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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

TESSA M. JENNINGS, on behalf of herself and others similarly situated, Plaintiff, v. SKYGROUP INVESTMENTS, LLC; iFLY HOLDINGS, LLC; and DOES 1 through 100, inclusive, Defendants.	Case No.: CIVSB2222518 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF** [Declaration of Anthony J. Orshansky, Declaration of Jacob N. Whitehead, and [Proposed] Order filed concurrently herewith] <u>Preliminary Approval Hearing</u>: Date: June 24, 2025 Time: 8:30 a.m. Dept.: S-26 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on June 24, 2025, at 8:30 a.m., or as soon thereafter as the matter may be heard in Department S-26 of the above-entitled Superior Court of California, County of San Bernardino, located at 247 West Third Street, San Bernardino, California 92415, before the Honorable Christian Towns, pursuant to Cal. Code of Civ. Pro. § 382, Cal. Rule of Court 3.769(c) and Lab. Code, § 2699(g)(1), Plaintiff Tessa M. Jennings ("Plaintiff") individually, and on behalf of all others similarly situated, will and hereby does move this Court for an entry of an Order granting preliminary approval of the Parties' proposed settlement by:

1. Preliminarily certifying the Class for purposes of settlement;

2. Preliminarily approving Plaintiff Tessa M. Jennings as Class Representative for purposes of settlement;

3. Preliminarily appointing CounselOne, PC and W Employment Law, APC as Class Counsel for purposes of settlement;

4. Preliminarily approving the settlement as fair, adequate, and reasonable based upon the terms set forth in the Parties' Stipulation of Class and Representative Action Settlement ("Settlement Agreement"), including payment by Defendants Skygroup Investments, LLC and iFLY Holdings, LLC (collectively, "Defendants") of the non-reversionary Gross Settlement Amount totaling Three Hundred and Thirty-Five Thousand Dollars ($335,000) for a putative class of approximately 209 current and former non-exempt employees who are or were employed by Defendants in California during the Class Period;

5. Preliminarily approving Class Counsel's request for up to 33⅓% of the Gross Settlement Amount as attorneys' fees (*i.e.*, up to $111,555), plus reimbursement of actual litigation costs up to $20,000;

6. Appointing CPT Group, Inc. as the third-party Settlement Administrator for mailing notices and for settlement administration, and approving up to $10,000 be deducted from the Gross Settlement Amount for the costs of settlement administration;

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7. Approving the proposed Notice of Pendency of Class and Representative Action Settlement and ordering it be distributed to Class Members; and

8. Scheduling a hearing to consider whether the settlement should be finally approved and award amounts for the Class Representative Enhancement Award, Administrative Costs, the Private Attorneys General Act payment to the California Labor and Workforce Development Agency, as well as attorneys' fees and costs to Class Counsel.

This Motion is based upon the supporting Memorandum of Points and Authorities, the Declaration of Anthony J. Orshansky, the Declaration of Jacob N. Whitehead, the executed long-form Settlement Agreement, the proposed Notice of Pendency of Class and Representative Action Settlement, and the [Proposed] Order filed concurrently herewith, along with such supplemental filings and exhibits as are required, evidence and argument of counsel may be presented at the hearing, and such additional matters as the Court may consider at the time of hearing. Finally, given the multiplicity of issues addressed in this motion, Plaintiff respectfully believes there is good cause to exceed the 20-page limit set forth in California Rule of Court 3.764(c)(2), and respectfully requests that the Court consider Plaintiff's memorandum of points and authorities, which is 28 pages in length.

Respectfully submitted,

DATED: March 11, 2025

COUNSELONE, PC
ANTHONY J. ORSHANSKY

By: ______________________
ANTHONY J. ORSHANSKY

Attorneys for Plaintiff Tessa M. Jennings, on behalf of herself and others similarly situated

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MEMORANDUM OF POINTS AND AUTHORITES

I. INTRODUCTION

Plaintiff Tessa M. Jennings ("Plaintiff") seeks preliminary approval of a settlement entered with Defendants Skygroup Investments, LLC and iFLY Holdings, LLC (collectively, "Defendants") (Plaintiff and Defendants together, the "Parties") on behalf of Plaintiff and a putative state class of current and former non-exempt employees of Defendants (the "Class"). If approved, the contemplated Stipulation of Class and Representative Action Settlement ("Settlement Agreement"), attached as **Exhibit 1** to the Declaration of Anthony J. Orshansky ("Orshansky Decl."), will resolve all claims of the Plaintiff and participating Class Members as well as claims for penalties under the Private Attorneys General Act of 2004 ("PAGA"), Lab. Code section 2698 *et seq*.

After engaging in substantial investigation, negotiation and a lengthy mediation with Jill Sperber, Esq. of Judicate West, the Parties agreed to settle the Settlement Class Members' and PAGA Group Members' claims alleged in this litigation. The settlement entails a non-reversionary payment by Defendants of a gross settlement amount of Three Hundred and Thirty-Five Thousand Dollars ($335,000). After deducting for Court-approved attorneys' fees and costs to Class Counsel, an enhancement award payment to the Class Representative, Administrative Costs, and penalties recoverable pursuant to PAGA, the remaining amount is the Net Settlement Amount ("Net Settlement Amount"), of which an estimated $158,445 will be distributed to Settlement Class Members. The entire Net Settlement Amount will be paid out to Settlement Class Members. Settlement Class Members shall automatically receive payments without the need to submit a claim form, and the PAGA Group Members will receive PAGA payments irrespective of whether they opt out.

For the reasons discussed herein, the proposed settlement is fair, reasonable, and adequate, and in the best interests of the Class Members. Plaintiff, with the consent of Defendants, therefore moves for an order: (1) conditionally certifying the Class for settlement purposes; (2) granting preliminary approval of the Settlement Agreement; (3) approving the Notice of Pendency of Class and Representative Action Settlement; and (4) setting a hearing for final approval of the Settlement.

II. SUMMARY AND STATUS OF THE LITIGATION

A. Nature of the Claims

Plaintiff and the Class were employed by Defendants in California as non-exempt employees. Orshansky Decl., ¶¶ 4, 40. On May 10, 2022, Class Counsel provided pre-filing written notice to the LWDA and by certified mail to Defendants of the above-identified allegations on behalf of Plaintiff and similarly situated aggrieved employees in accord with the PAGA, California Labor Code section 2698, *et seq*. Orshansky Decl., ¶ 26. On November 23, 2022, Plaintiff filed a Class and Representative Action Complaint asserting putative class action wage and hour claims, along with representative action claims under the PAGA. Orshansky Decl., ¶ 27. Plaintiff filed her First Amended Complaint on February 15, 2025. *Id.* Through this this lawsuit, Plaintiff alleged the following claims: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) meal period liability under Labor Code section 226.7; (4) rest break liability under Labor Code section 226.7; (5) failure to provide accurate itemized employee wage statements; (6) failure to pay vested vacation/paid time off; (7) failure to pay all wages owed timely and upon separation of employment; (8) failure to reimburse business expenses; (9) failure to provide sick pay and supplemental sick leave; (10) violation of Labor Code section 1174, subdivision (d); (11) violation of Business and Professions Code section 17200 et seq.; and (12) penalties pursuant to Labor Code section 2699 ("PAGA"). *See* generally Complaint and First Amended Complaint ("FAC"); *see also* Orshansky Decl., ¶ 27. Defendants deny Plaintiff's allegations of wrongdoing. Defendants do not believe that any liability to Plaintiff or other Class Members exists, or that Plaintiff or Class Members are entitled to any recovery. Settlement Agreement, ¶ 43; Orshansky Decl., ¶ 29.

B. Investigation and Exchange of Information

Prior to initiating this Lawsuit, Class Counsel thoroughly investigated the claims and considered the facts and circumstances underlying the pertinent issues and applicable law. *See* Orshansky Decl., ¶ 25. This required thorough discussions and interviews with Plaintiff and other

Class Members as well as research into the various legal issues involved in the case. *See id.* Class Counsel also obtained and analyzed Plaintiff's personnel records and wage statements received from Defendants pursuant to a formal records request to Defendants sent on January 7, 2022. *See id*. After conducting their initial investigation, Class Counsel determined that the claims were well suited for class action adjudication owing to what appeared to be a common course of conduct affecting a similarly situated group of employees. *See id.*

Counsel for the Parties agreed to attempt to resolve the matter through mediation, and engaged in an informal exchange of information and documents, which included Defendants' provision of information allowing for the evaluation of the exposure to Defendants of Plaintiff's claims across the Class and PAGA Group Members, including workweek/pay period information, rates of pay, meal premium compliance, and other relevant information. *See id*.

C. Mediation

The Parties participated in a full-day mediation with Jill Sperber, Esq. of Judicate West, where they debated and discussed their respective positions. Orshansky Decl., ¶ 30. Ms. Sperber is experienced in mediating complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. *Id.* During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. The Parties came to agreement on all material terms of this settlement pursuant to a mediator's proposal, and thereafter negotiated and executed a Memorandum of Understanding. *Id*.

III. SUMMARY OF THE SETTLEMENT TERMS

Under the terms of the Settlement Agreement, Defendants have agreed to pay a non-reversionary amount of Three Hundred and Thirty-Five Thousand Dollars ($335,000) into a common fund to settle the specific wage and hour claims of the Settlement Class Members and PAGA Group Members; this amount is called the "Gross Settlement Amount." Settlement Agreement, ¶ 16. This Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class Members, the Enhancement Payment to the Class Representative, the

Administration Costs to the Settlement Administrator, the Attorneys' Fees and Costs to Class Counsel, and the Private Attorneys General Act ("PAGA") Payment, including payment to PAGA Group Members and to the California Labor and Workforce Development Agency ("LWDA") for civil penalties pursuant to statute. *Id.* The only monies excluded from the Gross Settlement Amount is that amount to be paid by Defendants as the employer's share of payroll taxes with respect to the wage portion of the settlement payments to Settlement Class Members, which shall be paid separately. *Id.*

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

- Up to $111,555 – which is one third (33⅓%) of the Gross Settlement Amount – and up to $20,000 in litigation costs to Class Counsel (the "Attorneys' Fees and Costs");
- Up to $5,000 to the Class Representative as an Enhancement Payment – as a service award;
- Up to $30,000 allocated as a PAGA Payment – of which 75% of the PAGA Payment is allocated for payment to the LWDA for civil penalties pursuant to statute and 25% of the PAGA Payment is to be distributed to PAGA Group Members; and
- Up to $10,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately $158,445, is called the "Net Settlement Amount." Settlement Agreement, ¶ 21. The entire Net Settlement Amount will be paid out to Settlement Class Members. Settlement Class Members shall automatically receive payments without the need to submit a claim form, and the PAGA Group Members shall receive PAGA payments irrespective of whether or not they opt-out. *Id.*, ¶ 50(d).

A. The Settlement Provides for Reasonable Monetary Payments

If all of the approximately 209 Class Members participate (*i.e.*, do not submit a request for exclusion), and assuming hypothetically that distribution was on an individual *pro rata* basis, then each individual settlement payment would be an estimated $758.11 per Class Member. Orshansky Decl., ¶ 11. In actuality, each Class Member will receive a proportional share of the Net Settlement

Amount based on his or her eligible workweeks during the applicable Class Period. The Settlement Administrator will determine each Class Member's individual settlement payment as follows: First, the sum of all Class Members' individual Workweeks will be the "Total Workweeks." Second, the Net Settlement Amount will be divided by the Total Workweeks to yield the "Workweek Value." Third, each Class Member's individual settlement payments will be determined by multiplying his or her individual Workweeks by the Workweek Value. *See* Settlement Agreement, ¶ 50(f). Finally, in addition, all Class Members will receive a proportional share of the 25% of the PAGA Payment based on his or her Workweeks during the PAGA Period, defined as the period beginning on May 10, 2021 and ending on December 31, 2024. *See* Settlement Agreement, ¶¶ 26, 50(d).

After reduction for the employee's share of taxes on the wage portion,[1] the net payment to each Settlement Class Member will be the sum of his or her individual settlement payment, plus his or her share of the eligible PAGA Payment. As a result of the distribution formula, the consideration paid to each Settlement Class Member is tailored to the impact of Defendants' alleged violations as well to the claims he or she is releasing. Orshansky Decl., ¶ 10. Furthermore, Class Members may submit a written letter to the Settlement Administrator disputing the number of Workweeks credited if they believe that count is inaccurate. *See* Settlement Agreement, ¶ 55. Finally, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out.[2] *See id.*, ¶ 57.

B. Class Representative Enhancement Award, Attorneys' Fees, and Expenses

As part of the Settlement, Plaintiff will apply for a service award payment at the time of seeking final approval in the amount of $5,000 for services to the Class. *See* Settlement Agreement, ¶ 50(c); Orshansky Decl., ¶ 12. "[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class

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[1] The Parties agreed to allocate 20% of each individual settlement payment to wages and 80% of each individual settlement payment to interest, penalties, and other non-wage damages. *See* Settlement Agreement, ¶ 52(a).

[2] Again, if approved, all Class Members will receive their individual *pro rata* PAGA Payment irrespective of whether they opt-out of the Class. *See* Settlement Agreement, ¶ 50(d).

[and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393-94 (2010). Plaintiff's requested enhancement award payment is intended to recognize the significant benefits conferred upon the Class and be proportional to the respective time and effort that Plaintiff expended on behalf of the Class and the PAGA aggrieved employees including, providing factual information and documents to Class Counsel, discussing the claims and theories at issue in the case with Class Counsel, identifying potential witnesses and reviewing documents; reviewing the Settlement Agreement; and the significant risks Plaintiff undertook by agreeing to serve as named plaintiff. *See* Settlement Agreement, ¶ 49; Orshansky Decl., ¶ 13.

Class Counsel will apply for an attorneys' fees award of one third (33⅓%) of the Gross Settlement Amount ($111,555), and reimbursement of litigation costs in an amount up to $20,000. *See* Settlement Agreement, ¶ 50(a); Orshansky Decl., ¶¶ 7, 14. Class Counsel submit that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Orshansky Decl., ¶ 14. Class Counsel has devoted substantial attorney time to: pre-filing investigation; analyzing Plaintiff's claims; engaging in informal discovery; meeting and conferring over information and data, including Defendants' employee handbooks, policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements, and providing all wages at separation, as well as composite data regarding the number of Class Members and the mix of current versus former employees, total number of pay periods, total number of workweeks, and the average hourly rate in effect; preparing and submitting notice to the LWDA; negotiating and preparing the long-form Settlement Agreement and Class Notice; preparing this motion for preliminary approval; and otherwise litigating the case. *See id.*, ¶ 14. Class Counsel will also expend future attorney time in attending the hearing on this Motion, overseeing the notice and administration process, drafting the Final Approval Motion and supporting documents, and attending the Final Approval hearing, among other tasks, such as addressing questions from Class Members. *See id.*, ¶ 15.

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

Class Counsel submit that their request for attorneys' fees is reasonable when viewed as an overall percentage of the settlement amount in light of the substantial risks and significant work undertaken, the excellent results obtained for the Class Members, and the efficiency with which the Parties have conducted the litigation. Orshansky Decl., ¶ 16. Assuming that the Court grants preliminary approval, Class Counsel will seek an award of attorneys' fees and litigation costs at the time of seeking final approval of the Settlement. The Court-approved attorneys' fees award will be divided between Plaintiff's counsel CounselOne, PC and W Employment Law, APC, by terms agreed upon in writing between counsel and Plaintiff. *Id.*

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Express judicial policy favors maintaining wage and hour actions as class actions. *Prince v. CLS Transp., Inc.*, 118 Cal. App. 4th 1320, 1328 (2004); *Richard v. Dart Industries, Inc.*, 29 Cal. 3d 462 (1981) (finding that California public policy "encourages the use of the class action device"). Any doubt as to the appropriateness of class treatment should be resolved in favor of class certification, subject to later modification if necessary. *Id.* at 473-75. The decision to certify a class is purely a procedural one, and should be based on the allegations in the operative complaint, and not in the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-41 (2000).

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

A. There Is an Ascertainable and Sufficiently Numerous Class

Whether a class is ascertainable is determined by examining the class definition, the size of the class and the means available for identifying class members. *See Vasquez*, *supra*, 4 Cal. 3d at 821-22; *Reyes v. Board of Supervisors of San Diego County*, 196 Cal. App. 3d 1263, 1271 (1987); *Miller v. Woods*, 148 Cal. App. 3d 862, 873 (1983). Class members are "ascertainable" where they may be readily identified without unreasonable expense or time.

Here, the class definition is "precise, objective and presently ascertainable." *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010). The settlement here includes a class defined as "all non-exempt employees who worked for Defendants Skygroup Investments, LLC and iFLY Holdings, LLC within the State of California during the Class Period," which is "the period beginning on November 23, 2018 and ending on December 31, 2024." *See* Settlement Agreement, ¶¶ 5, 7; Orshansky Decl., ¶ 4. Defendants are required to and do maintain employment records of such persons, including contact information and social security numbers. Orshansky Decl., ¶ 78. Documents and information exchanged reflect a Class of approximately 209 non-exempt employees during the relevant period. *Id.* As a result, the proposed Class satisfies the ascertainability and numerosity requirements. *See, e.g.*, *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981), stating that "[n]o set number is required as a matter of law for the maintenance of a class action" and citing examples where classes as little as 10 (*Bowles v. Superior Court*, 44 Cal. 2d 574 (1955)) and 28 (*Hebbard v.* Colgrove, 28 Cal. App. 3d 1017 (1972)) were upheld. *See* *also, e.g.*, *Collins v. Rocha*, 7 Cal. 3d 232 (1972) (finding a class of 44 farm workers sufficiently numerous).

B. There Is a Well-Defined Community of Interest

A community of interest is established by the preponderance of common issues of law and fact. *See Vasquez*, *supra,* 4 Cal. 3d at 811. "The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claim or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

1) Common Issues of Law and Fact Predominate

The Court should grant class certification when questions of law and fact common to all Class Member predominate over any questions affecting only individual Class Members. The predominant inquiry tests whether a proposed class is sufficiently cohesive to warrant adjudication by representation. *See, e.g., Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987); *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128 (1983).

Here, common issues of fact and law predominate as to each of the claims alleged by Plaintiff and Class Members. This litigation is predicated on uniform company policies and systemic top-down business practices revolving principally around Defendants' timekeeping and pay practices – *e.g.,* off-the-clock work attributed to understaffing, unreasonable workloads, and/or inequitable rounding, failure to pay meal and rest break premiums, as well as business expense reimbursements, or lack thereof, etc. – as well as derivative inaccurate wage statements and unpaid wages owed at separation. These allegations have given rise to the following claims: failure to pay minimum and overtime wages; meal period liability; rest break liability; failure to pay all final wages at termination of employment; failure to maintain and provide accurate itemized wage statements and to maintain accurate payroll records; and derivative UCL and PAGA claims arising therefrom.

Because Plaintiff has alleged a single top-down compensation scheme, "the relevant proof [does] not vary among class members" and "clearly presents a common question fundamental to all class members." *See In Re NASDAQ Market-Makers Antitrust Litigation*, 172 F.R.D. 119, 123

(S.D.N.Y. 1997) (citing *In Re NASDAQ Market-Makers Antitrust* Litigation, 169 F.R.D. 493, 518 (S.D.N.Y. 1997)). California courts show "no hesitancy" in inferring class-wide causation, class-wide injury, and class-wide damages when a common course of action has been shown. *B.W.I. Custom Kitchens, supra*, 191 Cal. App. 3d at 1350 (granting class certification in a manufacturing defect case when a common course of action had been proven). This inference "*eliminates* the need for each class member to prove individually the consequences of the defendants' actions to him or her." *Id.* at 1351. Thus, the outcome of this matter depends upon questions that are common to members of the Class. These types of claims are commonly held to be proper for class certification. *See, e.g., Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864, 871 (2013) (reversing denial of rest period claim); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 726 (2013) (certifying meal period claim).

2) Plaintiff's Claims Are Typical of the Claims of the Class

The typicality requirement is satisfied where class representatives have claims that are typical of the rest of the class. *B.W.I. Custom Kitchens, supra*, 191 Cal. App. 3d at 1347. Here, Plaintiff's claims are typical of those held by members of the proposed Class. Like all other Class Members, Plaintiff was a non-exempt employee working for Defendants in California during the Class Period. Like Class Members, Plaintiff alleges she was not paid for all hours worked due to off-the-clock work (*i.e.*, pre-/post-shift duties and travel time, interrupted meals); did not receive timely and duty-free meal and rest breaks and was not paid premiums for non-compliant breaks; did not receive accurate wage statements and all wages and premiums owed upon termination of the business relationship; and incurred necessary unreimbursed business expenses; all while working for Defendants. *See generally* FAC; Orshansky Decl., ¶ 27. Plaintiff was therefore impacted by the same challenged policies and practices that allegedly injured the Class as a whole and subject to the same defenses raised by Defendants as to the Class; her claims are therefore typical of those of the Class.

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3) Plaintiff and Class Counsel Meet the Adequacy Requirements

The adequacy of representation requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. Department of Developmental Services*, 155 Cal. App. 4th 676, 697 (2007). Here, Plaintiff and Class Counsel will adequately represent the Settlement Class, as there are no conflicts between the Plaintiff and the Class she seeks to represent. Orshansky Decl., ¶ 82; *see also, e.g.*, *McGhee v. Bank of Bank of America*, 60 Cal. App. 3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour litigation. *See* Orshansky Decl., ¶¶ 72-76; Declaration of Jacob N. Whitehead ("Whitehead Decl."), ¶¶ 1-5.

C. A Class Action Is Superior to a Multiplicity of Litigation

In making its class certification decision, the court must determine that a class action would be superior to alternative means for the fair and efficient adjudication of the litigation. By consolidating more than two hundred individual actions into a single proceeding, this Court's use of the class action device enables it to manage this litigation in a manner that serves the efficiency interests of the litigants and the judicial system. Absent class treatment, the only alternative would be to force numerous employees to file individual actions. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 339 n.10 (2004) (stating "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions – not between the complexity of a class suit that must accommodate some individualized inquires and the absence of any remedial proceeding whatsoever.") Finally, in the context of settlement, the superiority concerns are essentially non-existent. Orshansky Decl., ¶ 83.

V. THE TWO-STEP APPROVAL PROCESS

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

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

See Manual for Complex Litigation (Second) (1985), § 30.44. The preliminary approval of the class action settlement by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. *See, e.g., Newberg*, § 11.25; *North County Contractor's Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085, 1094-95 (1994); *Federal Manual for Complex Litigation, Second*, § 30.44 ("Preliminary approval is appropriate if the agreement is 'fair, reasonable, and adequate under the circumstances'"). Thus, the preliminary approval of the class action settlement by the Court is simply a conditional finding that the Settlement appears to be within the range of acceptable settlements. A review of the preliminary approval criteria demonstrates a substantial basis for granting the preliminary approval requested by this Motion and proceeding to a full settlement hearing.

VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

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

In sum, the Settlement here is fair because it offers payment to each Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the Settlement proceeds whereby the Net Settlement Amount is allocated to Settlement Class Members proportionally based on their respective number of eligible weeks worked during the Class Period.

A. The Settlement Is Entitled to a Presumption of Fairness

Moreover, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. *See Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.* 2007 U.S. Dist. LEXIS 74767 at 24-25 (C.D. Cal. August 10, 2007); *In re Chicken Antitrust Litigation*, 560 F.Supp. 957, 962 (N.D. Ga. 1980); *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co*., 834 F.2d 677, 681 (7th Cir. 1987). Courts do not substitute their judgment for that of the proponents, particularly when settlement has been reached by experienced counsel familiar with the litigation. *See Rodriguez,* 2007 U.S. Dist. LEXIS 74767 at 24. As detailed at length in the accompanying declaration of Class Counsel, the settlement is the result of extensive settlement negotiations between the Parties, conducted at arm's length, and informed by substantial factual and legal investigations. Orshansky Decl., ¶¶ 25-32; Whitehead Decl., ¶ 14.

B. Investigation Was Sufficient to Allow Counsel to Act Intelligently

Throughout this case, Class Members have been represented by counsel who have years of experience in employment class action litigation. Orshansky Decl., ¶¶ 72-76; Whitehead Decl., ¶¶ 1-5. Class Counsel devoted a considerable amount of time to the prosecution of this case, including, but not limited to, conducting pre-filing investigation and research; reviewing Defendants' written policies concerning the claims set forth in the action, including Defendants' policies and procedures regarding the payment of wages, the provision of meal and rest breaks, time keeping policies, such as rounding and recording hours, reimbursement of expenses, issuance of wage statements, and providing all wages at separation; reviewing and analyzing time and pay records; meeting and conferring regarding the information and documents produced; interviewing

Class Members; drafting pleadings; researching applicable law; preparing damages models; consulting with an expert; preparing for and attending mediation; and negotiating and finalizing the settlement and related documents. Orshansky Decl., ¶ 14.

C. Negotiations Were at Arm's Length Before a Respected Mediator

The Parties participated in a lengthy mediation session with Jill Sperber, Esq. of Judicate West, who is experienced in mediating complex general litigation, labor and employment claims, class actions, and PAGA cases, among others. Orshansky Decl., ¶ 30. During the mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays of litigation and the risk to both Parties for proceeding with a motion for class certification, liability under the claims asserted, and the implications of a PAGA representative action. *Id.* These were contentious issues because of the factual and legal complexity of the case. *Id.* The Parties came to agreement on all material terms of this settlement pursuant to a mediator's proposal, and thereafter negotiated and executed a Memorandum of Understanding. *Id.*

D. Class Counsel Are Experienced in Similar Litigation

Class Counsel believe that the settlement is fair and reasonable and serves the best interests of the Class Members. Orshansky Decl., ¶ 32; Whitehead Decl., ¶¶ 6-14. Although the recommendations of counsel proposing the class settlement are not conclusive, the Court can properly take the recommendations into account, particularly if counsel have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and significant discovery has been completed. *See Newberg*, § 11.47. Here, Plaintiff is represented by competent and experienced counsel who possess extensive experience litigating wage and hour class actions and have been appointed as class counsel in numerous cases alleging similar claims. Orshansky Decl., ¶¶ 72-76; Whitehead Decl., ¶¶ 1-5.

E. <u>The Settlement Is Fair, Reasonable, and Adequate</u>

To make a fairness determination, the Court should consider several factors, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery and the stage of proceedings, [and] the experience and views of counsel." *Dunk v.*

Ford Motor Co., 48 Cal. App. 4th 1794, 1801 (1986). "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstance of each case." *Wershba*, *supra*, 91 Cal. App. 4th at 245. As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall factors in this case.

1) The Strength of Plaintiff's Case

Class Counsel carefully vetted the claims at issue to arrive at a comprehensive damages model for Defendants' liability. Orshansky Decl., ¶ 33. Although Plaintiff steadfastly maintains that her claims are meritorious, she acknowledges that there are substantial risks and uncertainty in proceeding with class certification and trial. *Id.* As explained in further detail below in the discussion valuing each of the claims, Defendants presented numerous defenses to Plaintiff's claims, both on the merits and with respect to class certification. *Id*. For example, Defendants defended against the minimum and overtime wage claims by relying on written policies that explicitly prohibited Class Members from engaging in off-the-clock work. *Id.*, ¶ 34. Defendants also argued that Class Members worked in different job positions and had different managers, and that, as a result, Defendants contended there was variation to the circumstances that could allegedly cause the employees to be deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this variation in circumstances raised highly individualized questions of fact. *Id.* Further, Defendants contended Plaintiff would face significant hurdles to certification given that Class Members signed arbitration agreements with class action waivers as a condition of their employment, which if enforceable would convert a putative class action (with the potential for class-wide damages) into an individual dispute and action – effectively forcing Class Members to retain their own counsel and proceed on the basis of individual claims only. *Id.*

Although Plaintiff was prepared to litigate these claims, given the substantial amount offered in settlement, Class Counsel predicted that it was far from certain that Plaintiff would be able to recover a greater amount at trial, particularly after considering the increased litigation costs that would accrue. Orshansky Decl., ¶ 37. Thus, this factor supports preliminary approval of the Settlement.

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2) Risk, Expense, Complexity, and Duration of Further Litigation

Absent settlement, the Parties would have needed to conduct substantial additional discovery, such as the production of voluminous records and numerous depositions of experts and percipient witnesses, and prepare the case for class certification and trial. *Id.*, ¶ 35. The Parties would have had to depose a number of people such as managers, supervisors, human resource representatives, and employees in order to establish liability. *Id*. Discovery disputes would have no doubt arisen and liability likely would have entailed a battle of experts. *Id*. This settlement avoids the considerable time, attorneys' fees and costs, and party resources associated with conducting additional discovery, moving for class certification and potentially summary judgment or adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued litigation on the Court. *Id*. Thus, this factor supports preliminary approval of the Settlement.

3) Risk of Maintaining Class Action Status

Here, settlement was reached prior to class certification and the result was a successful outcome for the Class. *Id.*, ¶ 36. Yet, class certification was by no means a foregone conclusion. *Id.* For example, Class Members worked in different job positions and had different supervisors, and that, as a result, Defendants contended there was variation to the circumstances that could allegedly cause the employees to work off-the-clock and/or be deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this variation in circumstances raised highly individualized questions of fact. *Id.* Defendants further disputed Plaintiff's characterization of working conditions, liability, and damages, and possessed documentary and testimonial evidence rebutting Plaintiff's allegations. *Id.* If the Court either denied class certification or later decertified it, the Class would recover nothing and Class Members would be forced to retain their own counsel and proceed on the basis of individual claims only. Here, Class Members may avoid each of the risks described and receive substantial monetary benefits, which also weighs in favor of preliminary approval.

4) Amount Offered in Settlement Given Realistic Value of Claims

A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages to be fair and reasonable.

Wershba, supra, 91 Cal. App. 4th at 246, 250 (acknowledging that "Compromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were successfully litigated, this is no bar to a class settlement because the public interest may indeed by served by a voluntary settlement in which each side gives in the interest of avoiding litigation."). The proposed Settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face of disputed claims.

Plaintiff carefully estimated the settlement recovery as a reasonable percentage of possible damages recoverable at trial. Based on data received in negotiations, and as further detailed below, Plaintiff's damages analysis shows that the proposed settlement reflects an estimated 20.5% of the maximum realistic potential damages recoverable at trial. Orshansky Decl., ¶ 38. Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question, *see, Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 123 (2008), this case clearly meets the requirements that the class settlement is within the "ballpark" of reasonableness.

<u>Unpaid Minimum and Overtime Wages</u>

Plaintiff, along with other non-exempt employees, performed pre- and post- shift off the clock work to minimize the incidence of overtime. Orshansky Decl., ¶ 40. Plaintiff contended that all off-the-clock work is compensable time. *Id.* An employer must pay its employees no less than the minimum wage for all hours worked, *see* Labor Code section 1197, thus, Plaintiff sought to recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that amount under Labor Code section 1194.2. *Id.*

Class Counsel analyzed the documents and data produced by Defendants and, in conjunction with interviews of Plaintiff and Class Members, determined Defendants' degree of liability and amounts due in damages – specifically, the incidence and amount of purported off-the-clock activity. Orshansky Decl., ¶ 41. Notwithstanding the obvious evidentiary challenge of quantifying unrecorded off-the-clock hours, Plaintiff estimated that Defendants are liable for an aggregate of approximately 20 minutes of unpaid straight and overtime pay per workweek. Orshansky Decl., ¶ 42. Based on Defendants' records, at the average straight time hourly rate of $23.07 and the average overtime hourly rate of $34.61, such yields an estimated damages amount of $88,696.93. *Id.* Additionally, Plaintiff estimated a further $69,453 in unpaid overtime due to Defendants' failure to include all compensation, including but not limited to non-discretionary bonuses, in the regular rate of pay for the purpose of calculating the applicable overtime rate of pay. Thus, the estimated total of unpaid minimum, straight and unpaid overtime wages is $158,149.93, without discounting for risks associated with certification or merits. *Id.*

In opposition to certification, Defendants contended that Plaintiff's claim for off-the-clock work is not amenable to class treatment, because employees worked in a variety of departments with different requirements, and it would require an unmanageable series of mini-trials to determine how much time was spent without pay. Orshansky Decl., ¶ 43. Further, Defendants vigorously disagreed with Plaintiff's theories regarding how much off-the-clock work occurred in reality, and the credibility of that claimed time given Defendants' express written policies to the contrary. *Id.* The failure to track all hours poses evidentiary difficulties because it is hotly contested how much off-the-clock work actually occurred. *Id*. Although Class Counsel conducted multiple Class Member interviews, for Plaintiff to establish the quantity of specific disputed and unrecorded work activities – especially over multiple job titles, at differing pay rates – would have been costly, time-consuming, and daunting. *Id.*

Defendants further responded that any off-the-clock time is *de minimis*. Orshansky Decl., ¶ 44. Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), given that the California Supreme Court refused to allow the *de minimis* defense to insulate Starbucks from having to pay employees for small amounts of work regularly performed off-the-clock. Orshansky Decl., ¶ 44. What is not clear, however, is to what extent the *de minimis* defense would apply where the uncaptured hours were associated with an occasionally recurring activity. *See id.*

Finally, Defendants contended that any alleged bonuses at issue were discretionary, percentage-based, or otherwise not required to be included in the regular rate for purposes of calculating the overtime rate. Orshansky Decl., ¶ 45. Altogether, Defendants' bases for opposing Plaintiff's unpaid wages claim, both on the merits as well as certification, warranted a downward departure from the maximum possible exposure.

Meal and Rest Period Violations

Plaintiff asserted that there are compliance issues with respect to meal periods – some are late, missed, short, or interrupted. Orshansky Decl., ¶ 47. Moreover, notwithstanding Defendants' otherwise compliant policies, Plaintiff and Class Members were not always allowed to leave the premises during meal periods. *Id.* Further, Defendants failed to provide Plaintiff and Class Members with second 30-minute meal periods for shifts lasting longer than 10 hours. *Id.*

On February 25, 2021, in *Donohue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021), the California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1) employers are not permitted to round time records when determining if employees are entitled to meal premium pay, and (2) it is the employer's burden to show that compliant meal periods were provided to employees if the time records show otherwise. Using this opportunity to echo its long stance that California liberally construes the Labor Code and wage orders to favor protection of employees, the Court emphasized that meal periods are part of the remedial worker protection framework to protect the health and safety of employees. Pursuant to Wage Order 4, section 7(A)(3), an "employer shall keep accurate information with respect to each employee including the following . . . [t]ime records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded." Under California law, employers, not employees, have the burden to record and maintain accurate time records. The California Supreme Court in *Donohue* also reiterated that it is the employer's duty to maintain accurate time records for meal periods. *See* 11 Cal. 5th at 81.

Plaintiff alleged that Defendants violated Labor Code sections 226.7, 512, and applicable Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and missed meal periods. Orshansky Decl., ¶ 49. Defendants contended that they had practices, policies, and procedures to provide meal and rest breaks every workday to their employees that fully complied with the law. *Id*. Defendants vehemently argued that they complied with the requirements articulated by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). Orshansky Decl., ¶ 49. Specifically, Defendants maintained that they "provide" employees with a reasonable opportunity to take timely meal periods of at least 30 minutes, relieves employees of all duties during meal periods, and relinquishes control over employees' activities, including the ability to leave the premises during meal periods. *Id.* Thus, Defendants argued, the failure of an employee to take a full meal period cannot be a fault of company policy, as they provide more than the minimum time prescribed by law for meal periods. *Id.* Defendants also pointed to evidence that they did, in fact, pay meal period premiums to employees in various instances, arguing that this demonstrated compliance with the law. *Id*.

Like most employers facing meal period litigation, Defendants also argued that employees were apprised of their right to take meal periods and provided compliant meal periods, but some may voluntarily have waived them. *Id*., ¶ 50. Defendants contended that the issue of voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding class certification. *Id.*; *see also Duran v. U.S. Bank National Association*, 59 Cal. 4th 1, 25 (2014) (holding that the defendant must be provided an opportunity to litigate affirmative defenses, even when they turn on individual questions).

Based upon the analysis of Class Members' time and payroll records and, in conjunction with interviews of Plaintiff and Class Members, Plaintiff determined that 14% of eligible shifts were the subject of unique violations for missed, short, or late meal periods, and calculated the potential exposure of this claim to be $193,822.30. Orshansky Decl., ¶ 51.

Plaintiff also alleged that Class Members did not receive authorized rest breaks as required whereby employers "relinquish control over how employees spend their time and relieve employees of all duties." Orshansky Decl., ¶ 52; see also *Augustus v. ABM Security Service, Inc.*, 2 Cal. 5th 257, 260 (2016). Due to Defendants' work demands and inadequate staffing, Plaintiff alleged she and Class Members did not receive timely and compliant rest breaks, nor did Defendants relinquish control over how employees spent their 10-minute rest periods. Orshansky Decl., ¶ 52. Plaintiff did not receive rest break premium payments for non-compliant rest breaks, nor is there evidence that Defendants made rest break premium payments to Class Members. *Id.* Thus, Plaintiff alleged that Defendants did not provide premium pay for each non-compliant rest break as required under Labor Code section 226.7. *Id.*

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Here again, Defendants disputed liability and damages. Defendants maintained that they authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction of four hours worked as required by Labor Code section 226.7. Orshansky Decl., ¶ 53. Defendants explained that Class Members had ample opportunity to take, and did take, regular rest breaks. *Id.* As with meal periods, Defendants argued that any Class Member who failed to take a rest break, or took a short or late rest break, did so voluntarily and that all applicable rest breaks were still authorized and provided. *Id.* Defendants also attempted to distinguish *Augustus, supra*, which involved security guards who were required to monitor a pager, phone, or other device as having an added constraint that is not present in this case. *Id.*

Class Counsel applied a 20% violation rate (*i.e.*, one shift per workweek with at least one rest break not provided) based on the narratives of Plaintiff and other Class Members for a maximum exposure of $292,989. Orshansky Decl., ¶ 54. For settlement purposes, and to account for the difficulties of certifying and proving unrecorded rest break violations, a downward departure from that maximum exposure was and is warranted. *Id.*

Unreimbursed Expenses

Plaintiff alleged a cause of action under Labor Code section 2802(a), which states that an employer must reimburse employees for all necessary expenditures that employees incur in discharging their duties. Orshansky Decl., ¶ 55. Here, Plaintiff and Class Members were required to use their personal cell phones to communicate with supervisors and coworkers for reasons related to work, yet Defendants failed to reimburse for these necessary business expenses. *Id.* Defendants contended that they have a policy and practice of reimbursing employees for necessary business-related expenses. *Id.*, ¶ 56. Defendants also contended that, with respect to the alleged expenses for which Plaintiff and other Class Members never requested reimbursement from Defendants, Defendants did not know and had no reason to know that the alleged business-related expenses were incurred. *Id.* Moreover, to the extent it occurred, Defendants asserted that this claim is not suitable for class treatment as it would require individualized determinations as to whether each employee used a personal cell phone for work-related purposes and, if so, how much of that use was a reasonable percentage of his or her individual monthly phone bill. *Id.* Defendants also argued that the California Labor Code only requires reimbursement of "necessary" expenses – as opposed to any expense that is incurred in the course of performing work – and argued that distinguishing a necessary expense from an unnecessary one would require individualized inquiry. *Id.*, ¶ 57; *see* also Labor Code § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007). Furthermore, whether an expense was necessary would depend in part on the reasonableness of the employee's choice and would thus have to be established by way of extensive individual factual inquiry and/or statistical evidence. *Cochran v. Schwan's Home Services, Inc.*, 228 Cal. App. 4th 1137 (2014).

For the foregoing reasons, and taking into account the wide variety of telephone plans, providers and costs which creates evidentiary complexities on an individual basis, let alone class-wide, Plaintiff assigned de minimis value to this claim. Orshansky Decl., ¶ 58.

Wage Statement Violations

Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendants' failure to provide accurate itemized wage statements. Orshansky Decl., ¶ 59. Failure to comply with the statute entitles employees to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000). *See* Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action because if Defendants did not provide minimum and overtime wages for all hours worked, owe premiums for non-compliant meal and rest breaks, unreimbursed expenses, and so forth, then the wage statements were inevitably inaccurate.

Defendants contended, however, that Labor Code section 226(e) penalties are not automatic. Orshansky Decl., ¶ 60. Rather, the employee must show that Defendants' noncompliance was "knowing and intentional." *Id.* Defendants suggested that any noncompliance was not knowing and intentional. *Id.*

Because the damages for this cause of action are penalties, the statute of limitations is only one year prior to the filing of the original complaint. *See* Code Civ. Proc. § 340. The Parties discussed these issues and, based on the $50 initial violation plus the $100 per pay period subsequent violation rates, Plaintiff estimates the total maximum wage statement exposure to be $254,350. Orshansky Decl., ¶ 61. However, for settlement purposes, and in consideration of the risks of a loss on the merits of the underlying derivative claim(s) and/or good faith defense,[3] a downward departure from that maximum exposure was and is warranted. *See id*.

Waiting Time Violations

Plaintiff further asserts a cause of action against Defendants for failure to timely pay all wages due employees at separation. Orshansky Decl., ¶ 62; *see also* Lab. Code §§ 201-203. As with other claims, Defendants vigorously disagreed that they engaged in any conduct giving rise to liability or entitlement to recovery of penalties. Orshansky Decl., ¶ 62.

Defendants argued that waiting time penalties are not appropriate because they attempted to pay employees all final wages owed in good faith upon their separation, thereby precluding a finding of willfulness necessary to obtain waiting time penalties. Orshansky Decl., ¶ 63. Based on the count of former employees, Class Counsel appraised the maximum value of the waiting-time claim as $658,879.20; however, to account for the uncertainty of proving the underlying claims, Class Counsel made a realistic allowance with the agreed-upon settlement dollar figure. Orshansky Decl., ¶ 64.

Derivative PAGA Penalties

The success of Plaintiff's PAGA claim is wholly dependent upon the success of her underlying claims occurring within the one-year statute of limitations applicable to the PAGA. Orshansky Decl., ¶ 65. Defendants maintained and continue to maintain they had legally compliant employment policies and practices throughout the statutory period. Orshansky Decl., ¶ 66. Defendants denied and continue to deny that they ever violated any provision of the

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[3] *See, e.g.*, *Naranjo v. Spectrum Security Services, Inc.*, 15 Cal. 5th 93 (2022). In 2023, the Court of Appeals, re-visiting *Naranjo* on remand, substantiated such good faith arguments because penalties for missed meal rest breaks were not clearly established law until the May 2022 California Supreme Court decision. *See Naranjo v. Spectrum Security Services, Inc*., 88 Cal. App. 5th 937 (2023). On May 6, 2024, the California Supreme Court, on review, clarified that an employer is not liable for statutory penalties for inaccurate wage statements when it had a good faith and reasonable belief that the issued statements were accurate. *Naranjo v. Spectrum Security Services, Inc.*, 15 Cal. 5th 1056 (2024).

California Labor Code and argued that, even assuming such violations occurred, Defendants will not be treated as having engaged in subsequent violations giving rise to heightened penalties. *Id.* In other words, Defendants argued that heightened civil penalties for subsequent violations would not be assessed unless it could be shown that Defendants had notice that they were violating the laws, *e.g.*, they had been cited by a labor agency or adjudged by a court to have done so. *Id.*; *see also, e.g.*, *Amaral v. Cintas Corp.*, 163 Cal. 4th 1157, 1209 (2008). Thus, Defendants contended that, at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower civil penalty associated with initial violations would apply. *Id.*

Moreover, Defendants asserted that, before a PAGA claim could be tried, under existing law, the court of law would have to be satisfied that the adjudication of the PAGA claim, based on a theory of uniform wage and hour practices relating to a large group of aggrieved employees, is sufficiently "manageable" so as not to interfere with Defendants' right to due process. Orshansky Decl., ¶ 67. Defendants reiterated how employees' job duties and work hours varied. *Id.*, ¶ 68. Defendants contended that there was variation as to the circumstances that could allegedly cause employees to work off-the-clock or to be deprived of the opportunity to take legally compliant, duty-free meal and/or rest periods. *Id.* Defendants further opined that these issues presented challenges not only to liability but also challenges to Plaintiff's ability to show that a PAGA claim could be efficiently and manageably adjudicated without abridging Defendants' due process rights. *Id.*

Finally, Defendants maintained that the Court has discretion to reduce any award of PAGA penalties where it views them as duplicative. Orshansky Decl., ¶ 69; *see also* Labor Code § 2699(e)(2) (the Court may "award a lesser amount than the maximum civil penalty amount [authorized by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory").

Although, strictly speaking, class certification requirements are not required to be satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication and valuation of a PAGA claim is uncertain. Orshansky Decl., ¶ 70. Thus, Class Counsel applied discounts for the risks in establishing manageability and possible bifurcation of discovery and/or trial, the risks regarding success on the merits and establishing liability, and the risks with proving the extent of penalties that are warranted and possible discretionary reduction of penalties by the Court. *Id.* As a result, Plaintiff used the "initial" $100 per pay period violation (as opposed to the $200 subsequent per violation rate) to calculate a realistic estimate of $310,000, in potential PAGA penalty exposure – of which, by statute, only 25%, or $77,500 – would be recoverable by aggrieved employees. *Id.*

Summary

Using the estimated figures for each of the claims described above, Plaintiff predicted that approximately $1,635,690.43[4] would be the maximum possible recovery in damages available to Class Members. Without any discount for risks for certification or liability, the proposed recovery to the Class of $335,000 thus represents 20.5% of the realistic possible exposure to Defendants (and recovery for the Class), while avoiding the further expense and serious risk of proceeding toward class certification and trial. Orshansky Decl., ¶ 71. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotations omitted); *see also, e.g., Altamirano v. Shaw Industries, Inc.*, 2015 WL 4512372 (N.D. Cal. 2015), at *9 (preliminarily approving wage and hour class action settlement stating, "[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval given the merits of Plaintiff's claims"). Taking into account the risk of non-certification, failure to prevail on the merits, and the Court's power to reduce the civil penalties, the proposed settlement falls within the realm of being fair, reasonable, and adequate.

The foregoing factors each indicate that the interests of Class Members are best served by a settlement of this action in the manner and upon the terms set forth in the Settlement

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[4] *I.e.*, $158,149.93 (unpaid wage exposure) + $193,822.30 (meal break exposure) + $292,989.00 (rest break exposure) + $254,350.00 (wage statement exposure) + $658,879.20 (waiting-time penalties exposure) + $77,500.00 (PAGA penalty exposure) = $1,635,690.43 (total potential exposure).

Agreement. Given the relatively small size of the Class as compared to, for example, larger nationwide corporate, consumer, or securities class actions, this Settlement confers a substantial benefit of $335,000. Moreover, each Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement, to pursue their own claims. Finally, settlement awards for each Settlement Class Member will be tailored to the extent to which he or she was affected by Defendants' alleged wage-and-hour violations based on his or her eligible workweeks. Orshansky Decl., ¶ 10. After analyzing the claims in this matter, Plaintiff and Class Counsel have concluded that the value of this Settlement is fair, reasonable, and adequate.

VII. THE PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS

This Court should order distribution of the proposed Notice of Pendency of Class and Representative Action Settlement (attached to the Settlement Agreement) to the Class by first class mail, postage prepaid, using the last known mailing address information provided by Defendants. This manner of giving notice is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified though reasonable effort." *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 173 (1974). Here, Plaintiff proposes (as agreed upon by the Parties) that the settlement be administered by CPT Group, Inc., an experienced class action settlement administrator. *See* Settlement Agreement, ¶ 33. Class Members' addresses will be ascertainable through Defendants' personnel and payroll records, which Defendants will provide to the Settlement Administrator within 10 calendar days after preliminary approval of the settlement. *Id.*, ¶ 53(b). Under the Settlement, the Settlement Administrator will run all addresses through the National Change of Address database and, to the extent that any notices are returned, will conduct further skip traces to obtain current address information. *Id.*, ¶¶ 53(d)-(e).

The content of the proposed notice satisfies California Rule of Court 3.766(d) because it advises Settlement Class Members of the nature of the claims, basic contentions and denials of the Parties, the key terms of the settlement, the uniform 45-day deadline to submit a workweek dispute, request for exclusion/opt-out, or object to the settlement and the procedure by which to do so, and explains the recovery formula and credited number of workweeks for each Class Member. The proposed notice will also notify Class Members of the final approval hearing date, provide the contact information for Class Counsel, and advise Class Members that they may enter an appearance through counsel if they wish. This manner of giving notice satisfies California Rule of Court 3.766(e) as the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974). Thus, the proposed method of notice is reasonably calculated to reach Class Members by the best means practicable and should be approved.

VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING

Finally, this Court should set a hearing for final approval of the Settlement on a date appropriately scheduled to follow the deadline by which Settlement Class Members must submit claims, opt out, or object to the Settlement. *See* California Rule of Court 3.769.

IX. CONCLUSION

Based upon the foregoing, and because the proposed Settlement is fair, reasonable, and advantageous to the Class Members, Plaintiff respectfully requests that the Court enter an Order:

1. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;
2. Preliminarily approving the form and content of the Notice of Pendency of Class and Representative Action Settlement, attached to the Settlement Agreement;
3. Provisionally certifying the Settlement Agreement's proposed Class comprised of the Class Members identified during the Class Period under Cal. Civ. Code section 382 for settlement purposes only;
4. Approving and appointing Plaintiff Tessa M. Jennings as the Class Representative;
5. Approving and appointing the law firms CounselOne, PC and W Employment Law, APC as Class Counsel;
6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;
7. Setting a date for the Final Approval Hearing; and
8. Any further relief the Court deems just and proper.

Respectfully submitted,

DATED: March 20, 2025

COUNSELONE, PC
ANTHONY J. ORSHANSKY

By: ______________________
ANTHONY J. ORSHANSKY
Attorneys for Plaintiff Tessa M. Jennings, on behalf of herself and others similarly situated