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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF FRESNO**
12 **(UNLIMITED JURISDICTION)**

13 JORGE L. LEON, on behalf of himself, all others
14 similarly situated, the general public, and as an
15 “aggrieved employee” on behalf of other
16 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19 DAVIS & ROBERTS CONSTRUCTION, INC.,
20 a California corporation; and DOES 1–50,
21 inclusive,

22 *Defendant(s).*
23
24
25
26
27
28

Case No. 22CECG00407

**PLAINTIFF JORGE L. LEON’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: June 5, 2024
Hearing Time: 3:30 p.m.
Hearing Dept.: 501, The Honorable D.
Tyler Tharpe

Action filed: February 08, 2022



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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 Jorge L. Leon (“Plaintiff”) submits this memorandum of points and authorities
5 in support of his unopposed motion for preliminary approval of the Class Action and PAGA
6 Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
7 Settlement Amount (“GSA”) of \$166,713.47 in compromise of all disputed claims on behalf of
8 hourly, non-exempt during the period of February 8, 2018 through the date of preliminary
9 approval of this Settlement. Through this Motion, Plaintiff respectfully requests for this Court to
10 (1) provisionally certify the below-defined Class for settlement purposes only under Code of Civil
11 Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as
12 Class Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines
13 of United Employees Law Group as Class Counsel; (5) approve the proposed notice procedures
14 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 Defendant is a construction business. DS, ¶ 11. Defendant employed Plaintiff in California
27 as a finisher from about December 30, 2020, until March 21, 2021. *Id.*

28 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 **A. The Claims and Procedural History**

2 On December 23, 2021, Plaintiff notified Defendant and the California Labor and
3 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
4 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
5 Code violations committed by Defendant. DS, ¶ 12, Ex. 2.

6 On February 08, 2022, Plaintiff filed a Class Action Complaint in the Fresno County
7 Superior Court, Case No. 22CECG00407, against Defendant on behalf of himself and others
8 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
9 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
10 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
11 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
12 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
13 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 13, Ex. 3. On
14 March 7, 2022, Plaintiff filed his First Amended Complaint adding a claim under PAGA. DS,
15 DS, ¶ 13, Ex. 4. On April 8, 2022, Defendant filed an answer to Plaintiff’s First Amended
16 Complaint. Defendant denies all of Plaintiff’s allegations and strongly contends that its wage and
17 hour policies, practices and procedures are fully compliant with all applicable laws. DS, ¶ 13. On
18 August 21, 2023 Plaintiff filed his Second Amended Complaint adding a claim a cause of action
19 for “Failure to Indemnify”, Plaintiff’s Unfair Competition. and “Civil Penalties” Causes of Action
20 revised to add the Lab. Code § 2802 violation. DS, ¶ 13, Ex. 5. On October 3, 2023, Defendant
21 filed an answer to Plaintiff’s Second Amended Complaint. DS, ¶ 13, Ex 6.

22 **B. Sampling**

23 On May 25, 2022, Plaintiff requested that Defendant informally disclose documents and
24 data to enable Plaintiff to prepare for settlement discussions, including the number of putative
25 class members and aggrieved employees, the number of paychecks and workweeks for the various
26 limitations periods applicable to Plaintiff’s claims. DS, ¶ 14. Plaintiff also requested a reasonable,
27 randomly selected sample of Defendant’s time, payroll, and expense records, and related
28 personnel records. *Id.* Finally, Plaintiff requested Defendant’s written policies applicable to the



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claims at hand and asked Defendant identify any and all comparable claims against it.

The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. Defendant produced Plaintiff's entire personnel file (including policies and agreements he signed and acknowledged) and copies of its relevant company written policies. DS, ¶ 15.

Defendant contends that it employed 119 putative class members during the period of November 29, 2018 to May 18, 2022. Defendant produced the records of 51.00% of the putative class members for the period of November 29, 2018 to May 18, 2022. There were records for 61 employees in the sample. Plaintiff chose the sample. The sample was randomly selected. The sample consisted of handwritten time sheet and paystubs in Microsoft Excel, and related records. DS, ¶ 16.

Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Plaintiff also employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using a margin of error of 32%, a confidence level of 95%, and a population size of 119, the Raosoft Sample Size Calculator recommended a sample of 9. DS, ¶ 17, Exhibit 7 (Raosoft Sample Size Calculator results print-out). Thus, the sample population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

///

³ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software 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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1 **C. Mediation**

2 On November 3, 2022, following much of the foregoing informal discovery and exchange
3 of information, the Parties participated in a mediation session presided over by The Honorable
4 Howard R. Broadman, Ret., an experienced class action mediator. The parties did not reach a
5 settlement.

6 After the first mediation, Defendant sought releases from the putative class members. This
7 campaign was highly successful for Defendant. Seventy-nine (79) of the putative class members
8 released the claims at issue in this lawsuit. Defendant settled 8,560 of the 9,686 potential
9 workweeks.

10 On May 19, 2023, the Parties participated in another mediation session presided over by
11 The Honorable Howard R. Broadman. During the mediation, the Parties had a full day of
12 productive negotiations and reached agreement on a class-wide settlement during the mediation
13 session. During the mediation sessions, each side, represented by his / its respective counsel,
14 recognized the risk of an adverse result in the Action and agreed to settle the Action and all other
15 matters covered by the Settlement Agreement pursuant to the terms and conditions of the
16 Settlement Agreement. DS, ¶ 20.

17 **III. OVERVIEW OF THE SETTLEMENT**

18 **A. Settlement Class and Aggrieved Employees Definition**

19 The Settlement defines the Settlement Class as all current and former hourly, nonexempt
20 employees of Defendant in California. The Class Period is February 08, 2018 through the date of
21 preliminary approval of this Settlement. *Id.* The “Aggrieved Employees” are all Class Members
22 employed by Defendant in California and classified as an hourly, non-exempt who worked for
23 Defendant during the PAGA Period. The “PAGA Period” begins December 23, 2020 and ends
24 September 04, 2023. *Id.*

25 **B. Monetary Terms**

26 Except as otherwise provided by Paragraphs 1.23 and 9 below, Defendant promises to pay
27 \$166,713.47 and no more as the Gross Settlement Amount and to separately pay any and all
28 employer payroll taxes owed on the Wage Portions of the Individual Class Payments. Defendant



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1 has no obligation to pay the Gross Settlement Amount (or any payroll taxes) prior to the deadline
2 stated in Paragraph 6.1 of the Settlement Agreement. The Administrator will disburse the entire
3 Gross Settlement Amount without asking or requiring Participating Class Members or Aggrieved
4 Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount
5 will revert to Defendant. Settlement ¶ 3.1.

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

8 Class Representative Service Payment to the Class Representative of not more than
9 \$15,000.00 (in addition to any Individual Class Payment and any Individual PAGA Payment the
10 Class Representative is entitled to receive as a Participating Class Member). Defendant will not
11 oppose Plaintiff's request for a Class Representative Service Payment that does not exceed this
12 amount. As part of the motion for Class Counsel Fees Payment and Class Litigation Expenses
13 Payment, Plaintiff will seek Court approval for any Class Representative Service Payments no
14 later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class
15 Representative Service Payment less than the amount requested, the Administrator will retain the
16 remainder in the Net Settlement Amount. The Administrator will pay the Class Representative
17 Service Payment using IRS Form 1099. Plaintiff assumes full responsibility and liability for
18 employee taxes owed on the Class Representative Service Payment. Settlement ¶ 3.2.1.

19 A Class Counsel Fees Payment of not more than 33.33%, which is currently estimated to
20 be \$55,571.00 and a Class Counsel Litigation Expenses Payment of not more than \$20,000.00.
21 Defendant will not oppose requests for these payments provided that do not exceed these amounts.
22 Plaintiff and/or Class Counsel will file a motion for Class Counsel Fees Payment and Class
23 Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing. If
24 the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses
25 Payment less than the amounts requested, the Administrator will allocate the remainder to the Net
26 Settlement Amount. Released Parties shall have no liability to Class Counsel or any other
27 Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment and/or
28 Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel Fees



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1 Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms. Class Counsel
2 assumes full responsibility and liability for taxes owed on the Class Counsel Fees Payment and
3 the Class Counsel Litigation Expenses Payment and holds Defendant harmless, and indemnifies
4 Defendant, from any dispute or controversy regarding any division or sharing of any of these
5 Payments. Settlement ¶ 3.2.2.

6 An Administrator Expenses Payment not to exceed \$6,000.00 except for a showing of
7 good cause and as approved by the Court. To the extent the Administration Expenses are less or
8 the Court approves payment less than \$6,000.00, the Administrator will retain the remainder in
9 the Net Settlement Amount. Settlement ¶ 3.2.3.

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

13 20.00% of each Participating Class Member's Individual Class Payment will be allocated
14 to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax
15 withholding and will be reported on an IRS W-2 Form. The remaining 80.00% of each
16 Participating Class Member's Individual Class Payment will be allocated to settlement of claims
17 for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to
18 wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume
19 full responsibility and liability for any employee taxes owed on their Individual Class Payment.
20 Settlement ¶ 3.2.4.1.

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

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

27 The Administrator will calculate each Individual PAGA Payment by (a) dividing the
28 amount of the Aggrieved Employees' 25% share of PAGA Penalties, \$1,000.00, by the total



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1 number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
2 Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods.
3 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
4 Individual PAGA Payment. An Individual PAGA Payment will be offset by any amount already
5 paid to the Aggrieved Employee as part of the Defendant's "Pick Up Stix" campaign. Settlement
6 ¶ 3.2.5.1.

7 If the Court approves PAGA Penalties of less than the amount requested, the
8 Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will
9 report the Individual PAGA Payments on IRS 1099 Forms. Settlement ¶ 3.2.

10 **C. Timing of Payments**

11 Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts
12 necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the
13 Administrator no later than 14 days after the Effective Date. Settlement ¶ 4.3.

14 **D. Calculation of Settlement Shares**

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

19 20.00% of each Participating Class Member's Individual Class Payment will be allocated
20 to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax
21 withholding and will be reported on an IRS W-2 Form. The remaining 80.00% of each
22 Participating Class Member's Individual Class Payment will be allocated to settlement of claims
23 for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to
24 wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume
25 full responsibility and liability for any employee taxes owed on their Individual Class Payment.
26 Settlement paras. 3.2.4 - 3.2.4.1.

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1 **E. Apportionment of Settlement Shares**

2 20.00% of each Participating Class Member’s Individual Class Payment will be allocated
3 to settlement of wage claims (the “Wage Portion”). The Wage Portions are subject to tax
4 withholding and will be reported on an IRS W-2 Form. The remaining 80.00% of each
5 Participating Class Member’s Individual Class Payment will be allocated to settlement of claims
6 for interest and penalties (the “Non-Wage Portion”). The Non-Wage Portions are not subject to
7 wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume
8 full responsibility and liability for any employee taxes owed on their Individual Class Payment.
9 Settlement ¶ 3.2.4.1.

10 **F. The Releases**

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

15 Plaintiff’s Release. Plaintiff and his respective former and present spouses,
16 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
17 and discharge Released Parties from all claims, transactions, or occurrences that occurred during
18 the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
19 been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims
20 that were, or reasonably could have been, alleged based on facts contained in the Operative
21 Complaint, Plaintiff’s PAGA Notice, or ascertained during the Action and released under 6.2,
22 below. (“Plaintiff’s Release.”) Plaintiff’s Release does not extend to any claims or actions to
23 enforce the Settlement Agreement, or to any claims for vested benefits, unemployment benefits,
24 disability benefits, social security benefits, workers’ compensation benefits that arose at any time,
25 or based on occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff may
26 discover facts or law different from, or in addition to, the facts or law that Plaintiff now knows or
27 believes to be true but agrees, nonetheless, that Plaintiff’s Release shall be and remain effective
28 in all respects, notwithstanding such different or additional facts or Plaintiff’s discovery of them.



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1 Settlement ¶ 6.1.

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

4 A general release does not extend to claims that the creditor or releasing party does not
5 know or suspect to exist in his or her favor at the time of executing the release, and that if known
6 by him or her would have materially affected his or her settlement with the debtor or Released
7 Party. Settlement ¶ 6.1.1.

8 All Participating Class Members, on behalf of themselves and their respective former and
9 present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release
10 Released Parties from all claims stated in the Operative Complaint and those based solely upon
11 the facts alleged in the Operative Complaint. Except as set forth in Section 6.3 of the Settlement
12 Agreement, Participating Class Members do not release any other claims, including claims for
13 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
14 unemployment insurance, disability, social security, workers' compensation, or claims based on
15 facts occurring outside the Class Period. Settlement ¶ 6.2.

16 Plaintiff releases all claims for civil penalties that could have been sought by the Labor
17 Commissioner for the violations identified in Plaintiff's pre-filing letter to the LWDA; Plaintiff
18 does not release the claim for wages or damages of any Aggrieved Employee unless such
19 Aggrieved Employee is a Participating Class Member. Settlement ¶ 6.

20 **G. Notice and Claims Process and Procedures**

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

24 Using best efforts to perform as soon as possible, and in no event later than 14 days after
25 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
26 Data, via first-class United States Postal Service ("USPS") mail, the Notice Packet with Spanish
27 translation, if applicable substantially in the forms attached to the Settlement Agreement as
28 Exhibits A, B, C, and D. The first page of the Class Notice shall prominently estimate the dollar



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1 amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class
2 Member, and the number of Work Weeks and PAGA Pay Periods (if applicable) used to calculate
3 these amounts. Before mailing Notice Packets, the Administrator shall update Class Member
4 addresses using the National Change of Address database. Settlement ¶ 8.4.2.

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

12 The deadlines for Class Members' written objections, Challenges to Work Weeks and/or
13 weekly Pay Periods (disputes), and Requests for Exclusion will be extended an additional 14 days
14 beyond the 60 days otherwise provided in the Class Notice for all Class Members whose notice
15 is re-mailed. The Administrator will inform the Class Member of the extended deadline with the
16 re-mailed Notice Packet. Settlement ¶ 8.4.4.

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

25 **1. Disputes**

26 Each Class Member shall have 60 days after the Administrator mails the Notice Packet
27 (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge
28 the number of Class Work Weeks and weekly PAGA Pay Periods (if any) allocated to the Class



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1 Member in the Class Notice. This is also known as a dispute. A Work Week Dispute form,
2 attached as Exhibit C, may be used for this purpose but is not required. The Class Member may
3 challenge the allocation by communicating with the Administrator via fax, email or mail. The
4 Administrator must encourage the challenging Class Member to submit supporting
5 documentation. In the absence of any contrary documentation, the Administrator is entitled to
6 presume that the Work Weeks contained in the Class Notice are correct so long as they are
7 consistent with the Class Data. The Administrator's determination of each Class Member's
8 allocation of Work Weeks and/or weekly Pay Periods shall be final and not appealable or
9 otherwise susceptible to challenge. The Administrator shall promptly provide copies of all
10 challenges to calculation of Work Weeks and/or weekly Pay Periods to Defense Counsel and
11 Class Counsel and the Administrator's determination the challenges. Settlement ¶ 8.6.

12 **2. Opting Out**

13 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
14 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later
15 than 60 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class
16 Members whose Notice Packet is re-mailed). A Request for Exclusion is a letter from a Class
17 Member or his/her representative that reasonably communicates the Class Member's election to
18 be excluded from the Settlement and includes the Class Member's name, address and email
19 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
20 or postmarked by the Response Deadline. An Election Not to Participate in Settlement form,
21 attached as Exhibit B, may be used for this purpose but is not required. Settlement ¶ 8.5.1.

22 The Administrator may not reject a Request for Exclusion as invalid because it fails to
23 contain all the information specified in the Class Notice. The Administrator shall accept any
24 Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the
25 person as a Class Member and the Class Member's desire to be excluded. The Administrator's
26 determination shall be final and not appealable or otherwise susceptible to challenge. If the
27 Administrator has reason to question the authenticity of a Request for Exclusion, the
28 Administrator may demand additional proof of the Class Member's identity. The Administrator's



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determination of authenticity shall be final and not appealable or otherwise susceptible to challenge. Settlement ¶ 8.5.2.

Every Class Member who does not submit a timely and valid Request for Exclusion is deemed to be a Participating Class Member under the Settlement Agreement, entitled to all benefits and bound by all terms and conditions of the Settlement, including the Participating Class Members' Releases under Paragraphs 6.2 and 6.3 of the Settlement Agreement, regardless of whether the Participating Class Member actually receives the Class Notice or objects to the Settlement. Settlement ¶ 8.5.3.

Every Class Member who submits a valid and timely Request for Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment or have the right to object to the class action components of the Settlement. Aggrieved Employees are eligible for an Individual PAGA Payment. Settlement ¶ 8.5.

3. Objecting

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

Participating Class Members may send written objections to the Administrator, by fax, email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A Participating Class Member who elects to send a written objection to the Administrator must do so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional 14 days for Class Members whose Notice Packet was re-mailed). The Objection form attached as Exhibit D may be used for this purpose but is not required. Settlement ¶ 8.7.2.

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

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1 **H. Uncashed Checks**

2 For any Class Member whose Individual Class Payment check or Individual PAGA
3 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
4 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
5 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
6 California Code of Civil Procedure Section 384, subd. (b). Settlement ¶ 4.4.3.

7 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

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

17 **A. The Settlement Class Is Objectively Ascertainable**

18 A class is ascertainable when it may be readily identified without unreasonable expense
19 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
20 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
21 defined Class is ascertainable because its members may be identified by reference to Defendant's
22 records and Defendant has agreed to share the relevant information from its records to facilitate
23 the settlement process. DS, ¶ 24; Settlement, ¶ 2.4. Therefore, the Settlement Class is
24 ascertainable.

25 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

26 The Settlement Class has sufficiently numerous members to render joinder impractical.
27 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
28 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 119 Class



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Members. DS, ¶ 25. 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, ¶ 25. *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 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

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

In this case, Plaintiff asserts all Class Members were subject to the same or similar operations and employment policies, practices, and procedures. The claims arise from Defendant’s alleged policy-driven failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, failure to pay wages, unauthorized and unlawful wage deductions, and related labor law violations, all of which Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff



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1 asserts that common questions include, but are not limited to: (1) Whether Defendant failed to
2 pay all wages earned to Class Members for all hours worked at the correct rates of pay; (2)
3 Whether Defendant failed to provide the class with all meal and rest periods in compliance with
4 California law; (3) Whether Defendant failed to pay the class one additional hour of pay on
5 workdays it failed to provide the class with one or more meal or rest periods in compliance with
6 California law; (4) Whether Defendant failed to indemnify the class for all necessary business
7 expenditures incurred during the discharge of their duties; (5) Whether Defendant knowingly and
8 intentionally failed to provide the class with accurate wage statements; (6) Whether Defendant
9 willfully failed to provide the class with timely final wages; and (7) Whether Defendant engaged
10 in unfair competition within the meaning of Business and Professions Code section 17200, *et*
11 *seq.*, with respect to the class. DS, ¶ 26. Therefore, common questions predominate.

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

13 The class representative must be similarly situated to the rest of the purported class. *See*
14 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
15 that the class representative must have identical interests with the class members. The only
16 requirements are .. that the class representative be *similarly* situated”) (emphasis in original); *See*
17 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
18 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that his claims
19 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent
20 Class Members was subject to the same relevant policies and procedures governing his
21 compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was
22 subject to the same general course of conduct as absent Class Members, resolving the common
23 questions as they apply to Plaintiff will determine Defendant’s *prima facie* liability to all Class
24 Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary
25 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical
26 of the Class. DS, ¶ 27.

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

2 The adequacy requirement is met where the plaintiff is represented by counsel qualified
3 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
4 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
5 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
6 conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 28.

7 First, Class Counsel have supplied the Court with declarations to show that they are
8 adequate to represent the Settlement Class and that they have significant experience in
9 employment litigation generally, and wage and hour and employment-related class action
10 litigation specifically. See DS, ¶¶ 30-37; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
11 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

12 Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
13 Class Members have strong and co-extensive interests in this litigation because they all worked
14 for Defendant during the relevant time period, allegedly suffered the same alleged injuries from
15 the same alleged course of conduct, and there is no evidence of any conflict of interest between
16 Plaintiff and the Class Members. DS, ¶ 29. Moreover, Plaintiff has demonstrated his commitment
17 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
18 with documents and extensively speaking with them to assist in identifying the claims asserted in
19 this case, assisting them in identifying witnesses, as well as exposing himself to the risk of
20 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 29. Thus,
21 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
22 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
23 Code of Civil Procedure § 382.

24 **E. Class Action Treatment Is the Superior Means For Resolving The Claims**
25 **Of The Class Members**

26 Plaintiff further contends that a class action is also superior to other means of adjudicating
27 the issues in this action. The predominance of common legal and factual questions shows that this
28 Court could fairly adjudicate the claims of Class Members through a single class action. In view
of the *theoretical* alternatives that proposed class members could potentially utilize—



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1 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
2 claims through the Division of Labor Standards Enforcement (where there would be relatively
3 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
4 superior to all of them. Thus, this consideration supports conditional class action treatment for
5 purposes of this Settlement only. DS, ¶ 38.

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

8 **A. Legal Standard**

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

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

19 In assessing preliminary approval, a court evaluates if the settlement process has certain
20 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
21 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
22 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
23 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
24 48 Cal.App.4th at 1794.

25 The class settlement here satisfies all of these factors. DS, ¶ 39. The Settlement resulted
26 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
27 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
28 weaknesses of their respective cases and Defendant’s estimated exposure. *Id.*

Plaintiff prepared “damages” estimates in advance of the mediation. DS, ¶ 30, Ex. 8.



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1 Plaintiff determined Defendant’s maximum possible exposure for restitution and penalties to be
2 approximately \$5,668,574.79 (consisting of \$572,900.00 in unpaid wages, \$286,450.00 in missed
3 meal period premium wages, \$572,900.00 in missed rest break premium wages, \$0.00 in
4 unreimbursed expenses, \$32,316.61 for wage statement penalties, \$151,487.23 for waiting time
5 penalties, and \$5,482,853.84 for civil penalties under PAGA. Plaintiff calculated the damages
6 based on the number of workweeks and pay periods provided by Defendant, Plaintiff’s reports,
7 and the sample data. *Id.*

8 Plaintiff also considered the possibility that Defendant could complete its *Pick Up Stix*
9 campaign and obtain individual release agreements from the remaining Class Members.
10 Defendant also represented that it interviewed its current employees regarding Plaintiff’s claims,
11 all of whom would provide declarations, under penalty of perjury, that were favorable to
12 Defendant with respect to the relevant factual issues at issue in Plaintiff’s action. Plaintiff’s
13 Counsel applied discounts to the maximum possible exposure to account for all other risks
14 discussed below. While it is difficult to assign anything but crudely-determined percentages of
15 risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude
16 recovery for such employees is substantial and alone justifies a significant discount because
17 Defendant would likely by trial have gathered releases from the majority of the Class Members.
18 *Id.*

19 Plaintiff is aware of only two significant awards under the PAGA in a contested
20 proceeding, both issued by federal district courts.⁴ DS, ¶ 55. PAGA penalty awards are often

21 _____
22 ⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
23 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
24 \$18,695,692.58. In this regard, the district court stated,

25 The plain language of PAGA provides that “a court may award a lesser amount than the
26 maximum civil penalty amount specified by this part if, *based on the facts and*
27 *circumstances of the particular case*, to do otherwise would result in an award that is
28 unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code s 2699(e)(2) (emphasis
added). The relationship between the amount of total damages and the amount of
maximum PAGA penalties is certainly a “circumstance” of the case under the term’s
ordinary meaning. The weight given to that circumstance is greater in this case because
Plaintiffs’ PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs’



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

8 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
9 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
10 \$166,713.47 is fair and reasonable. *Id.*

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

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

20
21 individual claims except for one. As a general matter, it would be excessively punitive
22 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
23 the damages caused by that injury or set of injuries.

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

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

⁵ 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 **1. Evaluation of Plaintiff's Case**

2 **a. Risks Associated with Defendant's Financial Condition**

3 Defendant's financial condition was the key factor in reaching this Settlement. DS, ¶ 43.
4 Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, he may
5 never recover the damages due to the risk of insolvency. During the first mediation, Defendant
6 explained that its business was in dire shape and had to lay off all but 12 employees due to a
7 significant drop in revenue. A very large class action judgment would almost certainly put the
8 company out of business and/or would interfere with the company's ability to carry out its
9 contractual obligations. *Id.* In short, the "poor financial health of [the defendant will] seriously
10 increase [] the chance that Plaintiffs would be left with nothing if they continued to litigate their
11 claims." *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial
12 condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C.*
13 *Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's
14 financial stability "strongly supports the reasonableness of the settlement"); *Laguna v. Coverall*
15 *N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at *11 (finding potential insolvency to
16 be additional risk that favors approval of a class action settlement). Accordingly, Defendant's
17 financial distress supports this settlement. *Id.*

18 **b. Risks Associated with the Unpaid Wages Claim**

19 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
20 best, largely because Defendant's written policies throughout the relevant time period prohibited
21 off-the-clock work. DS, ¶ 44. Off-the-clock claims are difficult where a defendant requires in its
22 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
23 *Hospital* (2014) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
24 be compensable). *Id.* In its written employment policies, Defendant mandates that employees
25 must record all time worked accurately on their time records and strictly prohibit employees from
26 performing any work off-the-clock. DS, ¶ 44. Moreover, while Defendant disputes that off-the-
27 clock work occurred, it contends that any time spent off the clock was *de minimis*. The California
28 Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular



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1 and minute periods of time may still be subject to a *de minimis* defense even if compensable.
2 (Stating that “We do not decide whether there are circumstances where compensable time is so
3 minute or irregular that it is unreasonable to expect the time to be recorded.”). Following *Troester*,
4 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
5 clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with
6 respect to this claim. *Id.*

7 The difficulty inherent in proving that off-the-clock work occurred poses a significant
8 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
9 Generally, a court will not certify a class unless it can determine an appropriate classwide
10 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
11 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
12 the lack of records indicating when such off-the-clock work may have taken place. Individualized
13 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
14 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
15 risk that the Court would consider this evidentiary showing insufficient as a classwide
16 methodology. DS, ¶ 45.

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

18 There are risks to Plaintiff’s meal period claim. DS, ¶ 46. Defendant contends that, to
19 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
20 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
21 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
22 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
23 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
24 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
25 to the meal break claim is the reason that a particular employee may have failed to take a meal
26 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

27 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
28 from taking their meal or rest periods. DS, ¶ 47. Defendant’s policies mandate that employees



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1 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
2 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
3 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
4 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
5 individualized evidence may be necessary to determine whether they occurred due to conduct of
6 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
7 the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

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

9 There are risks to Plaintiff's rest period claim. DS, ¶ 48. Employers are not required to
10 record rest periods and such periods are paid. *Id.* Defendant contends it provided non-exempt
11 employees the opportunity to take rest periods in accordance with California law. Further,
12 Defendant's written policies on meal and rest periods are consistent with the Wage Order. *Id.*
13 Thus, unlike meal periods, where there are often records showing whether an employee clocked
14 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
15 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
16 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
17 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
18 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
19 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
20 certification, it may be possible to manage individual issues through the use of surveys and
21 statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
22 *Corporation v. Behrend* (2013) 133 S.Ct. 1426.

23 **e. Risks Associated with the Failure to Indemnify Claim**

24 There is a risk that the Court may consider Plaintiff's claims as to Defendant's alleged
25 failure to indemnify for business expenses to be individual in nature and thus decline to certify
26 the class. DS, ¶ 49. Plaintiff investigated whether Defendant required Plaintiff and the Class
27 Members to use their personal items including cellular phones, tools and automobiles, and failed
28 to indemnify them for these business expenses. Plaintiff came up with little support for this claim.



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1 *Id.* Defendant presented evidence that it has supplied its employees with tools, equipment, and
2 other supplies and had an expense reimbursement policy. As such, there is a risk that the Court
3 may consider Plaintiff's claims to be individual in nature and unfit for class wide resolution. *Id.*

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

5 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
6 PAGA penalties. Under Labor Code section 226, wage statements must include various
7 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
8 DS, ¶ 50.

9 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
10 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply
11 with the requirements of Labor Code § 226. DS, ¶ 50.

12 **g. Risks Associated with the Waiting Time Penalty Claims.**

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

14 **h. Risks Associated With the PAGA Claim**

15 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
16 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
17 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid
18 defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA
19 claims likewise face significant uncertainty. DS, ¶ 53. There is a risk that the Court would
20 consider the maximum civil penalty available to be confiscatory. This is particularly the case
21 considering Defendant's financial condition. *Id.* Moreover, the current COVID-19 pandemic
22 could motivate the Court to further reduce the penalty award to avoid what it may consider a
23 confiscatory taking. *Id.*

24 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
25 significant discount for settlement purposes. DS, ¶ 54. For mediation purposes, Plaintiff's counsel
26 estimated a maximum possible exposure of approximately \$5,482,853.84 in civil penalties. This
27 estimate did not take into account any of the risks discussed above and assumed a violation for
28 every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay



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

8 **i. Risks Associated With A Pick-Up Stix Campaign**

9 An employer enjoys the right to settle a putative class member’s disputed wage claims
10 individually, without the consent or involvement of class counsel. DS, ¶ 57. (See *Chindarah v.*
11 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendant launched a
12 “pick off” settlement campaign and, if it continues, Defendant may obtain individual release
13 agreements from the remaining Class Members, thereby potentially narrowing the size of the
14 Settlement Class – 119 members - until it is no longer numerous enough for class certification.
15 *Id.* Plaintiff, then, may not have sufficient number of employees to represent. This led to a
16 significant reduction of claim value in settlement negotiations. *Id.*

17 While the evidence gathered through Plaintiff’s discovery supports the merits of the
18 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
19 presents significant risks that support a downward departure from Defendant’s estimated liability
20 exposure. DS, ¶ 58. In view of the risks, the Settlement reflects Plaintiff’s estimate of the total
21 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
22 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
23 It also represents a fair, adequate, and reasonable compromise amount for these claims and
24 warrants preliminary approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
25 1376 (the financial condition of defendant predominated in assessing the reasonableness of
26 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
27 concerning defendant’s financial stability “strongly supports the reasonableness of the
28 settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014



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1 WL 2465049, * 3.

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

3 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
4 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
5 appropriate under the circumstances. DS, ¶ 59. The Parties negotiated a good faith amount for
6 PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
7 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
8 “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount
9 was the result of self-interest at the expense of other Class Members,” such amounts are generally
10 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
11 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
12 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
13 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
14 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
15 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
16 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
17 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
18 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
19 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
20 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
21 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
22 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
23 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
24 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
25 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
26 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
27 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
28 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3



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(approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

3. Presence of Governmental Participant

As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this settlement to the LWDA with the filing and service of this motion. DS, ¶ 106, Ex. 20.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Notice Packet (attached as Exhibits A and D to the Settlement) and an opportunity to object. DS, ¶ 87. The parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed settlement.

Id.

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

The Individual Settlement Payments will be paid to each Class Member based on his or her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 76, Settlement ¶ 3.2.3. Because this method compensates Class Members based on the extent of their potential injuries, in that Class Members who worked for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and reasonable. *Id.*

Plaintiff estimates that there are 9,686 Work Weeks for the Class Period. So, each Work Week has a value of approximately \$6.42 (\$62,142.47 Net Settlement Amount / 9,686 Work Weeks = \$6.42). Plaintiff had 20 Work Weeks during the Class Period. Based on this, it is anticipated that Plaintiff Jorge L. Leon will receive an Individual Settlement Payment of approximately \$128.31 as a participating Class Member (20 Work Weeks x \$6.42 = \$128.31) while the average estimated Individual Settlement Payment to participating Class Members will be approximately \$522.21. Some Class Members – those who worked more Work Weeks during the Class Period - will receive more, and some less. The highest possible Individual Settlement Payment to a participating Class Member (i.e., to those who qualify for all Work Weeks in the Class Period) will be approximately \$1,859.11. The lowest possible Individual Settlement Payment to a participating Class Member (i.e., to those who qualify for only one Work Week in



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the Class Period) will be approximately \$6.42.

It is anticipated that the average Aggrieved Employee Individual PAGA Payment will be \$17.24. *Id.* Plaintiff's Individual PAGA Payment, his individual share of 25% of the PAGA 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 Defendant during the PAGA Period, compared to the total of all paychecks of all Aggrieved Employees during the PAGA Period, as reflected by Defendant's records. Plaintiff estimates that there are 2,844 Aggrieved Employee paychecks for the PAGA Period. So, each Aggrieved Employee paycheck from the PAGA Period has a value of approximately \$0.35 (25% of \$4,000.00 in PAGA Penalties / 2,844 Aggrieved Employee paychecks = \$0.35). It is anticipated that Plaintiff Jorge L. Leon will receive an Individual PAGA Payment of approximately \$7.03 as an Aggrieved Employee (20 paychecks during the PAGA Period x \$0.35 paycheck value = \$128.31) while the average estimated Individual PAGA Payment to an Aggrieved Employee will be approximately \$17.24 (\$1,000.00, 25% of PAGA Penalties / Aggrieved Employee paychecks during the PAGA Period = \$17.24 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 Period) will be approximately \$49.34. 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 \$0.35.

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 \$55,571.00 (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, ¶¶ 60-62.

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.*



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1 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced
2 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
3 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
4 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
5 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
6 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
7 of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee
8 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
9 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
10 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
11 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

12 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
13 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
14 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
15 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
16 down to devote time to this matter. DS, ¶ 61. Class Counsel interviewed and obtained information
17 from putative class members, met and conferred with Defendant’s counsel on numerous
18 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
19 Defendant and obtained through other sources, researched applicable law, and provided
20 estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

21 Class Counsel have borne all the risks and costs of litigation and will receive no
22 compensation until recovery is obtained. DS, ¶ 62. Class Counsel are well-experienced in wage-
23 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
24 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
25 the requested fees and costs are reasonable and should be awarded. *Id.*

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1 **VIII. THE CLASS REPRESENTATIVE SERVICE PAYMENT TO PLAINTIFF**
2 **SHOULD BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR,**
3 **ADEQUATE, AND REASONABLE**

4 Courts routinely approve incentive awards to compensate named plaintiffs for the services
5 they provide and the risks they incur during class action litigation, often in much higher amounts
6 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
7 (upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van*
8 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
9 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
10 Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff’s efforts in this
11 action and the risks he undertook on behalf of Class Members. DS, ¶ 63; Declaration of Jorge L.
12 Leon (“Plaintiff decl.”), generally. Plaintiff has devoted many hours advancing the interests of
13 the Settlement Class. Plaintiff has done this by, among other things, retaining experienced
14 counsel, providing them with information about his work history with Defendant and Defendant’s
15 policies and practices with respect to the wage and hour claims at issue, participating in mediation,
16 and being actively involved in the settlement process to ensure a fair result for the Settlement
17 Class as a whole. In doing this, Plaintiff has been exposed to significant risks, including the risk
18 of an order to pay Defendant’s attorneys’ fees and costs if this action had been unsuccessful (*See*
19 *Labor Code §§ 218.5-218.6*). The efforts and risks that Plaintiff undertook on behalf of the
20 Settlement Class shows that the proposed Class Representative Service Payment is fair, adequate,
21 and reasonable, and thus warrants preliminary approval. DS, ¶ 63; Plaintiff decl., generally.

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

25 With regard to the settlement administration costs (“Administration Expenses Payment”)
26 provision, it is reasonable. Before agreeing to Simpluris Inc. and its bid of \$6,000.00, the Parties
27 sought and reviewed bids from other reputable third-party administrators which provided higher
28 bids. DS, ¶ 99-100, Exs. 17, 18, and 19. Thus, the settlement administration costs provision should
be given preliminary approval.

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

5 This Court should approve the proposed plans for giving notice to the Settlement Class
6 and administering the Settlement. The standard for determining the adequacy of notice is whether
7 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
8 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
9 measures to ensure that as many Class Members as practicable receive actual notice of the
10 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
11 the Notice by First Class U.S. mail only. Settlement, ¶ 4.4.1. Although there are current employee
12 Class Members, it is uncertain whether Defendant’s records of their contact information include
13 email addresses and Class Members, who perform all of their work away from a desk, are not in
14 a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
15 DS, ¶ 63.

16 With respect to its content, “[The] notice given to the class must fairly apprise the class
17 members of the terms of the proposed compromise and of the options open to dissenting class
18 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
19 The purpose of the notice in class settlement context is to give class members sufficient
20 information to decide whether they should accept the benefits offered, opt out and pursue their
21 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
22 Class Members with all pertinent information that they need to fully evaluate their options and
23 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
24 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
25 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
26 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
27 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
28 individual Settlement Class Member’s estimated payment. Additionally, the Class Notice will
include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
the Notice should be approved because it describes the Settlement with sufficient clarity and



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1 specificity to explain to Class Members what this action is about, their rights under the Settlement,
2 and how to exercise those rights. DS, ¶ 86.

3 **XI. CONCLUSION**

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

6
7 Respectfully submitted,

THE SPIVAK LAW FIRM

8
9 Dated: April 26, 2024

By: 

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