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9 JUSTIN LOPEZ, and all others similarly situated

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

11 **FOR THE COUNTY OF LOS ANGELES**

12 **(UNLIMITED JURISDICTION)**

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

17 *Plaintiff(s),*

18 vs.

19 EDWARD WALTER SUNSERI, a natural
20 person doing business as Sunseri’s Bar and
21 Beverage Catering; MICHAEL SERENO, a
natural person; and DOES 1–50, inclusive,

22 *Defendant(s).*
23

Case No. 22STCV37939

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

Hearing Date: October 17, 2024

Hearing Time: 2:00 p.m.

Hearing Dept.: Dept. 14, The Honorable
Kenneth R. Freeman

Action filed: December 05, 2022

Trial Date: Not Set



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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 Justin Lopez (“Plaintiff”) submits this memorandum of points and authorities in
5 support of his unopposed motion for preliminary approval of the Class Action and PAGA
6 Settlement Agreement and Class Notice and Addendum to the Class Action and PAGA
7 Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
8 Settlement Amount (“GSA”) of \$375,000.00 in compromise of all disputed claims on behalf of
9 hourly, non-exempt employees during the period of December 6, 2018, through December 31,
10 2023. Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally
11 certify the below-defined Class for settlement purposes only under Code of Civil Procedure §
12 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class
13 Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines of
14 United Employees Law Group as Class Counsel; (5) approve the proposed notice procedures and
15 related forms; and (6) schedule a final approval hearing.

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

26 **II. BACKGROUND**

27 Defendants are event caterers. DS, ¶ 12. Defendants employed Plaintiff in California as a
28 bartender from about December 31, 2009, until June 2, 2022. *Id.*

A. The Claims and Procedural History

On November 23, 2022, Plaintiff notified Defendants and the California Labor and

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



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1 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
2 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
3 Code violations committed by Defendants. DS, ¶ 13, Ex. 2.

4 On December 05, 2022, Plaintiff filed a Class Action Complaint in the Los Angeles
5 County Superior Court, Case No. 22STCV37939, against Defendants on behalf of himself and
6 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All
7 Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to
8 Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab.
9 Code §§226.7, 512 and 1198); (4) Wage Statement Penalties (Lab. Code § 226); (5) Waiting Time
10 Penalties (Lab. Code §§ 201-203); and (6) Unfair Competition (Bus. & Prof. Code §§ 17200, *et*
11 *seq.*). DS, ¶ 14, Ex. 3. On February 10, 2023, Plaintiff filed his First Amended Complaint adding
12 a claim under PAGA. DS, ¶ 14, Ex. 4. On April 10, 2023, Defendants filed an answer to Plaintiff’s
13 First Amended Complaint. DS, ¶ 14, Ex. 5. Defendants deny all of Plaintiff’s allegations and
14 strongly contend that their wage and hour policies, practices and procedures are fully compliant
15 with all applicable laws. DS, ¶14.

16 **B. Sampling**

17 On April 12, 2023, Plaintiff requested that Defendants informally disclose documents and
18 data to enable Plaintiff to prepare for settlement discussions, including the number of putative
19 class members and aggrieved employees, the number of paychecks and workweeks for the various
20 limitations periods applicable to Plaintiff’s claims. DS, ¶15. Plaintiff also requested a reasonable,
21 randomly selected sample of Defendants’ time, payroll, and related personnel records. *Id.* Finally,
22 Plaintiff requested Defendants’ policies applicable to the claims at hand and asked Defendants
23 identify any and all comparable claims against them.

24 The Parties thereafter engaged in an informal, voluntary exchange of information in the
25 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
26 Plaintiff’s entire personnel file. DS, ¶16.

27 The Defendants disclosed that there have not been any comparable claims against them.
28 DS, ¶21.

Defendants contend that they employed 209 putative class members during the period of
January 12, 2018, to December 30, 2022. Defendants produced the records of 15.27% of the
putative class members for the period of January 12, 2018, to December 30, 2022. There were



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1 records for 31 employees in the sample. Plaintiff chose the sample. The sample was randomly
2 selected. The sample consisted of payroll sheets, event sheets, time sheets, scheduling text
3 messages, financial records, and related records. DS, ¶17.

4 Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Plaintiff also
5 employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to
6 determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004)
7 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative
8 margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin
9 of error of 43.3 percent was unacceptable. Using a margin of error of 32%, a confidence level of
10 95%, and a population size of 209, the Raosoft Sample Size Calculator recommended a sample
11 of 10. DS, ¶18, **Exhibit 6.** (Raosoft Sample Size Calculator results print-out). Thus, the sample
population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

12 **C. Mediation**

13 On July 28, 2023, following much of the foregoing informal discovery and exchange of
14 information, the Parties participated in a mediation session presided over by Mediator Monique
15 Ngo-Bonnici, an experienced class action mediator. During the mediation, the Parties had a full
16 day of productive negotiations and reached agreement on a class-wide settlement after the
17 mediation session. During the mediation sessions, each side, represented by his respective
18 counsel, recognized the risk of an adverse result in the Action. Though the Action did not settle
19 at the mediation session, ultimately, the Parties agreed to settle the Action and all other matters
covered by this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶19.

20 **D. Defendants' Financial Condition**

21 At the mediation, it became clear that Defendants had insufficient resources to cover the
22 full extent of liability. DS ¶20. As part of the settlement negotiations, Defendants disclosed their
23 tax returns, bank statements, profit and loss statements, balance sheets, and related information



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

1 for recent years. *Id.* The information provided was sufficient to demonstrate the financial
2 condition of the Defendants and that they will unlikely be able to afford payment of a larger
3 amount than the Settlement amount. Based on such records, Plaintiff, on his own behalf and on
4 behalf of the Class Members, has agreed to settle the lawsuit on the terms set forth in the
Settlement. *Id.*

5 **III. OVERVIEW OF THE SETTLEMENT**

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

7 The Settlement defines the Settlement Class as all persons employed by Defendants in
8 California and classified as an hourly, non-exempt employee who worked for Defendants during
9 the Class Period. Settlement, ¶1.9. The Class Period is December 06, 2018, through December
10 31, 2023. Settlement, ¶1.12. The “Aggrieved Employees” are all persons employed by Defendants
11 in California and classified as hourly, nonexempt who worked for Defendants during the PAGA
12 Period. Settlement, ¶1.4. The “PAGA Period” begins November 23, 2021 and ends December 31,
2023. Settlement, ¶1.32.

13 **B. Monetary Terms**

14 Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below,
15 Defendants promise to pay \$375,000.00 and no more as the Gross Settlement Amount and to
16 separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual
17 Class Payments. Defendants have no obligation to pay the Gross Settlement Amount (or any
18 payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator
19 will disburse the entire Gross Settlement Amount without asking or requiring Participating Class
20 Members or Aggrieved Employees to submit any claim as a condition of payment. None of the
Gross Settlement Amount will revert to Defendants. Settlement, ¶ 3.1.

21 Payments from the Gross Settlement Amount. The Administrator will make and deduct
22 the following payments from the Gross Settlement Amount, in the amounts specified by the Court
23 in the Final Approval. Settlement, ¶3.2.

24 To Plaintiff: Class Representative Service Payment to the Class Representative of not
25 more than \$15,000.00 each (in addition to any Individual Class Payments and any Individual
26 PAGA Payments the Class Representative is entitled to receive as a Participating Class Member
27 and Aggrieved Employee). Defendants will not oppose Plaintiff’s request for a Class
28 Representative Service Payment that does not exceed this amount. As part of the motion for Class
Counsel Fees Payment and Class Litigation Expenses Payment, Plaintiff will seek Court approval



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1 for any Class Representative Service Payment no later than 16 court days prior to the Final
2 Approval Hearing. If the Court approves a Class Representative Service Payment less than the
3 amount requested, the Administrator will retain the remainder in the Net Settlement Amount. The
4 Administrator will pay the Class Representative Service Payment using IRS Form 1099. Plaintiff
5 assumes full responsibility and liability for employee taxes owed on the Class Representative
6 Service Payment. Settlement, ¶ 3.2.1.

7 To Class Counsel: A Class Counsel Fees Payment of not more than 33.33%, which is
8 currently estimated to be \$125,000.00 and a Class Counsel Litigation Expenses Payment of not
9 more than \$16,000.00. Defendants will not oppose requests for these payments provided that do
10 not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel
11 Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the
12 Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class
13 Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will
14 allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to
15 Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class
16 Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will
17 pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more
18 IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the
19 Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds
20 Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any
21 division or sharing of any of these Payments. Settlement, ¶ 3.2.2

22 To the Administrator: An Administrator Expenses Payment not to exceed \$13,000.00
23 except for a showing of good cause and as approved by the Court. To the extent the
24 Administration Expenses are less, or the Court approves payment less than \$13,000.00, the
25 Administrator will retain the remainder in the Net Settlement Amount. Settlement, ¶ 3.2.3.

26 To Each Participating Class Member: An Individual Class Payment calculated by (a)
27 dividing the Net Settlement Amount by the total number of Pay Periods worked by all
28 Participating Class Members and Aggrieved Employees during the Class Period and (b)
multiplying the result by each Participating Class Member's Pay Periods. Settlement, ¶ 3.2.4.

Tax Allocation of Individual Class Payments. 33.33% of each Participating Class
Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage



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1 Portion”). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2
2 Form. The 66.67% of each Participating Class Member’s Individual Class Payment will be
3 allocated to settlement of claims for interest and penalties (the “Non-Wage Portion”). The Non-
4 Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms.
5 Participating Class Members assume full responsibility and liability for any employee taxes owed
6 on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

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

11 To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$4,000.00 to
12 be paid from the Gross Settlement Amount, with 75% (\$3,000.00) allocated to the LWDA PAGA
13 Payment and 25% (\$1,000.00) allocated to the Individual PAGA Payments. Settlement, ¶ 3.2.5.

14 The Administrator will calculate each Individual PAGA Payment by (a) dividing the
15 amount of the Aggrieved Employees’ 25% share of PAGA Penalties \$1,000.00 by the total
16 number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
17 Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods.
18 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
19 Individual PAGA Payment. Settlement, ¶ 3.2.5.1.

20 If the Court approves PAGA Penalties of less than the amount requested, the
21 Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will
22 report the Individual PAGA Payments on IRS 1099 Forms. Settlement, ¶ 3.2.5.2.

23 **C. Timing of Payments**

24 Funding of Gross Settlement Amount. Defendants shall fully fund the Gross Settlement
25 Amount, and also fund the amounts necessary to fully pay Defendants’ share of payroll taxes by
26 transmitting the funds to the Administrator no later than 14 days after the Effective Date.
27 Settlement, ¶ 4.3.

28 Payments from the Gross Settlement Amount. Within 14 days after Defendants fund 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



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1 the Class Representative Service Payment. Disbursement of the Class Counsel Fees Payment, the
2 Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall
3 not precede disbursement of Individual Class Payments and Individual PAGA Payments.
4 Settlement, ¶ 4.4.

5 **D. Calculation of Settlement Shares**

6 An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by
7 the total number of Pay Periods worked by all Participating Class Members and Aggrieved
8 Employees during the Class Period and (b) multiplying the result by each Participating Class
9 Member's Pay Periods. Settlement, ¶ 3.2.4.

10 Individual PAGA Payment means the Aggrieved Employee's pro rata share of 25% of the
11 PAGA Penalties calculated according to the number of Pay Periods worked during the PAGA
12 Period. Settlement, ¶ 1.24.

13 **E. Apportionment of Settlement Shares**

14 Tax Allocation of Individual Class Payments. 33.33% of each Participating Class
15 Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage
16 Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2
17 Form. The 66.67% of each Participating Class Member's Individual Class Payment will be
18 allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-
19 Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms.
20 Participating Class Members assume full responsibility and liability for any employee taxes owed
21 on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

22 **F. The Releases**

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

27 Plaintiff's Release. Plaintiff and his respective former and present spouses,
28 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
and discharge Released Parties from all claims, transactions, or occurrences that occurred during
the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims
that were, or reasonably could have been, alleged based on facts contained in the Operative



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1 Complaint, Plaintiff's PAGA Notice, or ascertained during the Action and released under 6.2,
2 below. "Released Class Claims" specifically means any and all claims, causes of action, damages,
3 wages, benefits, expenses, penalties, debts, liabilities, demands, obligations, attorneys' fees,
4 costs, and any other form of relief or remedy in law, equity, or whatever kind of nature, arising
5 from the claims pled in the Action and any claims based on facts alleged in the operative
6 complaint, including, all claims for unpaid overtime, meal period violations, rest break violations,
7 unpaid minimum wage, failure to pay all wages during and at termination of employment, failure
8 to provide accurate wage statements, failure to maintain accurate records, failure to reimburse
9 necessary business expenses, and unlawful business practices under the California Labor Code
10 and/or the California Business and Professions Code, including all claims for restitution or
11 equitable relief, liquidated damages, penalties of any nature whatsoever, attorneys' fees and costs,
12 asserted or that might have been asserted by any Class Member against the Released Parties based
13 on the facts or claims alleged in the Action during the Class Period. "Released Class Claims" also
14 includes claims meeting the above definition(s) under any and all applicable statutes, including
15 without limitation California Labor Code §§ 201, 202, 203, 204, 210, 221, 226, 226.3, 226.7, 510,
16 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, and 1198; the California Unfair Competition
17 Act, and in particular, California Business and Professions Code §§ 17200 et seq ("Plaintiff's
18 Release.") Plaintiff's Release does not extend to any claims or actions to enforce this Agreement,
19 or to any claims for vested benefits, unemployment benefits, disability benefits, social security
20 benefits, workers' compensation benefits that arose at any time, or based on occurrences outside
21 the Class Period. Plaintiff acknowledges that Plaintiff may discover facts or law different from,
22 or in addition to, the facts or law that Plaintiff now know or believe to be true but agrees,
23 nonetheless, that Plaintiff's Release shall be and remain effective in all respects, notwithstanding
24 such different or additional facts or Plaintiff's discovery of them.

25 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of
26 Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits,
27 if any, of section 1542 of the California Civil Code, which reads:

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



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1 or Released Party.

2 Release by Participating Class Members Who Are Not Aggrieved Employees: All
3 Participating Class Members, on behalf of himself and their respective former and present
4 representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released
5 Parties from all claims stated in the Operative Complaint and those based solely upon the facts
6 alleged in the Operative Complaint. Except as set forth in Section 6.3 of this Agreement,
7 Participating Class Members do not release any other claims, including claims for vested benefits,
8 wrongful termination, violation of the Fair Employment and Housing Act, unemployment
9 insurance, disability, social security, workers' compensation, or claims based on facts occurring
outside the Class Period.

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

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

15 No later than three (3) business days after receipt of the Class Data, the Administrator
16 shall notify Class Counsel that the list has been received and state the number of Class Members,
PAGA Members, Pay Periods in the Class Data.

17 Using best efforts to perform as soon as possible, and in no event later than 14 days after
18 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
19 Data, via first-class United States Postal Service ("USPS") mail, the Notice Packet with Spanish
20 translation, if applicable substantially in the forms attached to this Agreement as Exhibits A, B,
21 C, and D. The first page of the Class Notice shall prominently estimate the dollar amounts of any
22 Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and
23 the number of Class Pay Periods and PAGA Pay Periods (if applicable) used to calculate these
24 amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses
using the National Change of Address database.

25 Not later than 3 business days after the Administrator's receipt of any Notice Packet
26 returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet using any
27 forwarding address provided by the USPS. If the USPS does not provide a forwarding address,
28 the Administrator shall conduct a Class Member Address Search, and re-mail the Notice Packet



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1 to the most current address obtained. The Administrator has no obligation to make further
2 attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by
3 the USPS a second time. Settlement, ¶ 8.4.

4 **1. Disputes**

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

10 If the Administrator, Defendants or Class Counsel is contacted by or otherwise discovers
11 any persons who believe they should have been included in the Class Data and should have
12 received Notice Packet, the Parties will expeditiously meet and confer in person or by telephone,
13 and in good faith. in an effort to agree on whether to include them as Class Members. If the Parties
14 agree, such persons will be Class Members entitled to the same rights as other Class Members,
15 and the Administrator will send, via email or overnight delivery, a Class Notice requiring them
16 to exercise options under this Agreement not later than 14 days after receipt of Class Notice, or
17 the deadline dates in the Class Notice, which ever are later. Settlement, ¶ 8.4.5.

18 Each Class Member shall have 60 days after the Administrator mails the Notice Packet
19 (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge
20 the number of Class Pay Periods and PAGA Pay Periods (if any) allocated to the Class Member
21 in the Class Notice. This is also known as a dispute. Pay Period Dispute form, attached as Exhibit
22 C, may be used for this purpose but is not required. The Class Member may challenge the
23 allocation by communicating with the Administrator via fax, email or mail. The Administrator
24 must encourage the challenging Class Member to submit supporting documentation. In the
25 absence of any contrary documentation, the Administrator is entitled to presume that the Pay
26 Periods contained in the Class Notice are correct so long as they are consistent with the Class
27 Data. The Administrator's determination of each Class Member's allocation of Pay Periods shall
28 be final and not appealable or otherwise susceptible to challenge. The Administrator shall
promptly provide copies of all challenges to calculation of Pay Periods and/or Pay Periods to
Defense Counsel and Class Counsel and the Administrator's determination of the challenges.
Settlement, ¶ 8.6.



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2. Opting Out

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

The Administrator may not reject a Request for Exclusion as invalid because it fails to contain all the information specified in the Class Notice. The Administrator shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the person as a Class Member and the Class Member's desire to be excluded. The Administrator's determination shall be final and not appealable or otherwise susceptible to challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion, the Administrator may demand additional proof of the Class Member's identity. The Administrator's determination of authenticity shall be final and not appealable or otherwise susceptible to challenge. Settlement, ¶ 8.5.2.

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

Every Class Member who submits a valid and timely Request for Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment or have the right to object to the class action components of the Settlement. Aggrieved Employees are eligible for an Individual PAGA Payment. Settlement, ¶ 8.5.4.

3. Objecting

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



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1 Payment and/or Class Representative Service Payment. Settlement, ¶ 8.7.1.

2 Participating Class Members may send written objections to the Administrator, by fax,
3 email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
4 attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
5 Participating Class Member who elects to send a written objection to the Administrator must do
6 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
7 14 days for Class Members whose Notice Packet was re-mailed). The Objection form attached as
8 Exhibit D may be used for this purpose but is not required. Settlement, ¶ 8.7.2.

9 Non-Participating Class Members have no right to object to any of the class action
10 components of the Settlement. Settlement, ¶ 8.7.3.

11 **H. Uncashed Checks**

12 The Administrator will issue checks for the Individual Class Payments and/or Individual
13 PAGA Payments and send them to the Class Members via First Class U.S. Mail, postage prepaid.
14 The face of each check shall prominently state the date (not less than 180 days after the date of
15 mailing) when the check will be voided. The Administrator will cancel all checks not cashed by
16 the void date. The Administrator will send checks for Individual Settlement Payments to all
17 Participating Class Members (including those for whom Notice Packet was returned undelivered).
18 The Administrator will send checks for Individual PAGA Payments to all Aggrieved Employees
19 including Non-Participating Class Members who qualify as Aggrieved Employees (including
20 those for whom Notice Packet was returned undelivered). The Administrator may send
21 Participating Class Members a single check combining the Individual Class Payment and the
22 Individual PAGA Payment. Before mailing any checks, the Administrator must update the
23 recipients' mailing addresses using the National Change of Address Database. Settlement, ¶ 4.4.1.

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

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



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Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

A. The Settlement Class Is Objectively Ascertainable

A class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the settlement process. DS, ¶23. 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. Defendants estimate that there are approximately 209 Class Members. DS, ¶24. 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, ¶24. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

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

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

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



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1 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
2 the claims of the Class Members all stem from the same sources. DS, ¶25.

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

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

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



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1 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical
2 of the Class. DS, ¶26.

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

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

9 First, Class Counsel have supplied the Court with declarations to show that they are
10 adequate to represent the Settlement Class and that they have significant experience in
11 employment litigation generally, and wage and hour and employment-related class action
12 litigation specifically. See DS, ¶¶ 29-36; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
13 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

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

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

28 Plaintiff further contends that a class action is also superior to other means of adjudicating
the issues in this action. The predominance of common legal and factual questions shows that this
Court could fairly adjudicate the claims of Class Members through a single class action. In view
of the *theoretical* alternatives that proposed class members could potentially utilize—
representative PAGA action (where there is less relief available), individual civil lawsuits or wage



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1 claims through the Division of Labor Standards Enforcement (where there would be relatively
2 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
3 superior to all of them. Thus, this consideration supports conditional class action treatment for
4 purposes of this Settlement only. DS, ¶37.

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

7 **A. Legal Standard**

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

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

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

24 The class settlement here satisfies all of these factors. DS, ¶38. The Settlement resulted
25 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
26 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
27 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.*

28 On December 05, 2022, Plaintiff commenced this Action by filing a Complaint alleging
causes of action against Defendants for failure to pay wages, failure to provide meal periods,
failure to authorize and permit rest periods, failure to issue proper wage statements, failure to
timely pay wages, and related claims. On February 10, 2023, Plaintiff filed a First Amended
Complaint alleging causes of action against Defendants for failure to pay wages, failure to provide



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1 meal periods, failure to authorize and permit rest periods, failure to issue proper wage statements,
2 failure to timely pay wages, and for civil penalties under the California Private Attorneys' General
3 Act ("PAGA"). The First Amended Complaint is the operative complaint in the Action (the
4 "Operative Complaint.") Defendants deny the allegations in the Operative Complaint, deny any
5 failure to comply with the laws identified in the Operative Complaint and deny any and all liability
6 for the causes of action alleged. Settlement ¶2.1.

7 Pursuant to Labor Code section 2699.3, subd.(a), Plaintiff gave timely written notice to
8 Defendants and the LWDA by sending the PAGA Notice. Settlement ¶2.2. DS, ¶40. Plaintiff
9 prepared "damages" estimates in advance of the mediation. DS, ¶ 40, Ex. 7. Plaintiff determined
10 Defendants' maximum possible exposure for restitution and penalties to be approximately
11 \$5,484,253.36 (consisting of \$64,269.23 in unpaid wages, \$163,497.48 in missed meal period
12 premium wages, \$168,989.64 in missed rest break premium wages, \$211,894.21 for wage
13 statement penalties, \$164,343.38 for waiting time penalties, and \$3,511,259.42 for civil penalties
14 under PAGA). Plaintiff calculated the damages based on the number of workweeks and pay
15 periods provided by Defendants, Plaintiff's reports, and the sample data. *Id.*

16 Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix*
17 campaign and pursue individual release agreements from the Class Members. Defendants also
18 represented that they had interviewed all of Defendants' current employees regarding Plaintiff's
19 claims, all of whom would provide declarations, under penalty of perjury, that were favorable to
20 Defendants with respect to the relevant factual issues Plaintiff's Counsel applied discounts to the
21 maximum possible exposure to account for all other risks discussed below. While it is difficult to
22 assign anything but crudely-determined percentages of risk to any of the claims, it is safe to say
23 that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees is
24 substantial and alone justifies a significant discount because Defendants would likely by trial have
25 gathered releases from the majority of the Class Members.

26 Plaintiff is aware of only two significant awards under the PAGA in a contested
27 proceeding, both issued by federal district courts.⁴ DS, ¶ 55. PAGA penalty awards are often
28

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,



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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 \$375,000.00 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 The plain language of PAGA provides that "a court may award a lesser amount than the
18 maximum civil penalty amount specified by this part if, *based on the facts and*
19 *circumstances of the particular case*, to do otherwise would result in an award that is
20 unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code s 2699(e)(2) (emphasis
21 added). The relationship between the amount of total damages and the amount of
22 maximum PAGA penalties is certainly a "circumstance" of the case under the term's
23 ordinary meaning. The weight given to that circumstance is greater in this case because
24 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
25 individual claims except for one. As a general matter, it would be excessively punitive
26 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
27 the damages caused by that injury or set of injuries.

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

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

⁵ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.



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1 of a governmental participant; and (8) the reaction of the class members to the proposed
2 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
3 factors.

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

5 **a. Risks Associated with Defendants' Financial Condition**

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

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

20 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
21 best, largely because Defendants' policies throughout the relevant time period prohibited off-the-
22 clock work. DS, ¶ 44. Off-the-clock claims are difficult where a defendant requires that all work
23 must take place while clocked in. *See Jong v. Kaiser Foundation Hospital* (2014) 226 Cal.App.4th
24 391 (employer must have notice of off-the-clock work for it to be compensable). *Id.* Defendants
25 mandate that employees must record all time worked accurately on their time records and strictly
26 prohibit employees from performing any work off-the-clock. DS, ¶ 44. Moreover, while
27 Defendants disputes that off-the-clock work occurred, they contend that any time spent off the
28 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. (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*, Defendants contend that the *de minimis* doctrine



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1 may apply here because the time spent off the clock was minute and insignificant. Accordingly,
2 a large award of penalties seems unlikely with respect to this claim. *Id.*

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

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

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

22 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
23 from taking their meal or rest periods. DS, ¶ 47. Defendants require that employees take at least
24 a 30-minute, uninterrupted meal period *Id.* Accordingly, there is a significant risk that the value
25 of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

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

27 There are risks to Plaintiff’s rest period claim. DS, ¶ 48. Employers are not required to
28 record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
employees the opportunity to take rest periods in accordance with California law. Further,
Defendants’ policies on meal and rest periods are consistent with the Wage Order. *Id.* Thus, unlike
meal periods, where there are often records showing whether an employee clocked out or not,



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1 there is no such evidence to prove a missed rest period or that the employer refused to authorize
2 and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.* Plaintiff
3 will depend on sample witness testimony and surveys to prove the claims. *Id.* While a victory
4 with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial
5 management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*, (2014) 59
6 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class certification, it
7 may be possible to manage individual issues through the use of surveys and statistical
8 sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v.*
Behrend (2013) 133 S.Ct. 1426.

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

10 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
11 PAGA penalties. Under Labor Code section 226, wage statements must include various
12 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
13 DS, ¶ 49.

14 Here, Plaintiff’s wage statement claim has the same underlying risks as the above claims,
15 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants largely
16 comply with the requirements of Labor Code § 226. DS, ¶ 40.

17 **f. Risks Associated With the PAGA Claim**

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

27 This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and required a
28 significant discount for settlement purposes. DS, ¶ 54. For mediation purposes, Plaintiff’s counsel
estimated a maximum possible exposure of approximately \$3,511,259.42 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



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

7 **g. 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, ¶ 57. (See *Chindarah v.*
10 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
11 a “pick off” settlement campaign to pursue individual release agreements from the Class
12 Members, thereby potentially narrowing the size of the Settlement Class – 209 members - until it
13 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
14 number of employees to represent. This led to a significant reduction of claim value in settlement
15 negotiations. *Id.*

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



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1 appropriate under the circumstances. DS, ¶ 59. The Parties negotiated a good faith amount for
2 PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
3 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
4 “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount
5 was the result of self-interest at the expense of other Class Members,” such amounts are generally
6 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
7 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
8 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
9 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
10 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
11 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
12 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
13 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
14 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
15 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
16 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
17 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
18 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
19 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
20 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
21 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
22 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
23 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
24 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
25 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

26 **3. Presence of Governmental Participant**

27 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
28 settlement to the LWDA with the filing and service of this motion. DS, ¶ 108, Ex. 17.

4. Reaction of Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members will be provided with the Court
Approved Notice of Class Action Settlement and Hearing Date For Final Court Approval
(attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 87. The parties’



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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 Pay Periods compared to the total Pay Periods. DS, ¶ 77. Settlement § 3.2.4. Because this method compensates Class Members based on the extent of their potential injuries, in that Class Members who worked for Defendants longer would have been subject to more alleged violations, it is fair, adequate, and reasonable. *Id.*

Plaintiff estimates that there are 6,290 Pay Periods for the Class Period. So, each Pay Period has a value of approximately \$32.11 (\$202,000.00 Net Settlement Amount / 6,290 Pay Periods = \$32.11). Plaintiff had 182 Pay Periods during the Class Period. Based on this, it is anticipated that Plaintiff Justin Lopez will receive an Individual Class Payment of approximately \$5,844.02 as a Settlement Class Member (182 Pay Periods x \$32.11 = \$5,844.02) while the average estimated Individual Class Payment to Settlement Class Members will be approximately \$966.51. Some Class Members – those who worked more Pay Periods during the Class Period - will receive more, and some less. The highest possible Individual Class Payment to a Settlement Class Member (i.e., to those who qualify for all Pay Periods in the Class Period) will be approximately \$8,468.72. The lowest possible Individual Class Payment to a Settlement Class Member (i.e., to those who qualify for only one Pay Period in the Class Period) will be approximately \$32.11. DS, ¶ 76.

It is anticipated that the average Aggrieved Employee or PAGA member Individual PAGA Payment will be \$6.67. *Id.* Plaintiff's Individual PAGA Payment, his individual share of 25% of the PAGA Penalties, will be less than that of some absent Aggrieved Employee or PAGA members. Under the Settlement, each Aggrieved Employee or PAGA member will receive a *pro rata* distribution of 25% of the PAGA Penalties proportionate to the number of paychecks he or she had with Defendants during the PAGA Period, compared to the total of all paychecks of all Aggrieved Employee or PAGA members during the PAGA Period, as reflected by Defendants' records. Plaintiff estimates that there are 2,900 Aggrieved Employee or PAGA member paychecks for the PAGA Period. So, each Aggrieved Employee or PAGA member



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1 paycheck from the PAGA Period has a value of approximately \$0.34 (25% of \$4,000.00 in PAGA
2 Penalties / 2,900 Aggrieved Employee or PAGA member paychecks = \$0.34). It is anticipated
3 that Plaintiff Justin Lopez will receive an Individual PAGA Payment of approximately \$9.18 as
4 an Aggrieved Employee or PAGA member (27 paychecks during the PAGA Period x \$0.34
5 paycheck value = \$9.18) while the average estimated Individual PAGA Payment to an Aggrieved
6 Employee or PAGA member will be approximately \$6.67 (\$1,000.00, 25% of PAGA Penalties /
7 Aggrieved Employee or PAGA member paychecks during the PAGA Period = \$6.67 Individual
8 PAGA Payment). Some Aggrieved Employee or PAGA members – those who had more
9 paychecks during the PAGA Period - will receive more, and some less. The highest possible
10 Individual PAGA Payment to an Aggrieved Employee or PAGA member (i.e., to those who
11 qualify for all paychecks in the PAGA Period) will be approximately \$109.41. The lowest
12 possible Individual PAGA Payment to an Aggrieved Employee or PAGA member (i.e., to those
13 who qualify for only one paycheck in the PAGA Period) will be approximately \$0.34. DS, ¶ 78.

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

16 The Settlement and Addendum state Class Counsel may seek attorneys’ fees of up to one-
17 third of the GSA (which is currently estimated to be \$125,000.00) and up to \$16,000.00 for actual
18 reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement § 3.2.2.
19 These amounts are reasonable, given the facts and circumstances of the case. DS, ¶¶ 60-62.

20 Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their
21 decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v.*
22 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced
23 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
24 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
25 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
26 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
27 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
28 of the common fund. *Laffitte, supra*, 1 Cal. 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*



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1 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

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

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

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

18 Courts routinely approve incentive awards to compensate named plaintiffs for the services
19 they provide and the risks they incur during class action litigation, often in much higher amounts
20 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
21 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
22 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
23 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
24 Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
25 action and the risks he undertook on behalf of Class Members. DS, ¶ 63; Declaration of Justin
26 Lopez ("Plaintiff decl."), generally. Plaintiff has devoted many hours advancing the interests of
27 the Settlement Class. Plaintiff has done this by, among other things, retaining experienced
28 counsel, providing them with information about his work history with Defendants and
Defendants' policies and practices with respect to the wage and hour claims at issue, participating
in mediation, and being actively involved in the settlement process to ensure a fair result for the
Settlement Class as a whole. In doing this, Plaintiff has been exposed to significant risks,



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1 including the risk of an order to pay Defendants’ attorneys’ fees and costs if this action had been
2 unsuccessful (See Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on
3 behalf of the Settlement Class shows that the proposed Class Representative Service Payment is
4 fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶¶ 63-73; Plaintiff
decl., generally.

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

8 With regard to the settlement administration costs (“Administrator Expense Payment”) provision, it is reasonable. Before agreeing to Phoenix Class Action Settlement Solutions, Inc. and its bid of \$13,000.00, the Parties sought and reviewed bids from other reputable third-party administrators which provided comparable bids. DS, ¶¶ 100-101, Exs. 14-16. Thus, the settlement administration costs provision should be given preliminary approval.

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

15 This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures to ensure that as many Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The Settlement requires distribution of the Notice by First Class U.S. mail only. Settlement, ¶ 8.4. Although there are current employee Class Members, it is uncertain whether Defendants’ records of their contact information include email addresses and Class Members, who perform all of their work away from a desk, are not in a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable. DS, ¶ 87.

24 With respect to its content, “[The] notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152. The purpose of the notice in class settlement context is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their



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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 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the individual Settlement Class Member's estimated payment. Additionally, the Class Notice will include the number of Pay Periods a Class Member had during the Class Period. Accordingly, the Notice should be approved because it describes the Settlement with sufficient clarity and specificity to explain to Class Members what this action is about, their rights under the Settlement, and how to exercise those rights. DS, ¶ 87.

XI. CONCLUSION

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: 05 / 01 / 2024

By: 

DAVID G. SPIVAK, Attorneys for
Plaintiff, JUSTIN LOPEZ, and all
others similarly situated



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