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9 KENNETH MILLER, and all others similarly situated

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

11 **FOR THE COUNTY OF MADERA**

12 **(UNLIMITED JURISDICTION)**

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

17 *Plaintiff(s),*

18
19 vs.

20 BARRIER SPECIALTY ROOFING &
21 COATINGS, INC., a California corporation; and
DOES 1–50, inclusive,

22 *Defendant(s).*

Case No. MCV089466

**DECLARATION OF DAVID SPIVAK
IN SUPPORT OF PLAINTIFF
KENNETH MILLER’S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Date: July 7, 2025

Hearing Time: 8:30 a.m.

Hearing Dept.: 44, Hon. Michael
Jurkovich

Action filed: May 15, 2023

Trial Date: Not set



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**DECLARATION OF DAVID SPIVAK IN SUPPORT OF PLAINTIFF KENNETH
MILLER'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT**

I, DAVID SPIVAK, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am an attorney of record for Plaintiff Kenneth Miller ("Plaintiff") in his lawsuit against Defendant Barrier Specialty Roofing & Coatings, Inc. ("Defendant"), which provides commercial roofing and solar services. Plaintiff and Defendant are collectively referred to as the "Parties."

2. Except as otherwise indicated, I have personal knowledge of all matters set forth herein and, if called as a witness, could and would competently testify thereto under oath.

3. The Class Action And PAGA Settlement Agreement and Class Notice (the "Settlement") is attached hereto as **Exhibit 1**. The Settlement Class consists of all persons employed by Defendant as hourly-paid or non-exempt employees in the State of California at any time from May 15, 2019 to March 28, 2025. The "Class Period" means the period from May 15, 2019 through March 28, 2025. *Id.* The "Aggrieved Employees" are hourly, non-exempt employees who worked for Defendant in the State of California during the PAGA Period. The "PAGA Period" begins May 15, 2022 and ends March 28, 2025. *Id.* The Settlement is written, signed by all necessary Parties, and attached to this declaration as stated above.

The Release Provisions

4. **Released Persons.** Under the Settlement, the release to be given by the Participating Class Members (other than the Class Representative) is limited to Defendant named in the Operative Complaint, together with its officers, directors, employees, and agents. The released persons consist of: Defendant, and any predecessor, successor, subsidiary, parent, or affiliate as defined by Corporations Code § 150, and each of their current, former and future officers, directors, members, managers, employees, consultants, partners, shareholders, joint venturers, agents, representatives, investors, administrators, predecessors, successors, assigns, accountants, insurers, reinsurers, management companies, and legal representatives are collectively the "Released Parties."

5. **Released Claims.** Under the Settlement, the release to be given by the Participating Class Members (other than the Class Representative) is limited to the claims stated in the Operative Complaint, and those based solely upon the facts alleged in the Operative Complaint.

6. **Release Period.** Under the Settlement, the release to be given by the Participating



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Class Members (other than the Class Representative) is limited to liability that arose during the Class Period. See above.

7. **PAGA Release.** Under the Settlement, Plaintiff releases all claims for civil penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter to the LWDA; Plaintiff does not release the claim for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a Participating Class Member. The PAGA Release states as follows: Effective on the date when Defendant fully funds the entire Gross Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the Individual Class Payments, Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as follows . . . Release of PAGA Claim. Plaintiff, acting on behalf of himself, the State of California and the Aggrieved Employees, releases all claims for civil penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter to the LWDA and the Operative Complaint. Settlement, ¶¶ 6, 6.3.

No Reversion

8. The Settlement does not provide that any portion of the consideration paid or deposited by the Defendant may revert to the Defendant.

Taxes

9. The Settlement provides that Defendant will separately pay the employer's share of any applicable payroll taxes and provides as follows with regard to the tax treatment of settlement shares: Tax Allocation of Individual Class Payments. 20.00% 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. 40.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and the remaining 40.00% will be allocated to penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

Factual and Procedural Background

10. **Plaintiff's Employment with Defendant.** Defendant employed Plaintiff as a Roofer in California from about April 7, 2022 until January 19, 2023.



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11. **LWDA Notice.** On May 15, 2023, Plaintiff notified Defendant and the California Labor and Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations committed by Defendant. A true and correct copy of the letter to the LWDA dated May 15, 2023 is attached hereto as **Exhibit 2**.

12. **Lawsuit.** On May 15, 2023, Plaintiff filed a Class Action Complaint in the Madera County Superior Court, Case No. MCV089466, against Defendant on behalf of himself and others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide Meal Periods (Lab. Code §§226.7, 512, and 1198); (3) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage Statement Penalties (Lab. Code § 226); (6) Waiting Time Penalties (Lab. Code §§ 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). On July 20, 2023, Plaintiff filed his First Amended Complaint adding a claim under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On August 29, 2023, Defendant filed an answer to Plaintiff’s First Amended Complaint. Defendant denies all of Plaintiff’s allegations and strongly contends that its wage and hour policies, practices, and procedures are fully compliant with all applicable laws. A true and correct copy of the complaint is attached hereto as **Exhibit 3**. A true and correct copy of Plaintiff’s First Amended Complaint is attached hereto as **Exhibit 4**. A true and correct copy of Defendant’s Answer is attached hereto as **Exhibit 5**.

13. **Investigation.** On December 28, 2023, Plaintiff requested that Defendant informally disclose documents and data to enable Plaintiff to prepare for settlement discussions, including the number of putative class members and aggrieved employees and the number of paychecks and workweeks for the various limitations periods applicable to Plaintiff’s claims. Plaintiff also requested a reasonable, randomly selected sample of Defendant’s time, payroll, and expense records, and related personnel records. *Id.* Finally, Plaintiff requested Defendant’s written policies applicable to the claims at hand and asked Defendant to identify any and all comparable claims against it.

14. The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. Defendant produced Plaintiff’s entire personnel file (including policies and agreements he signed and

acknowledged) and copies of its relevant company written policies.

15. **Sampling.** Defendant contends that it employed 95 putative class members during the period of May 15, 2019 to January 15, 2024. Defendant produced the records of 20.00% of the putative class members for the period of May 15, 2019 to January 15, 2024. There were records for 19 employees in the sample. Defendant chose the sample. The sample was randomly selected. The sample consisted of time, payroll, and related records.

16. **Plaintiff's Data Analyst.** Plaintiff retained James Toney, a data analyst, to analyze the sample. Plaintiff also employed the Raosoft⁸ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using a margin of error of 32.0%, a confidence level of 95%, and a population size of 95, the Raosoft Sample Size Calculator recommended a sample of 9. A true and correct copy of the results from the Raosoft Sample Size Calculator are attached as **Exhibit 6** (Raosoft Sample Size Calculator results print-out). Thus, the sample population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

17. **First Mediation.** On February 29, 2024, following much of the foregoing informal discovery and exchange of information, the Parties participated in a mediation session presided over by Mediator Scott Radovich, an experienced class action mediator. The Parties did not reach a settlement at the first mediation.

18. **Pick Up Stix Individual Settlements.** Following the first mediation, Defendant obtained general releases from 68 Class Members to settle any and all legal claims against Defendant, including the claims in this Action (the *Pick Up Stix* Settlement Agreements). Defendant paid a total of \$176,500.00 in exchange for such settlements (the *Pick Up Stix*

⁸ 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>.



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1 Settlement Payments). Settlement, ¶ 1.49. Defendant also obtained signed arbitration agreements
2 from most of the 68 Class Members who signed *Pick Up Stix* Settlement Agreements.

3 19. **Second Mediation.** On January 28, 2025, the Parties participated in a second
4 mediation session presided over by Mr. Radovich. During the combined mediation sessions, the
5 Parties had a full day of productive negotiations and reached agreement on a class-wide settlement
6 during the second mediation session. During the mediation sessions, each side, represented by
7 his/its respective counsel, recognized the risk of an adverse result in the Action and agreed to
8 settle the Action and all other matters covered by the Settlement pursuant to the terms and
conditions of the Settlement.

9 *Similar Actions*

10 20. **Relevant Litigation and Claims.** I am not aware of any class, representative,
11 or other collective action in any other court, in this, or any other jurisdiction, that asserts
12 claims similar to those asserted in this action, on behalf of the class or group of individuals,
13 some or all of whom would also be members of the class to find in this action. I have made
14 a reasonable inquiry of the other members of my law firm and my counsel to determine
15 whether they are aware of any such similar actions. Based on these inquiries, I am aware of
16 no such similar actions. The Defendant disclosed that there have not been any comparable claims
against it.

17 *Uncashed Checks*

18 21. **Disposition of Uncashed Checks.** The Settlement provides for the disposition
19 of uncashed checks as follows: For any Class Member whose Individual Class Payment check or
20 Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator
21 shall transmit the funds represented by such checks to Marjaree Mason Center of Fresno County,
22 California (“Marjaree Mason Center”) thereby leaving no “unpaid residue” subject to the
requirements of California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶ 4.4.3.

23 22. **Cy Pres Recipient.** In accordance with Code of Civil Procedure section 384,
24 subdivision (b), the Parties selected Marjaree Mason Center over other potential recipients
25 considered because it is a nonprofit organization, foundation, or program of the type described
26 in that subdivision. Marjaree Mason Center supports and empowers adults and their children
27 affected by domestic violence, while striving to prevent and end the cycle of abuse through
28 education and advocacy. It is Fresno County’s only dedicated provider of domestic violence
shelter and support services. Marjaree Mason Center provides a variety of services including



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1 legal advocacy, court accompaniment, education, emergency and longer-term Safe Housing,
2 along with a wide variety of other support services for victims of domestic violence in Fresno
3 County. There exists no relationship between the proposed recipient and (1) any class
4 representative or other party, (2) any officer, director, or manager of any party, or (3) any
5 attorney or law firm for any party. I conducted my due diligence in determining whether there
6 is any such relationship through having my office verify with Marjaree Mason Center and with
7 Defense Counsel, in determining whether any such relationship exists. *See also* Declaration of
8 Blair Cunnings.

9 *Ascertainable and Numerous Class*

10 23. **Ascertainability.** A class is ascertainable when it may be readily identified
11 without unreasonable expense or time by reference to official records. Here, Plaintiff maintains
12 that the above-defined Class is ascertainable because its members may be identified by reference
13 to Defendant's records, and Defendant has agreed to share the relevant information from its
14 records to facilitate the settlement process. Therefore, the Settlement Class is ascertainable.

15 24. **Numerosity.** The Settlement Class has sufficiently numerous members to render
16 joinder impractical. No set number is required as a matter of law to maintain a class action. The
17 California Supreme Court has upheld a class of as few as 10 individuals. Defendant estimates that
18 there are approximately 95 Class Members for the Class Period of May 15, 2019 to March 28,
19 2025. Plaintiff maintains that it would be impractical and economically inefficient to require each
20 Settlement Class Member to separately maintain an individual action or be joined as a named
21 plaintiff in this action. In light of these considerations, the Settlement Class's membership is
22 sufficiently numerous. Additionally, there are 55 Aggrieved Employees for the PAGA Period of
23 May 15, 2022 to March 28, 2025.

24 *Predominant Common Questions*

25 25. A question of law or fact is common to the members of a class if it may be resolved
26 through common proof. In this case, there are many predominant common questions. Plaintiff
27 asserts all class members were subject to the same or similar operations and employment policies,
28 practices, and procedures. The claims arise from Defendant's alleged policy-driven failure to pay
wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to
indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
wages, and related labor law violations, all of which Plaintiff claims constitute unfair business



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practices and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendant failed to pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether Defendant failed to provide the class with all meal and rest periods in compliance with California law; (3) Whether Defendant failed to pay the class one additional hour of pay on workdays it failed to provide the class with one or more meal or rest periods in compliance with California law; (4) Whether Defendant failed to indemnify the class for all necessary business expenditures incurred during the discharge of their duties; (5) Whether Defendant knowingly and intentionally failed to provide the class with accurate wage statements; (6) Whether Defendant willfully failed to provide the class with timely final wages; and (7) Whether Defendant engaged in unfair competition within the meaning of Business and Professions Code section 17200, *et seq.*, with respect to the class.

Typicality

26. Plaintiff contends that his claims are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent Class Members, was subject to the same relevant policies and procedures governing his compensation, hours of work, meal and rest periods, and indemnification. Because Plaintiff contends that he was subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to Plaintiff will determine Defendant's *prima facie* liability to all Class Members. Moreover, Plaintiff's claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical of the Class.

Adequacy

27. The adequacy requirement is met where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class's interests. In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class.

28. To the best of my knowledge, neither Plaintiff nor I have any conflicts of interest with the absent Settlement Class Members. Plaintiff contends that he is an adequate class representative. Plaintiff and the Class Members have strong and co-extensive interests in this 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



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1 evidence of any conflict of interest between Plaintiff and the Class Members. Moreover, Plaintiff
2 has demonstrated his commitment to the Settlement Class by, among other things, retaining
3 experienced counsel, providing counsel with documents and extensively speaking with them to
4 assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as
5 well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit
6 had been unsuccessful. Thus, Plaintiff is adequate to serve as settlement class representative.

7 ***Background of Class Counsel***

8 29. In 1991, I earned a Bachelor of the Arts degree with a major in Political Science
9 from the University of California at Berkeley. In 1995, I earned a Juris Doctor degree from
10 Southwestern University School of Law.

11 30. In December of 1995, the Supreme Court for the State of California admitted me
12 as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this
13 State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February
14 2013, I became admitted to the New York State Bar.

15 31. My law practice has always focused on representation of private and public
16 employees with claims of unpaid wages, wrongful termination, harassment, family and medical
17 leave, whistleblowing, discrimination, benefits, and civil rights violations. One of my websites,
18 FightWrongfulTermination.com, provides a further description of my practice.

19 32. I have tried many cases before California and federal courts, government agencies
20 and neutral arbitrators. I am a member of the California Employment Lawyers Association
21 ("CELA").

22 33. Since I started practicing law, I have tried many cases before courts, arbitrators
23 and government agencies. Some of my cases are:

24 a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court,
25 Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special
26 Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and
27 discipline. The jury awarded compensatory damages. Court subsequently awarded additional
28 back pay and gave Plaintiffs a retroactive promotion. *See* "Lawsuit Puts Customs Service on Trial:
Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, San Diego Union-
Tribune, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced Bias And
Retaliation" by Valerie Alvord, San Diego Union-Tribune, May 16, 1998.



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1 b. *Jorge Guzman v. Department of Justice*, United States District Court,
2 Central District of California (the Honorable Lourdes Baird presiding), 1999. Plaintiffs Special
3 Agent for the Immigration and Naturalization Service alleged racial discrimination, retaliation
4 and police brutality by agents of the Office of the Inspector General. Jury found the Defendants
5 liable. Case settled shortly before the damages phase. *See* “U.S. to Pay \$400,000 to INS Agent in
6 Bias Suit; Courts: Complaint says he suffered 10 years of harassment on the job because he is
7 Latino, including falsified charges” by Patrick J. McDonnell, Los Angeles Times, January 21,
8 1999.

9 c. *Dr. Perry Crouch v. SHIELDS*, Los Angeles Superior Court, Compton (the
10 Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights claims
11 and wrongful termination claims against employer in a month-long jury trial. The jury awarded
12 compensatory and punitive damages. *See* “Activist Says Criticism of Rail Plan Cost His Job” by
13 Dan Weikel, Los Angeles Times, September 28, 2000; “Punitive Damages Awarded to Fired
14 Social Worker” by Dan Weikel, Los Angeles Times, June 10, 2000; “A Whistleblower’s
15 Revenge” by Susan Goldsmith, New Times Los Angeles, June 8, 2000.

16 d. *Imagraph, Inc. (Steve Shiffman) v. Mohamed T. Nehmeh*, Orange County
17 Superior Court, Central Justice Center (the Honorable Kirk H. Nakamura presiding), 2004.
18 Plaintiff, who I represented pro bono sought the return of \$45,000.00 he paid to an attorney
19 escrow officer who subsequently absconded with the money. The jury awarded compensatory
20 damages. The Judgment with interest is now far in excess of that amount. Soon after this case was
21 litigated, the State Bar of California awarded me the Wiley W. Manuel Award for Pro Bono Legal
22 Services.

23 e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
24 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated Customs
25 Agent, followed by an award of Attorneys’ fees and costs.

26 f. *Richard Wamel v. Ocelot Engineering Co.*, Judicate West before the
27 Honorable Robert Polis (ret.) (2008). In that case, I represented a victim of FMLA violations and
28 wrongful termination against his former employer. The Neutral Arbitrator awarded compensatory
and liquidated damages. The claims for damages, attorney's fees and costs were resolved shortly
thereafter by means of a confidential settlement.

 g. *Alina Ghrdilyan v. RJ Financial, Inc., et al.*, LA Superior Court case no.



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1 BC430633 (2012), the Honorable Ronald Sohigian presiding. To my knowledge, this case is the
2 first and only case to be successfully prosecuted through trial under the Labor Code Private
3 Attorney Generals Act of 2004, Labor Code §§ 2698, *et seq.* on behalf of plaintiffs and other
4 aggrieved employees against someone other than an employer for civil penalties including unpaid
5 wages. The case involves claims of unpaid overtime, unprovided rest and meal periods, unpaid
6 vacation, untimely interval and final wages, and unreimbursed expenses. For my work in that
7 case, the Court awarded me an hourly rate of \$600.00 hour based on my skill and experience.

8 34. Since 2007, I have prosecuted several traditional wage & hour class actions as the
9 sole or primary attorney for the plaintiffs, including *Pudelwitts v. Regent Parking, Inc.*, *Singery*
10 *v. Quality Vessel Engineering*, *Tesillo v. LA Executive Towing Service, Inc.*, and *Madison v. The*
11 *Limousine Connection*. One such case is *Jose Tapia v. Mangen Group, Inc.*, LASC case no.
12 BC377114, a garden-variety wage & hour class action with many of the same claims at issue in
13 this case. The Honorable Jane Johnson of the Los Angeles Superior Court, presiding over the
14 motion for final approval of the Settlement Class action settlement in *Tapia*, had no quarrel with
15 an hourly rate of \$525.00 for my services.

16 35. In my representation of employees, I have prosecuted several lawsuits on behalf
17 of employees with claims of rest and meal period and overtime violations or other wage claims.

18 36. I have been involved in the prosecution of numerous wage and hour class actions
19 at various stages of litigation. A small sampling of the wage and hour class action cases in which
20 I have recently been counsel of records is as follows:

21 a. *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior
22 Court, Case No. VCU-245496 (appointed Class Counsel and granted final approval class action
23 settlement on behalf of assistant fitness manager employees).

24 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
25 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
26 court on behalf of nonexempt employees).

27 c. *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case
28 No. BC465017 (appointed Class Counsel and granted final approval by this Court of class action
settlement on behalf of merchandiser employees).

d. *Deckard v. MSL Community Management LLC*, Riverside County Superior
Court, Case No. RIC1204182 (appointed Class Counsel and granted final approval of class action



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1 settlement on behalf of caregivers and medical technicians).

2 e. *DiCato v. Francesca's Collections, Inc.*, San Diego County Superior
3 Court, Case No. 37-2012-00094401-CU-OE-CTL (appointed Class Counsel and granted final
4 approval of class action settlement on behalf of boutique manager and assistant manager
5 employees).

6 f. *Evans v. Equinox, et al.*, Los Angeles Sup.Ct., Case No. BC440058
7 (appointed Class Counsel and granted final approval by this Court of class action settlement on
8 behalf of personal trainer employees).

9 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
10 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
11 action settlement on behalf of medical devices employees).

12 h. *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
13 BC480808 (appointed Class Counsel and granted final approval of class action settlement on
14 behalf of hourly employees).

15 i. *La Fleur v. Medical Management International, Inc.*, United States District
16 Court, Central District of California, Case No. EDCV13-00398-VAP (appointed Class Counsel
17 and granted final approval of class action settlement on behalf of practice managers).

18 j. *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior Court,
19 Case No. CIVDS1500146 (appointed Class Counsel and granted final approval of class action
20 settlement on behalf of non-exempt hourly employees excluding truck drivers).

21 k. *Lynch, et al. v. American Guard Services*, Los Angeles Superior Court,
22 Case No. BC462681 (appointed Class Counsel and granted final approval of class action
23 settlement on behalf of security guard employees).

24 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
25 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
26 on behalf of dairy and agricultural laborers).

27 m. *Montes v. Branam Enterprises, Inc.*, Los Angeles Sup.Ct. Case No.
28 BC442608 (appointed Class Counsel and granted final approval by this Court of class action
settlement on behalf of call concert rigging employees).

n. *Nardone v. Sequoia Beverage Company, LP*, Tulare County Superior
Court, Case No. VCU-248370 (appointed Class Counsel and granted final approval of class action



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1 settlement by the court on behalf of hourly employees).

2 o. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.*, United
3 States District Court, Eastern District of California, Case No. EDCV13-00672-KJM-KJN
4 (appointed Class Counsel and granted final approval of class action settlement on behalf of virtual
customer account executives).

5 p. *Rosen v. Image Transfer*, Los Angeles Superior Court, Case No.
6 BC511072 (appointed Class Counsel and granted final approval of class action settlement on
7 behalf of bobtail truck drivers).

8 q. *Sandoval v. Rite Aid Corp.*, Los Angeles Superior Court, Case No.
9 BC431249 (granted class certification through contested motion and appointed Class Counsel in
10 case on behalf of former pharmacy employees based on late final wage payments in violation of
11 Labor Code §§ 201–203).

12 r. *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District
13 of Colorado, Case No. 13-CV-01229-REB-BNB (appointed Class Counsel and granted final
14 approval of class action settlement by the court on behalf of auditor employees).

15 s. *Stucker v. L’Oreal*, Los Angeles Sup.Ct. Case No. BC456080 (appointed
16 Class Counsel and granted final approval by this Court of class action settlement involving alleged
misclassification of sales employees and unpaid vacation pay).

17 t. *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No.
18 BC462917 (appointed Class Counsel and granted final approval by this Court of class action
19 settlement on behalf of service account manager employees).

20 u. *Valencia v. SCIS Air Security Corp.*, Los Angeles Superior Court, Case
21 No. BC421485 (granted class certification through contested motion and appointed Class Counsel
22 in case on behalf of former security workers based on late final wage payments in violation of
23 Labor Code §§ 201–203).

24 v. *Vang v. Burlington Coat Factory Corporation*, United States District Court
25 Central District of California, Case No. 09-CV-08061-CAS-JCx (appointed Class Counsel and
26 granted final approval of class action settlement by the court on behalf of assistant store manager
employees).

27 w. *Volney-Parris v. Southern California Edison Company*, Los Angeles
28 Superior Court, Case No. BC493038 (appointed Class Counsel and granted final approval of class



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1 action settlement on behalf of customer specialist employees).

2 x. *White v. 20/20 Communications, Inc.*, San Bernardino County Superior
3 Court, Case No. CIVRS1301718 (appointed Class Counsel and granted final approval of class
4 action settlement on behalf of hourly employees).

5 ***Class Action Treatment Is Superior***

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

15 ***The Settlement is Presumptively Fair***

16 38. The class settlement here satisfies all of the *Kullar* factors. The Settlement resulted
17 from thorough, arms' length, negotiations between experienced counsel with the assistance of a
18 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
19 weaknesses of their respective cases and Defendant's estimated exposure. Both defense counsel
20 and I are particularly experienced in employment law and wage and hour class actions. We are
21 experienced and qualified to evaluate the class claims, the viability of the defenses, and the risks
22 and benefits of settlement versus trial on a fully informed basis. I have negotiated many wage and
23 hour class settlements, including many involving the same issues presented here. Counsel on both
24 sides share the view that the Settlement is a fair and reasonable settlement in light of the
25 complexities of the case and uncertainties of class certification and litigation, and a fair result for
26 the Class Members.

27 ***Exposure & Risk Analysis***

28 39. On May 15, 2023, Plaintiff commenced this Action by filing a Complaint alleging
causes of action against Defendant for failure to pay wages, failure to provide meal periods,
failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to
issue proper wage statements, failure to timely pay wages, and related claims. On July 20, 2023,





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1 Plaintiff filed a First Amended Complaint to add a claim for civil penalties under PAGA. The
2 First Amended Complaint is the operative complaint in the Action (the “Operative Complaint”).
3 Defendant denies the allegations in the Operative Complaint, denies any failure to comply with
4 the laws identified in in the Operative Complaint, and denies any and all liability for the causes
5 of action alleged. Settlement, ¶ 2.1. Plaintiff prepared “damages” estimates in advance of the
6 mediation. Plaintiff determined Defendant’s maximum possible exposure for restitution and
7 penalties to be approximately \$12,308,491.35 (consisting of \$3,434,590.73 in unpaid wages,
8 \$3,434,590.73 in liquidated damages, \$17,482.39 in missed meal period premium wages,
9 \$17,482.39 in missed rest break premium wages, \$154,682.24 in unreimbursed expenses,
10 \$363,857.25 for wage statement penalties, \$530,613.45 for waiting time penalties, and
11 \$4,355,192.16 for civil penalties under PAGA. True and correct copies of the spreadsheets I
12 prepared for mediation of this Action are collectively attached to this declaration as **Exhibit 7**.

13 40. The estimates are in essence “home run” projections that omit data points that will
14 undoubtedly reduce the maximum possible damages award and do not factor in any of the risks
15 involved in litigating this Action. Plaintiff calculated the damages based on the number of
16 workweeks and pay periods provided by Defendant, Plaintiff’s reports, and the sample data. *Id.*
17 Plaintiff also considered the possibility that Defendant could launch a further *Pick Up Stix*
18 campaign and pursue individual release agreements from the Class Members. Defendant also
19 represented that it had interviewed Defendant’s current employees regarding Plaintiff’s claims,
20 all of whom would provide declarations, under penalty of perjury, that were favorable to
21 Defendant with respect to the relevant factual issues at issue in Plaintiff’s action. Plaintiff’s
22 Counsel applied discounts to the maximum possible exposure to account for all other risks
23 discussed below. While it is difficult to assign anything but crudely-determined percentages of
24 risk to any of the claims, it is safe to say that the risk that a further *Pick Up Stix* campaign would
25 preclude recovery for such employees is substantial and alone justifies a significant discount
26 because Defendant would likely by trial have gathered releases from the majority of the Class
27 Members.

28 41. My initial estimates do not realistically account for the risks outlined below or the
risk that a class will not be certified. Therefore, I believe a class settlement for \$376,500.00 is fair
and reasonable.

42. **Risks Associated with the Arbitration Agreements.** The arbitration agreements

1 entered into between Defendant on the one hand, and the Class Members, on the other, present a
2 significant risk to the success of Plaintiff's class action litigation. According to Defendant, the
3 majority of the Class entered into arbitration agreements with Defendant. As the arbitration
4 agreements in question restrict potential litigants from bringing class actions against Defendant,
5 Plaintiff would be effectively barred from pursuing claims on behalf of the Class in Court. Thus,
6 there is a significant risk the Court could determine that those Class Members who have not
7 entered into arbitration agreements with Defendant do not constitute a sufficiently numerous class
8 to justify class action treatment. As such, by continuing to trial on class-wide claims, Plaintiff
9 would run the high risk of suffering defeat due to the existence of the arbitration agreement.
10 Moreover, the arbitration agreements would pose danger to any class certification motion brought
11 by Plaintiff. Because different defenses would apply to some Class Members and not others – i.e.,
12 the existence of signed arbitration agreements – there is a risk that the Court could determine that
13 Plaintiff's claims present too many individualized inquiries to justify class certification.

14 43. **Risks Associated with Unpaid Wages Claim.** There is a risk that Plaintiff's
15 recovery for unpaid wages would be extremely limited at best, largely because Defendant's
16 written policies throughout the relevant time period prohibited off-the-clock work. Off-the-clock
17 claims are difficult where a defendant requires in its written policies that all work must take place
18 while clocked in. *See Jong v. Kaiser Foundation Hospital* (2014) 226 Cal.App.4th 391 (employer
19 must have notice of off-the-clock work for it to be compensable). *Id.* In its written employment
20 policies, Defendant mandates that employees must record all time worked accurately on their time
21 records and strictly prohibits employees from performing any work off-the-clock. Moreover,
22 while Defendant disputes that off-the-clock work occurred, it contends that any time spent off the
23 clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal.
24 5th 829, 835 suggested that irregular and minute periods of time may still be subject to a *de*
25 *minimis* defense even if compensable. (Stating: "We do not decide whether there are
26 circumstances where compensable time is so minute or irregular that it is unreasonable to expect
27 the time to be recorded."). Following *Troester*, Defendant contends that the *de minimis* doctrine
28 may apply here because the time spent off the clock was minute and insignificant. Accordingly,
a large award of penalties seems unlikely with respect to this claim.

44. The difficulty inherent in proving that off-the-clock work occurred poses a
significant hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove



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

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

19 46. Defendant contends it did not impede or discourage Plaintiff, or any other
20 employees, from taking their meal or rest periods. Defendant’s policies mandate that employees
21 take at least a 30-minute, uninterrupted meal period and record the beginning and ending time of
22 their meal breaks each day on their time records. The time records that comprise the random
23 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
24 taken the vast majority of the time. Of the time records that show a late, short, or no lunch,
25 individualized evidence may be necessary to determine whether they occurred due to conduct of
26 the Defendant or each of the employees concerned. Defendant paid premium wages for
27 unprovided meal periods for part of the Class Period. Accordingly, there is a significant risk that
28 the value of Plaintiff’s meal period claim would be substantially reduced at trial.

47. **Risks Associated with the Rest Break Claim.** There are risks to Plaintiff’s rest
period claim. Employers are not required to record rest periods, and such periods are paid.
Defendant contends it provided non-exempt employees the opportunity to take rest periods in



1 accordance with California law. Further, Defendant's written policies on meal and rest periods
2 are consistent with the Wage Order. The time records that comprise the random sample Defendant
3 produced to Plaintiff for purposes of mediation show multiple instances where the employees
4 recorded rest breaks. Managing such claims at trial has become exceedingly difficult. Plaintiff
5 will depend on sample witness testimony and surveys to prove the claims. While a victory with
6 such evidence is certainly possible, relevant caselaw makes such claims risky from a trial
7 management and due process perspective. *See Duran v. U.S. Bank National Assn.* (2014) 59 Cal.
8 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class certification, it may
9 be possible to manage individual issues through the use of surveys and statistical sampling.");
10 *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013)
11 133 S.Ct. 1426.

12 48. **Risks Associated with the Failure to Indemnify Claim.** There is a risk that the
13 Court may consider Plaintiff's claims as to Defendant's alleged failure to indemnify for business
14 expenses to be individual in nature and thus decline to certify the class. Plaintiff alleges that
15 Defendant required Plaintiff and the Class Members to use their personal items, including cellular
16 phones and vehicles, and failed to indemnify them for these business expenses and for rideshare
17 expenses. Defendant presented evidence that it has supplied its employees with transportation and
18 telecom and had an expense reimbursement policy. As such, there is a risk that the Court may
19 consider Plaintiff's claims to be individual in nature and unfit for class wide resolution.

20 49. **Risks Associated with the Statutory Wage Statement Penalty Claims.** Plaintiff
21 also asserts claims for wage statement violations, untimely wage violations, and PAGA penalties.
22 Under Labor Code section 226, wage statements must include various information, including the
23 applicable rates of pay, corresponding hours worked, and gross pay. Here, Plaintiff's wage
24 statement claim has the same underlying risks as the above claims, as it is derivative of them. On
25 their face, the wage statements issued by Defendant comply with the requirements of Labor Code
26 section 226.

27 50. **Risks Associated with the Waiting Time Penalties Claims.** Without proof
28 willful behavior, Plaintiff will be unable to recover these penalties.

51. **Risks Associated With the PAGA Claim.** As the Operative Complaint makes
clear, Plaintiff predicates his PAGA claim on the same Labor Code violations as his other
claims. Plaintiff's "damages" spreadsheet, Exhibit 7, states the length of the relevant time period



1 for the PAGA claim and the number of employees allegedly employed during that time period.
2 Plaintiff's "damages" spreadsheet, Exhibit 7, also states the total amount of civil penalties for
3 which Defendant is potentially liable if all allegations are proven. As I state above in connection
4 with Plaintiff's claims for statutory penalties with regard to proof of Defendant's intent,
5 knowledge, and willfulness, there are serious risks to proving Defendant acted intentionally,
6 knowingly, and willfully in violating the rights of Class Members under the Labor Code. Plaintiff
7 calculated the agreed-upon amount of civil penalties by considering the risks outlined above and
8 that the Settlement already provides substantial payments for the Labor Code violations that the
9 civil penalties claim is predicated on.

10 52. Regarding PAGA, a court has discretion to award a lesser amount than the
11 maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
12 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendant has
13 posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus,
14 the PAGA claims likewise face significant uncertainty. There is a risk that the Court would
15 consider the maximum civil penalty available to be confiscatory.

16 53. This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and
17 required a significant discount for settlement purposes. For mediation purposes, Plaintiff's
18 counsel estimated a maximum possible exposure of approximately \$346,072.15 in civil penalties.
19 This estimate did not take into account any of the risks discussed above and assumed a violation
20 for every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same
21 pay period for the same alleged violations of different Labor Code provisions and derivative
22 violations. Although two federal district court decisions held that "stacking" PAGA penalties in
23 this fashion may be appropriate to determine the amount in controversy for purposes of removal
24 jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs
25 multiple PAGA penalties for the same violation for the same pay period under different Labor
26 Code provisions. This may be because the PAGA does not provide for what many employers
27 characterize as claim splitting and not merely stacking.

28 54. I am aware of only two significant awards under the PAGA in a contested



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proceeding, both issued by federal district courts.⁹ PAGA penalty awards are often small even for egregious, intentional violations of the Labor Code.¹⁰

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

⁹ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil penalties under the PAGA of \$12,277,500.00 where total adjusted damages were \$18,695,692.58. In this regard, the district court stated,

The plain language of PAGA provides that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, *based on the facts and circumstances of the particular case*, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code s 2699(e)(2) (emphasis added). The relationship between the amount of total damages and the amount of maximum PAGA penalties is certainly a “circumstance” of the case under the term's 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.

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

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

¹⁰ In 2012, I tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. A true and correct copy of the first amended complaint in *Ghrdilyan* is attached as **Exhibit** Error! Main Document Only. 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. A true and correct copy of the judgment transcript in *Ghrdilyan* is attached as **Exhibit 20**, 19:8-20:19. Also, on October 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff civil, represented by very experienced counsel, penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no. BC492828. A similar result could occur here.



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1 56. **Risks Associated with a *Pick Up Stix* Campaign.** An employer enjoys the right
2 to settle a putative class member’s disputed wage claims individually, without the consent or
3 involvement of class counsel. (See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796 (2009).
4 As discussed above, Defendant already engaged in a “pick off” settlement campaign to pursue
5 individual release agreements from 68 of the 95 Class Members. There are only 27 Putative Class
6 Members left. While this is still a numerous group for purposes of class certification, it may not
7 remain that way if the litigation continues. Without this Class Settlement—which provides
8 additional compensation to Class Members who signed *Pick Up Stix* Settlement Agreements and
9 covers a period extending beyond the date the *Pick Up Stix* Settlement Agreements were signed—
10 Defendant’s *Pick Up Stix* campaign could have the effect of potentially narrowing the size of the
11 Settlement Class, such that it may no longer be numerous enough for class certification.
12 Consequently, Defendant may argue that Plaintiff, then, may not have a sufficient number of
13 employees to represent. This led to a significant reduction of claim value in settlement
14 negotiations.

15 57. While the evidence gathered through Plaintiff’s discovery supports the merits of
16 the claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
17 presents significant risks that support a downward departure from Defendant’s estimated liability
18 exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages,
19 monetary penalties, or other relief that the Class could reasonably expect to be awarded at trial,
20 taking into account the likelihood of prevailing and other attendant risks. It also represents a fair,
21 adequate, and reasonable compromise amount for these claims and warrants preliminary
22 approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial
23 condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C.*
24 *Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant’s
25 financial stability “strongly supports the reasonableness of the settlement”); *See Laguna v.*
26 *Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3.

27 58. Above, Plaintiff lists the maximum amounts recoverable in this action.
28 However, based on the difficulties of proof, the Defendant’s defenses, and the other attendant
risks I identify above, I estimate the *likely* awards at trial should Plaintiff prevail to be the
following amounts:

- a. Unpaid wages with interest in the amount of \$343,459.07;



- b. Liquidated damages with interest in the amount of \$343,459.07;
- c. Meal period premium wages with interest in the amount of \$16,608.27;
- d. Rest period premium wages with interest in the amount of \$16,608.27;
- e. Unreimbursed expenses with interest in the amount of \$7,734.11;
- f. Statutory pay stub penalties in the amount of \$18,192.86;
- g. Waiting time penalties in the amount of \$26,530.67; and
- h. Civil penalties in the amount of \$346,072.15.

The total of these amounts is \$1,118,664.48. The Gross Settlement Amount of \$376,500.00 is 33.66% of this amount.

Allocation of the PAGA Payment

59. The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Aggrieved Employees, is reasonable and appropriate under the circumstances. The Parties negotiated a good faith amount for PAGA Penalties to be paid to the LWDA and to the Aggrieved Employees. The portion to be paid to the LWDA was not the result of self-interest at the expense of other Aggrieved Employees.

Attorneys' Fees and Costs

60. I intend to request Class Counsel Attorneys' Fees of one-third of the GSA, which is currently estimated to be \$125,500.00, and Class Counsel's litigation costs incurred in prosecuting this Action, which I currently estimate to be approximately \$12,000.00 and will be no more than \$12,000.00 at the conclusion of matters related to the Settlement. In view of my efforts and risks in pursuing this case these amounts are well within the range of reasonableness and thus warrant this Court's preliminary approval. In addition, based on my experience in wage and hour class action matters, fee awards of approximately one-third of the settlement fund are routinely approved as reasonable. I have been awarded attorneys' fees equaling approximately one-third of the fund in several recent wage and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County Superior Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San Diego Superior Court, Case No. 37-2010-00093743-CU-OE-CTL (one-third of fund); *Butler v. Lexxiom, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1001579 (one-third of fund); *Perez v. Southwest Dealer Services, Inc.*, Los Angeles County Superior Court, Case No. BC439253 (one-third of fund); *O'Brien v. Optima Network*



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1 *Services, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1107056 (one-third of
2 fund); *Noyd v. The Cristcat Group, et al.*, Los Angeles County Superior Court, Case No.
3 BC439558 (one-third of fund); *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct.,
4 Case No. 37-2009-00103277-CU-OE-CTL (one-third of fund); *Cunningham v. DPI Specialty*
5 *Foods West, Inc.*, Los Angeles Sup.Ct., Case No. BC465017 (one-third of fund); *Stucker v.*
6 *L'Oreal USA S/D, Inc.*, Los Angeles Sup. Ct., Case No. BC456080 (one-third of fund); *Valdez v.*
7 *Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No. BC462917 (one-third of fund);
8 *Hernandez, et al v. HSBC*, U.S. District Court, Central District of California, Case No. 10-CV-
9 4753 (one-third of fund); *Sandoval, et al. v. Thrifty Payless, Inc., et al.* Los Angeles Sup.Ct., Case
10 No. BC431249 (one-third of fund); *Alafa v. Custom Built Personal Training, Inc.*, Tulare County
11 Superior Court, Case No. VCU-245496 (one-third of fund); *Nardone v. Sequoia Beverage*
12 *Company, LP*, Tulare Sup.Ct., Case No. VCU-248370 (one-third of fund); *Rosen v. Image*
13 *Transfer*, Los Angeles Sup.Ct., Case No. BC511702 (one-third of fund); *Tucker v. Maly's West,*
14 *Inc.*, Los Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King v. Build.com*, Butte
15 Sup.Ct., Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay & Grain*, Los Angeles
16 Sup.Ct., Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin Shoppe*, Contra Costa
17 Sup.Ct., Case No. CIVMSC13-01136 (one-third of fund); *Clarke v. Insight Global*, U.S. District
18 Court, Southern District of California, Case No. 13-CV-0357 (one-third of fund); *Fischer, et al.*
19 *v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No. RIC1114952 (one-third
20 of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District of Colorado,
21 Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v. Comcast of California/*
22 *Colorado/ Florida/ Oregon, Inc.*, United States District Court, Eastern District of California, Case
23 No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v. American Guard Services,*
24 Los Angeles Superior Court, Case No. BC462681 (one-third of fund); *Volney-Parris v. Southern*
25 *California Edison Company*, Los Angeles Superior Court, Case No. BC493038 (one-third of
26 fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No. BC480808 (one-third of
27 fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-1500-CV-282679
28 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior Court,
Case No. CIVDS1500146 (one-third of fund).

61. Fees may be awarded under equitable doctrines if the litigation results in a
defendant's taking "voluntary" corrective action. *See, e.g., Lewis v. Anderson* (9th Cir 1982) 692

1 F.2d 1267; *Northington v. Davis* (1979) 23 Cal.3d 955, 960 n2. This is sometimes referred to as
2 the “catalyst theory.” See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553 (preserving
3 “catalyst theory” as basis for awarding statutory attorney fees). *Graham* held that to recover fees
4 under the catalyst theory, the trial court must find, based on an abbreviated review, that the lawsuit
5 had sufficient merit to show that it was not a nuisance lawsuit, i.e., that it was not “frivolous,
6 unreasonable or groundless,” either legally or factually. 34 Cal.4th at 575. This showing “may
7 generally be established during the attorney fee proceeding by declarations, or, at the discretion
8 of the trial court, by an abbreviated evidentiary hearing.” 34 Cal.4th at 576. *Graham* found that
9 the catalyst theory of attorney fee recovery is applicable “if the defendant changes its behavior
10 substantially because of, and in the manner sought by, the litigation,” even if the lawsuit
11 terminates without any judicial resolution of the merits. *Graham*, 34 Cal.4th at 560. In doing so,
12 the court expressly rejected the United States Supreme Court’s contrary ruling in *Buckhannon*
13 *Bd. & Care Home, Inc. v West Va. Dep’t of Health & Human Resources* (2001) 532 U.S. 598,
14 121 S. Ct. 1835.¹¹

15 62. As stated above, under the Settlement, Plaintiff’s counsel is accorded up to 33.33%
16 of the GSA for the Class Counsel Fees Payment, which is currently estimated to be \$125,500.00.
17 Settlement, ¶ 3.2.2. This fee is fair and reasonable given the fact that Plaintiff’s counsel’s legal
18 work (including extensive interviews with class members, preparation of the mediation statement
19 and damages analyses, and other pleadings and practice) led to Defendant’s promise to pay
20 \$200,000.00 in “new money” (or more if the Escalator Clause is triggered pursuant to paragraph
21 9 of the Settlement) plus the earlier paid \$176,500.00 to putative class members through *Pick Up*
22 *Stix* Settlements. The money Defendant has paid through the individual settlements is the result
23 of Plaintiff’s counsel’s lawsuit and related legal work in support thereof. Thus, the modest fee
24 sought is fair to all, especially considering that the Class Members would not have received a
25 penny had it not been for the work of Plaintiff’s counsel.

26 63. The amount of fees and costs requested are commensurate with (1) the risk Class
27 Counsel took in bringing the case, (2) the extensive time, effort, and expense dedicated to the

28 ¹¹ The catalyst theory, which allows a party to be declared the prevailing party when the litigation
induces the defendant to take voluntary corrective action, no longer applies to federal prevailing
party fee statutes, but does apply to fee-shifting claims under California law. See *Tipton-*
Whittingham v. City of Los Angeles (2004) 34 Cal.4th 604, 608; *Graham v. DaimlerChrysler*
Corp. (2004) 34 Cal.4th 553, 570.



1 case, (3) the skill and determination Class Counsel have shown, (4) the results Class Counsel
2 achieved, (5) the value Class Counsel achieved for the class, and (6) the other cases Class Counsel
3 turned down to devote time to this matter. Class Counsel also interviewed and obtained
4 information from putative class members, met and conferred with Defendant's counsel on
5 numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided
6 by Defendant and obtained through other sources, researched applicable law, and calculated
estimates of "damages" for purposes of settlement discussions, among other tasks.

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

12 65. Plaintiff has agreed in writing to authorize 75% of the Class Counsel Fees Payment
13 to be issued to The Spivak Law Firm and 25% of the Class Counsel Fees Payment to be issued to
14 United Employees Law Group, PC. Also, Plaintiff has agreed in writing to authorize The Spivak
15 Law Firm and United Employees Law Group, PC to receive reimbursement of their respective
16 litigation expenses upon successful resolution of this action. A true and correct copy of the fully
executed retainer agreement is attached hereto as **Exhibit 8**.

17 ***Class Representative Service Payment***

18 66. The Settlement provides that Plaintiff may seek a Class Representative Service
19 Payment of \$10,000.00. This amount is entirely reasonable given Plaintiff's efforts in this Action
20 and the risks he undertook on behalf of Class Members. Here, Plaintiff has devoted many hours
21 advancing the interests of the Settlement Class. Plaintiff has done this by, among other things,
22 retaining experienced counsel, providing them with information about his work history with
23 Defendant and Defendant's policies and practices with respect to the wage and hour claims at
24 issue, assisting counsel in identifying witnesses, participating in two mediations, and being
25 actively involved in the settlement process to ensure a fair result for the Settlement Class as a
26 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
27 §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the Settlement Class
28 show that the proposed Class Representative Service Payment is fair, adequate, and reasonable,



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1 and thus warrant preliminary approval.

2 67. Plaintiff began his investigation and retention of attorneys to pursue the claims at
3 issue on approximately January 23, 2023. Awarding Plaintiff 2.66% of the GSA is entirely
4 reasonable given Plaintiff's efforts in this case undertaken on behalf of absent Class Members. In
5 this case, Plaintiff has devoted substantial hours of his time advancing the interests of the Class
6 Members and also expects to devote additional hours of his time with Class Counsel overseeing
7 the administration of the Settlement if the Court grants final approval of the Settlement. Plaintiff
8 has done this by, among other things, retaining experienced counsel, providing them with
9 extensive information about his work history with Defendant and Defendant's policies and
10 practices with respect to the wage and hour claims at issue, assisting them in contacting absent
11 Class Members to gather information, participating in two mediations, foregoing pursuit of his
12 individual claims in favor of a fair class-wide resolution, and being actively involved in the
13 settlement process to ensure a fair result for the Class Members as a whole.

14 68. As Class Representative, Plaintiff agreed to (1) consider the interests of the class
15 just as he would consider his own interests and, in some cases, to put the interests of the class
16 before his own interests; (2) actively participate in the lawsuit, as necessary, by among other
17 things, answering interrogatories, producing documents to Defendant, and giving deposition and
18 trial testimony if requested; (3) travel to give such testimony; (4) recognize and accept that any
19 resolution of the lawsuit by dismissal or settlement, is subject to court approval, and must be
20 designed in the best interest of the class as a whole; (5) follow the progress of the lawsuit and
21 provide all relevant facts to Class Counsel; (6) champion many other people with similar claims
22 and injuries because of the importance of the case and the necessity that all Class Members benefit
23 from the lawsuit; and (7) fight for a resolution in which the individual recovery to each Class
24 Member, including Plaintiff, may be relatively small. Plaintiff agreed to shoulder all of these
25 responsibilities in exchange for a proportionate share of funds made available for distribution to
26 the Class Members. Plaintiff had no guarantee of a Class Representative Service Payment. This
27 justifies the Class Representative Service Payment sought.

28 69. In taking the actions outlined above, Plaintiff has exposed himself to significant
risks, including the risk that he could have been ordered to pay Defendant's attorneys' fees and
costs if this Action had been unsuccessful (*see* Lab. Code §§ 218.5-218.6), as well as the risk that
he could, in the future, face a potentially hostile work environment and worsened career prospects



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1 for suing a prior employer for wage and hour violations and serving as the Plaintiff in a class
2 action lawsuit. Additionally, Plaintiff has exposed himself to the risk that he could end up
3 receiving less than Defendant would have paid him at the beginning of the Action via a C.C.P. §
4 998 offer or other individual settlement offer to drop his class allegations. On many occasions,
5 California courts have ordered wage and hour plaintiffs and would be class representatives to pay
outrageous fee and/or cost awards for unsuccessful claims. A few examples are:

- 6 a. *Zalewa v. Tempo Research Corp.*, No. B238142, 2013 WL 766535 (CA 2nd Dist.
7 March 1, 2013) (court awarded the employer \$2,210,360 in attorney's fees to be
8 paid by employee for employee's unsuccessful suit for unpaid bonuses). A true
9 and correct copy of the court's order is attached to this declaration as **Exhibit 9**.
- 10 b. *Cun v. Café Tiramisu LLC*, No. A131241, 2011 WL 5979937 (CA 1st Dist. Nov.
11 30, 2011) (court ordered the employee to pay \$36,612.50 in attorney's fees and
12 costs to employer for unsuccessful suit for unpaid wages). A true and correct copy
13 of the court's order is attached to this declaration as **Exhibit 10**.
- 14 c. *Csaszi v. Sharp Healthcare*, No. D038558, 2003 WL 352422 (CA 4th Dist. Feb.
15 18, 2003) (court ordered the employee to pay \$20,269 in attorney's fees and costs
16 to the employer for unsuccessful suit for unpaid wages and overtime). A true and
17 correct copy of the court's order is attached to this declaration as **Exhibit 11**.
- 18 d. *Villalobos v. Guertin*, No. CIV. S-07-2778 LKK/GGH, 2009 WL 4718721
19 (U.S.D.C. Eastern Dist. Dec. 3, 2009) (court ordered Plaintiff's counsel to pay
20 \$21,180 in attorney's fees and \$1,525.80 in costs to defense counsel for unpaid
21 wages). A true and correct copy of the court's order is attached to this declaration
as **Exhibit 12**.

22 Such costs awards are higher than the share of the Net Settlement Amount ("NSA") that Plaintiff
23 stands to receive as a Participating Class Member. It is unfair in view of the substantial risk of an
24 adverse fee or cost award of several thousand dollars that Plaintiff receives less as a reward for
25 taking such a risk. Moreover, we cannot lose sight of the fact that Plaintiff is not a high wage
26 earner. Even the lowest of the cost awards listed above would have devastating consequences for
Plaintiff in view of his modest earnings.

27 70. As I explain further below, Plaintiff's individual share of the Net Settlement
28 Amount will be less than that of some absent Participating Class Members. Under the Settlement,



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1 Participating Class Members will receive a *pro rata* distribution of the Settlement proceeds
2 proportionate to the period of time he or she worked for Defendant during the Class Period,
3 compared to the total period of time worked by all Participating Class Members during the Class
4 Period, as reflected by Defendant's records. Because Plaintiff may have been employed for a
5 shorter period during the Class Period, some Class Members will have worked more Work Weeks
6 than Plaintiff and, as a result, receive larger shares in the recovery – *even though they did not*
7 *actively participate in the lawsuit*. While this is a risk that Plaintiff assumed when he brought his
8 lawsuit, it is unfair to limit Plaintiff's Class Representative Service Payment to an amount not
9 much greater than an absent Class Member's share of the recovery. To encourage employees like
10 Plaintiff to don the helm of class champions (and thereby advance the important public policies
11 behind class actions), the Court should award something substantial to Plaintiff for his readiness
12 to receive less than absent Class Members while assuming all the risk and delay of payment.

13 71. The average putative class member in this case would be unlikely to pursue
14 individually the claims Plaintiff brought against Defendant because such claims would be too
15 small to justify the cost and the risk. A putative class member will be unlikely to find an attorney
16 who is willing to pursue an individual's claims because the claims are too small to justify the
17 hundreds of hours of legal work necessary to prove each claim. Only the class action vehicle,
18 which allows for the aggregation of hundreds of risky small dollar value claims, makes such
19 claims advantageous for an attorney to pursue on a contingency basis and there can be no class
20 action without a class member assuming the great fiduciary responsibilities of as class
21 representative. This Court should allow the Class Representative Service Payment requested
22 because to do otherwise would discourage employees (and attorneys) from bringing class actions
23 in the first place.

24 72. If would-be class action plaintiffs are not adequately incentivized to advance the
25 public policy behind class actions in court in light of the time and risk it will entail, it is unlikely
26 that they will bring class action lawsuits in the first place. Once employers realize that such
27 lawsuits are unlikely, they will have no incentive to comply with wage and hour laws.

28 73. Plaintiff faced the risk that he could face worsened career prospects for suing a
former employer for wage and hour violations and serving as the Plaintiff in a class action lawsuit.
Because he filed a lawsuit in the California Superior Court, a public record now exists that
Plaintiff sued his employer for Labor Code violations – a fact that won't be lost on prospective



1 employers considering him for a job. Common sense dictates that an employer will think twice
2 about hiring someone who sued his last employer. Legal experts have recognized this fact.
3 Attached to this declaration as **Exhibit 13** is a true and correct copy of the article “Employees:
4 Better Think Twice Before Suing Your Employer (Four Reasons Why).” Attached to this
5 declaration as **Exhibit 14** is a true and correct copy of the article “What To Expect If You Sue
6 Your Employer.” California even has laws to address this risk: Labor Code § 1102.5 prohibits
7 retaliation against employees who speak up about Labor Code violations and Labor Code § 98.6
8 prohibits discrimination against employees who bring Labor Code violations to the attention of
9 the Labor Commissioner. Thus, the risk to Plaintiff’s future employment shows that the Class
10 Representative Service Payment sought is fair, adequate, and reasonable, and warrants
11 preliminary approval of the Court.

12 74. Class Counsel depended on Plaintiff’s input to prosecute this lawsuit. Plaintiff
13 made this case possible for a number of reasons. First, Plaintiff challenged his employers on an
14 unlawful practice that led to Defendant paying a large percentage of the unpaid wages in question
15 plus interest to the remainder of their employees – in spite of Defendant’s financial limitations.
16 Plaintiff provided Class Counsel with detailed descriptions of how Defendant’s business operates,
17 the hours and scheduling of employees, and the nature of the work Class Members performed.

18 75. By agreeing to settle the case in the best interest of the Class Members, Plaintiff
19 has given up the right to pursue individual claims and recover substantially more in unpaid wages,
20 interest, waiting time penalties, pay stub penalties, and civil penalties that he will release as part
21 of the Settlement. Plaintiff did not seek an individual settlement for his claims at all, instead
22 choosing to prosecute the claims on behalf of the Class Members.

23 76. In view of the risks, Plaintiff achieved a result the Class can be proud of. There
24 were significant risks (outlined in the preliminary approval motion) to any award on behalf of the
25 Class Members, and still Plaintiff achieved a settlement of \$376,500.00. This outstanding result
26 calls for significant awards to Plaintiff for making the result possible. If the Court is disinclined
27 to award Plaintiff all or part of the Class Representative Service Payment requested, Class
28 Counsel request that the Court allocate the difference to Plaintiff from Class Counsel’s requested
attorney fee award.

Class Member and Aggrieved Employee Settlement Share Estimates

77. Above, Plaintiff estimates Plaintiff’s anticipated Individual Class Payment.



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1 78. **Individual Class Payments.** At \$16.00 per hour (the average Class Member's
2 hourly wage), the average estimated Individual Class Payment to Participating Class Members is
3 the equivalent of over 141 hours of unpaid wages (the primary remedies sought) ($\$2,263.16 /$
4 $\$16.00 = 141.45$ hours). Thus, this is a result the Class can be proud of in view of the significant
5 risks.

6 79. Plaintiff estimates that there are 12,915 Work Weeks for the Class Period. So, each
7 Work Week has a value of approximately \$16.65 ($\$215,000.00$ Net Settlement Amount / 12,915
8 Work Weeks = \$16.65). Plaintiff had 41 Work Weeks during the Class Period. Based on this, it
9 is anticipated that Plaintiff Kenneth Miller will receive an Individual Class Payment of
10 approximately \$682.65 as a Participating Class Member ($41 \text{ Work Weeks} \times \$16.65 = \$682.65$)
11 while the average estimated Individual Class Payment to Participating Class Members will be
12 approximately \$2,263.16. Some Class Members – those who worked more Work Weeks during
13 the Class Period – will receive more, and some less. The highest possible Individual Class
14 Payment to a Participating Class Member (i.e., to those who qualify for all Work Weeks in the
15 Class Period) will be approximately \$5,111.55. The lowest possible Individual Class Payment to
16 a Participating Class Member (i.e., to those who qualify for only one Work Week in the Class
17 Period) will be approximately \$16.65. Some Class Members – those who worked more Work
18 Weeks during the Class Period – will receive more, and some less.

19 80. The Individual Class Payment will be paid to each Class Member based on his or
20 her eligible Work Weeks compared to the total Work Weeks. Because this method compensates
21 Class Members based on the extent of their potential injuries, in that Class Members who worked
22 for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and
23 reasonable.

24 81. **Individual PAGA Payments.** I estimate that the average Aggrieved
25 Employee Individual PAGA Payment will be \$18.18. *Id.* Plaintiff's Individual PAGA Payment,
26 his individual share of 25% of the PAGA Penalties, will be less than that of some absent
27 Aggrieved Employees. Under the Settlement, each Aggrieved Employee will receive a *pro rata*
28 distribution of 25% of the PAGA Penalties proportionate to the number of Pay Periods he or she
had with Defendant during the PAGA Period, compared to the total of all Pay Periods of all
Aggrieved Employees during the PAGA Period, as reflected by Defendant's records. Plaintiff
estimates that there are 3,666 Aggrieved Employee Pay Periods for the PAGA Period. So, each



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1 Aggrieved Employee Pay Period from the PAGA Period has a value of approximately \$0.27
2 (25% of \$4,000.00 in PAGA Penalties / 3,666 Aggrieved Employee Pay Periods = \$0.27). It is
3 anticipated that Plaintiff Kenneth Miller will receive an Individual PAGA Payment of
4 approximately \$9.45 as an Aggrieved Employee (35 Pay Periods during the PAGA Period x \$0.27
5 Pay Period value = \$9.45) while the average estimated Individual PAGA Payment to an
6 Aggrieved Employee will be approximately \$18.18 (\$1,000.00, 25% of PAGA Penalties / 55
7 Aggrieved Employee during the PAGA Period = \$18.18 Individual PAGA Payment). Some
8 Aggrieved Employees – those who had more Pay Periods during the PAGA Period – will receive
9 more, and some less. The highest possible Individual PAGA Payment to an Aggrieved Employee
10 (i.e., to those who qualify for all Pay Periods in the PAGA Period) will be approximately \$40.73.
11 The lowest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those who
12 qualify for only one paycheck in the PAGA Period) will be approximately \$0.27.

Proposed Preliminary Approval Order

13 82. Plaintiff files a proposed Preliminary Approval Order with this declaration. The
14 proposed Preliminary Approval Order includes the Notice Packet. The Notice Packet consists of
15 the Class Notice (Exhibit A to the Preliminary Approval Order), the Election Not to Participate
16 in Settlement form (Exhibit B to the Preliminary Approval Order), the Work Week Dispute form
17 (Exhibit C to the Preliminary Approval Order), and the Objection form (Exhibit D to the
18 Preliminary Approval Order) in English with Spanish translations. Based on my investigation,
19 the Class Members all understand English, Spanish, or both. The Notice Packet does not include
20 any other forms. The Settlement Agreement is not attached to the proposed Preliminary Approval
21 Order. I have carefully reviewed both the terms and the terminology of the proposed
22 Preliminary Approval Order and accompanying Notice Packet to confirm that the various
23 documents are internally consistent, consistent with each other, and consistent with the
24 Settlement Agreement.

25 83. **Identity of Administrator.** The proposed Preliminary Approval Order states
26 the name of the Administrator, and describes the nature of the services that the Administrator
27 will be required to perform, either directly or by reference to the Settlement Agreement.

28 84. **Exclusion Form.** The proposed Preliminary Approval Order provides that the
Class Notice shall be accompanied by the Election Not to Participate in Settlement form
(Exhibit B to the Preliminary Approval Order), the Work Week Dispute form (Exhibit C to the



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Preliminary Approval Order), and the Objection form (Exhibit D to the Preliminary Approval Order) in English with Spanish translations. Based on my investigation, the Class Members all understand English, Spanish, or both. The proposed Preliminary Approval Order provides that any exclusion form shall be submitted to the Administrator rather than filed with the Court. The proposed Preliminary Approval Order does not require the Class Member to send copies of the exclusion form to counsel, but requires the Administrator to do so. The proposed Preliminary Approval Order provides that the Administrator shall file a declaration concurrently with the filing of Plaintiff's motion for final approval with a copy of every exclusion form received by the Administrator.

85. **Objection form.** The proposed Preliminary Approval Order provides that the Class Notice shall be accompanied by the Objection form that the Class Members may use. The proposed Preliminary Approval Order provides that any objection shall be submitted to the Administrator rather than filed with the Court. The proposed Preliminary Approval Order does not require the Class Member to send copies of the objection form to counsel, but requires the Administrator to do so. The proposed Preliminary Approval Order provides that the Administrator shall file a declaration concurrently with the filing of the motion for final approval with a copy of every objection form received by the Administrator.

86. Neither the proposed Preliminary Approval Order, the Class Notice, nor the Objection form requires an objecting party to, either personally or through counsel, appear at the hearing on the motion for final approval for that party's objection to be considered. Neither the proposed Preliminary Approval Order, the Class Notice, nor the Objection form requires an objecting party to, either personally or through counsel, to file or serve, or to state in the objection, a notice of intention to appear at the hearing on the motion for final approval.

87. **Final Approval Hearing Date.** The proposed Preliminary Approval Order provides a proposed date for the Final Approval Hearing. The proposed Preliminary Approval Order requires the Administrator to give notice to any objecting party of any continuance of the hearing of the motion for final approval.

88. **No Injunction against Filing Claims.** Neither the proposed Preliminary Approval Order nor the Class Notice purports to enjoin the Class Members from filing any actions or administrative claims or proceedings pending the final hearing on the settlement, or for any other period.

89. **No Claim Form.** The Settlement does not require a claim form.

The Notice Packet

90. The Settlement requires distribution of the Notice by First Class U.S. mail only. Settlement, ¶ 7.4.2. Although there are current employee Class Members, it is uncertain whether Defendant's records of their contact information include email addresses, and Class Members, who perform all of their work away from a desk, are not in a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable. The Notice Packet (attached as Exhibits A, B, C, and D to the Settlement) provides Class Members with all pertinent information that they need to fully evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the estimated settlement shares for each Class Member. Additionally, the Notice will include the number of eligible Work Weeks a Class Member had during the Class Period. Accordingly, the Notice should be approved because it describes the Settlement with sufficient clarity and specificity to explain to Class Members what this action is about, their rights under the Settlement, and how to exercise those rights. As such, the Parties' proposed Notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed settlement.

91. The Settlement does not require Class Members to submit claims to participate.

92. Each document in the Notice Packet is drafted in a manner that is likely to be readily understood by the members of the Class. The Notice Packet does not contain any Latin terms, legal terms of art, or unfamiliar symbols or abbreviations.

93. As stated above, the Class Notice includes an estimate of the likely recovery by the individual Class Member. It also provides the estimated dollar value of a Work Week and the estimated dollar value of a Pay Period.

94. The Class Notice states that the Court has determined only that there is sufficient evidence to suggest that the proposed settlement might be fair, adequate, and reasonable, and that any final determination of those issues will be made at the final hearing.

95. The Class Notice advises the Class Members of where they can find the



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1 Settlement Agreement, by describing the full title and filing date either of the settlement
2 agreement and this declaration to which the Settlement Agreement is attached. The Class
3 Notice also states the address of the courthouse to which the case is assigned, and the address
4 of the court's website at which the case file can be viewed on-line.

5 96. The Class Notice describes the releases by Plaintiff and the Class Members.

6 97. The lawsuit includes claim for civil penalties under PAGA. The Class Notice
7 defines PAGA. It states that Class Members may not opt out of the PAGA provisions of the
8 Settlement. However, it does not bar them from objecting to the PAGA portions of the
9 Settlement. The Class Notice also describes the terms of the settlement of the PAGA claim,
10 including who is an Aggrieved Employee. The Class Notice provides an estimate of the
11 individual Aggrieved Employee's share of 25% of the PAGA Penalties and advises
12 Aggrieved Employees that the payments will be reported on a Form 1099.

13 98. The Objection form instructs the objecting Class Member that the objection
14 must be delivered to the Administrator. The Objection form states the name and address of
15 the Administrator. It also states the date by which the objection must be mailed or otherwise
16 delivered.

17 99. The information required to be provided by an objecting Class Member on the
18 Objection form does not exceed the minimum information necessary to (i) identify the
19 objector as a person entitled to object to the Settlement, (ii) describe the nature of and basis
20 for the objection, and (iii) contact the objector to clarify any uncertainties.

21 100. The Election Not To Participate form (i) instructs the Class Member seeking
22 exclusion that the exclusion form must be mailed or delivered to the Administrator, (ii) states
23 the name and address of the Administrator, and (iii) states the date by which the exclusion
24 form must be mailed or otherwise delivered.

25 101. The information required to be provided by a Class Member on the Election
26 Not To Participate form does not exceed the minimum information necessary to (i) identify
27 the person as a Class Member and (ii) contact the person to clarify any uncertainties.

28 102. The Election Not To Participate form indicates that exclusion from the Class
Settlement will not result in exclusion from the PAGA portion of the Settlement.

Administrator Duties

103. The duties of the Settlement Administrator are spelled out in the Settlement and in
the bid provided by Xpand Legal Consulting LLC a true and correct copy of which is attached

hereto as **Exhibit 15**.

Administration Costs

104. With regard to the settlement administration costs provision (Settlement §3.2.3), it is reasonable. Before agreeing to Xpand Legal Consulting LLC the Parties sought and reviewed bids from other reputable third-party administrators: (A) CPT = \$8,000.00; (B) Simpluris = \$7,000.00; (C) Apex Class Action Administration = \$5,990.00; and (D) Xpand Legal Consulting LLC = \$5,990.00. A true and correct copy of the bid from CPT is attached hereto as **Exhibit 16**. A true and correct copy of the bid from Simpluris is attached hereto as **Exhibit 17**. A true and correct copy of the bid from Apex Class Action Administration is attached hereto as **Exhibit 18**. The bid provided by Xpand Legal Consulting LLC was the lowest. Thus, the settlement administration costs provision should be given preliminary approval.

PAGA Provisions of the Settlement

105. The memorandum of points and authorities that accompanies this declaration explains the terms of the provisions of the Settlement that apply to PAGA and civil penalties.

106. The Settlement provides that 25% of the PAGA Penalties shall be distributed among all Aggrieved Employees, even those who opt out of the Class Settlement. See Settlement, ¶ 3.2.5.

107. The Settlement states as follows with regard to the release of the PAGA claim: Plaintiff, acting on behalf of himself, the State of California and the Aggrieved Employees, releases all claims for civil penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter to the LWDA and the Operative Complaint. Settlement, ¶ 6.3.

108. The PAGA Release is limited to the Defendant named in the Operative Complaint, together with Defendant's predecessor, successor, subsidiary, parent, or affiliate as defined by Corporations Code § 150, and each of their current, former and future officers, directors, members, managers, employees, consultants, partners, shareholders, joint venturers, agents, representatives, investors, administrators, predecessors, successors, assigns, accountants, insurers, reinsurers, management companies, and legal representatives. See Settlement, ¶ 1.42 ("Released Parties").

109. The Settlement releases only those claims described in the notice sent by the plaintiff to the LWDA, and only to the extent that they are alleged in the complaint. The



1 Settlement states: Effective on the date when Defendant fully funds the entire Gross Settlement
2 Amount and funds all employer payroll taxes owed on the Wage Portion of the Individual Class
3 Payments, Plaintiff, Class Members, and Class Counsel will release claims against all Released
4 Parties as follows . . . Release of PAGA Claim. Plaintiff, acting on behalf of himself, the State of
5 California and the Aggrieved Employees, releases all claims for civil penalties that could have
6 been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter
to the LWDA and the Operative Complaint. Settlement, ¶¶ 6, 6.3.

7 ***Notice of Settlement to the LWDA***

8 110. Pursuant to Labor Code § 2699(1)(2), Plaintiff has provided notice of this
9 settlement to the LWDA with the filing and service of this motion. A true and correct copy of
10 Plaintiff's submission with the LWDA and a confirmation email is attached hereto as **Exhibit 21**.

11 I declare under the penalty of perjury of the laws of the State of California that the
12 foregoing is true and correct.

13 Executed on Wednesday, June 11, 2025 at New York, New York.

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15 DAVID SPIVAK,
16 Declarant
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