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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SONOMA**

11 **(UNLIMITED JURISDICTION)**

12
13 MARTHA P. BRIANO MARTINEZ, on behalf
14 of herself, all others similarly situated, the
15 general public, and as an “aggrieved employee”
16 on behalf of other “aggrieved employees” under
the Labor Code Private Attorneys General Act of
2004,

17 *Plaintiff(s),*

18 vs.

19 NOR CAL FOODS, LLC, a California
20 corporation; and DOES 1–50, inclusive,

21 *Defendant(s).*
22

Case No. SCV-270596

**PLAINTIFF MARTHA P. BRIANO
MARTINEZ’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Dept.: 16, The Hon. Patrick
Broderick

Action filed: April 13, 2022



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TABLE OF CONTENTS

TABLE OF AUTHORITIES	vi
I. INTRODUCTION	1
II. BACKGROUND	2
A. The Claims and Procedural History.....	2
B. Mediation	2
III. OVERVIEW OF THE SETTLEMENT	3
A. Settlement Class Definition.....	3
B. Monetary Terms	3
C. Timing of Payments	3
D. Calculation of Settlement Shares	4
E. Apportionment of Settlement Shares.....	4
F. The Releases	4
G. Notice and Claims Process and Procedures	5
1. Class Member Disputes.....	6
2. Opting Out	6
3. Objecting	6
H. Uncashed Checks.....	7
IV. CERTIFICATION OF THE CLASS IS APPROPRIATE	7
A. The Settlement Class Is Objectively Ascertainable.....	7
B. The Membership of the Settlement Class Is Sufficiently Numerous	7
C. Class Members Share a Well-Defined Community of Interest	8
D. Plaintiff Is Typical of the Settlement Class	9
E. Plaintiff Will Adequately Represent the Settlement Class.....	9
F. Class Action Treatment Is the Superior Means For Resolving The Claims Of The Class Members	10



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1	V. INTRODUCTION THE COURT SHOULD GRANT PRELIMINARY APPROVAL	
2	BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.....	10
3	A. Legal Standard.....	10
4	B. The Settlement Is Presumptively Fair	11
5	C. The Settlement Satisfies the Kullar Factors for Approval.....	13
6	1. Evaluation of Plaintiff's Case.....	14
7	a. Risks Associated With the Arbitration Agreements.....	14
8	b. Risks Associated with the Unpaid Wages Claim	14
9	c. Risks Associated with the Meal Period Claims.....	15
10	d. Risks Associated with the Rest Break Claims.....	16
11	e. Risks Associated with the Failure to Indemnify Claim.....	16
12	f. Risks Associated with the Statutory "Wage Statement" Penalty Claims.....	16
13	g. Associated with the Statutory "Wage Statement" Penalty Claims.....	17
14	h. Risks Associated With the PAGA Claim	17
15	i. Risks Associated With A Pick-Up Stix Campaign.....	18
16	2. Allocation of the PAGA Payment	18
17	3. Presence of Governmental Participant	19
18	4. Reaction of Class Members to Proposed Settlement.....	19
19		
20	VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY	
21	COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS MEMBER	
22	BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY COMPARED TO	
23	OTHER CLASS MEMBERS.....	20
24	VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS' FEES	
25	AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE	20
26	VIII. THE CLASS REPRESENTATIVE SERVICE PAYMENT TO PLAINTIFF SHOULD	
27	BE PRELIMINARILY APPROVED BECASUSE IT IS FAIR, ADEQUATE, AND	
28	REASONABLE.....	21
	IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE	
	PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE, AND	



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1 REASONABLE..... 22

2 X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN
3 SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO GIVE
4 ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO EXERCISE
5 THEIR RIGHTS..... 22

6 XI. CONCLUSION 23

7
8
9
10
11
12
13
14
15
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17
18
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TABLE OF AUTHORITIES

Cases

<i>Arenas v. El Torito Rests., Inc.</i> , (2010) 183 Cal. App. 4th 723	8
<i>Bell v. Farmers Ins. Exchange</i> (2004) 115 Cal.App.4th 715	21
<i>Bernstein v. Virgin Am., Inc</i> (N.D. Cal. 2022) 2022 WL 17994018	12
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<i>Bravo v. Gale Triangle, Inc.</i> (C.D. Cal. Feb 16, 2017) 2017 WL 708766	12
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	15
<i>Capitol People First v. Dept. of Developmental Servs.</i> (2007) 155 Cal. App. 4th 676	8
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal.App.5th 504	13, 19
<i>Cartt v. Superior Court</i> (1975) 50 Cal.App.3d 960	22
<i>Chindarah v. Pick Up Stix, Inc.</i> (2009) 171 Cal.App.4th 796	12, 18
<i>Chu v. Wells Fargo Investments, LLC</i> (N.D. Cal. Feb. 16, 2011) 2011 WL 67245	19
<i>Classen v. Weller</i> (1983) 145 Cal.App.3d 27	9
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<i>Daar v. Yellow Cab Co.</i> (1967) 67 Cal.2d 695	8



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2	(1996) 48 Cal.App.4th 1794	11, 7
3	<i>Duran v. U.S. Bank National Assn</i>	
4	(2014) 59 Cal. 4th 1	15, 16
5	<i>EEOC v. Waffle House</i>	
6	(2002) 534 US 279	18
7	<i>Franco v. Ruiz Food Prods., Inc</i>	
8	(E.D. Cal. Nov. 27, 2012) 2012 WL 5941801	19
9	<i>Garcia v. Gordon Trucking</i>	
10	(E.D. Cal. Oct. 31, 2012) 2012 WL 5364575.....	19
11	<i>Hebbard v. Colgrove</i>	
12	(1972) 28 Cal.App.3d 1017	7, 8
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16	(N.D. Cal. Aug. 8, 2008) 2008 WL 3385452	19
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19	<i>Hypolite v. Carlson</i>	
20	(1975) 52 Cal.App.3d 566	7
21	<i>In re Activision</i>	
22	(N.D. Cal. 1989) 723 F.Supp. 1373.....	20
23	<i>In re Ampicillin Antitrust Litig.</i>	
24	(D.D.C. 1981) 526 F.Supp. 494.....	21
25	<i>In re Newbridge Networks Sec. Litig.</i>	
26	(D.D.C. Oct. 23, 1998) 1998 WL 765724	12
27	<i>In re Omnivision Techs., Inc.</i>	
28	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	12
	<i>In re Pacific Enterprises</i>	
	(9th Cir. 1995) 47 F.3d 373	20
	///	



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1	<i>Iskanian v. CLS Transportation</i>	
2	(2014) 59 Cal.4 th 348.....	18
3	<i>Jong v. Kaiser Foundation Hospital</i>	
4	(2012) 226 Cal.App.4th 391	14
5	<i>Ketchum v. Moses</i>	
6	(2001) 24 Cal. 4th 1122.....	20
7	<i>Kullar v. Foot Locker Retail, Inc.</i>	
8	(2008) 168 Cal.App.4th 116	11, 13
9	<i>Laffitte v. Robert Half Intl, Inc.</i>	
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11	<i>Laguna v. Coverall N. Am., Inc.</i>	
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20	(1976) 60 Cal.App.3d 442	9
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22	(2010) 186 Cal.App.4 th 576.....	19
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28	(2004) 34 Cal. 4th 319.....	8
	<i>Spann v. J.C. Penney Corp.</i>	
	(C.D. Cal. 2016) 211 F.Supp.3d 1244.....	18
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6	(2018) 5 Cal.5th 829	14, 15
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10	(2015) 136 S.Ct. 382	16
11	<i>Van Vranken v. Atlantic Richfield Co.</i>	
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19	Statutes	
20	Bus. & Prof. Code, section 17200 et seq	2, 9
21	Code Civ. Proc., section 382	1, 7, 10
22	Code Civ. Proc., section 384	7
23	Lab. Code, section 201	2
24	Lab. Code, section 202	2
25	Lab. Code, section 203	2
26	Lab. Code, section 218.5	22
27	Lab. Code, section 218.6	22
28		



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1	Lab. Code, section 226	2, 17
2	Lab. Code, section 226.2	2
3	Lab. Code, section 226.7	2
4	Lab. Code, section 510	2
5	Lab. Code, section 512	2
6	Lab. Code, section 1194	2
7	Lab. Code, section 1197	2
8	Lab. Code, section 1198	2
9	Lab. Code, section 2698	2
10	Lab. Code, section 2699	17, 19
11	Lab. Code, section 2802	2
12	Rules	
13	California Rules of Court, Rule 3.766.....	20
14	California Rules of Court, Rule 3.769.....	10, 20
15	Other	
16	<i>Alba Conte & Herbert B. Newberg</i> , Newberg on Class Actions § 3:29	9



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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 Martha P. Briano Martinez (“Plaintiff”) submits this memorandum of points and
5 authorities in support of her unopposed motion for preliminary approval of the Class Action and
6 PAGA Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
7 Settlement Amount (“GSF”) of \$120,000.00 in compromise of all disputed claims on behalf of
8 all persons employed by Defendant Nor Cal Foods, LLC (“Defendant”) in California and
9 classified as hourly, non-exempt employees who worked for Defendant during the Class Period
10 and did not execute a release of his/her/their claims in California at any time between April 13,
11 2018 through March 6, 2023. Through this Motion, Plaintiff respectfully requests for this Court
12 to (1) provisionally certify the below-defined Class for settlement purposes only under Code of
13 Civil Procedure § 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint
14 Plaintiff as Class Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter
15 L. Haines of United Employees Law Group, PC as Class Counsel; (5) approve the proposed notice
16 procedures and related forms; and (6) schedule a final approval hearing.

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

27 ///

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 is an owner and operator of a Denny's restaurant DS, ¶ 4. Defendant employed
3 Plaintiff as a hourly, non-exempt cook from about October 2, 2020 until July 5, 2021. *Id.*

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

5 On March 22, 2022, Plaintiff notified Defendant and the California Labor and Workforce
6 Development Agency ("LWDA"), pursuant to the California Private Attorneys General Act of
7 2004, California Labor Code sections 2698, *et seq.* ("PAGA"), of alleged Labor Code violations
8 committed by Defendant. DS, ¶ 5, Ex. 2.

9 On April 13, 2022, Plaintiff filed a Class Action Complaint in the Sonoma County
10 Superior Court, Case No. SCV-270596, against Defendant on behalf of herself 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 May 27, 2022, Plaintiff filed her First Amended Complaint adding a claim under PAGA. DS, ¶
18 6, Ex. 4. On July 18, 2022, Defendant filed an answer to Plaintiff's First Amended Complaint.
19 DS, ¶ 6, Ex. 5. Defendant denies all of Plaintiff's allegations and strongly contends that its wage
20 and hour policies, practices and procedures are fully compliant with all applicable laws. DS, ¶ 6.

21 **B. Mediation**

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

28 On January 10, 2023, following much of the foregoing informal discovery and exchange
of information, the Parties participated in a mediation session presided over by Mediator Scott
Radovich, an experienced class action mediator. During the mediation, the Parties had a full 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 her/its respective



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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. Plaintiff entered into a separate settlement of her sexual harassment and retaliation claims against Defendant and a coworker. Plaintiff will provide it to the Court on request.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the class as all persons employed by Defendant in California and classified as hourly, non-exempt employees who worked for Defendant during the Class Period and did not execute a release of his/her/their claims. “Class Period” means the period from April 13, 2018 to the date of preliminary approval of this Settlement.

B. Monetary Terms

Defendant promises to pay \$120,000.00 and no more as the Gross Settlement Amount and to separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual Class Payments. Defendant has no obligation to pay the Gross Settlement Amount (or any payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator will disburse the entire Gross Settlement Amount without asking or requiring Participating Class Members or Aggrieved Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount will revert to Defendant. Settlement, para. 3.1.

C. Timing of Payments

Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant’s share of payroll taxes by transmitting the funds to the Administrator no later than 30 days after the Effective Date. Within 14 days after Defendant funds the Gross Settlement Amount, the Administrator will mail checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payment. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of Individual Class Payments and Individual PAGA Payments. Settlement, paras. 4.3 and 4.4.

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D. Calculation of Settlement Shares

An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Work Weeks. Settlement, para. 3.2.4. 3.2.5.1. The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties \$1,000.00 by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. Settlement, para. 3.2.5.1.

E. Apportionment of Settlement Shares

33.33% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 66.67% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment. Settlement, para. 3.2.4.1. The Administrator will report the Individual PAGA Payments on IRS 1099 Forms. Settlement, para. 3.2.5.2.

F. The Releases

All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and ascertained in the course of the Action including, failure to pay wages, unauthorized and unlawful wage deductions, 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 during employment, and at the separation of employment, failure to maintain required payroll records, unfair competition, Civil Penalties under PAGA, and related allegations. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing



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1 Act, unemployment insurance, disability, social security, workers' compensation, or claims based
2 on facts occurring outside the Class Period. Settlement, para. 6.2. All Non-Participating Class
3 Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their
4 respective former and present representatives, agents, attorneys, heirs, administrators, successors,
5 and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or
6 reasonably could have been alleged, based on the PAGA Period facts stated in the Operative
7 Complaint and the PAGA Notice and ascertained in the course of the Action including, failure to
8 pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure
9 to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
10 proper wage statements, failure to timely pay wages, failure to maintain required payroll records,
and related claims. Settlement, para. 6.3.

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

12 Using best efforts to perform as soon as possible, and in no event later than 14 days after
13 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
14 Data, via first-class United States Postal Service ("USPS") mail, the Class Notice with Spanish
15 translation, if applicable substantially in the form attached to this Agreement as Exhibit A. The
16 first page of the Class Notice shall prominently estimate the dollar amounts of any Individual
17 Class Payment and/or Individual PAGA Payment payable to the Class Member, and the number
18 of Work Weeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before
19 mailing Class Notices, the Administrator shall update Class Member addresses using the National
20 Change of Address database. Settlement, para. 8.4.2. Not later than 3 business days after the
21 Administrator's receipt of any Class Notice returned by the USPS as undelivered, the
22 Administrator shall re-mail the Class Notice using any forwarding address provided by the USPS.
23 If the USPS does not provide a forwarding address, the Administrator shall conduct a Class
24 Member Address Search, and re-mail the Class Notice to the most current address obtained. The
25 Administrator has no obligation to make further attempts to locate or send Class Notice to Class
26 Members whose Class Notice is returned by the USPS a second time. Settlement, para. 8.4.3.
27 8.4.4 The deadlines for Class Members' written objections, Challenges to Work Weeks and/or
28 Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 60
days otherwise provided in the Class Notice for all Class Members whose notice is re-mailed.



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1 The Administrator will inform the Class Member of the extended deadline with the re-mailed
2 Class Notice. Settlement, para. 8.4.4.

3 **1. Class Member Disputes**

4 Each Class Member shall have 60 days after the Administrator mails the Class Notice
5 (plus an additional 14 days for Class Members whose Class Notice is re-mailed) to challenge the
6 number of Class Work Weeks and PAGA Pay Periods (if any) allocated to the Class Member in
7 the Class Notice. The Class Member may challenge the allocation by communicating with the
8 Administrator via fax, email or mail. The Administrator must encourage the challenging Class
9 Member to submit supporting documentation. In the absence of any contrary documentation, the
10 Administrator is entitled to presume that the Work Weeks contained in the Class Notice are
11 correct so long as they are consistent with the Class Data. The Administrator's determination of
12 each Class Member's allocation of Work Weeks and/or Pay Periods shall be final and not
13 appealable or otherwise susceptible to challenge. The Administrator shall promptly provide
14 copies of all challenges to calculation of Work Weeks and/or Pay Periods to Defense Counsel and
15 Class Counsel and the Administrator's determination the challenges. Settlement, para. 8.6.

16 **2. Opting Out**

17 Class Members who wish to exclude themselves (opt-out of) the Class Settlement must
18 send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later
19 than 60 days after the Administrator mails the Class Notice (plus an additional 14 days for Class
20 Members whose Class Notice is re-mailed). A Request for Exclusion is a letter from a Class
21 Member or his/her representative that reasonably communicates the Class Member's election to
22 be excluded from the Settlement and includes the Class Member's name, address and email
23 address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed,
24 or postmarked by the Response Deadline. Settlement, para. 8.5.1.

25 **3. Objecting**

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



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1 who elects to send a written objection to the Administrator must do so not later than 60 days after
2 the Administrator's mailing of the Class Notice (plus an additional 14 days for Class Members
3 whose Class Notice was re-mailed). Settlement, para. 8.7.2. Non-Participating Class Members
4 have no right to object to any of the class action components of the Settlement. Settlement, para.
5 8.7.3.

6 **H. Uncashed Checks**

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

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

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

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

23 A class is ascertainable when it may be readily identified without unreasonable expense
24 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
25 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
26 defined Class is ascertainable because its members may be identified by reference to Defendant's
27 records and Defendant has agreed to share the relevant information from its records to facilitate
28 the settlement process. DS, ¶ 10; Settlement, § 4.2. Therefore, the Settlement Class is
ascertainable.

B. The Membership of the Settlement Class Is Sufficiently Numerous

The Settlement Class has sufficiently numerous members to render joinder impractical.
No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*



(1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 131 Class Members. DS, ¶ 11. 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, ¶ 11. *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.*, 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 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. DS, ¶ 28.

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 pay wages, unauthorized and unlawful wage deductions, 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, and related labor law violations, all of which Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendant failed to pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether



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1 Defendant failed to provide the class with all meal and rest periods in compliance with California
2 law; (3) Whether Defendant failed to pay the class one additional hour of pay on workdays it
3 failed to provide the class with one or more meal or rest periods in compliance with California
4 law; (4) Whether Defendant failed to indemnify the class for all necessary business expenditures
5 incurred during the discharge of their duties; (5) Whether Defendant knowingly and intentionally
6 failed to provide the class with accurate wage statements; (6) Whether Defendant willfully failed
7 to provide the class with timely final wages; and (7) Whether Defendant engaged in unfair
8 competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
respect to the class. DS, ¶ 12. Therefore, common questions predominate.

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

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

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

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

28 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



1 employment litigation generally, and wage and hour and employment-related class action
2 litigation specifically. See DS, ¶¶ 16 - 23; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
3 Thus, Plaintiff’s counsel are adequate to serve as Class Counsel.

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

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

18 Plaintiff further contends that a class action is also superior to other means adjudicating
19 the issues in this action. The predominance of common legal and factual questions shows that this
20 Court could fairly adjudicate the claims of Class Members through a single class action. In view
21 of the *theoretical* alternatives that proposed class members could potentially utilize—
22 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
23 claims through the Division of Labor Standards Enforcement (where there would be relatively
24 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
25 superior to all of them. Thus, this consideration supports conditional class action treatment for
26 purposes of this Settlement only. DS, ¶ 24.

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

A. Legal Standard

A class action settlement requires court approval. California Rules of Court (“CRC”),
Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
written motion for preliminary approval, the proposed class settlement, and the proposed class



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1 notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval
2 hearing where class members may be heard regarding the settlement, and at which evidence and
3 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
4 The decision to approve or reject a class settlement is committed to the Court's broad discretion.
5 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
6 class settlement may be reversed only upon a showing of "clear abuse of discretion." *Id.*

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

8 In assessing preliminary approval, a court evaluates if the settlement process has certain
9 indicia of fairness. A "presumption of fairness exists where (1) the settlement is reached through
10 arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
11 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
12 of objectors is small." *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
13 48 Cal.App.4th at 1794.

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

18 On April 13, 2022, Plaintiff commenced this Action by filing a Complaint alleging causes
19 of action against Defendant for failure to pay wages, unauthorized and unlawful wage deductions,
20 failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify
21 for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure
22 to maintain required payroll records, failure to pay all wages at separation, that Defendant
23 engaged in unfair competition, and related claims. On May 27, 2022, Plaintiff filed a First
24 Amended Complaint alleging causes of action against Defendant for failure to pay wages,
25 unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize
26 and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage
27 statements, failure to timely pay wages, failure to maintain required payroll records, failure to pay
28 all wages at separation, that Defendant engaged in unfair competition, that Defendant owes civil
penalties under the Private Attorney General Act ("PAGA"), and related allegations. The First
Amended Complaint is the operative complaint in the Action (the "Operative Complaint.").
Settlement, para. 2.1. DS, ¶ 26. Plaintiff prepared "damages" estimates in advance of the



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1 mediation. DS, ¶ 26, Ex. 6. In advance of the mediation, Plaintiff determined Defendant's
2 maximum exposure for restitution and penalties to be approximately \$3,118,708.95 (consisting
3 of \$60,760.34 in unpaid wages, \$71,139.72 in missed meal period premium wages, \$112,881.32
4 in missed rest break premium wages, \$39,350.00 for wage statement penalties, \$242,797.23 for
5 waiting time penalties, and \$2,529,850.00 for civil penalties). 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.* Plaintiff also considered the possibility that Defendant could launch a
8 *Pick Up Stix* campaign and pursue individual release agreements from the Class Members.
9 Defendant also represented that it had interviewed all of Defendant's current employees regarding
10 Plaintiff's claims, all of whom would provide declarations, under penalty of perjury, that were
11 favorable to Defendant with respect to the relevant factual issues at issue in Plaintiff's action.
12 Plaintiff's Counsel applied discounts to the maximum exposure to account for all other risks
13 discussed below. While it is difficult to assign anything but crudely-determined percentages of
14 risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude
15 recovery for such employees is substantial and alone justifies a significant discount because
16 Defendant would likely by trial have gathered releases from the majority of the Class Members.
17 A settlement for approximately 3.85% of the potential recovery is a proportion substantially in
18 excess of recovery proportions sanctioned by existing case law.³ *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, ¶ 39. PAGA penalty awards are often

21 ³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
22 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
23 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
24 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
25 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
26 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
27 of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
28 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
potential recovery asserted by either party.”).

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

The plain language of PAGA provides that “a court may award a lesser amount than the
maximum civil penalty amount specified by this part if, *based on the facts and*



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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 \$120,000.00 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 *circumstances of the particular case*, to do otherwise would result in an award that is
19 unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code s 2699(e)(2) (emphasis
20 added). The relationship between the amount of total damages and the amount of
21 maximum PAGA penalties is certainly a "circumstance" of the case under the term's
22 ordinary meaning. The weight given to that circumstance is greater in this case because
23 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
24 individual claims except for one. As a general matter, it would be excessively punitive
25 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
26 the damages caused by that injury or set of injuries.

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

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

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.



1 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
2 factors.

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

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

5 The arbitration agreements entered into between Defendant on the one hand, and many
6 employees who are not Class Members, on the other, present a significant risk to the success of
7 Plaintiff's class action litigation. Defendant will no doubt enter into such agreements with the
8 Class Members if the case does not settle. DS ¶ 28. According to Defendant, the majority of its
9 employees entered into arbitration agreements with Defendant. *Id.* As the arbitration agreements
10 in question restrict potential litigants from bringing class actions against Defendant, Plaintiff
11 would be effectively barred from pursuing claims on behalf of the Class in Court. *Id.* Thus, there
12 is a significant risk the Court could determine that those Class Members who ultimately will not
13 have entered into arbitration agreements with Defendant may not constitute a sufficiently
14 numerous class to justify class action treatment. As such, by continuing to trial on class-wide
15 claims, Plaintiff would run the high risk of suffering defeat due to the existence of the arbitration
16 agreement. Moreover, the arbitration agreements would pose danger to any class certification
17 motion brought by Plaintiff. Because different defenses would apply to some Class Members and
18 not others – i.e., the existence of signed arbitration agreements – there is a risk that the Court
19 could determine that Plaintiff's claims present too many individualized inquiries to justify class
20 certification. *Id.*

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

22 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
23 best, largely because Defendant's written policies throughout the relevant time period prohibited
24 off-the-clock work. DS, ¶ 29. Off-the-clock claims are difficult where a defendant requires in its
25 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
26 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
27 be compensable). *Id.* In its written employment policies, Defendant mandates that employees
28 must record all time worked accurately on their time records and strictly prohibit employees from
performing any work off-the-clock. DS, ¶ 29. Moreover, while Defendant disputes that off-the-
clock work occurred, it contends that any time spent off the clock was *de minimis*. The California
Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular
and minute periods of time may still be subject to a *de minimis* defense even if compensable.



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

The difficulty inherent in proving that off-the-clock work occurred poses a significant hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim. Generally, a court will not certify a class unless it can determine an appropriate classwide methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff 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 risk that the Court would consider this evidentiary showing insufficient as a classwide methodology. DS, ¶ 30.

c. Risks Associated with the Meal Period Claims

There are risks to Plaintiff’s meal period claim. DS, ¶ 31. Defendant contends that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a particular 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.*

Defendant contends it did not impede or discourage Plaintiff, or any other employees, from taking their meal or rest periods. DS, ¶ 32. Defendant’s policies mandate that employees take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time of their meal breaks each day on their time records. *Id.* The time records that comprise the random sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,



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1 individualized evidence may be necessary to determine whether they occurred due to conduct of
2 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
3 the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

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

5 There are risks to Plaintiff's rest period claim. DS, ¶ 33. Employers are not required to
6 record rest periods and such periods are paid. *Id.* Defendant contends it provided non-exempt
7 employees the opportunity to take rest periods in accordance with California law. Further,
8 Defendant's written policies on meal and rest periods are consistent with the Wage Order. *Id.*
9 Thus, unlike meal periods, where there are often records showing whether an employee clocked
10 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
11 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
12 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
13 victory with such evidence is certainly possible, relevant case law makes such claims risky from
14 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
15 (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class
16 certification, it may be possible to manage individual issues through the use of surveys and
statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
Corporation v. Behrend (2013) 133 S.Ct. 1426.

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

18 There is a risk that the Court may consider Plaintiff's claims as to Defendant's alleged
19 failure to indemnify for business expenses to be individual in nature and thus decline to certify
20 the class. DS, ¶ 34. Plaintiff alleges that Defendant required Plaintiff and the Class Members to
21 use their personal items including cellular phones, computers and other electronic devices,
22 vehicles, and tools, and failed to indemnify them for these business expenses. *Id.* Defendant
23 presented evidence that it has supplied its employees with tools, equipment, and other supplies
24 and had an expense reimbursement policy. As such, there is a risk that the Court may consider
Plaintiff's claims to be individual in nature and unfit for class wide resolution. *Id.*

25 **f. Risks Associated with the Statutory "Wage Statement"**
26 **Penalty Claims**

27 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
28 PAGA penalties. Under Labor Code section 226, wage statements must include various
information, including the applicable rates of pay, corresponding hours worked, and gross pay.



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DS, ¶ 35.

Here, Plaintiff's wage statement claim has the same underlying risks as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply with the requirements of Labor Code § 226. DS, ¶ 35.

g. Risks Associated with the Statutory "Wage Statement" Penalty Claims.

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

h. Risks Associated With the PAGA Claim

Regarding PAGA, a court has discretion to award a lesser amount than the maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant uncertainty. DS, ¶ 37. There is a risk that the Court would consider the maximum civil penalty available to be confiscatory. This is particularly the case considering Defendant's financial condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a significant discount for settlement purposes. DS, ¶ 38. For mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately \$2,529,850.00 in civil penalties. This estimate did not take into account any of the risks discussed above and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in controversy for purposes of removal jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

Also, the United States Supreme Court announced on December 15, 2021 that, in the near future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide (likely no later than the end of summer 2022) whether or not to overrule the California Supreme



1 Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private arbitration
2 agreement cannot deprive an employee of his right to sue under PAGA in a court of law. If the
3 Supreme Court sides with the Petitioner, Plaintiff's PAGA claim may be subject to an arbitration
4 agreement allowing only bilateral arbitration and, consequently, inhibiting the claim altogether.
5 While such an outcome would conflict squarely with *EEOC v. Waffle House* (2002) 534 US 279
6 (private settlement agreements do not preclude government prosecutions on behalf of employee
signatories to such agreements), this potential outcome is a risk.

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

8 An employer enjoys the right to settle a putative class member's disputed wage claims
9 individually, without the consent or involvement of class counsel. DS, ¶ 42. (See *Chindarah v.*
10 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendant may launch a
11 "pick off" settlement campaign to pursue individual release agreements from the Class Members,
12 thereby potentially narrowing the size of the Settlement Class – 131 members - until it is no longer
13 numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient number of
14 employees to represent. This led to a significant reduction of claim value in settlement
negotiations. *Id.*

15 While the evidence gathered through Plaintiff's discovery supports the merits of the
16 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
17 presents significant risks that support a downward departure from Defendant's estimated liability
18 exposure. DS, ¶ 43. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
19 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
20 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
21 It also represents a fair, adequate, and reasonable compromise amount for these claims and
22 warrants preliminary approval. *Id.*, *Torrison v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
23 1376 (the financial condition of defendant predominated in assessing the reasonableness of
24 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
25 concerning defendant's financial stability "strongly supports the reasonableness of the
26 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
WL 2465049, * 3.

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

28 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and



appropriate under the circumstances. DS, ¶ 44. The Parties negotiated a good faith amount for PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members. *Id.* 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 67245, 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(1)(2), Plaintiffs will provide notice of this settlement to the LWDA. DS, ¶ 53, Ex. 12.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Class Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 3. 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, ¶ 50, Settlement § 1.23. 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.*

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 \$40,000.00 (one-third of the GSF) and up to \$15,000.00 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, ¶¶ 45 - 47.

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

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



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1 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
2 down to devote time to this matter. DS, ¶ 46. 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, ¶ 47. 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 SERVICE PAYMENT TO PLAINTIFF**
13 **SHOULD BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR,**
14 **ADEQUATE, AND 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 an Class Representative
21 Service Payment of \$5,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
22 action and the risks she undertook on behalf of Class Members. DS, ¶ 48. Plaintiff has devoted
23 many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among
24 other things, retaining experienced counsel, providing them with information about her work
25 history with Defendant and Defendant's policies and practices with respect to the wage and hour
26 claims at issue, participating in mediation, and being actively involved in the settlement process
27 to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
28 to 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 Service Payment is fair, adequate, and reasonable, and thus warrants preliminary
approval. DS, ¶ 48.



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

4 With regard to the settlement administration costs provision, it is reasonable. Before
5 agreeing to ILYM Group, Inc. and its bid of \$7,150.00, the Parties sought and reviewed bids from
6 other reputable third-party administrators which provided higher bids. DS, ¶ 51 - 52, Exs. 9, 10,
7 and 11. Thus, the settlement administration costs provision should be given preliminary approval.

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

12 This Court should approve the proposed plans for giving notice to the Settlement Class
13 and administering the Settlement. The standard for determining the adequacy of notice is whether
14 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
15 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
16 measures to ensure that as many Class Members as practicable receive actual notice of the
17 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
18 the Notice by First Class U.S. mail only. Settlement, § 1.11. Although there are current employee
19 Class Members, it is uncertain whether Defendant’s records of their contact information include
20 email addresses and Class Members, who perform all of their work away from a desk, are not in
21 a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
22 DS, ¶ 50.

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



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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, ¶ 50.

6 **XI. CONCLUSION**

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

9 Respectfully submitted,

10 THE SPIVAK LAW FIRM

11 Dated: September 1, 2023

11 By: 

12 DAVID G. SPIVAK
13 MAYA CHEAITANI, Attorneys for
14 Plaintiff, MARTHA P. BRIANO
15 MARTINEZ, and all others similarly
16 situated
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