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Maria G. Flores, on behalf of themselves and others
8 similarly situated

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN BERNARDINO**
12

13 BERNARDO HERNANDEZ and MARIA G.
14 FLORES, on behalf of themselves and others
similarly situated,

15
16 Plaintiffs,

17 v.

18 WILBUR CURTIS CO., INC.; WCCO
19 HOLDINGS, INC.; KEVIN ROBERT CURTIS;
20 MICHAEL AITKIN CURTIS; and DOES 1
21 through 100, inclusive,

22 Defendants.
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Ca Case No. CIVSB2125955

Assigned for all purposes to the Honorable
David Cohn

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Preliminary Approval Hearing

Date: October 7, 2022

Time: 10:00 a.m.

Department: S26

Complaint Filed: September 8, 2021

FAC Filed: February 9, 2022

Trial Date: None set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on October 7, 2022, at 10:00 a.m. before the Honorable
3 David Cohn in Department S26 of the above-entitled Court, located at 247 West Third Street, San
4 Bernardino, California, 92515-0210, Plaintiffs Bernardo Hernandez and Maria G. Flores
5 (“Plaintiffs” or “Class Representatives”), on behalf of themselves and others similarly situated, will
6 and hereby do move this Court pursuant to California Rules of Court, Rule 3.769 for:

7 1. Preliminary approval of the proposed Stipulation of Class and Representative Action
8 Settlement;

9 2. Pursuant to section 382 of the California Code of Civil Procedure, provisional
10 certification of the following Class defined as follows:

11 **Class Members** - All current and former hourly-paid or non-exempt employees who
12 worked for Defendants, and/or their predecessors or merged entities, within the State
of California during the Class Period (the “Class” or “Class Members”).¹

13 3. Preliminary appointment of Plaintiffs as Class Representatives;

14 4. Preliminary appointment of CounselOne, P.C. as Class Counsel;

15 5. Preliminary appointment of CPT Group, Inc. as the third-party Settlement
16 Administrator;

17 6. Approval of the proposed Notice of Pendency of Class and Representative Action
18 Settlement and entry of the proposed Order instructing the notice to be disseminated to the Class as
19 provided in the settlement; and

20 7. The scheduling of a hearing to consider whether the settlement should be finally
21 approved and award amounts to the Class Representatives as Enhancement Payments,
22 Administration Costs to the Settlement Administrator, the Private Attorneys General Act payment
23 to the California Labor and Workforce Development Agency, as well as Attorneys’ Fees and Costs
24 to Class Counsel.

25 This motion is based on this notice of motion, the attached memorandum of points and
26 authorities, the declaration of Anthony J. Orshansky filed concurrently herewith, and the exhibits

27 _____
28 ¹ “Class Period” means the period beginning on April 6, 2017 and ending on August 24, 2022.
(Settlement Agreement ¶ 7.)

1 attached thereto, the pleadings and other papers filed in this action, and on any further oral or
2 documentary evidence or argument presented at the time of hearing. Finally, given the multiplicity
3 of issues addressed in this Motion, Plaintiffs respectfully submit there is good cause to exceed the
4 20-page limit set forth in California Rules of Court, Rule 3.764(c)(2), and respectfully request that
5 the Court consider the attached Memorandum of Points and Authorities.

6
7 Dated: September 14, 2022

Respectfully submitted,

8 COUNSELONE, PC

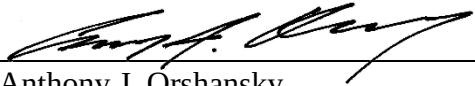
9 By: 
10 Anthony J. Orshansky
11 Jennifer L. Connor
12 Justin Kachadoorian
13 Attorneys for Plaintiffs, Class Members, and
14 PAGA Group Members
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Bernardo Hernandez and Maria G. Flores (“Plaintiffs” or “Class Representatives”),
4 individually and on behalf of all others similarly situated,² seek preliminary approval of the
5 Stipulation of Class and Representative Action Settlement (“Settlement Agreement”) entered into
6 with Defendants Wilbur Curtis Co., Inc., WCCO Holdings, Inc., Kevin Robert Curtis, and Michael
7 Aitkin Curtis (collectively, “Defendants”). The Settlement Agreement between Plaintiffs and
8 Defendants (together, the “Parties”), if approved, will resolve specific claims of the Settlement Class
9 Members and PAGA Group Members in exchange for Defendants’ agreement to pay a ***non-***
10 ***reversionary amount of One Million Five Hundred Seventy-Five Thousand Dollars***
11 ***(\$1,575,000).***³ There are approximately 705 Class Members employed as hourly-paid or non-
12 exempt employees during the Class Period.

13 By way of this class and representative lawsuit, Plaintiffs pursued their rights against
14 Defendants for violations of wage-and-hour laws under the California Labor Code and Business and
15 Professions Code. Plaintiffs’ lawsuit sought to recover unpaid wages, premiums for non-compliant
16 meal and rest breaks, reimbursement of business expenses, penalties for improper wage statements
17 waiting time penalties, civil penalties pursuant to the Private Attorneys General Act (“PAGA”),
18 restitution, liquidated damages, injunctive and other equitable relief, prejudgment interest, and
19 attorneys’ fees and costs.

20 After engaging in substantial independent investigation and after mediation with Paul
21 Grossman of Paul Hastings LLP, the Parties agreed to settle the Settlement Class Members’ and
22 PAGA Group Members’ claims alleged in this litigation for the non-reversionary sum of \$1,575,000

23 _____
24 ² “Class Members” are defined as all current and former hourly-paid or non-exempt employees who
25 worked for Defendants, and/or their predecessors or merged entities, within the State of California
26 during the Class Period (Settlement Agreement ¶ 5.) “Class Period” is defined as the period
27 beginning on April 6, 2017 and ending on August 24, 2022. (Settlement Agreement ¶ 7.)

26 ³ “Settlement Class” or “Settlement Class Members” are defined as all Class Members who have
27 not submitted a timely and valid opt-out/Request for Exclusion from the class settlement.
28 (Settlement Agreement ¶ 34.) “PAGA Group Member(s)” are defined as all Class Members
employed by Defendants within California at any time during the PAGA Period. (Settlement
Agreement ¶ 23.) “PAGA Period” is defined as the period beginning on July 2, 2020 and ending on
August 24, 2022. (Settlement Agreement ¶ 26.)

1 (“Gross Settlement Amount”). A true and correct copy of the fully executed Settlement Agreement
2 is attached as **Exhibit A** to Declaration of Anthony J. Orshansky (“Orshansky Decl.”), filed
3 concurrently herewith. After deductions for Attorneys’ Fees and Costs to Class Counsel,
4 Enhancement Payments to the Class Representatives, Administration Costs to the Settlement
5 Administrator, and the PAGA Payment, the remaining amount (the “Net Settlement Amount”) will
6 be distributed to Settlement Class Members. (Settlement Agreement ¶¶ 22, 47(a)-(d).) Settlement
7 Class Members shall automatically receive payments without the need to submit a claim form, and
8 PAGA Group Members shall receive PAGA payments irrespective of whether they opt out. (*Id.* at
9 ¶¶ 47(d), 51.)

10 The settlement is fair, reasonable, and adequate, and in the best interests of Class Members
11 and PAGA Group Members. Consequently, Plaintiffs, with the consent and approval of Defendants,
12 hereby move for an order: (1) conditionally certifying the Class for settlement purposes; (2) granting
13 preliminary approval of the Settlement Agreement; (3) approving the Notice of Pendency of Class
14 and Representative Action Settlement; and (4) setting a hearing for final approval of the settlement.

15 **II. THE EXTENT OF INVESTIGATION AND STAGE OF PROCEEDINGS**

16 **A. Discovery and Investigation**

17 The Parties engaged in extensive discovery—informally exchanging information,
18 documents and reviewing and analyzing extensive data made available by Defendants—which
19 enabled the Parties to thoroughly evaluate Plaintiffs’ claims, the claims of the putative Class
20 Members, and the aggrieved employees’ PAGA claim, along with Defendants’ affirmative defenses,
21 and the likely outcomes, risks, and expense of pursuing litigation.

22 Prior to initiating the lawsuit, as early as June 2021, counsel for Plaintiffs, CounselOne, P.C.,
23 independently and thoroughly investigated the claims and considered the facts and circumstances
24 underlying the pertinent issues and applicable law. (Orshansky Decl. ¶ 24.) This required thorough
25 discussions and interviews with Plaintiffs and other Class Members as well as research into the
26 various legal issues involved in the case. (*Ibid.*) After conducting their initial investigation, Class
27 Counsel determined that the claims were well suited for class action adjudication owing to what
28 appeared to be a common course of conduct affecting a similarly situated group of employees. (*Ibid.*)

1 On July 2, 2021, Plaintiff Hernandez filed his pre-filing written notice (“PAGA Notice”) with
2 the California Labor & Workforce Development Agency (“LWDA”) and sent a letter by certified
3 mail to Defendant Wilbur Curtis Co., Inc. setting forth the facts and theories of the violations alleged
4 against Defendant Wilbur Curtis Co., Inc., on behalf of himself and similarly situated aggrieved
5 employees in accord with the PAGA, California Labor Code sections 2698, *et seq.* (Orshansky Decl.
6 ¶ 25.)

7 Plaintiff Hernandez filed the Class and Representative Action Complaint (“Complaint”)
8 asserting the following claims on behalf of himself and similarly situated employees: (1) failure to
9 pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide compliant meal periods
10 and/or pay premiums owed thereon; (4) failure to provide compliant rest breaks and/or pay premiums
11 owed thereon; (5) failure to reimburse business expenses; (6) failure to provide accurate and
12 compliant itemized wage statements; (7) failure to pay all wages owed timely during employment
13 and upon separation of employment; (8) failure to maintain requisite payroll records in violation of
14 Labor Code § 1174(d); (9) violation of California Business and Professions Code §§ 17200, *et seq.*;
15 and (10) violation of the Private Attorneys General Act of 2004 (“PAGA”), codified in Labor Code
16 §§ 2698, *et seq.* (Orshansky Decl. ¶ 26.)

17 On December 3, 2021, Plaintiffs Hernandez and Flores filed their amended written notice
18 with the LWDA (“Amended PAGA Notice”) and sent a letter by certified mail to Defendants Wilbur
19 Curtis Co., Inc., WCCO Holdings, Inc., Kevin Robert Curtis, and Michael Aitkin Curtis setting forth
20 the facts and theories of the violations alleged against Defendants, as prescribed by Labor Code
21 sections 2698, *et seq.* (Orshansky Decl. ¶ 27.)

22 On February 14, 2022, Plaintiffs filed their First Amended Class and Representative Action
23 Complaint (“First Amended Complaint”) adding predecessor entity employer WCCO Holdings,
24 Inc., and individuals Kevin Robert Curtis and Michael Aitkin Curtis. As owners and officers of the
25 corporate employer, individual defendants Kevin Robert Curtis and Michael Aitkin Curtis are liable
26 in their individual capacity for civil penalties, attorneys’ fees and litigation costs available to
27 aggrieved employees pursuant to Labor Code sections 558.1 and 1197.1. (*See Atempa v. Pedrazzani*
28 (2018) 27 Cal.App.5th 809 [the California Court of Appeal held that the trial court did not err in

1 holding the individual defendant liable, stating: “the language in both section 558(a) and section
2 1197.1(a) is broad enough to unambiguously include [the owner and CEO of the defendant
3 employer] as a person other than the corporate employer subject to the civil penalties awarded by
4 the trial court under those two statutes.”].) (Orshansky Decl. ¶ 28.)

5 Defendants deny Plaintiffs’ allegations of wrongdoing; Defendants do not believe that any
6 liability to Plaintiffs, Class Members, or PAGA Group Members exists, or that they are entitled to
7 any recovery. (Settlement Agreement ¶¶ 42, 44.) Defendants contend that they have complied with
8 all applicable state, federal, and local laws. (*Ibid.*) Defendants further contend this action is not
9 appropriate for class and/or representative treatment for purposes other than this settlement.
10 (Orshansky Decl. ¶ 40.) Moreover, the settlement of this action on a class and representative action
11 basis shall not impact the enforceability of any agreement to arbitrate or class or representative action
12 waiver entered between Defendants and any Class Member or PAGA Group Member. (Settlement
13 Agreement ¶ 44.)

14 Class Counsel analyzed information and documentation concerning the alleged violations,
15 such as Defendants’ written policies concerning those claims, including Defendants’ employee
16 handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest
17 breaks, reimbursement of business-related expenses, time keeping policies, such as recording hours,
18 issuance of wage statements, and providing all wages at separation, as well as composite data
19 regarding the number of Class Members and PAGA Group Members and the mix of current versus
20 former employees, total number of workweeks, total number of pay periods, and the average hourly
21 rate in effect. Defendants also produced time and pay records for Class Members. (Orshansky Decl.
22 ¶ 32.) Counsel met and conferred at length regarding the information and documents produced.
23 (*Ibid.*) Class Counsel interviewed Class Members, analyzed the documents and data produced, and
24 spent significant time consulting with an expert, to determine Defendants’ degree of liability and
25 potential amounts due in damages. (*Id.* at ¶ 33.)

26 **B. Mediation and Settlement**

27 After having performed extensive investigation and analysis of the legal and factual issues
28 and risks, the Parties participated in a full day mediation with Paul Grossman of Paul Hastings LLP.

(Orshansky Decl. ¶ 34.) Mr. Grossman is an experienced litigator and mediator of wage and hour class and representative actions. (*Ibid.*) During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. (*Id.* at ¶ 35.) These were contentious issues because of the factual and legal complexity of the case. (*Ibid.*)

The case did not settle at mediation. However, after a few weeks, the Parties accepted the mediator's proposal. Thereafter, the Parties engaged in extensive negotiations to draft the Settlement Agreement, along with the Notice of Pendency of Class and Representative Action Settlement. (*Id.* at ¶ 36.)

The settlement negotiations were hard fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class actions, representative actions, and wage and hour cases. (*Id.* at ¶ 37.) The settlement was the product of a non-collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the action. (*Ibid.*)

From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class Counsel believe that the recovery being made available to Class Members and PAGA Group Members is fair, reasonable, and adequate taking into consideration the amounts received in other wage and hour class and representative actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Settlement Class Member's and PAGA Group Member's claim to the settlement award he or she will receive. Class Counsel believe that the settlement serves the best interests of Class Members and PAGA Group Members. (*See* Settlement Agreement ¶ 41; Orshansky Decl. ¶ 38.)

III. SUMMARY OF BASIC SETTLEMENT TERMS

Under the terms of the Settlement Agreement, Defendants have agreed to pay a non-reversionary amount of One Million Five Hundred Seventy-Five Thousand Dollars (\$1,575,000) into a common fund to settle the specific wage and hour claims of the Settlement Class Members

1 and PAGA Group Members; this amount is called the “Gross Settlement Amount.” (Settlement
2 Agreement ¶ 17.) This Gross Settlement Amount shall be inclusive of all settlement payments to
3 Settlement Class Members, the Enhancement Payments to the Class Representatives, the
4 Administration Costs to the Settlement Administrator, the Attorneys’ Fees and Costs to Class
5 Counsel, and the Private Attorneys General Act (“PAGA”) Payment, including payment to PAGA
6 Group Members and to the LWDA for civil penalties pursuant to statute. (*Ibid.*)

7 The amount available for distribution to Settlement Class Members is determined by
8 deducting the following from the Gross Settlement Amount:

- 9 • Up to \$551,250—which is 35% of the Gross Settlement Amount—and up to \$25,000 in
10 litigation costs to Class Counsel (the “Attorneys’ Fees and Costs”);
- 11 • Up to \$10,000 to each Class Representative as an Enhancement Payment (total of
12 \$20,000);
- 13 • Up to \$140,000 allocated as a PAGA Payment—of which 75% is allocated for payment
14 to the LWDA for civil penalties pursuant to statute and 25% is allocated for payment to
15 PAGA Group Members on a *pro rata* basis; and
- 16 • Up to \$18,000 to the Settlement Administrator for Administration Costs to notify Class
17 Members and PAGA Group Members and administer the settlement.

18 The amount remaining after the foregoing deductions, approximately \$820,750, is called the “Net
19 Settlement Amount.” (Settlement Agreement ¶¶ 22, 47(a)-(d); Orshansky Decl. ¶ 7.) The entire Net
20 Settlement Amount shall be paid out to Settlement Class Members. Settlement Class Members shall
21 automatically receive payments without the need to submit a claim form, and PAGA Group
22 Members shall receive PAGA payments irrespective of whether they opt out of the class settlement.
23 (Settlement Agreement ¶¶ 47(d), 51; Orshansky Decl. ¶ 7.)

24 **A. The Settlement Provides for Reasonable Monetary Payments**

25 Although exact recovery amounts depend on each Settlement Class Members’ relative
26 number of qualifying workweeks, for estimation purposes only, if all of the approximately 705 Class
27 Members participate in the settlement, then the average Individual Settlement Share would be an
28 estimated \$1,164.18 per Settlement Class Member. (Orshansky Decl. ¶ 11.) Of course, any Class

1 Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may
2 opt out. (*Ibid.*; Settlement Agreement ¶ 54.)

3 The Net Settlement Amount is the amount available for distribution to Settlement Class
4 Members on a *pro rata* basis, based on workweeks worked during the Class Period. (Settlement
5 Agreement ¶¶ 22, 47(f); Orshansky Decl. ¶ 8.) Each Individual Settlement Share shall be calculated
6 as follows: The Net Settlement Amount shall be divided by the total of all Workweeks of Settlement
7 Class Members during the Class Period in order to yield the “Workweek Value.” (Settlement
8 Agreement ¶ 47(f); Orshansky Decl. ¶ 9.) The Individual Settlement Share to each Settlement Class
9 Member shall be calculated by multiplying his or her individual Workweeks by the Workweek
10 Value. (Settlement Agreement ¶ 47(f); Orshansky Decl. ¶ 8.)

11 In addition, PAGA Group Members will receive a proportional share of the PAGA Payment
12 allocated to PAGA Group Members (*i.e.*, \$35,000) based on pay periods they worked during the
13 PAGA Period. (Settlement Agreement ¶¶ 25, 47(d); Orshansky Decl. ¶ 9.) Specifically, each
14 individual PAGA payment shall be calculated as follows: The amount of the PAGA Payment
15 allocated to PAGA Group Members (*i.e.*, \$35,000) shall be divided by the total of all Pay Periods
16 worked by PAGA Group Members during the PAGA Period in order to yield the “Pay Period Value.”
17 (See Settlement Agreement ¶¶ 28, 47(d); Orshansky Decl. ¶ 9.) The individual PAGA payment to
18 each PAGA Group Member shall be calculated by multiplying his or her individual Pay Periods by
19 the Pay Period Value. (See Settlement Agreement ¶¶ 28, 47(d); Orshansky Decl. ¶ 9.)

20 After reduction for the employee’s share of taxes on the wage portion,⁴ the net payment to
21 each Settlement Class Member/PAGA Group Member will be the sum of his or her Individual
22 Settlement Share and, if applicable, his or her individual PAGA payment. (Settlement Agreement ¶
23 19; Orshansky Decl. ¶ 10.) As a result of the distribution formulas, the consideration paid to each
24 Settlement Class Member and PAGA Group Member is tailored to the impact of Defendants’
25 alleged violations as well as to the claims he or she is releasing. (Orshansky Decl. ¶ 10.) Finally,
26

27 ⁴ The Parties agreed to allocate twenty-five percent (25%) of each Individual Settlement Share to
28 wages and seventy-five percent (75%) of each Individual Settlement Share to interest, penalties, and
other non-wage damages. (Settlement Agreement ¶ 49(a).)

1 any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative
2 recovery may opt out.⁵ (Orshansky Decl. ¶ 10; Settlement Agreement ¶ 54.)

3 **B. Class Representative Enhancement Payments, Attorneys’ Fees, and Expenses**

4 As part of the settlement, Plaintiffs will each apply for an enhancement payment at the time
5 of seeking final approval in the amount of \$10,000 for their services to the Settlement Class.
6 (Settlement Agreement ¶ 47(c); Orshansky Decl. ¶ 12.) “[I]ncentive awards are fairly typical in
7 class action cases . . . and are intended to compensate class representatives for work done on behalf
8 of the class [and] to make up for financial or reputational risk undertaken in bringing the action.”
9 (*In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-1394.) Plaintiffs’
10 requested enhancement payments are intended to recognize the significant benefits conferred upon
11 the Settlement Class and be proportional to the time and effort that Plaintiffs expended on behalf of
12 the Class including providing factual information and documents to Class Counsel, discussing the
13 claims and theories at issue in the case with Class Counsel, identifying potential witnesses, and
14 reviewing the Settlement Agreement, as well as the significant risks Plaintiffs undertook by agreeing
15 to serve as named plaintiffs. (Settlement Agreement ¶¶ 29, 47(c); Orshansky Decl. ¶ 12.)

16 Class Counsel will apply for an attorneys’ fees award of no more than thirty-five percent
17 (35%) of the Gross Settlement Amount, and reimbursement of litigation costs in an amount up to
18 \$25,000. (Settlement Agreement ¶¶ 3, 47(a); Orshansky Decl. ¶ 13.) Plaintiffs submit that the
19 requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming
20 litigation on a purely contingent fee basis. (Orshansky Decl. ¶ 13.) Class Counsel have incurred
21 substantial attorneys’ fees conducting pre-filing investigation, analyzing Plaintiffs’ claims,
22 conducting legal research and analysis, conducting discovery, meeting and conferring with defense
23 counsel, interviewing Class Members, analyzing documents produced by Defendants, including
24 corporate policies and employee time and payroll records, consulting with an expert, building
25 damages models, preparing for and attending mediation, routine case updates and consultations with
26 clients, and negotiating and preparing the Settlement Agreement as well as the Notice of Pendency

27 _____
28 ⁵ Again, if approved, PAGA Group Members will receive their individual PAGA payments
irrespective of whether they opt out of the settlement. (Settlement Agreement ¶¶ 47(d), 51.)

1 of Class and Representative Action Settlement, and preparing this motion for preliminary approval
2 and supporting documents. (*Ibid.*) Class Counsel will also expend future attorney time in attending
3 the hearing on this Motion, overseeing the notice and administration process, drafting the final
4 approval motion and supporting documents, and attending the final approval hearing, among other
5 tasks, such as addressing questions from Class Members. (*Id.* at ¶ 14.)

6 Both California and federal courts have recognized that an appropriate method for awarding
7 attorneys’ fees in class actions is to award a percentage of the “common fund” created as a result of
8 the settlement. (*See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 506 [“the
9 percentage of fund method survives in California class action cases...”]; *Wershba v. Apple*
10 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [recognizing both the “percentage of recovery” and
11 “lodestar/multiplier” methods].) Historically, courts have awarded percentage fees in the range of
12 20% to 50%, depending on the circumstances of the case. (*See* 4 Newberg on Class Actions § 14.6
13 (4th Ed. 2013) [“No general rule can be articulated on what is a reasonable percentage of a common
14 fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in
15 order to assure that the fees do not consume a disproportionate part of the recovery obtained for the
16 class, although somewhat larger percentages are not unprecedented.”].)

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

23 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

24 Express judicial policy favors maintaining wage and hour actions as class actions. (*Prince*
25 *v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1328; *Richard v. Dart Industries, Inc.* (1981) 29
26 Cal.3d 462 [finding that California public policy “encourages the use of the class action device”].)
27 Any doubt as to the appropriateness of class treatment should be resolved in favor of class
28 certification, subject to later modification if necessary. (*Id.* at pp. 473-475.) The decision to certify

1 a class is purely a procedural one and should be based on the allegations in the operative complaint,
2 and not in the perceived factual or legal merit of the class claims. (*Linder v. Thrifty Oil Co.* (2000)
3 23 Cal.4th 429, 439-441.)

4 To certify a settlement class, the trial court must find the two primary requirements for
5 maintaining a class action: (1) there must be an ascertainable class and (2) there must be a well-
6 defined community of interest in the questions of law and fact involving the parties to be
7 represented. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 805-809; *Daar v. Yellow Cab*
8 *Company* (1967) 67 Cal.2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal.App.4th
9 467, 471; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341.) These criteria
10 are met here for the reasons set forth below.

11 **A. There Is an Ascertainable and Sufficiently Numerous Class**

12 Whether a class is ascertainable is determined by examining the class definition, the size of
13 the class and the means available for identifying class members. (*See Vasquez, supra*, 4 Cal.3d at
14 pp. 821-822; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263,
15 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Class members are “ascertainable” where
16 they may be readily identified without unreasonable expense or time.

17 Here, the class definition is “precise, objective and presently ascertainable.” (*Sevidal v.*
18 *Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are comprised of all current and
19 former hourly-paid or non-exempt employees who worked for Defendants (and/or its predecessors
20 or merged entities) in the State of California during the Class Period. (Settlement Agreement ¶ 5.)
21 Further, the Class Period is defined as the period beginning on April 6, 2017 and ending on August
22 24, 2022. (Settlement Agreement ¶ 7; Orshansky Decl. ¶ 89.) Thus, all Class Members are of a
23 specific type (hourly-paid or non-exempt employees) employed within California. (Settlement
24 Agreement ¶ 5; Orshansky Decl. ¶ 89.) Documents and information exchanged reflect a class of
25 approximately 705 current and former hourly, non-exempt employees working in California during
26 the Class Period. (*Ibid.*) Thus, the proposed Class satisfies the ascertainability and numerosity
27 requirements. (*See e.g., Collins v. Rocha* (1972) 7 Cal.3d 232 [finding a class of 44 farm workers
28 sufficiently numerous].)

1 **B. There Is a Well-Defined Community of Interest**

2 A community of interest is established by the preponderance of common issues of law and
3 fact. (*See Vasquez, supra*, 4 Cal.3d at p. 811.) The requirement of a community of interest:

4 [D]oes not depend upon an identical recovery, and the fact that each member of the
5 class must prove his separate claim to a portion of any recovery by the class is only
6 one factor to be considered...The mere fact that separate transactions are involved
7 does not of itself preclude a finding of the requisite community of interest so long as
8 every member of the alleged class would not be required to litigate numerous and
substantial questions to determine his individual right to recover subsequent to the
rendering of any class judgment which determined in plaintiffs' favor whatever
questions were common to the class.

9 (*Id.* at p. 809.) The instant litigation is predicated on uniform company policies and systemic top-
10 down business practices revolving principally around Defendants' timekeeping and pay practices –
11 *e.g.*, off-the-clock work attributed to inequitable rounding, understaffing, and unreasonable
12 workloads, failure to fully reimburse for business expenses, and failure to pay meal and rest break
13 premiums. (Orshansky Decl. ¶ 90.) These allegations have given rise to the following claims: failure
14 to pay minimum and overtime wages; meal period liability; rest break liability; failure to reimburse
15 business expenses; and derivative claims arising therefrom. (*Ibid.*)

16 Because Plaintiffs have alleged a single top-down compensation scheme where “the relevant
17 proof [does] not vary among class members” and “clearly present[] a common question fundamental
18 to all class members.” (*See In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
19 172 F.R.D. 119, 123 [citing *In Re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997)
20 169 F.R.D. 493, 518].) California courts show “no hesitancy” in inferring class-wide causation,
21 class-wide injury, and class-wide damages when a common course of action has been shown. (*B.W.I.*
22 *Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350 [granting class
23 certification in a manufacturing defect case when a common course of action had been proven].)
24 This inference “*eliminates* the need for each class member to prove individually the consequences
25 of the defendants' actions to him or her.” (*Id.* at p. 1351 [emphasis added].) Thus, the outcome of
26 this matter depends upon questions that are common to members of the Class. (Orshansky Decl. ¶
27 91.) These types of claims are commonly held to be proper for class certification. (*Ibid.*; *see, e.g.*,
28 *Bluford v. Safeway, Inc.* (2013) 216 Cal.App.4th 864, 871 [reversing denial of rest period claim];

1 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [certifying meal
2 period claim].)

3 **C. The Claims of the Named Plaintiffs Are Typical**

4 The typicality requirement is satisfied where class representatives have claims that are
5 typical of those of the rest of the class. (*B.W.I Custom Kitchen, supra*, 191 Cal.App.3d at p. 1347.)
6 Here, Plaintiffs' claims are typical of those held by the members of the Class. (Orshansky Decl. ¶
7 92.) Like all other Class Members, Plaintiffs were non-exempt hourly employees working for
8 Defendants in California during the Class Period. (*Ibid.*) As alleged, Plaintiffs were shorted wages,
9 not reimbursed for business expenses, and not provided with legally compliant meal and rest breaks.
10 (*Ibid.*) Plaintiffs were therefore impacted by the same challenged policies that allegedly injured the
11 Class as a whole and subject to the same defenses forwarded by Defendants as to the Class, thus
12 their claims are therefore typical. (*Ibid.*)

13 **D. Named Plaintiffs and Class Counsel Will Fairly and Adequately Represent the**
14 **Settlement Class**

15 The adequacy of representation requirement examines conflicts of interest between named
16 parties and the class(es) they seek to represent. (*Capital People First v. Department of*
17 *Developmental Services* (2007) 155 Cal.App.4th 676, 697.) Here, Plaintiffs and Class Counsel will
18 adequately represent the Class as there are no conflicts between the named Plaintiffs and the Class
19 they seek to represent. (Orshansky Decl. ¶ 93.) *See McGhee v. Bank of America* (1976) 60
20 Cal.App.3d 442, 450 [finding adequacy satisfied where there was no indication that plaintiff's
21 counsel were not qualified and the named plaintiff had no interests antagonistic to those of the
22 proposed class].) Class Counsel also have extensive experience in wage and hour litigation.
23 (Orshansky Decl. ¶¶ 83-87, 93.)

24 **E. A Class Action is Superior to a Multiplicity of Litigation**

25 In making its class certification decision, the court must determine that a class action would
26 be superior to alternative means for the fair and efficient adjudication of the litigation. By
27 consolidating more than seven hundred individual actions into a single proceeding, this Court's use
28 of the class action device enables it to manage this litigation in a manner that serves the efficiency

1 interests of the litigants and the judicial system. (Orshansky Decl. ¶ 94.) Absent class treatment, the
2 only alternative would be to force these employees to file individual actions. (*Sav-On Drug Stores*
3 *v. Super. Ct.* (2004) 34 Cal.4th 319, 339, fn. 10 [stating “[t]he relevant comparison lies between the
4 costs and benefits of adjudicating Plaintiff’s claims in a class action and the costs and benefits of
5 proceeding by numerous separate actions – not between the complexity of a class suit that must
6 accommodate some individualized inquires and the absence of any remedial proceeding
7 whatsoever.”].) Finally, in the context of settlement, the superiority concerns are essentially non-
8 existent.

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

10 Any settlement of class action litigation must be reviewed and approved by a court. This is
11 accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a detailed
12 review after the notice has been distributed to the class members for their comments or objections.
13 In this regard, the Federal Manual for Complex Litigation (Second) explains:

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

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

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

2 As a matter of public policy, courts both encourage the use of the class action device and
3 favor settlement over continued litigation. (*See, e.g., Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th
4 429, 434 [“Courts have long acknowledged the importance of class actions as a means to prevent a
5 failure of justice in our judicial system.”]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471;
6 *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d 1268, 1276 [“[S]trong judicial policy...favors
7 settlements, particularly where complex class action litigation is concerned.”]; Newberg, § 11.41.)
8 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior*
9 *Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
10 fact that plaintiff might have received more if the case had been fully litigated is no reason not to
11 approve the settlement.”].)

12 To summarize, the settlement here is fair because it offers payment to each Settlement Class
13 Member and PAGA Group Member for releasing his or her claims, extinguishes the risk of
14 litigation, and provides a fair and adequate distribution of the settlement proceeds whereby the funds
15 are allocated proportionally based on the respective number of workweeks/pay periods that he or
16 she worked during the relevant periods. (Orshansky Decl., *passim*.) For all of the foregoing reasons,
17 the proposed settlement should be preliminarily approved.

18 **A. The Settlement Is Entitled to a Presumption of Fairness**

19 Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement
20 unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were
21 conducted in good faith. (*See* Newberg, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D.Cal. August
22 10, 2007) 2007 U.S. Dist. LEXIS 74767, *24-25; *In re Chicken Antitrust Litigation* (N.D.Ga. 1980)
23 560 F.Supp. 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v.*
24 *Continental Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.) Courts do not
25 substitute their judgment for that of the proponents, particularly when settlement has been reached
26 by experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767
27 at *24.) As detailed at length in the accompanying Declaration of Anthony J. Orshansky, the
28

1 settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's
2 length, and informed by substantial factual and legal investigations. (Orshansky Decl., *passim*.)

3 **B. Negotiations Were at Arm's-Length before a Respected Mediator**

4 The Parties engaged in a full day mediation session with Paul Grossman of Paul Hastings
5 LLP. (Orshansky Decl. ¶ 34.) Mr. Grossman is an experienced litigator and mediator of wage and
6 hour class and representative actions. (*Ibid.*) Pursuant to the mediator's proposal, the Parties came
7 to an agreement on all material terms of settlement. (*Id.* at ¶ 36.) The settlement negotiations were
8 hard fought and conducted in good faith and at arm's length between attorneys with substantial
9 experience litigating class actions, representative actions, and wage and hour cases. (*Id.* at ¶ 37.)
10 The settlement was the product of a non-collusive settlement process in which the Parties were
11 forced to make significant compromises in the interest of reaching a full and complete settlement of
12 the action. (*Ibid.*)

13 **C. Investigation Was Sufficient to Allow Counsel to Act Intelligently**

14 Throughout this case, Class Members have been represented by counsel who have years of
15 experience in employment class action litigation. (Orshansky Decl. ¶¶ 83-87.) Class Counsel
16 devoted a considerable amount of time to the prosecution of this case, including, but not limited to,
17 conducting pre-filing investigation and research; conducting informal discovery; reviewing
18 Defendants' written policies concerning the claims set forth in the action, including Defendants'
19 policies and procedures regarding the payment of wages, the provision of meal and rest breaks,
20 reimbursement of work-related expenses, time keeping policies, such as rounding and recording
21 hours, issuance of wage statements, and providing all wages at separation; reviewing and analyzing
22 time and pay records; meeting and conferring regarding the information and documents produced;
23 interviewing Class Members; drafting pleadings; researching California law; preparing damages
24 models; consulting with an expert; preparing for and attending mediation; and negotiating and
25 finalizing the settlement and related documents. (Orshansky Decl. ¶¶ 13, 24, 32-36.)

26 **D. Class Counsel Are Experienced in Similar Litigation**

27 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
28 of the Class Members and PAGA Group Members. (See Settlement Agreement ¶ 41; Orshansky

Decl. ¶ 38.) Although the recommendations of counsel proposing the class settlement are not conclusive, the Court can properly take the recommendations into account, particularly if counsel have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and significant discovery has been completed. (*See Newberg* § 11.47.) Here, Plaintiffs are represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions and have been appointed as class counsel in numerous cases alleging similar claims. (Orshansky Decl. ¶¶ 83-87.)

E. The Settlement Is Fair, Reasonable, and Adequate

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

1. The Strength of Plaintiffs’ Case

Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages model for Defendants’ liability. (Orshansky Decl. ¶ 39.) Although Plaintiffs steadfastly maintain that their claims are meritorious, they acknowledge that there are substantial risks and uncertainty in proceeding with class certification and trial. (*Ibid.*) As explained in further detail in Section VI.E.4 *infra*, Defendants presented numerous defenses to Plaintiffs’ claims, both on the merits and with respect to class certification. (*Id.* at ¶ 40.) For example, Defendants defended against the minimum and overtime wage claims by relying on policies that explicitly prohibited Class Members from engaging in off-the-clock work. (*Ibid.*) Defendants also argued that Class Members worked in different job positions and had different managers, and that, as a result, Defendants contended that there are various circumstances that caused Class Members to allegedly take late meal and rest breaks or miss meal and rest breaks, even when Defendants allowed them the opportunities to take

1 those duty-free breaks, and this variation in circumstances raised highly individualized questions of
2 fact. (*Ibid.*) Further, Defendants contended Plaintiffs would face significant hurdles to certification
3 given that Class Members signed arbitration agreements with class action waivers as a condition of
4 their employment, which, if enforceable, would convert a putative class action (with the potential
5 for class-wide damages) into an individual dispute and action—effectively forcing Class Members
6 and PAGA Group Members to retain their own counsel and proceed on the basis of individual claims
7 only.⁶ (*Ibid.*)

8 Although Plaintiffs were prepared to litigate these claims through class certification and,
9 ultimately, through trial, given the substantial amount offered in settlement, Class Counsel predicted
10 that it was far from certain that Plaintiffs would be able to recover a greater amount at trial,
11 particularly after considering the increased litigation costs that would accrue. (Orshansky Decl. ¶
12 40.) Thus, this factor supports preliminary approval of the settlement.

13 2. Risk, Expense, Complexity, and Duration of Further Litigation

14 Although Plaintiffs investigated the claims prior to settlement, the Parties agreed to focus on
15 exhausting settlement efforts before launching into full-fledged and hotly contested litigation.
16 (Orshansky Decl. ¶ 41.) Therefore, absent settlement, the Parties would have needed to conduct
17 substantial additional discovery, such as the production of voluminous records and numerous
18 depositions of experts and percipient witnesses and prepare the case for class certification and trial.
19 (*Ibid.*) The Parties would have had to depose a number of people such as managers, supervisors,
20 human resource representatives, and employees in order to establish liability. (*Ibid.*) Discovery
21 disputes would have been in the offing and liability likely would have entailed a battle of experts.
22 (*Ibid.*) This settlement avoids the considerable time, attorneys' fees and costs, and party resources
23 associated with conducting additional discovery, moving for class certification and potentially
24 summary judgment or adjudication, and ultimately, trial, as well as the risks and the accompanying
25

26 ⁶ On June 15, 2022, the U.S. Supreme Court issued a decision in *Viking River Cruises, Inc. v.*
27 *Moriana* (2022) 596 U.S. ____ (No. 20-1573), holding that the FAA preempts California's
28 prohibition on the employer's ability to contract with employees to bring only their individual claims
in arbitration and not a representative Private Attorneys General Act (PAGA) claim. This potentially
limits an employer's exposure to PAGA representative claims through use of arbitration agreements.

1 burden of continued litigation on the Court. (*Ibid.*) Thus, this factor supports preliminary approval
2 of the settlement.

3 **3. Risk of Maintaining Class Action Status**

4 Here, settlement was reached prior to class certification and the result was a successful
5 outcome for the Class. (Orshansky Decl. ¶ 42.) Yet, class certification was by no means a foregone
6 conclusion. (*Ibid.*) For example, Class Members worked in different job positions and had different
7 managers, and, as a result, Defendants contended there was variation to the circumstances that could
8 allegedly cause employees to work off the clock and/or be deprived of the opportunity to take legally
9 compliant, duty-free meal and rest periods, and this variation in circumstances raised highly
10 individualized questions of fact. (*Ibid.*) Defendants disputed Plaintiffs’ characterization of working
11 conditions, liability, and damages, and possess documentary and testimonial evidence rebutting
12 Plaintiffs’ allegations. (*Ibid.*) Here, Class Members may avoid each of the risks described and
13 receive substantial monetary benefits, which also weighs in favor of preliminary approval.

14 **4. Amount Offered in Settlement Given Realistic Value of Claims**

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

22 Plaintiffs’ estimate of the settlement recovery is a reasonable percentage of possible damages
23 recoverable at trial. After calculating the possible recovery to Class Members for each claim, in light
24 of the arguments and defenses advanced by Defendants, Plaintiffs discounted Defendants’ maximum
25 damages exposure by 50% to account for the risk of non-certification, and by 25% for the risk of
26 being unsuccessful on the merits, yielding total damages of \$2,429,227.33. (Orshansky Decl. ¶ 82.)
27 Adding PAGA penalties of \$496,300.00, the aggregate dollar amount is \$2,925,527.33 in total
28 damages and penalties. (*Ibid.*) Hence, the total settlement amount of \$1,575,000.00 represents

1 approximately 53.84% of Plaintiffs’ potential realistic recovery, while avoiding the further expense
2 and serious risk of proceeding toward class certification and trial. (*Ibid.*) Utilizing a class-wide
3 damages study to assess the nature and magnitude of the claims in question (*see Kullar v. Foot*
4 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116), this case clearly meets requirements establishing
5 that the class settlement is within the “ballpark” of reasonableness. (Orshansky Decl. ¶ 44.) This
6 settlement provides a fair and reasonable monetary recovery for the Class in the face of disputed
7 claims. (*Ibid.*)

8 **Unpaid Minimum and Overtime Wages**

9 Plaintiffs, along with other hourly non-exempt employees, performed pre- and post- shift off
10 the clock work to minimize the incidence of overtime. (Orshansky Decl. ¶ 46.) Plaintiffs contended
11 that all off-the-clock work is compensable time. (*Ibid.*) An employer must pay its employees no less
12 than the minimum wage for all hours worked, *see* Labor Code section 1197; thus, Plaintiffs sought
13 to recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that
14 amount under Labor Code section 1194.2. (Orshansky Decl. ¶ 46.) Additionally, Plaintiffs
15 contended that certain non-discretionary pay was not included in employees’ regular rate of pay.
16 (*Ibid.*)

17 Class Counsel analyzed the documents and data produced by Defendants and, in conjunction
18 with interviews of Plaintiffs and Class Members, determined Defendants’ degree of liability and
19 amounts due in damages—specifically, the incidence and amount of purported off the clock activity.
20 (Orshansky Decl. ¶ 47.)

21 Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-clock
22 hours, Plaintiffs estimated that Defendants are liable for an aggregate of approximately fifteen (15)
23 minutes of unpaid straight and overtime pay per workweek. (Orshansky Decl. ¶ 48.) Based on
24 Defendants’ records, Plaintiffs determined that 78.1% of Class Members’ shifts qualified for
25 overtime rate of pay. (*Ibid.*) At the average straight time hourly rate of \$17.22 and the average
26 overtime hourly rate of \$25.83, such yields an estimated damages amount of \$271,589.47. (*Ibid.*)
27 Plaintiffs also determined that inequitable rounding of time resulted in unpaid wages to Class
28 Members in the amount of \$451,588.00. (*Ibid.*) Thus, the estimated total of unpaid straight and

1 overtime wages is \$723,177,47, without discounting for risks associated with certification or merits.
2 (*Ibid.*)

3 In opposition to certification, Defendants contended that Plaintiffs' claim for off-the-clock
4 work is not amenable to class treatment, because employees worked in a variety of departments with
5 different requirements, and it would require an unmanageable series of mini-trials to determine how
6 much time was spent without pay. (Orshansky Decl. ¶ 49.) Defendants also contended that not all
7 time records reflected rounding of time. (*Ibid.*) Further, in terms of merit defenses, Defendants
8 vigorously disagreed with Plaintiffs' theories regarding how much off-the-clock work occurred in
9 reality and the credibility of those claimed hours given Defendants' policies to the contrary. (*Id.* at
10 ¶ 50.) The failure to track all hours poses evidentiary difficulties because it is hotly contested how
11 much off-the-clock work actually occurred. (*Id.* at ¶ 51.) Although Class Counsel conducted multiple
12 Class Member interviews, for Plaintiffs to establish the quantity of specific disputed and unrecorded
13 work activities—especially over multiple job titles, at differing pay rates—would have been costly,
14 time-consuming, and daunting. (*Ibid.*)

15 Defendants further responded that any off-the-clock time is *de minimis*. (Orshansky Decl. ¶
16 52.) Plaintiffs countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*
17 (2018) 5 Cal.5th 829, given that the California Supreme Court refused to allow the *de minimis*
18 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
19 performed off-the-clock. (Orshansky Decl. ¶ 52.) What is not clear, however, is to what extent the
20 *de minimis* defense would apply where the uncaptured hours were associated with an occasionally
21 recurring activity. (*Ibid.*)

22 Additionally, in response to Plaintiffs' allegation that overtime was underpaid because
23 Defendants incorrectly calculated the regular rate by failing to include non-discretionary forms of
24 pay, Defendants vigorously disputed the discretionary nature of certain payments, and the degree to
25 which they were required to be included in calculating the regular rate of pay. (Orshansky Decl. ¶
26 53.)

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1 In light of these considerations—especially the evidentiary difficulties of demonstrating off-
2 the-clock work on a class-wide basis—Class Counsel applied a discount that incorporated the risks
3 of non-certification and being unsuccessful on the merits. (Orshansky Decl. ¶ 54.)

4 **Meal and Rest Period Violations**

5 Plaintiffs asserted that there are compliance issues *vis-à-vis* meal periods—some are late,
6 missed, short, or interrupted. (Orshansky Decl. ¶ 55.)

7 On February 25, 2021, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the
8 California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1)
9 employers are not permitted to round time records when determining if employees are entitled to
10 meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods were
11 provided to employees if the time records show otherwise. Using this opportunity to echo its long
12 stance that California liberally construes the Labor Code and wage orders to favor protection of
13 employees, the California Supreme Court emphasized that meal periods are part of the remedial
14 worker protection framework to protect the health and safety of employees.

15 Although Defendants made some premium payments for non-complaint meal periods, those
16 payments are merely a portion of what should have been paid pursuant to code. (*Cf.* Wage Order
17 Nos. 4-2001 and 7-2001, § 11(b); *see* Orshansky Decl. ¶ 57.) Consequently, Plaintiffs alleged that
18 Defendants violated Labor Code sections 226.7 and 512, and applicable Wage Orders, by failing to
19 compensate Plaintiffs and Class Members for all short, late, interrupted, and missed meal periods.
20 (Orshansky Decl. ¶ 57.)

21 Defendants, however, contended that they had practices, policies, and procedures to provide
22 meal and rest breaks every workday to their employees that fully complied with the law. (Orshansky
23 Decl. ¶ 58.) Defendants vehemently argued that they complied with the requirements articulated by
24 the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.
25 (Orshansky Decl. ¶ 58.) Specifically, Defendants maintained that they “provide” employees with a
26 reasonable opportunity to take timely meal periods of at least 30 minutes, relieve employees of all
27 duties during meal periods, and relinquish control over employees’ activities, including the ability
28 to leave the premises during meal periods. (*Ibid.*)

1 Like most employers facing meal period litigation, Defendants argued that employees were
2 apprised of their right to take meal periods and provided compliant meal periods, but some may have
3 voluntarily waived them. (Orshansky Decl. ¶ 59.) Defendants contended that the issue of voluntary
4 waiver would necessarily devolve into a series of individualized mini-trials, precluding class
5 certification. (*Id.* at ¶ 59; *see Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25
6 [holding that the defendant must be provided an opportunity to litigate affirmative defenses, even
7 when they turn on individual questions].)

8 Based upon the analysis of Class Members’ time and payroll records and, in conjunction
9 with interviews of Plaintiffs and Class Members, Plaintiffs determined that 74.75% of eligible shifts
10 were the subject of unique violations for missed, short, or late meal periods, and calculated the
11 potential exposure of this claim to be \$2,446,260.76, without discounting for risks associated with
12 certification or merits. (Orshansky Decl. ¶ 60.)

13 Plaintiffs also alleged that Class Members did not receive authorized rest breaks as required
14 whereby employers “relinquish control over how employees spend their time and relieve employees
15 of all duties.” (Orshansky Decl. ¶ 61; *Augustus v. ABM Security Service, Inc.* (2016) 2 Cal.5th 257,
16 260.) Due to Defendants’ work demands and inadequate staffing, Plaintiffs and Class Members did
17 not receive timely rest breaks, nor did Defendants relinquish control over how employees spent their
18 rest breaks. Plaintiffs did not receive rest break premium payments for non-compliant rest breaks,
19 nor is there evidence that Defendants made rest break premium payments to Class Members at any
20 time (unlike non-compliant meal periods, for which Defendants made some premium payments, as
21 noted above). (Orshansky Decl. ¶ 62.) Thus, Plaintiffs alleged that Defendants did not provide
22 premium pay for each non-compliant rest break as required under Labor Code section 226.7. (*Ibid.*)

23 Here again, Defendants disputed liability and damages. Defendants maintained that they
24 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
25 of four hours worked as required by Labor Code section 226.7. (Orshansky Decl. ¶ 63.) Defendants
26 explained that Class Members had ample opportunity to take, and did take, regular rest breaks. (*Ibid.*)
27 As with meal periods, Defendants argued that any Class Member who failed to take a rest break, or
28 took a short or late rest break, did so voluntarily and that all applicable rest breaks were still

1 authorized and provided. (*Ibid.*) Defendants also attempted to distinguish *Augustus, supra*, which
2 involved security guards who were required to monitor a pager, phone, or other device as having an
3 added constraint that is not present in the matter *sub judice*. (*Ibid.*)

4 Unlike meal periods, rest breaks need not be recorded and thus establishing Defendants’
5 exertion of pressure, control, and resulting violations is likely to be more difficult. (Orshansky Decl.
6 ¶ 64.) Thus, Class Counsel applied a 20% violation rate based on the narratives of Plaintiffs and
7 other Class Members for a maximum exposure of \$683,393.72. (*Ibid.*) For settlement purposes, and
8 to account for the difficulties of certifying and proving unrecorded rest break violations, a downward
9 departure from that maximum exposure was and is warranted. (*Ibid.*)

10 **Unreimbursed Expenses**

11 Plaintiffs alleged a cause of action under Labor Code section 2802(a), which states that an
12 employer must reimburse employees for all necessary expenditures that employees incur in
13 discharging their duties. (Orshansky Decl. ¶ 65.) Here, Plaintiffs and Class Members were required
14 to use their personal cell phones to communicate with supervisors and coworkers for reasons related
15 to work, yet Defendants failed to reimburse for these necessary business expenses. (*Ibid.*)

16 Defendants contended that they have a policy and practice of reimbursing employees for
17 necessary business-related expenses. (Orshansky Decl. ¶ 66.) Defendants also contended that, with
18 respect to the alleged expenses for which Plaintiffs and other Class Members never requested
19 reimbursement from Defendants, Defendants did not know and had no reason to know that the
20 alleged business-related expenses were incurred. (*Ibid.*) Moreover, to the extent it occurred,
21 Defendants asserted that this claim is not suitable for class treatment as it would require
22 individualized determinations as to whether each employee used a personal cell phone for work-
23 related purposes and, if so, how much of that use was a reasonable percentage of his or her individual
24 monthly phone bill. (*Ibid.*)

25 Defendants also argued that the California Labor Code only requires reimbursement of
26 “necessary” expenses—as opposed to any expense that is incurred in the course of performing
27 work—and argued that distinguishing a necessary expense from an unnecessary one would require
28 individualized inquiry. (Orshansky Decl. ¶ 67; *see* Labor Code § 2802; *Gattuso v. Harte-Hanks*

1 *Shoppers, Inc.* (2007) 42 Cal.4th 554.) Furthermore, whether an expense was necessary would
2 depend in part on the reasonableness of the employee's choice and would thus have to be established
3 by way of extensive individual factual inquiry and/or statistical evidence. (Orshansky Decl. ¶ 67;
4 *Cochran v. Schwan's Home Services, Inc.* (2014) 228 Cal.App.4th 1137.)

5 For the foregoing reasons, and taking into account the wide variety of telephone plans,
6 providers and costs which creates evidentiary complexities on an individual basis, let alone class-
7 wide, Plaintiffs assigned *de minimis* value to this claim. (Orshansky Decl. ¶ 68.)

8 **Wage Statement Violations**

9 Plaintiffs alleged a cause of action under Labor Code section 226(a) for Defendants' failure
10 to provide accurate itemized wage statements. Failure to comply with the statute entitles employees
11 to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which
12 a violation occurs and one hundred dollars (\$100) for each violation in a subsequent pay period, not
13 exceeding an aggregate penalty of four thousand dollars (\$4,000). (See Labor Code § 226(e).) This
14 cause of action is derivative of the foregoing causes of action because if Defendants did not provide
15 wages for all hours worked, premiums for non-compliant meal and rest breaks, and so forth, then
16 the wage statements were inevitably inaccurate. (Orshansky Decl. ¶ 69.)

17 Defendants contended, however, that Labor Code section 226(e) penalties are not automatic.
18 (Orshansky Decl. ¶ 70.) Rather, the employee must show that Defendants' non-compliance was
19 "knowing and intentional." Defendants suggested that any non-compliance was not knowing and
20 intentional. (*Ibid.*) Moreover, Defendants argued that meal and rest period violations cannot support
21 derivative wage statement penalties. (*Ibid.*; see *Naranjo v. Spectrum Security Service, Inc.* (2019)
22 40 Cal.App.5th 444, 474 [holding that violations of Labor Code's meal break provisions do not
23 entitle employees to pursue the derivative wage statement penalties]; *cf.*, but *review granted*,
24 *Naranjo v. Spectrum Security Services, Inc.* (Cal., Jan. 02, 2020, No. S258966) 455 P.3d 704, 257
25 Cal.Rptr.3d 188.) It was not until after this case settled, on May 23, 2022, that the California Supreme
26 Court ruled that premium pay for missed meal and rest breaks constitutes "wages" that must be
27 reported on wage statements and paid within the statutory deadlines when an employee leaves the
28 job, thereby overturning the decision of the Court of Appeal. (Orshansky Decl. ¶ 70.)

Further, 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, Plaintiffs estimate the total maximum wage statement exposure to be \$488,450.00. (Orshansky Decl. ¶ 71.)

Derivative Waiting Time and UCL Claims

Plaintiffs further asserted causes of action against Defendants for failure to timely pay all wages due employees at separation and for engaging in unfair, unlawful, and fraudulent business practices. (*See* Labor Code §§ 203, 2699, *et seq.*; Bus. & Prof. Code §§ 17200, *et seq.*) As with other claims, Defendants vigorously disagreed that they engaged in any conduct giving rise to liability or entitlement to recovery of penalties or equitable relief. (Orshansky Decl. ¶ 72.)

Defendants argued that waiting time penalties are not appropriate because they 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. (Orshansky Decl. ¶ 73.) Moreover, Defendants maintained that no waiting time penalties were recoverable from alleged meal or rest period violations. (*Ibid.*) Defendants raised the Second Appellate District’s decision in *Naranjo*, *supra*, 40 Cal.App.5th 444, to argue that meal and rest break violations trigger neither wage statement nor waiting time penalties. (Orshansky Decl. ¶ 73.) At that time, the *Naranjo* decision was still pending before the California Supreme Court, and though a decision has since issued (on May 23, 2022) the uncertainty and risk of an adverse decision added additional weight to the Defendants’ defense. (Orshansky Decl. ¶ 73.) Finally, Defendants argued that adequate remedies at law exist to render the action unsuitable for equitable remedies, and again contended that the allegations underlying the unfair competition claim lacked merit. (*Id.* at ¶ 74.)

Based on the count of 517 former employees, Class Counsel calculated the maximum value of the waiting time claim to be \$2,136,657.60. (Orshansky Decl. ¶ 75.) However, to account for the uncertainty of proving the underlying claims, Class Counsel made a realistic allowance with the agreed upon settlement dollar figure. (*Ibid.*)

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PAGA Penalties

The success of Plaintiffs' PAGA claim is wholly dependent upon the success of his underlying claims occurring within the one-year statute of limitations applicable to the PAGA. (Orshansky Decl. ¶ 76.) Defendants maintained and continue to maintain that they had legally compliant employment policies and practices throughout the statutory period. (*Id.* at ¶ 77.) Defendants denied and continue to deny that they ever violated any provision of the California Labor Code and argued that, even assuming such violations occurred, Defendants will not be treated as having engaged in subsequent violations giving rise to heightened penalties. (*Id.* at ¶ 77.) In other words, Defendants argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendants had notice that they were violating the law, *e.g.*, they had been cited by a labor agency or adjudged by a court to have done so. (Orshansky Decl. ¶ 77; *see, e.g., Amaral v. Cintas Corp.* (2008) 163 Cal.4th 1157, 1209.) Thus, Defendants contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply. (Orshansky Decl. ¶ 77.)

Moreover, Defendants asserted that before a PAGA claim could be tried, under existing law, the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently "manageable" so as not to interfere with Defendants' right to due process. (Orshansky Decl. ¶ 78.) Defendants reiterated how employees' job duties and managers varied. (*Id.* at ¶ 79.) Defendants contended that there was variation as to the circumstances that could allegedly cause employees to work off the clock or to be deprived of the opportunity to take legally compliant, duty-free meal and/or rest breaks. (*Ibid.*) Defendants further opined that these issues presented challenges not only to liability but also challenges to Plaintiffs' ability to show that a PAGA claim could be efficiently and manageably adjudicated without abridging Defendants' due process rights. (*Ibid.*)

Defendants argued that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. (Orshansky Decl. ¶ 80; *see* Labor Code § 2699e(2) [the Court may "award a lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based

1 on the facts and circumstances of the particular case, to do otherwise would result in an award that
2 is unjust, arbitrary and oppressive, or confiscatory.”].)

3 Although, strictly speaking, class certification requirements are not required to be satisfied
4 in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and
5 valuation of a PAGA claim is uncertain. (Orshansky Decl. ¶ 81.) Thus, counsel applied discounts
6 for the risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks
7 regarding success on the merits and establishing liability, and the risks with proving the extent of
8 penalties that are warranted and possible discretionary reduction of penalties by the Court. (*Ibid.*)
9 As a result, Plaintiffs used the “initial” \$100 per pay period violation (as opposed to the \$200
10 subsequent per violation rate) to calculate a realistic estimate of \$496,300.00 in potential PAGA
11 penalty exposure—of which, by statute, only 25%, or \$124,075.00—would be recoverable by
12 aggrieved employees.⁷ (*Ibid.*)

13 Summary

14 Plaintiffs’ estimate of the settlement recovery is a reasonable percentage of possible damages
15 recoverable at trial. After calculating the possible recovery to Class Members for each claim, in light
16 of the arguments and defenses advanced by Defendants, Plaintiffs discounted Defendants’ maximum
17 damages exposure by 50% to account for the risk of non-certification, and by 25% for the risk of
18 being unsuccessful on the merits, yielding total damages of \$2,429,227.33. (Orshansky Decl. ¶ 82.)
19 Adding PAGA penalties of \$496,300.00, the aggregate dollar amount is \$2,925,527.33 in total
20 damages and penalties. (*Ibid.*) Hence, the total settlement amount of \$1,575,000.00 represents
21 approximately 53.84% of Plaintiffs’ potential realistic recovery, while avoiding the further expense
22 and serious risk of proceeding toward class certification and trial. (*Ibid.*) “The fact that a proposed
23 settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean
24 that the proposed settlement is grossly inadequate and should be disapproved.” (*Linney v. Cellular*

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26 ⁷ This case was settled before the U.S. Supreme Court issued a decision in *Viking River Cruises,*
27 *Inc. v. Moriana* (2022) 596 U.S. ____ (No. 20-1573), holding that the FAA preempts California’s
28 prohibition on the employer’s ability to contract with employees to bring only their individual claims
in arbitration and not a representative Private Attorneys General Act (PAGA) claim. This potentially
limits an employer’s exposure to PAGA representative claims through use of arbitration agreements.

1 *Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted]; *see, e.g.,*
2 *Altamirano v. Shaw Industries, Inc.* (N.D.Cal. 2015) 2015 WL 4512372, at *9 [preliminarily
3 approving wage-and-hour class action settlement stating, “[a]lthough 15% represents a modest
4 fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the
5 Court to grant preliminary approval given the merits of Plaintiff’s claims.”].) Taking into account
6 the risk of non-certification, failure to prevail on the merits, and the Court’s power to reduce the
7 civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and adequate.
8 (Orshansky Decl. ¶ 82.)

9 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS**

10 This Court should order distribution of the proposed Notice of Pendency of Class and
11 Representative Action Settlement, *see* Exhibit 1 to the Settlement Agreement (Exhibit A to the
12 Orshansky Declaration), to the Class by first class mail, postage prepaid, using the last known
13 mailing address information provided by Defendants. (Orshansky Decl. ¶ 95.) Here, the Parties
14 propose that the settlement be administered by CPT Group, Inc. (“CPT”), an experienced class
15 action settlement administrator. (Orshansky Decl. ¶ 96; Settlement Agreement ¶¶ 33, 50(a).) Class
16 Members’ addresses will be ascertainable through Defendants’ personnel and payroll records, which
17 Defendants will provide to CPT within twenty-one (21) calendar days after preliminary approval of
18 the settlement. (Orshansky Decl. ¶ 96; Settlement Agreement ¶ 50(b).) To the extent that any notices
19 are returned, CPT will run those addresses through the National Change of Address database and/or
20 conduct skip traces to obtain current address information. (Orshansky Decl. ¶ 96; Settlement
21 Agreement ¶ 50(e).)

22 The content of the proposed notice satisfies California Rules of Court, Rule 3.766(d) because
23 it advises Class Members of the nature of the claims, basic contentions and denials of the Parties,
24 the key terms of the settlement, the uniform 45-day deadline to submit a dispute, opt-out, or objection
25 to the class settlement and the procedure by which to do so, and explains the recovery formula and
26 credited number of workweeks and pay periods for each Class Member and PAGA Group Member
27 during the relevant periods. (Orshansky Decl. ¶ 97.) The proposed notice will also notify Class
28 Members of the final approval hearing date, provide the contact information for Class Counsel, and

1 advise Settlement Class Members that they may appear at the final approval hearing. (*Id.* at ¶ 98.)
2 This manner of giving notice satisfies California Rules of Court, Rule 3.766(e) as the most reliable
3 and cost-effective method of reaching Class Members. (*Ibid.*) Thus, the proposed method of notice
4 is reasonably calculated to reach Class Members by the best means practicable and should be
5 approved. (*Ibid.*)

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

7 Finally, this Court should set a hearing for final approval of the settlement on a date
8 appropriately scheduled to follow the deadline by which Class Members must file objections to the
9 settlement or opt out. (*See* California Rules of Court, Rule 3.769.)

10 **IX. CONCLUSION**

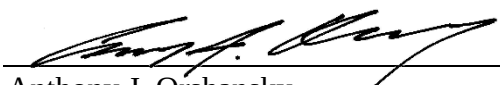
11 Based upon the foregoing, and because the proposed settlement is fair, reasonable, and
12 advantageous to the Class Members, Plaintiffs respectfully request that the Court enter an Order:

- 13 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
- 14 2. Preliminarily approving the form and content of the Notice of Pendency of Class and
15 Representative Action Settlement, attached as Exhibit 1 to the Settlement Agreement;
- 16 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the
17 Class Members identified during the Class Period under Civil Code section 382 for settlement
18 purposes only;
- 19 4. Approving and appointing Plaintiffs Bernardo Hernandez and Maria G. Flores as the
20 Class Representatives;
- 21 5. Approving and appointing the law firm of CounselOne, P.C. as Class Counsel;
- 22 6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;
- 23 7. Setting a date for the Final Approval Hearing; and
- 24 8. Any further relief the Court deems just and proper.

25 Dated: September 14, 2022

Respectfully submitted,

26 COUNSELONE, PC

27 By: 

28 Anthony J. Orshansky

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