ZACK I. DOMB, SBN 265185
E-Mail zack@dombrauchwerger.com
DEVIN RAUCHWERGER, SBN 274234
E-Mail devin@dombrauchwerger.com
DOMB & RAUCHWERGER LLP
1055 East Colorado Blvd., Fifth Floor
Pasadena, California 91106
Telephone: (213) 537-9225

Attorneys for Plaintiffs
DAVID FREDERICK BITONTI, JR.,
MERRIT LYNN CHASSIE, and the Proposed Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DAVID FREDERICK BITONTI JR. and MERRIT LYNN CHASSIE, individually, and on behalf of others similarly situated, and on behalf of other aggrieved employees pursuant to the Private Attorneys General Act,

Plaintiffs,

vs.

TEEN ROAD TO SAFETY INC., a California corporation; ANDREW WUNDERLICH, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No. 30-2023-01333703-CU-OE-CXC

NOTICE OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM IN SUPPORT THEREOF

Hearing Information:

Date: May 15, 2025
Time: 2:00 p.m.
Dept.: CX104
Judge: Hon. Melissa McCormick

RESERVATION NO.: 74458888

[Filed concurrently with: (1) Declaration of Devin Rauchwerger; (2) Declaration of Plaintiff David Frederick Bitonti, Jr.; (3) Declaration of Plaintiff Merrit Lynn Chassie (4) Declaration of Jodey Lawrence, and (5) [Proposed] Order]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 15, 2025, at 2:00 p.m., or as soon thereafter as this matter may be heard by the Court in Department CX104 of the Orange County Superior Court, at the Civil Complex Center, 751 W. Santa Ana Blvd., Santa Ana, CA 92701, Plaintiffs David Frederick Bitonti, Jr. and Merrit Lynn Chassie, on behalf of themselves and a Settlement Class, will and hereby do move for an Order:

1) Preliminarily approving the proposed class action settlement and PAGA settlement in the above-captioned case;
2) Preliminarily certifying the Settlement Class;
3) Preliminarily approving the appointment of Plaintiffs as Class Representatives;
4) Preliminarily approving the appointment as Class Counsel of Domb & Rauchwerger LLP;
5) Approving appointment of Phoenix Class Action Administration Solutions as the Settlement Administrator;
6) Approving and directing distribution of notice to the Settlement Class; and
7) Setting a final fairness and approval hearing that is at least 120 days after the Court grants Preliminary Approval.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which permits settlement of a purported class action, allows the Court to preliminarily certify a class for settlement purposes.

The proposed settlement is fair, adequate, and reasonable and in the best interests of the settlement class as a whole, and the procedures proposed by the parties are adequate to ensure the opportunity of class members to participate in, opt out of, or object to the settlement.

Date: January 3, 2025

Respectfully submitted,
DOMB & RAUCHWERGER LLP

By: Devin Rauchwerger
Zack I. Domb
Devin Rauchwerger
Attorneys for Plaintiff and the Proposed Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs David Frederick Bitonti, Jr. and Merrit Lynn Chassie (collectively "Plaintiffs," or individually, "Bitonti" or "Chassie") and Defendants Teen Road to Safety, Inc., and Andrew Wunderlich ("Defendants"), have reached a proposed class action and Private Attorneys General Act settlement. Plaintiffs and Defendants (collectively, the "Parties") submit the Joint Stipulation of Class Action and PAGA Settlement (the "Settlement" or "Settlement Agreement") to the Court for its preliminary approval. The Settlement Agreement ("SA") is attached to the Declaration of Devin Rauchwerger ("Rauchwerger Decl.") ¶ 2 as **Exhibit 1**.[1]

The Settlement provides for a **non-reversionary** payment of $220,000 for which Defendants will be separately responsible for any employer payroll taxes. Approximately $101,500 will be available for disbursement to Participating Settlement Class Members (the "Net Settlement Amount"). There are believed to be 29 Class Members, and the average Individual Settlement Payment will be approximately $3,500.00 (not including the separate Individual PAGA Payments that will be paid only to the PAGA Settlement Members).

The Settlement occurred as a result of extensive arm's length negotiations by experienced counsel after sufficient discovery and investigation into the facts with guidance of Lisa Klerman, Esq., a highly experienced and well-respected class action mediator. As detailed below, the Settlement is fair, reasonable, and in the best interests of the Settlement Class.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Pleadings & Nature of The Action

Defendant Teen Road to Safety, Inc. ("Defendant," or "TRTS") was a company that provided automobile driving instruction to students in Orange County. (Rauchwerger Decl. ¶ 3.) TRTS employees would drive to the customers' homes (using company vehicles) and provide them with two-hour lessons. (*Id.*) TRTS ceased operations on or around August 1, 2023. (*Id.*) Plaintiff Bitonti was employed by TRTS as a driving instructor from approximately November 2022 to August of 2023 (when Defendants ceased operations); Plaintiff Chassie was

[1] For ease of reference and consistency, defined terms from the Settlement Agreement are utilized below.

employed by TRTS as a driving instructor from approximately May of 2022 to April of 2023. (Declaration of David Frederick Bitonti, Jr. ("Bitonti Decl.") ¶ 3; Declaration of Merrit Lynn Chassie ("Chassie Decl.") ¶ 3.)

On June 27, 2023, Plaintiffs commenced this Action by filing a Complaint alleging causes of action against Defendants for (1) Violation of Cal. Labor Code §§ 226.2, 510, 558, 558.1, 1194, and 1198 (Unpaid Overtime); (2) Violation of Cal. Labor Code §§ 226.7, 512(a), 558, and 558.1 (Unpaid Meal Period Premiums); (3) Violation of Cal. Labor Code § 226.7, 558, and 558.1 (Unpaid Rest Period Premiums); (4) Violation of Cal. Labor Code §§ 226.2, 558, 558.1, 1194, 1197 and 1197.1 (Unpaid Minimum Wages); (5) Violation of Cal. Labor Code §§ 201, 202, 203, 558, and 558.1 (Final Wages Not Timely Paid); (6) Violation of Cal. Labor Code §§ 558, 558.1, 2800 and 2802 (Failure to Reimburse Necessary Business Expenses); (7) Violation of Cal. Labor Code § 226(a), 558, and 558.1 (Failure to Provide Accurate Wage Statements); (8) Violation of Labor Code §§ 226 and 246(i) (Failure to Provide Written Notice of Paid Sick Leave and Supplemental Paid Sick Leave); and (9) Violation of Cal. Business & Professions Code § 17200, et seq. (Rauchwerger Decl. ¶ 4.) On June 28, 2023, Plaintiffs submitted a letter to the Labor and Workforce Development Agency alleging various violations of the California Labor Code.[2] (*Id.*) A true and correct copy of the June 28, 2023 letter to the LWDA is attached to the Declaration of Devin Rauchwerger as **Exhibit 2**. (*Id.*)

On September 1, 2023, Plaintiffs filed a First Amended Complaint to add a cause of action under the California Private Attorneys General Act (California Labor Code §§ 2699, et. seq.), for which penalties are provided in this Settlement Agreement. (Rauchwerger Decl. ¶ 5.) The First Amended Complaint is the operative complaint in the Action (the "Operative Complaint"). (*Id.*) After making a reasonable inquiry, neither the Parties nor their Counsel are aware of any class, representative or other collective action in any other court that asserts claims similar to those asserted in the action being settled. (Rauchwerger Decl. ¶ 6.)

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[2] Plaintiffs amended the PAGA letter on December 19, 2023 to add in additional Defendants Teen Road To Safety Irvine LLC, Teen Road to safety of Orange Inc, Teen Road To Safety Of Orange LLC, and Teen Road To Safety Upland LLC. (Rauchwerger Decl. ¶ 4.)

B. **Discovery Taken By The Parties**

The parties engaged in extensive informal discovery leading up to mediation on January 30, 2024. (Rauchwerger Decl. ¶ 7.) Prior to the mediation, Class Counsel requested and received class data for purposes of the mediation, including the number of Class Members, Aggrieved Employees, total Workweeks worked by the Class Members during the Class Period, total PAGA Pay Periods, applicable meal and rest period policies and practices, time keeping policies and practices, documents reflecting the Class Members schedules (including the number of lessons that each Class Member taught per day), applicable expense reimbursement policies and practices, and other documents relevant to the litigation. (*Id.*) In total, Defendants produced hundreds of pages of relevant documents prior to the mediation. (*Id.*) Defendants also provided Plaintiffs with a sampling (10 out of the 29 putative class members) of the time sheets and payroll records for the Class. (*Id.*)

Further, the Parties held numerous meetings and informal conferences wherein they exchanged information, additional class data, and theories of the case. (Rauchwerger Decl. ¶ 8.) The Parties also submitted detailed mediation briefs, which outlined the Parties' respective positions in the case. (*Id.*)

C. **Mediation With Lisa Klerman, Esq.**

On January 30, 2024, the Parties participated in a full-day mediation with Lisa Klerman, Esq. (Rauchwerger Decl. ¶ 9.) Ms. Klerman was agreed to by the Parties based on her excellent skills and experience as a mediator in wage-and-hour class actions such as this one. (*Id.*) After contentious and lengthy negotiations, the Parties accepted a settlement proposal of $220,000. (*Id.*) Thereafter, the Parties negotiated the long-form Settlement Agreement, which is now presented to the Court for preliminary approval. (*Id.*)

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III. LEGAL ANALYSIS OF SETTLEMENT

A. Two-Step Settlement Process

Any settlement of class litigation must be reviewed and approved by the Court. (Cal. Rules of Court, rule 3.769; Fed. Rules Civ. Proc. 23(e).[3]) This is done in two steps: (1) a preliminary review by the trial court, and (2) a final review after notice has been distributed to the Settlement Class informing them of the terms of the settlement and allowing them to exclude themselves from and/or object to the settlement.

B. The Settlement Warrants Preliminary Approval Because It Is Fair And Reasonable.

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial Court. (*Wershba v. Apple Computer* (2009) 91 Cal.App.4th 224, 234-35; *Dunk v. Ford Motor Co.* (1966) 48 Cal.App.4th 1794.) Pursuant to California Rules of Court, rule 3.769(d), parties also may, at the preliminary approval stage, request that the Court provisionally approve certification of the class conditional upon final approval of the settlement. "[P]re-certification settlements are routinely approved if found to be fair and reasonable." (*Wershba v. Apple Computer, supra,* at 240.) A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. No one factor should be determinative, but rather all factors should be considered. These criteria have been summarized as follows:

> "If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement."
>
> Manual of Complex Litigation, Second § 30.44, at 229.

Moreover, a proposed settlement is presumptively fair and reasonable where: (1) the

[3] The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, Plaintiffs cite Federal Rule 23 and federal case law in addition to California law.

settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*In re Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389 (citations omitted).) Here, as discussed above and further below, the Settlement meets all these criteria, including having been reached through an arms-length negotiation by way of a mediator's proposal, having a sufficient investigation conducted to determine the settlement is fair, and being agreed to by counsel who all have extensive experience with class actions. (Rauchwerger Decl. ¶ 10.) Furthermore, there is no reason to suspect that the amount of class members objecting will be high. (Rauchwerger Decl. ¶ 11.)

C. **Due To The Risks Of Continued Litigation, The Settlement Is Fair And In The Best Interests Of The Class.**

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel believes that the settlement with Defendants for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, adequate, and is in the best interest of the Class in light of all known risks, facts and circumstances. (Rauchwerger Decl. ¶ 12.) These risks include: the risk of significant delay in class members receiving any type of funds, particularly if the Defendants were to declare bankruptcy given they are no longer in operation; risks associated with a contested class certification; the defenses asserted by Defendants, including the argument that the matters at issue will require individualized issues that make class certification inappropriate; the fact that Defendants ceased operation and therefore no longer has any operating income with which to pay a large settlement; the prospect of Defendants obtaining releases from putative class members; Defendants having its employees sign arbitration agreements, exempting them from participation in a class action lawsuit, and numerous potential appellate issues. (Rauchwerger Decl. ¶ 12.)

Finally, the Settlement was reached after lengthy negotiations, exchange of information, and with the assistance and supervision of Lisa Klerman, who has mediated numerous wage-and-hour class actions, and clearly qualifies to oversee serious and informed negotiations conducted by the Parties. (See *Toure v. Amerigroup Corp.* (E.D. N.Y. 2012) 2012 WL 1432302, at *1 ("The assistance of an experienced mediator, Linda Singer, Esq., reinforces that the Settlement Agreement is non-collusive"); *Morales v. Stevco, Inc.* (E.D. Cal. 2011) 2011 WL 5511767, at *11 (concluding that the class action settlement was not collusive because "[t]he parties utilized an impartial mediator, and the matter was 'resolved by means of a mediator's proposal.'").)

D. The *Kullar* Requirements

In *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, the Court of Appeals explained that, although "not exhaustive," a determination of whether a settlement is "fair, adequate and reasonable" should take into account the strength of a plaintiff's case, the risk, expense, complexity and the likely duration of further litigation. (*Id.* at 127-128.) Subsequently, in *Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, the Court of Appeals clarified:

> "[Appellant] misunderstands *Kullar*, apparently interpreting it to require the record in all cases to contain evidence in the form of an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims—a number which appears nowhere in the record of this case. But Kullar does not, as [Appellant] claims, require any such explicit statement of value; it requires a record, which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."

(*Id.* at 409 (quoting *Kullar*, 168 Cal.App.4th at 120))

Here, the potential damages for the causes of action asserted in the Action along with the relative risks, complexities, and expenses are detailed below. The key data points and associated documentation upon which Plaintiffs relied in analyzing the exposure (as of the date of mediation) are as follows:

- Total Class Size: **29**.
- Total number of Workweeks worked by the Class Members during the Class Period: **2,877.**
- Total Aggrieved Employees: **19.**
- Total PAGA Pay Periods: **425**.
- Average Regular Rate: **$33.45** per hour**.**

(Rauchwerger Decl. ¶ 13.)

1. **Failure to Pay Minimum and/or Overtime Wages.**

Defendants paid class members on a "per-lesson" (e.g., piece-rate) basis of $60 per two-hour lesson, although the amount somewhat varied depending on the time period. (Rauchwerger Decl. ¶ 14.) Plaintiffs contend that they and the other putative class members are owed additional compensation off-the-clock work because Defendants maintained a policy and practice of not paying employees for their drive time between lessons and for time spent taking rest breaks. (*Id.*) Furthermore, Plaintiffs contend that they were entitled to overtime for work performed in excess of 8 hours per day and/or 40 hours in a week; however, due to Defendants' policy of paying class members on a flat-rate basis, Defendants never paid class members overtime. (*Id.*) To determine Defendants' potential exposure for these claims, Plaintiffs' counsel analyzed the sample time and pay records provided by Defendants and compared with the employee pay records. (*Id.*)

It is well-settled in California that "non-productive" time (such as time spent traveling between lessons) is compensable as time worked. (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 317.) The lessons that Plaintiffs and the class members taught were structured so that they took two hours each and employees were required to travel directly from one lesson to another lesson; lessons were scheduled so that there was 30 minutes between the end of one lesson and the beginning of the next lesson. (Rauchwerger Decl. ¶ 15.) Thus, Plaintiffs' counsel calculated the uncompensated "drive time" on days in which class members taught more than one lesson as 30 minutes for each lesson beyond the first. (*Id.*) By applying this formula to the sample data which Defendants provided for the purposes of mediation, Plaintiffs' counsel determined there was a total of 903 unpaid driving hours in the sample. (*Id.*) Extrapolating that figure out to the full class, Plaintiffs' counsel estimated that there was a total of 2,709 unpaid driving hours for the class. (*Id.*) Plaintiffs' counsel then calculated the uncompensated drive time at the then-applicable minimum wage of $14 (since this non-productive time does not need to be compensated at the regular rate) to reach an uncompensated drive time figure of $37,926. (*Id.*)

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In addition to uncompensated drive time, the overtime and minimum wage claims also include an estimated figure for damages incurred due to working through rest breaks without being compensated for the time spent on authorized rest breaks. (Rauchwerger Decl. ¶ 16.) California's Wage Order No. 4 provides that "[a]uthorized rest period time shall be counted as hours worked for which there shall be no deduction from wages." (Cal. Code Regs., tit. 8, § 11040, subd. 12.) Moreover, California Labor Code section 226.2(a)(1) states that "Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation." Based on Plaintiffs' counsel's analysis of the sample data, counsel was able to determine that there were 268 hours and 20 minutes of uncompensated rest period time at issue; extrapolated out to the entire class, the total rest break time owed for the entire class is 805 hours. (Rauchwerger Decl. ¶ 16.) Multiplied by the $33.45 average hourly rate, the total potential loss to the employees for unpaid rest break time is $26,927.25. (*Id.*)

The unpaid overtime claims were calculated by reviewing the records, allocating two hours of work time for each lesson, an additional 30 minutes of work time for each scheduled lesson beyond the first (for drive time, as discussed above), and then comparing these figures to the pay records. (Rauchwerger Decl. ¶ 17.) Analysis of the sample data using this formula showed that there was a total of 531.5 hours of overtime that should have been paid out; extrapolating the sample figure out to the full class results in 1,594.5 hours which should have been paid as overtime. (*Id.*) Multiplying the overtime hour figure by $16.725 (1/2 of the regular hourly rate of $33.45, which is the unpaid portion) results in a potential damages exposure of $26,668.01 for unpaid overtime. (*Id.*) In total, the estimated amount owed for all minimum and overtime wages is approximately $91,521.26. (*Id.*)

The risks related to proving these off-the-clock wage, overtime and minimum wage claims are significant. First of all, Plaintiffs would need to demonstrate that employees were actually uncompensated for their drive time and/or rest break time. (Rauchwerger Decl. ¶ 18.) Defendants have alleged and have claimed that employees were actually compensated for their drive time and that drive time was built-in to a flat rate which Defendants paid its driving instructors for each lesson given. (*Id.*) Further, it is impossible to discern from the records the exact amount of off-the-clock work that each employee performed and what they are entitled to; these questions could be viewed as creating individualized issues inappropriate for class certification. (*Id.*) Furthermore, the unpaid rest break claims are subject to a showing that employees both actually received rest breaks and that they were uncompensated for their time spent on rest breaks. (*Id.*) Plaintiffs have also contended that Defendants did not provide rest breaks at all, which would be subject to rest period premiums as discussed below rather than for off-the-clock work. (*Id.*)

2. <u>Failure to Provide Meal & Rest Periods (Lab. Code §§ 204, 223 226.7, 512 and 1198)</u>

Plaintiffs contend that they and the other Class Members routinely did not receive lawful and compliant meal periods and that Defendants failed to keep any records of any meal breaks that the class members took. Plaintiffs also contend that they and the other Class Members did not receive rest breaks and were never provided with an instruction or opportunity to do so. The premium owed for failing to provide a legally mandated meal or rest period, providing a short or interrupted meal or rest period, is payment of one hour of wages at the employee's regular rate of pay. The range of this claim depends on the number of meal and rest periods that Class Members were denied as a result of Defendant's policies.

Plaintiffs' counsel calculated the amount of meal breaks at issue in this matter by analyzing the sample set of Class Data to determine the number of occasions when an employee should have received a meal break (which would have been when the employee taught at least three lessons in a day), and then extrapolated the results out to the remainder of the Class Members not included in the data set. (Rauchwerger Decl. ¶ 19.) The data showed that the employees should have received a meal break 22.5% of the time. (*Id.*) Given this percentage, Plaintiffs' counsel assumed that employees suffered one meal break violation per week. Using the above average rate of $33.45, the calculation of $33.45 x 2,877 workweeks in the class period results in potential exposure of $96,235.65 (*Id.*)

Plaintiffs' counsel calculated the amount of rest breaks at issue in this matter by analyzing the sample set of Class Data to determine the number of occasions when an employee should have received at least one rest break (which would have been any occasion when an employee taught at least two lessons in a day). (Rauchwerger Decl. ¶ 20.) The sample data showed that employees should have received at least one rest break in 75.4% of instances. (*Id.*) Class Counsel calculated the potential exposure for missed rest periods by taking the number of workweeks (2,877), multiplying that figure by 5 to get the number of workdays (14,385). (*Id.*) Then, Class Counsel took 75.4% of that amount to determine the expected number of days (10,846) where employees would have been entitled to a rest break. (*Id.*) Multiplying this figure by the average hourly rate ($33.45 x 10,846 days) results in a reasonable exposure of $362,798.70. (*Id.*)

There are unique risks to the unrecorded rest period claims. Employers are not required to record rest periods and such rest periods are paid. Thus, unlike meal periods, where there are often records showing whether an employee was subject to a violation, there is no such evidence to prove a missed rest period. Managing such claims at trial may be exceedingly difficult. Plaintiffs will depend on sample witness testimony and surveys to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. (See *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 31 (explaining "[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling.").)

3. <u>Failure to Reimburse Necessary Business Expenses (Lab. Code § 2802) and Failure to Maintain Records (Lab. Code § 1174)</u>

Although Plaintiffs asserted causes of action for violation of California Labor Code sections 1174 (failure to maintain accurate records) and 2802 (reimbursement), Plaintiffs' counsel does not believe there are significant, if any, damages associated with these claims, as employees drove company cars. (Rauchwerger Decl. ¶ 21.) California Labor Code section 1174 does not contain a private right of action; penalties pursuant to Section 1174.5 are civil penalties only recoverable by the Labor Commissioner or through PAGA (Section 1174.5 provides that the total amount of such recoverable penalties is $500). (*Id.*) Based on Class Counsel's investigation of the claims, Plaintiffs do not believe that there are any provable damages associated with the cause of action for business expense reimbursement claim because it did not appear that Class Members actually incurred business-related expenses as a part of their job duties. (*Id.*) As such, Plaintiffs have not allocated damages to these claims. (*Id.*)

4. <u>Failure to Provide Accurate Written Wage Statements (Lab. Code § 226 (a))</u>

Plaintiffs contend that due to working off the clock and lack of premium pay for noncompliant meal/rest periods and/or accurate calculation and payment of wages, the Class Members' wage statements were not accurate. (*See Naranjo v. Spectrum Sec. Servs., Inc.* (2022) 13 Cal.5th 93, 117 (Because premium pay for missed meal and rest breaks under Lab. Code, § 226.7 compensated employees for the work performed during a break period and therefore constituted wages within the meaning of Lab. Code, §§ 200, subd. (a), 203, 226, penalties are available for an employer's alleged failure to timely pay or report such payments.).) Pursuant to Labor Code section 226(e), statutory damages are "fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)." As proving actual damages for each employee on a class-wide basis is unlikely, this claim would likely be subject to a one-year statutory period.[4]

Plaintiffs contend that each paystub failed to include complete itemizations for monies owed, including overtime, the number of hours the Class Members worked and the appropriate hourly rates, the appropriate piece-rate shift information, and the meal and rest break premiums owed to the Class Members. (Rauchwerger Decl. ¶ 22.) The Class Members worked 425 pay periods during the PAGA period (which coincides with the same one-year statutory period) and

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[4] "Courts that have recognized that two limitations periods apply to Section 226 have uniformly found that the $50 and $100 figures recoverable under Section 226(e)(1) are penalties, subject to a one-year limitation period." *Novoa v. Charter Communs., Ltd. Liab. Co.* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1025 (citing *Taylor v. W. Marine Prods.* (N.D. Cal. Sep. 19, 2014) No. C 13-04916 WHA, 2014 U.S. Dist. LEXIS 133728, at *7; *Sarkisov v. Stonemor Partners* (N.D. Cal. Apr. 3, 2014) *L.P.*, No. C 13-04834 WHA, 2014 U.S. Dist. LEXIS 47021, at *2; *Mouchati v. Bonnie Plants, Inc.* (C.D. Cal. Mar. 6, 2014) No. EDCV 14-00037-VAP (SPx), 2014 U.S. Dist. LEXIS 60855, at *8-9; *Singer v. Becton, Dickinson & Co., Med.-Safe Sys.* (S.D. Cal. July 23, 2008) No. 08cv821 IEG (BLM), 2008 U.S. Dist. LEXIS 56326, at *4-5.

there were 19 employees during that period. (*Id.)* To calculate the potential exposure for this claim, Plaintiffs' counsel assigned $50 penalties for 19 pay periods for the first violation ($950), and the remaining 406 pay periods were assigned $100 penalties as subsequent violations ($40,600). (*Id.*) This results in exposure of $41,550. (*Id.*)

There are some hurdles to obtaining class certification that would apply to this claim. Defendants contend that the wage statements were accurate in all material respects and that Labor Code section 226 requires "a knowing and intentional failure by an employer to comply with subdivision (a)." (*See* Lab. Code § 226(e); *see also* Lab. Code § 226(e)(3) (For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake.")) In this regard, Defendants contend that any failure to include information on wage statements was an inadvertent or isolated mistake.

5. <u>Failure to Timely Pay All Final Wages (Lab. Code §§ 201, 202 and 203)</u>

An employer who willfully fails to pay any wages due to a terminated employee at the time of their termination or within 72 hours for employees who quit, may be assessed a waiting time penalty pursuant to California Labor Code section 203. The waiting time penalty is an amount equal to the employee's daily rate of pay for each day the wages remain unpaid, up to a maximum of 30 calendar days. All 29 Class Members are separated employees, as Defendants had fully shut down its operations in August of 2023. (Rauchwerger Decl. ¶ 23.) An analysis of the sample data of all hours worked showed that class members worked an average of 4.92 hours per day. (*Id.*) Using the hourly rate of $33.45, the potential exposure for waiting time penalties is $143,179.38 ($33.45/hour x 4.92 hours/per x 30-day maximum x 29 separated employees). (*Id.*) However, to prevail under Section 203, Plaintiffs must establish not only the underlying violations addressed above and that the wages were paid late, but also that Defendants' failure to timely pay such wages was willful. (Lab. Code § 203(a)) A good faith belief in a legal defense precludes any finding of willfulness. (*Gonzalez v. Downtown LA Motors* (2013) 215 Cal.App.4th 36, 54.)

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6. <u>Civil Penalties pursuant to the Private Attorney General Act ("PAGA") (Lab. Code § 2698 *et seq*.)</u>

PAGA penalties for unpaid minimum wages and meal period violations are $100 per pay period for each initial violation and $200 per pay period for any subsequent violation. (Lab. Code § 2699(f)(2).) Courts have held that there is no "subsequent violation" until an employer has been notified by the Labor Commissioner or a court that its practices are in violation of the law. (*Amaral v. Cintas* (2008)163 Cal.App.4th 1157). A Court also may award a lesser amount "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." (Lab. Code § 2699 (e)(2).) The statute of limitations under PAGA is one year.

There are 425 pay periods in the PAGA period. (Rauchwerger Decl. ¶ 24.) Assuming that no penalty "stacking" will apply (i.e. the imposition of multiple penalties per pay period) and that the Court will use the violation rate of $100 per pay period, potential PAGA penalties equal $42,500. (*Id.*) Plaintiffs' PAGA claims are also predicated on the violations described above, and thus subject to the same disputes and defenses. (*Id.*) Additionally, PAGA states that a court has discretion to award a lesser amount than the maximum penalty. (Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 528-529 (affirming the trial court's PAGA penalty award of $5 per violation). These uncertainties increased the risks related to the PAGA cause of action.

Pursuant to California Labor Code section 2699(l), the Settlement Agreement has been provided to the Labor and Workforce Development Agency and a proof of service has been concurrently filed and is also attached as **<u>Exhibit 4</u>** to the Declaration of Devin Rauchwerger. (Rauchwerger Decl. ¶ 25.) The amount to be paid to the LWDA ($7,500 of the $10,000 total) comports with PAGA settlement amounts approved by other courts[5] and is fair to both the State

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[5] *See Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of $7,500 to LWDA out of $6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of $7,500 to LWDA out of $1.25 million common fund settlement); *Hicks v. Toys 'R' Us–Delaware, Inc.* (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving

of California and the persons affected, as the PAGA claims are merely derivative of the class claims towards which most of the settlement is allocated. (See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77.)

7. <u>Unfair Competition (Bus & Prof. Code § 17200 *et. seq.*)</u>

Though a plaintiff may assert a UCL claim for purported wage violations, remedies are still limited to restitution and injunctive relief. (See *Korea Supply v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1148-51; see also *Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 173.) In wage-and-hour class actions, a UCL claim typically has little to no independent value and is instead pled for the purposes of extending the statute of limitations on unpaid wage claims to four years. The unfair competition law's (UCL) four-year limitations period, rather than the shorter periods of limitation applicable to contractual or statutory wage claims, governs a UCL action based on failure to pay wages because the UCL provides that "any" action on "any" UCL cause of action is subject to the four-year period of limitations. (*Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 178.)

IV. <u>CLASS CERTIFICATION ANALYSIS</u>

A. <u>The Class Is Properly Certified For Settlement Purposes.</u>

Plaintiffs seek certification of this action for settlement purposes under California Code of Civil Procedure section 382. The California Supreme Court has summarized that:

> "Code of Civil Procedure section 382 authorizes class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."

(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (internal citations omitted)).

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$5,000 PAGA payment in a case involving $4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of $10,000 as part of $2.5 million settlement).

While Defendants reserve all rights to dispute Plaintiffs' ability to satisfy any of these requirements, the Parties agree that for purposes of settlement, Defendants will not raise such a dispute. (Rauchwerger Decl. ¶ 26.) Therefore, the proposed Settlement Class should be certified for purposes of settlement.

1. The Proposed Class is Numerous and Ascertainable

The class consists of 29 members with specifically identifiable information. (SA § 9) The requirement of Code of Civil Procedure section 382 that there be "many" parties to a class action suit is indefinite and has been construed liberally. (*Renken v. Compton City School Dist.* (1962) 207 Cal.App.2d 106, 113.) No set number is required as a matter of law for the maintenance of a class action. (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030; See also *Bowles v. Superior Court* (1955) 44 Cal.2d 574 (class with 10 members sufficiently numerous); see also *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 (class of 48 members satisfies the numerosity requirement).) Class members are "ascertainable" where they may be readily identified without unreasonable expense or time by reference to official records. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) Here, the class is sufficiently numerous because there are 29 employees in the Class, and there is a common interest to many persons as this claim will confer significant benefits to those persons. (Rauchwerger Decl. ¶ 27.) Furthermore, it would be impracticable to bring all of them before the Court on an individual basis. (*Id.*) Moreover, the Class is readily ascertainable as Defendants are in possession of contact information for its current and former employees via regularly maintained employment records. (*Id.*)

2. The Community of Interest Requirement Is Also Satisfied.

"The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) Here, the common questions of law and fact clearly exist, as the underlying dispute involves Defendants' employment policies and practices which affected all the employees in the proposed Class. (Rauchwerger Decl. ¶ 28.)

Plaintiffs are typical of the class they seek to represent because Plaintiffs worked for Defendants, contend that the alleged violations occurred as a result of common policies affecting all of the putative Class Members. (Bitonti Decl. ¶¶ 3-4; Chassie Decl. ¶¶ 3-4)

B. <u>Class Counsel Has Extensive Experience In Class Actions And Similar Cases.</u>

Class Counsel has extensive experience in similar cases and believe that the proposed Settlement is adequate, reasonable, fair, and in the best interests of all class members. (Rauchwerger Decl. ¶¶ 10, 29-30.)

C. <u>The Class Representatives Are Adequate.</u>

Plaintiffs Bitonti and Chassie are adequate Class Representatives who have similar, co-extensive interests with the proposed Class Members. (Rauchwerger Decl. ¶ 31.) Plaintiffs have remained intricately involved in this lawsuit and have understood their responsibilities with respect to the class. (Bitonti Decl. ¶ 5; Chassie Decl. ¶ 5.) Plaintiffs understood from the beginning that they had a duty to look out for the best interests of the Class, and that by taking on this case, they were agreeing to take on significant responsibility, which could include having to be deposed and provide extensive information to respond to discovery requests, as well as potentially testifying at trial. (*Id.*) Plaintiffs have taken their responsibilities as Class Representatives seriously and have learned the laws as they relate to the payment of wages, requirements for meal and rest periods, and other issues related to this Action. (Bitonti Decl. ¶ 6; Chassie Decl. ¶ 6.) Moreover, Plaintiffs are unaware of any conflicts between their own interests and goals and the interests and goals of anyone else in the Class. (Bitonti Decl. ¶ 7; Chassie Decl. ¶ 7.)

D. <u>The Proposed Enhancement Payments To Plaintiffs Are Reasonable.</u>

In connection with the final approval hearing, Class Counsel will request approval of a Class Representative Enhancement Payment of $7,500 to Plaintiff Bitonti and $5,000 to Plaintiff Chassie for their services as class representatives and in consideration for a general release of all claims against Defendants. These amounts are based on the extent of Plaintiffs' assistance in this lawsuit, including providing relevant information and documents to Class Counsel, answering various questions and providing additional information throughout the entirety of the case, reviewing the complaint and reviewing the settlement agreement and having related discussions. (*See* e.g., Bitonti Decl. ¶¶ 4-6, Chassie Decl. ¶¶ 4-6.) This amount is also reasonable given that Plaintiffs are providing a general release of all known and unknown claims against Defendants. The requested incentive payment is well within the accepted range of awards for purposes of preliminary approval. (*See*, e.g. *In re Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393).

E. <u>Settlement Administration Costs are Reasonable.</u>

The parties solicited bids for settlement administration work and have agreed upon Phoenix Settlement Administrators. Phoenix works in the settlement administration business, and costs of administration should not exceed $5,000.00, which was the most cost-efficient bid the parties were able to obtain for administration of a class of this size. (Declaration of Jodey Lawrence ("Lawrence Decl.") ¶ 15.) Plaintiffs respectfully request that the Court approve the appointment of Phoenix Settlement Administrators as the Settlement Administrator. The qualifications of Phoenix Settlement Administrators to administer this settlement are included in the concurrently filed Declaration of Jodey Lawrence, Phoenix's President of Business Development (See, e.g., Lawrence Decl. ¶¶ 2-11.)

V. <u>THE PROPOSED SETTLEMENT</u>

A. <u>The Settlement Class & Released Claims</u>

<u>Class & Class Size</u>: The "Class," "Class Members" or "Settlement Class" is defined as: "all current and former non-exempt employees of Defendants employed as driving instructors within the State of California during the Class Period." (SA § 1.5.) The "Class Period" means the period from June 27, 2019 to August 1, 2023. (SA § 1.12.) Class Members who do not submit a valid and timely request for exclusion from the Class Settlement are referred to as the "Participating Class Members." (SA § 1.36.)

<u>Release</u>: The scope of the release for Participating Class Members is limited only to those claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint. (SA § 5.2.) Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair

Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period. (*Id.*) The named Plaintiffs have agreed to a broader release, which only applies to the named Plaintiffs. (SA § 5.1-5.1.1.) Plaintiffs, as agents and proxy of the LWDA, also agree to release all claims for civil penalties under PAGA. (SA § 5.3.) The effective date of the release will be on the date when Defendants fully fund the entire Gross Settlement Amount and fund all employer payroll taxes, which will be 30 days following the Effective Date of the Settlement Agreement. (SA § 4.3.) The "Effective Date" of the Settlement Agreement is the date on which both of the following have occurred: (a) the Court has entered a Judgment on its Order Granting Final Approval of the Settlement; and (b) the Judgment is final and not subject to appeal. (SA § 1.19)

B. The Settlement Payment

Defendants will, through the Settlement Administrator, create a ***non-reversionary*** settlement fund in the amount of Two-Hundred Twenty Dollars ($220,000) ("Gross Settlement Amount"). (SA § 3.1.) The settlement is allocated such that one-third (33 1/3%) of the recovery will be considered wages, and any employer share of payroll taxes that become due shall be paid separate and apart from the Gross Settlement Amount by Defendant. (SA § 3.1; 3.2.4.1.) The Escalator Clause provides if, as of the date of preliminary approval, the verified count of the number of workweeks increases by more than 10% for the Class Period, the Gross Settlement Amount shall be increased proportionately (thereby increasing other amounts such as the Class Counsel Fees Payment proportionately above the 10% amount, but not increasing the Class Representative Service Payment, Class Counsel Litigation Expenses Payment or Administration Expenses). (SA § 8.)

C. Settlement Payment Distribution Plan

All expenses associated with the Settlement are to be paid from the Settlement's Gross Settlement Amount (SA § 3.2-3.3), including up to $77,000.00 to Class Counsel for attorneys' fees (35% of the Gross Settlement Amount), up to $14,000.00 to Class Counsel for reimbursement of litigation expenses incurred (SA § 3.2.2); Settlement Administration expenses not to exceed $5,000 to be paid to the qualified Settlement Administrator Phoenix to administer the notice and process payments (SA § 3.2.3); Class Representative Service Payments of $7,500 to Plaintiff Bitonti and $5,000 to Plaintiff Chassie for their services as class representatives and in consideration for a general release of all claims against Defendants (SA § 3.2.1); and a PAGA Payment of $10,000 in resolution of any claims that have been or could have been asserted under the Private Attorney General Act of 2004 ("PAGA"), codified in California Labor Code section 2698, *et seq.*, pertaining to the allegations in the Operative Complaint and the PAGA letter sent to the LWDA. Pursuant to California Labor Code section 2699(i), and subject to approval by the Court under California Labor Code section 2699(l), $7,500 or 75% of the PAGA Settlement Amount will be paid to the California Labor and Workforce Development Agency, in resolution of the PAGA claims for the Aggrieved Employees. The remaining $2,500 of the PAGA Settlement Amount will be paid to the Aggrieved Employees through Individual PAGA Payments. (SA § 3.2.5.) For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue." (SA § 4.4.3)

1. <u>Calculating Participating Class Members' Individual Settlement Payments</u>

All Participating Class Members will receive an Individual Class Payment. After deducting the amount of the fees award, the costs award, the enhancement award to Plaintiff, the Settlement Administrator expenses that are all finally approved by the Court, and the PAGA penalty amounts, the remaining "Net Settlement Amount" will be distributed to the Participating Class Members through "Individual Settlement Payments." (SA § 1.29.)

Individual Class Settlement Payments will be paid from the Net Settlement Amount and calculated by taking the total number of days that all Class Member taught at least 2 lessons in a day during the Class Period ("Qualifying Shift") and dividing that by the number of days that a particular Class Member worked a Qualifying Shift during the Class period.[6] (SA §§ 1.24, 1.40, 3.2.4.) The estimated Net Settlement Amount will be approximately $101,500.[7] (Rauchwerger Decl. ¶ 32.) Based on these figures, the average Individual Settlement Payment is approximately $3,500.00. (*Id.*)

All Individual Settlement Payments will be allocated as follows: (i) One Third (33 1/3%) of each Individual Settlement Payment will be allocated as wages for which IRS Forms W-2 will be issued and there will be tax withholdings on this amount; and (ii) Two Thirds (66 2/3%) will be allocated as non-wages (penalties, interest, and expense reimbursement) for which IRS Forms 1099-MISC will be issued and there will not be tax withholdings on this amount. (SA § 3.2.4.1.) The Parties agree that the formula for allocating the Individual Settlement Payments to Participating Class Members is reasonable and that the payments provided herein are designed to provide a fair settlement to such persons, in light of the uncertainties regarding the calculation of alleged wages, penalties, interest, and expense reimbursement to each Participating Class Member. (Rauchwerger Decl. ¶ 33.)

2. <u>Calculating PAGA Settlement Members' Individual PAGA Payments</u>

Individual PAGA Payments will be calculated as a *pro rata* share of the 25% of the PAGA Penalties according to the number of pay periods worked during the PAGA Period. The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties, $2,500, by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying

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[6] Plaintiffs' counsel believes that assigning monetary value to employees based on the number of occasions they taught at least two lessons in a day more accurately compensates the Class Members as opposed to using the standard work week calculation. (Rauchwerger Decl. ¶ 34.) It would be very unlikely that a Class Member who only taught one lesson in a day would have incurred any violation on that particular day as they would not have worked any non-compensated drive time between lessons (since they only taught one lesson) and they would not have worked long enough to incur either a rest break or meal break violation. (*Id.*) As such, this manner of awarding the funds to Class Members eliminates any shifts when an employee only taught one lesson. (*Id.*)

[7] The estimated Net Settlement Amount of $101,500 is calculated by taking the $220,000 Gross Settlement Amount and subtracting: the requested attorneys' fees of 35% of the Gross Settlement Amount ($77,000), reimbursement of litigation costs (in the maximum amount of $14,000), Class Representative Enhancement Payments of $7,500 to the named Plaintiff Bitonti and $5,000 to the named Plaintiff Chassie, Settlement Administrator costs in the maximum amount of $5,000, and PAGA penalties in the amount of $10,000. (Rauchwerger Decl. ¶ 32.)

the result by each Aggrieved Employee's PAGA Pay Periods. (SA § 3.2.5.1.)

3. <u>Distributions To Settlement Class</u>

No claim form will be required for the Individual Settlement Payment to be sent. (SA § 3.1.) Within fourteen (14) days after Defendants funds the Settlement, the Settlement Administrator will mail checks for all Individual Class Payments, the Administration Expenses Payment, the Class Counsel Fee Payment, Class Counsel Litigation Expense Payment and the Class Representatives Service Payments. (SA § 4.4.)

D. <u>Notice To the Class Members</u>

Attached to the Declaration of Devin Rauchwerger as **<u>Exhibit 5</u>** is the [Proposed] Notice of Class Action Settlement and Hearing Date for Final Court Approval. (Rauchwerger Decl. ¶ 35.) The notice is only being sent in English as none of the Class Members are Spanish only speakers. To protect the rights of absent class members, the court must provide class members with the best class action settlement notice practicable. (See Cal. Rules of Court, rule 3.769(f); *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12.) The primary purpose of class notice is to provide affected parties with due process rights reasonably calculated to apprise interested parties of the pendency of the action affecting their interests and an opportunity to present their objections. (See *Ryan v. Cal. Interscholastic Fed'n – San Diego Section* (2001) 94 Cal.App. 1048, 1072.) The proposed Notice of Class Action Settlement and Hearing Date for Final Court Approval satisfies these requirements. The proposed Class notices ensure the Settlement Class is alerted to the terms of the Settlement and allows them to protect their rights. The proposed notice plan, calling for first-class mailed notice to all members of the Settlement Class is consistent with noticed approved by State and Federal Courts and constitutes the best notice practicable. (*Cartt v. Super. Ct.* (1975) 50 Cal.App.3d 960, 966; *Cooper v. Am. Sav. & Loan Ass'n.* (1976) 55 Cal.App.3d 274, 285.) The Settlement Agreement calls for Class Notice to be mailed to Class Members no later than 14 days after receipt of the Class Data (SA § 7.4.2.), which must be received by the Administrator no later than 21 days after date the Court grants Preliminary Approval of the Settlement. (SA § 4.2.) In the event that a class member files an objection or a dispute of the Qualifying Shifts or Paga Pay Periods they are allocated, the settlement administrator has final authority over the decision (SA § 7.8.4.)

VI. CONCLUSION

For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair, adequate, and reasonable and that it is in the best interest of the Class Members. Under the applicable class action criteria and guidelines, this Class should be conditionally certified, the Settlement should be preliminarily approved, the Class should be notified regarding the Settlement, and the Court should schedule a final approval hearing for 120 days after the Court grants Preliminary Approval.

Dated: January 3, 2025

Respectfully submitted,
DOMB & RAUCHWERGER LLP

By: Devin Rauchwerger
Zack I. Domb
Devin Rauchwerger
Attorneys for Plaintiffs,
DAVID FREDERICK BITONTI, JR.,
MERRIT LYNN CHASSIE
and the Proposed Class