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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF LOS ANGELES**

12 **(UNLIMITED JURISDICTION)**

13 LUIS LARRABURU, on behalf of himself, all
14 others similarly situated, the general public, and
15 as an “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 AMERICAN MERCHANDISING
20 SPECIALISTS, INC., a North Carolina
21 corporation; and DOES 1–50, inclusive,

22 *Defendant(s).*

Case No. 21STCV17704

**PLAINTIFF LUIS LARRABURU’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: September 1, 2022

Hearing Time: 10:00 a.m.

Hearing Dept.: SSC-9, The Honorable
Yvette M. Palazuelos

Action filed: May 11, 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 Luis Larraburu (“Plaintiff”) submits this memorandum of points and authorities
5 in support of his unopposed motion for preliminary approval of the Joint Stipulation Of Class
6 Action Settlement And Release Of Claims (the “Settlement”)², which provides for a Gross
7 Settlement Amount of Two Hundred and Fifteen Thousand Dollars and No Cents (\$215,000.00)
8 payable by Defendant as provided by this Agreement, plus Defendant’s employer-side payroll
9 taxes in compromise of all disputed claims on behalf of all current and former non-exempt
10 employees who are or were employed by Defendant American Merchandising Specialists, Inc.
11 (“Defendant”) in California at any time between August 25, 2016 through March 15, 2022.
12 Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the
13 below-defined Class for settlement purposes only under Code of Civil Procedure § 382; (2)
14 preliminarily approve the Settlement; (3) appoint David Spivak of The Spivak Law Firm and
15 Walter L. Haines of United Employees Law Group as class counsel; (4) preliminarily appoint
16 Plaintiff as class representative; (5) approve the proposed notice procedures and related forms;
17 and (6) schedule a final approval hearing.

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

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 **II. BACKGROUND**

2 Defendant operates a retail service company that provides retail solutions for Samsung
3 and other customers, such as product knowledge training and equipment maintenance and repair.
4 DS, ¶ 4. Defendant employed Plaintiff as a marketing representative from about October 2019
until January 2020. *Id.*

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

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

9 On May 11, 2021, Plaintiff filed a Class Action Complaint in the Los Angeles County
10 Superior Court, Case No. 21STCV17704, against Defendant on behalf of himself and others
11 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
12 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
13 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
14 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
15 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
16 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On
17 August 6, 2021, Defendant filed an answer to Plaintiff’s Class Complaint. DS, ¶ 6, Ex. 4.
18 Defendant denies all of Plaintiff’s allegations and strongly contends that its wage and hour
19 policies, practices and procedures are fully compliant with all applicable laws. *Id.*

20 **B. Mediation**

21 The Parties thereafter engaged in an informal, voluntary exchange of information in the
22 context of privileged settlement discussions to facilitate an early mediation. Defendant produced
23 Plaintiff’s entire personnel file, copies of its relevant company written policies, time-keeping
24 records, email messages, and paycheck data and records for the putative class, and more detailed
time and payroll data for a random sample of putative class members specifically selected by
25 Plaintiff’s counsel. DS, ¶ 7.

26 On November 15, 2021, following much of the foregoing informal discovery and
exchange of information, the Parties participated in a mediation session presided over by Mediator
27 David Phillips, an experienced class action mediator. During the mediation, the Parties had a full
28 day of productive negotiations and reached agreement on a class-wide settlement during the



second mediation session. During the mediation sessions, each side, represented by their respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the Action and all other matters covered by this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 8.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the class as all nonexempt, hourly field marketing representatives employed by Defendant in California of at any time between August 25, 2016, through March 15, 2022. Settlement, §§ I(B), I(G).

B. Monetary Terms

In consideration for settlement of the Class Action, Defendants agree to pay a total of Two Hundred and Fifteen Thousand Dollars and Zero Cents (\$215,000.00) (the “Gross Settlement Amount” or “GSA”) plus Defendant’s employer-side payroll taxes. Settlement, § I(P). The GSA will be all-inclusive and includes: (1) all Settlement Shares to Class Members (“Net Settlement Amount”); (2) a Class Representative Payment to Plaintiff, as class representative and private attorney general, for up to \$15,000; (3) a Fee Award for Class Counsel’s attorneys’ fees of not more than one third of the GSA (\$71,666.66) and for litigation costs not to exceed \$17,500 (“Litigation Expenses Payment”) (4) the Settlement Administrator’s Fees in an amount currently estimated to not exceed \$10,000.00; and (5) \$4,000 for PAGA penalties under California Labor Code §§ 2699 et seq. (75% or \$3,000 will go to the California Labor & Workforce Development Agency (“LWDA”) and 25% or \$1,000 will go to PAGA Members). The GSA shall be exclusive of Defendants’ employer-side payroll taxes, which Defendants shall pay in addition to the GSA. Settlement, §§ I(C), I(D).

Defendant estimated for purposes of mediation that there are 6,042 Work Weeks by 115 Class Members for the period of August 25, 2016, through November 15, 2021. These numbers would be expected to increase proportionately for the passage of time between that date and the time of court approval. Before the Parties seek or a Party seeks court approval of the Settlement, the Settlement Administrator will advise Plaintiff’s counsel of Defendant’s report of the total number of Work Weeks and Class Members. If the Work Weeks and/or Class Members as of the



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1 date the Court approves the settlement exceeds the referenced 6,042 Work Weeks and/or 115
2 Class Members by more than 10.00%, the Gross Settlement Amount, including the Class Counsel
3 Fees Payment, the Class Representative Payment, and the LWDA payment, will increase
4 proportionally according to the number of additional Work Weeks or Class Members, whichever
5 results in a higher increase in the Gross Settlement Amount. Settlement, (C)(R).

6 Within 10 calendar days of the Effective Date³ of Settlement, Defendant shall deposit the
7 GSA in an account designated by the Settlement Administrator: (i) the total amount of all
8 Settlement Shares to Participating Class Members, (ii) the Court approved Class Counsel fees &
9 costs, (iii) the Court-approved Class Representative Payment, (iv) the Court-approved costs of
10 the Settlement Administrator, and (v) the payment to the LWDA.

11 The Net Settlement Amount (“NSA”) will equal the net amount available for payment of
12 claims to Class Members after deducting the above-referenced costs from the Gross Settlement
13 Amount.

14 The NSA will be calculated and distributed as follows:

- 15 • **Participating Class Members’ Settlement Shares.** The settlement shares are
16 allocated 15.00% to wages (for which employment taxes will be deducted and W-
17 2s issued) and 85.00% to penalties (for which 1099s will be issued).
- 18 • **Settlement Ratio Calculation.** The Settlement Administrator shall assign to each
19 Class Member a “Settlement Ratio,” which shall be a fractional number
20 comprised of (a) that Class Member’s Individual Work Weeks as the numerator,
21 and (b) the aggregate total of all Class Members’ Individual Work Weeks as the
22 denominator. The Settlement Administrator shall assign to each Class Member
23 the “Settlement Share” which shall be calculated by multiplying that Class
24 Member’s Settlement Ratio by amount allocated to Class Members from the Net
25 Settlement Amount.
- 26 • **Individual Settlement Amounts for PAGA Payments.** The Individual
27 Settlement Amount for each PAGA Member will be calculated by the Settlement
28

3 “Effective Date is defined as follows: If no objection to this Settlement or to any of the terms and or conditions of
the Settlement are filed by Plaintiff, another member of the Settlement class, or any intervenor to this Lawsuit, the
Effective Date shall occur on the day that the Court enters an order of final approval of this Settlement; however, if
any objection to this Settlement or to any of the terms and or conditions of the Stipulation is filed by a member of
the Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur upon the expiration of the time
for the filing any appeal of the order of final approval of this Settlement. If an appeal is filed or any writ granted,
then the Effective Date shall occur after the appeal has been dismissed or the writ dissolved and when there is no
further time to appeal the dismissal of the appeal or the dissolution of the writ.



1 Administrator using the Class Data provided by Defendant. The Settlement
2 Administrator will calculate the number of PAGA Work Weeks by calculating the
3 number of days each PAGA Member was employed using their original hire date
4 and final termination date, excluding any time they were unemployed in between
5 during that time period, during the PAGA Period, dividing by seven (7), and
6 rounding up to the nearest whole number. PAGA Members shall receive their
7 portion of the PAGA Penalties regardless of their decision to opt-out of the class
8 settlement.

9 Settlement, § III(D).

10 **C. Timing of Settlement Shares Payments**

11 Within ten (10) calendar days of receipt of the Gross Settlement Amount, the Settlement
12 Administrator shall pay Settlement Shares, from the Settlement Account, to all Class Members
13 (who do not submit valid requests to be excluded from the Action). The Settlement Administrator
14 shall pay each Settlement Share by sending a check in the appropriate amount to the Class
15 Member at the address indicated in the list of Class Member names and addresses provided by
16 Defendant, or as subsequently determined by the Settlement Administrator to be the correct
17 address. Settlement, § IV(K).

18 **D. Appointment of Settlement Administrator**

19 The Parties will ask the Court to appoint Phoenix Settlement Administrators, a qualified
20 administrator, to serve as the Settlement Administrator, which, as a condition of appointment,
21 will agree to be bound by this Agreement with respect to the performance of its duties and its
22 compensation. The Settlement Administrator's duties will include preparing, printing, and
23 mailing the Class Notice to all Class Members; and using reasonable measures to contact all Class
24 Members, including conducting a National Change of Address search on all Class Members
25 before mailing the Class Notice to each Class Member's address. The Settlement Administrator's
26 duties will also include re-mailing the Class Notice to the Class Member's new address for those
27 Class Members whose address has changed; providing the Parties with weekly status reports
28 about the delivery of Class Notice; calculating Settlement Shares; issuing and distributing checks
to effectuate the payments due under the Settlement; reporting to the Court as required; and
otherwise administering the Settlement pursuant to this Agreement. The Settlement
Administrator's reasonable fees and expenses, including the cost of printing and mailing the Class
Notice, will be paid out of the Gross Settlement Amount, as set forth herein, subject to Court
approval. Any portion of the of the Settlement Administrator's fees and expenses that are not used



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1 or which are not awarded by the Court will not revert to Defendant, but instead will be part of the
2 Net Settlement Amount for distribution to Participating Class Members. If the Settlement
3 Administrator's fees and expenses exceed Ten Thousand Dollars and No Cents (\$10,000.00),
4 such cost will be deducted from the Net Settlement Amount. Settlement, § III(E).

5 **E. The Releases**

6 Upon the Effective Date and after Defendant has paid the GSA in full per the
7 Settlement Agreement, Plaintiff and Class Members will be deemed to have released Defendants,
8 and all of their past and present owners, officers, directors, shareholders, employees, agents,
9 assigns, attorneys, insurers, parent companies, subsidiaries, and affiliates, and their respective
10 predecessors, successors, and assigns, without limitation ("the Released Parties") of and from all
11 of the Released Claims during the Class Period. These claims include all claims alleged or could
12 have been alleged based on the facts, circumstances, and/or primary rights at issue in the
13 operative complaint and any amendments thereto. They include without limitation: all claims
14 alleged in the operative First Amended Complaint along with related claims that could have been
15 alleged based on the facts alleged in the operative First Amended Complaint including: (1) claims
16 for unpaid wages (including but not limited to overtime pay, minimum wage, regular wages,
17 missed meal period premium pay, missed rest period premium pay, failure to pay wages of
18 terminated or resigned employees, or other benefits), and claims for interest, penalties, or
19 premiums in connection therewith, as well as any claims under the California Labor Code, any
20 applicable California Wage Order(s); (2) claims for failure to comply with the employee itemized
21 wage statement provision under California Labor Code section 226; (3) claims for failure to
22 provide or make available meal and rest periods as required under California Labor Code §512
23 and IWC Wage Orders; (4) claims for failure to indemnify as required under California Labor
24 Code §§1198 and 2802); (5) penalties for violations of the California Labor Code; (6) violation
25 of California Business and Professions Code Section 17200, et seq.; and (7) all other claims under
26 California common law, the California Labor Code, California Wage Orders, the California
27 Business and Professions Code, set forth in the Complaint including alleged violation of
28 California Labor Code sections 201-204, 210, 215-216, 218.5, 225.5, 226, 226.3, 226.6, 226.7,



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1 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2698, 2699, 2699.3,
2 2699.5, 2802, California Civil Code sections 1021.5, 3287, 3288, California Business and
3 Professions Code sections 17000 and 17200 et. seq., the relevant Wage Orders issued by the
4 Industrial Welfare Commission, or any other claim for any statutory or civil penalty that have
5 been, or could have been, asserted based on the facts alleged in the First Amended Complaint
6 under California law that arise from the allegations as pled including claims for damages,
7 reimbursement, restitution, losses, penalties, fines, liens, attorney's fees, costs, expenses, debts,
8 interest, injunctive or declaratory relief, liquidated damages or similar relief. The Final Judgment
9 shall cover and bar each and every Participating Class Member from asserting any Released
10 Claims in the future. PAGA claims – include the underlying claims alleged in the PAGA notice
11 letter and Plaintiff's Operative Complaint - will be released, and PAGA Members will be entitled
12 to their portion of the PAGA Payment, regardless of whether or not the Participating Class
13 Member opts-out or excludes him or herself from the Class.

14 . Settlement, § V.

15 **F. Notice and Claims Process and Procedures**

16 **1. Procedures for Class Member Disputes**

17 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
18 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
19 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
20 disputes and supporting documents must be postmarked by the date specified in the Class Notice
21 (no less than 60 days from the initial mailing of the Class Notice by the Settlement Administrator).
22 A Class Member may use the Work Weeks Dispute form (Exhibit C to the Settlement), though a
23 Class Member is not obligated to do so to request exclusion from the Settlement. Settlement, §
24 IV(C).

25 **2. Procedures for Opting Out of the Class**

26 Class Members who wish to exclude themselves from the Class must mail the Settlement
27 Administrator a request for exclusion from the Class in writing within 60 days after the date the
28 Class Notice was mailed (the "Response Deadline") unless the Court orders otherwise. All
requests for exclusion must be made in writing, signed by the Class Member, and must be



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submitted by postal mail. The delivery date is deemed to be the date the Opt-Out request is deposited in the U.S. Mail as evidenced by the postmark.

A request to be excluded from the Class will be deemed valid only if the Class Member provided his or her name and address by the Response Deadline. The written request to be excluded must indicate the Class Member's intent to be excluded from the Settlement. Settlement, § IV(D)(1).

3. **Procedures for Objecting to the Settlement**

Any Class Member who seeks to object to the Settlement may serve a copy of the objection to the Settlement Administrator. All objections should be served within 60 days of mailing of the Class Notice. The Settlement Administrator will forward a copy of the objection to counsel for the parties. Members may appear at the final approval hearing to be heard on their objections, even if they have not previously served a written objection. Settlement, § IV(D)(2).

4. **Uncashed Settlement Share Checks.**

Any check issued by the Settlement Administrator to Class Members who do not timely and validly opt out shall be negotiable for one hundred and eighty (180) calendar days. Those funds represented by checks returned as undeliverable and those checks remaining un-cashed for more than 180 days after issuance (collectively, "Voided Settlement Checks"), plus any interest that has accrued on those funds, will be paid to the California Unclaimed Property Fund. Settlement, § IV(L).

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.

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

2 A class is ascertainable when it may be readily identified without unreasonable expense
3 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
4 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
5 defined Class is ascertainable because its members may be identified by reference to Defendant's
6 records and Defendant has agreed to share the relevant information from its records to facilitate
7 the settlement process. DS, ¶ 9; Settlement, § II(D). Therefore, the Settlement Class is
8 ascertainable.

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

10 The Settlement Class has sufficiently numerous members to render joinder impractical.
11 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
12 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 115 Class
13 Members. DS, ¶ 10. Plaintiff maintains that it would be impractical and economically inefficient
14 to require each Class Member to separately maintain an individual action or be joined as a named
15 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
16 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
17 the Settlement Class' membership is sufficiently numerous. *Id. See Daar v. Yellow Cab Co.*
18 (1967) 67 Cal.2d 695.

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

20 The community of interest requirement "embodies three factors: (1) predominant common
21 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
22 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
23 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
24 uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
25 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and
26 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
27 renders class certification appropriate." *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

28 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., 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*
FA v. Superior Court, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for



1 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
2 the claims of the Class Members all stem from the same sources. DS, ¶ 11.

3 In this case, Plaintiff asserts all class members were subject to the same or similar
4 operations and employment policies, practices, and procedures. The claims arise from
5 Defendant's alleged policy-driven failure to pay wages, failure to provide meal periods, failure to
6 authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
7 proper wage statements, failure to timely pay wages, and related labor law violations, all of which
8 Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff
9 asserts that common questions include, but are not limited to: (1) Whether Defendant failed to
10 pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether
11 Defendant failed to provide the class with all meal and rest periods in compliance with California
12 law; (3) Whether Defendant failed to pay the class one additional hour of pay on workdays it
13 failed to provide the class with one or more meal or rest periods in compliance with California
14 law; (4) Whether Defendant failed to indemnify the class for all necessary business expenditures
15 incurred during the discharge of their duties; (5) Whether Defendant knowingly and intentionally
16 failed to provide the class with accurate wage statements; (6) Whether Defendant willfully failed
17 to provide the class with timely final wages; and (7) Whether Defendant engaged in unfair
18 competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
19 respect to the class. DS, ¶ 11. Therefore, common questions predominate.

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

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



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Members. Moreover, Plaintiff's claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical of the Class. DS, ¶ 12.

E. Plaintiff Will Adequately Represent the Settlement Class

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

First, Class Counsel have supplied the Court with declarations to show that they are adequate to represent the Settlement Class and that they have significant experience in employment litigation generally, and wage and hour and employment-related class action litigation specifically. See DS, ¶¶ 15-22; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3. Thus, Plaintiff's counsel are adequate to serve as class counsel.

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

F. Class Action Treatment Is the Superior Means for Resolving the Claims of The Class Members

Plaintiff further contends that a class action is also superior to other means adjudicating the issues in this action. The predominance of common legal and factual questions shows that this 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—



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, ¶ 23.

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

9 **A. Legal Standard**

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

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

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

26 The class settlement here satisfies all of these factors. DS, ¶ 24. The Settlement resulted
27 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
28 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
weaknesses of their respective cases and Defendant’s estimated exposure. *Id.*

Plaintiff alleged that defendants failed to pay him and the other Class Members for all
time spent traveling as part of their job duties, failed to pay overtime wages to him and the other
Class Members on quarterly performance bonuses they earned, required him and other Class



1 Members to remain on duty for meal periods and rest breaks, fail to pay him and the other Class
2 Members premium wages for days on which they were unable to take meal breaks and rest breaks,
3 failed to indemnify them for all mileage they incurred traveling for work, issued incomplete and
4 inaccurate wage statements, and failed to timely pay them their final wages upon the end of the
5 employment relationship. DS, ¶ 25. Plaintiff prepared “damages” estimates in advance of the
6 mediation. DS, ¶ 25, Ex. 5. In advance of the mediation, Plaintiff determined Defendant’s
7 maximum exposure for restitution and penalties to be approximately \$2,817,990.53 (consisting
8 of \$61,249.91 in unpaid wages, \$120,943.12 in missed meal period premium wages, \$133,599.96
9 in missed rest break premium wages, \$143,600.00 for wage statement penalties, \$361,257.30 for
10 waiting time penalties, and \$1,846,850.00 for civil penalties). Plaintiff calculated the damages
11 based on the number of workweeks and pay periods provided by Defendant, Plaintiff’s reports,
12 and the sample data. *Id.* Plaintiff also considered the possibility that Defendant could launch a
13 *Pick Up Stix* campaign and pursue individual release agreements from the Class Members.
14 Defendant also represented that it had interviewed all of Defendant’s current employees regarding
15 Plaintiff’s claims, all of whom would provide declarations, under penalty of perjury, that were
16 favorable to Defendant with respect to the relevant factual issues at issue in Plaintiff’s action.
17 Plaintiff’s Counsel applied discounts to the maximum exposure to account for all other risks
18 discussed below. While it is difficult to assign anything but crudely-determined percentages of
19 risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude
20 recovery for such employees is substantial and alone justifies a significant discount because
21 Defendant would likely by trial have gathered releases from the majority of the Class Members.
22 A settlement for approximately 7.63% of the potential recovery is a proportion substantially in
23 excess of recovery proportions sanctioned by existing case law.⁴ *Id.*

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.”).



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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, ¶ 37. 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. DS, ¶ 26. Therefore, Plaintiff believes a class settlement for
12 \$215,000.00 is fair and reasonable. *Id.*

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

14 The *Kullar* case sets forth several factors a court should consider in determining whether
15 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
16 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class

17 ⁵ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
18 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
19 plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of
20 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
21 suffered a particularly sizeable injury – the court found that the defendant's policies caused
22 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
23 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to
24 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
25 compensate its flight attendants for work performed outside of “block time” (time during which
26 the aircraft is moving), including time spent participating in pre-flight briefings, boarding
27 passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
28 1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

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.



1 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
2 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
3 of a governmental participant; and (8) the reaction of the class members to the proposed
4 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
5 factors.

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

7 **a) Risks Associated with the Unpaid Wages Claim**

8 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
9 best, largely because Defendant's written policies throughout the relevant time period prohibited
10 off-the-clock work. DS, ¶ 27. Off-the-clock claims are difficult where a defendant requires in its
11 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
12 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
13 be compensable). *Id.* In its written employment policies, Defendant mandates that employees
14 must record all time worked accurately on their time records and strictly prohibit employees from
15 performing any work off-the-clock. DS, ¶ 27. Moreover, while Defendant disputes that off-the-
16 clock work occurred, it contends that any time spent off the clock was *de minimis*. The California
17 Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular
18 and minute periods of time may still be subject to a *de minimis* defense even if compensable.
19 (Stating that "We do not decide whether there are circumstances where compensable time is so
20 minute or irregular that it is unreasonable to expect the time to be recorded."). Following *Troester*,
21 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
22 clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with
23 respect to this claim. *Id.*

24 The difficulty inherent in proving that off-the-clock work occurred poses a significant
25 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
26 Generally, a court will not certify a class unless it can determine an appropriate classwide
27 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
28 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
the lack of records indicating when such off-the-clock work may have taken place. Individualized
inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
in fact worked "minutes" off-the-clock on a "regular" basis. Accordingly, there is a significant



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1 risk that the Court would consider this evidentiary showing insufficient as a classwide
2 methodology. DS, ¶ 28.

3 **b) Risks Associated with the Meal Period Claims**

4 There are risks to Plaintiff's meal period claim. DS, ¶ 29. Plaintiff argued that Defendant
5 required him and the class members to travel and monitor mobile electronic communication
6 devices during meal breaks. However, Defendant presented written policies that prohibited such
7 conduct. Defendant contends that, to establish a violation for missed meal periods, a plaintiff must
8 do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an
9 employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it
10 has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at
11 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the
12 employee from taking a proper break, or otherwise failed to release the employee of all control.
13 *Id.* "Thus, the crucial issue with regard to the meal break claim is the reason that a particular
14 employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal.
2010) 271 F.R.D. 629, 641. *Id.*

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

24 **c) Risks Associated with the Rest Break Claims**

25 There are risks to Plaintiff's rest period claim. DS, ¶ 31. Plaintiff argued that Defendant
26 required him and the class members to travel and monitor mobile electronic communication
27 devices during rest breaks. However, Defendant presented written policies that prohibited such
28 conduct. Employers are not required to record rest periods and such periods are paid. *Id.*
Defendant contends it provided non-exempt employees the opportunity to take rest periods in
accordance with California law. Further, Defendant's written policies on meal and rest periods
are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records



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1 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
2 period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial
3 has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and
4 surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant
5 caselaw makes such claims risky from a trial management and due process perspective. *Id.*, See
6 *Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common
7 questions exist to support class certification, it may be possible to manage individual issues
8 through the use of surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouaphakeo* (2016)
136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

9 **d) Risks Associated with the Failure to Indemnify Claim**

10 There is a risk that the Court may consider Plaintiff’s claims as to Defendant’s alleged
11 failure to indemnify for business expenses to be individual in nature and thus decline to certify
12 the class. DS, ¶ 32. Plaintiff claims that Defendant did not reimburse its employees for all mileage
13 they incurred traveling as part of their job duties. However, defendant presented evidence of
14 substantial mileage reimbursement. Furthermore, Defendant presented evidence that it allowed
15 its employees to "challenge" the GPS records of mileage that defendant utilized to determine
16 mileage reimbursement. When employees challenged the mileage under payments, Defendant
17 paid the employees the mileage they sought without dispute. Plaintiff alleges that Defendant
18 required Plaintiff and the Class Members to use their personal items including cellular phones,
19 computers and other electronic devices, vehicles, and tools, and failed to indemnify them for these
20 business expenses. *Id.* Defendant presented evidence that it has supplied its employees with tools,
21 equipment, and other supplies and had an expense reimbursement policy. As such, there is a risk
22 that the Court may consider Plaintiff’s claims to be individual in nature and unfit for class wide
23 resolution. *Id.*

24 **e) Risks Associated with the Statutory “Wage Statement”**
25 **Penalty Claims**

26 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
27 PAGA penalties. Plaintiff claims that Defendant failed to issue accurate and complete itemized
28 wage statements. His claim is derivative of his other claims above. If they fail, the wage statement
claim also fails. Under Labor Code section 226, wage statements must include various
information, including the applicable rates of pay, corresponding hours worked, and gross pay.
DS, ¶ 33.



1 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
2 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply
3 with the requirements of Labor Code § 226. Further, to the extent that Plaintiff claims Defendant's
4 wage statements were inaccurate because they did not include wages or premium payments that
5 they contend Defendant should have paid, Plaintiff's claims are subject to additional risk, as case
6 law suggests that such premium payments are not to be considered wages, and therefore do not
7 give rise to claims under section 203. *Id.* See *Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist.
8 LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties
9 based on meal period claims because "the underlying violation that gives rise to a section 226.7
10 [meal period] claim is not the nonpayment of wages"); *Nguyen v. Baxter Healthcare Corp.* 2011
11 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not
12 even cover meal period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely
13 foreclose this claim.⁷ DS, ¶ 33.

13 **f) Risks Associated with The Waiting Time Penalties Claim**

14 Plaintiff's claims for untimely wages is predicated on Labor Code §§ 201, 202, and 203.
15 Plaintiff claims that Defendant failed to timely pay all final wages at the conclusion of
16 employment. His claim is derivative of his other claims above. If they fail, the waiting time
17 penalty claims also fails. Defendant can argue based on the *Jones* and *Nguyen* decisions, *supra*,
18 that meal or rest premium pay is not a "wage" for purposes of Labor Code section 203 penalties.
19 Further, in the recent decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App. 5th
20 1239, the Court of Appeal held that unlawful meal and rest periods under section 226.7 cannot
21 serve as a basis for recovery of penalties under section 203. *Id.* at 1252 ("We conclude that the
22 administrative and legislative history of the statute indicates that . . . the Legislature intended
23 section 226.7 first and foremost to *compensate* employees . . . Section 226.7's additional hour of
24 pay is a premium wage . . . not a penalty.") (internal citations and quotation marks omitted). Under
25 the *Loews* decision, it is highly unlikely that the Court will permit untimely wage penalties for
26 Defendant's alleged failure to provide meal and rest period penalties. DS, ¶ 34.

25 **g) Risks Associated with the PAGA Claim**

26 Plaintiff predicates his demand for civil penalties on the theories of recovery outlined
27 above. If those theories fail, so too will be private attorney general claim. Regarding PAGA, a
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1 court has discretion to award a lesser amount than the maximum penalty. Lab. Code § 2699(e)(2);
2 *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing
3 PAGA award). As set forth above, Defendant has posed valid defenses to the Labor Code claims
4 underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant
5 uncertainty. DS, ¶ 35. There is a risk that the Court would consider the maximum civil penalty
6 available to be confiscatory. This is particularly the case considering Defendant's financial
7 condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to further
8 reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

9 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
10 significant discount for settlement purposes. DS, ¶ 36. For mediation purposes, Plaintiff's counsel
11 estimated a maximum exposure of approximately \$1,846,850.00 in civil penalties. This estimate
12 did not take into account any of the risks discussed above and assumed a violation for every single
13 pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the
14 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
15 two federal district court decisions held that "stacking" PAGA penalties in this fashion may be
16 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
17 Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
18 penalties for the same violation for the same pay period under different Labor Code provisions.
19 *Id.* This may be because the PAGA does not provide for what many employers characterize as
20 claim splitting and not merely stacking. *Id.*

21 Also, the United States Supreme Court announced on December 15, 2021 that, in the near
22 future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide
23 (likely no later than the end of summer 2022) whether or not to overrule the California Supreme
24 Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private arbitration
25 agreement cannot deprive an employee of his right to sue under PAGA in a court of law. If the
26 Supreme Court sides with the Petitioner, Plaintiff's PAGA claim may be subject to an arbitration
27 agreement allowing only bilateral arbitration and, consequently, inhibiting the claim altogether.
28 While such an outcome would conflict squarely with *EEOC v. Waffle House* (2002) 534 US 279
(private settlement agreements do not preclude government prosecutions on behalf of
employee signatories to such agreements), this potential outcome is a risk.



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Where settlements “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The amount to be paid to the LWDA comports with PAGA settlement amounts approved by other courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 672645, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us—Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (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. DS, ¶ 51 Ex. 11.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Notice Of Class Action Settlement And Hearing Date For Court Approval (attached as Exhibit A to the Settlement) and an opportunity to object (attached as Exhibit B to the Settlement). DS, ¶ 48. 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.*



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

5 The Individual Settlement Payments will be paid to each Class Member based on his or
6 her eligible Individual Work Weeks compared to the aggregate total of all Class Members'
7 Individual Work Weeks. DS, ¶ 47, Settlement, § III(D)(b). Because this method compensates
8 Class Members based on the extent of their potential injuries, in that Class Members who worked
9 for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and
10 reasonable. *Id.*

11 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'**
12 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE**

13 The Settlement states Class Counsel may seek attorneys' fees of \$71,666.66 (one-third of
14 the \$215,000.00) and up to \$17,500.00 for actual reasonable litigation costs and expenses incurred
15 in prosecuting the Action. Settlement § III(C)(2). These amounts are reasonable, given the facts
16 and circumstances of the case. DS, ¶¶ 43-45.

17 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
18 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
19 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
20 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
21 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
22 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
23 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
24 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
25 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
26 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
27 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
28 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).

29 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
30 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
31 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the



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1 value of the Class Settlement achieved for the class, and (6) the other cases Class Counsel turned
2 down to devote time to this matter. DS, ¶ 45. Class Counsel interviewed and obtained information
3 from putative class members, met and conferred with Defendant's counsel on numerous
4 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
5 Defendant and obtained through other sources, researched applicable law, and provided
6 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

7 Class Counsel have borne all the risks and costs of litigation and will receive no
8 compensation until recovery is obtained. DS, ¶ 45. Class Counsel are well-experienced in wage-
9 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
10 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
11 the requested fees and costs are reasonable and should be awarded. *Id.*

12 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO PLAINTIFF SHOULD BE**
13 **PRELIMINARILY APPROVED BECASUSE IT IS FAIR, ADEQUATE, AND**
14 **REASONABLE**

15 Courts routinely approve incentive awards to compensate named plaintiffs for the services
16 they provide and the risks they incur during class action litigation, often in much higher amounts
17 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
18 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
19 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
20 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
21 Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this action
22 and the risks he undertook on behalf of Class Members. DS, ¶ 46. Plaintiff has devoted many
23 hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
24 things, retaining experienced counsel, providing them with information about his work history
25 with Defendant and Defendant's policies and practices with respect to the wage and hour claims
26 at issue, participating in mediation, and being actively involved in the settlement process to ensure
27 a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to
28 significant risks, including the risk of an order to pay Defendant's 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 Representative
Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 46.



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

4 With regard to the settlement administration costs provision, it is reasonable. Before
5 agreeing to Phoenix Settlement Administrators and its bid of \$6,000.00, the Parties sought and
6 reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶
7 49-50, Exs. 9, 10, and 11. Thus, the settlement administration costs provision should be given
8 preliminary approval.

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

13 This Court should approve the proposed plans for giving notice to the Settlement Class
14 and administering the Settlement. The standard for determining the adequacy of notice is whether
15 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
16 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
17 measures to ensure that as many Class Members as practicable receive actual notice of the
18 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
19 the Notice by First Class U.S. mail only. Although there are current employee Class Members, it
20 is uncertain whether Defendant’s records of their contact information include email addresses and
21 Class Members, who perform all of their work away from a desk, are not in a position to check
22 their emails. As such, notice by mail alone is fair, adequate, and reasonable. DS, ¶ 48.

23 With respect to its content, “[The] notice given to the class must fairly apprise the class
24 members of the terms of the proposed compromise and of the options open to dissenting class
25 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
26 The purpose of the notice in class settlement context is to give class members sufficient
27 information to decide whether they should accept the benefits offered, opt out and pursue their
28 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
other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how



1 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
2 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
3 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
4 the Notice should be approved because it describes the Settlement with sufficient clarity and
5 specificity to explain to Class Members what this action is about, their rights under the Settlement,
6 and how to exercise those rights. DS, ¶ 48.

7 **XI. CONCLUSION**

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

10 Respectfully submitted,

11 THE SPIVAK LAW FIRM

12
13 Dated: June 6, 2022

14 By: 

15 DAVID G. SPIVAK
16 MAYA CHEAITANI, Attorneys for
17 Plaintiff LUIS LARRABURU, and all
18 others similarly situated
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