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

11 **FOR THE COUNTY OF VENTURA**

12 **(UNLIMITED JURISDICTION)**

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

17 *Plaintiff(s),*

18 vs.

19 SCJM2, LLC, a California limited liability
20 company; and DOES 1–50, inclusive,

21 *Defendant(s).*

Case No. 2023CUOE008247

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

Hearing Date: February 24, 2025
Hearing Time: 8:30 a.m.
Hearing Dept.: 42, The Honorable Henry
J. Walsh



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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Heather Rodriguez (“Plaintiff”) submits this memorandum of points and
5 authorities in support of her unopposed motion for preliminary approval of the Class Action and
6 PAGA Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
7 Settlement Amount (“GSA”) of \$275,000.00 in compromise of all disputed claims on behalf of
8 hourly, non-exempt employees of Defendant SCJM2, LLC (“Defendant”) during the period of
9 April 28, 2019 through the date of preliminary approval of this class action settlement (the “Class
10 Period”). Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally
11 certify the below-defined Class for settlement purposes only under Code of Civil Procedure §
12 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class
13 Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines of
14 United Employees Law Group as Class Counsel; (5) approve the proposed notice procedures and
15 related forms; and (6) schedule a final approval hearing.

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

26 **II. BACKGROUND**

27 SCJM2, LLC DS, ¶ 11. Defendant employed Plaintiff in California as a hairstylist from
28 about December 12, 2021 until October 7, 2022. *Id.*

A. The Claims and Procedural History

On April 27, 2023, Plaintiff notified Defendant and the California Labor and Workforce

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



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1 Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of
2 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations
3 committed by Defendant. DS, ¶ 12, Ex. 2.

4 On April 27, 2023, Plaintiff filed a Class Action Complaint in the Ventura County
5 Superior Court, Case No. 2023CUOE008247, against Defendant on behalf of herself and others
6 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
7 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
8 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
9 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
10 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
11 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 13, Ex. 3. On
12 July 31, 2023, Plaintiff filed her First Amended Complaint adding a claim under PAGA. DS, ¶
13 13, Ex. 4. On October 23, 2023, Defendant filed an answer to Plaintiff’s First Amended
14 Complaint. DS, ¶ 13, Ex. 5. Defendant denies all of Plaintiff’s allegations and strongly contends
15 that its wage and hour policies, practices and procedures are fully compliant with all applicable
16 laws. DS, ¶ 13.

17 **B. Sampling**

18 On April 11, 2024, Plaintiff requested that Defendant informally disclose documents and
19 data to enable Plaintiff to prepare for settlement discussions, including the number of putative
20 class members and aggrieved employees, the number of paychecks and workweeks for the various
21 limitations periods applicable to Plaintiff’s claims. DS, ¶ 14. Plaintiff also requested a reasonable,
22 randomly selected sample of Defendant’s time, payroll, and expense records, and related
23 personnel records. *Id.* Finally, Plaintiff requested Defendant’s written policies applicable to the
24 claims at hand and asked Defendant identify any and all comparable claims against it.

25 The Parties thereafter engaged in an informal, voluntary exchange of information in the
26 context of privileged settlement discussions to facilitate an early mediation. Defendant produced
27 Plaintiff’s entire personnel file (including policies and agreements she signed and acknowledged)
28 and copies of its relevant company written policies. DS, ¶ 15.

The Defendant disclosed that there have been comparable claims against it. Defendant
disclosed and/or Plaintiff discovered the following comparable claims: (1) *Michelle Mangan v.*
SCJM, LLC, et al., San Diego County Superior Court, case no. 37-2020-00035806-CU-WT-CTL,



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1 a lawsuit filed on October 7, 2020 for discrimination and other individual relief that is currently
2 pending; and (2) *Josephine Pascua v. SCJM2, LLC*, San Diego County Superior Court, case no.
3 37-2024-00025089-CU-OE-NC, a class and PAGA lawsuit filed on May 29, 2024 for unprovided
4 seating and claims comparable to those in the instant lawsuit that is currently pending. DS, ¶ 20.

5 Defendant contends that it employed 1,225 putative class members during the period of
6 April 28, 2019 to June 5, 2024. Defendant produced the records of 13.87% of the putative class
7 members for the period of April 28, 2019 to June 5, 2024. There were records for 170 employees
8 in the sample. Defendant chose the sample. The sample was randomly selected. The sample
consisted of time and payroll records, and related records. DS, ¶ 16.

9 Plaintiff retained Nikita Pimenov, a data analyst, to analyze the sample. Plaintiff also
10 employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to
11 determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004)
12 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative
13 margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin
14 of error of 43.3 percent was unacceptable. Using a margin of error of 32%, a confidence level of
15 95%, and a population size of 1,225, the Raosoft Sample Size Calculator recommended a sample
16 of 10. DS, ¶ 17, **Exhibit 6** (Raosoft Sample Size Calculator results print-out). Thus, the sample
population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

17 **C. Mediation**

18 On June 11, 2024, following much of the foregoing informal discovery and exchange of
19 information, the Parties participated in a mediation session presided over by Mediator Scott
20 Radovich, an experienced class action mediator. During the mediation, the Parties had a full day
21 of productive negotiations and reached agreement on a class-wide settlement after the mediation
22 session. During the mediation sessions, each side, represented by her / its respective counsel,
23 recognized the risk of an adverse result in the Action. Though the Parties did not settle at the



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

mediation, they continued to negotiate. Defendant produced financial records. After Plaintiff reviewed them, the Parties agreed to settle the Action and all other matters covered by this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 18.

D. Defendant's Financial Condition

At the mediation, it became clear that Defendant had insufficient resources to cover the full extent of liability. DS ¶ 19. As part of the settlement negotiations, Defendant disclosed its balance sheets, profit and loss statements, tax returns, and related information from 2021 through 2024. *Id.* Plaintiff's Counsel has reviewed the financial records. *Id.* The information provided was sufficient to demonstrate the financial condition of the Defendant and that it will unlikely be able to afford payment of a larger amount than the Settlement amount. Based on such records, Plaintiff, on her own behalf and on behalf of the Class Members or Settlement Class Members, has agreed to settle the lawsuit on the terms set forth in the Settlement. *Id.*

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class and Aggrieved Employees Definition

The Settlement defines the Settlement Class as all hourly, non-exempt employees of Defendant in California during the Class Period. Settlement, ¶ 1.5 (Ex.1 at p. 4). The Class Period is April 28, 2019 through the date of preliminary approval of this class action settlement. *Id.* The "Aggrieved Employees" are persons employed by Defendant in California and classified as a hourly, non-exempt who worked for Defendant during the PAGA Period. Settlement, ¶ 1.4 (Ex.1 at p. 4). The "PAGA Period" begins April 27, 2022 and ends June 05, 2024. *Id.*

B. Monetary Terms

Gross Settlement Amount. Except as otherwise provided by Paragraph 9 of the Settlement (Ex. 1 at p. 21-22), Defendant promises to pay \$275,000.00 and no more as the Gross Settlement Amount and to separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual Class Payments. Defendant has no obligation to pay the Gross Settlement Amount (or any payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement (Ex.1 at pp. 13-14). The Gross Settlement Amount will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Payment and the Administrator's Expenses. None of the Gross Settlement Amount will revert to Defendant. Settlement, ¶ 3.1 (Ex.1 at p. 9).

Payments from the Gross Settlement Amount. The Administrator will make and deduct the following payments from the Gross Settlement Amount, in the amounts specified by the Court



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1 in the Final Approval:

2 To Plaintiff: Class Representative Service Payment to the Class Representative of not
3 more than \$10,000.00 (in addition to any Individual Class Payment and any Individual PAGA
4 Payment the Class Representative is entitled to receive as a Participating Class Member).
5 Defendant will not oppose Plaintiff's request for a Class Representative Service Payment that
6 does not exceed this amount. As part of the motion for Class Counsel Fees Payment and Class
7 Litigation Expenses Payment, Plaintiff will seek Court approval for any Class Representative
8 Service Payments no later than 16 court days prior to the Final Approval Hearing. If the Court
9 approves a Class Representative Service Payment less than the amount requested, the
10 Administrator will retain the remainder in the Net Settlement Amount. The Administrator will
11 pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full
12 responsibility and liability for employee taxes owed on the Class Representative Service Payment.
13 Settlement, ¶ 3.2.1 (Ex.1 at pp. 9-10).

14 To Class Counsel: A Class Counsel Fees Payment of not more than 33.33%, which is
15 currently estimated to be \$91,666.67 and a Class Counsel Litigation Expenses Payment of not
16 more than \$17,500.00. Defendant will not oppose requests for these payments provided that do
17 not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel
18 Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the
19 Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class
20 Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will
21 allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to
22 Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class
23 Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will
24 pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more
25 IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the
26 Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds
27 Defendant harmless, and indemnifies Defendant, from any dispute or controversy regarding any
28 division or sharing of any of these Payments. Settlement, ¶3.2.2 (Ex.1 at p. 10).

To the Administrator: An Administrator Expenses Payment not to exceed \$17,000.00
except for a showing of good cause and as approved by the Court. To the extent the
Administration Expenses are less or the Court approves payment less than \$17,000.00, the



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1 Administrator will retain the remainder in the Net Settlement Amount.

2 To Each Participating Class Member: An Individual Class Payment calculated by (a)
3 dividing the Net Settlement Amount by the total number of Work Weeks worked by all
4 Participating Class Members during the Class Period and (b) multiplying the result by each
5 Participating Class Member's Work Weeks. Settlement, ¶ 3.2.4 (Ex.1 at p. 10)

6 **C. Timing of Payments**

7 Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts
8 necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the
9 Administrator no later than 30 days after the Effective Date. Settlement, ¶ 4.3 (Ex.1 at p. 12).
10 Within 14 days after Defendant funds the Gross Settlement Amount, the Administrator will mail
11 checks for all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA
12 Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class
13 Counsel Litigation Expenses Payment, and the Class Representative Service Payment.
14 Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses
15 Payment and the Class Representative Service Payment shall not precede disbursement of
16 Individual Class Payments and Individual PAGA Payments. Settlement, ¶ 4.4 (Ex.1 at p. 12).

17 **D. Calculation of Settlement Shares**

18 To Each Participating Class Member: An Individual Class Payment calculated by (a)
19 dividing the Net Settlement Amount by the total number of Work Weeks worked by all
20 Participating Class Members during the Class Period and (b) multiplying the result by each
21 Participating Class Member's Work Weeks. Settlement, ¶ 3.2.4 (Ex.1 at p. 10). The Administrator
22 will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved
23 Employees' 25% share of PAGA Penalties \$2,500.00 by the total number of PAGA Period Pay
24 Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the
25 result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume
26 full responsibility and liability for any taxes owed on their Individual PAGA Payment. Settlement,
27 ¶ 3.2.5.1 (Ex.1 at p. 11).

28 **E. Apportionment of Settlement Shares**

Tax Allocation of Individual Class Payments. 10.00% of each Participating Class
Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage
Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2
Form. The 90.00% of each Participating Class Member's Individual Class Payment will be



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1 allocated to settlement of claims for interest and penalties (the “Non-Wage Portion”). The Non-
2 Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms.
3 Participating Class Members assume full responsibility and liability for any employee taxes owed
4 on their Individual Class Payment. Settlement, ¶ 3.2.4.1 (Ex.1 at pp. 10-11).

5 **F. The Releases**

6 Effective on the date when Defendant fully funds the entire Gross Settlement Amount and
7 funds all employer payroll taxes owed on the Wage Portion of the Individual Class Payments,
8 Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as
9 follows:

10 Plaintiff’s Release. Plaintiff and her respective former and present spouses,
11 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
12 and discharge Released Parties from all claims, transactions, or occurrences that occurred during
13 the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
14 been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims
15 that were, or reasonably could have been, alleged based on facts contained in the Operative
16 Complaint, Plaintiff’s PAGA Notice, or ascertained during the Action and released under 6.3,
17 below. (“Plaintiff’s Release.”) Plaintiff’s Release does not extend to any claims or actions to
18 enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability
19 benefits, social security benefits, workers’ compensation benefits that arose at any time, or based
20 on occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff may discover facts
21 or law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be
22 true but agrees, nonetheless, that Plaintiff’s Release shall be and remain effective in all respects,
23 notwithstanding such different or additional facts or Plaintiff’s discovery of them. Settlement, ¶
24 6.1 (Ex.1 at pp. 13-14).

25 Plaintiff’s Waiver of Rights Under California Civil Code Section 1542. In addition to the
26 releases set forth herein, Plaintiff agrees to a general release with a waiver of any and all
27 individual claims she has or may have against Defendant under California Civil Code Section
28 1542. For purposes of Plaintiff’s General Release, Plaintiff expressly waives and relinquishes the
provisions, rights, and benefits, if any, of section 1542 of the California Civil Code, which reads:

A general release does not extend to claims that the creditor or releasing party does not



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1 know or suspect to exist in his or her favor at the time of executing the release, and that if
2 known by him or her would have materially affected his or her settlement with the debtor
3 or Released Party.

4 Settlement, ¶ 6.1.1 (Ex.1 at p. 14).

5 Release by Participating Class Members Who Are Not Aggrieved Employees: All
6 Participating Class Members, on behalf of themselves and their respective former and present
7 representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released
8 Parties from all claims stated in the Operative Complaint and those based solely upon the facts
9 alleged in the Operative Complaint. Except as set forth in Section 6.3 of this Agreement (Ex. 1 at
10 p. 15), Participating Class Members do not release any other claims, including individual claims
11 for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
12 unemployment insurance, disability, social security, workers' compensation, or claims based on
13 facts occurring outside the Class Period. Settlement, ¶ 6.2 (Ex.1 at pp. 14-15).

14 Release of PAGA Claim. Plaintiff releases all claims for civil penalties that could have
15 been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter
16 to the LWDA; Plaintiff does not release the claim for wages or damages of any Aggrieved
17 Employee unless such Aggrieved Employee is a Participating Class Member. Settlement, ¶ 6.3
(Ex.1 at p. 15).

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

19 No later than five (5) business days after receipt of the Class Data, the Administrator shall
20 notify Class Counsel that the list has been received and state the number of Class Members,
21 PAGA Members, Work Weeks, and Pay Periods in the Class Data. Settlement, ¶ 8.4.1 (Ex.1 at p.
17).

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



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1 amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses
2 using the National Change of Address database. Settlement, ¶ 8.4.2 (Ex.1 at p. 17).

3 Not later than five (5) business days after the Administrator's receipt of any Notice Packet
4 returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet using any
5 forwarding address provided by the USPS. If the USPS does not provide a forwarding address,
6 the Administrator shall conduct a Class Member Address Search, and re-mail the Notice Packet
7 to the most current address obtained. The Administrator has no obligation to make further
8 attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by
9 the USPS a second time. Settlement, ¶ 8.4.3 (Ex.1 at p. 17).

10 The deadlines for Class Members' written objections, Challenges to Work Weeks and/or
11 Pay Periods (disputes), and Requests for Exclusion will be extended an additional 14 days beyond
12 the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-
13 mailed. The Administrator will inform the Class Member of the extended deadline with the re-
14 mailed Notice Packet. Settlement, ¶ 8.4.4 (Ex.1 at pp. 17-18).

15 If the Administrator, Defendant, or Class Counsel are contacted by or otherwise discover
16 any persons who believe they should have been included in the Class Data and should have
17 received Notice Packet, the Parties will expeditiously meet and confer in good faith in an effort
18 to agree on whether to include them as Class Members. If the Parties agree, such persons will be
19 Class Members entitled to the same rights as other Class Members, and the Administrator will
20 send, via email or overnight delivery, a Class Notice requiring them to exercise options under this
21 Agreement not later than 14 days after receipt of Class Notice, or the deadline dates in the Class
22 Notice, which ever are later. Settlement, ¶ 8.4.5 (Ex.1 at p. 18).

23 **1. Disputes**

24 Each Class Member shall have 60 days after the Administrator mails the Notice Packet
25 (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge
26 the number of Class Work Weeks and PAGA Pay Periods (if any) allocated to the Class Member
27 in the Class Notice. This is also known as a dispute. A Work Week Dispute form, attached as
28 Exhibit C, may be used for this purpose but is not required. The Class Member may challenge the
allocation by communicating with the Administrator via fax, email or mail. The Administrator
must encourage the challenging Class Member to submit supporting documentation. In the
absence of any contrary documentation, the Administrator is entitled to presume that the Work



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Weeks contained in the Class Notice are correct so long as they are consistent with the Class Data. The Administrator's determination of each Class Member's allocation of Work Weeks and/or Pay Periods shall be final and not appealable or otherwise susceptible to challenge. The Administrator shall promptly provide copies of all challenges to calculation of Work Weeks and/or Pay Periods to Defense Counsel and Class Counsel and the Administrator's determination the challenges. Settlement, ¶ 8.6 (Ex.1 at p. 19).

2. Opting Out

Class Members who wish to exclude themselves (opt-out of) the Class Settlement must send the Administrator, by fax, email, or mail, a signed written Request for Exclusion not later than 60 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class Members whose Notice Packet is re-mailed). A Request for Exclusion is a letter from a Class Member or his/her representative that reasonably communicates the Class Member's election to be excluded from the Settlement and includes the Class Member's name, address and email address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed, or postmarked by the Response Deadline. An Election Not to Participate in Settlement form, attached as Exhibit B, may be used for this purpose but is not required. Settlement, ¶ 8.5.1 (Ex.1 at p. 18).

The Administrator may not reject a Request for Exclusion as invalid because it fails to contain all the information specified in the Class Notice. The Administrator shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the person as a Class Member and the Class Member's desire to be excluded. The Administrator's determination shall be final and not appealable or otherwise susceptible to challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion, the Administrator may demand additional proof of the Class Member's identity. The Administrator's determination of authenticity shall be final and not appealable or otherwise susceptible to challenge. Settlement, ¶ 8.5.2 (Ex.1 at p. 18).

Every Class Member who does not submit a timely and valid Request for Exclusion is deemed to be a Participating Class Member under this Agreement, entitled to all benefits and bound by all terms and conditions of the Settlement, including the Participating Class Members' Releases under Paragraphs 6.2 and 6.3 of this Agreement (Ex. 1 at pp. 14-15), regardless of whether the Participating Class Member actually receives the Class Notice or objects to the



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1 Settlement. Settlement, ¶ 8.5.3 (Ex.1 at pp. 18-19).

2 Every Class Member who submits a valid and timely Request for Exclusion is a Non-
3 Participating Class Member and shall not receive an Individual Class Payment or have the right
4 to object to the class action components of the Settlement. Aggrieved Employees are eligible for
5 an Individual PAGA Payment. Settlement, ¶ 8.5.4 (Ex.1 at p. 19).

6 **3. Objecting**

7 Only Participating Class Members may object to the class action components of the
8 Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or
9 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
10 Payment and/or Class Representative Service Payment. Settlement, ¶ 8.7.1 (Ex.1 at p. 19).

11 Participating Class Members may send written objections to the Administrator, by fax,
12 email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
13 attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
14 Participating Class Member who elects to send a written objection to the Administrator must do
15 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
16 14 days for Class Members whose Notice Packet was re-mailed). An The Objection form attached
17 as Exhibit D may be used for this purpose but is not required. Settlement, ¶ 8.7.2 (Ex.1 at pp. 19-
18 20).

19 Non-Participating Class Members have no right to object to any of the class action
20 components of the Settlement. Settlement, ¶ 8.7.3 (Ex.1 at p. 20).

21 **H. Uncashed Checks**

22 For any Class Member whose Individual Class Payment check or Individual PAGA
23 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
24 funds represented by such checks to the Boys and Girls Club of Carlsbad thereby leaving no
25 "unpaid residue" subject to the requirements of California Code of Civil Procedure Section 384,
26 subd. (b). If the Court does not approve the Boys and Girls Club of Carlsbad, the Administrator
27 shall transmit the funds represented by such checks to the State of California Unclaimed Property
28 Fund in the name of the Class Members concerned thereby leaving no "unpaid residue" subject
to the requirements of California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶
4.4.3 (Ex.1 at p. 13).

IV. CERTIFICATION OF THE CLASS IS APPROPRIATE

Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable



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1 and its members are too numerous for joinder to be practical; (2) the representative and absent
2 class members share a community of interest and questions of law and fact common to the class
3 predominate over questions unique to individual class members; (3) the representative's claims
4 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
5 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
6 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
7 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

8 **A. The Settlement Class Is Objectively Ascertainable**

9 A class is ascertainable when it may be readily identified without unreasonable expense
10 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
11 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
12 defined Class is ascertainable because its members may be identified by reference to Defendant's
13 records and Defendant has agreed to share the relevant information from its records to facilitate
the settlement process. DS, ¶ 23. Therefore, the Settlement Class is ascertainable.

14 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

15 The Settlement Class has sufficiently numerous members to render joinder impractical.
16 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
17 (1972) 28 Cal.App.3d 1017, 1030. Defendant estimates that there are approximately 1,225 Class
18 Members or Settlement Class Members. DS, ¶ 24. Plaintiff maintains that it would be impractical
19 and economically inefficient to require each Class Member or Settlement Class Member to
20 separately maintain an individual action or be joined as a named plaintiff in this action. The
21 California Supreme Court has upheld a class of as few as 10 individuals. *See Bowles v. Superior*
22 *Court* (1955) 44 Cal.2d 574. In light of these considerations, the Settlement Class' membership
is sufficiently numerous. DS, ¶ 24. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

23 **C. Class Members or Settlement Class Members Share a Well-Defined**
24 **Community of Interest**

25 The community of interest requirement "embodies three factors: (1) predominant common
26 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
27 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
28 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155



1 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
2 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
3 renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

4 To justify certification, the class proponent “‘must show ... that questions of law or fact
5 common to the class predominate over the questions affecting the individual members’” *See*,
6 *Arenas v. El Torito Rests., Inc.* (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank,*
7 *FA v. Superior Court* (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for
8 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
9 the claims of the Class Members or Settlement Class Members all stem from the same sources.
DS, ¶ 38.

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

D. Plaintiff Is Typical of the Settlement Class

The class representative must be similarly situated to the rest of the purported class. *See*



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1 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
2 that the class representative must have identical interests with the class members. The only
3 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
4 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
5 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that her claims
6 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent
7 Class Members or Settlement Class Members was subject to the same relevant policies and
8 procedures governing her compensation, hours of work and meal and rest periods. Because
9 Plaintiff contends that she was subject to the same general course of conduct as absent Class
10 Members or Settlement Class Members, resolving the common questions as they apply to Plaintiff
11 will determine Defendant’s *prima facie* liability to all Class Members or Settlement Class
12 Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary
13 affirmative defenses as those of absent Class Members or Settlement Class Members.
14 Accordingly, Plaintiff’s claims are typical of the Class. DS, ¶ 26.

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

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

21 First, Class Counsel have supplied the Court with declarations to show that they are
22 adequate to represent the Settlement Class and that they have significant experience in
23 employment litigation generally, and wage and hour and employment-related class action
24 litigation specifically. *See* DS, ¶¶ 28-36; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
25 Thus, Plaintiff’s counsel are adequate to serve as Class Counsel.

26 Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the
27 Class Members or Settlement Class Members have strong and co-extensive interests in this
28 litigation because they all worked for Defendant during the relevant time period, allegedly
suffered the same alleged injuries from the same alleged course of conduct, and there is no
evidence of any conflict of interest between Plaintiff and the Class Members or Settlement Class
Members. DS, ¶ 28. Moreover, Plaintiff has demonstrated her commitment to the Settlement



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1 Class by, among other things, retaining experienced counsel, providing counsel with documents
2 and extensively speaking with them to assist in identifying the claims asserted in this case,
3 assisting them in identifying witnesses, as well as exposing herself to the risk of attorneys' fees
4 and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 28. Thus, Plaintiff is
5 adequate to serve as settlement class representative. Accordingly, this Court should find that
6 Plaintiff and her counsel are adequate to represent the Settlement Class as required under Code
of Civil Procedure § 382.

7 **F. Class Action Treatment Is the Superior Means For Resolving The Claims**
8 **Of The Class Members or Settlement Class Members**

9 Plaintiff further contends that a class action is also superior to other means of adjudicating
10 the issues in this action. The predominance of common legal and factual questions shows that this
11 Court could fairly adjudicate the claims of Class Members or Settlement Class Members through
12 a single class action. In view of the *theoretical* alternatives that proposed class members could
13 potentially utilize—representative PAGA action (where there is less relief available), individual
14 civil lawsuits or wage claims through the Division of Labor Standards Enforcement (where there
15 would be relatively little money at stake, but the claims would be time-consuming to litigate)—a
16 class action is plainly superior to all of them. Thus, this consideration supports conditional class
action treatment for purposes of this Settlement only. DS, ¶ 37.

17 **V. INTRODUCTION THE COURT SHOULD GRANT PRELIMINARY**
18 **APPROVAL BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND**
19 **REASONABLE**

20 **A. Legal Standard**

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

B. The Settlement Is Presumptively Fair

In assessing preliminary approval, a court evaluates if the settlement process has certain



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

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

9 On April 27, 2023, Plaintiff commenced this Action by filing a Complaint alleging causes
10 of action against Defendant for failure to pay wages, unauthorized and unlawful wage deductions,
11 failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify
12 for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure
13 to maintain required payroll records, and related claims. On July 31, 2023, Plaintiff filed a First
14 Amended Complaint alleging causes of action against Defendant for failure to pay wages,
15 unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize
16 and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage
17 statements, failure to timely pay wages, failure to maintain required payroll records, and related
18 allegations. The First Amended Complaint is the operative complaint in the Action (the
19 “Operative Complaint.”) Defendant denies the allegations in the Operative Complaint, denies any
20 failure to comply with the laws identified in in the Operative Complaint and denies any and all
21 liability for the causes of action alleged. Settlement, ¶ 2.1. DS, ¶ 39. Plaintiff prepared “damages”
22 estimates in advance of the mediation. DS, ¶ 39, Ex. 7. Plaintiff determined Defendant’s
23 maximum possible exposure for restitution and penalties to be approximately \$73,129,755.69
24 (consisting of \$1,516,260.59 in unpaid wages, \$1,516,260.59 in liquidated damages,
25 \$2,888,062.90 in missed meal period premium wages, \$4,741,760.40 in missed rest break
26 premium wages, \$1,185,405.96 in unreimbursed expenses, \$2,582,500.00 for wage statement
27 penalties, \$2,330,005.25 for waiting time penalties, and \$56,369,500.00 for civil penalties under
28 PAGA. Plaintiff calculated the damages based on the number of workweeks and pay periods
provided by Defendant, Plaintiff’s reports, and the sample data. *Id.*

Plaintiff also considered the possibility that Defendant could launch a *Pick Up Stix*



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1 campaign and pursue individual release agreements from the Class Members or Settlement Class
2 Members. Defendant also represented that it had interviewed current employees regarding
3 Plaintiff's claims, all of whom would provide declarations, under penalty of perjury, that were
4 favorable to Defendant with respect to the relevant factual issues at issue in Plaintiff's action.
5 Plaintiff's Counsel applied discounts to the maximum possible exposure to account for all other
6 risks discussed below. While it is difficult to assign anything but crudely-determined percentages
7 of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would
8 preclude recovery for such employees is substantial and alone justifies a significant discount
9 because Defendant would likely by trial have gathered releases from the majority of the Class
Members or Settlement Class Members.

10 Plaintiff is aware of only two significant awards under the PAGA in a contested
11 proceeding, both issued by federal district courts.⁴ DS, ¶ 55. PAGA penalty awards are often
12 small even for egregious, intentional violations of the Labor Code.⁵ *Id.* For instance, on October

13
14 ⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
15 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
\$18,695,692.58. In this regard, the district court stated,

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

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

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

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



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1 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
2 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
3 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
4 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
5 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
6 result could occur here. *Id.*

7 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
8 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
9 \$275,000.00 is fair and reasonable. *Id.*

10 **C. The Settlement Satisfies the Kullar Factors for Approval**

11 The *Kullar* case sets forth several factors a court should consider in determining whether
12 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
13 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
14 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
15 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
16 of a governmental participant; and (8) the reaction of the class members to the proposed
17 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
18 factors.

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

20 **a. Risks Associated with Defendant's Financial Condition**

21 Defendant's financial condition was the key factor in reaching this Settlement. DS, ¶ 42.
22 Due to Defendant's financial condition, even if Plaintiff prevailed on all claims at trial, she may
23 never recover the damages due to the risk of insolvency. A very large class action judgment would
24 almost certainly put the company out of business and/or would interfere with the company's
25 ability to carry out its contractual obligations. *Id.* In short, the "poor financial health of [the
26 defendant will] seriously increase [] the chance that Plaintiffs would be left with nothing if they
27 continued to litigate their claims." *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
28 1376 (the financial condition of defendant predominated in assessing the reasonableness of
settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
concerning defendant's financial stability "strongly supports the reasonableness of the
settlement"); *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 2014 U.S. App. LEXIS 10259 at
*11 (finding potential insolvency to be additional risk that favors approval of a class action



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1 settlement). Accordingly, Defendant's financial distress supports this settlement. *Id.*

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

3 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
4 best, largely because Defendant's written policies throughout the relevant time period prohibited
5 off-the-clock work. DS, ¶ 43. Off-the-clock claims are difficult where a defendant requires in its
6 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
7 *Hospital* (2014) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
8 be compensable). *Id.* In its written employment policies, Defendant mandates that employees
9 must record all time worked accurately on their time records and strictly prohibit employees from
10 performing any work off-the-clock. DS, ¶ 43. Moreover, while Defendant disputes that off-the-
11 clock work occurred, it contends that any time spent off the clock was *de minimis*. The California
12 Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular
13 and minute periods of time may still be subject to a *de minimis* defense even if compensable.
14 (Stating that "We do not decide whether there are circumstances where compensable time is so
15 minute or irregular that it is unreasonable to expect the time to be recorded."). Following *Troester*,
16 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with
respect to this claim. *Id.*

17 The difficulty inherent in proving that off-the-clock work occurred poses a significant
18 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
19 Generally, a court will not certify a class unless it can determine an appropriate classwide
20 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
21 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
22 the lack of records indicating when such off-the-clock work may have taken place. Individualized
23 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
24 in fact worked "minutes" off-the-clock on a "regular" basis. Accordingly, there is a significant
25 risk that the Court would consider this evidentiary showing insufficient as a classwide
26 methodology. DS, ¶ 44. Defendant presented evidence that the pay cards they issued were not
subject to fees.

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

28 There are risks to Plaintiff's meal period claim. DS, ¶ 45. Defendant presented evidence
that it paid premium wages for missed meal periods. Defendant contends that, to establish a



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1 violation for missed meal periods, a plaintiff must do more than show that a meal break was not
2 taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
3 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
4 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
5 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
6 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
7 to the meal break claim is the reason that a particular employee may have failed to take a meal
8 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

9 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
10 from taking their meal or rest periods. DS, ¶ 46. Defendant’s policies mandate that employees
11 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
12 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
13 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
14 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
15 individualized evidence may be necessary to determine whether they occurred due to conduct of
16 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
17 the value of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

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

19 There are risks to Plaintiff’s rest period claim. DS, ¶ 47. Employers are not required to
20 record rest periods and such periods are paid. *Id.* Defendant contends it provided non-exempt
21 employees the opportunity to take rest periods in accordance with California law. Further,
22 Defendant’s written policies on meal and rest periods are consistent with the Wage Order. *Id.*
23 Thus, unlike meal periods, where there are often records showing whether an employee clocked
24 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
25 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
26 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
27 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
28 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
(2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class
certification, it may be possible to manage individual issues through the use of surveys and
statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*



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1 *Corporation v. Behrend* (2013) 133 S.Ct. 1426.

2 **e. Risks Associated with the Failure to Indemnify Claim**

3 There is a risk that the Court may consider Plaintiff's claims as to Defendant's alleged
4 failure to indemnify for business expenses to be individual in nature and thus decline to certify
5 the class. DS, ¶ 48. Defendant presented evidence that it did not require employees to download
6 an application or otherwise use their personal mobile phones to check schedules, communicate
7 with management during working hours, or perform other job duties. Plaintiff alleges that
8 Defendant required Plaintiff and the Class Members or Settlement Class Members to use their
9 personal items including cellular phones, computers and other electronic devices, vehicles, and
10 tools, and failed to indemnify them for these business expenses. *Id.* Defendant presented evidence
11 that it has supplied its employees with tools, equipment, and other supplies and had an expense
12 reimbursement policy. As such, there is a risk that the Court may consider Plaintiff's claims to be
13 individual in nature and unfit for class wide resolution. *Id.*

14 **f. Risks Associated with the Statutory Wage Statement Penalty**
15 **Claims**

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

20 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
21 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant comply
22 with the requirements of Labor Code § 226. DS, ¶ 49.

23 **g. Risks Associated with the Waiting Time Penalty Claims.**

24 Without proof willful behavior, Plaintiff will be unable to recover these penalties.
25 Defendant presented evidence that the pay cards they issued were not subject to fees.

26 **h. Risks Associated With the PAGA Claim**

27 With regard to the patronage claim, Defendant presented evidence that it did not require
28 the Class Members to sell products as part of their job duties. Also, as proof of this, Defendant
presented evidence that the sales from such products is extremely small. Regarding PAGA, a
court has discretion to award a lesser amount than the maximum penalty. Lab. Code § 2699(e)(2);
Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112, 1135 (reducing
PAGA award). As set forth above, Defendant has posed valid defenses to the Labor Code claims
underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant



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1 uncertainty. DS, ¶ 53. There is a risk that the Court would consider the maximum civil penalty
2 available to be confiscatory. This is particularly the case considering Defendant's financial
3 condition. *Id.* Moreover, the current COVID-19 pandemic could motivate the Court to further
4 reduce the penalty award to avoid what it may consider a confiscatory taking. *Id.*

5 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
6 significant discount for settlement purposes. DS, ¶ 54. For mediation purposes, Plaintiff's counsel
7 estimated a maximum possible exposure of approximately \$56,369,500.00 in civil penalties. This
8 estimate did not take into account any of the risks discussed above and assumed a violation for
9 every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay
10 period for the same alleged violations of different Labor Code provisions and derivative
11 violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties
12 in this fashion may be appropriate to determine the amount in controversy for purposes of removal
13 jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs
14 multiple PAGA penalties for the same violation for the same pay period under different Labor
15 Code provisions. *Id.* This may be because the PAGA does not provide for what many employers
16 characterize as claim splitting and not merely stacking. *Id.*

17 **i. Risks Associated With A Pick Up Stix Campaign**

18 An employer enjoys the right to settle a putative class member's disputed wage claims
19 individually, without the consent or involvement of class counsel. DS, ¶ 57. (See *Chindarah v.*
20 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendant may launch a
21 "pick off" settlement campaign to pursue individual release agreements from the Class Members
22 or Settlement Class Members, thereby potentially narrowing the size of the Settlement Class –
23 1,225 members – until it is no longer numerous enough for class certification. *Id.* Plaintiff, then,
24 may not have sufficient number of employees to represent. This led to a significant reduction of
25 claim value in settlement negotiations. *Id.*

26 While the evidence gathered through Plaintiff's discovery supports the merits of the
27 claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
28 presents significant risks that support a downward departure from Defendant's estimated liability
exposure. DS, ¶ 58. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
amount of damages, monetary penalties or other relief that the Class could reasonably expect to
be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*



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1 It also represents a fair, adequate, and reasonable compromise amount for these claims and
2 warrants preliminary approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
3 1376 (the financial condition of defendant predominated in assessing the reasonableness of
4 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
5 concerning defendant's financial stability "strongly supports the reasonableness of the
6 settlement"); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
7 WL 2465049, * 3.

8 **2. Allocation of the PAGA Payment**

9 The settlement of PAGA penalties in the sum of \$10,000.00, of which 75% (\$7,500.00)
10 will be paid to the LWDA and 25% (\$2,500.00) will be distributed to the Class, is reasonable and
11 appropriate under the circumstances. DS, ¶ 59. The Parties negotiated a good faith amount for
12 PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
13 was not the result of self-interest at the expense of other Class Members or Settlement Class
14 Members. *Id.* Where settlements "negotiate[] a good faith amount" for PAGA penalties and "there
15 is no indication that this amount was the result of self-interest at the expense of other Class
16 Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D.
17 Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer
18 did not act willfully, and made good faith attempts to comply with wage and hour laws, a
19 reduction or lesser penalty is warranted because imposing maximum PAGA penalty for each
20 violation would have been unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.*
21 (2018) 30 Cal.App.5th 504, 528-529 (affirming trial court's award of only 10% of maximum
22 PAGA penalty for meal break violations). *Id.* The amount to be paid to the LWDA comports with
23 PAGA settlement amounts approved by other courts. See, e.g., *Chu v. Wells Fargo Investments,*
24 *LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to
25 LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11,
26 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million
27 common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL
28 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases*
(2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to
PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys*
'R' Us-Delaware, Inc., (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000



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PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

3. Presence of Governmental Participant

As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this settlement to the LWDA with the filing and service of this motion. DS, ¶ 108, Ex. 20.

4. Reaction of Class Members or Settlement Class Members to Proposed Settlement

If the settlement is preliminarily approved, Class Members or Settlement Class Members will be provided with the Notice of Settlement To LWDA (attached as Exhibits A and D to the Settlement) and an opportunity to object. DS, ¶ 88. The parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members or Settlement Class Members to make informed responses to the proposed settlement. *Id.*

VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY COMPENSATE CLASS MEMBERS OR SETTLEMENT CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS MEMBER OR SETTLEMENT CLASS MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY COMPARED TO OTHER CLASS MEMBERS OR SETTLEMENT CLASS MEMBERS

The Individual Settlement Payments will be paid to each Class Member or Settlement Class Member based on his or her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 78, Settlement § 3.2.4 (Ex.1 at p. 10). Because this method compensates Class Members or Settlement Class Members based on the extent of their potential injuries, in that Class Members or Settlement Class Members who worked for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and reasonable. *Id.*

Plaintiff estimates that there are 79402 Work Weeks for the Class Period. So, each Work Week has a value of approximately \$1.62 (\$128833.33 Net Settlement Amount / 79402 Work Weeks = \$1.62). Plaintiff had 43 Work Weeks during the Class Period. Based on this, it is anticipated that Plaintiff Heather Rodriguez will receive an Individual Class Payment of approximately \$69.77 as a Participating Class Member (43 Work Weeks x \$1.62 = \$69.77) while the average estimated Individual Class Payment to Participating Class Members will be approximately \$105.17. Some Class Members or Settlement Class Members – those who worked



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1 more Work Weeks during the Class Period - will receive more, and some less. The highest
2 possible Individual Class Payment to a Participating Class Member (i.e., to those who qualify for
3 all Work Weeks in the Class Period) will be approximately \$431.11. The lowest possible
4 Individual Class Payment to a Participating Class Member (i.e., to those who qualify for only one
5 Work Week in the Class Period) will be approximately \$1.62. *See* DS, ¶ 77.

6 It is anticipated that the average Aggrieved Employee Individual PAGA Payment will
7 be \$3.17. *Id.* Plaintiff's Individual PAGA Payment, her individual share of 25% of the PAGA
8 Penalties, will be less than that of some absent Aggrieved Employees. Under the Settlement,
9 each Aggrieved Employee will receive a *pro rata* distribution of 25% of the PAGA Penalties
10 proportionate to the number of paychecks he or she had with Defendant during the PAGA Period,
11 compared to the total of all paychecks of all Aggrieved Employees during the PAGA Period, as
12 reflected by Defendant's records. Plaintiff estimates that there are 26219 Aggrieved Employee
13 paychecks for the PAGA Period. So, each Aggrieved Employee paycheck from the PAGA
14 Period has a value of approximately \$0.10 (25% of \$10000.00 in PAGA Penalties / 26219
15 Aggrieved Employee paychecks = \$0.10). It is anticipated that Plaintiff Heather Rodriguez will
16 receive an Individual PAGA Payment of approximately \$1.14 as an Aggrieved Employee (12
17 paychecks during the PAGA Period x \$0.10 paycheck value = \$69.77) while the average
18 estimated Individual PAGA Payment to an Aggrieved Employee will be approximately \$3.17
19 (\$2500.00, 25% of PAGA Penalties / Aggrieved Employee paychecks during the PAGA Period
20 = \$3.17 Individual PAGA Payment). Some Aggrieved Employees – those who had more
21 paychecks during the PAGA Period - will receive more, and some less. The highest possible
22 Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for all paychecks
23 in the PAGA Period) will be approximately \$5.23. The lowest possible Individual PAGA
24 Payment to an Aggrieved Employee (i.e., to those who qualify for only one paycheck in the
25 PAGA Period) will be approximately \$0.10. *See* DS, ¶ 79.

26 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'**
27 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE**

28 The Settlement states Class Counsel may seek attorneys' fees of \$91,666.67 (one-third of
the GSA) and up to \$17,500.00 for actual reasonable litigation costs and expenses incurred in
prosecuting the Action. Settlement § 3.2.2 (Ex.1 at p. 9). These amounts are reasonable, given the
facts and circumstances of the case. DS, ¶¶ 60-63.

Trial courts have "wide latitude" in assessing the value of attorneys' fees and their



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1 decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v.*
2 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the “experienced
3 trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum*
4 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
5 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
6 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82
7 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
8 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
9 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
10 *(9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); In re Activision (N.D.*
11 *Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); In re Ampicillin Antitrust*
12 *Litig. (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).*

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

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

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

Courts routinely approve incentive awards to compensate named plaintiffs for the services
they provide and the risks they incur during class action litigation, often in much higher amounts
than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726



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(upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000 enhancement award). The Settlement provides that Plaintiff may seek an Class Representative Service Payment of \$10,000.00. This amount is entirely reasonable given Plaintiff’s efforts in this action and the risks she undertook on behalf of Class Members or Settlement Class Members. DS, ¶ 64. Plaintiff has devoted many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other things, retaining experienced counsel, providing them with information about her work history with Defendant and Defendant’s policies and practices with respect to the wage and hour claims at issue, participating in mediation, and being actively involved in the settlement process to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendant’s attorneys’ fees and costs if this action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class Representative Service Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 64.

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

With regard to the settlement administration costs (“Administration Expenses Payment”) provision, it is reasonable. Before agreeing to ILYM Group, Inc. and its bid of \$10,950.00, the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶ 101-102, Exs. 15, 16, and 17. Thus, the settlement administration costs provision should be given preliminary approval.

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

This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple measures to ensure that as many Class Members or Settlement Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The



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1 Settlement requires distribution of the Notice by First Class U.S. mail only. Settlement, ¶ 4.4.1
2 (Ex.1 at p. 12). Although there are current employee Class Members or Settlement Class
3 Members, it is uncertain whether Defendant's records of their contact information include email
4 addresses and Class Members or Settlement Class Members, who perform all of their work away
5 from a desk, are not in a position to check their emails. As such, notice by mail alone is fair,
adequate, and reasonable. DS, ¶ 88.

6 With respect to its content, "[The] notice given to the class must fairly apprise the class
7 members of the terms of the proposed compromise and of the options open to dissenting class
8 members." *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
9 The purpose of the notice in class settlement context is to give class members sufficient
10 information to decide whether they should accept the benefits offered, opt out and pursue their
11 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
12 Class Members or Settlement Class Members with all pertinent information that they need to fully
13 evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and
14 concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement
15 Class Member or Settlement Class Member; (3) how Class Counsel will be paid; (4) how to
16 submit an exclusion request not to be bound by the Settlement; (5) how to object to the Settlement;
17 (6) how the Settlement will be allocated; (7) how payments to Class Members or Settlement Class
18 Members will be calculated; (8) how the disputes will be resolved; and (9) the individual
19 Settlement Class Member or Settlement Class Member's estimated payment. Additionally, the
20 Class Notice will include the number of Work Weeks a Class Member or Settlement Class
21 Member had during the Class Period. Accordingly, the Notice should be approved because it
22 describes the Settlement with sufficient clarity and specificity to explain to Class Members or
23 Settlement Class Members what this action is about, their rights under the Settlement, and how
to exercise those rights. DS, ¶ 88.

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1 **XI. CONCLUSION**

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

4 Respectfully submitted,

5 THE SPIVAK LAW FIRM

6
7 Dated: January 24, 2025

8 By: 
9 DAVID G. SPIVAK, Attorneys for
10 Plaintiff, HEATHER RODRIGUEZ,
11 and all others similarly situated



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