agrees to pay a \$5,000 incentive
23 award to each named Plaintiff for their efforts (\$10,000 in total). *Id.*, at ¶ 17(e). Plaintiffs will
24 separately move this Court for attorneys' fees, costs, and incentive awards prior to the hearing for
25 Final Approval.

26 **IV. LEAVE TO FILE THE FIRST AMENDED COMPLAINT SHOULD BE GRANTED** 27 **TO ALLOW A GLOBAL SETTLEMENT**

28 Pursuant to California Code of Civil Procedure, section 472, a plaintiff may amend its
complaint "upon stipulation by the parties." Pursuant to the Settlement Agreement, the parties have

1 stipulated that Plaintiffs may amend their complaint to add the claims of Ms. Lopez Acevedo, as well
2 as the PAGA claims. Kashima Decl., at ¶ 25, Settlement Agreement at ¶ 7. This amendment will
3 allow the parties to settle their claims in a single action, avoiding duplication of efforts that would
4 result from disjointed settlements. Accordingly, leave to file the First Amended Complaint should be
5 granted for settlement purposes only.

6 **V. THE PROPOSED SETTLEMENT CLASS MEETS ALL THE REQUIREMENTS OF**
7 **CLASS CERTIFICATION**

8 In order to effectuate the proposed Settlement, Plaintiffs move for certification of the
9 Settlement Class, solely for the purposes of Settlement. California favors class actions to protect
10 individuals from fraudulent and deceptive business practices while California courts encourage use of
11 this procedural mechanism to remedy such wrongs. *Sav On Drug Stores, Inc. v. Sup. Ct.* (2004) 34
12 Cal.4th 319, 340. Code of Civil Procedure, section 382, authorizes the maintenance of a class action
13 “when the question is one of a common or general interest, of many persons, or when the parties are
14 numerous, and it is impracticable to bring them all before the court.” In moving to certify a class, a
15 plaintiff assumes the burden of showing the existence of an ascertainable class and a well-defined
16 community of interest. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. “The community of
17 interest requirement embodies three factors: (1) predominant common questions of law or fact; (2)
18 class representatives with claims or defenses typical of the class; and (3) class representatives who can
19 adequately represent the class.” *Id.*, citing *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470;
20 *Mass. Mutual Life Ins. Co. v. Sup. Ct.* (2002) 97 Cal.App.4th 1282, 1287.

21 Courts, however, should apply a lesser standard of scrutiny when reviewing certification of a
22 class for settlement than when determining the propriety of class certification for litigation. *Dunk v.*
23 *Ford Motor Co.* (1996) 48 Cal. App .4th 1794, 1807 n.19, *as modified* (Sept. 30, 1996) *citing Officers*
24 *for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco* (9th Cir. 1982) 688 F.2d 615, 633.
25 This reduced standard reflects the fact that a class settlement foregoes further litigation, and thus does
26 not require that plaintiffs prove that the classwide prosecution of the case would be manageable at
27 trial. *Id.*

28 **A. Numerosity and Ascertainability**

In this case, the proposed Settlement Class is both numerous and ascertainable. Based on

1 Defendants' employment records, there are approximately sixty-two members of the Class. Kashima
2 Decl., ¶ 8.⁴ Each Settlement Class Member can be identified by name, address, and Social Security
3 number. JCL Decl., ¶ 35. Defendants' records further provide the number of work weeks that each
4 Class Member was employed by Defendant during the Class Period. *Id.* Accordingly, Plaintiffs can
5 not only ascertain the identity of the Settlement Class, but also approximate the damages owed to each
6 Class Settlement Member.

7 **B. Predominance and Commonality**

8 The Court must next determine whether questions of law and fact common to the Class are
9 substantially similar and predominate over questions affecting the member individually. *Wershba v.*
10 *Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 237-38. The test of predominance is not whether
11 each class member's situation is identical, but rather, whether the common issues would be "the
12 principal issues in any individual action, both in terms of time to be expended in their proof and of
13 their importance, [so] that if a class suit were not permitted, a multiplicity of legal actions dealing with
14 identical basic issues would be required in order to permit recovery by each [absent class member]." *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 810.

16 In this case, each Class Member had similar job duties, were subject to the same alleged failure
17 to pay wages for all hours worked, overtime wages, were not provided meal and rest breaks (or the
18 resulting pay premium), and were all aggrieved employees pursuant to PAGA. *See* FAC, at ¶¶ 101,
19 163. The Class's alleged injury stems from Defendants' common business practice, *i.e.* Defendant's
20 timekeeping policies, failure to account for time worked during paid rest periods, and inaccurate time
21 records. *See id.* Thus, the Settlement Class shares common questions of law and fact, including, *inter*
22 *alia*, whether they were compensated for all hours work, overtime wage premiums, provided with
23 accurate written wage statements, timely paid earned wages, and failed to receive the required meal
24 and rest breaks. *See generally id*; *see also Ogbuehi v. Comcast of California/Colorado/Fla./ Oregon,*
25 *Inc.* (E.D. Cal. 2014) 303 F.R.D. 337, 345.

27 ⁴ The size of the Settlement Class is based on numbers provided by Defendants' prior to mediation.
28 Updated information regarding the size of the Members Class and estimated Individual Class
Settlement Payments due to Settlement Class Members will be provided to the Settlement
Administrator following preliminary approval. Settlement Approval, at ¶ 16. This information will
also be provided to the Court a final approval.

1 Additionally, each Class Member’s individual settlement payments will be determined by the
2 duration of their employment, eliminating any individualized damages calculations. Settlement
3 Agreement at ¶ 17(b), (d); *Williams v. Sup. Ct.* (2013) 221 Cal. App. 4th 1353, 1365 (noting that “Trial
4 by Formula” is an acceptable method of calculating damages); *see also Sav-on Drug Stores, Inc. v.*
5 *Sup. Ct.* (2004) 34 Cal. 4th 319, 334-35 (“[I]ndividualized proof of damages is not per se an obstacle
6 to class treatment [citation] and ‘that each member of the class must prove his separate claim to a
7 portion of any recovery by the class is only one factor to be considered in determining whether a class
8 action is proper.’”). Accordingly, the commonality and predominance requirements have been met.

9 **C. Typicality**

10 Plaintiffs’ claims are also typical of those of the Class. Typicality requires that the named
11 plaintiffs’ interests in the action be aligned with those of other Class members. *Richmond*, 29 Cal. 3d
12 at 470-75; *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46. However, “[t]ypicality refers to the
13 nature of the claim or defense of the class representative, and not to the specific facts from which it
14 arose or the relief sought.” *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal. App. 4th 1497, 1509.
15 Here, the core of the Class’s claims all arise from the violations of the same Labor Code sections:
16 Defendant failed to paid the Settlement Class Members for all time worked and wages owed (*e.g.*,
17 CAL. LABOR CODE e §§ 1182.12, 1194, 1197, 1198), overtime premiums (*e.g.*, 29 U.S.C. § 216(b),
18 CAL. LABOR CODE §§ 510 and 1198), failure to provide accurate wage statements (*e.g.*, CAL. LABOR
19 CODE §§ 226 and 1174), failure to provide meal and rest periods (CAL. LABOR CODE § 226.7, 512),
20 failure to pay wages on discharge (CAL. LABOR CODE §§ 201-03), and unlawful wage deductions (CAL.
21 LABOR CODE §§ 221 and 223). Accordingly, Plaintiffs’ claims coincide with those of the other Class
22 Members.

23 **D. Adequacy**

24 The requirement that a plaintiff adequately represent the class is met by fulfilling two
25 conditions: (1) the named plaintiff must be represented by counsel qualified to conduct the pending
26 litigation; and (2) there are no disabling conflicts of interest between the class representative and the
27 class. *McGhee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450. The Court may presume the
28 adequacy of the proposed representative(s) where they have a common interest in obtaining the same

1 relief as the absent class members and where the representatives' interests are not otherwise adverse
2 to those of the Class. *See Lazar v. Hertz Corp.* (1983) 143 Cal. App. 3d 128, 142; *Rosack v. Volvo of*
3 *America Corporation* (1982) 131 Cal. App. 3d 741, 763.

4 Each of the Plaintiffs are willing to assume the responsibilities as class representatives, have
5 no disabling conflicts of interest, and intend to vigilantly protect and advance the rights of the similarly
6 situated Settlement Class. Kashima Decl., at ¶¶ 42-45; Declarations of Simin Borjkhani and Eva
7 Lopez Acevedo. Plaintiffs have also chosen competent and experienced counsel to pursue their
8 claims. *Id.*, at ¶ 2, Ex. A. Thus, Plaintiffs have established a shared interest and a lack of conflicts,
9 nothing more is required. *See Richmond*, 29 Cal.3d at 473; *McGhee*, 60 Cal.App. 3d at 487.

10 **E. Superiority**

11 Finally, Settlement of the instant case as a class action is superior to any alternative. This case
12 involves approximately sixty-two Settlement Class Members, who have all been injured in a relatively
13 small amount. Kashima Decl., at ¶¶ 8, 43 (the average recovery settlement would be \$2,182.80). The
14 individual amounts of recovery at issue would otherwise be too small to warrant individual litigation.
15 *Richmond*, 29 Cal.3d at 469; *see Carnegie v. Household Int'l, Inc.* (7th Cir. 2004) 376 F.3d 656, 661
16 ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits,
17 as only a lunatic or a fanatic sues for \$30"). But even if the individual Class Members were inclined
18 to separately seek relief, such repetitious litigation would not benefit the parties or the Court.
19 *Richmond*, 29 Cal.3d at 469. Instead, "this state has a public policy which encourages the use of the
20 class action device." *Id.*, at 473. Accordingly, this Settlement is superior to continued and individual
21 litigations.

22 For these reasons, Plaintiffs request that the Court certify the Settlement Class for purposes of
23 the proposed Settlement, appoint Plaintiffs as Class Representatives, and the undersigned counsel as
24 Class Counsel.

25 **VI. THE COURT SHOULD PRELIMINARILY APPROVE THIS SETTLEMENT**

26 **A. The Proposed Settlement Meets the Standards for Preliminary Approval**

27 Pre-trial settlement of complex class actions is a judicially favored remedy. *Officers for Justice*
28 *v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are

the preferred means of dispute resolution.”). Accordingly, the California Rules of Court sets forth a two-step process for settlement of class actions:

First, the court preliminarily approves the settlement and the class members are notified as directed by the court. (CRC, rule 3.769(c)-(f).) “The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.” (CRC, rule 3.769(f).) Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. (CRC, rule 3.769(g).)

In re Cellphone Termination Fee Cases (2009) 180 Cal. App. 4th 1110, 1118. Each class settlement must be reviewed and approved by the trial court. See CAL. R. CT. 3.769(a); see also *Dunk*, 48 Cal.App.4th at 1800-01.

While the Rules of Court are silent on a precise legal standard that should be adopted at preliminary approval, the Court should generally examine the fairness of the settlement terms and the adequacy of class notice. *Merch. v. OfficeTeam* (Cal. Ct. App. Mar. 21, 2013, No. B241888), 2013 WL 1153648, at *7 (unpublished) (citing the Los Angeles Superior Guidelines for Motions for Preliminary and Final Approval of Class Settlement). In this manner, the Court’s process for preliminary approval mirrors the standards imposed by its federal counterparts:

“[The] preliminary determination establishes an initial presumption of fairness * * *.” *In re General Motors Corp.*, 55 F.3d 768, 784 (3d Cir.1995) (emphasis added). As noted in the *Manual for Complex Litigation*, Second, “[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing * * *.” *Manual for Complex Litigation*, Second § 30.44 (1985). In addition, “[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid.” *Newberg on Class Actions* § 11.25 (1992).

In re Tableware Antitrust Litig. (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1079–80 (citing *Schwartz v. Dallas Cowboys Football Club, Ltd.* (E.D. Pa. 2001) 157 F.Supp.2d 561, 570 n.12; *Dunk*, 48 Cal.App.4th at 1802 (noting that “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... .”); see also *Vasquez*, 4 Cal.3d at 821 (California courts examine the Federal Rules of Civil Procedure for guidance in interpreting state class action procedure in absence of controlling state jurisprudence).

1 Nevertheless, at the preliminary approval stage, at final analysis of the settlement’s merits is
2 not required. Accordingly, “[p]reliminary approval of a settlement and notice to the proposed class is
3 appropriate: ‘[i]f [1] the proposed settlement appears to be the product of serious, informed,
4 noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential
5 treatment to class representatives or segments of the class, and [4] falls with[in] the range of possible
6 approval[.]’” *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2009) 670 F.Supp.2d 1114, 1125
7 (“*Coast Valley Roofing*”) (citation and internal quotations omitted).

8 1. The Settlement was Reached After Contentious and Informed Arms’ Length
9 Negotiations

10 “A presumption of correctness is said to attach to a class settlement reached in arm’s-length
11 negotiations between experienced capable counsel after meaningful discovery.” *In re Heritage Bond*
12 *Litig.* (C.D. Cal. June 10, 2005, No. 02-ML-1475 DT) 2005 WL 1594403, at *9; *Dunk*, 48 Cal.App.4th
13 at 1802. Moreover, if the terms of the settlement are fair, courts generally assume the negotiations
14 were proper. *See In re GM Pick-up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. 1995) 55 F.3d 768,
15 785-86.

16 In the instant case, the Settlement was negotiated after an initial disclosure of information
17 which enabled Plaintiffs to develop an individualized damages model, which approximated the value
18 of the Settlement Class’s claims on an individual and collective basis. Kashima Decl.. ¶¶ 9-15.
19 Additionally, the parties also engaged an experienced and respected mediator in an attempt to broker
20 a settlement. Kashima Decl.. ¶ 7. Yet, even with the assistance of a neutral mediator, the parties’
21 settlement negotiations extended well over five months and only concluded after mediation and
22 numerous calls with the mediator. Kashima Decl.. ¶¶ 22-27. The involvement of a mediator, as well
23 as the lengthy and adversarial nature of the settlement negotiations, are all indicia of the “contentious”
24 nature of the underlying negotiations. *See Wershba*, 91 Cal. App. 4th at 245.

25 2. The Proposed Settlement Falls Within the Range of Possible Approval

26 To determine whether a settlement is fair and reasonable, California courts considered a
27 number of factors, including: (1) the value of the settlement; (2) the inherent risk of continued
28 litigation; (3) the extent of discovery completed and the status of the proceedings when settlement is
reached; (4) the complexity, expense, and likely duration of the litigation in the absence of a

1 settlement; and (5) the experience and views of class counsel. *See Wershba*, 91 Cal. App. 4th at 244-
2 45; *Dunk*, 48 Cal.App.4th at 1801. “Ultimately, the court's determination is simply an amalgam of
3 delicate balancing, gross approximations and rough justice.” *Cho v. Seagate Tech. Holdings, Inc.*
4 (2009) 177 Cal.App.4th 734, 743.

5 *a. The Settlement Represents a Significant Value to the Class*

6 The Settlement Fund provides the Class \$275,000 in total relief. Based on the total number of
7 Settlement Class Members, and the total number of work weeks, Plaintiffs estimate the average
8 recovery will be **\$2,182.80** (or approximately **\$41.59** per week worked). Kashima Decl., at ¶ 43.
9 Settlement Class Members will not have to take any affirmative steps to secure their portion of the
10 Settlement. Instead, funds will be mailed directly to the Settlement Class Members. Settlement
11 Agreement, at ¶ 17(a). Even uncashed checks will be held by the State in the name of the Class
12 Member. *Id.* Thus, this recovery is not illusory or insignificant.

13 The valuation of the outstanding claims, and the ultimate Settlement, was informed by the
14 parties’ early discovery and damages models, which were vetted by Plaintiffs’ expert. Kashima Decl.,
15 ¶¶ 11-14. Plaintiffs projected that the total damages for the Settlement Class ranged between
16 \$824,179.75 and \$1,325,065.80, if Plaintiffs were successful at trial. *Id.*, ¶ 15. Accordingly, the
17 Settlement Fund of \$275,000 represents **between 20.75% and 33.37% of the full verdict value** of
18 the claims being released (or **\$41.59 per week worked; \$2,182.80 per worker**). *Id.*, ¶ 35. This is
19 well within the bounds of reasonableness. *See Vicerol v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016,
20 No. 15-CV-02198) 2016 WL 5907869, at *3, 7 (approving a California wage and hour settlement
21 where the class received 11.6% of the estimated total liability, or approximately \$29 per work week);
22 *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. June 28, 2017, No. 16-CV-00784) 2017 WL
23 2797811, at *7 (Approving a California wage and hour settlement where the class received 18% of
24 the estimated total liability); *see also In re Newbridge Networks Sec. Litig.* (D.D.C. Oct. 23, 1998)
25 1998 WL 765724, at *2 (“Courts have not identified a precise numerical range within which a
26 settlement must fall in order to be deemed reasonable; but an agreement that secures roughly six to
27 twelve percent of a potential trial recovery, while preventing further expenditures and delays and
28 eliminating the risk that no recovery at all will be won, seems to be within the targeted range of

1 reasonableness.”).⁵

2 In exchange for this relief, the Settlement Class agrees to release claims that could have, or
3 should have, been pled in the Complaint. Settlement Agreement, at ¶ 1(NN)(a). Accordingly, the
4 scope of the release is also reasonable. *Coast Valley Roofing*, 370 F.Supp.2d at 1126 (finding a class
5 action settlement fair because the “settlement does not release unrelated claims that class members
6 may have against defendants.”). *C.f. Trotsky v. Los Angeles Federal Savings & Loan Ass'n.* (1975) 48
7 Cal.App.3d 134, 147-49 (“[T]he complaint was not amended to encompass the terms of the settlement.
8 Without amendment of the complaint the purported settlement... was outside the scope of the action
9 and was not valid.”).

10 Moreover, the Settlement provides recovery to the State of California in the form of stipulated
11 PAGA civil penalties. There are no articulated standards for determining whether a certain quantum
12 of PAGA civil penalties are reasonable upon settlement. *Ramirez v. Benito Valley Farms, LLC* (N.D.
13 Cal. Aug. 25, 2017, No. 16-CV-04708) 2017 WL 3670794, at *3. Instead, the court “evaluates the
14 PAGA settlement in light of the PAGA requirement that the award not be ‘unjust, arbitrary and
15 oppressive, or confiscatory.’” *Id.* (citing CAL. LABOR CODE § 2699(e)(2)).

16 It is important to note that under PAGA, both underpaid wages and civil penalties are
17 recoverable. CAL. LABOR CODE § 2699(i), *see also* CAL. LABOR CODE § 558. “Underpaid wages go[
18] entirely to the affected employee or employees as an express exception to the general rule that civil
19 penalties recovered in a PAGA action are distributed 75 percent to the Labor and Workforce
20 Development Agency (LWDA) and 25 percent to the aggrieved employees.” *Thurman v. Bayshore*
21 *Transit Mgmt., Inc.* (2012) 203 Cal. App. 4th 1112, 1145. But it is not necessary for a settlement to
22

23 ⁵ This average net recovery also far exceeds many wage and hour class action settlements approved
24 by California state courts. *See, e.g., Palencia v. 99 Cents Only Stores*, No. 34-2010-00079619
25 (Sacramento County Super. Ct.) (average net recovery of approximately \$80); *Fukuchi v. Pizza Hut*,
26 Case No. BC302589 (LA. County Super. Ct.) (average net recovery of approximately \$120);
27 *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net
28 recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018
(L.A. County Super. Ct.) (average net recovery of approximately \$90); *Lim v. Victoria's Secret Stores,*
Inc., Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35);
and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of
approximately \$20) (please note that these are unpublished decisions, however they provide the Court
with guidance concerning settlements in similar state court cases).

1 allocate any funds towards PAGA civil penalties if the settlement benefits the aggrieved employees.
2 *See Ramirez, supra*, 2017 WL 3670794, at *4 (“[C]lassifying the PAGA penalties in this case solely
3 as underpaid wages is reasonable.”). The Settlement Agreement, nonetheless, provides that \$16,000
4 shall be allocated as civil penalties to be divide among the aggrieved employees and the State.
5 Settlement Agreement at ¶ 17(c). This amount is similar to allocations that have been approved in
6 other class settlements. *See, e.g., Viceria, supra*, 2016 WL 5907869, at *8 (approving an allocation
7 of \$20,000 of a \$6,000,000 settlement to the PAGA civil penalties); *In re Uber FCRA Litig.* (N.D.
8 Cal. June 29, 2017, No. 14-CV-05200) 2017 WL 2806698, at *2 (approving an allocation of \$7,500
9 of a \$7,500,000 settlement to the PAGA civil penalties). The benefit provided by the proposed
10 Settlement is substantial and easily falls within the range of reasonableness.

11 *b. The Risk of the Litigation Favors Settlement*

12 “It can be difficult to ascertain with precision the likelihood of success at trial. The Court
13 cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation],
14 and to the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good
15 value for a relatively weak case or a sell-out of an extraordinary strong case.’” *Misra v. Decision One*
16 *Mortg. Co.* (C.D. Cal. Apr. 13, 2009, No. SACV070994) 2009 WL 4581276, at *7

17 Plaintiffs are confident about the strength of their claims. Nonetheless, Plaintiffs recognize
18 that Defendant has factual and legal defenses that, if successful, would potentially defeat or
19 substantially impair the value of Plaintiffs’ lawsuit. For example, Plaintiffs may not be unable to
20 certify a class or prove the merits of their claims on a classwide basis at trial. *See* Kashima Decl. ¶¶
21 17-20. These risk are not remote. *See, e.g., Zackaria v. Wal-Mart Stores, Inc.* (C.D. Cal. May 18,
22 2015, No. ED CV 12–1520) 2015 WL 2412103, at *16 (denying certification of claims that asset
23 protection coordinators were misclassified as exempt; although putative class members received
24 similar training and were held to identical job expectations, an analysis of how employees actually
25 spent their time is an individual question not amenable to resolution through collective proof). Class
26 damages are particularly hard to prove in cases involving unrecorded time, where the schedule of the
27 individual employees varies significantly. Additionally, meal and rest break violations require proof
28 that the employer was actually undermining its own formal break policies. *Brinker Restaurant Corp.*

1 v. *Super. Ct.* (2012) 53 Cal. 4th 1004, 1039-40 (“Proof an employer had knowledge of employees
2 working through meal periods will not alone subject the employer to liability for premium pay;
3 employees cannot manipulate the flexibility granted them by employers to use their breaks as they see
4 fit to generate such liability.”) This can be difficult to prove at trial.

5 “The Settlement eliminates these and other risks of continued litigation, including the very real
6 risk of no recovery after several years of litigation.” *In re Nvidia Derivs. Litig.* (N.D. Cal. Dec. 22,
7 2008, No. C-06-06110) 2008 WL 5382544, at *3. Indeed, potential appeals aside, litigating a complex
8 case through trial is inherently perilous regardless of the strengths of Plaintiffs’ claims:

9 [N]othing is assured when litigating against commercial giants with vast litigative
10 resources, particular in such complex litigation as this, which would strain the cognitive
11 capacities of any jury. Defense judgments were hardly beyond the realm of possibility.
Accordingly, this factor weighs in favor of preliminary approval.

12 *Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1140, *opinion modified* (June 18, 1990);
13 See Kashima Decl. ¶ 19.

14 Finally, even if Plaintiffs were successful at trial, business realities created uncertainty
15 regarding Plaintiffs’ ability to recover their hard-fought judgment. Potential exposure for the
16 Settlement Class’s claims could easily exceed \$900,000. Kashima Decl., at ¶ 16. Plaintiffs are
17 concerned that Defendant may not be able to absorb a large judgment in this case. *Id.*, at ¶ 18; *In re*
18 *Toys R Us* (C.D. Cal. 2014) 295 F.R.D. 438, 452 (“For its part, Toys risked the possibility of
19 ‘catastrophic damages’ ... The fact that both sides faced this type of all-or-nothing prospect weighs in
20 favor of approval.”); *County of Suffolk v. Long Island Lighting Co.* (2d Cir. 1990) 907 F.2d 1295,
21 1323–1324 (The Court should consider the ability of the defendant to withstand a greater judgment
22 when approving a class settlement.).⁶ This is more true after limitations on retail stores after COVID.
23 Accordingly, were this case to move forward, the ultimate recovery could have been considerably less
24 than the value achieved by this Settlement. These risks weight in favor of approval of the Settlement.

25 c. *Complexity, Expense, and Likely Duration of Further Litigation*

26 Continuing to litigate this action would require extensive resources coupled with significant
27 Court time to proceed through trial and post-trial motions; which can often take years. Kashima Decl.

28 ⁶ Indeed, the COVID-19 pandemic makes these concerns even more acute. Kashima Decl. ¶ 18.

¶ 19. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to determining classwide damages. *Id.*, ¶ 18. But even if Plaintiffs are successful at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect that Defendant would appeal any favorable judgment. *Id.*, ¶ 19. “Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.” *Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527. Thus, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Id.* at 526.

d. The Experience and Views of Counsel

In contemplating the preliminary approval of a proposed settlement, “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *Knight v. Red Door Salons Inc.* (N.D. Cal. Feb. 2, 2009, No. 08-01520) 2009 WL 248367, at *4 (citing *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 622); see also *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (citing *Cotton v. Hinton* (5th Cir. 1977) 559 F.2d 1326, 1330). “Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enters. Secs. Litig.*, 47 F.3d at 378. Thus, “the Court should not without good cause substitute its judgment for [counsel’s].” *Boyd*, 485 F. Supp. at 622.

Nothing suggests that Class Counsel’s recommendation of Settlement is unreasonable. Plaintiffs and the Settlement Class were represented by a law firm having extensive class action experience, including wage and hour litigation. Kashima Decl., at ¶ 2; Ex. A; *Knight*, 2009 WL 248367, at *4 (“In addition to being familiar with the present dispute, Plaintiffs’ counsel has considerable expertise in employment, consumer and class action litigation.”). Based on that experience, and information gleaned from early discovery, Counsel was able to negotiate a sizable recovery for the Settlement Class.

3. The Settlement Provides the Same Relief for All Settlement Class Members

Finally, the Settlement does not improperly discriminate between any segments of the Settlement Class. *Vasquez*, 670 F.Supp.2d at 1125. Each Settlement Class Member is entitled to the

1 same relief calculated from the same formula. Settlement Agreement, at ¶ 17. Indeed, the only
2 variation between the Settlement Class Members’ recovery is a function of the number of weeks
3 worked during the Class Period. *Id.* Given that both the civil penalties and damages accrued by
4 Settlement Class Members would be logically proportional to the amount of time worked, the payment
5 formula forwarded in the Settlement Agreement is both rationally based and directly related to the
6 claims asserted. *See True v. American Honda Motor Co.* (C.D. Cal. 2010) 749 F.Supp.2d 1052, 1067
7 (“[D]ifferential treatment of class members may be appropriate where ‘the settlement terms are
8 rationally based on legitimate considerations.’”); *Petruzzi’s, Inc. v. Darling–Delaware Co., Inc.* (M.D.
9 Pa. 1995) 880 F.Supp. 292, 300–01 (“disparate treatment of class members may be justified by a
10 demonstration that the favored class members have different claims or greater damages”). There is no
11 preferential treatment.

12 Additionally, while the Settlement Agreement allows Plaintiffs to seek an incentive award of
13 up to \$5,000 each, this payment to the named Plaintiffs is a sensible amount given the amount of time
14 expended in prosecuting this case. Settlement Agreement, at ¶ 17(e); *Roe v. Frito-Lay, Inc.*, (N.D.
15 Cal. Apr. 7, 2017, No. 14-CV-00751) 2017 WL 1315626, at *8 (“[A] \$5,000 incentive award is
16 ‘presumptively reasonable’ in the Ninth Circuit.”) (collecting cases). Indeed, Class Counsel would
17 have been able to properly value the Settlement Class’s claims with the input of the named Plaintiffs.
18 Kashima Decl., at ¶¶ 51-53.

19 4. The Settlement Has No Obvious Deficiencies

20 Here, the Settlement was a product of extensive and arm’s length negotiations, and involved
21 counsel experienced in class litigation. It provides the Settlement Class real and immediate relief.
22 Accordingly, the Settlement does not suffer any obvious deficiencies. It is for these reasons that
23 Plaintiffs request that the Settlement be preliminarily approved.

24 **B. The Settlement Also Warrants Approval under the FLSA**

25 In addition to the standards set forth in Rule 3.769, the FLSA contains a separate standard for
26 examining settlements. The FLSA was enacted for the purpose of protecting all covered workers from
27 the inequities in the workplace that result from the differences in bargaining power between employers
28 and employees. *See Barrentine v. Arkansas–Best Freight System, Inc.* (1981) 450 U.S. 728, 739. The

1 goal of the FLSA was to ensure that each employee covered by the Act received “[a] fair day’s pay
2 for a fair day’s work and would be protected from the evil of overwork as well as underpay.” *Id.* at
3 739 (internal citation and quotations omitted). The FLSA, therefore, provides that “[a]ny employer
4 who violates the provisions of section 206 or 207 of this title shall be liable to the employee ... affected
5 in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case
6 may be....” 29 U.S.C. § 216(b). The FLSA’s provisions are mandatory and, except in two narrow
7 circumstances, are generally not subject to bargaining, waiver, or modification by contract or
8 settlement. *Brooklyn Sav. Bank v. O’Neil* (1945) 324 U.S. 697, 706-07. The two circumstances in
9 which the FLSA may be compromised are claims that are supervised by the Secretary of Labor and
10 when a court reviews and approves a settlement in a private action for back wages under 29 U.S.C. §
11 216(b). *Lynn’s Food Stores, Inc. v. United States* (11th Cir. 1982) 679 F.2d 1350, 1353.

12 The latter exception applies to this case. The Court’s role in this situation is comparable to
13 that of a court in a settlement of a class action brought pursuant to California Code of Civil § 382.
14 *Collins v. Sanderson Farms, Inc.* (E.D. La. 2008) 568 F. Supp. 2d 714, 721-22 (analogizing the
15 standards for section 216(b) settlements to Rule 23(e) settlements); *Vasquez*, 4 Cal.3d at 821
16 (California courts examine the Federal Rules of Civil Procedure for guidance in interpreting state class
17 action procedure in absence of controlling state jurisprudence). “In essence, the Court must ensure
18 that the parties are not, via settlement of the plaintiffs’ claims, negotiating around the clear FLSA
19 requirements of compensation for all hours worked, minimum wages, maximum hours, and overtime.”
20 *Collins, supra*, 568 F. Supp. 2d at 719. Citing 29 U.S.C. §§ 206, 207. The existence of a question as
21 to the plaintiffs’ entitlement to compensation under the FLSA serves as a guarantee that the parties
22 have not manipulated the settlement process to permit the employer to avoid its obligations under the
23 FLSA. Thus, to ensure that the plaintiffs have not abandoned their rights under the Act, “the court
24 must determine whether such a question, or *bona fide* dispute, exists.” *Crawford v. Lexington–Fayette*
25 *Urban County Gov’t* (E.D. Ky. Oct. 23, 2008, No. 06-299) 2008 WL 4724499, *3.

26 The Settlement Agreement in this case resolves a “*bona fide* dispute” under the FLSA. Both
27 sides aggressively advocated their positions, which clearly demonstrated that the legal and factual
28 issues presented in this action did not necessarily favor either side. This *bona fide* dispute justifies

1 settlement in this matter. Moreover, for all the foregoing reasons discussed in the preceding sections,
2 the Settlement is a fair and reasonable compromise and should be approved under the appropriate
3 FLSA standards.

4 **C. The Proposed Notice will Adequately Apprise the Class of their Rights Under**
5 **the Settlement**

6 Assuming the Court determines the Settlement is fair and adequate, it should also be ordered
7 that notice be sent to the Settlement Class. Manual for Complex Litig., § 21.632 at 321. Pursuant to
8 California Rules of Court, rule 3.769(f), “[t]he notice must contain an explanation of the proposed
9 settlement and procedures for class members to follow in filing written objections to it and in arranging
10 to appear at the settlement hearing and state any objections to the proposed settlement.”

11 The proposed notice meets all of these requirements. The Notice of Class Action Settlement
12 are neutral, written in an easy-to-understand and clear language, and provide consumers with (1) basic
13 information about the lawsuit; (2) a description of the benefits provided by the settlement; (3) an
14 explanation of how Class Members can exercise their right to object to the settlement or opt-out of the
15 settlement; (4) an explanation that any claims against Defendant that could have been litigated in this
16 action will be released; (5) a schedule of the names of counsel for the Class and information concerning
17 attorney’s fees and incentive awards; and (6) the date and time of the fairness hearing, along with an
18 explanation of eligibility to appear.⁷ Settlement Agreement, Ex. B. The Notices are also eye-catching,
19 and are similar to the exemplar notices set forth in the Federal Judicial Center, Judges’ Class Action
20 Notice and Claims Process Checklist (2010). *Id.* Additionally, notice of any Final Judgment in this
21 case will be provided to the Class through a notice accompanying any payment under the Settlement,
22 directing individuals to Class Counsel’s website (listing the specific URL at which the Final Judgment
23 can be found) or from the Court. *Id.*, at ¶ 17(h).

24 Collectively, the notice regime is predicted to directly reach a vast majority (if not all) of the
25 Settlement Class. The Notice Packets will be provided *via* First Class U.S. Mail. Settlement
26 Agreement, at ¶ 16(a). Defendant shall provide Settlement Class Members’ addresses, drawn from its
27 own employment records, to the Settlement Administrator. *Id.* If any Notice is returned to the

28 ⁷ The notice will also provide individuals with notice to review the Court's website most recent social distancing and mark guidelines. Settlement Agreement, Ex. B at p. 7.

Settlement Administrator as non-delivered, the Notice Packets will be resent to a forwarding address provided; otherwise, the Settlement Administrator will attempt to determine a correct address by lawful use of skip-tracing, or other search using the name, address and/or Social Security number of the Settlement Class Member involved. *Id.* Settlement Class Member whose Notice Packet is not returned to the Settlement Administrator as undeliverable within fifteen (15) calendar days after mailing is conclusively presumed to have received the Notice Packet under the Settlement. *Id.*

This process will ensure that the Class receives the best practicable notice that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. Notice is provided directly to Class Members, by First Class U.S. Mail. But returned Notice Packets will result in skip-tracing of the Settlement Class Member, ensuring that any wrong address is corrected. Given that the Class Settlement does not require any affirmative action to participate, for purposes of the Settlement, after fifteen (15) calendar days, unreturned Notice Packets are presumed to be received and will not be re-mailed.⁸ This allows Settlement payments to be made to all Class Members in the most efficient manner possible.

Similarly, it will also ensure that the individual settlement payments will be provided to the correct address.⁹

D. Proposed Timeline for Events Should be Adopted

If the Court preliminarily approves the Settlement Agreement envisions the following schedule:

Event	Date
Defendants to provide Class Member list to Settlement Administrator	21 days from the date of the Court’s Order Granting Preliminary Approval
Settlement Administrator to mail Notice Packets	14 days after receiving Class Member List
Class Counsel to file motion for attorney's fees,	14 days before Response Deadline

⁸ This presumption would not prevent an absent Class Member from challenging the proposed notice in a separate action, it is only for the purposes of administration Settlement. Retailed notices receive additional time to response and requires the Settlement Administrator to a skip-trace search. According, there needs to be some deadline by which the notice is deemed received.

⁹ Plaintiffs also provided notice of the Settlement to the LWDA of the Settlement concurrently with this filing. Kashima Decl., at ¶ 42, Ex. F.

costs, and class representative service awards	
Deadline for Class Members to opt-out and/or object to the Settlement Agreement	45 days after mailing of Notice Packets (Settlement Class Members who received a re-mailed Notice Packet shall have their Response Deadline extended ten (10) days)
Plaintiffs to file motion for final settlement approval	21 days after the Response Deadline
Final Approval Hearing	To be determined by the Court.

The parties respectfully request that the Court adopt the above settlement schedule and provide the parties an appropriate hearing date for Final Approval.

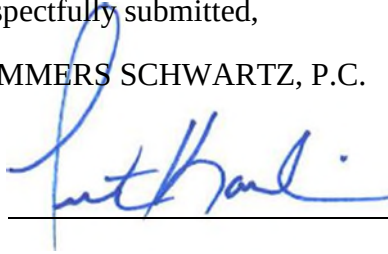
VII. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant their request for leave to file the First Amended Complaint, Court certify the Settlement Class, appoint Plaintiffs as Class Representatives and the undersigned counsel as Class Counsel, and preliminarily approval the Settlement.

Respectfully submitted,

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