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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

LINDSAY ORIN, on behalf of herself
and all others similarly situated and on
behalf of the general public,

Plaintiff,

v.

CAL. DEL. U.S.A. INC., a California
corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No. 2:23-cv-03404-FMO-KS

Assigned To: Fernando M. Olguin
Courtroom: 6D

CLASS ACTION

**NOTICE OF RENEWED MOTION
AND UNOPPOSED RENEWED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND PAGA
ACTION SETTLEMENT**

Date: April 18, 2024

Time: 10:00 A.M.

Courtroom: 6D

Judge: Fernando M. Olguin

1 **TO THE COURT AND TO ALL PARTIES:**

2 **PLEASE TAKE NOTICE** that on April 18, 2024 at 10:00 A.M., in Courtroom
3 6D of the United States District Court for the Central District of California, located at
4 350 W. 1st Street, 6th Floor, Courtroom 6D, Los Angeles, CA 90012, Plaintiff Lindsay
5 Orin will, and hereby does, move this Court for an order:

- 6 • Granting preliminary approval of the proposed class action settlement
7 described herein and set forth in the Parties' First Amended Stipulation
8 and Settlement of Class, Collective and Representative Action (the
9 "Settlement" or "Settlement Agreement") attached as **Exhibit B** to the
10 Declaration of Daniel F. Gaines, including the means of allocation and
11 distribution of the Gross Settlement Amount and the Net Settlement
12 Amount, and the allocations for an award of Attorneys' Fees and Costs,
13 Class Representative Enhancement Payment, penalties under the Private
14 Attorneys General Act, and Claims Administration Costs;
- 15 • Conditionally certifying the proposed Settlement Class and the proposed
16 FLSA Collective Members for settlement purposes only;
- 17 • Appointing Plaintiff Lindsay Orin as the Class Representative;
- 18 • Appointing Daniel F. Gaines and Alex P. Katofsky of Gaines & Gaines,
19 APLC as Class Counsel;
- 20 • Approving the proposed Notice of Pendency of Proposed Class Action
21 Settlement and Final Hearing, attached as Exhibit 1 to the Settlement and
22 the FLSA Settlement Claim Form and Release of Claims, attached as
23 Exhibit 2 to the Settlement;
- 24 • Appointing ILYM Group, Inc. ("ILYM") as the Claims Administrator to
25 handle the notice and administration process for the Settlement;
- 26 • Directing ILYM to mail the Notice of Pendency of Proposed Class Action
27 Settlement and Final Hearing and FLSA Settlement Claim Form and
28

1 Release of Claims to the proposed Settlement Class and FLSA Collective
2 Members;

- 3 • Approving the proposed deadlines for the notice and administration
4 process as reflected herein and in the Settlement Agreement; and
5 • Scheduling a hearing to consider final approval of the proposed
6 Settlement, at which time the Court will also consider whether to grant
7 final approval of the requests for an award of Attorneys' Fees and Costs,
8 Class Representative Enhancement Payment, and Claims Administration
9 Costs.

10 The basis for this Motion is that the proposed settlement reached by the Parties
11 is fair, adequate, and reasonable and in the best interests of the settlement class as a
12 whole, and that the procedures proposed by the Parties are adequate to ensure the
13 opportunity of class members to participate in, opt out of, or object to the settlement.

14 This unopposed motion is made following the conference of counsel pursuant to
15 L.R. 7-3 which took place on multiple occasions over the past several months.

16 This motion will be based on this Notice and accompanying Memorandum of
17 Points and Authorities, the Declaration of Daniel F. Gaines, the First Amended
18 Stipulation and Settlement of Class, Collective and Representative Action (including
19 exhibits), all filed herewith, and on such further evidence and argument as may be
20 presented at the hearing.

21 Dated: March 15, 2024 Respectfully Submitted,

22 GAINES & GAINES, APLC
23

24 By: /s/ Daniel F. Gaines
25 Daniel F. Gaines, Esq.
26 Alex P. Katofsky, Esq.
27 Attorneys for Plaintiff Lindsay Orin and
28 Proposed Class Counsel

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1 **I. INTRODUCTION**

2 Plaintiff Lindsay Orin (“Plaintiff” or “Orin”) respectfully requests that this Court
3 grant preliminary approval of the First Amended Stipulation and Settlement of Class,
4 Collective and Representative Action (the “Settlement,” “Settlement Agreement,”
5 “Stipulation,” or “Stip.”) entered into by and between Plaintiff, individually and on
6 behalf of the proposed Settlement Class and FLSA Collective Members (collectively,
7 “Class Members”), and Defendant Cal. Del. U.S.A. Inc. (“Defendant” or “CDUSA”)
8 (“Plaintiff and “Defendant” are collectively referred to as the “Parties”). Subject to
9 Court approval, Plaintiff and Defendant have agreed to settle this lawsuit for a Gross
10 Settlement Amount of \$250,000.¹

11 The proposed Settlement warrants preliminary approval under Federal Rule of
12 Civil Procedure (“Rule”) 23 and Ninth Circuit case law. *See Briseño v. Henderson*, 998
13 F.3d 1014, 1026 (9th Cir. 2021) (“*Briseño*”), *citing* Rule 23(e). As Plaintiff discusses
14 in detail below, the Settlement is the product of serious, non-collusive negotiations by
15 highly experienced counsel who were well-informed about the case’s key legal and
16 factual issues, sufficient to assess the claims’ value and settlement terms, and with the
17 mediator’s assistance. *See* Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶¶ 12-
18 15, 17. It provides an excellent result for the proposed Settlement Class and FLSA
19 Collective Members on fair, reasonable, and adequate terms.

20 Accordingly, Plaintiff requests that the Court: (a) grant preliminary approval of
21 the Settlement, (b) conditionally grant certification of the proposed Settlement Class²
22 and FLSA Collective Members³, (c) approve the appointment of ILYM Group, Inc.

23
24 ¹ The Parties’ First Amended Stipulation and Settlement of Class, Collective and
25 Representative Action is attached as **Exhibit B** to the Declaration of Daniel F. Gaines
26 (“Gaines Decl.”), submitted herewith.

27 ² The “Settlement Class” are all current and former non-exempt employees of
28 Defendant employed in California at any time between April 3, 2019 through the date
of Preliminary Approval, or December 4, 2024, whichever occurs first (the “Class
Period”). *See* Settlement at §§ II(I) and (J).

³ The “FLSA Collective Members” are all current and former non-exempt employees
of Defendant employed in California at any time between April 3, 2020 through the
(Footnote Cont’d on Following Page)

1 (“ILYM”) as the Claims Administrator, (d) authorize notice pursuant to the proposed
2 notice plan, (e) schedule a final fairness and approval hearing, (f) appoint Plaintiff Orin
3 as Class Representative, and (g) appoint Plaintiff’s counsel Daniel F. Gaines and Alex
4 P. Katofsky of Gaines & Gaines, APLC as Settlement Class Counsel.

5 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

6 Plaintiff and Class Members are current and former non-exempt employees of
7 CDUSA in the State of California. Gaines Decl. at ¶ 7. Defendant does business as
8 Tod’s, a luxury goods retail store. Tod’s “is a brand of Italian heritage offering shoes,
9 handbags, and other accessories handcrafted in Italy.” *See* Declaration of Miriam Sweet
10 (“Sweet Decl.”) at ¶ 2. Plaintiff was employed by Defendant from October 2022
11 through March 2023 as a non-exempt employee in Los Angeles County, California.
12 Gaines Decl. at ¶ 7.

13 On or about March 27, 2023, Plaintiff complied with the administrative
14 prerequisites set forth in the Private Attorneys General Act, Labor Code ¶ 2698 *et. seq.*
15 (“PAGA”) by sending a letter, by online submission to the Labor & Workforce
16 Development Agency (“LWDA”) and by certified mail to Defendant, outlining the
17 facts and theories underlying her claims. Gaines Decl. at ¶ 8; **Exhibit C**.

18 On April 3, 2023, Plaintiff filed a Class and Collective Action Complaint with
19 the Los Angeles County Superior Court. (Dkt. 1). On or about May 4, 2023, Defendant
20 removed the Action to the United States District Court, Central District. (Dkt. 1). On
21 July 19, 2023, Plaintiff filed her First Amended Class, Collective, and Representative
22 Action Complaint in this Court. (Dkt. 16). Gaines Decl. at ¶ 9.

23 In the First Amended Complaint, Plaintiff alleges that: Defendant paid Class
24 Members commission wages that were not included in their regular rate of pay for
25 purposes of paying them sick pay wages at the correct rate, in violation of Labor Code
26 §§ 246 and 558 and IWC Wage Order No. 4-2001; Defendant failed to pay Class

27
28 date of Preliminary Approval, or December 4, 2024, whichever occurs first (the
“FLSA Collective Action Period”). *See* Settlement at §§ II(O) and (N).

1 Members premium overtime compensation for all overtime hours worked, in violation
2 of Labor Code §§ 510, 558, and 1194; Defendant failed to provide Class Members with
3 legally compliant rest periods, or premium wages of one hour's pay in lieu thereof, as
4 required by Labor Code §§ 226.7 and IWC Wage Order 4-2001; Defendant failed to
5 permit or authorize Class Members to take timely 30-minute meal periods for shifts
6 greater than 5 hours in length, in violation of Labor Code §§ 226.7, 512, and 558 and
7 IWC Wage Order 4-2001; Class Members were required to incur expenses in the
8 performance of their job duties for which they are not fully reimbursed, in violation of
9 Labor Code § 2802; Defendant failed to issue Class Members accurately itemized wage
10 statements, in violation of Labor Code § 226(a)(1), (2), (5), and (9); and Defendant
11 failed to pay Class Members all wages due upon separation of employment, in violation
12 of Labor Code §§ 201-202. As a result, Plaintiff claims she and the Class are entitled
13 to wages and overtime pay pursuant to the Fair Labor Standards Act, 29 USC §§ 206,
14 207 and Labor Code sections 226.7, 246, 510, 512, and 1194, compensation for missed
15 rest breaks pursuant to Labor Code section 226.7; compensation for missed meal breaks
16 pursuant to Labor Code sections 226.7 and 512, reimbursement of necessary business
17 expenses pursuant to Labor Code section 2802; penalties for inaccurate itemized wage
18 statements pursuant to Labor Code section 226(a), (e), penalties to separated employees
19 pursuant to Labor Code section 203, PAGA penalties pursuant to Labor Code section
20 2699, and restitution and injunctive relief in accord with California Business and
21 Professions Code section 17200, as well as interest and attorneys' fees. Gaines Decl.
22 at ¶ 10.

23 The Parties reached a resolution of the claims in the First Amended Complaint
24 through mediation. Gaines Decl. at ¶ 14. They documented their settlement. *Id* at ¶ 15;
25 **Exhibit B.**

26 On January 11, 2024, the Court held a hearing on Plaintiff's Unopposed Motion
27 for Preliminary Approval of Class and PAGA Action Settlement. (Dkt. 26). The Court
28

1 denied Plaintiff's Unopposed Motion for Preliminary Approval of Class and PAGA
2 Action Settlement without prejudice. (Dkt. 26).

3 **III. DISCOVERY AND INVESTIGATION**

4 After engaging in informal discussions about the case, the Parties agreed to
5 forego formal discovery, engage in comprehensive informal discovery, and to engage
6 in private mediation. Gaines Decl. at ¶ 11.

7 Specifically, Plaintiff requested, and Defendant informally produced, the
8 number of current and former Class Members, number of workweeks, number of pay
9 periods, number of current and former alleged aggrieved employees, and average rates
10 of pay. Defendant also produced relevant portions of Defendant's employee handbook,
11 Plaintiff's personnel records, and a 25% sampling of time and pay records for Class
12 Members. Gaines Decl. at ¶ 12.

13 Prior to attending mediation, Plaintiff's Counsel engaged an outside expert to
14 analyze the sampling of time and wage data which provided Plaintiff's Counsel with
15 details including, but not limited to, when and if meal periods were taken, and the
16 amount of underpaid overtime wages and sick pay wages due to Defendant's alleged
17 failure to blend commission wages into its employees' regular rate of pay. Gaines Decl.
18 at ¶ 13. *See generally* Declaration of Bennett Berger ("Berger Decl.").

19 On October 4, 2023, the Parties attended a mediation session presided over by
20 Michael L. Ludwig, Esq., a mediator with significant experience in wage and hour class
21 actions. Each Party was represented by respective counsel during the good-faith
22 negotiations facilitated by Mr. Ludwig. In connection with the mediation, Defendant
23 provided information to Mr. Ludwig and Class Counsel concerning CDUSA's
24 practices throughout the State of California with regards to wage payment, meal and
25 rest break claims, unpaid wage claims, and issuance of wage statements. The Parties
26 were able to reach agreement at the mediation. Gaines Decl. at ¶ 14.

27 The Parties, after taking into account the sharply disputed factual and legal issues
28 involved in this action, the risks of attending further prosecution, and the benefits to be

1 received pursuant to the compromise and settlement, subsequently negotiated the terms
2 of a formal settlement agreement, attached as **Exhibit B** to the Gaines Declaration
3 submitted herewith. The Settlement includes all terms of the Parties' agreement.
4 Gaines Decl. at ¶ 15.

5 Plaintiff's Counsel represents the Settlement is in the best interest of Plaintiff
6 and Class Members and is fair and reasonable. Plaintiff's Counsel represents that they
7 have conducted a thorough investigation into the facts of this case and have diligently
8 pursued an investigation of the Class Members' claims against Defendant, including
9 the research of applicable law and the potential defenses and review of the relevant
10 documents and data. Gaines Decl. at ¶¶ 16-18.

11 Defendant denies all of Plaintiff's allegations. Specifically, Defendant believes
12 that Plaintiff and Class Members were properly paid all wages due under the Fair Labor
13 Standards Act and California wage-and-hour law, including compensation for all time
14 worked, all accrued vacation and paid time off, and that they received all meal periods
15 and/or meal period premiums which they may have been entitled to under California
16 law. Stip. at ¶ XXI(11). However, Defendant has also concluded that there are benefits
17 associated with settling this action. After taking into account the disputed factual and
18 legal issues involved in the action, the expense and burden of protracted litigation, and
19 the desire to put the controversy to rest, Defendant believes that the Settlement is in its
20 best interests and is fair and reasonable. *Id.*

21 **IV. SUMMARY OF SETTLEMENT TERMS**

22 The significant terms of the Settlement are as follows:

23 **A. The Settlement Class**

24 The Settlement Class is defined as:

25 All current and former non-exempt employees who have
26 worked for Defendant, in California during the Settlement
27 Class Period [the period from April 3, 2019 through the date
28 the Court enters an order granting preliminary approval of
the settlement or December 4, 2024, whichever occurs first].

1 Stip. at §§ II(I) and (J).

2 **B. The FLSA Collective Members**

3 The FLSA Collective is defined as:

4 All current and former non-exempt employees who have
5 worked for Defendant, in California during the FLSA
6 Collective Action Period [the period from April 3, 2020
7 through the date the Court enters an order granting
8 preliminary approval of the settlement or December 4, 2024,
9 whichever occurs first].

10 Stip. at §§ II(N) and (O).

11 **C. Settlement Consideration**

12 The amount which Defendant is required pay under the Settlement is \$250,000
(the “Gross Settlement Amount”)⁴, to be allocated as follows:

13 **1. Attorneys’ Fees and Costs to Class Counsel**

14 The Settlement provides that Plaintiff’s Counsel may request up to \$62,500 as
15 an award of attorneys’ fees, representing twenty-five percent (25%) of the Gross
16 Settlement Amount, in consideration of the time and effort they have expended for the
17 benefit of Plaintiff and Class Members. Further, the Settlement provides that Plaintiff’s
18 Counsel may request up to \$13,000 in reimbursement of litigation costs and expenses
19 actually and reasonably incurred during the course of this litigation. If the Court does
20 not award Class Counsel the entirety of the attorneys’ fees and/or costs and expenses
21 requested, the unawarded amounts will revert to the Net Settlement Amount to be
22 distributed to the Settlement Class. Stip. at ¶ II(D).

23 ///

24
25 ⁴ The Gross Settlement Amount may increase based on the escalator provision.
26 Defendant understands and believes there are approximately 6,200 workweeks by
27 Class Members from April 3, 2019 through September 24, 2023. If it is determined that
28 the actual number of workweeks through September 24, 2023 exceeds 6,200 by more
than ten percent (10%) (i.e., exceeds 6,820), then, Defendant shall increase the Gross
Settlement Amount by \$36.66 for each workweek in excess of 6,820 through
September 24, 2023. Alternatively, Defendant may choose to cut off the Class and
PAGA Periods on the date on which the workweek total reached 6,820. Stip. at ¶ XIX.

1 **2. Payment of Claims Administration Expenses**

2 The Parties have selected ILYM Group, Inc., an experienced and reputable
3 settlement administrator, to administer the settlement, including the provision of notice
4 and facilitation of the claims and opt-out process. The cost of settlement administration
5 is estimated to be approximately \$3,000, which shall be paid from the Gross Settlement
6 Amount. *See generally*, Declaration of Lisa Mullins. To the extent actual Claims
7 Administration Costs are greater than \$3,000, such excess amount will be deducted
8 from the Gross Settlement Amount, subject to the Court’s approval. Stip. at ¶ II(F).

9 **3. Class Representative Enhancement Payment to the Class**
10 **Representative**

11 The Settlement provides that Plaintiff Orin may request a class representative
12 enhancement payment of up to \$5,000, subject to the Court’s approval, which is
13 intended to compensate her for the time, expense, and risk she has expended in bringing
14 this lawsuit for the benefit of Class Members. If the Court does not award Plaintiff the
15 entirety of the Enhancement Payment requested, the unawarded amount will revert to
16 the Net Settlement Amount to be distributed to the Settlement Class. Stip. at ¶ II(K).

17 **4. Payment of Payroll Taxes**

18 The Settlement further provides that Defendant will be responsible for any
19 employer payroll taxes required by law, separate and in addition to the Gross
20 Settlement Amount, including the employer FICA, FUTA, and SDI contributions on
21 the wage portion of the Settlement Payment Checks. Stip. at ¶ II(R).

22 **5. Resolution of Class Members’ Claims Pursuant to PAGA**

23 The amount that the Parties have agreed to pay to the LWDA in connection with
24 PAGA. The Parties have agreed that \$10,000 of the Gross Settlement Amount will be
25 allocated to the resolution of any claims arising under PAGA (“PAGA Settlement
26 Amount”) as set forth in the Released Aggrieved Employee Claims. Pursuant to
27 PAGA, \$7,500 (75%) of the PAGA Settlement Amount will be paid to the LWDA and
28 \$2,500 (25%) of the PAGA Settlement Amount will be distributed to Aggrieved

1 Employees. The 25% portion of the PAGA Settlement Amount is referred to as
2 “Aggrieved Employees Amount.” Stip. at ¶ II(U).

3 **6. Resolution of FLSA Collective Members’ Claims Pursuant to**
4 **FLSA**

5 The Parties have agreed that \$10,000 of the Gross Settlement Amount (the
6 “FLSA Settlement Amount”) will be allocated to the resolution of any claims arising
7 under the FLSA, payable to the FLSA Collective Members. Stip. at ¶ II(P).

8 **7. Distribution to Participating Settlement Class Members and**
9 **FLSA Collective Members**

10 This is a fully funded settlement with no potential for a reversion to CDUSA.
11 Each Settlement Class member who does not submit a timely and valid Request for
12 Exclusion from the Settlement will be deemed a Class Member and will be bound by
13 all terms of the Settlement Agreement if the Settlement is granted Final Approval by
14 the Court. Any Settlement Class member who timely submits a valid Request for
15 Exclusion will not receive a Settlement Payment Check, and will not be bound by the
16 terms of the Settlement Agreement or Judgment (with the exception of claims arising
17 under PAGA).

18 Only FLSA Collective Members who submit a FLSA Collective Claim Form
19 (those who opt in and consent to participate in the Stipulated FLSA Collective) shall
20 be “Participating FLSA Collective Members” and shall be bound by the FLSA release
21 defined herein. Participating Collective Members have the ability to opt-in based on
22 the procedures outlined in the Notice of Pendency of Proposed Class Action Settlement
23 and Final Hearing (the “Notice”) (attached as “Exhibit 1” to **Exhibit B** of Gaines Decl.)
24 and the FLSA Settlement Claim Form and Release of Claims (the “FLSA Settlement
25 Claim Form”) (attached as “Exhibit 2” to **Exhibit B** of Gaines Decl.).

26 Aggrieved Employees eligible for a portion of the PAGA Settlement Amount
27 will receive their share of the employee portion of the PAGA Settlement Amount and
28

1 will be deemed to have released the Released Aggrieved Employee Claims, regardless
2 of whether they submit a Request for Exclusion. Stip. at ¶ II(JJ).

3 Individual Settlement Payments will be calculated and apportioned from the Net
4 Settlement Amount based on the total gross wages a Settlement Class member and
5 Participating FLSA Collective Member was paid in a non-exempt position in California
6 during the applicable Class Period and FLSA Collective Action Period and based on
7 the number of Individual Pay Periods an Aggrieved Employee worked in a non-exempt
8 position in California during the PAGA Period with respect to the PAGA payment.
9 Specific calculations of Individual Settlement Payments will be made as follows:

10 (a) The Claims Administrator will calculate the total amount of gross
11 wages paid to each Class Member (“Individual Wages”) and the
12 total amount of gross wages paid to all Class Members (“Class
13 Wages”) during the Class Period.

14 (b) To determine each Class Member’s Individual Settlement Payment,
15 the Claims Administrator will use the following formula: Individual
16 Settlement Payment = (Individual Wages ÷ Class Wages) × Net
17 Settlement Amount.

18 Non-Participating Class Members will not receive any Individual Settlement
19 Payments. The Administrator will retain amounts equal to their Individual Settlement
20 Payments in the Net Settlement Amount for distribution to Participating Class
21 Members on a pro rata basis. Stip. at ¶ X.

22 The Individual Settlement Payments made to Class Members under this
23 Settlement, and any other payments made pursuant to this Settlement, will not be
24 utilized to calculate any additional benefits under any benefit plans to which any Class
25 Members may be eligible, including, but not limited to, profit-sharing plans, bonus
26 plans, 401(k) plans, stock purchase plans, vacation plans, sick leave plans, PTO plans,
27 and any other benefit plan. Rather, it is the Parties’ intention that this Settlement
28

1 Agreement will not affect any rights, contributions, or amounts to which any Class
2 Members may be entitled under any benefit plans. Stip. at ¶ X.

3 Individual FLSA Payments to Participating FLSA Collective Members will be
4 calculated and apportioned from the FLSA Settlement Amount will be calculated as
5 follows:

6 (a) The Claims Administrator will calculate the total amount of gross
7 wages paid to each FLSA Collective Member (“Individual FLSA
8 Wages”) and the total amount of gross wages paid to all FLSA
9 Collective Members (“Collective FLSA Wages”) during the FLSA
10 Collective Action Period.

11 (b) To determine each FLSA Collective Member’s Individual
12 Settlement Payment, the Claims Administrator will use the
13 following formula: Individual FLSA Settlement Payment =
14 (Individual FLSA Wages ÷ Collective FLSA Wages) × FLSA
15 Settlement Amount.

16 Non-Participating FLSA Collective Members will not receive any Individual
17 FLSA Settlement Payments. The Administrator will retain amounts equal to their
18 Individual FLSA Settlement Payments in the Net Settlement Amount for distribution
19 to Participating FLSA Collective Members on a pro rata basis. Stip. at ¶ X.

20 The Individual FLSA Settlement Payments made to Participating FLSA
21 Collective Members under this Settlement, and any other payments made pursuant to
22 this Settlement, will not be utilized to calculate any additional benefits under any
23 benefit plans to which any Class Members may be eligible, including, but not limited
24 to, profit-sharing plans, bonus plans, 401(k) plans, stock purchase plans, vacation
25 plans, sick leave plans, PTO plans, and any other benefit plan. Rather, it is the Parties’
26 intention that this Settlement Agreement will not affect any rights, contributions, or
27 amounts to which any Participating FLSA Collective Members may be entitled under
28 any benefit plans. Stip. at ¶ X.

1 PAGA Payments will be calculated and apportioned from the Aggrieved
2 Employees Amount based on the number of workweeks an Aggrieved Employee
3 worked in a non-exempt position in California during the PAGA Period. Specific
4 calculations of PAGA Payments will be made as follows:

5 (a) The Claims Administrator will calculate the total number of weeks
6 worked (weeks in which at least one day was worked) by each
7 Aggrieved Employee (“Individual Pay Periods”) and the total
8 number of weeks worked by all Aggrieved Employees (“Total Pay
9 Periods”) during the Class Period.

10 (b) To determine each Aggrieved Employees Individual PAGA
11 Payment, the Claims Administrator will use the following formula:
12 PAGA Payment = (Individual Pay Periods ÷ Total Pay Periods) ×
13 Aggrieved Employees Amount.

14 The Individual Settlement Payment will be reduced by any required deductions
15 for each Class Member as set forth herein, including employee-side tax withholdings
16 or deductions. The class portion of the Individual Settlement Payments will be
17 allocated as follows: one-third (1/3) to wages, one-third (1/3) to interest, and one-third
18 (1/3) to penalties. The PAGA portion will be allocated 100% to penalties. Stip. at ¶ X.

19 The Net Settlement Amount is approximately \$146,500, and is calculated as
20 follows: the Gross Settlement Amount (\$250,000), less all attorneys’ fees (\$62,500),
21 litigation costs (\$13,000), claims administration (\$3,000), class representative
22 enhancement payment to Class Representative Lindsay Orin (\$5,000), the PAGA
23 Settlement Amount (\$10,000), and the FLSA Settlement Amount (\$10,000). Stip. at ¶
24 IX.

25 Any checks issued by the Claims Administrator to Class Members will be
26 negotiable for one-hundred eighty (180) calendar days. After one-hundred eighty (180)
27 calendar days from the date of mailing, the checks shall become null and void, and any
28 monies remaining in the distribution account shall be distributed to the Controller of

1 the State of California to be held pursuant to the Unclaimed Property Law, California
2 Civil Code § 1500 et seq., for the benefit of those Settlement Class members, FLSA
3 Collective Members, or Aggrieved Employees who did not cash their checks until such
4 time that they claim their property. Stip. at ¶ XIII(2).

5 **D. The Release by Plaintiff and Class Members**

6 Any Class Member who does not properly and timely submit an Exclusion Form
7 will automatically be bound by all terms and conditions of the Settlement, including its
8 release of claims, if the Settlement is approved by the Court, and be bound by the Final
9 Approval Order, regardless of whether he or she has objected to the Settlement. Stip.
10 at ¶ II(JJ). FLSA Collective Members are only bound if they submit a consent to join.

11 The Released Parties are Defendant and its past, present, and future parents,
12 subsidiaries, affiliated companies (including but not limited to, An. Del. U.S.A., and
13 all of its subsidiaries and affiliates), agents, managing agents, employees, servants,
14 officers, directors, owners (whether direct or indirect), general partners, limited
15 partners, trustees, representatives, shareholders, stockholders, members, mortgagees or
16 ground lessors, attorneys, parents, subsidiaries, equity sponsors, related
17 companies/corporations and/or partnerships, divisions, assigns, predecessors,
18 successors, insurers, consultants, joint venturers, joint employers, potential and/or
19 alleged joint employers, temporary staffing agencies, dual employers, potential and/or
20 alleged dual employers, co-employers, potential and/or alleged co-employers, common
21 law employers, potential and alleged common law employers, contractors, affiliates,
22 service providers, alter-egos, potential and/or alleged alter-egos, vendors, affiliated
23 organizations, any person and/or entity with potential or alleged to have joint liability,
24 and all of their respective past, present and future employees, directors, officers,
25 members, owners, agents, representatives, payroll agencies, attorneys, stockholders,
26 fiduciaries, parents, subsidiaries, other service providers, and assigns and any and all
27 persons and/or entities acting under, by, through or in concert with any of them. Stip.
28 at ¶ II(II).

1 As of the date of the Order Granting Final Approval, and only after the
2 Settlement has been fully funded by Defendant, all Class Members shall fully and
3 finally release Released Parties of the Released Class Claims as follows:

4 The Released Class Claims include any and all claims, rights,
5 demands, liabilities and causes of action alleged in the
6 operative First Amended Complaint, and all claims, rights,
7 demands, liabilities and causes of action which could be
8 alleged based on the facts set forth in the First Amended
9 Complaint, for all periods of employment in a non-exempt
10 position in California during the Settlement Class Period.
11 This includes claims for unpaid wages, including, failure to
12 pay minimum wages, straight time compensation, overtime
13 compensation, double-time compensation, and interest;
14 reimbursement for all necessary business expenses; failure to
15 provide accurate wage statements; unfair business practices;
16 penalties, including, but not limited to, civil penalties apart
17 from those as described in Paragraph FF, above, statutory
18 penalties, recordkeeping penalties, wage statement penalties,
19 minimum-wage penalties, and waiting-time penalties; and
20 attorneys' fees and costs; all claims related to the Released
21 Claims which are asserted in the Lawsuit or which could
22 have been asserted based on the factual allegations pled in
23 the Action arising under: the California Labor Code
24 (including, but not limited to, sections 201, 202, 203, 218.5,
25 226, 226.3, 226.7, 246, 510, 512, 558, 558.1, 1174, 1174.5,
26 1194, 1194.2, 1197, 1197.1, 1198, and 2802), Wage Order 4-
27 2001 of the California Industrial Welfare Commission; and
28 California Business and Professions Code section 17200, et
seq based on the foregoing. This release excludes the release
of claims not permitted by law and excludes all claims arising
under PAGA ("Released Class Claims").

23 Stip. at ¶ II(GG).

24 As of the date of the Order Granting Final Approval, and only after the
25 Settlement has been fully funded by Defendant, all Participating FLSA Collective
26 Members shall fully and finally release Released Parties of the Released Participating
27 FLSA Collective Member Claims.

1 In exchange for Defendants' promise to make the Fair Labor
2 Standards Act ("FLSA") payments provided for in this
3 Settlement Agreement, Participating FLSA Collective
4 Members will release all Released Parties for the FLSA
5 claims that were alleged or that reasonably could have been
6 alleged based on the facts alleged in the First Amended
7 Complaint, including but not limited to claims pursuant to 29
8 U.S.C. sections 206 and 207, for all periods of employment
in a non-exempt position in California during the FLSA
Collective Action Period ("Released Participating FLSA
Collective Member Claims").

Stip. at ¶ II(HH).

9 As of the date of the Order Granting Final Approval, and only after the
10 Settlement has been fully funded by Defendant, all Aggrieved Employees shall fully
11 and finally release Released Parties of the Released Aggrieved Employee Claims.

12 The Released Aggrieved Employee Claims include all
13 claims, rights, demands, liabilities and causes of action under
14 PAGA which are alleged in the operative First Amended
15 Complaint, and all claims, rights, demands, liabilities and
16 causes of action under PAGA which could be alleged based
17 on the facts set forth in the First Amended Complaint, for all
18 periods of employment in a non-exempt position in
19 California during the PAGA Period. This includes claims
20 arising under PAGA for unpaid wages, including, failure to
21 pay minimum wages, straight time compensation, overtime
22 compensation, double-time compensation, and interest;
23 reimbursement for all necessary business expenses; failure to
24 provide accurate wage statements; unfair business practices;
25 penalties, including, but not limited to, statutory penalties,
26 recordkeeping penalties, wage statement penalties,
27 minimum-wage penalties, and waiting-time penalties; and
28 attorneys' fees and costs; all claims related to the PAGA
Released Claims which are asserted in the Lawsuit or which
could have been asserted based on the factual allegations
pled in the Lawsuit arising under: the California Labor Code
(including, but not limited to, sections 201, 202, 203, 218.5,
226, 226.3, 226.7, 246, 510, 512, 558, 558.1, 1174, 1174.5,
1194, 1194.2, 1197, 1197.1, 1198, and 2802), and Wage
Order 4-2001 of the California Industrial Welfare

Commission (“PAGA Released Claims”). This release excludes the release of claims not permitted by law and excludes all claims for unpaid wages and statutory penalties. Aggrieved Employees shall not be able to exclude themselves from the PAGA portion of this settlement and the PAGA Released Claims, and Aggrieved Employees shall receive their PAGA portion of the settlement even if they opt-out of the class action settlement.

Stip. at ¶ II(FF).

E. Proposed Form of Notice to Class Members

The Notice of Class Action Settlement (attached as “Exhibit 1” to the Settlement), FLSA Settlement Claim Form and Release of Claims (attached as “Exhibit 2” to the Settlement), Individual Settlement Payment calculations, Individual Participating FLSA Collective Member Settlement Payment calculations, and Individual PAGA Payment calculations to include workweek and wage information are collectively referred to as the “Notice Packet.” Stip. at ¶ II(Y).

Notice of Settlement: Within fourteen (14) calendar days after receiving the Class List from Defendant, the Claims Administrator will mail a Notice Packet to all Class Members via regular First-Class U.S. Mail, using the last known mailing addresses identified in the Class List. Stip. at ¶ XI(3).

Prior to mailing, the Claims Administrator will perform a search based on the National Change of Address Database for information to update and correct any known or identifiable address changes. Within seven (7) days of receiving a returned Notice Packet, the Claims Administrator must re-mail the Notice Packet via regular First-Class U.S. Mail to the forwarding address affixed thereto and the Claims Administrator will indicate the date of such re-mailing on the Notice Packet. If no forwarding address is provided, the Claims Administrator will promptly attempt to determine the correct address using a skip-trace, or other search using the name, address and/or Social Security number of the Class Member involved, and will then perform a single re-mailing. Those Class Members who receive a re-mailed Notice Packet, whether by

1 skip-trace or by request, will have between the later of (a) an additional fifteen (15)
2 calendar days or (b) the Response Deadline to postmark a Request for Exclusion or
3 Notice of Objection to the Settlement. Stip. at ¶ XI(4).

4 Class Members will have an opportunity to dispute the information provided in
5 their Notice Packets. To the extent Class Members dispute the number of workweeks
6 to which they have been credited or the amount of their Individual Settlement Payment,
7 Class Members may produce evidence to the Claims Administrator showing that such
8 information is inaccurate. Absent evidence rebutting Defendant's records, Defendant's
9 records will be presumed determinative. However, if a Class Member produces
10 evidence to the contrary, the Claims Administrator will evaluate the evidence
11 submitted by the Class Member and will make the final decision as to the number of
12 eligible workweeks that should be applied and/or the Individual Settlement Payment to
13 which the Class Member may be entitled. The workweek dispute must be returned by
14 mail or fax to the Claims Administrator at the specified address or facsimile number
15 and postmarked or faxed on or before the Response Deadline. The date of the postmark
16 or fax receipt confirmation will be the exclusive means to determine whether a
17 workweek dispute has been timely submitted. All such disputes are to be resolved not
18 later than fourteen (14) calendar days after the Response Deadline. Stip. at ¶ XI(6).

19 Request for Exclusions: Any Class Member wishing to opt-out from the Class
20 must sign and postmark, email or fax a written Request for Exclusion to the Claims
21 Administrator within the Response Deadline. The date of the postmark on the return
22 mailing envelope or the fax receipt confirmation will be the exclusive means to
23 determine whether a Request for Exclusion has been timely submitted. All Requests
24 for Exclusion will be submitted to the Claims Administrator, who will certify jointly
25 to Class Counsel and Defendant's Counsel the Requests for Exclusion that were timely
26 submitted. The Administrator may not reject a Request for Exclusion as invalid
27 because it fails to contain all the information specified in the Class Notice. The
28 Administrator shall accept any Request for Exclusion as valid if the Administrator can

1 reasonably ascertain the identity of the person as a Class Member and the Class
2 Member's desire to be excluded. The Administrator's determination shall be final and
3 not appealable or otherwise susceptible to challenge. If the Administrator has reason to
4 question the authenticity of a Request for Exclusion, the Administrator may demand
5 additional proof of the Class Member's identity. The Administrator's determination of
6 authenticity shall be final and not appealable or otherwise susceptible to challenge.
7 Any Class Member who does not timely seek exclusion will be included in the Class.
8 Any Class Member who timely submits a valid Request for Exclusion will not receive
9 payment from the Settlement, and will not be bound by the terms of the Settlement
10 Agreement or Judgment (with the exception of the PAGA Released Claims if they are
11 an Aggrieved Employee). Class Members eligible for a portion of the PAGA
12 Settlement will receive their share of the employee portion of the PAGA Settlement
13 Amount and will be deemed to have released any claims arising out of PAGA,
14 regardless of whether they submit a Request for Exclusion. Stip. at ¶ XI(8). FLSA
15 Collective Members are bound by the FLSA Release if they submit the FLSA
16 Settlement Claim Form and Release of Claims.

17 **V. APPROVAL OF THE SETTLEMENT UNDER THE FLSA**

18 The policy of the federal courts is to encourage settlement before trial:
19 "Litigation settlements offer parties and their counsel relief from the burdens and
20 uncertainties inherent in trial ... The economics of litigation are such that pretrial
21 settlement may be more advantageous for both sides than expending the time and
22 resources inevitably consumed in the trial process. *Franklin v. Kavpro Corp.*, 884 F.2d
23 1222, 1225 (9th Cir. 1989).

24 Consistent with this policy, the parties seek this Court's approval of the
25 settlement of Plaintiff's and any Participating FLSA Collective Members' claims under
26 the FLSA. FLSA claims can only be fully and finally released and settled under the
27 supervision of either the Secretary of Labor or the Court. *Lynn's Food Stores, Inc. v.*
28 *United States*, 679 F.2d 1350, 1353 (11th Cir. 1982). To obtain district court approval,

1 the parties must “present to the court a proposed settlement, upon which the court may
2 enter a stipulated judgment only after scrutinizing the settlement for fairness.” *See Yue*
3 *Zhou v. Wang’s Rest.*, 2007 U.S. Dist. LEXIS 60683 at *1 (N.D. Cal. Aug 8, 2007)
4 (citing *Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n. 8 (1946); *Lynn’s Food Stores, Inc.*,
5 679 F.2d at 1353). Moreover, “[i]n reviewing the fairness of such a settlement, a court
6 must determine whether the settlement is a fair and reasonable resolution of bona fide
7 dispute.” *Id.* (citing *Lynn’s Food Stores, Inc.*, 679 F.2d at 1354 (“If a settlement is an
8 employee FLSA suit ... reflect[s] a reasonable compromise over issues, such as FLSA
9 coverage or computation of back wages, that are actually in dispute[,] we allow the
10 district court to approve the settlement in order to promote the policy of encouraging
11 settlement of litigation”)). A bona fide dispute exists when “there are legitimate
12 questions about the existence and extent of Defendant’s FLSA liability. *Selk v. Poners*
13 *Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cal. 2016).

14 The parties have provided the Stipulation for the Court’s review and request that
15 the Court approve the Stipulation and enter an order finding: that the terms of the
16 Stipulation are fair and reflect a reasonable compromise of Plaintiff’s FLSA claims,
17 including the amount contemplated to be paid to Plaintiff and the Participating FLSA
18 Collective Members for resolution of their claims; that the settlement is not the product
19 of fraud or overreaching by, or collusion between, the negotiating parties; and that the
20 settlement, taken as a whole, is fair, reasonable and adequate to all concerned. *See,*
21 *e.g., Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir.
22 1982).

23 The FLSA states that “[n]o employee shall be a party plaintiff to any such action
24 unless he gives his consent in writing to become such a party and such consent is filed
25 in the court in which such action is brought.” 29 U.S.C. § 216(b). “Thus, a class
26 member can only release her federal FLSA claims if she opts in, giving her consent in
27 writing to become a party.” *Apparicio v. Radioshack Corp. et al.*, No. CV 08-1145,
28 2009 U.S. Dist. LEXIS 49316, at *6–*7 (C.D. Cal. May 21, 2009) (denying preliminary

1 approval of class action settlement involving only state law claims where release
2 included claims under “any state or federal statute, rule or regulation”); *Thomas La*
3 *Parne et al. v. Monex Deposit Co. et al.*, Case No. SACV 08-0302, 2010 U.S. Dist.
4 LEXIS 131029, at *9 (C.D. Cal. Nov. 29, 2010) (“[O]nly class members who
5 affirmatively ‘opt-in’ to the Settlement should be bound by the Settlement’s release of
6 FLSA liability.”); *Kakani et al. v. Oracle Corp.*, No. C 06-06493, 2007 U.S. Dist.
7 LEXIS 47515, at *20 (N.D. Cal. June 19, 2007) (“Under no circumstances can counsel
8 collude to take away FLSA rights including the worker’s right to control his or her own
9 claim without the burden of having to opt out of someone else’s lawsuit.”) Under the
10 Settlement, only Participating FLSA Collective Members who timely submit an FLSA
11 Collective Claim Form (those who opt in and consent to participate in the Stipulated
12 FLSA Collective) shall be bound by the Release of Claims by Participating FLSA
13 Collective Members (Stip. at ¶ II(AA)), such that the settlement is consistent with 29
14 U.S.C. § 216(b).

15 In considering whether FLSA settlements should be approved, courts look to
16 whether the settlement is a fair and reasonable resolution of a bona fide dispute. *Lynn’s*
17 *Food Stores, Inc. v. United States*, 679 F. 2d 1350, 1352-53 (1982). A bona fide dispute
18 exists when “there are legitimate questions about the existence and extent of
19 Defendant’s FLSA liability. *Selk v. Poners Mem’l Healthcare Dist.*, 159 F. Supp. 3d
20 1164, 1172 (S.D. Cal. 2016).

21 The FLSA permits collective actions where the allegedly aggrieved employees
22 are “similarly situated.” 29 U.S.C. § 216(b). Whether employees are similarly situated
23 is judged in two stages: a preliminary or “notice stage” and then a more substantive
24 stage at the close of discovery when the defendant brings a motion to decertify the
25 class. *Nen Thio v. Genji, LLC*, 14 F.Supp.3d 1324, 1340 (N.D. Cal. 2014). Neither the
26 FLSA, nor the Ninth Circuit, has defined the term “similarly situated” for purposes
27 of certifying a collective action. *Nen Thio.*, 14 F.Supp.3d at 1340. However, courts
28 have determined that “the requisite showing of similarity of claims under the FLSA is

1 considerably less stringent than the requisite showing under Rule 23 of the Federal
2 Rules of Civil Procedure.” *Hill v. R+L Carriers, Inc.*, 690 F.Supp.2d 1001, 1009
3 (N.D. Cal. 2010); accord *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 607
4 (E.D. Cal. 2015).

5 At the notice stage, Plaintiff can satisfy her burden to show that the FLSA
6 Collective Members are similarly situated by making substantial allegations that the
7 “putative class members were together the victims of a single decision, policy, or plan.
8 *Nen Thio.*, 14 F.Supp.3d at 1340. As discussed below, Plaintiff and other FLSA
9 Collective Members all claim to have suffered injury as a result of Defendant’s uniform
10 policies, practices, and procedures of allegedly failing to properly pay FLSA Collective
11 Members for all hours worked, including overtime wages. As such, Plaintiff
12 respectfully requests that the Court conditionally certify the FLSA collective.

13 **VI. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS**

14 A class action may not be dismissed, compromised, or settled without the
15 approval of the Court. Fed. R. Civ. P. 23(e). Federal Rules of Civil Procedure, Rule
16 23(e) sets forth a “two-step process in which the Court first determines whether a
17 proposed class action settlement deserves preliminary approval and then, after notice
18 is given to class members, whether final approval is warranted.” *Nat’l Rural*
19 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) *citing*
20 *Manual for Complex Litigation (Third)* § 30.41 (1995). The settlement approval
21 procedure includes the following steps: (1) preliminary fairness review of the proposed
22 Settlement; (2) dissemination of mailed and/or published notice of the Settlement and
23 formal fairness review to all affected class members; and (3) a formal fairness hearing,
24 or final settlement approval hearing, at which class members may be heard and
25 evidence and argument concerning the fairness, adequacy, and reasonableness of the
26 Settlement may be presented. *Manual for Complex Litigation (Fourth)* §§ 21.632-
27 21.635 (2004).

1 Class certification under Rule 23 requires a plaintiff to demonstrate the four
2 requirements of Rule 23(a) are met: numerosity, commonality, typicality, and
3 adequacy. The plaintiff must also establish that one of the bases for certification in Rule
4 23(b) is met. Rule 23(b)(3) requires Plaintiff show questions of law or fact common to
5 class members predominate over questions affecting individual class members and that
6 the class action is superior to other available methods. Fed. R. Civ. P. 23(b)(3). Plaintiff
7 need only make a “prima facie showing” of the requirements under Rule 23. *Busby v.*
8 *JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008); *see also* Schwarzer,
9 Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial § 10:571 (The
10 Rutter Group 2012). In determining the propriety of class certification, a court may not
11 delve into the underlying merits of the claims. The fundamental question “is not
12 whether . . . plaintiffs have stated a cause of action or will prevail on the merits, but
13 rather whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*,
14 417 U.S. 156, 178 (1974). Accordingly, when ruling on the propriety of class
15 certification, a district court “is bound to take the substantive allegations of the
16 complaint as true.” *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975)
17 (“*Blackie*”). A court “may not require plaintiffs to make a preliminary proof of their
18 claim; it requires only sufficient information to form a reasonable judgment.” *Baldwin*
19 *& Flynn v. Nat’l Safety Associates*, 149 F.R.D. 598, 600 (N.D. Cal. 1993). Under these
20 governing standards, this action meets the requirements for provisional certification
21 under Rule 23(a) and Rule 23(b)(3).

22 **A. Numerosity**

23 Under Rule 23(a)(1), a class action may be maintained where “the class is so
24 numerous that joinder of all members is impracticable.” Joinder is usually
25 impracticable if a class is “large in numbers.” *See Jordan v. City. of Los Angeles*, 669
26 F.2d 1311, 1319 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (class sizes
27 of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). “As a general
28 matter, courts have found that numerosity is satisfied when class size exceeds 40

1 members, but not satisfied when membership dips below 21.” *Slaven v. BP Am., Inc.*,
2 *190 F.R.D. 649, 654* (C.D. Cal. 2000); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D.
3 466, 473 (C.D. Cal. 2012) (“A proposed class of at least forty members presumptively
4 satisfies the numerosity requirement.”). Numerosity is satisfied here because based on
5 the data provided by Defendant, the proposed settlement class includes approximately
6 68 potential members and joinder of the estimated 68 individuals would be
7 impracticable.⁵ Berger Decl. at ¶ 5. Sweet Decl. at ¶ 3.

8 **B. Commonality**

9 A Rule 23 class is certifiable only if “there are questions of law or fact common
10 to the class.” Fed. R. Civ. P. 23(a)(2). This commonality requirement must be
11 “construed permissively.” *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1019 (9th Cir.
12 1998) (“*Hanlon*”). “The plaintiff must demonstrate the capacity of classwide
13 proceedings to generate common answers to common questions of law or fact that are
14 apt to drive the resolution of the litigation.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d
15 581, 588 (9th Cir. 2012) (“*Mazza*”) (internal quotation marks omitted). “This does not,
16 however, mean that every question of law or fact must be common to the class; all that
17 Rule 23(a)(2) requires is a single significant question of law or fact.” *Abdullah v. U.S.*
18 *Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis and internal quotation
19 marks omitted); *see also Mazza*, 666 F.3d at 589 (characterizing commonality as a
20 “limited burden[,]” stating that it “only requires a single significant question of law or
21 fact”). Where a class is united by a common interest in determining whether a
22 defendant’s broad course of conduct is actionable, commonality is not defeated “by
23 slight differences in class members’ positions.” *Blackie*, 524 F.2d at 902.

24 Here, all Class Members share several common legal questions: (1) whether
25 Defendant violated Labor Code §§ 226.7, 246, 510, 512, and 1194 and the FLSA, 29
26 U.S.C. §§ 206 and 207 by failing to pay all wages due during employment; (2) whether

27
28 ⁵ At the time of mediation, there were 63 Class Members. According to Defendant,
the Class has increased to 68 members since then. *See Sweet Decl.* at ¶ 3.

1 Defendant violated Labor Code § 226(a) by failing to provide fully and accurately
2 itemized wage statements; (3) whether Defendant violated Labor Code § 2802 by
3 failing to reimburse for all necessary business expenses; (4) whether Defendant
4 violated Labor Code §§ 226.7 and 512 by failing to provide all meal and rest periods,
5 or compensation in lieu thereof; and (5) whether Defendant violated Labor Code §§
6 201-203 by failing to timely pay all wages due at separation of employment. Gaines
7 Decl. at ¶ 44.

8 Any factual variations among class members have no bearing on these common
9 legal questions. All class members share the common interest of determining whether
10 Defendant violated the above-described Labor Code and FLSA provisions. As
11 discussed throughout, and in the Declaration of Lindsay Orin (“Orin Decl.”) at
12 paragraph 7, Defendant had uniform policies that applied to all non-exempt California
13 employees. With regards to the payment of sick pay and overtime wages, Defendant
14 used a formula that allegedly did not properly compute commission earnings into its
15 employees’ regular rate of pay for purposes of paying sick pay and overtime wages at
16 the correct rates. Gaines Decl. at ¶ 19. Defendant also produced time records that will
17 show when meal breaks are short, missed, or late. *See Donohue v. AMN Services, LLC*
18 (2021) 11 Cal.5th 58, 76 (holding that “[b]ecause time records are required to be
19 accurate...[i]f the records are accurate, then the records reflect an employer’s true
20 liability.”). Regarding Defendant’s rest break policies and practices, Defendant asserts
21 that it maintained uniform and compliant policies and practices that were applied to all
22 non-exempt employees statewide. Finally, Plaintiff’s claims that Defendant failed to
23 issue complete and accurate wage statements and issue final wages timely at the
24 separation of employment were purely derivative based on the unpaid wages claims
25 above. Gaines Decl. at ¶ 19.

26 C. Typicality

27 Rule 23(a)(3) requires the representative plaintiff have claims “typical of the
28 claims . . . of the class.” “Typicality refers to the nature of the claim or defense of the

1 class representative, and not to the specific facts from which it arose or the relief
2 sought.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (“*Ellis*”)
3 (internal quotation marks and citation omitted). Representative claims are typical “if
4 they are reasonably co-extensive with those of absent class members; they need not be
5 identical.” *Hanlon*, 150 F.3d at 120. “The test of typicality is whether other members
6 have the same or similar injury, whether the action is based on conduct which is not
7 unique to the named plaintiffs, and whether other class members have been injured by
8 the same course of conduct.” *Ellis*, 657 F.3d at 984.

9 It is Plaintiff’s position that her claims are not only typical of those of all Class
10 Members – they are identical. Plaintiff Orin alleges that the same employment policies
11 – the calculation of overtime and sick pay, the provision of meal and rest breaks, and
12 expense reimbursement – were applied to her as they were to each and every Settlement
13 Class Member. Gaines Decl. at ¶ 46. Plaintiff satisfies the typicality requirement for
14 settlement purposes because her claims arise from the same factual basis and are based
15 on the same legal theories as those applicable to all Settlement Class Members. *Welmer*
16 *v. Syntex* 117 F.R.D. 641, 644 (N.D. Cal. 1987).

17 **D. Adequate Representation**

18 Rule 23(a)(4) requires that “the representative parties will fairly and adequately
19 protect the interests of the class.” Adequate representation turns on whether the named
20 plaintiff and his counsel “have any conflicts of interest with other class members,” and
21 whether the named plaintiff and his counsel will “prosecute the action vigorously on
22 behalf of the class.” *Hanlon*, 150 F.3d at 1020.

23 Here, Plaintiff alleges that there are no conflicts of interest between Plaintiff and
24 Class Members. Given the similarity of the claims asserted and remedies sought by
25 Class Members in this case, it is hard to imagine how there could be any conflicts.
26 Gaines Decl. at ¶ 47.

27 Nor are there any conflicts with Plaintiff’s Counsel. Gaines Decl. at ¶ 49.
28 Plaintiff’s Counsel, who have substantial class action experience, can adequately

1 represent the class. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las*
2 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (adequacy established by mere
3 fact that counsel were experienced practitioners).

4 Plaintiff's counsel are highly experienced litigators, with more than five decades
5 of litigation experience. As evidenced by the Declaration of Daniel F. Gaines filed
6 herewith, each of the attorneys working on this matter has substantial experience
7 prosecuting complex class action cases in the employment context. In short, Class
8 Counsel are experienced and qualified to evaluate the class claims and to evaluate
9 settlement versus trial on a fully informed basis, and to evaluate the viability of the
10 defenses. Gaines Decl. at ¶¶ 2-5, 48-49.

11 **E. Predominance of Common Questions**

12 The predominance inquiry focuses on whether the class is "sufficiently cohesive
13 to warrant adjudication by representation." *Culinary/Bartender Trust Fund v. Las*
14 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Central to predominance is
15 "the notion that the adjudication of common issues will help achieve judicial
16 economy." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th Cir.
17 2001).

18 Plaintiff submits that the proposed Settlement Class is sufficiently cohesive
19 because all Settlement Class Members share a common nucleus of facts and potential
20 legal remedies – the same facts and law govern their claims; this Court could try their
21 claims in representative fashion by common evidence regarding Plaintiff's and Class
22 Members' claims, and identical law applies. Few factual issues are individualized to
23 Class Members – the policies applied by Defendant to all Class Members will drive the
24 resolution of the litigation. All of the Settlement Class Members seek relief based on
25 the same allegations and factual predicates (e.g. uniform policies and practices relating
26 to overtime and sick pay, meal and rest breaks, and expense reimbursement). As a
27 result, common questions of law and fact predominate here. Gaines Decl. at ¶ 45.

1 These issues predominate over any individual issues. Considerations of judicial
2 economy obviously favor litigating this common issue once in a class action instead of
3 hundreds of times in separate lawsuits. “When common questions present a significant
4 aspect of the case and they can be resolved for all members of the class in a single
5 adjudication, there is clear justification for handling the dispute on a representative
6 rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022. It is well settled that the
7 need for determining differing amounts of damages suffered by different class
8 members does not preclude class certification. *Leyva v. Medline Indus.*, 716 F.3d 510,
9 513-514 (9th Cir. 2013); *Blackie*, 524 F.2d at 905.

10 **F. Superiority**

11 To determine whether the superiority requirements of Rule 23(b)(3) are satisfied,
12 a court must compare a class action with alternative methods for adjudicating the
13 parties’ claims. Lack of a viable alternative to a class action necessarily means that a
14 class action satisfies the superiority requirement. *Culinary/Bartenders Trust Fund*, 244
15 F.3d at 1163; *see also Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir.
16 1996) (“a class action is a superior method for managing litigation if no realistic
17 alternative exists”).

18 Consideration of the factors listed in Rule 23(b)(3)-(A) interest of members of
19 the class in individually controlling the prosecution/defense of separate actions; (B)
20 extent and nature of litigation already commenced by or against members of the class;
21 (C) desirability/ undesirability of concentrating the litigation of the claims in the
22 particular forum; (D) the difficulties likely to be encountered in the management of a
23 class action—only bolster this conclusion. However, when a court reviews a class
24 action settlement, the fourth factor does not apply. *Amchem Products Inc. v.*
25 *Woodward*, 521 U.S. 591, 620 (1997). Here, Plaintiff contends that the remaining
26 factors set forth in Rule 23(b)(3)(A), (B) and (C) all favor class certification.

27 First, Class Members have no particular interest in individually controlling the
28 prosecution of separate actions. “This factor weighs against class certification where

1 each class member has suffered sizeable damages or has an emotional stake in the
2 litigation.” *Barbosa v. Cargill Meat Solutions Corp*, 297 F.R.D. 431, 444 (E.D. Cal.
3 2013). Here, there is no indication that the amount of damages any individual Class
4 Member could recover is significant or substantially greater than any other Class
5 Member. Gaines Decl. at ¶ 51.

6 Second, there will be no competing litigation regarding the statutory violations
7 at issue as the Parties are unaware of any pending related actions. Further, any Class
8 Member who wants to pursue these claims on an individual action and seek
9 compensation in excess of their estimated settlement payment can opt-out of the
10 Settlement.

11 Finally, it is desirable to concentrate the issues in this forum because the Class
12 Members reside in California and the Class is comprised of employees who worked for
13 Defendant in California. The conclusion to Plaintiff is inescapable that a class action
14 provides the most efficient mechanism for resolving all the claims of the Class
15 Members in this case.

16 These factors weigh in favor of class treatment. Further, the filing of separate
17 suits by dozens of other class members “would create an unnecessary burden on
18 judicial resources.” *Barbosa*, 297 F.R.D. at 445.

19 **VII. PRELIMINARY SETTLEMENT APPROVAL PROCESS**

20 Rule 23(e) requires district courts to approve any proposed class settlement to
21 ensure that it “is ‘fair, reasonable, and adequate,’” to protect absent class members’
22 interests “while also accounting ‘for the strong judicial policy that favors settlements,
23 particularly where complex class action litigation is concerned.’” *Campbell v.*
24 *Facebook, Inc.*, 951 F.3d 1106, 1120-21 (9th Cir. 2020), *quoting* Rule 23(e)(2) and *In*
25 *re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556, 568 (9th Cir. 2019) (en banc)
26 (“*Hyundai*”). Rule 23(e)(2) sets forth factors that courts must consider when assessing
27 a settlement, including whether:
28

1 (A) the class representatives and class counsel have
2 adequately represented the class; (B) the proposal was
3 negotiated at arm's length; (C) the relief provided for the
4 class is adequate, taking into account: (i) the costs, risks, and
5 delay of trial and appeal; (ii) the effectiveness of any
6 proposed method of distributing relief to the class, including
7 the method of processing class-member claims; (iii) the
8 terms of any proposed award of attorney's fees, including
9 timing of payment; and (iv) any agreement required to be
10 identified under Rule 23(e)(3); and (D) the proposal treats
11 class members equitably relative to each other.

12 Rule 23(e)(2); *see also* *Briseño*, 998 F.3d 1022-1026, *citing* Rule 23(e)(2)).

13 The Rule 23(e) factors are “not intended to displace any factors currently
14 considered by courts, ‘but rather to focus the court and the lawyers on the core concerns
15 of procedure and substance that should guide the decision whether to approve the
16 proposal.’” *Miguel-Sanchez v. Mesa Packing, LLC*, No. 20-cv-00823-VKD, 2021 U.S.
17 Dist. LEXIS 84437, at *22 (N.D. Cal. May 3, 2021), *quoting* Rule 23(e) Advisory
18 Comm. Note to 2018 amendment. Although the relevant factors “will naturally vary
19 from case to case,” courts generally consider:

20 (1) the strength of the plaintiff's case; (2) the risk, expense,
21 complexity, and likely duration of further litigation; (3) the
22 risk of maintaining class action status throughout the trial;
23 (4) the amount offered in settlement; (5) the extent of
24 discovery completed and the stage of the proceedings; (6) the
25 experience and views of counsel; ... and (8) the reaction of
26 the class members of the proposed settlement.

27 *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935,
28 946 (9th Cir. 2011) (“*Bluetooth*”) (internal quotations and citation omitted); *Briseño*,
998 F.3d. at 1023 (listing same factors).

At the preliminary approval stage, courts routinely grant approval when the class
settlement: “(1) appears to be the product of serious, informed, non-collusive
negotiations; (2) does not grant improper preferential treatment to class representatives

1 or other segments of the class; (3) falls within the range of possible approval; and (4)
2 has no obvious deficiencies.” See e.g., *Morrison v. Am. Nat'l Red Cross*, No. 19-cv-
3 02855-HSG, 2020 U.S. Dist. LEXIS 132712, at *22-23 (N.D. Cal. July 27, 2020);
4 *Toolajian v. Air Methods Corp.*, No. 18-cv-06722-AGT, 2020 U.S. Dist. LEXIS
5 250904, at *22 (N.D. Cal. Apr. 24, 2020).

6 **A. Class Counsel and the Class Representative are Adequate**

7 The Ninth Circuit applies a two-pronged test to determine whether the
8 representative parties will adequately represent the class: “(1) do the named plaintiffs
9 and their counsel have any conflicts of interest with other class members; and (2) have
10 the named plaintiffs and their counsel prosecuted the action vigorously on behalf of the
11 class. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). As discussed
12 above, *supra* VI.D, Plaintiff Orin is an adequate class representative. Plaintiff has no
13 conflict with the class and has acted in the best interests of the class since commencing
14 the action. See generally Orin Decl. See also Gaines Decl. at ¶ 47. Plaintiff’s Counsel
15 is experienced in employment wage and hour and class action matters. Gaines &
16 Gaines, APLC is a well-regarded firm that handles primarily employment matters.
17 Gaines Decl. at ¶¶ 2-5, 48-49. Gaines & Gaines, APLC, has been approved as class
18 counsel in numerous actions. *Id.*

19 **B. The Settlement was the Product of Informed, Non-Collusive, Arm’s -**
20 **Length Negotiations**

21 As discussed above, the Parties reached the proposed Settlement after arm’s
22 length, non-collusive negotiations with the assistance of an experienced wage and hour
23 mediator, Michael L. Ludwig, Esq., and following an extensive informal exchange of
24 documents, data, and information. Gaines Decl. at ¶¶ 11-18. See *Satchell v. Fed. Exp.*
25 *Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (“The assistance of an
26 experienced mediator in the settlement process confirms that the settlement is non-
27 collusive.”); *Hanlon*, 150 F.3d at 1027 (affirming approval of settlement after finding
28 “no evidence to suggest that the settlement was negotiated in haste or in the absence of

1 information illuminating the value of plaintiffs' claims"); *Villegas v. J.P. Morgan*
2 *Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal.
3 Nov. 21, 2012) (stating that participation in private mediation "tends to support the
4 conclusion that the settlement process was not collusive").

5 Plaintiff was well-informed about the strengths and weaknesses of her case after
6 reviewing Defendant's written policies and relevant data, and conducted a damages
7 analysis based on data produced by Defendant. Gaines Decl. at ¶ 17; *see also*,
8 *generally*, Berger Decl.

9 Plaintiff and the putative class have been represented by experienced counsel,
10 who demanded the most advantageous terms for the class throughout the litigation. In
11 addition to the total settlement amount, counsel insisted that the settlement payment be
12 non-reversionary (i.e., maximizing payments to class members and aligning the
13 interests of all parties to a successful settlement administration). Gaines Decl. at ¶ 41.

14 **C. The Relief to the Class is Adequate**

15 When considering whether the settlement and the relief to the class is adequate
16 under to Rule 23(e)(2)(C), the court is to take into account: (i) the costs, risks, and delay
17 of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief
18 to the class, including the method of processing class-member claims; (iii) the terms of
19 any proposed attorney's fees, including timing of payment; and (iv) any agreement
20 required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(c)(i)-(iv). Under
21 the terms of the Settlement, Defendant will pay \$250,000 to resolve the action. The
22 settlement amount is approximately 36% of the maximum damages allegedly owed to
23 Class Members. Gaines Decl. at ¶ 33.

24 The gross settlement will pay an average payment of approximately \$3,968.25
25 ($\$250,000 \div 68 = \$3,676.47$) per employee. The Settlement Class are only releasing
26 claims which are asserted in the operative complaint or which could have been asserted
27 based on the factual allegations pled in the Action. Stip. at ¶ II(GG). The FLSA
28 Collective Members are only releasing claims for the FLSA claims that were alleged

1 or that reasonably could have been alleged based on the facts alleged in the operative
2 complaint. Stip. at ¶ II(HH). *See Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG,
3 2016 U.S. Dist. LEXIS 134872, at *4, 8, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016)
4 (approving class settlement and scope of the release was limited to “the factual
5 predicate in the operative complaint”).

6 Defendant’s liability for the released claims is limited. Stip. at ¶¶ II(FF), (GG),
7 (HH). Defendant forcefully maintained that it enforced legally compliant policies and
8 procedures regarding meal and rest periods that provided all employees with proper,
9 timely meal and rest breaks, and any missed meal and rest periods were waived by
10 employees on their own volition. Gaines Decl. at ¶ 20. Defendant also maintained that
11 it had legally compliant expense reimbursement policies and all employees were
12 properly reimbursed for all business expenses incurred. *Id.* Finally, as to Plaintiff’s
13 claim that Defendant failed to blend all non-base wages into the regular rate of pay,
14 Defendant also maintained numerous defenses to this claim, including that the
15 payments were discretionary, and that Class Members rarely earned any commissions
16 or other non-base hourly wages, so liability, if any, would be minimal. Data shows that
17 overtime wages were almost always paid correctly at the proper rates. *Id.*

18 Additionally, the risks and costs of proceeding to trial and potential appeal
19 warrant further reduction of the value of the claims. Continued litigation would be
20 expensive and would result in a substantial delay and would likely reduce any recovery
21 by Class Members. Plaintiff contends that the risks in proceeding combined with the
22 delays if the case were to go to trial or be appealed significant favor settlement,
23 especially a settlement which provides significant relief to Class Members. Gaines
24 Decl. at ¶ 21. The fact that the Settlement will eliminate delay and further expense
25 weighs strongly in favor of approval. *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948,
26 966 (9th Cir. 2009).

27 Further, the proposed award of attorneys’ fees is well within the 9th Circuits
28 benchmark of 25% of the common fund. *See Bellinghausen v. Tractor Supply Co.* 306

1 F.R.D. 245, 265 (N.D. Cal. Mar. 20, 2015); *Perez v. CVS Health Corp.*, No. 1:19-cv-
2 00449-DAD-BAM, 2021 U.S. Dist. LEXIS 110216, at *25 (E.D. Cal. June 11, 2021)
3 (finding no disproportionate distribution as the 33.33% fee request was within the
4 Ninth Circuit’s accepted range); *Wong v. Arlo Techs.*, No. 5:19-cv-00372-BLF, 2021
5 U.S. Dist. LEXIS 58514, at *24 (N.D. Cal. Mar. 25, 2021) (same as to 25% fee
6 request); *Bluetooth*, 654 F.3d at 943 (noting 25% is benchmark). Plaintiff’s Counsel
7 will not be paid any attorneys’ fees until the time that the class members are paid.

8 **D. The Settlement Does Not Grant Preferential Treatment to Plaintiff or**
9 **Segments of the Class**

10 The Settlement will treat class members fairly according to the formula set forth
11 above which provides payment pro rata based on the number of gross wages paid to all
12 Class Members. Stip. at ¶ X. The PAGA Payment will be apportioned to Aggrieved
13 Employees on a pro rata basis based on the total number of weeks worked (weeks in
14 which at least one day was worked) by each Aggrieved Employee and the total number
15 of weeks worked by all Aggrieved Employees during the Class Period. *Id.*

16 Class payment apportionment is an art, not a science, and cannot always be
17 accomplished with precision. The proposed allocation here is fair based on the
18 information Plaintiff’s Counsel reviewed and the records maintained by Defendant.
19 Gaines Decl. at ¶ 40. Plaintiff’s Counsel believes that apportioning the Net Settlement
20 Amount and FLSA Settlement Amount to the Class Members based on the gross wages
21 paid to all Class Members is fair. The more wages an employee earned means that the
22 employee worked more shifts and more hours, and therefore, it is generally
23 proportionate to the damages sustained. *Id.*

24 Indeed, “the goal of any distribution method is to get as much of the available
25 damages remedy to class members as possible and in as simple and expedient a manner
26 as possible.” *Hudson v. Libre Technology Inc.*, 2020 WL 2467060, *6 (S.D. Cal. 2020)
27 (quoting Newberg on Class Actions). See generally 4 Newberg and Rubenstein on
28 Class Actions § 12:15 (6th ed.). See also *Moreno v. Beacon Roofing Supply, Inc.*, 2020

1 WL 1139672, *9 (S.D. Cal. 2020), subsequent determination, 2020 WL 3960481 (S.D.
2 Cal. 2020) (*quoting* Newberg on Class Actions) (holding same); *Hilsley v. Ocean Spray*
3 *Cranberries, Inc.*, 2020 WL 520616, *7 (S.D. Cal. 2020) (*quoting* Newberg on Class
4 Actions) (same); *Hendricks v. StarKist Co.*, 2015 WL 4498083, *8 (N.D. Cal. 2015)
5 (*citing* Newberg on Class Actions) (approving flat payment plan that may have
6 overcompensated infrequent purchasers at expense of frequent purchasers of
7 defendant's product, but holding that given the small amounts of money at issue, flat
8 distribution was favorable to more complex claiming program).

9 The class representative's modest Enhancement Payment of \$5,000 is justified
10 under the case law and the facts of this case. *See, e.g., Staton v. Boeing Co.*, 327 F.3d
11 938, 977 (9th Cir. 2003) (recognizing service awards to named plaintiffs in class
12 actions are permissible and do not render a settlement unfair or unreasonable); *Glass*
13 *v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *50-
14 52 (N.D. Cal. Jan. 26, 2007) (approving payments of \$25,000 to each named plaintiff);
15 *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (awarding
16 named plaintiff in wage and hour class action \$10,000 as a service award, and an
17 additional \$5,000 award solely for the general release that the named plaintiff executed
18 as part of the settlement agreement); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp.
19 294, 299 (N.D. Cal. 1995) (awarding \$50,000 to a lead plaintiff). In *Van Vranken*, the
20 court articulated the following relevant factors to assess the appropriateness of a Class
21 Representative's enhancement: 1) the risk to the class representative in commencing
22 suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered
23 by the class representatives; 3) the amount of time and effort spent by the class
24 representatives; 4) the duration of the litigation, and; 5) the personal benefit (or lack
25 thereof) enjoyed by the class representatives as a result of the litigation. *Id.* at 299.
26 These factors support the need for a service payment to the class representative.

27 Plaintiff experienced risk to her reputation, future job prospects, and likely an
28 employment reference as a result of bringing this case and placing herself in the public

1 record as someone willing to sue her employer when she believes her rights are
2 violated. *See generally* Orin Decl. *See also* *Rutti v. Lojack Corp.*, No. SACV 06-350
3 DOC (JCx), 2012 U.S. Dist. LEXIS 107677, at *14-15 (C.D. Cal. July 31, 2012) (citing
4 research, noting the “strong disincentives for employees to participate in a class action
5 against their current or former employer”); *Ross v. U.S. Bank Nat. Ass’n*, No. C 07-
6 02951 SI, 2010 U.S. Dist. LEXIS 107857, at *6-7 (N.D. Cal. Sept. 29, 2010) (service
7 awards based on “willingness to serve as representatives despite the potential stigma
8 that might attach to them in the banking industry from taking on those roles”).) Plaintiff
9 has also estimated she has spent approximately 25 hours on this case including, inter
10 alia, searching for an attorney, communicating with her attorneys, and reviewing and
11 signing the settlement. *See generally* Orin Decl. The personal benefit Plaintiff would
12 receive if it was limited to her settlement payment as part of the class would not
13 compensate her for the aforementioned personal costs and risks she has assumed in
14 order to benefit the class. Gaines Decl. at ¶ 47.

15 **E. The Settlement Falls Within the Range of Possible Approval**

16 The Ninth Circuit has also identified eight additional factors for courts to
17 consider which overlap with the requirements of Rule 23(e). Courts “preview the
18 factors that ultimately inform final approval:” (1) the strength of the plaintiffs’ case;
19 (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk
20 of maintaining class action status; (4) the amount offered in settlement; (5) the extent
21 of discovery completed; (6) the experience and views of counsel; (7) the presence of a
22 government participant (not applicable here); and (8) the reaction of class members.
23 *Id.*

24 The Gross Settlement Amount is fair compared to the estimated full relief for
25 Plaintiff and the Class Members’ claims when considering Defendant’s defenses and
26 the risks involved as set forth in more detail in Plaintiff’s Counsel’s declaration. Gaines
27 Decl. at ¶ 33. As explained in further detail in the Gaines and Berger declarations, the
28 estimated maximum value of the claims, without adjusting for risk, according to a

1 comprehensive analysis, is realistically \$687,270 (stacking PAGA penalties add an
2 additional (\$585,300). *Id.* at ¶ 25.

3 In short, Plaintiff's expert found there was up to \$44,276 in potential actual
4 damages for underpaid overtime wages and sick pay wages as a result of Defendant's
5 alleged failure to pay blend commissions and other non-base hourly wages into its
6 employees' regular rate of pay (\$2,710 in underpaid overtime and \$41,566 in underpaid
7 sick pay). Berger Decl. at ¶¶ 6-7. For Plaintiff's meal period claim, Mr. Berger found
8 that only 28.8% of shifts analyzed exhibited a unique meal period violation. *Id.* at ¶ 9.
9 Based on this, Mr. Berger calculated the value of this claim at approximately \$142,733
10 in damages. *Id.* Plaintiff's rest period claim was calculated based on a 50% violation
11 rate during the Class Period. Based on this number, Mr. Berger calculated that the value
12 of this claim was approximately \$260,200 in damages. *Id.* at ¶ 8. While Plaintiff attests
13 that she rarely received a rest break, Defendant argues that all employees were provided
14 with ten-minute rest breaks as required by California law, and that any failure to take
15 an authorized break was a waiver thereof. Plaintiff's Counsel gauged that it would be
16 difficult, if not impossible, through a survey process, to demonstrate a 100% violation
17 rate for rest breaks particularly where, as here, Defendant argues that rest breaks were
18 indeed offered. Based on the likelihood that Plaintiff would be able to demonstrate
19 some, but not all, rest breaks were not properly provided, she applies a projected 50%
20 violation rate. However, this assumption is likely overstated. As discussed below,
21 Defendant contends that any rest periods not taken were waived, not denied. Gaines
22 Decl. at ¶ 22. Finally, as to Plaintiff's expense reimbursement claim, Plaintiff contends
23 that she was required to use her personal cell phone for her first 90 days of employment,
24 until she was provided with a work cell phone. Based on this, Plaintiff's Counsel
25 calculated \$30 in unreimbursed cell phone expenses per employee for three months of
26 employment. *Id.* at ¶ 23. Based on these analyses, Mr. Berger calculated \$5,670 in
27 unreimbursed expenses. Berger Decl. at ¶ 10.

1 Mr. Berger concluded that there were approximately 1,160 total wage statements
2 issued to all Class Members between April 3, 2022 and October 4, 2023 (“Wage
3 Statement Period”). Berger Decl. at ¶ 12. Plaintiff’s derivative wage statement statutory
4 penalties were calculated by applying a formula of \$50 for the initial wage statement
5 violation for one pay period for each Class Member, plus \$100 for each subsequent pay
6 period worked by Class Members during the Wage Statement Period. *Id.* In sum, this
7 claim was valued at \$114,050 in statutory penalties. *Id.*

8 Finally, with respect to Plaintiff’s derivative claim that Defendant failed to
9 timely pay all wages due at the separation of employment, Mr. Berger calculated up to
10 \$120,431 in damages, based on 30 separated Class Members and 30 days of wages at
11 the average hourly base rate of \$18.24. Berger Decl. at ¶ 11.

12 Plaintiff’s Counsel did not have Mr. Berger compute separate damages based on
13 the violation of Business & Professions Code § 17200 claim (the “UCL claim”) because it does not have any independent value. Gaines Decl. at ¶ 24. The UCL claim
14 is wholly predicated on the Labor Code violations alleged and it simply extends the
15 statute of limitations to four years; the value of the unpaid wage and expense
16 reimbursement claims set forth herein extend for the four-year limitations period
17 available under the UCL. *Id.* See also *Aryeh v. Canon Business Solutions, Inc.* (2013)
18 55 Cal.4th 1185, 1193 (holding that the UCL broadly prohibits all unlawful, fraudulent
19 or unfair business acts or practices, and that the UCL statute provides that the suit must
20 be filed within four years after the cause of action accrued. Based on this language, the
21 UCL’s limitations period is subject to the “well-settled body of law that has built up
22 around accrual of claims.”) (internal quotations omitted).

24 Based on the calculations provided by Mr. Berger, the estimated maximum
25 amount of damages and penalties that Class Members theoretically could be awarded
26 at trial is approximately \$687,270, inclusive of unpaid wages, meal and rest period
27 premiums, waiting time penalties, and wage statement penalties. Gaines Decl. at ¶ 25.
28 The estimated maximum amount of PAGA civil penalties that Aggrieved Employees

1 theoretically could be awarded at trial is approximately \$585,300. *Id.* However,
2 Plaintiff's Counsel believes that a more accurate number for the PAGA penalties is
3 \$194,600, based on one penalty per pay period at \$100 per penalty. *Id.* As discussed
4 below, it is unlikely that this Court would allow for the "stacking" of PAGA penalties,
5 and therefore, this number is the most accurate estimation of potential PAGA civil
6 penalties Defendant could be found liable for. *Id.*

7 There were numerous risks to recovery here which required a compromise to
8 resolve the Action at this juncture of the litigation. Defendant argued that many of its
9 employees rarely received commission or other non-base hourly wages, and when they
10 did, all employees were properly compensated for overtime and sick pay wages.
11 Defendant also forcefully maintained that it enforced legally compliant policies and
12 procedures regarding meal and rest periods that provided all employees with proper,
13 timely meal and rest breaks, and any missed meal and rest periods were waived by
14 employees. Defendant argued that no wage statement penalties or waiting time
15 penalties would be recovered because it paid all wages due, it acted in good faith at all
16 times, and Class Members suffered no actionable injury. It also took the position that
17 PAGA penalties could not be stacked, and the Court would likely exercise its discretion
18 to reduce or eliminate them altogether, based on the alleged weakness of the claims
19 asserted. It also contended that a class could not be certified because of manageability
20 concerns, among other issues, particularly with respect to the claims for meal and rest
21 periods. Finally, Defendant argued that Plaintiff faced the risk that she would not
22 obtain a maximum damage/penalty award on all (or any of) her claims. Gaines Decl.
23 at ¶ 26.

24 Defendant strongly contends that its policies and practices do not violate any
25 laws. It contends that it properly paid all wages and provided for all meal and rest
26 periods and fully compensated its employees for all time worked. It further contends
27 that the wage statements it provided to its employees are fully compliant with
28 California law. Gaines Decl. at ¶ 27.

1 Defendant also contended that the Ninth Circuit has held that heightened PAGA
2 penalties are not appropriate where the defendant was not notified by the Labor
3 Commissioner or any court that it was committing any violation of the law. *Bernstein*
4 *v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021). *See also Gunther v. Alaska*
5 *Airlines, Inc.* (2021) 72 Cal.App.5th 334, 340 (reversing heightened penalties awarded
6 by trial court for Labor Code § 226.3 because “the plain language of the statute [Labor
7 Code § 226.3] provides that heightened penalties apply only where the employer fails
8 to provide wage statements or fails to keep required records.”) Further, based on
9 Plaintiff’s Counsel’s experience, courts are often hesitant to award a heightened
10 penalty where there is no prior citation by the Labor Commissioner. *See Bernstein* at
11 1144. *See also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209
12 (holding that “[u]ntil the employer has been notified that it is violating a Labor Code
13 provision...the employer cannot be presumed to be aware that its continuing
14 underpayment of employee’s is a violation subject to penalties.”) (internal quotations
15 omitted). Defendant was not notified by the Labor Commissioner or any court that it
16 was subject to the California Labor Code, and has not been previously cited by the
17 Labor Commissioner for Labor Code violations. Therefore, any violations prior to
18 Plaintiff’s LWDA letter are not subject to heightened penalties. Gaines Decl. at ¶ 28.

19 Additionally, Defendant contended that there is no California authority that
20 expressly permits the practice of counting multiple PAGA violations/penalties that
21 occur within the same pay period, known as “stacking” penalties. Class Counsel is
22 aware of no court that has actually stacked such PAGA penalties for multiple violations
23 (meaning the “market” for PAGA settlements is based on no stacking of penalties) and
24 given the circumstances of this case, it is unlikely that this Court would impose a
25 massive penalty by stacking the PAGA penalty claims against Defendant. Although
26 stacking penalties is not unlawful, the majority of cases that address awards of PAGA
27 penalties focus on the court’s discretion to reduce awards. *See Romo v. GMRI, Inc.*,
28 2014 WL 11320647, at *7 (C.D. Cal. Feb. 18, 2014) (“The court retains discretion over

1 awards under a PAGA claim”); *Cardenas v. McLane Foodservice, Inc.*, 2011 WL
2 379413, at *4 (C.D. Cal. Jan. 31, 2011) (“The PAGA text also provides the Court with
3 the discretion to limit the amount Plaintiffs may recover from the employer.”); *Bright*
4 *v. 99c Only Stores* (2010) 189 Cal. App. 4th 1472, 1480 n.8 (“The trial court has
5 discretion to award less than the maximum amount of the civil penalty”). Based
6 thereon, the non-stacking/one penalty per pay period is an appropriate evaluation for
7 maximum potential PAGA civil penalties exposure in this case. Gaines Decl. at ¶ 29.

8 Finally, Defendant contended it acted within the requirements of California law
9 at all times as to all Class Members and Aggrieved Employees. In particular,
10 Defendant contends that it paid all employees all wages due. Defendant also contended
11 that it has compliant meal and rest break practices. Defendant further contends that not
12 every pay period at issue involved an alleged Labor Code violation. Moreover,
13 Defendant maintained that even if the Court did award PAGA civil penalties, the Court
14 could and would *substantially* reduce the penalties awarded based on the discretionary
15 factors contained in Labor Code § 2699(e)(2) (“In any action by an aggrieved
16 employee . . . , a court may award a lesser amount than the maximum civil penalty
17 amount specified by this part if, based on the facts and circumstances of the particular
18 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
19 or confiscatory.”). Gaines Decl. at ¶ 30.

20 Plaintiff’s Counsel found Defendant’s defenses on these claims could be
21 meritorious and result in no recovery for Plaintiff and the Class. Further, the reasonable
22 damages and/or penalties that Class Members could expect to be awarded at trial are
23 uncertain. Class certification is a tremendous risk, and Plaintiff’s Counsel believes that
24 the risk entailed in losing a class certification motion is up to 50%, particularly as to
25 the meal and rest break claims. All penalty claims alleged are wholly derivative of the
26 unpaid wage claims, such that if Plaintiff does not prevail on those claims, she will not
27 recover a penny of penalties (and these penalties represent a substantial portion of her
28 damage model). Accordingly, when the costs and risks of non-certification and loss on

the merits are considered, Plaintiff's Counsel is of the opinion that the settlement reached is clearly a favorable one. Gaines Decl. at ¶ 31.

The table below shows the maximum potential recovery on each claim alleged by Plaintiff and the realistic recovery on each such claim, as gauged by Plaintiff's Counsel, applying a 75% discount (representing a 50% discount for class certification risks and a 50% discount for the risk of a loss on the merits). As to PAGA claims, Plaintiff's Counsel believes that there is at least a 50% risk of reduction of the penalties due to the Court's discretion to reduce them.

CLAIM	MAXIMUM POTENTIAL RECOVERY	REALISTIC RECOVERY
Unpaid Wages	\$44,276	\$11,069
Meal Breaks	\$142,733	\$35,683.25
Rest Breaks	\$260,200	\$65,050
Expense Reimbursement	\$5,670	\$1,417.50
Wage Statements	\$114,050	\$28,512.50
Waiting Time Penalties	\$120,341	\$30,085.25
PAGA Penalties – All Claims	\$194,600	\$97,300
TOTAL:	\$881,870	\$269,117.50

The \$250,000 settlement is 92% of the risk-adjusted exposure in this case, a fair result when considering Defendant's significant defenses, and warranting this Court's approval. Gaines Decl. at ¶ 33. Compare this result to *Ma v. Covidian Holding, Inc.*, No. SACV 12-02161-DOC (RNBx), 2014 U.S. Dist. LEXIS 13296, at *12 (C.D. Cal. Jan. 31, 2014), in which a settlement providing "9.1% of the total value of the action [was] 'within the range of reasonableness.'" *Id.* at *5. See also *O'Sullivan v. AMN Servs., Inc.*, No. 12-cv-2125-JCS, ECF No. 92 (N.D. Cal. Feb. 7, 2014) (approving

1 \$478.12 net average payment where total exposure before penalties and interest was
2 estimated at \$108 million, for a recovery of less than 3% of full relief).

3 In comparison, settlements that have been disapproved are dramatically different
4 from this one. For example, in *Lusby v. Gamestop Inc.*, 297 F.R.D. 400 (N.D. Cal. Mar.
5 25, 2013), the rejected settlement would have been \$750,000 for 13,872 people –
6 paying a de minimis \$0.26/shift, after fees/costs, etc. were deducted.

7 With respect to additional factors the Ninth Circuit has identified:

8 First, as discussed above, the amount offered under the proposed Settlement
9 provides a fair average per person net recovery for a wage-and-hour class action,
10 especially in light of the narrow scope of the claims at hand (net payments will be
11 \$2,338.23 on average for each of the 68 Class Members). Second, Plaintiff believes in
12 the merits of her case, but risks not certifying a class or having a class decertified are
13 ever present. Plaintiff also could face the risk of an unfavorable finding at trial should
14 the case have progressed beyond contested class certification without settling. Further,
15 Defendant has indicated it would consider a motion for summary judgment which
16 poses an additional risk to Plaintiff. Third, the complexity and the expense of a Class
17 trial would be considerable and would almost certainly result in appeals by one or both
18 sides, including possible interlocutory appeals at various stages of the proceedings.
19 Fourth, the risk of failing to maintain class status through trial is substantial. Fifth, the
20 Parties have engaged in informal discovery, including exchanging all information and
21 documents necessary to assess the value of Class Member's claims, such as information
22 regarding Defendant's policies and Class Members time records, etc. Sixth, the firm
23 representing Plaintiff is experienced in wage and hour class actions, having had wage
24 and hour settlements approved repeatedly by federal and state courts in California.
25 Gaines Decl. at ¶¶ 34-37. In the view of undersigned counsel, this Settlement is in the
26 best interests of the Class in light of the risk and delay of a class action trial and appeal,
27 as compared with the immediate and substantial recovery in the Settlement. Seventh,
28 there is no governmental entity involved except the LWDA who did not give notice

1 that it will investigate the claims and who received notice of the Settlement. Gaines
2 Decl. at ¶ 38; **Exhibit D**. Eighth, the reaction of the Class Members to the settlement
3 will be better gauged at the final fairness hearing and the close of the opt out and
4 objection deadline. Gaines Decl. at ¶ 39.

5 **F. Attorneys' Fees Equal to the Ninth Circuit's Benchmark of Twenty-**
6 **Five Percent of the Common Fund are Justified**

7 Before final approval, Plaintiff's Counsel intends to seek, and Defendant will
8 not oppose, final approval of a request for attorneys' fees of twenty-five percent (i.e.,
9 \$62,500) of the \$250,000 Settlement. Stip. at II(D). Plaintiff's Counsel requests
10 preliminary approval of the presumptively reasonable twenty-five percent amount. *See*,
11 *e.g.*, *Bellinghausen v. Tractor Supply Co.* 306 F.R.D. 245, 265 (N.D. Cal. Mar. 20,
12 2015) (25% is presumptively reasonable benchmark amount).

13 The United States Supreme Court "has recognized consistently that a litigant or
14 a lawyer who recovers a common fund ... is entitled to a reasonable attorney's fee from
15 the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Ninth
16 Circuit's benchmark for presumptively reasonable fees in this context is twenty-five
17 percent of the Gross Settlement Amount. *Glass v. USB Fin. Servs.*, No. C-06-4068
18 MMC, 2007 U.S. Dist. LEXIS 8476, at *44-45 (N.D. Cal. Jan. 26, 2007).

19 Here, Plaintiff's Counsel's request for twenty-five percent of the common fund,
20 is justified by the fair result and the non-reversionary nature of the settlement. Courts
21 consider not only the results achieved, but also the risk of litigation, the contingent
22 nature of the fee and the financial burden carried by the Plaintiff. *See, e.g., In re*
23 *Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. Dec. 6, 2007).

24 **G. Plaintiff's Counsel's Fee Request is Reasonable Under the Lodestar**
25 **Method**

26 In a common fund settlement "[t]he lodestar method is merely a cross-check on
27 the reasonableness of a percentage figure." *Vizcaino v. Microsoft Corp.* 290 F.3d 1043,
28 1050, n.5 (9th Cir. 2002). In this case, consideration of Class Counsel's lodestar as a

1 cross-check to the percentage figure also strongly supports the reasonableness of the
2 requested fee award. The base amount is then adjusted in light of various factors.

3 Here, Plaintiff's Counsel has spent considerable time on the Action and will
4 provide a detailed lodestar analysis with the motion for final approval.

5 **VIII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

6 Upon settlement of a certified class, "[t]he court must direct notice in a
7 reasonable manner to all class members who would be bound by the proposal." Fed. R.
8 Civ. P. 23(e)(1)(B). Federal Rule of Civil Procedure 23(c)(2) requires the "best notice
9 that is practicable under the circumstances, including individual notice to all members
10 who can be identified through reasonable effort." A class action settlement notice "is
11 satisfactory if it generally describes the terms of the settlement in sufficient detail to
12 alert those with adverse viewpoints to investigate and to come forward and be heard."
13 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal quotation
14 marks omitted). These requirements are satisfied.

15 As discussed in section IV(E), *supra*, the proposed Notice Packet fairly apprises
16 the putative class members of the terms of the proposed Settlement, and of the options
17 available to them in connection with the settlement and court proceedings. *See* Exhibit
18 1 and Exhibit 2 to **Exhibit B** of Gaines Decl. The Notice describes the nature of the
19 action and the claims alleged; it provides the definition of the class, and explains the
20 terms of the settlement, including the settlement amount, the distribution of that
21 amount, and the release; it includes an explanation that lays out the class members'
22 options under the settlement: they may remain in the class, object to the settlement but
23 still remain in the class, or exclude themselves from the settlement and pursue their
24 claims separately against defendant; it explains the procedures for objecting to the
25 settlement; and provides information about the Final Fairness Hearing. *Id.* Class
26 members are instructed to submit their written objections directly to the Court, and the
27 settlement provides for submission of an exclusion form to be provided to class
28 members by the Settlement Administrator. In short, the procedure for providing notice

1 and the content of the notice constitutes the best practicable notice and complies with
2 the requirements of Rule 23 and due process.

3 **IX. CAFA NOTICE**

4 The Parties agree that notice under the Class Action Fairness Act (“CAFA”) is
5 required. In compliance with the CAFA, within ten (10) days after this Renewed
6 Motion for Preliminary Approval is filed, Defendant’s Counsel shall cause notice of
7 this proposed Settlement to be served on the Attorney General of the United States and
8 the Attorneys General of California and Texas (where Class Members presently
9 reside). Defendant shall file with the Court a certification stating the date(s) upon which
10 such CAFA notices were sent. Defendant will provide Plaintiff’s Counsel with any
11 substantive responses received in response to any CAFA notice served. The Settlement
12 complies with the substantive requirements of CAFA because it does not include
13 coupons, class members are not obligated to pay any money to Class Counsel, and the
14 Settlement does not discriminate based on geographic location. Gaines Decl. at ¶ 56.

15 **X. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

16 The last step in the settlement approval process is the formal fairness hearing, at
17 which the Court may hear all evidence and argument necessary to evaluate the
18 Settlement. At that hearing, proponents of the Settlement may explain and describe its
19 terms and conditions and offer argument in support of Settlement approval, and
20 members of the Class, or their counsel, may be heard in support of or in opposition to
21 the Settlement Agreement. Other deadlines in the Settlement approval process,
22 including the deadlines for requesting exclusion from the Settlement Class or objecting
23 to the Settlement, will be determined based on the date of the Final Approval Hearing
24 or the date on which the Preliminary Approval Order is entered. The Parties
25 respectfully propose the following schedule, which is also outlined in the Proposed
26 Order filed herewith:

27 **DAY 28**

28 Deadline for Claims
Administrator to mail Class
Notice and Deadline for Class

	Counsel to file and serve Motion for Attorneys' Fees and Costs and Class Representative's service payment
DAY 73	Deadline for Class Members to postmark or deliver objections to the Settlement to the Court.
DAY 73	Deadline for Class Members to postmark or deliver a request for exclusion to the Claims Administrator.
DAY 73	Deadline for FLSA Collective Members to postmark or deliver their FLSA Settlement Claim Form and Release of Claims to the Claims Administrator.
DAYS PRIOR TO FINAL HEARING	Deadline for Class Counsel to file and serve motion for final approval of Settlement.
[DATE]	Final Approval Hearing

XI. CONCLUSION

The Settlement is fair and reasonable and all of the requirements for preliminary approval are met. The Court is therefore requested to grant this motion and enter an order in the form submitted herewith.

Dated: March 15, 2024

Respectfully Submitted,

GAINES & GAINES, APLC

By: /s/ Daniel F. Gaines

Daniel F. Gaines, Esq.

Alex P. Katofsky, Esq.

Attorneys for Plaintiff Lindsay Orin and
Proposed Class Counsel