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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF RIVERSIDE**

11 SHARONE BLACKBURN, on behalf of herself
12 and all others similarly situated,

13 Plaintiff,

14 vs.

15 ACTRIV HEALTHCARE, INC., a corporation;
16 and DOES 1 through 100, inclusive,

17 Defendants.
18
19
20
21

Case No.: CVRI2205649

*[Assigned for all purposes to Hon. Harold
W. Hopp, Dept. 1]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: October 18, 2024
Time: 8:30 a.m.
Dept.: 1

Action Filed: December 28, 2022
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on October 18, 2024, at 8:30 a.m., in Department 1 of the above-entitled Court, located at 4050 Main Street, Riverside, California 92501, Plaintiff Sharone Blackburn (“Plaintiff”) will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement (“Settlement”) between Plaintiff and Defendant Actriv Healthcare, Inc. (“Actriv”);

2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:

All current and former non-exempt employees who worked for Actriv in California at any time from December 28, 2018 through the date of Preliminary Approval (the “Class Period”).

3. Preliminary appointment of Plaintiff as Class Representative;

4. Preliminary appointment of Abramson Labor Group as Class Counsel;

5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;

6. Approval of the proposed Class Notice, Request for Exclusion Form, Objection Form, and Notice of Estimated Settlement Award (together, the “Notice Packet”), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement; and

7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award a Class Representative Enhancement Payment to Plaintiff, and attorneys’ fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declaration of Neil M. Larsen and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declaration of Plaintiff; the pleadings and other papers filed in this action; and any further evidence or argument presented at the time of hearing.

Dated: September 25, 2024

Respectfully Submitted,
ABRAMSON LABOR GROUP

Neil Larsen

Neil M. Larsen
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Sharone Blackburn (“Plaintiff”) seeks preliminary approval of a class action
4 settlement agreement (“Settlement”) with Defendant Actriv Healthcare, Inc. (“Actriv” or
5 “Defendant”) (together with Plaintiff, the “Parties”). The Settlement resolves a class and
6 representative action pending before this Court (the “Action”), in which Plaintiff alleges that
7 Actriv failed to pay minimum wages; failed to pay overtime wages; failed to provide meal
8 periods; failed to authorize and permit rest periods; failed to reimburse business expenses; and
9 failed to pay vacation wages upon termination. Plaintiff further alleges that as a result of these
10 violations, Actriv failed to comply with its final payment and wage statement obligations, and is
11 also liable for civil penalties under the Private Attorneys General Act (“PAGA”).

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-
13 reversionary, common-fund class action Settlement,¹ in which Actriv has agreed to pay
14 \$125,000.00 to the following Settlement Class, which is estimated to consist of 27 individuals:

15 All current and former non-exempt employees who worked for Actriv in California at
16 any time from December 28, 2018 through the date of Preliminary Approval (the
“Class Period”).

17 After deductions for Plaintiff’s requested Class Representative Service payment,
18 settlement administrator costs, the amount set aside as PAGA civil penalties, and requested
19 attorneys’ fees and costs to Class Counsel, the remaining amount (the “Net Settlement Amount”
20 or “NSA”)) will be distributed to Participating Settlement Class members (i.e., those Settlement
21 Class members who do not opt-out of the Settlement) as follows: **First**, \$500.00 will be allocated
22 to each Participating Class member who did not sign a *Pick Up Stix* settlement agreement with
23 Actriv, as a “true up” payment meant to place those employees on equal footing with those
24 employees who did sign a *Pick Up Stix* agreement and received a \$500.00 payment from Actriv.
25 Actriv represents that there are 15 Settlement Class members who did not sign a *Pick Up Stix*
26 settlement, and thus, this “true up” payment will equal approximately \$7,500.00; **Second**, the
27

28 ¹ The Settlement is attached as Exhibit A to the Larsen Declaration. The Class Notice, Notice of
Estimated Settlement Award, Request for Exclusion Form, and Objection Form are attached,
respectively, as Exhibits 1, 2, 3, and 4 to the Settlement.

remainder of the NSA, i.e. \$50,833.75 (the “NSA Remainder”), will be distributed to all Participating Class Members based on the proportionate number of workweeks worked by each Class Member during the Class Period.

Significantly, Class Members do not need to file a claim form in order to receive a Settlement Award, as all Class Members will automatically receive a Settlement Award unless they affirmatively opt-out. There are approximately 27 Class Members, and overall, the average Settlement Award is projected to be approximately **\$1,882.73**. This is an excellent result for Class Members.

The proposed Settlement is well within the range of possible approval in light of the significant legal and factual obstacles that Plaintiff faced, the risks and costs of further litigation, and the significant monetary benefits to be received by Plaintiff and the Settlement Class. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Actriv Healthcare, Inc. (“Actriv”) is healthcare staffing agency that placed nursing professionals at healthcare facilities in California during the Class Period. *See* Declaration of Neil M. Larsen (“Larsen Decl.”), ¶ 6. No Class Member has worked for Actriv in California since approximately November 2022. *Id.* Plaintiff is a former nurse who worked for Actriv in California from approximately December 2021 to approximately March 2022. *Id.*

On December 20, 2022, Plaintiff provided written notice to the Labor & Workforce Development Agency (“LWDA”) and Actriv of her intent to pursue PAGA civil penalties for alleged violations of the California Labor Code, as required by Labor Code §2699.3. *Id.*, ¶ 7, Exhibits B-C.

On December 28, 2022, Plaintiff filed this Action, alleging class action claims for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) wage statement violations; (6) waiting time penalties; (7) failure to reimburse business expenses; (8) failure to pay vacation wages; and

(9) unfair business practices. Larsen Decl., ¶ 8.

On February 24, 2023, Plaintiff filed the operative First Amended Complaint (“FAC”), which added a claim for PAGA civil penalties. *Id.*, ¶ 9. On February 27, 2023, Plaintiff electronically submitted a copy of the FAC to the LWDA. *Id.*, Exhibit D.

B. ACTRIV’S PICK UP STIX CAMPAIGN

During this litigation, Actriv engaged in a “Pick Up Stix” campaign in which it offered individual settlement payments of \$500.00 each to many of its employees, in exchange for those employees signing a general release. *See* Larsen Decl., ¶ 10. According to Actriv, approximately 12 putative class members signed releases and received payments as a result of its *Pick Up Stix* campaign. *Id.* This, Actriv contends, would narrow the scope of any potential class that Plaintiff could represent in this action.

C. PLAINTIFF’S CLAIMS AND ACTRIV’S DEFENSES

1. On-Call Meal Periods – Unpaid Wages

Plaintiff alleged that Actriv failed to pay Class Members all wages owed during the Class Period. Larsen Decl., ¶ 18. Specifically, Plaintiff alleges that although Class Members typically clocked out for their meal periods, Actriv required Plaintiff and other employees to remain on-call and on-duty during their meal periods. *Id.* As a result, Plaintiff asserts that she and other employees should have been paid for this on-call/on-duty meal period time. *Id.* Furthermore, Plaintiff alleges that she and other employees did not enter into a written on-duty meal period agreement with Actriv, and therefore, even assuming that the nature of the work qualified for an on-duty meal period, the on-call and on-duty meal periods were unlawful. *Id.* Based on an analysis of the timekeeping records produced by Actriv, Plaintiff’s counsel determined that Plaintiff and other employees were clocked out (and therefore not paid) for approximately 690 hours for on-call/on-duty meal period time during the Class Period. *Id.* Additionally, an analysis of the records produced by Actriv revealed that Class Members typically worked shifts of at least 8.0 hours. *Id.* Thus, and assuming the unpaid wages were generally overtime wages, Plaintiff calculated Actriv’s maximum potential exposure for this claim if entirely successful at trial as: 690 hours * \$33.30/ avg. hourly rate * 1.5 (OT premium) = \$34,465. *Id.* However, Actriv contends that it maintained compliant written meal period policies throughout the Class Period, and provided legally-compliant off-duty meal periods in line with those policies. *Id.*

1 Activr further asserts that many putative class members would testify that they were, in fact,
2 provided with legally compliant off-duty meal periods and were not required to remain on-
3 call/on-duty. *Id.* Activr further argues that individualized inquires would be needed to determine
4 whether each meal period was on-call or off-duty for each employee, thus making certification
5 of the meal period claim unlikely. *Id.* In light of these defenses, Plaintiff discounted the
6 maximum recovery on this claim by 30% for risk of non-certification, and an additional 40% to
7 account for the risk of losing on the merits or failure to recover the full amount sought, for a
8 realistic exposure of \$14,475 on this claim. *Id.*

9 **2. Meal Period Violations**

10 Plaintiff also alleges that Activr failed to provide her and other employees with legally
11 compliant meal periods. Larsen Decl., ¶ 20. Specifically, Plaintiff’s counsel’s analysis of the
12 timekeeping records produced by Activr revealed approximately 620 meal period violations
13 during the Class Period, which include late first meal periods (meal period commencing after 5
14 hours of work) and no recorded second meal periods on shifts over 10.0 hours. *Id.* Additionally,
15 Plaintiff’s counsel’s review of the payroll records produced by Activr did not reflect payment
16 of meal period premium wages. *Id.* Thus, Plaintiff estimated the maximum potential exposure
17 for this claim if entirely successful at trial as approximately \$20,646 (620 meal period violations
18 * \$33.30/avg. hourly rate). *Id.* However, Activr contends that it maintained compliant written
19 meal period policies throughout the Class Period, and provided legally-compliant meal periods
20 in line with those policies. *Id.* Activr further contends that under *Brinker*, it is only required to
21 “provide” meal periods, not “ensure” that they are taken, and that is has always done so. Activr
22 further contends that any short, missed, or late meal period was the result of lawful employee
23 waiver or choice, thereby precluding liability. *Id.* Activr further asserts that many putative class
24 members would testify that they were, in fact, provided with legally compliant off-duty meal
25 periods. *Id.* Lastly, Activr argues that individualized inquires would be needed to determine why
26 each meal period was missed, taken late or was short by each employee, whether there was a
27 valid waiver, and whether each meal period was on-call or off duty for each employee, thus
28 making certification of the meal period claim unlikely. *Id.* In light of these defenses, Plaintiff
discounted the maximum value of this claim by 30% for risk of non-certification certification,
and an additional 40% for risk of losing on the merits or failure to recover the full amount

sought, for a realistic exposure of \$8,671 on the meal period claim. *Id.*

3. Rest Period Violations

Plaintiff alleges that Actriv failed to authorize and permit legally compliant rest periods. Larsen Decl., ¶ 21. From the records produced by Actriv, Plaintiff's counsel determined that there were approximately 1,380 shifts of 3.5 hours or more worked by Class Members during the Class Period, and that the average rate of pay was approximately \$33.30 per hour. *Id.* Thus, assuming a 100% violation rate for those shifts, Plaintiff estimated that the maximum potential exposure for this claim if entirely successful at trial as approximately \$45,954 (1,380 shifts * \$33.30/avg. hourly rate). *Id.* However, Actriv presented several defenses to this claim, including its assertion that it is only required to authorize and permit rest period, not ensure that they are taken; that it has always maintained lawful rest period policies and authorized and permitted rest period in accordance with those policies; that rest periods are not recorded and therefore present difficulties with respect to class certification; and that differences in managers/supervisors and other specific circumstances with rest to each individual shift worked by each employee would render class certification even less likely. *Id.* In light of these defenses, Plaintiff discounted this claim by 40% for risk of non-certification, and an additional 45% for risk of losing on the merits or failure to recover the full amount sought, to arrive at a realistic exposure of \$15,165. *Id.*

4. Vacation Pay Claim

Plaintiff alleges that Actriv failed to pay Plaintiff her unused vacation wages upon separation of employment. Larsen Decl., ¶ 22. Plaintiff's counsel's analysis of the records produced by Actriv revealed that there was no widespread failure to pay employees their unused vacations. *Id.* Additionally, Actriv contends that it has always maintained policies regarding the payment of unused vacation wage and in accordance with those policies Actriv contends that this claims is not suitable for class treatment as an individualized inquiries would be required to determine whether unused vacation wages were paid at separation of employment. *Id.* Accordingly, Plaintiff assessed no value on this claim. *Id.*

5. Claim for Failure to Reimburse Business Expenses

Plaintiff alleges that Actriv failed to indemnify her and other employees for the use of their personal cell phones for work purposes, including submitting their weekly timekeeping records to management, and to communicate with managers and supervisors. Larsen Decl., ¶ 23.

1 Plaintiff estimated approximately \$15 per month in unreimbursed expenses for employees' use
2 of their personal cell phones for work purposes. Plaintiff's counsel's analysis of the records
3 produced by Actriv revealed approximately 78 months worked by Class Members during the
4 Class Period. Thus, Plaintiff calculated Actriv's potential exposure on the reimbursement claim
5 if entirely successful at trial as: $\$15 * 78 = \$1,170$. *Id.* Actriv contends that its non-exempt
6 employees are not required to use their personal cell phones in connection with their job duties,
7 and that if they actually did, there are procedures in place for employees to request reimbursement
8 of work-related expenses. *Id.* Actriv also contends that employees are provided with any
9 equipment necessary to perform their job duties and to submit their timekeeping records. *Id.*
10 Actriv further contends that this claim would not be certified, as it would require hundreds of
11 individualized inquiries as to whether employees incurred business-related expenses, whether
12 they were reimbursed, whether Actriv knew (or reasonably should have known) about the
13 expense, and whether the expense was "necessary" under the circumstances. Larsen Decl., ¶ 13;
14 *see also Gattuso v. Hart-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) ("In calculating the
15 reimbursement amount due under section 2802, the employer may consider not only the actual
16 expenses that the employee incurred, but also whether each of those expenses was 'necessary,'
17 which in turn depends on the reasonableness of the employee's choices."); *Grissom v. Vons*
18 *Companies, Inc.*, 1 Cal.App.4th 52, 58 (1991) (under § 2802, "ascertaining what was a necessary
19 expenditure will require an inquiry into what was reasonable under the circumstances"). Given
20 the relatively low value of this claim, Plaintiff did not discount the estimated recovery for this
21 claim.

22 **6. Claims Under Lab. Code §§ 203, 226, and the PAGA**

23 As a result of its alleged failure to pay all minimum and overtime wages, failure to provide
24 meal periods, and failure to authorize and permit rest periods, Plaintiff asserts that Actriv failed
25 to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code
26 §§ 203 and 226, respectively. Larsen Decl., ¶¶ 24-25. Finally, Plaintiff seeks civil penalties under
27 the PAGA based on the aforementioned claims. *Id.*

28 With respect to Plaintiff's derivative **wage statement claim**, Plaintiff's counsel calculated
approximately 335 weekly pay periods worked by Settlement Class members within the one-year
liability period applicable to Section 226. Larsen Decl., ¶ 24. In calculating Actriv's exposure,

1 Plaintiff assumed that he could recover the “initial” \$50 penalty under Labor Code § 226(e) for
2 each violation, for a total of \$16,750 in potential exposure for Plaintiff’s wage statement claim if
3 entirely successful at trial. *Id.*; see *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207
4 (2008) (finding “initial” violation rate applies until employer has been notified it violated Labor
5 Code); *Patel v. Nike Retail Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing
6 *Amaral* and applying “initial” \$50 penalty to all pay periods in calculating amount-in-controversy
7 for wage statement claim). However, Actriv presented multiple defenses to this derivative claim,
8 including the defenses to Plaintiff’s underlying claims that would apply equally to his derivative
9 wage statement claim; that Plaintiff could not show that any violations were “knowing and
10 intentional,” particularly given its good-faith defenses; that Plaintiff cannot show she or other
11 employees suffered “injury” as required under Section 226(e); and that individualized issues
12 entailed in analyzing each wage statement for each pay period for each employee to determine
13 whether a violation occurred. Larsen Decl., ¶ 24; see *Naranjo v. Spectrum Security Svcs., Inc.*,
14 15 Cal.5th 1056, 1091 (2024) (holding that an employee’s “good faith” belief that it is not
15 violating Labor Code Section 226 precludes a finding of a knowing and intentional violation). In
16 light of these defenses, Plaintiff discounted the maximum recovery of this claim by 30% for risk
17 of non-certification, and an additional 40% for risk of losing on the merits or failure to recover
18 the full amount sought, for a realistic exposure of \$7,035 on the wage statement claim. Larsen
19 Decl., ¶ 24.

20 With respect to Plaintiff’s waiting time penalties claim, based on the data provided by
21 Actriv, there are 27 employees who separated their employment with Actriv since December 28,
22 2019 (i.e., three years prior to the filing of the Action). Larsen Decl., ¶ 25. Plaintiff further
23 estimated an average waiting time penalty of \$7,992 (\$33.30/avg. rate of pay * 8 hrs. * 30 days),
24 for a maximum waiting time penalty exposure of \$215,784 (27 * \$7,992) if entirely successful at
25 trial. *Id.* Actriv, however, asserts it has strong, good-faith defenses to Plaintiff’s underlying
26 claims, and that any failure to pay wages was therefore not “willful” as a matter of law. *Id.*
27 Moreover, because the waiting time claim is derivative of Plaintiff’s underlying wage claims,
28 Plaintiff would need to overcome Actriv’s defenses, both as to class certification and on the

1 merits, to his underlying claims. *Id.* Based on these defenses, Plaintiff discounted Actriv’s
2 maximum exposure by 30% for risk of non-certification and by an additional 45% for risk of
3 being unsuccessful on the merits or failing to recover the full amount sought, to arrive at an
4 estimated total of \$83,077. *Id.*

5 In general, Actriv argues that Plaintiff’s derivative claims fail for the same reasons her
6 underlying claims fail. Actriv further asserts it has strong, good-faith defenses to Plaintiff’s
7 underlying claims, precluding waiting time penalties. Larsen Decl., ¶¶ 24-26; *see also* 8 Cal. Code
8 Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting
9 time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith
10 dispute” precluded imposition of waiting time penalties); *see Naranjo v. Spectrum Security Srvcs.,*
11 *Inc.*, 15 Cal.5th 1056, 1091 (2024) (holding that an employer’s “good faith” belief that it is not
12 violating Labor Code Section 226 precludes a finding of a knowing and intentional violation).

13 Finally, with respect to Plaintiff’s PAGA claim, Plaintiff estimated approximately 312 pay
14 periods were worked by Class Members during the PAGA Period. Larsen Decl., ¶ 26. Plaintiff
15 estimates a maximum PAGA exposure of \$31,200, based on the \$100 “initial” violation rate for
16 each pay period under Labor Code § 2699(f). *Id.* Actriv, however, contends Plaintiff’s PAGA
17 claim fails because the underlying claims fail. Larsen Decl., ¶ 26; *see, e.g., Price v. Starbucks*
18 *Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the
19 derivative UCL and PAGA claims also fail.”). Actriv further maintains that given its strong
20 defenses and its good-faith attempts to comply with the law, the Court would substantially reduce
21 PAGA penalties even if it were to find in Plaintiff’s favor on his underlying claims. Larsen Decl.,
22 ¶ 26; *see also* Lab. Code § 2699(e)(2) (authorizing discretionary reduction in PAGA penalties);
23 *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming
24 reduction of PAGA penalties because, *inter alia*, “the evidence showed...defendants took their
25 obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No.
26 ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA
27 penalties by over 82% in part because employer was “not aware” of violations); *Carrington v.*
28 *Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay

period where employer made “good faith attempts” to comply with the law).

D. DISCOVERY AND MEDIATION

The Parties engaged in extensive informal discovery prior to settlement negotiations. Larsen Decl., ¶ 28. In advance of settlement negotiations, Actriv produced timekeeping and payroll records for all Class Members; a detailed class list that included each Class Members’ hire date, termination date (if applicable), and average rate of pay; its applicable wage and hour policies; and other information. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiff’s claims and Actriv’s defenses, as well as the chances for class certification. *Id.* After Plaintiff’s counsel’s review and analysis of the data and information provided by Actriv, the Parties engaged in settlement negotiations and ultimately agreed to the proposed Settlement. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, Actriv will pay a non-reversionary Gross Settlement Amount (“GSA”) of \$125,000.00. *See* Settlement, ¶ 6. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	\$125,000.00
• Minus Court-approved attorneys’ fees (one-third):	\$41,666.25
• Minus Court-approved costs (up to):	\$5,000.00
• Minus Court-approved Enhancement Payment:	\$5,000.00
• Minus Amount Set Aside as PAGA penalties:	\$10,000.00
• <u>Minus estimated Settlement Administration costs:</u>	<u>\$5,000.00</u>
Net Settlement Amount (“NSA”):	\$58,333.75
PLUS 25% of PAGA penalties (“PAGA Amount”):	\$2,500.00
Total Amount Paid to Settlement Class:	\$60,833.75

1. Funding of the Settlement

The GSA shall be deposited with the Settlement Administrator no later than thirty (30) days after the Settlement becomes “Final.” *See* Settlement, § 6(B). The Settlement will become “Final” after: (i) if there is an appeal of the Court’s Judgment, the date the Judgment is affirmed on appeal, the date of dismissal of such appeal, or the expiration of the time to file a petition for writ of certiorari to the United States Supreme Court, or, (ii) if a petition for writ of certiorari is filed, the date of denial of the petition for writ of certiorari, or the date the Judgment is affirmed

pursuant to such petition; or (iii) if no appeal is filed, the expiration date of the time for filing or noticing any appeal of the Judgment. *Id.*, § 6.

Activ's share of payroll taxes on any wage portion of the payments to Settlement Class members shall be paid by Activ separately from, and in addition to, the GSA. *See* Settlement, § 6(B). Activ's share of payroll taxes shall be deposited with the Settlement Administrator at the same time it deposits the GSA. *Id.*

2. The Settlement Provides for Reasonable Monetary Payments

As noted above, after deducting amounts for a court-approved Class Representative Enhancement Payment, settlement administration costs, attorneys' fees and costs, and PAGA payment to the LWDA, Activ will pay at least \$58,333.75 to Settlement Class members. *See* Settlement, §§ 6(C), 7(A)-(B).

The NSA shall be distributed to Participating Settlement Class members (i.e., those Settlement Class members who do not opt-out of the Settlement) as follows: First, \$500.00 will be allocated to each Participating Class member who did not sign a *Pick Up Stix* settlement agreement with Activ, as a "true up" payment meant to place those employees on equal footing with those employees who did sign a *Pick Up Stix* agreement and received the \$500.00 payment from Activ. *See* Settlement, § 7(B). Defendant represents there are 15 Settlement Class members who did not sign the *Pick Up Stix* settlement, and thus, this "true up" payment will equal approximately \$7,500.00. *Id.* The remainder of the NSA, called the "NSA Remainder," will be distributed to all Participating Class Members based on the proportionate number of workweeks worked by each Participating Class Member during the Class Period. *See* Settlement, § 7(B)(ii).

Based on the records produced by Activ, there are 27 Class Members who worked for Activ during the Class Period. Larsen Decl., ¶ 16. Thus, Participating Class Members will receive an average payment from the NSA Remainder of approximately \$1,882.73. *Id.* The lowest potential payment a Participating Class Member could receive is estimated to be approximately \$36.84. *Id.* The highest potential payment a Participating Class Member could receive is estimated to be approximately \$7,772.41. *Id.*

In addition, all Settlement Class members (regardless of whether they opt-out) who were

1 employed by Actriv in California at any time between December 20, 2021 and the date of
2 preliminary approval of the Class Action Settlement (the “PAGA Period”), will receive a portion
3 of the \$2,500 PAGA Amount, based on their proportionate number of pay periods worked during
4 the PAGA Period. *See* Settlement, § 7(C).

5 Payments from the PAGA Amount will be treated as 100% penalties. *See* Settlement, §
6 7(E). Payments from the NSA will be treated as 30% wages reported on a Form W-2 and 70%
7 treated as interest and penalties and reported on a Form 1099. *Id.* Payments from the “true up”
8 payment shall be treated as 75% wages and 25% interest and penalties. *Id.*

9 **3. Notice Period and Release of Claims**

10 Settlement Class members will have sixty (60) days from the Notice mailing to opt-out of
11 or object to the Settlement, or submit disputes, thereby providing ample time to review the Notice
12 without unduly delaying the Settlement. *See Id.*, § 12(C)-(E).

13 Participating Class Members will be bound by the Settlement, Defendant Actriv, the
14 named defendant in the complaint, together with Actriv’s officers, directors, employees and
15 agents; any facilities to which Actriv assigned Class Members to work at, including, but not
16 limited to, any ProMedica, Silverado, or ManorCare facilities and their past and present officers,
17 directors, employees and agent; as well as any payroll companies that processed payroll for such
18 assignments from all claims, causes of action, and legal theories alleged in the operative First
19 Amended Complaint, and any additional wage and hour claims, causes of action, and legal
20 theories that could have been alleged based on the facts alleged in the operative First Amended
21 Complaint that arose during the Class Period (i.e., “December 28, 2018 through the date of the
22 Court Order granting preliminary approval of the Settlement”). Larsen Decl., ¶ 32; *see also*
23 Settlement ¶ 2.

24 In addition, the release of claims for PAGA binds only the named Plaintiff and will release
25 only those claims described in the notice sent by Plaintiff to the LWDA, and only to the extent
26 that they are alleged in the Complaint. Larsen Decl., ¶ 33; *see also* Settlement ¶ 3. Specifically,
27 the proposed PAGA release provides: “Plaintiff releases all claims for statutory penalties against
28 the Released Parties that could have been sought for violations identified in Plaintiff’s December

20, 2022 pre-filing PAGA letter to the Labor & Workforce Development Agency (“LWDA”). Plaintiff does not release any aggrieved employee’s claim for wages or damages.” See Settlement, ¶ 3.

4. Attorneys’ Fees and Costs, Service Award, and PAGA Payment

At final approval, Plaintiff will apply for a Class Representative Enhancement Payment in the amount of \$5,000. See Settlement, § 6(C)(iii). “[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 [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).

As will be fully briefed at final approval, Plaintiff’s requested payment is in recognition of the time and effort she expended on behalf of the Settlement Class, including providing factual information and documents to counsel, discussing with counsel the claims and theories at issue in the litigation, identifying potential witnesses, attending multiple telephonic meetings with my office to discuss the claims and theories at issue in this Action, reviewing the settlement agreement, and otherwise actively participating in the prosecution of this case, as well as her general release of claims and waiver of Civil Code § 1542. See Settlement, ¶¶ 3-5. Plaintiff respectfully submits that the requested payment is well within the range of approval. See, e.g., *Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving \$15,000 payment to named plaintiff from wage and hour class action settlement, including \$10,000 incentive payment and additional \$5,000 for his general release, where payments to class members averaged just over \$450); *Martinez v. Knight Transportation*, No. 1:16-cv-01730, 2023 WL 5917989 (E.D. Cal. Sept. 11, 2023) (approving \$10,000 award to plaintiff in \$400,000 wage and hour class action settlement where payments to class members averaged about \$127).

The Parties have also designated \$10,000 of the GSA as PAGA penalties, of which \$7,500 (75%) will be paid to the LWDA, with the remaining \$2,500 (25%) distributed to Settlement Class members (see Settlement, § 6(C)(v)), consistent with the PAGA’s requirement that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to aggrieved employees (Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is appropriate

1 in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv.,*
2 *LLC*, No. C-05-4526-MHP, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA
3 payment of \$7,500 to LWDA from \$6.9 million settlement); *Hudson v. Libre Technology, Inc.,*
4 No. 3:18-cv-1371-GPC, 2020 WL 2467060 at *8 (S.D. Cal. May 13, 2020) (approving \$21,250
5 PAGA payment from \$4235,000 settlement).

6 At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA
7 (currently estimated at \$41,666.25), and up to \$5,000.00 in litigation costs. Larsen Decl., ¶ 58;
8 *see also* Settlement, ¶ 6(C)(iv). The requested fee is fair compensation for undertaking complex,
9 risky, expensive, and time-consuming litigation on a contingent basis. Larsen Decl., ¶ 58.
10 Plaintiff's counsel have incurred substantial attorneys' fees conducting pre-filing investigation
11 and legal research; analyzing timekeeping, payroll, and other data to create a comprehensive
12 damages model; negotiating and preparing the Settlement; preparing this Motion; and otherwise
13 prosecuting this case. *Id.* Counsel will also incur future attorney fees in overseeing the Notice
14 process, fielding phone calls from Settlement Class members, preparing the Final Approval
15 Motion, and appearing at the Final Approval Hearing. *Id.*

16 It is appropriate to award attorney fees as a percentage of the "common fund" created by
17 the settlement. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480 (2016) (holding "the percentage of
18 fund method survives in California class action cases"). Counsel's fee request is well within the
19 range of reasonableness and is typical for common fund settlements. *See, e.g., Chavez v. Netflix,*
20 *Inc.*, 162 Cal.App.4th 43, n.11 (2008) ("regardless whether the percentage method or the lodestar
21 method is used, fee awards in class actions average around one-third of the recovery"). As will
22 be briefed at final approval, the fee request is reasonable in light of the substantial risks and work
23 undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

24 **IV. ARGUMENT**

25 **A. PRELIMINARY APPROVAL IS WARRANTED**

26 California Rule of Court 3.769 conditions class action settlements on court approval,
27 which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United*
28 *Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine

1 “that the settlement is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*,
2 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine “whether a proposed
3 settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred means of
4 dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*,
5 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role is to ensure the settlement agreement taken
6 as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a
7 presumption of fairness when a settlement is negotiated at arm’s length by counsel. *See, e.g.*,
8 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

9 **1. Standard for Preliminary Approval**

10 To make a fairness determination, the Court should consider several factors, including:
11 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further
12 litigation, the risk of maintaining class action status through trial, the amount offered in
13 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
14 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
15 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing
16 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
17 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate,
18 and reasonable in light of the overall balance of factors in this case.

19 **a. The Strength of Plaintiff’s Case**

20 Although she maintains her claims are meritorious, Plaintiff acknowledges there were
21 substantial risks and uncertainty in proceeding with class certification and eventual trial on the
22 merits. As described in section II.C., *supra*, Actriv presented multiple defenses to Plaintiff’s
23 claims, both on the merits and to class certification, rendering success far from certain.

24 **b. Risk, Expense, Complexity, and Duration of Further Litigation**

25 Although the Parties engaged in significant informal discovery, they had not completed
26 formal written and deposition discovery, which would have required expenditure of substantial
27 time and resources. Larsen Decl., ¶ 60. Plaintiff also still had to file for class certification. *Id.*
28 Even if Plaintiff obtained certification, the Parties would incur considerable fees and costs through

a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id.* The Settlement avoids those risks and the accompanying expense.

c. Risk of Maintaining Class Action Status

Plaintiff had not yet filed her class certification motion, and as such, the extent to which of Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk there would not be a certified class at trial, or if there were, that it would consist of a significantly smaller group of employees than the proposed Settlement Class, and the expected recovery would be significantly reduced. Thus, this factor supports preliminary approval.

d. Amount Offered in Settlement Given Realistic Value of Claims

The Settlement provides a fair and reasonable monetary recovery for the Settlement Class for disputed claims. As detailed in the Larsen Declaration, Plaintiff conducted an analysis of potential damages due to Actriv's allegedly unlawful policies and practices. Based upon Plaintiff's counsel's calculations, if Plaintiff was entirely successful at trial on all claims described above, Plaintiff estimates the maximum total exposure for all claims to be approximately \$365,969. Larsen Decl., ¶ 27. After applying reasonable discounts for risks of not obtaining class certification and risks of losing on the merits, Plaintiff estimated her claims had a realistic potential value of approximately \$129,953. Larsen Decl., ¶¶ 18-28. The proposed settlement of \$125,000.00 therefore represents about 96% of Plaintiff's reasonably forecasted classwide recovery. *Id.*, ¶ 27. As noted above, payments under the Settlement will average \$1,882.73. Preliminary approval is appropriate as the Settlement provides significant monetary relief to the Class.

e. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience litigating wage and hour class actions, and have been appointed class counsel in numerous cases alleging similar claims. See Larsen Decl., ¶¶ 2-5. Counsel conducted an in-depth review of Actriv's policies, timekeeping and payroll records, and other relevant data, and drew on their

extensive experience to assess Plaintiff's claims. Larsen Decl., ¶¶ 2-5, 18-28.

2. The Preliminary Approval Standard Is Met

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

As noted, the Settlement reflects about 96% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information and months of arm's-length negotiations. Plaintiff carefully vetted the claims at issue and conducted a detailed analysis of the relevant data and information. Larsen Decl., ¶¶ 18-28. The Settlement is thus entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130.

c. The Settlement Is Devoid of Obvious Deficiencies

The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees and costs, Plaintiff's Class Representative Enhancement Payment, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification because: (1) the Settlement Class is ascertainable and numerous; (2) common questions of law and fact predominate; (3) Plaintiff's claims are typical of the Settlement Class; and (4) Plaintiff and her counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189

Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked for Actriv in California during the Class Period, and thus can be readily identified from Actriv's records. Actriv represents there are approximately 27 Settlement Class members, rendering it impracticable to bring them all before the Court. Numerosity is therefore satisfied.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on Actriv's alleged failure to pay minimum wage; failure to pay overtime wages; failure to provide meal periods; and failure to authorize and permit rest periods. Such claims are commonly held proper for class certification. *See, e.g., Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

3. The Named Plaintiff's Claims Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff was employed by Actriv as a non-exempt employee in California during the Class Period, and she was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. *See Declaration of Sharone Blackburn*, ¶¶ 2-3. Thus, typicality is satisfied.

4. Plaintiff and Class Counsel Will Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and her counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiff or her counsel and the Settlement Class. *See McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel was 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 class action litigation, as noted above.

1 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE**

2 The Court should order distribution of the proposed Notice by U.S. Mail, using last known
3 mailing addresses provided by Activ. *See* Settlement, § 12. This is the “best notice practicable”
4 under the circumstances, as it provides “individual notice to all members who can be identified
5 through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff
6 proposes the Settlement be administered by Pheonix Settlement Administrators, an experienced
7 class action settlement administrator. *See* Jodey Lawrence Declaration and exhibits. Settlement
8 Class members’ addresses will be ascertainable through Activ’s records. Phoenix will also run
9 all addresses through the U.S. Postal Service National Change of Address database and/or perform
10 “skip traces” to obtain current addresses. *See* Settlement, § 12(F).

11 The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement
12 Class members of the nature of the claims; the basic contentions of the parties; the key terms of
13 the Settlement; the 60-day deadline to opt-out, object, or submit a dispute and how to do so;
14 explains the recovery formula and expected recovery amount for each Settlement Class member;
15 and explains the releases of claims included in the Settlement. *See* Larsen Decl., Exh. 1 to Exh.
16 A. The proposed Notice also includes the final approval hearing date and time, and it provides
17 contact information for Class Counsel and Settlement Administrator (Phoenix) in the event
18 Settlement Class members have any questions about the Settlement. *Id.* This Notice satisfies Cal.
19 Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching the Settlement
20 Class.

21 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

22 Finally, the Court should set a hearing for final approval on a date appropriately scheduled
23 to follow Settlement Class members’ response deadline. *See* Cal. Rule of Court 3.769.

24 **V. CONCLUSION**

25 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
26 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
27 Proposed Order submitted concurrently herewith.

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Respectfully submitted,

Dated: September 25, 2024

ABRAMSON LABOR GROUP

By: Neil Larsen
Neil M. Larsen
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