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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SACRAMENTO**
15 **(UNLIMITED JURISDICTION)**

16 MARIA ELENA DIAZ HERNANDEZ, on
17 behalf of herself, all others similarly situated, the
18 general public, and as an “aggrieved employee”
19 on behalf of other “aggrieved employees” under
20 the Labor Code Private Attorneys General Act of
21 2004,

22 *Plaintiff(s),*

23 vs.

24 GUITRON ALCAZAR ALCAZAR INC., a
25 California corporation doing business as El
26 Tapatio Mexican Cuisine; GUITRON
27 ALCAZAR III, INC, a California corporation;
28 GUITRON ALCAZAR IV, LLC, a California
limited liability company; and DOES 3–50,
inclusive,

Defendant(s).

Case No. 34-2021-00306648

**PLAINTIFF MARIA ELENA DIAZ
HERNANDEZ’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Date: March 1, 2024
Hearing Time: 9:00 a.m.
Reservation No: A-306648-001
Hearing Dept.: 22, The Honorable
Lauri A. Damrell

Action filed: August 23, 2021



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

3 **I. INTRODUCTION**

4 Plaintiff Maria Elena Diaz Hernandez (“Plaintiff”) submits this memorandum of points
5 and authorities in support of her unopposed motion for preliminary approval of the Class Action
6 and PAGA Settlement Agreement and Class Notice (the “Settlement”)², which provides for a
7 Gross Settlement Amount (“GSA”) of \$685,000.00 in compromise of all disputed claims on
8 behalf of non-exempt, hourly employees during the period of August 23, 2017 through the date
9 of the order preliminarily approving the Settlement. Through this Motion, Plaintiff respectfully
10 requests for this Court to (1) provisionally certify the below-defined Class for settlement purposes
11 only under Code of Civil Procedure § 382; (2) preliminarily approve the Settlement; (3)
12 preliminarily appoint Plaintiff as Class Representative; (4) appoint David Spivak of The Spivak
13 Law Firm and Walter L. Haines of United Employees Law Group as Class Counsel; (5) approve
14 the proposed notice procedures and related forms; and (6) schedule a final approval hearing.

15 This Court should grant Plaintiff’s motion because: (1) for settlement purposes, the
16 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
17 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
18 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
19 Representative; (4) Plaintiff’s attorneys are adequate to serve as Class Counsel; (5) the proposed
20 notice procedures, and related forms, fully comport with due process and adequately apprise Class
21 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
22 Class Members an opportunity to be heard regarding the Settlement and to give it finality.
23 Accordingly, for the reasons detailed below, this Court should grant Plaintiff’s Motion in its
24 entirety and preliminarily approve the Settlement.

25 **II. BACKGROUND**

26 Defendants are owners and operators of El Tapatio restaurants. DS, ¶ 11. Defendants
27 employed Plaintiff in California as a cook from about February 28, 2020 until November 15,
28 2020. *Id.*

A. The Claims and Procedural History

On August 26, 2021, Plaintiff notified Defendants and the California Labor and

² The Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of David Spivak (“DS”), which is submitted herewith under a separate cover.



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1 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
2 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
3 Code violations committed by Defendants. DS, ¶ 12, Ex. 2.

4 On August 23, 2021, Plaintiff filed a Class Action Complaint in the Sacramento County
5 Superior Court, Case No. 34-2021-00306648, against Defendants on behalf of herself and others
6 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Provide Rest
7 Breaks (Lab. Code §§226.7 and 1198); (2) Failure to Provide Meal Periods (Lab. Code §§226.7,
8 512 and 1198); (3) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (4) Waiting Time
9 Penalties (Lab. Code §§ 201-203); and (5) Unfair Competition (Bus. & Prof. Code §§ 17200, *et*
10 *seq.*). DS, ¶ 13, Ex. 3. On December 10, 2021, Plaintiff filed her First Amended Complaint adding
11 a claim under PAGA. DS, ¶ 13, Ex. 4. Defendants deny all of Plaintiff’s allegations and strongly
12 contend that their wage and hour policies, practices and procedures are fully compliant with all
13 applicable laws. DS, ¶ 13.

14 **B. Sampling**

15 On February 09, 2022, Plaintiff requested that Defendants informally disclose documents
16 and data to enable Plaintiff to prepare for settlement discussions, including the number of putative
17 class members and aggrieved employees, the number of paychecks and workweeks for the various
18 limitations periods applicable to Plaintiff’s claims. DS, ¶ 14. Plaintiff also requested a reasonable,
19 randomly selected sample of Defendants’ time and payroll records, and related personnel records.
20 *Id.* Finally, Plaintiff requested Defendants’ written policies applicable to the claims at hand and
21 asked Defendants to identify any and all comparable claims against them.

22 The Parties thereafter engaged in an informal, voluntary exchange of information in the
23 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
24 Plaintiff’s entire personnel file (including policies and agreements she signed and acknowledged)
25 and copies of their relevant company written policies. DS, ¶ 15.

26 Defendants contend that they employed 126 putative class members during the period of
27 September 10, 2020 to May 10, 2022. Defendants produced the records of 20.00% of the putative
28 class members for the period of September 10, 2020 to May 10, 2022. There were records for 26
employees in the sample. Plaintiff chose the sample. The sample was randomly selected. The
sample consisted of time and payroll records, and related records. DS, ¶ 16.

Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Plaintiff also

1 employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>)
2 to determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004)
3 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative
4 margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin
5 of error of 43.3 percent was unacceptable. Using a margin of error of 32%, a confidence level of
6 95%, and a population size of 126, the Raosoft Sample Size Calculator recommended a sample
7 of 9. DS, ¶ 17, Ex. 5 (Raosoft Sample Size Calculator results print-out). Thus, the sample
8 population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

9 **C. Mediation**

10 On July 6, 2022, following much of the foregoing informal discovery and exchange of
11 information, the Parties participated in a mediation session presided over by Mediator David L.
12 Perrault, an experienced class action mediator. During the mediation, the Parties had a full day of
13 productive negotiations and reached agreement on a class-wide settlement during the mediation
14 session. During the mediation sessions, each side, represented by her / their respective counsel,
15 recognized the risk of an adverse result in the Action. Though the case did not settle at mediation,
16 the Parties ultimately agreed to settle the Action and all other matters covered by this Agreement
17 pursuant to the terms and conditions of this Agreement. DS, ¶ 18.

18 **D. Defendants' Financial Condition**

19 At the mediation, it became clear that Defendants had insufficient resources to cover the
20 full extent of liability. DS ¶ 19. As part of the settlement negotiations, Defendants disclosed their
21 profit and loss statements, balance sheets, and related information for 2019, 2020, and 2021. *Id.*
22 The information provided was sufficient to demonstrate the financial condition of the Defendants
23 and that they will unlikely be able to afford payment of a larger amount than the Settlement
24 amount. Based on such records, Plaintiff, on her own behalf and on behalf of the Class Members,
25 has agreed to settle the lawsuit on the terms set forth in the Settlement. *Id.*



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26 ³ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the
27 Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software
28 programs for information gathering and analysis. The family of survey software supports data
collection and reporting for any form-based data. Support is for web-surveys and forms, email
distribution, diskette, PDA, laptop or pen-based: all types of distribution." The Raosoft webpage
advertises that is it "database web survey software for gathering information."
<http://www.raosoft.com/>. It also advertises, "The parameters of the sample size calculation are
something that you choose." <http://www.raosoft.com/suggestreading.html>.



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III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class and Aggrieved Employees Definition

The Settlement defines the Settlement Class as all persons employed by Defendants in California and classified as non-exempt, hourly employees who worked for Defendants during the Class Period. The Class Period is August 23, 2017 through the date of the order preliminarily approving the Settlement. *Id.* The “Aggrieved Employees” are all Class Members who worked for Defendants during the PAGA Period. The “PAGA Pay Period” begins August 26, 2020 and ends September 19, 2023. *Id.*

B. Monetary Terms

Defendants promise to pay \$685,000.00 and no more as the Gross Settlement Amount and to separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual Class Payments. Defendants have no obligation to pay the Gross Settlement Amount (or any payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator will disburse the entire Gross Settlement Amount without asking or requiring Participating Class Members or Aggrieved Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount will revert to Defendants. Settlement, ¶ 3.1.

The Administrator will make and deduct the following payments from the Gross Settlement Amount, in the amounts specified by the Court in the Final Approval:

Class Representative Service Payment to the Class Representative of not more than \$15,000.00 (in addition to any Individual Class Payment and any Individual PAGA payment the Class Representative is entitled to receive as a Participating Class Member). Defendants will not oppose Plaintiff’s request for a Class Representative Service Payment that does not exceed these amounts. As part of the motion for Class Counsel Fees Payment and Class Litigation Expenses Payment, Plaintiff will seek Court approval for any and a Class Representative Service Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Representative Service Payment less than the amount requested, the Administrator will retain the remainder in the Net Settlement Amount. The Administrator will pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full responsibility and liability for employee taxes owed on the Class Representative Service Payment. Settlement, ¶ 3.2.1.

A Class Counsel Fees Payment of not more than 33.33%, which is currently estimated to be \$228,333.30 and a Class Counsel Litigation Expenses Payment of not more than \$20,000.00.



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Defendants will not oppose requests for these payments provided that do not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any division or sharing of any of these Payments. Settlement, ¶ 3.2.2.

An Administrator Expenses Payment not to exceed \$25,000.00 except for a showing of good cause and as approved by the Court. To the extent the Administration Expenses are less or the Court approves payment less than \$25,000.00, the Administrator will retain the remainder in the Net Settlement Amount. Settlement, ¶ 3.2.3.

Each Participating Class Member: An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Work Weeks. Settlement, ¶ 3.2.4.

20.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 80.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment.

Non-Participating Class Members will not receive any Individual Class Payments. The Administrator will retain amounts equal to their Individual Class Payments in the Net Settlement Amount for distribution to Participating Class Members on a pro rata basis. Settlement, ¶ 3.2.4.2.

1 PAGA Penalties in the amount of \$4,000.00 to be paid from the Gross Settlement Amount,
2 with 75% (\$3,000.00) allocated to the LWDA PAGA payment and 25% (\$1,000.00) allocated to
3 the Individual PAGA payments. Settlement, ¶ 3.2.5.

4 The Administrator will calculate each Individual PAGA payment by (a) dividing the
5 amount of the Aggrieved Employees' 25% share of PAGA Penalties \$1,000.00 by the total
6 number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
7 Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods.
8 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
9 Individual PAGA payment. Settlement, ¶ 3.2.5.1.

10 If the Court approves PAGA Penalties of less than the amount requested, the
11 Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will
12 report the Individual PAGA payments on IRS 1099 Forms. Settlement, ¶ 3.2.5.2.

13 **C. Escalator Clause**

14 Based on their records, Defendants estimate that, as of the date of this Settlement
15 Agreement, (1) there are 611 Class Members and 23,061 Total Work Weeks during the Class
16 period and (2) there were 305 Aggrieved Employees who worked 8,474 Pay Periods during the
17 PAGA Period. If the Work Weeks and/or Class Members as of the date the Court approves the
18 settlement exceeds the referenced 23,061 Work Weeks and/or 611 Class Members by more than
19 10.00%, the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class
20 Representative Service Payment, and the LWDA payment, will increase proportionally
21 according to the number of additional Work Weeks or Class Members, whichever results in a
22 higher increase in the Gross Settlement Amount. In the alternative, in the event that this escalator
23 provision is triggered, then Defendants have the option to elect to end the Class Period so as to
24 have an earlier end date at the Defendants' discretion in order to limit the covered workweeks to
25 25,368 in lieu of paying an increase to the Settlement Amount. The Settlement Administrator
26 will calculate the workweeks worked by the Class Members during the Class Period, the amount
27 to be paid pro rata, and the individual settlement payments to eligible Class Members.
28 Defendants' data will be presumed to be correct, unless a particular Class Member proves
 otherwise to the Settlement Administrator by credible evidence. All disputes as to workweeks
 worked will be resolved and decided by the Settlement Administrator and the Settlement



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1 Administrator's decision on all disputes as to workweeks worked will be final and non-
2 appealable. Settlement, ¶ 9.

3 **D. Timing of Payments**

4 There will be multiple distributions of the Gross Settlement Amount as follows:

5 Within fourteen (14) calendar days of the Effective Date, or within ten (10) calendar days
6 of the deadline for the First payment (whichever is later), the Settlement Administrator shall
7 distribute, pro rata, the portion of the Gross Settlement Amount Defendants paid by that date,
8 including pro rata portions of the Individual Class Payments, Individual PAGA Payments, LWDA
9 PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the
10 Class Counsel Litigation Expenses Payment, and the Administrator's expenses. Settlement, ¶
11 4.4.1.

12 Within ten (10) calendar days of the Second Installment Payment, the Settlement
13 Administrator shall distribute, pro rata, the portion of the Gross Settlement Amount Defendants
14 paid since the first distribution, including pro rata portions of the Individual Class Payments,
15 Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the
16 Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the
17 Administrator's expenses. Settlement, ¶ 4.4.2.

18 Disbursements of the pro rata portions of the Class Counsel Fees Payment, the Class
19 Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not
20 precede disbursement of pro rata portions of the Individual Class Payments and Individual PAGA
21 payments. Settlement, ¶¶ 4.4, 4.4.1, and 4.4.2.

22 **E. Calculation of Settlement Shares**

23 "Individual Class Payment" means the Participating Class Member's pro rata share of the
24 Net Settlement Amount calculated according to the number of Work Weeks worked during the
25 Class Period. Settlement, ¶ 1.23.

26 "Individual PAGA payment" means the Aggrieved Employee's pro rata share of 25% of
27 the PAGA Penalties calculated according to the number of Pay Periods worked during the PAGA
28 Period. Settlement, ¶¶ 1.23 and 1.24.

F. Apportionment of Settlement Shares

Tax Allocation of Individual Class Payments. 20.00% of each Participating Class
Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage
Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2



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Form. The 80.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

G. The Releases

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

Plaintiff and her respective former and present spouses, representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release and discharge Released Parties from all claims, transactions, or occurrences that occurred during the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the Operative Complaint, Plaintiff's PAGA Notice, or ascertained during the Action and released under 6.2, below ("Plaintiff's Releases.") Plaintiff's Releases do not extend to any claims or actions to enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability benefits, social security benefits, workers' compensation benefits that arose at any time, or based on occurrences outside the Class Period. Plaintiff acknowledges that she may discover facts or law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective in all respects, notwithstanding such different or additional facts or her discovery of them. Settlement, ¶ 6.1.

For purposes of Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits, if any, of section 1542 of the California Civil Code, which reads:

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

All Participating Class Members, on behalf of themselves and their respective former and



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1 present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release
2 Released Parties from (i) all claims that were alleged, or reasonably could have been alleged,
3 based on the Class Period facts stated in the Operative Complaint and ascertained in the course
4 of the Action including, failure to provide meal periods, failure to authorize and permit rest
5 periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain
6 required payroll records, and related allegations. Except as set forth in Section 6.3 of this
7 Agreement, Participating Class Members do not release any other claims, including claims for
8 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
9 unemployment insurance, disability, social security, workers' compensation, or claims based on
facts occurring outside the Class Period. Settlement, ¶ 6.2.

10 All Non-Participating Class Members who are Aggrieved Employees are deemed to
11 release, on behalf of themselves and their respective former and present representatives, agents,
12 attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for
13 PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA
14 Period facts stated in the Operative Complaint and the PAGA Notice and ascertained in the course
15 of the Action including, failure to provide meal periods, failure to authorize and permit rest
16 periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain
required payroll records, and related claims. Settlement, ¶ 6.

17 **H. Notice and Claims Process and Procedures**

18 No later than three (3) business days after receipt of the Class Data, the Administrator
19 shall notify Class Counsel that the list has been received and state the number of Class Members,
20 PAGA Members, Work Weeks, and Pay Periods in the Class Data. Settlement, ¶ 8.4.1.

21 Using best efforts to perform as soon as possible, and in no event later than 14 days after
22 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
23 Data, via first-class United States Postal Service ("USPS") mail, the Class Notice with Spanish
24 translation substantially in the form attached to the Settlement Agreement as Exhibit A. The first
25 page of the Class Notice shall prominently estimate the dollar amounts of any Individual Class
26 Payment and/or Individual PAGA payment payable to the Class Member, and the number of
27 Work Weeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before
28 mailing Class Notices, the Administrator shall update Class Member addresses using the National
Change of Address database. Settlement, ¶ 8.4.2.



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1 Not later than 3 business days after the Administrator's receipt of any Class Notice
2 returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any
3 forwarding address provided by the USPS. If the USPS does not provide a forwarding address,
4 the Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to
5 the most current address obtained. The Administrator has no obligation to make further attempts
6 to locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a
second time. Settlement, ¶ 8.4.3.

7 The deadlines for Class Members' written objections, Challenges to Work Weeks and/or
8 Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 60
9 days otherwise provided in the Class Notice for all Class Members whose notice is re-mailed.
10 The Administrator will inform the Class Member of the extended deadline with the re-mailed
11 Class Notice. Settlement, ¶ 8.4.4.

12 If the Administrator, any of the Defendants or Class Counsel is contacted by or otherwise
13 discovers any persons who believe they should have been included in the Class Data and should
14 have received Class Notice, the Parties will expeditiously meet and confer in person or by
15 telephone, and in good faith, in an effort to agree on whether to include them as Class Members.
16 If the Parties agree, such persons will be Class Members entitled to the same rights as other Class
17 Members, and the Administrator will send, via email or overnight delivery, a Class Notice
18 requiring them to exercise options under this Agreement not later than 14 days after receipt of
Class Notice, or the deadline dates in the Class Notice, which ever are later. Settlement, ¶ 8.4.

19 **1. Disputes**

20 Each Class Member shall have 60 days after the Administrator mails the Class Notice
21 (plus an additional 14 days for Class Members whose Class Notice is re-mailed) to challenge the
22 number of Class Work Weeks and PAGA Pay Periods (if any) allocated to the Class Member in
23 the Class Notice. The Class Member may challenge the allocation by communicating with the
24 Administrator via fax, email or mail. The Administrator must encourage the challenging Class
25 Member to submit supporting documentation. In the absence of any contrary documentation, the
26 Administrator is entitled to presume that the Work Weeks contained in the Class Notice are
27 correct so long as they are consistent with the Class Data. The Administrator's determination of
28 each Class Member's allocation of Work Weeks and/or Pay Periods shall be final and not
appealable or otherwise susceptible to challenge. The Administrator shall promptly provide



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1 copies of all challenges to calculation of Work Weeks and/or Pay Periods to Defense Counsel and
2 Class Counsel and the Administrator's determination the challenges. Settlement, ¶ 8.4.4.

3 **2. Opting Out**

4 The Administrator will promptly review on a rolling basis Requests for Exclusion to
5 ascertain their validity. Not later than 5 days after the expiration of the deadline for submitting
6 Requests for Exclusion, the Administrator shall email a list to Class Counsel and Defense Counsel
7 containing (a) the names and other identifying information of Class Members who have timely
8 submitted valid Requests for Exclusion ("Exclusion List"); (b) the names and other identifying
9 information of Class Members who have submitted invalid Requests for Exclusion; (c) copies of
10 all Requests for Exclusion from Settlement submitted (whether valid or invalid). Settlement, ¶
11 8.2.4.

12 **3. Objecting**

13 Only Participating Class Members may object to the class action components of the
14 Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or
15 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
16 Payment and/or Class Representative Service Payment. Settlement, ¶ 8.7.1.

17 Participating Class Members may send written objections to the Administrator, by fax,
18 email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
19 attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
20 Participating Class Member who elects to send a written objection to the Administrator must do
21 so not later than 60 days after the Administrator's mailing of the Class Notice (plus an additional
22 14 days for Class Members whose Class Notice was re-mailed). Settlement, ¶ 8.7.2.

23 Non-Participating Class Members have no right to object to any of the class action
24 components of the Settlement. Settlement, ¶ 8.7.

25 **I. Uncashed Checks**

26 For any Class Member whose Individual Class Payment check or Individual PAGA
27 payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
28 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶ 4.4.5.

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IV. CERTIFICATION OF THE CLASS IS APPROPRIATE

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

A. The Settlement Class Is Objectively Ascertainable

A class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the settlement process. DS, ¶ 22. Therefore, the Settlement Class is ascertainable.

B. The Membership of the Settlement Class Is Sufficiently Numerous

The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. Defendants estimates that there are approximately 611 Class Members. DS, ¶ 23. Plaintiff maintains that it would be impractical and economically inefficient to require each Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. The California Supreme Court has upheld a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations, the Settlement Class' membership is sufficiently numerous. DS, ¶ 23. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

C. Class Members Share a Well-Defined Community of Interest

The community of interest requirement "embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have

1 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
2 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
3 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
4 renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

5 To justify certification, the class proponent “‘must show .. that questions of law or fact
6 common to the class predominate over the questions affecting the individual members ..”’ *See*,
7 *Arenas v. El Torito Rests., Inc.* (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank,*
8 *FA v. Superior Court* (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for
9 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
10 the claims of the Class Members all stem from the same sources. DS, ¶ 24.

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

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

26 The class representative must be similarly situated to the rest of the purported class. *See*
27 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
28 that the class representative must have identical interests with the class members. The only
requirements are .. that the class representative be *similarly* situated”) (emphasis in original); *See*
also *Newberg*, § 3:29 (typicality “focuses on whether there exists a relationship between the
Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that her claims



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1 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent
2 Class Members was subject to the same relevant policies and procedures governing her
3 compensation, hours of work and meal and rest periods. Because Plaintiff contends that she was
4 subject to the same general course of conduct as absent Class Members, resolving the common
5 questions as they apply to Plaintiff will determine Defendants' *prima facie* liability to all Class
6 Members. Moreover, Plaintiff's claims could potentially be subject to the same primary
7 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical
8 of the Class. DS, ¶ 25.

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

10 The adequacy requirement is met where the plaintiff is represented by counsel qualified
11 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
12 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
13 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
14 conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 26.

15 First, Class Counsel have supplied the Court with declarations to show that they are
16 adequate to represent the Settlement Class and that they have significant experience in
17 employment litigation generally, and wage and hour and employment-related class action
18 litigation specifically. See DS, ¶¶ 28-35; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
19 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

20 Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the
21 Class Members have strong and co-extensive interests in this litigation because they all worked
22 for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
23 the same alleged course of conduct, and there is no evidence of any conflict of interest between
24 Plaintiff and the Class Members. DS, ¶ 25. Moreover, Plaintiff has demonstrated her commitment
25 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
26 with documents and extensively speaking with them to assist in identifying the claims asserted in
27 this case, assisting them in identifying witnesses, as well as exposing herself to the risk of
28 attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 27. Thus,
Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
find that Plaintiff and her counsel are adequate to represent the Settlement Class as required under
Code of Civil Procedure § 382.



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

3 Plaintiff further contends that a class action is also superior to other means of adjudicating
4 the issues in this action. The predominance of common legal and factual questions shows that this
5 Court could fairly adjudicate the claims of Class Members through a single class action. In view
6 of the *theoretical* alternatives that proposed class members could potentially utilize—
7 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
8 claims through the Division of Labor Standards Enforcement (where there would be relatively
9 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
10 superior to all of them. Thus, this consideration supports conditional class action treatment for
11 purposes of this Settlement only. DS, ¶ 36.

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

14 **A. Legal Standard**

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

24 **B. The Settlement Is Presumptively Fair**

25 In assessing preliminary approval, a court evaluates if the settlement process has certain
26 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
27 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
28 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
48 Cal.App.4th at 1794.

 The class settlement here satisfies all of these factors. DS, ¶ 37. The Settlement resulted
from thorough, arms’ length, negotiations between experienced counsel with the assistance of a



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1 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
2 weaknesses of their respective cases and Defendants' estimated exposure. *Id.*

3 In the operative complaint, Plaintiff sues for unpaid wages, unprovided meal and rest
4 breaks, wage statement penalties, waiting time penalties, unfair competition, and civil penalties.
5 DS, ¶ 38. Plaintiff prepared "damages" estimates in advance of the mediation. DS, ¶ 38, Ex. 6.
6 Plaintiff determined Defendants' maximum possible exposure for restitution and penalties to be
7 approximately \$4,049,788.11 (consisting of \$215,750.00 in missed meal period premium wages,
8 \$431,500.00 in missed rest break premium wages, \$209,500.00 for wage statement penalties,
9 \$212,525.86 for waiting time penalties, and \$3,236,000.00 for civil penalties under PAGA.
10 Plaintiff calculated the damages based on the number of workweeks and pay periods provided by
11 Defendants, Plaintiff's reports, and the sample data. *Id.* The total of these amounts is
12 \$4049788.11. The Gross Settlement Amount of \$685,000.00 is 16.91% of this amount. DS, ¶ 39.

13 Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix*
14 campaign and pursue individual release agreements from the Class Members. Plaintiff's Counsel
15 applied discounts to the maximum possible exposure to account for all other risks discussed
16 below. While it is difficult to assign anything but crudely-determined percentages of risk to any
17 of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery
18 for such employees is substantial and alone justifies a significant discount because Defendants
19 would likely by trial have gathered releases from the majority of the Class Members. A settlement
20 for approximately 16.91% of the potential recovery is a proportion substantially in excess of
21 recovery proportions sanctioned by existing case law.⁴ *Id.*



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24 ⁴ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
25 ("[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
26 be within the targeted range of reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
27 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
28 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) ("a settlement for fourteen percent recovery
of Plaintiffs' maximum recovery is reasonable"); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
1036, 1042 (N.D. Cal. 2008) (approving settlement amount that "is just over 9% of the maximum
potential recovery asserted by either party.").

1 Plaintiff is aware of only two significant awards under the PAGA in a contested
2 proceeding, both issued by federal district courts.⁵ DS, ¶ 50. PAGA penalty awards are often
3 small even for egregious, intentional violations of the Labor Code.⁶ *Id.* For instance, on October
4 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
5 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
6 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
7 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
8 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
9 result could occur here. *Id.*

10 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
11 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
12 \$685,000.00 is fair and reasonable. *Id.*

13
14 ⁵ In *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
15 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
16 \$18,695,692.58. In this regard, the district court stated,

17 The plain language of PAGA provides that "a court may award a lesser amount than the
18 maximum civil penalty amount specified by this part if, *based on the facts and*
19 *circumstances of the particular case*, to do otherwise would result in an award that is
20 unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code s 2699(e)(2) (emphasis
21 added). The relationship between the amount of total damages and the amount of
22 maximum PAGA penalties is certainly a "circumstance" of the case under the term's
23 ordinary meaning. The weight given to that circumstance is greater in this case because
24 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
25 individual claims except for one. As a general matter, it would be excessively punitive
26 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
27 the damages caused by that injury or set of injuries.

28 *Id.*, fn. 9. The district court further stated, "Virgin "has not presented any evidence that the full
penalty would be excessive in relation to its ability to pay," the weight of this factor is lessened."
Id.

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
comply with the requirements of California Labor Code section 226.

⁶ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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

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

10 **1. Evaluation of Plaintiff’s Case**

11 **a. Risks Associated With the Arbitration Agreements**

12 The arbitration agreements entered into between Defendant on the one hand, and Class
13 Members, on the other, present a significant risk to the success of Plaintiff’s class action
14 litigation. DS ¶ 41. According to Defendants, they began entering into arbitration agreements
15 with Class Members after the lawsuit was filed. *Id.* As the arbitration agreements in question
16 restrict potential litigants from bringing class actions against Defendant, Plaintiff would be
17 effectively barred from pursuing claims on behalf of the Class in Court. *Id.* Thus, there is a
18 significant risk the Court could determine that those Class Members who have not entered into
19 arbitration agreements with Defendant do not constitute a sufficiently numerous class to justify
20 class action treatment. As such, by continuing to trial on class-wide claims, Plaintiff would run
21 the high risk of suffering defeat due to the existence of the arbitration agreement. Moreover, the
22 arbitration agreements would pose danger to any class certification motion brought by Plaintiff.
23 Because different defenses would apply to some Class Members and not others – i.e., the
24 existence of signed arbitration agreements – there is a risk that the Court could determine that
25 Plaintiff’s claims present too many individualized inquiries to justify class certification. *Id.*

26 **b. Risks Associated with Defendants’ Financial Condition**

27 Defendants’ financial condition was the key factor in reaching this Settlement. DS, ¶ 42.
28 Due to Defendants’ financial condition, even if Plaintiff prevailed on all claims at trial, she may
never recover the damages due to the risk of insolvency. A very large class action judgment would
almost certainly put the company out of business and/or would interfere with the company’s
ability to carry out its contractual obligations. *Id.* In short, the “poor financial health of [the
defendant will] seriously increase [] the chance that Plaintiffs would be left with nothing if they



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1 continued to litigate their claims.” *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
2 1376 (the financial condition of defendant predominated in assessing the reasonableness of
3 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
4 concerning defendant’s financial stability “strongly supports the reasonableness of the
5 settlement”); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at
6 *11 (finding potential insolvency to be additional risk that favors approval of a class action
7 settlement). Accordingly, Defendants’ financial distress supports this settlement. *Id.*

8 **c. Risks Associated with the Meal Period Claims**

9 There are risks to Plaintiff’s meal period claim. DS, ¶ 43. Defendants contend that, to
10 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
11 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
12 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
13 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
14 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
15 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
16 to the meal break claim is the reason that a particular employee may have failed to take a meal
17 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

18 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
19 from taking their meal or rest periods. DS, ¶ 44. Defendants’ policies mandate that employees
20 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
21 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
22 sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
23 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
24 individualized evidence may be necessary to determine whether they occurred due to conduct of
25 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
26 the value of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

27 **d. Risks Associated with the Rest Break Claims**

28 There are risks to Plaintiff’s rest period claim. DS, ¶ 45. Employers are not required to
record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
employees the opportunity to take rest periods in accordance with California law. Further,
Defendants’ written policies on meal and rest periods are consistent with the Wage Order. *Id.*
Thus, unlike meal periods, where there are often records showing whether an employee clocked



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1 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
2 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
3 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
4 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
5 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
6 (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class
7 certification, it may be possible to manage individual issues through the use of surveys and
8 statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
Corporation v. Behrend (2013) 133 S.Ct. 1426.

9 **e. Risks Associated with the Waiting Time Penalty Claims**

10 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
11 PAGA penalties. Under Labor Code section 226, wage statements must include various
12 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
13 DS, ¶ 46.

14 Here, Plaintiff’s wage statement claim has the same underlying risks as the above claims,
15 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
16 with the requirements of Labor Code § 226. DS, ¶ 46.

17 **f. Risks Associated with the Waiting Time Penalty Claims.**

18 Without proof willful behavior, Plaintiff will be unable to recover these penalties.

19 **g. Risks Associated With the PAGA Claim**

20 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
21 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
22 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants has posed valid
23 defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations. Thus, the PAGA
24 claims likewise face significant uncertainty. DS, ¶ 47. There is a risk that the Court would
25 consider the maximum civil penalty available to be confiscatory. This is particularly the case
26 considering Defendants’ financial condition. *Id.* Moreover, the current COVID-19 pandemic
27 could motivate the Court to further reduce the penalty award to avoid what it may consider a
28 confiscatory taking. *Id.*

This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and required a
significant discount for settlement purposes. DS, ¶ 48. For mediation purposes, Plaintiff’s counsel
estimated a maximum possible exposure of approximately \$3,236,000.00 in civil penalties. This



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1 estimate did not take into account any of the risks discussed above and assumed a violation for
2 every single pay period. *Id.* Plaintiff’s counsel also assessed multiple penalties for the same pay
3 period for the same alleged violations of different Labor Code provisions and derivative
4 violations. *Id.* Although two federal district court decisions held that “stacking” PAGA penalties
5 in this fashion may be appropriate to determine the amount in controversy for purposes of removal
6 jurisdiction, Plaintiff’s counsel is not aware of any California state courts awarding plaintiffs
7 multiple PAGA penalties for the same violation for the same pay period under different Labor
8 Code provisions. *Id.* This may be because the PAGA does not provide for what many employers
9 characterize as claim splitting and not merely stacking. *Id.*

9 **h. Risks Associated With A Pick-Up Stix Campaign**

10 An employer enjoys the right to settle a putative class member’s disputed wage claims
11 individually, without the consent or involvement of class counsel. DS, ¶ 52. (See *Chindarah v.*
12 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
13 a “pick off” settlement campaign to pursue individual release agreements from the Class
14 Members, thereby potentially narrowing the size of the Settlement Class – 611 members - until it
15 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
16 number of employees to represent. This led to a significant reduction of claim value in settlement
17 negotiations. *Id.*

18 While the evidence gathered through Plaintiff’s discovery supports the merits of the
19 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
20 presents significant risks that support a downward departure from Defendants’ estimated liability
21 exposure. DS, ¶ 53. In view of the risks, the Settlement reflects Plaintiff’s estimate of the total
22 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
23 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
24 It also represents a fair, adequate, and reasonable compromise amount for these claims and
25 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
26 1376 (the financial condition of defendant predominated in assessing the reasonableness of
27 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
28 concerning defendant’s financial stability “strongly supports the reasonableness of the
settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
WL 2465049, * 3.



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

2 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
3 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
4 appropriate under the circumstances. DS, ¶ 55. The Parties negotiated a good faith amount for
5 PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
6 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
7 “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount
8 was the result of self-interest at the expense of other Class Members,” such amounts are generally
9 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
10 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
11 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
12 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
13 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
14 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
15 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
16 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
17 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
18 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
19 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
20 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
21 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
22 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
23 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
24 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
25 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
26 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
27 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
28 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

1 **3. Presence of Governmental Participant**

2 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
3 settlement to the LWDA with the filing and service of this motion. DS, ¶ 105, Ex. 19.



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

2 If the settlement is preliminarily approved, Class Members will be provided with the Class
3 Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 84. The
4 parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
5 will allow Class Members to make informed responses to the proposed settlement. *Id.*

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

10 The Individual Settlement Payments will be paid to each Class Member based on his or
11 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 74. Settlement § 1.23. Because
12 this method compensates Class Members based on the extent of their potential injuries, in that
13 Class Members who worked for Defendants longer would have been subject to more alleged
14 violations, it is fair, adequate, and reasonable. *Id.*

15 Plaintiff estimates that there are 23061 Work Weeks for the Class Period. So, each Work
16 Week has a value of approximately \$17.03 (\$392,666.70 Net Settlement Amount / 23,061 Work
17 Weeks = \$17.03). Plaintiff had 37 Work Weeks during the Class Period. Based on this, it is
18 anticipated that Plaintiff Maria Elena Diaz Hernandez will receive a Individual Class Payment of
19 approximately \$630.01 as a Class Member (37 Work Weeks x \$17.03 = \$630.01) while the
20 average estimated Individual Class Payment to Class Members will be approximately \$642.66.
21 Some Class Members – those who worked more Work Weeks during the Class Period - will
22 receive more, and some less. The highest possible Individual Class Payment to a Class Member
23 (i.e., to those who qualify for all Work Weeks in the Class Period) will be approximately
24 \$5305.24. The lowest possible Individual Class Payment to a Class Member (i.e., to those who
25 qualify for only one Work Week in the Class Period) will be approximately \$17.03. DS, ¶ 73.

26 It is anticipated that the average Aggrieved Employee Individual PAGA Payment will
27 be \$3.28. *Id.* Plaintiff's Individual PAGA Payment, her individual share of 25% of the PAGA
28 Penalties, will be less than that of some absent Aggrieved Employees. Under the Settlement,
each Aggrieved Employee will receive a *pro rata* distribution of 25% of the PAGA Penalties
proportionate to the number of paychecks he or she had with Defendants during the PAGA Period,
compared to the total of all paychecks of all Aggrieved Employees during the PAGA Period, as
reflected by Defendants' records. Plaintiff estimates that there are 8,474 Aggrieved Employee
paychecks for the PAGA Period. So, each Aggrieved Employee paycheck from the PAGA



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Period has a value of approximately \$0.12 (25% of \$4000.00 in PAGA Penalties / 8474 Aggrieved Employee paychecks = \$0.12). It is anticipated that Plaintiff Maria Elena Diaz Hernandez will receive an Individual PAGA Payment of approximately \$0.71 as a Aggrieved Employee (6 paychecks during the PAGA Pay Period x \$0.12 paycheck value = \$630.01) while the average estimated Individual PAGA Payment to an Aggrieved Employee will be approximately \$3.28 (\$1000.00, 25% of PAGA Penalties / Aggrieved Employee paychecks during the PAGA Period = \$3.28 Individual PAGA Payment). Some Aggrieved Employees – those who had more paychecks during the PAGA Period - will receive more, and some less. The highest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for all paychecks in the PAGA Pay Period) will be approximately \$9.41. The lowest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for only one paycheck in the PAGA Period) will be approximately \$0.12. DS, ¶ 75.

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

The Settlement states Class Counsel may seek attorneys’ fees of \$228,333.30 (one-third of the GSA) and up to \$20,000.00 for actual reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement § 3.2.2. These amounts are reasonable, given the facts and circumstances of the case. DS, ¶¶ 56-59.

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

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel



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1 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
2 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
3 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
4 down to devote time to this matter. DS, ¶ 57. Class Counsel interviewed and obtained information
5 from putative class members, met and conferred with Defendants' counsel on numerous
6 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
7 Defendants and obtained through other sources, researched applicable law, and provided
8 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

9 Class Counsel have borne all the risks and costs of litigation and will receive no
10 compensation until recovery is obtained. DS, ¶ 58. Class Counsel are well-experienced in wage-
11 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
12 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
13 the requested fees and costs are reasonable and should be awarded. *Id.*

14 **VIII. THE CLASS REPRESENTATIVE SERVICE PAYMENT TO PLAINTIFF**
15 **SHOULD BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR,**
16 **ADEQUATE, AND REASONABLE**

17 Courts routinely approve incentive awards to compensate named plaintiffs for the services
18 they provide and the risks they incur during class action litigation, often in much higher amounts
19 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
20 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
21 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
22 enhancement award). The Settlement provides that Plaintiff may seek an Class Representative
23 Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
24 action and the risks she undertook on behalf of Class Members. DS, ¶ 60. Plaintiff has devoted
25 many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among
26 other things, retaining experienced counsel, providing them with information about her work
27 history with Defendants and Defendants' policies and practices with respect to the wage and hour
28 claims at issue, participating in mediation, and being actively involved in the settlement process
to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
to significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if
this action had been unsuccessful (*See Labor Code §§ 218.5-218.6*). The efforts and risks that
Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class



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1 Representative Service Payment is fair, adequate, and reasonable, and thus warrants preliminary
2 approval. DS, ¶¶ 60-70.

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

6 With regard to the settlement administration costs (“Administration Expenses Payment”) provision, it is reasonable. Before agreeing to CPT Group, Inc. and its bid of \$12,250.00, the
7 Parties sought and reviewed bids from other reputable third-party administrators which provided
8 higher bids. DS, ¶¶ 98-99, Exs. 16-18. Thus, the settlement administration costs provision should
9 be given preliminary approval.

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

14 This Court should approve the proposed plans for giving notice to the Settlement Class
15 and administering the Settlement. The standard for determining the adequacy of notice is whether
16 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
17 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
18 measures to ensure that as many Class Members as practicable receive actual notice of the
19 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
20 the Notice by First Class U.S. mail only. Settlement, ¶ 8.4.2. Although there are current employee
21 Class Members, it is uncertain whether Defendants’ records of their contact information include
22 email addresses and Class Members, who perform all of their work away from a desk, are not in
23 a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
24 DS, ¶ 84.

25 With respect to its content, “[The] notice given to the class must fairly apprise the class
26 members of the terms of the proposed compromise and of the options open to dissenting class
27 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
28 The purpose of the notice in class settlement context is to give class members sufficient
information to decide whether they should accept the benefits offered, opt out and pursue their
own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
Class Members with all pertinent information that they need to fully evaluate their options and
exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among



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1 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
2 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
3 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
4 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
5 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
6 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
7 the Notice should be approved because it describes the Settlement with sufficient clarity and
8 specificity to explain to Class Members what this action is about, their rights under the Settlement,
and how to exercise those rights. DS, ¶ 84.

9 **XI. CONCLUSION**

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

12 Respectfully submitted,

13 THE SPIVAK LAW FIRM

14
15 Dated: February 7, 2024

By: 

16 DAVID G. SPIVAK
17 MAYA CHEAITANI, Attorneys for
18 Plaintiff, MARIA ELENA DIAZ
19 HERNANDEZ, and all others similarly
20 situated



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