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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF MERCED**
14

15 AGUSTIN FLORES, on behalf of himself
16 and others similarly situated,

17 Plaintiff,

18 vs.

19 AMERICAN INTERNATIONAL
20 INDUSTRIES; and DOES 1 through 100,
21 inclusive,

22 Defendants.

Case No. 23CV-04631

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT THEREOF**

[Declaration of Anthony J. Orshansky and
[Proposed] Order filed concurrently
herewith]

Preliminary Approval Hearing:

Date: March 5, 2025

Time: 8:15 a.m.

Dept.: 8

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on March 5, 2025, at 8:15 a.m., or as soon thereafter as the matter may be heard in Department 8 of the above-entitled Superior Court of California, County of Merced, located at 627 W. 21st Street Merced, California 95340, before the Honorable Stephanie Jamieson, pursuant to Cal. Code of Civ. Pro. § 382, Cal. Rule of Court 3.769(c) and Lab. Code, § 2699(g)(1), Plaintiff Agustin Flores (“Plaintiff”) individually, and on behalf of all others similarly situated, will and hereby does move this Court for an entry of an Order granting preliminary approval of the Parties’ proposed settlement.

1. Preliminarily certifying the Class for purposes of settlement;
2. Preliminarily approving Plaintiff Agustin Flores as Class Representative for purposes of settlement;
3. Preliminarily appointing CounselOne, PC as Class Counsel for purposes of settlement;
4. Preliminarily approving the settlement as fair, adequate, and reasonable based upon the terms set forth in the Parties’ Stipulation of Class and Representative Action Settlement (“Settlement Agreement”), including payment by Defendant American International Industries (“Defendant”) of the non-reversionary Gross Settlement Amount totaling Two Hundred and Eighty-Five Thousand Dollars (\$285,000) for a putative class of approximately 369 current and former hourly-paid or non-exempt employees who are or were employed by Defendant in California during the Class Periods;
5. Preliminarily approving Class Counsel’s request for up to thirty-five percent of the Gross Settlement Amount as attorneys’ fees (i.e., up to \$99,750), plus reimbursement of actual litigation costs up to \$10,000;
6. Appointing CPT Group, Inc. as the third-party Settlement Administrator for mailing notices and for settlement administration, and approving up to \$10,000 be deducted from the Gross Settlement Amount for the costs of settlement administration;

1 7. Approving the proposed Notice of Class Action and PAGA Settlement (“Class
2 Notice”), along with the Share Form (collectively, “Notice Packet”), and ordering they be
3 distributed to Class Members; and

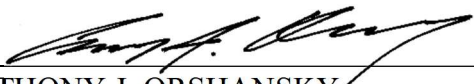
4 8. The scheduling of a hearing to consider whether the settlement should be finally
5 approved and award amounts for the Class Representative Service Award Payment,
6 Administrative Costs, the Private Attorneys General Act payment to the California Labor and
7 Workforce Development Agency, as well as attorneys’ fees and costs to Class Counsel.

8 This Motion is based upon the supporting Memorandum of Points and Authorities, the
9 Declaration of Anthony J. Orshansky, the long-form Settlement Agreement, the proposed Notice
10 of Class Action and PAGA Settlement, the Share Form, and the [Proposed] Order filed
11 concurrently herewith, along with such supplemental filings and exhibits as are required and
12 described *infra*, evidence and argument of counsel may be presented at the hearing, and such
13 additional matters as the Court may consider at the time of hearing. Finally, given the multiplicity
14 of issues addressed in this motion, Plaintiff respectfully believes there is good cause to exceed the
15 20-page limit set forth in California Rule of Court 3.764(c)(2), and respectfully requests that the
16 Court consider Plaintiff’s memorandum of points and authorities, which is 28 pages in length.

17
18 Respectfully submitted,

19
20 DATED: February 7, 2025

COUNSELONE, PC
ANTHONY J. ORSHANSKY

21
22 By: 
23 ANTHONY J. ORSHANSKY

24 Attorneys for Plaintiff Agustin Flores, on behalf
25 of himself and others similarly situated
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1 **MEMORANDUM OF POINTS AND AUTHORITES**

2 **I. INTRODUCTION**

3 Plaintiff Agustin Flores (“Plaintiff”) seeks preliminary approval of a settlement entered
4 with Defendant American International Industries (“Defendant”) on behalf of himself and a
5 putative state class of current and former hourly-paid or non-exempt employees of Defendant. If
6 approved, the contemplated Joint Stipulation of Class Action and PAGA Settlement (“Settlement
7 Agreement”), attached as **Exhibit 1** to the Declaration of Anthony J. Orshansky (“Orshansky
8 Decl.”), will resolve all claims of the Plaintiff and participating Class Members as well as claims
9 for penalties under the Private Attorneys General Act of 2004 (“PAGA”), Lab. Code § 2698 *et*
10 *seq.*

11 Importantly, this wage-and-hour class and representative settlement matches the terms of
12 an existing larger settlement entered into by the same Defendant that has already received final
13 approval from another court. Specifically, this proposed settlement follows a prior class and
14 representative settlement in the matter of *Berenice de la Torre v. American International*
15 *Industries* (“Torre”), Los Angeles County Superior Court Case No. 20STCV29551, filed on
16 August 4, 2020 by the same counsel representing Plaintiff in this case. As further discussed below
17 and in the accompanying declaration of counsel, the *Torre* settlement received final approval on
18 September 8, 2022. Following that approval, counsel for the parties discovered that a small group
19 of employees had been inadvertently omitted from the *Torre* settlement. Counsel evaluated the
20 prospects of further litigation and after further negotiation, agreed to (1) settle the claims in this
21 case, effectively extending the *Torre* settlement through an additional payment by Defendant on
22 the same per-workweek value as to the newly included class members, and (2) secure an
23 additional release period as to all class members through additional consideration paid by
24 Defendant.

25 The settlement entails a **non-reversionary** payment by Defendant of a gross settlement
26 amount of **Two Hundred and Eighty-Five Thousand Dollars (\$285,000)**. After deducting for
27 Court-approved attorneys’ fees and costs to Class Counsel, a service award payment to the Class
28 Representative, Administrative Costs, and penalties recoverable pursuant to PAGA, the

1 remaining amount is the Net Settlement Amount (“Net Settlement Amount”) of which an
2 estimated \$120,250 will be distributed to participating Class Members.

3 Like the *Torre* settlement, this settlement too is fair, reasonable, and adequate, and in the
4 best interests of the Class Members. Consequently, Plaintiff, with the consent of Defendant,
5 hereby moves for an order: (1) conditionally certifying the Class for settlement purposes;
6 (2) granting preliminary approval of the Settlement Agreement; (3) approving the Notice of Class
7 Action and PAGA Settlement, along with the Share Form to be sent to Class Members; and
8 (4) setting a hearing for final approval of the Settlement.

9 **II. SUMMARY AND STATUS OF THE LITIGATION**

10 **A. Nature of the Claims**

11 Plaintiff and the Class were employed by Defendant in California as non-exempt
12 employees. Orshansky Decl., ¶ 43. Through this this lawsuit, Plaintiff alleged the following
13 claims: (1) Violation of California Labor Code §§ 1194, 1194.2, 1197, 1197.1, and 1199 (Failure
14 to Pay Minimum Wages); (2) Violation of California Labor Code §§ 510, 1198, and 1199 (Failure
15 to Pay All Overtime Wages); (3) Violation of California Labor Code §§ 226.7 and 512(a) (Meal
16 Period Liability); (4) Violation of California Labor Code § 226.7 (Rest Break Liability); (5)
17 Violation of California Labor Code § 226(a) (Failure to Provide Accurate Itemized Wage
18 Statements); (6) Violation of California Labor Code §§ 201-204 (Failure to Pay All Wages Owed
19 Timely and Upon Separation of Employment); (7) Violation of California Labor Code §§ 2800
20 and 2802 (Failure to Reimburse Business Expenses); (8) Violation of California Labor Code
21 Section 1174(d) (Failure to Maintain Accurate Itemized Wage Statements); (9) Violation of
22 California Business and Professions Code Section 17200, et seq. (Unfair Business Practices); and
23 (10) Penalties Pursuant to Labor Code Section 2699 (Private Attorneys General Act). *See*
24 generally Complaint; *see also* Orshansky Decl., ¶ 27.

25 **B. The Prior *Torre* Settlement**

26 On September 8, 2022, the Los Angeles County Superior Court granted final approval of
27 a settlement in the matter of *Berenice de la Torre v. American International Industries*, Case No.
28 20STCV29551. The *Torre* matter resolved claims under the same causes of action as in this case

1 for a class of approximately 592 class members employed by the same Defendant, for a class
2 period of approximately 4.5 years, from February 1, 2017 to October 15, 2021. *See* Orshansky
3 Decl., ¶ 30.

4 **C. Investigation, Exchange of Information, and Settlement Negotiations**

5 Following the finalization and distribution of funds in the *Torre* settlement, counsel for the
6 Defendant discovered and informed counsel for Plaintiff that approximately 41 individuals had
7 been inadvertently omitted from the *Torre* settlement. Orshansky Decl., ¶ 32. The omission of
8 these individuals would not have triggered the escalator clause from the *Torre* settlement
9 agreement. *Id.* Against the prospect of further litigation, the parties negotiated at arm's length a
10 settlement that paid the omitted 41 individuals the same per-workweek value as in *Torre*, as well
11 as extended the release period for all 321 current and former employees (including the originally
12 omitted 41 employees) who had worked from the time period from October 16, 2021 (the end of
13 the *Torre* class period) to July 18, 2022. Orshansky Decl., ¶ 32. The settlement here includes a
14 "Class A" period defined as February 1, 2017 to October 15, 2021 (corresponding to the 41
15 individuals inadvertently omitted from the *Torre* settlement), and a "Class B" period defined as
16 October 16, 2021 to July 18, 2022 (which includes all 328 current and former employees for an
17 additional release period beyond the *Torre* settlement release period, which ended October 15,
18 2021). *See* Settlement Agreement, ¶¶ 3-8; Orshansky Decl., ¶ 80. The per-workweek value of the
19 Net Settlement Amount (net of fees, costs and the PAGA Payment) paid as consideration for "Class
20 A" members is the same as it was for class members in *Torre*. Orshansky Decl., ¶ 79. The per-
21 workweek value of the Net Settlement Amount for "Class B" members is approximately half of
22 the Class A / *Torre* amount in light of the fact that, following *Torre*, Defendant was securing a
23 release for a time period post-*Torre* in which it had significantly tightened compliance with
24 relevant wage-and-hour practices. *Id.*

25 **III. SUMMARY OF THE SETTLEMENT TERMS**

26 Under the terms of the Settlement Agreement, Defendant has agreed to pay a *non-*
27 *reversionary* amount of *Two Hundred and Eighty-Five Thousand Dollars (\$285,000)* into a
28 common fund to settle the specific wage and hour claims of the Settlement Class Members and

PAGA Group Members; this amount is called the “Gross Settlement Amount.” Settlement Agreement ¶ 21. This Gross Settlement Amount shall be inclusive of all settlement payments to Settlement Class Members, the Enhancement Payment to the Class Representative, the Administration Costs to the Settlement Administrator, the Attorneys’ Fees and Costs to Class Counsel, and the Private Attorneys General Act (“PAGA”) Payment, including payment to PAGA Group Members and to the California Labor and Workforce Development Agency (“LWDA”) for civil penalties pursuant to statute. *Id.* The only monies excluded from the Gross Settlement Amount is that amount to be paid by Defendant as the employer’s share of payroll taxes with respect to the wage portion of the settlement payments to Settlement Class Members, which shall be paid separately. *Id.*

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

- Up to \$99,750 – which is 35% of the Gross Settlement Amount – and up to \$10,000 in litigation costs to Class Counsel (the “Attorneys’ Fees and Costs”);
- Up to \$5,000 to the Class Representative as an Enhancement Payment – as a service award and in exchange for a general release of claims;
- Up to \$40,000 allocated as a PAGA Payment – of which 75% of the PAGA Payment is allocated for payment to the LWDA for civil penalties pursuant to statute and 25% of the PAGA Payment is to be distributed to PAGA Group Members; and
- Up to \$10,000 to the Settlement Administrator for Administration Costs to notify Class Members and administer the settlement.

The amount remaining after the foregoing deductions, approximately \$120,250, is called the “Net Settlement Amount.” Settlement Agreement ¶¶ 27, 58. The entire Net Settlement Amount will be paid out to Settlement Class Members. Settlement Class Members shall automatically receive payments without the need to submit a claim form, and the PAGA Group Members shall receive PAGA payments irrespective of whether or not they opt out. Settlement Agreement, ¶ 56.

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1 **A. The Settlement Provides for Reasonable Monetary Payments.**

2 If all of the approximately 369 Class Members participate (*i.e.*, do not submit a request for
3 exclusion/opt-out), and assuming hypothetically that distribution was on an individual *pro rata*
4 basis, then each individual settlement payment would be an estimated \$325.88 per Class Member.
5 Orshansky Decl., ¶ 11. In actuality, each Class Member will receive a proportional share of the
6 Net Settlement Amount based on his or her eligible workweeks during the applicable Class Period.
7 The Settlement Administrator will determine each Class Member’s individual settlement payment
8 as follows: First, the sum of all Class Members’ individual Workweeks will be the “Total
9 Workweeks.” Second, the Net Settlement Amount will be divided by the Total Workweeks to yield
10 the “Workweek Value.” Third, each Class Member’s individual settlement payments will be
11 determined by multiplying his or her individual Workweeks by the Workweek Value. *See*
12 Settlement Agreement, ¶ 58(e)(i)-(ii). Finally, in addition, all Class Members will receive a
13 proportional share of the 25% of the PAGA Payment based on his or her Workweeks during the
14 PAGA Periods, defined as July 24, 2019 through October 15, 2021 as to the “PAGA Group A
15 Period” (corresponding to the 41 employees inadvertently omitted from the *Torre* settlement) and
16 October 16, 2021 to July 18, 2022 as to the “PAGA Group B Members” (as to all 328 current and
17 former employees from whom Defendant is securing a release beyond the time period released in
18 *Torre*). *See id.*; Orshansky Decl., ¶ 9.

19 After reduction for the employee’s share of taxes on the wage portion,¹ the net payment to
20 each participating Class Member will be the sum of his or her individual settlement payment, plus
21 his or her share of the eligible PAGA Payment. As a result of the distribution formula, the
22 consideration paid to each participating Class Member is tailored to the impact of Defendant’s
23 alleged violations as well to the claims he or she is releasing. Orshansky Decl., ¶ 10. Furthermore,
24 Class Members may submit a written letter to the Settlement Administrator disputing the number
25 of Workweeks credited if he or she believes that count is inaccurate. *See* Settlement Agreement,
26

27 ¹ The Parties agreed to allocate 20% of each individual settlement payment to wages and 80% of
28 each individual settlement payment to interest, penalties, and other non-wage damages. *See*
Settlement Agreement, ¶ 60(a).

¶ 63(a). Finally, any Class Member who prefers to preserve his or her right to pursue relief or seek an alternative recovery may opt out.² *See id.*, ¶ 65.

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

As part of the Settlement, Plaintiff will apply for a service award payment at the time of seeking final approval in the amount of \$5,000 for services to the Class and a general release of all claims against Defendant. *See* Settlement Agreement, ¶¶ 40, 57; Orshansky Decl., ¶ 12. “[I]ncentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393-94 (2010). Plaintiff’s requested service award payment is intended to recognize the significant benefits conferred upon the Class and be proportional to the respective time and effort that Plaintiff expended on behalf of the Class and the PAGA aggrieved employees including, providing factual information and documents to Class Counsel, discussing the claims and theories at issue in the case with Class Counsel, identifying potential witnesses and reviewing documents; reviewing the Settlement Agreement, as well as the significant risks Plaintiff undertook by agreeing to serve as named plaintiff, and the fact that Plaintiff agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement Agreement, ¶¶ 40, 57; Orshansky Decl., ¶ 13.

Class Counsel will apply for an attorneys’ fees award of thirty-five percent (35%) of the Gross Settlement Amount: \$99,750, and reimbursement of litigation costs in an amount up to \$10,000. *See* Settlement Agreement, ¶ 58(a); Orshansky Decl., ¶ 14. Class Counsel submits that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent fee basis. Orshansky Decl., ¶ 14. Class Counsel has devoted substantial attorney time to: pre-filing investigation; analyzing Plaintiff’s claims; engaging in discovery; meeting and conferring over information and data, including Defendant’s employee handbooks, policies and procedures regarding the payment of wages, the provision of

² Again, if approved, all Class Members will receive their individual *pro rata* PAGA Payment irrespective of whether they opt-out of the Class. *See* Settlement Agreement, ¶ 56.

1 meal and rest breaks, time keeping policies, such as recording hours, issuance of wage statements,
2 and providing all wages at separation, as well as composite data regarding the number of Class
3 Members and the mix of current versus former employees, total number of pay periods, total
4 number of workweeks, and the average hourly rate in effect; preparing and submitting notice to
5 the LWDA; negotiating and preparing the long-form Settlement Agreement and Class Notice;
6 preparing this motion for preliminary approval; and otherwise litigating the case. *See* Orshansky
7 Decl., ¶ 14. Class Counsel will also expend future attorney time in attending the hearing on this
8 Motion, overseeing the notice and administration process, drafting the Final Approval Motion and
9 supporting documents, and attending the Final Approval hearing, among other tasks, such as
10 addressing questions from Class Members. Orshansky Decl., ¶ 15.

11 Both California and federal courts have recognized that an appropriate method for
12 awarding attorneys' fees in class actions is to award a percentage of the "common fund" created
13 as a result of the settlement. *See Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480, 506
14 (2016) ("the percentage of fund method survives in California class action cases"); *Wershba v.*
15 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001) (recognizing both the "percentage of
16 recovery" and "lodestar/multiplier" methods). Historically, courts have awarded percentage fees
17 in the range of 20% to 50%, depending on the circumstances of the case. *See Newberg on Class*
18 *Actions*, § 14.6 (4th Ed. 2013) ("No general rule can be articulated on what is a reasonable
19 percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee
20 award from a common fund in order to assure that the fees do not consume a disproportionate part
21 of the recovery obtained for the class, although somewhat larger percentages are not
22 unprecedented.").

23 Class Counsel submit that their request for attorneys' fees is reasonable when viewed as
24 an overall percentage of the settlement amount in light of the substantial risks and significant work
25 undertaken, the excellent results obtained for the Class Members, and the efficiency with which
26 the Parties have conducted the litigation. Orshansky Decl., ¶ 16. Assuming that the Court grants
27 preliminary approval, Class Counsel will seek an award of attorneys' fees and litigation costs at
28 the time of seeking final approval of the Settlement.

1 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

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

10 To certify a settlement class, the trial court must find the two primary requirements for
11 maintaining a class action: (1) there must be an ascertainable class; and (2) there must be a well-
12 defined community of interest in the questions of law and fact involving the parties to be
13 represented. *Vasquez v. Superior Court*, 4 Cal.3d 800, 805-809 (1971); *Daar v. Yellow Cab*
14 *Company*, 67 Cal.2d 695, 704 (1967); *Daniels v. Centennial Capital Group*, 16 Cal. App. 4th 467,
15 471 (1993); *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341 (1987). These
16 criteria are met here for the reasons set forth below.

17 **A. There Is an Ascertainable and Sufficiently Numerous Class.**

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

23 Here, the class definition is “precise, objective and presently ascertainable.” *Sevidal v.*
24 *Target Corp.*, 189 Cal. App. 4th 905, 919 (2010). The settlement here includes a “Class A” period
25 defined as February 1, 2017 to October 15, 2021 (corresponding to the 41 individuals inadvertently
26 omitted from the *Torre* settlement), and a “Class B” period defined as October 16, 2021 to July
27 18, 2022 (which includes all 328 current and former employees for an additional release period
28 beyond the *Torre* settlement release period, which ended October 15, 2021). *See Settlement*

Agreement, ¶¶ 3-8; Orshansky Decl., ¶ 80. Defendant is required to and does maintain employment records of such persons, including contact information and social security numbers. Documents and information exchanged reflect a Class of approximately 369 non-exempt hourly employees during the relevant period. As a result, the proposed Class satisfies the ascertainability and numerosity requirements. *See, e.g., Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981), stating that “[n]o set number is required as a matter of law for the maintenance of a class action” and citing examples where classes as little as 10 (*Bowles v. Superior Court*, 44 Cal.2d 574 (1955)) and 28 (*Hebbard v. Colgrove*, 28 Cal.App.3d 1017 (1972)) were upheld. *See also, Collins v. Rocha*, 7 Cal.3d 232 (1972) (finding a class of 44 farm workers sufficiently numerous).

B. There Is a Well-Defined Community of Interest.

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

1) Common Issues of Law and Fact Predominate.

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

Here, common issues of fact and law predominate as to each of the claims alleged by Plaintiff and Class Members. This litigation is predicated on uniform company policies and systemic top-down business practices revolving principally around Defendant’s timekeeping and pay practices – *e.g.*, off-the-clock work attributed to understaffing, unreasonable workloads, and/or inequitable rounding, failure to pay meal and rest break premiums, as well as business expense reimbursements, or lack thereof, etc. – as well as derivative inaccurate wage statements and pay owed upon separation. These allegations have given rise to the following claims: failure to pay

1 minimum and overtime wages; meal period liability; rest break liability; failure to pay all final
2 wages at termination of employment; failure to maintain and provide accurate itemized wage
3 statements and to maintain accurate payroll records; and derivative UCL and PAGA claims arising
4 therefrom.

5 Because Plaintiff has alleged a single top-down compensation scheme, “the relevant proof
6 [does] not vary among class members” and “clearly presents a common question fundamental to
7 all class members.” *See In Re NASDAQ Market-Makers Antitrust Litigation*, 172 F.R.D. 119, 123
8 (S.D.N.Y. 1997) (citing *In Re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493, 518
9 (S.D.N.Y. 1997)). California courts show “no hesitancy” in inferring class-wide causation, class-
10 wide injury, and class-wide damages when a common course of action has been shown. *B.W.I.*
11 *Custom Kitchens, supra*, 191 Cal.App.3d at 1350 (granting class certification in a manufacturing
12 defect case when a common course of action had been proven). This inference “*eliminates* the
13 need for each class member to prove individually the consequences of the defendants’ actions to
14 him or her.” *Id.* at 1351. Thus, the outcome of this matter depends upon questions that are common
15 to members of the Class. These types of claims are commonly held to be proper for class
16 certification. *See, e.g., Bluford v. Safeway, Inc.*, 216 Cal.App.4th 864, 871 (2013) (reversing denial
17 of rest period claim); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 726
18 (2013) (certifying meal period claim).

19 **2) Plaintiff’s Claims Are Typical of the Claims of the Settlement Class**

20 The typicality requirement is satisfied where class representatives have claims that are
21 typical of the rest of the class. *B.W.I. Custom Kitchens, supra*, 191 Cal.App.3d at 1347. Here,
22 Plaintiff’s claims are typical of those held by members of the proposed Class. Like all other Class
23 Members, Plaintiff was an hourly-paid and non-exempt employee working for Defendant in
24 California during the Class Period. Like Class Members, Plaintiff alleges he was not paid for all
25 hours worked due to off-the-clock work (*i.e.*, pre-/post-shift duties and travel time, interrupted
26 meals, and detrimentally rounded time); did not receive timely and duty-free meal and rest breaks
27 and was not paid premiums for non-compliant breaks; did not receive accurate wage statements
28 and all wages and premiums owed upon termination of the business relationship; and incurred

1 necessary unreimbursed business expenses; while working for Defendant. Orshansky Decl., ¶ 90.
2 Plaintiff was therefore impacted by the same challenged policies and practices that allegedly
3 injured the Class as a whole and subject to the same defenses raised by Defendant as to the Class
4 and is therefore typical.

5 **3) Plaintiff and His Counsel Meet the Adequacy Requirements.**

6 The adequacy of representation requirement examines conflicts of interest between named
7 parties and the class(es) they seek to represent. *Capital People First v. Department of*
8 *Developmental Services*, 155 Cal.App.4th 676, 697 (2007). Here, Plaintiff and Class Counsel will
9 adequately represent the Settlement Class, as there are no conflicts between the Plaintiff and the
10 Class he seeks to represent. Orshansky Decl., ¶ 91; *see also, e.g., McGhee v. Bank of Bank of*
11 *America*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication
12 that plaintiff's counsel were not qualified and the named plaintiff had no interests antagonistic to
13 those of the proposed class). Class Counsel also have extensive experience in wage and hour
14 litigation. *See* Orshansky Decl., ¶¶ 81-85, 91.

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

16 In making its class certification decision, the court must determine that a class action would
17 be superior to alternative means for the fair and efficient adjudication of the litigation. By
18 consolidating hundreds of individual actions into a single proceeding, this Court's use of the class
19 action device enables it to manage this litigation in a manner that serves the efficiency interests of
20 the litigants and the judicial system. Absent class treatment, the only alternative would be to force
21 numerous employees to file individual actions. *Sav-On Drug Stores, Inc. v. Superior Court*, 34
22 Cal.4th 319, 339 n.10 (2004) (stating "[t]he relevant comparison lies between the costs and benefits
23 of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by
24 numerous separate actions – not between the complexity of a class suit that must accommodate
25 some individualized inquires and the absence of any remedial proceeding whatsoever.") Finally,
26 in the context of settlement, the superiority concerns are essentially non-existent. Orshansky Decl.,
27 ¶ 92.

28 ///

1 **V. THE TWO-STEP APPROVAL PROCESS**

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

5 In this regard, the *Manual for Complex Litigation (Second)* explains:

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

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

21 **VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

22 As a matter of public policy, courts both encourage the use of the class action device and
23 favor settlement over continued litigation. *See, e.g., Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434
24 (2000) ("Courts have long acknowledged the importance of class actions as a means to prevent a
25 failure of justice in our judicial system."); *State v. Levi Strauss & Co.*, 41 Cal.3d 460, 471 (1986);
26 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (1992) ("[S]trong judicial policy . . . favors
27 settlements, particularly where complex class action litigation is concerned."); *Newberg*, § 11.41.
28 Settlement is favored, and settlement agreements are realistically assessed. *Stamburgh v. Superior*

1 *Court*, 62 Cal. App. 3d 231, 236 (1976); *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989)
2 (“The fact that plaintiff might have received more if the case had been fully litigated is no reason
3 not to approve the settlement.”).

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

9 **A. The Settlement Is Entitled to a Presumption of Fairness**

10 Moreover, courts presume the absence of fraud or collusion in the negotiation of a
11 settlement unless evidence to the contrary is offered. In short, there is a presumption that the
12 negotiations were conducted in good faith. *See Newberg*, § 11.51; *Rodriguez v. West Publ. Corp.*
13 2007 U.S. Dist. LEXIS 74767 at 24-25 (C.D. Cal. August 10, 2007); *In re Chicken Antitrust*
14 *Litigation*, 560 F.Supp. 957, 962 (N.D. Ga. 1980); *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir.
15 1989); *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 681
16 (7th Cir. 1987). Courts do not substitute their judgment for that of the proponents, particularly
17 when settlement has been reached by experienced counsel familiar with the litigation. *Rodriguez*,
18 *supra*, 2007 U.S. Dist. LEXIS 74767 at 24. As detailed at length in the accompanying declaration
19 of Class Counsel, the settlement is the result of extensive settlement negotiations between the
20 Parties, conducted at arm’s length, and informed by substantial factual and legal investigations.
21 Orshansky Decl., ¶¶ 25-34.

22 **1) Investigation Was Sufficient to Allow Counsel to Act Intelligently**

23 In the prior *Torre* matter, the Parties participated in a lengthy mediation session with
24 Jeffrey Krivis, Esq. of First Mediation Corporation, who is experienced in mediating complex
25 general litigation, labor and employment claims, class actions, and PAGA cases, among others.
26 Orshansky Decl., ¶ 31. During the mediation, the Parties exchanged further information and
27 discussed all aspects of the case, including the risks and delays of litigation and the risk to both
28 Parties for proceeding with a motion for class certification, liability under the claims asserted, and

1 the implications of a PAGA representative action. *Id.* These were contentious issues because of
2 the factual and legal complexity of the case. *Id.* The *Torre* case did not settle at mediation. *Id.*
3 However, the Parties continued to negotiate with the assistance of Mr. Krivis, and after several
4 months, accepted the mediator’s proposal. *Id.*

5 Here, when it became known that certain employees had been inadvertently omitted from
6 the *Torre* settlement, the Parties naturally built upon the foundation of the *Torre* settlement –
7 including the significant work prior to, during and after mediation to reach an agreement – in order
8 to arrive at a resolution for the additional workweeks released in the present settlement. *Id.*, ¶¶ 32-
9 33.

10 3) *Class Counsel Are Experienced in Similar Litigation*

11 Class Counsel believe that the settlement is fair and reasonable and serves the best interests
12 of the Class Members. Orshansky Decl., ¶ 34. Although the recommendations of counsel
13 proposing the class settlement are not conclusive, the Court can properly take the
14 recommendations into account, particularly if counsel have been involved in litigation for some
15 period of time, appear to be competent, have experience with this type of litigation, and significant
16 discovery has been completed. *See Newberg*, § 11.47. Here, Plaintiff is represented by competent
17 and experienced counsel who possess extensive experience litigating wage and hour class actions
18 and have been appointed as class counsel in numerous cases alleging similar claims. Orshansky
19 Decl., ¶¶ 81-85.

20 B. The Settlement Is Fair, Reasonable, and Adequate

21 To make a fairness determination, the Court should consider several factors, including “the
22 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation,
23 the risk of maintaining class action status through trial, the amount offered in settlement, the extent
24 of discovery and the stage of proceedings, [and] the experience and views of counsel.” *Dunk v.*
25 *Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1986). “The list of factors is not exclusive and the
26 court is free to engage in a balancing and weighing of factors depending on the circumstance of
27 each case.” *Wershba, supra*, 91 Cal. App. 4th at 245. As discussed below, the proposed Settlement
28 is fair, adequate, and reasonable in light of the overall factors in this case.

1 ***1) The Strength of Plaintiff's Case***

2 In connection with and in addition to the prior *Torre* matter, Class Counsel carefully vetted
3 the claims at issue to arrive at a comprehensive damages model for Defendant's liability.
4 Orshansky Decl., ¶ 35. Although Plaintiff steadfastly maintains that his claims are meritorious,
5 he acknowledges that there are substantial risks and uncertainty in proceeding with class
6 certification and trial. *Id.* As explained in further detail below in the discussion valuing each of
7 the claims, Defendant presented numerous defenses to Plaintiff's claims, both on the merits and
8 with respect to class certification. Orshansky Decl., ¶ 35. For example, Defendant defended
9 against the minimum and overtime wage claims by relying on written policies that explicitly
10 prohibited Class Members from engaging in off-the-clock work. Orshansky Decl., ¶ 36.
11 Defendant also argued that Class Members worked in different job positions and had different
12 managers, and that, as a result, Defendant contended there was variation to the circumstances that
13 could allegedly cause the employees to be deprived of the opportunity to take legally compliant,
14 duty-free meal and rest periods, and this variation in circumstances raised highly individualized
15 questions of fact. *Id.* Additionally, with regard to Plaintiff's meal period violation claims,
16 Defendant contended that it utilized a "bell system" for meal periods, whereby a bell would ring
17 to notify all employees to take their meal period, and another bell would ring at the end of the
18 meal period to notify all employees to return to work. *Id.* Moreover, Defendant alleged it provided
19 35-minute meal periods rather than the 30 minutes required by law. *Id.* Further, Defendant
20 contended Plaintiff would face significant hurdles to certification given that Class Members
21 signed arbitration agreements with class action waivers as a condition of their employment, which
22 if enforceable would convert a putative class action (with the potential for class-wide damages)
23 into an individual dispute and action – effectively forcing Class Members to retain their own
24 counsel and proceed on the basis of individual claims only. *Id.*

25 Although Plaintiff was prepared to litigate these claims through class certification and,
26 ultimately, through trial, given the substantial amount offered in settlement, Class Counsel
27 predicted that it was far from certain that Plaintiff would be able to recover a greater amount at
28

trial, particularly after considering the increased litigation costs that would accrue. Orshansky Decl., ¶ 40. Thus, this factor supports preliminary approval of the Settlement.

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

While Plaintiff conducted informal discovery (and counsel had conducted several rounds of written discovery in the prior *Torre* action), the Parties agreed to explore early settlement efforts before launching into full-fledged and hotly contested litigation. Orshansky Decl., ¶¶ 25-34. Therefore, absent settlement, the Parties would have needed to conduct substantial additional discovery, such as the production of voluminous records and numerous depositions of experts and percipient witnesses, and prepare the case for class certification and trial. *Id.*, ¶ 37. The Parties would have had to depose a number of people such as managers, supervisors, human resource representatives, and employees in order to establish liability. *Id.* Discovery disputes would have no doubt arisen and liability likely would have entailed a battle of experts. *Id.* This settlement avoids the considerable time, attorneys' fees and costs, and party resources associated with conducting additional discovery, moving for class certification and potentially summary judgment or adjudication, and ultimately, trial, as well as the risks and the accompanying burden of continued litigation on the Court. *Id.* Thus, this factor supports preliminary approval of the Settlement.

3) Risk of Maintaining Class Action Status

Here, settlement was reached prior to class certification and the result was a successful outcome for the Class. Orshansky Decl., ¶ 38. Yet, class certification was by no means a foregone conclusion. *Id.* For example, Class Members worked in different job positions and had different supervisors, and that, as a result, Defendant contended there was variation to the circumstances that could allegedly cause the employees to work off-the-clock and/or be deprived of the opportunity to take legally compliant, duty-free meal and rest periods, and this variation in circumstances raised highly individualized questions of fact. *Id.* Defendant further disputed Plaintiff's characterization of working conditions, liability, and damages, and possessed documentary and testimonial evidence rebutting Plaintiff's allegations. *Id.* If the Court either denied class certification or later decertified it, the Class would recover nothing and Class Members would be forced to retain their own counsel and proceed on the basis of individual claims

only. Here, Class Members may avoid each of the risks described and receive substantial monetary benefits, which also weighs in favor of preliminary approval.

4) Amount Offered in Settlement Given Realistic Value of Claims

A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages to be fair and reasonable. *Wershba, supra*, 91 Cal. App. 4th at 246, 250 (acknowledging that “Compromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives in the interest of avoiding litigation.”). The proposed Settlement provides a fair and reasonable monetary recovery for the Settlement Class in the face of disputed claims.

Plaintiff carefully estimated the settlement recovery as a reasonable percentage of possible damages recoverable at trial. Based on data received in negotiations, Plaintiff’s damages analysis shows that the proposed settlement reflects an ***estimated 26.3% of the maximum realistic potential damages*** recoverable at trial. Orshansky Decl., ¶¶ 41, 76. Utilizing a class-wide damages study to assess the nature and magnitude of the claims in question, *see, Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 123 (2008), this case clearly meets the requirements that the class settlement is within the “ballpark” of reasonableness.

Unpaid Minimum and Overtime Wages

Plaintiff, along with other hourly non-exempt employees, performed pre- and post- shift off the clock work to minimize the incidence of overtime. Orshansky Decl., ¶ 43. Plaintiff contended that all off-the-clock work is compensable time. *Id.* An employer must pay its employees no less than the minimum wage for all hours worked, *see* Labor Code § 1197, thus, Plaintiff sought to recover at least the minimum wage for all off-the-clock work, plus liquidated damages in that amount under Labor Code § 1194.2. *Id.*

In the prior *Torre* matter, Class Counsel analyzed the documents and data produced by Defendant and, in conjunction with interviews of Plaintiff and Class Members, determined Defendant’s degree of liability and amounts due in damages – specifically, the incidence and

1 amount of purported off-the-clock activity. Orshansky Decl., ¶ 44. Notwithstanding the obvious
2 evidentiary challenge of quantifying unrecorded off-the-clock hours, Plaintiff estimated that
3 Defendant is liable for an aggregate of approximately twenty (20) minutes of unpaid straight and
4 overtime pay per workweek. Orshansky Decl., ¶ 45. Based on Defendant's records, at the average
5 straight time hourly rate of \$15.82 and the average overtime hourly rate of \$23.73, such yields an
6 estimated damages amount of \$205,904.81. *Id.* Plaintiff also concluded that inequitable rounding
7 occurred with a net loss of 6,885.27 hours being unpaid to employees, thus adding an additional
8 \$154,782.43 to that off-the-clock sum. Thus, the estimated total of unpaid straight and unpaid
9 overtime wages is \$360,687.24, without discounting for risks associated with certification or
10 merits. *Id.* However, given that the bulk of the workweeks at issue post-date the *Torre* litigation,
11 after which Defendant credibly indicated that it had significantly tightened up its practices around
12 uncompensated off-the-clock and rounded time, Class Counsel determined that a 75% reduction
13 was appropriate, yielding an estimated \$90,171.81 was a more realistic maximum recoverable
14 amount on this claim.

15 In opposition to certification, Defendant contended that Plaintiff's claim for off-the-clock
16 work is not amenable to class treatment, because employees worked in a variety of departments
17 with different requirements, and it would require an unmanageable series of mini-trials to
18 determine how much time was spent without pay. Orshansky Decl., ¶ 46. Further, in terms of
19 merit defenses, Defendant vigorously disagreed with Plaintiff's theories regarding how much off-
20 the-clock work occurred in reality, and the credibility of those claimed hours given Defendant's
21 express written policies to the contrary. *Id.* The failure to track all hours poses evidentiary
22 difficulties because it is hotly contested how much off-the-clock work actually occurred. *Id.*
23 Although Class Counsel conducted multiple Class Member interviews, for Plaintiff to establish
24 the quantity of specific disputed and unrecorded work activities – especially over multiple job
25 titles, at differing pay rates – would have been costly, time-consuming, and daunting. *Id.*

26 Defendant further responded that any off-the-clock time is *de minimis*. Orshansky Decl.,
27 ¶ 47. Plaintiff countered that such defense lacks viability in light of *Troester v. Starbucks Corp.*,
28 5 Cal.5th 829 (2018), given that the California Supreme Court refused to allow the *de minimis*

1 defense to insulate Starbucks from having to pay employees for small amounts of work regularly
2 performed off-the-clock. *Id.* What is not clear, however, is to what extent the *de minimis* defense
3 would apply where the uncaptured hours were associated with an occasionally recurring activity.
4 *Id.*

5 In light of these considerations – especially the evidentiary difficulties of demonstrating
6 off-the-clock work on a class-wide basis – Class Counsel applied a discount that incorporated the
7 risks of non-certification and being unsuccessful on the merits. Orshansky Decl., ¶ 48.

8 **Meal and Rest Period Violations**

9 Plaintiff asserted that there are compliance issues with respect to meal breaks meal breaks
10 – some are late, missed, short, or interrupted. Orshansky Decl., ¶ 49. Moreover, notwithstanding
11 Defendant’s otherwise compliant policy, Plaintiff and Class Members were not always allowed to
12 leave the premises during meal periods. *Id.* Further, Defendant failed to provide Plaintiff and
13 Class Members with second 30-minute meal periods for shifts lasting longer than 10 hours. *Id.*

14 On February 25, 2021, in *Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021), the
15 California Supreme Court reversed the Fourth Appellate District and set forth two clear rules:
16 (1) employers are not permitted to round time records when determining if employees are entitled
17 to meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods
18 were provided to employees if the time records show otherwise. Using this opportunity to echo
19 its long stance that California liberally construes the Labor Code and wage orders to favor
20 protection of employees, the California Supreme Court emphasized that meal periods are part of
21 the remedial worker protection framework to protect the health and safety of employees. Here,
22 however, Defendant employed an automatic meal period deduction policy and did not provide a
23 mechanism by which Plaintiff and Class Members could override the auto-deduction if they did
24 indeed work during a meal period. Orshansky Decl., ¶ 50.

25 According to Defendant’s policy, employees “must accurately record all hours worked,
26 including the start and stop times at the beginning and end of their shift, as well as the start and
27 end of their meal periods. Failure to do so will result in disciplinary action.” Orshansky Decl.,
28 ¶ 51. However, pursuant to Wage Order 4, section 7(A)(3), an “employer shall keep accurate

1 information with respect to each employee including the following . . . [t]ime records showing
2 when the employee begins and ends each work period. Meal periods, split shift intervals and total
3 daily hours worked shall also be recorded.” Under California law, employers, not employees, have
4 the burden to record and maintain accurate time records. The California Supreme Court in
5 *Donohue* also reiterated that it is the employer’s duty to maintain accurate time records for meal
6 periods. *See* 11 Cal.5th at 81.

7 Significantly, there is no indication that Defendant made any payments of a meal period
8 premium for “missed,” “short,” or “late” meal periods to employees. Orshansky Decl., ¶ 52.
9 Consequently, Plaintiff alleged that Defendant violated Labor Code §§ 226.7, 512, and applicable
10 Wage Orders by failing to compensate Plaintiff and Class Members for short, late, interrupted, and
11 missed meal periods. *Id.*

12 Defendant contended that it had practices, policies, and procedures to provide meal and rest
13 breaks every workday to their employees that fully complied with the law. Orshansky Decl., ¶ 53.
14 Defendant vehemently argued that it complied with the requirements articulated by the California
15 Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). Orshansky
16 Decl., ¶ 53. Specifically, Defendant maintained that it “provides” employees with a reasonable
17 opportunity to take timely meal periods of at least 30 minutes, relieves employees of all duties
18 during meal periods, and relinquishes control over employees’ activities, including the ability to
19 leave the premises during meal periods. *Id.* In fact, Defendant alleged that it employs a “bell
20 system,” by which a bell rings to notify employees to take their meal periods, where all employees
21 take their meal periods at the same time, and a bell rings again to notify employees it is time to
22 return to work. *Id.* Defendant claimed that because of this system, it cannot be liable for meal
23 period violations given all employees take timely meal periods. *Id.* Additionally, Defendant
24 maintained employees certify that they have been provided all meal periods and rest breaks that
25 they were due on their time sheets or timecards each pay period, except for any instances duly
26 recorded by the employee on the Missed Meal and Rest Period Sign In Sheet. *Id.*

27 Further, after the prior similar class and representative action against the same Defendant
28 in the *Torre* case, Defendant contended it has since further tightened its policies and procedures to

1 ensure compliance with California law. Thus, Defendant argued, the failure of an employee to take
2 a full meal period cannot be a fault of company policy, as it provides more than the minimum time
3 prescribed by law for meal periods. *Id.*

4 Like most employers facing meal period litigation, Defendant argued that employees were
5 apprised of their right to take meal periods and provided compliant meal periods, but some may
6 voluntarily have waived them. Orshansky Decl., ¶ 54. Defendant contended that the issue of
7 voluntary waiver would necessarily devolve into a series of individualized mini-trials, precluding
8 class certification. *Id.*; see also *Duran v. U.S. Bank National Association*, 59 Cal.4th 1, 25 (2014)
9 (holding that the defendant must be provided an opportunity to litigate affirmative defenses, even
10 when they turn on individual questions).

11 Based upon the analysis of Class Members' time and payroll records and, in conjunction
12 with interviews of Plaintiff and Class Members, Plaintiff determined that 10% of eligible shifts
13 were the subject of unique violations for missed, short, or late meal periods, and calculated the
14 potential exposure of this claim to be \$173,881.62. Orshansky Decl., ¶ 55.

15 Plaintiff also alleged that Class Members did not receive authorized rest breaks as required
16 whereby employers "relinquish control over how employees spend their time and relieve
17 employees of all duties." Orshansky Decl., ¶ 56; see also *Augustus v. ABM Security Service, Inc.*,
18 2 Cal.5th 257, 260 (2016). Due to Defendant's work demands and inadequate staffing, Plaintiff
19 alleged he and Class Members did not receive timely and compliant rest breaks, nor did Defendant
20 relinquish control over how employees spent their 10-minute rest periods. *Id.* As with the meal
21 periods, Plaintiff did not receive rest break premium payments for non-compliant rest breaks, nor
22 is there evidence that Defendant made rest break premium payments to Class Members. *Id.*, ¶ 57.
23 Thus, Plaintiff alleged that Defendant did not provide premium pay for each non-compliant rest
24 break as required under Labor Code § 226.7. *Id.*

25 Here again, Defendant disputed liability and damages. Defendant maintained that it
26 authorized and permitted duty-free rest breaks of not less than ten minutes for every major fraction
27 of four hours worked as required by Labor Code § 226.7. Orshansky Decl., ¶ 58. Defendant
28 explained that Class Members had ample opportunity to take, and did take, regular rest breaks. *Id.*

1 As with meal periods, Defendant argued that any Class Member who failed to take a rest break, or
2 took a short or late rest break, did so voluntarily and that all applicable rest breaks were still
3 authorized and provided. *Id.* Defendant also attempted to distinguish *Augustus, supra*, which
4 involved security guards who were required to monitor a pager, phone, or other device as having
5 an added constraint that is not present in this case. *Id.*

6 Class Counsel again applied a 10% violation rate based on the narratives of Plaintiff and
7 other Class Members for a maximum exposure rate of \$173,881.62. *Id.* For settlement purposes,
8 and to account for the difficulties of certifying and proving unrecorded rest break violations, a
9 downward departure from that maximum exposure was and is warranted. *Id.*

10 **Unreimbursed Expenses**

11 Plaintiff alleged a cause of action under Labor Code § 2802(a), which states that an
12 employer must reimburse employees for all necessary expenditures that employees incur in
13 discharging their duties. Orshansky Decl., ¶ 60. Here, Plaintiff and Class Members were required
14 to use their personal cell phones to communicate with supervisors and coworkers for reasons
15 related to work, yet Defendant failed to reimburse for these necessary business expenses. *Id.*
16 Defendant contended that it has a policy and practice of reimbursing employees for necessary
17 business-related expenses. *Id.*, ¶ 61. Defendant also contended that, with respect to the alleged
18 expenses for which Plaintiff and other Class Members never requested reimbursement from
19 Defendant, Defendant did not know and had no reason to know that the alleged business-related
20 expenses were incurred. *Id.* Moreover, to the extent it occurred, Defendant asserted that this claim
21 is not suitable for class treatment as it would require individualized determinations as to whether
22 each employee used a personal cell phone for work-related purposes and, if so, how much of that
23 use was a reasonable percentage of his or her individual monthly phone bill. *Id.* Defendant also
24 argued that the California Labor Code only requires reimbursement of “necessary” expenses – as
25 opposed to any expense that is incurred in the course of performing work – and argued that
26 distinguishing a necessary expense from an unnecessary one would require individualized inquiry.
27 *Id.*, ¶ 62 *see also* Labor Code § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554
28 (2007). Furthermore, whether an expense was necessary would depend in part on the

1 reasonableness of the employee's choice and would thus have to be established by way of
2 extensive individual factual inquiry and/or statistical evidence. *Cochran v. Schwan's Home*
3 *Services, Inc.*, 228 Cal.App.4th 1137 (2014).

4 For the foregoing reasons, and taking into account the wide variety of telephone plans,
5 providers and costs which creates evidentiary complexities on an individual basis, let alone class-
6 wide, Plaintiff assigned de minimis value to this claim. Orshansky Decl., ¶ 63.

7 **Wage Statement Violations**

8 Plaintiff alleges a cause of action under Labor Code section 226(a) for Defendant's failure
9 to provide accurate itemized wage statements. Orshansky Decl., ¶ 64. Failure to comply with the
10 statute entitles employees to recover the greater of all actual damages or fifty dollars (\$50) for the
11 initial pay period in which a violation occurs and one hundred dollars (\$100) for each violation in
12 a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000).
13 *See* Labor Code § 226(e). This cause of action is derivative of the foregoing causes of action
14 because if Defendant did not provide minimum and overtime wages for all hours worked, owes
15 premiums for non-compliant meal and rest breaks, unreimbursed expenses, and so forth, then the
16 wage statements were inevitably inaccurate.

17 Defendant contended, however, that Labor Code section 226(e) penalties are not automatic.
18 Orshansky Decl., ¶ 65. Rather, the employee must show that Defendant's noncompliance was
19 "knowing and intentional." *Id.* Defendant suggested that any noncompliance was not knowing
20 and intentional. *Id.*

21 Because the damages for this cause of action are penalties, the statute of limitations is only
22 one year prior to the filing of the original complaint. *See* Code Civ. Proc. § 340. The Parties
23 discussed these issues and, based on the \$50 initial violation plus the \$100 per pay period
24 subsequent violation rates, Plaintiff estimates the total maximum wage statement exposure to be
25 \$445,345.12. Orshansky Decl., ¶ 66. However, for settlement purposes, and in consideration of
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27
28

1 the risks of a loss on the merits of the underlying derivative claim(s) and/or good faith defense,³ a
2 downward departure from that maximum exposure was and is warranted. *See id.*

3 **Waiting Time Violations**

4 Plaintiff further asserts a cause of action against Defendant for failure to timely pay all
5 wages due employees at separation. Orshansky Decl., ¶ 67; *see also* Lab. Code §§ 201-203. As
6 with other claims, Defendant vigorously disagrees that it engaged in any conduct giving rise to
7 liability or entitlement to recovery of penalties. Orshansky Decl., ¶ 67.

8 Defendant argued that waiting time penalties are not appropriate because it attempted to
9 pay employees all final wages owed in good faith upon their separation, thereby precluding a
10 finding of willfulness necessary to obtain waiting time penalties. Orshansky Decl., ¶ 68. Based
11 on the estimated count of 20 former employees not previously included in the *Torre* settlement
12 and additional employees in the post-*Torre* release period who had become former employees,
13 Class Counsel appraised the maximum value of the waiting time claim as \$75,936. Orshansky
14 Decl., ¶ 69.

15 **Derivative PAGA Penalties**

16 The success of Plaintiff's PAGA claim is wholly dependent upon the success of his
17 underlying claims occurring within the one-year statute of limitations applicable to the PAGA.
18 Orshansky Decl., ¶ 70. Defendant maintained and continues to maintain it had legally compliant
19 employment policies and practices throughout the statutory period. Orshansky Decl., ¶ 71.
20 Defendant denied and continues to deny that it ever violated any provision of the California
21 Labor Code and argued that, even assuming such violations occurred, Defendant will not be
22 treated as having engaged in subsequent violations giving rise to heightened penalties. *Id.* In
23

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

1 other words, Defendant argued that heightened civil penalties for subsequent violations would
2 not be assessed unless it could be shown that Defendant had notice that it was violating the laws,
3 *e.g.*, it had been cited by a labor agency or adjudged by a court to have done so. *Id.*; *see also*,
4 *e.g.*, *Amaral v. Cintas Corp.*, 163 Cal.4th 1157, 1209 (2008). Thus, Defendant contended that,
5 at best, even if a violation giving rise to a penalty was shown for each pay period, only the lower
6 civil penalty associated with initial violations would apply. *Id.*

7 Moreover, Defendant asserted that, before a PAGA claim could be tried, under existing
8 law, the court of law would have to be satisfied that the adjudication of the PAGA claim, based
9 on a theory of uniform wage and hour practices relating to a large group of aggrieved employees,
10 is sufficiently “manageable” so as not to interfere with Defendant’s right to due process. *Id.*,
11 ¶ 72. Defendant reiterated how hourly employees’ job duties and work hours varied. *Id.*, ¶ 73.
12 Defendant contended that there was variation as to the circumstances that could allegedly cause
13 employees to work off-the-clock or to be deprived of the opportunity to take legally compliant,
14 duty-free meal and/or rest periods. *Id.* Defendant further opined that these issues presented
15 challenges not only to liability but also challenges to Plaintiff’s ability to show that a PAGA
16 claim could be efficiently and manageably adjudicated without abridging Defendant’s due
17 process rights. *Id.*

18 Finally, Defendant maintained that the Court has discretion to reduce any award of PAGA
19 penalties where it views them as duplicative. Orshansky Decl., ¶ 74; *see also* Labor Code
20 § 2699(e)(2) (the Court may “award a lesser amount than the maximum civil penalty amount
21 [authorized by PAGA] if, based on the facts and circumstances of the particular case, to do
22 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”).

23 Although, strictly speaking, class certification requirements are not required to be
24 satisfied in order to adjudicate a PAGA claim, the state of the law with respect to the adjudication
25 and valuation of a PAGA claim is uncertain. Orshansky Decl., ¶ 75. Thus, Class Counsel applied
26 discounts for the risks in establishing manageability and possible bifurcation of discovery and/or
27 trial, the risks regarding success on the merits and establishing liability, and the risks with
28 proving the extent of penalties that are warranted and possible discretionary reduction of

penalties by the Court. *Id.* As a result, Plaintiff used the “initial” \$100 per pay period violation (as opposed to the \$200 subsequent per violation rate) to calculate a realistic estimate of \$123,941.57, in potential PAGA penalty exposure – of which, by statute, only 25%, or \$30,985.39 – would be recoverable by aggrieved employees. *Id.*

Summary

Using the estimated figures for each of the claims described above, Plaintiff predicted that approximately **\$1,083,157.74⁴** would be the maximum possible recovery in damages available to Class Members. Without any discount for risks for certification or liability, the proposed recovery to the Class of \$285,000 thus represents **26.3% of the realistic possible exposure** to Defendant. Orshansky Decl., ¶ 76.

The foregoing factors each indicate that the interests of Class Members are best served by a settlement of this action in the manner and upon the terms set forth in the Settlement Agreement. Given the relatively small size of the Class as compared to, for example, larger nationwide corporate, consumer, or securities class actions, this Settlement confers a substantial benefit of \$285,000. Moreover, each Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement, to pursue their own claims. Finally, Settlement awards for each participating Class Member will be tailored to the extent to which he or she was affected by Defendant’s alleged wage-and-hour violations based on his or her eligible workweeks. Orshansky Decl., ¶¶ 8-9. After analyzing the claims in this matter, Plaintiff and Class Counsel have concluded that the value of this Settlement is fair, reasonable, and adequate.

VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE CLASS

This Court should order distribution of the proposed Notice of Class Action and PAGA Settlement and accompanying Share Form (together, the “Class Notice”) to the current and former employees (*see* Exhibit 1 to the [Proposed] Order submitted concurrently) to the Class by first class mail, postage prepaid, using the last known mailing address information provided by

⁴ *I.e.*, \$90,171.81 (unpaid wage exposure) + \$173,881.62 (meal break exposure) + \$173,881.62 (rest break exposure) + \$445,345.12 (wage statement exposure) + \$75,936.00 (waiting-time penalties exposure) + \$123,941.57 (PAGA penalty exposure) = \$1,083,157.74 (total potential exposure).

1 Defendant.⁵ This manner of giving notice is the “best notice practicable” under the circumstances
2 because it provides “individual notice to all members who can be identified through reasonable
3 effort.” *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 173 (1974). Here, Plaintiff proposes that
4 the settlement be administered by CPT Group, Inc., an experienced class action settlement
5 administrator. See Settlement Agreement, ¶ 44. Class Members’ addresses will be ascertainable
6 through Defendant’s personnel and payroll records, which Defendant will provide to the
7 Settlement Administrator within 15 calendar days after preliminary approval of the settlement. *Id.*,
8 ¶ 61(b). Under the Settlement, the Settlement Administrator will run all addresses through the
9 National Change of Address database and, to the extent that any notices are returned, will conduct
10 further skip traces to obtain current address information. *Id.*, ¶¶ 61(d)-(e).

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

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28 ⁵ Notice will be given in both English and Spanish. See Settlement Agreement, ¶ 61(a).

1 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

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

5 **IX. CONCLUSION**

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

8 1. Preliminarily approving the Settlement Agreement as fair, reasonable, and
9 adequate;

10 2. Preliminarily approving the form and content of the current and former employee
11 versions of the Notice of Class Action and PAGA Settlement, attached to the Settlement
12 Agreement;

13 3. Provisionally certifying the Settlement Agreement's proposed Class comprised of
14 the Class Members identified during the Class Period under Cal. Civ. Code section 382 for
15 settlement purposes only;

16 4. Approving and appointing Plaintiff Agustin Flores as the Class Representative;

17 5. Approving and appointing the law firm CounselOne, PC as Class Counsel;

18 6. Approving and appointing CPT Group, Inc. as the Settlement Administrator;

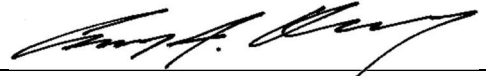
19 7. Setting a date for the Final Approval Hearing; and

20 8. Any further relief the Court deems just and proper.

21 Respectfully submitted,

22
23 DATED: February 7, 2025

COUNSELONE, PC
ANTHONY J. ORSHANSKY

24
25 By: 

26 ANTHONY J. ORSHANSKY

27 Attorneys for Plaintiff Agustin Flores, on behalf
28 of himself and others similarly situated