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

EDWIN AIWAZIAN, SBN 232943
E-mail: edwin@calljustice.com
ARBY AIWAZIAN, SBN 269827
E-Mail: arby@calljustice.com
JOANNA GHOSH, SBN 272479
E-Mail: joanna@calljustice.com
ELIZABETH PARKER-FAWLEY, SBN 301592
E-Mail: elizabeth@calljustice.com
LAWYERS *for* JUSTICE, PC
410 West Arden Avenue, Suite 203
Glendale, California 91203
Tel: (818) 265-1020 / Fax: (818) 265-1021

Attorneys for Plaintiffs
REBECCA HANNETT, MITZI YALOHA BURCIAGA, and the Proposed Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE – CIVIL COMPLEX CENTER

REBECCA HANNETT, individually, and on behalf of other members of the general public similarly situated; MITZI YALOHA BURCIAGA, individually, and on behalf of other members of the general public similarly situated and on behalf of other aggrieved employees pursuant to the California Private Attorneys General Act;

Plaintiffs,

vs.

SERENDIPITY HEARING, INC., a California corporation; WILLARD CLAYTON GILILLAND, individually; SONUS HEARING CARE PROFESSIONALS, an unknown business entity; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 30-2021-01216930-CU-OE-CXC
(*Related to Case No.: 30-2021-01229201 and Consolidated for Pre-Trial Purposes Only*)

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

<u>Hearing Information</u>:

Date: March 27, 2025
Time: 2:00 PM
Dept.: CX104
Judge: Hon. Melissa McCormick

RESERVATION NO: 74417842

[Filed concurrently with: (1) Declaration of Devin Rauchwerger; (2) Declaration of Plaintiff Rebecca Hannett; (3) Declaration of Plaintiff Mitzi Yaloha Burciaga; (4) Declaration of Elizabeth Parker-Fawley; (5) Declaration of Jodey Lawrence, and (6) [Proposed] Order]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on March 27, 2025, at 2:00 pm, or as soon thereafter as this matter may be heard by the Court in Department CX104 of the Orange County Civil Complex Center, located at 751 W. Santa Ana Blvd Santa Ana, CA 92701, Plaintiffs Rebecca Hannett and Mitzi Yaloha Burciaga, on behalf of themselves and a Settlement Class, will and hereby do move for an Order:

1) Preliminarily approving the Parties' proposed Class Action Settlement Agreement as fair, adequate and reasonable;
2) Conditionally and preliminarily certifying the Settlement Class for settlement purposes only;
3) Preliminarily approving the appointment of Plaintiffs as Class Representatives;
4) Preliminarily approving the appointment of Lawyers for Justice, P.C. and Domb & Rauchwerger LLP as Class Counsel;
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 approximately 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, and allows the Court to conditionally certify a class for settlement purposes.

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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: November 1, 2024

Respectfully submitted,

DOMB & RAUCHWERGER LLP

By: Devin Rauchwerger

Zack Domb
Devin Rauchwerger
Attorneys for Plaintiffs Rebecca Hannett,
Mitzi Yaloha Burciaga, and the Proposed Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Rebecca Hannett and Mitzi Yaloha Burciaga ("Plaintiffs") and Defendants Serendipity Hearing, Inc., Willard Clayton Gililland, and Sonus Hearing Care Professionals ("Defendants") have reached a proposed class action and PAGA settlement. Plaintiffs now submit the Class Action and PAGA Settlement Agreement (the "Settlement," "Settlement Agreement," or "SA") to the Court for its preliminary approval. The Settlement Agreement is attached to the Declaration of Devin Rauchwerger ("Rauchwerger Decl.") as **Exhibit 1**[1]. (Rauchwerger Decl. ¶ 2.)

The Settlement provides for a **non-reversionary** payment of $325,000 for which Defendant will be separately responsible for any employer payroll taxes. Approximately $121,500 will be available for disbursement to Participating Settlement Class Members and Aggrieved Employees (the "Net Settlement Amount"). There are believed to be 339 Class Members as of the date of this Motion. Based on this figure, the average Individual Settlement Share will be approximately $358.41 (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 Brandon McKelvey, 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

Defendants Serendipity Hearing Inc. and Sonus Hearing Care Professionals operate a chain of hearing health clinics that offer personalized care, testing and equipment for persons who are hearing impaired. (Rauchwerger Decl. ¶ 3.) Defendants employed Plaintiff Hannett as an hourly-paid non-exempt Administrative Assistant from approximately February 2019 to approximately April 2020, in Orange County, California. (Rauchwerger Decl. ¶ 3; Declaration of

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

Rebecca Hannett ("Hannett Decl.") ¶ 3.) Defendants employed Plaintiff Burciaga as an hourly-paid, non-exempt Patient Care Coordinator from approximately March 2022 to approximately November 2022, in Los Angeles County, California. (Rauchwerger Decl. ¶ 3; Declaration of Mitzi Yaloha Burciaga ("Burciaga Decl.") ¶ 3.)

On August 16, 2021, Plaintiff Hannett filed a class action complaint in the Orange County Superior Court, case number 30-2021-01216930-CU-OE-CXC naming Serendipity Hearing, Inc. as the sole defendant. (Rauchwerger Decl. ¶ 4.) The Complaint alleged ten causes of action for: (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime), (2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums), (3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums), (4) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages), (5) Violation of California Labor Code §§ 201 and 202 (Final Wages Not Timely Paid), (6) Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment), (7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements), (8) Violation of California Labor Code § 1174(d) (Failure To Keep Requisite Payroll Records), (9) Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses), (10) Violation of California Business & Professions Code §§ 17200, *et seq.* (*Id.*) On October 29, 2021, Plaintiff Hannett filed a separate case in Orange County Superior Court, Orange County Superior Court case number 30-2021-01229201-CU-OE-CXC, against Defendant Serendipity Hearing Inc. and Defendant Willard Clayton Gililland alleging a single cause of action for civil penalties under the Private Attorney Generals Act (Cal. Labor code section 2698 et. seq.). (*Id.*) On October 5, 2023, Plaintiff Burciaga filed a separate Complaint in Los Angeles County Superior Court against Defendants Serendipity Hearing, Inc. and Sonus Hearing Care Professionals alleging eleven causes of action for: (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime), (2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums), (3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums), (4) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages), (5) Violation of California Labor Code §§ 201 and 202 (Final Wages Not Timely Paid), (6) Violation of California Labor Code § 204 (Wages Not

Timely Paid During Employment), (7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements), (8) Violation of California Labor Code § 1174(d) (Failure To Keep Requisite Payroll Records), (9) Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses), (10) Violation of California Business & Professions Code §§ 17200, *et seq.* and (11) Violation of California Labor Code § 2698, et seq. (California Labor Code Private Attorneys General Act of 2004). (*Id.*)

On June 7, 2024, Plaintiffs' Counsel advised the Los Angeles Superior Court in the Burciaga matter that Plaintiff Burciaga would be seeking to obtain approval of the Settlement Agreement in front of the Orange County Superior Court and asked the Los Angeles County Superior Court to stay that matter. (Rauchwerger Decl. ¶ 5.) On June 12, 2024, the Los Angeles County Superior Court issued an Order staying the Burciaga matter until at least February 28, 2025 to permit the Parties to seek approval of the Settlement Agreement in front of the Orange County Superior Court. (*Id.*) On August 9, 2024, the Parties stipulated to the filing of an Amended Complaint in this matter which brings all of the parties and claims before the same Court for the purposes of seeking approval of the Settlement (which covers all three matters). (*Id.*) The First Amended Complaint was filed on August 19, 2024 and is the operative Complaint in this matter. (*Id.*)

B. <u>Discovery Taken by The Parties</u>

The parties engaged in extensive formal discovery prior to reaching a settlement in this matter. (Declaration of Elizabeth Parker-Fawley ("Parker-Fawley Decl.") ¶ 10.) Prior to mediation in October 2023, Defendant provided Plaintiffs with a sampling of timekeeping data and pay statements for approximately 40% of the Class. (Parker-Fawley Decl. ¶ 11.) Plaintiffs also informally requested and received further class data for purposes of the mediation, including the number of Class Members, total Workweeks worked by the Class Members during the Class Period, applicable meal and rest period policies and practices, time keeping policies and practices, timekeeping and pay records, applicable expense reimbursement policies and practices, and other documents relevant to the litigation. (*Id.*) Class Counsel analyzed over ten thousand pages of information, documents, and data obtained from Plaintiffs, Defendants, and other sources. (*Id.*)

In addition to the above, the Parties held numerous meetings and informal conferences wherein they exchanged information, additional class data, and theories of the case. (Parker-Fawley Decl. ¶ 12.) The Parties also submitted detailed mediation briefs, which outlined the Parties' respective positions in the case. (*Id.*)

C. Mediations With Brandon McKelvey, Esq.

The Parties participated in mediation with Brandon McKelvey, Esq. on October 4, 2023. (Parker-Fawley Decl. ¶ 13.) The first day of mediation did not lead to an agreement to settle the matter, so thereafter, the Parties scheduled a second day of mediation, which took place on November 21, 2023. (*Id.*) The second day of mediation also did not result in a settlement of the claims; however, the Parties continued to discuss the possibility of a settlement. (*Id.*) After a significant amount of additional discussion with further assistance from Brandon McKelvey, on February 28, 2024, the Parties tentatively agreed on a settlement of all the claims at issue in all three filed cases. (*Id.*) After the Parties agreed to settle the matters, they negotiated a Memorandum of Understanding, which was executed on April 23, 2024. (*Id.*) Thereafter, Plaintiffs' counsel also consulted with and associated in as co-counsel the firm of Domb & Rauchwerger LLP to help facilitate moving the action towards approval and final resolution, which led to the long-form Settlement Agreement that is now presented to the Court for preliminary approval. (Parker-Fawley Decl. ¶ 13, Rauchwerger Decl. ¶ 6.)

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).[2] 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.

[2] 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.

B. The Settlement Warrants Preliminary Approval Because It Is Fair, Adequate, 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 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 Fee Termination 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 direct and informed negotiations following two full days of mediation, 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. ¶¶ 7, 24-25; Parker-Fawley Decl. ¶¶ 2-7.) Furthermore, there is no reason to suspect that the amount of class members objecting will be high. (Rauchwerger Decl. ¶ 8.)

Class counsel is not aware of any other class, representative or other collective actions in any Court in this or any other jurisdiction that asserts claims similar to those asserted in this action on behalf of a class or group of individuals who might be members of this proposed class. (Rauchwerger Decl. ¶ 9.)

C. **<u>Due To the Risks Of Continued Litigation, The Settlement Is Fair And In The Best Interests Of The Class.</u>**

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel believe 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. ¶ 10; Parker-Fawley Decl. ¶ 11.) These risks include: the risk of significant delay in class members receiving any type of funds, particularly if the Defendants were to declare bankruptcy; possible issues with Defendants' finances, 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 prospect of Defendants obtaining releases from putative class members; Defendants having its employees sign arbitration agreements, the potential for the Court to reduce PAGA penalties, exempting them from participation in a class action lawsuit, and numerous potential appellate issues. (Rauchwerger Decl. ¶ 10; Parker-Fawley Decl. ¶ 14.)

Finally, the Settlement was reached after lengthy negotiations, exchange of information, and with the assistance and supervision of Brandon McKelvey, Esq. 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. <u>The *Kullar* Requirements</u>

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: **339** individuals[3].
  - **295** Former Employees.
- Total number of Workweeks worked by the Class Members during the Class Period: **19,641.**
- Average Regular Rate: **$17.00** per hour**.**
  - Average Overtime Rate: **$25.50** per hour.
- PAGA Pay Periods: **12,908**
- Aggrieved Employee Group Size: **285**

(Rauchwerger Decl. ¶ 11.)

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[3] As of the date of mediation, there were 325 employees in the Class Data, however, as of the date of this Motion, there are believed to be 339 class members.

1. <u>Failure to Pay Minimum and/or Overtime Wages.</u>

Plaintiffs allege that they and the other putative class members are owed compensation for work they performed off-the-clock and were never paid for due to Defendants' alleged policies and practices prohibiting the recording of hours outside of their scheduled shift times and discouraging recorded overtime work while also requiring employees to complete tasks that either could not be performed during their scheduled working hours or during periods in which time was unable to be recorded due to repeated problems with Defendants' timekeeping system. (Rauchwerger Decl. ¶12.) Typically, Plaintiffs and the other class members would be required to start answering phones or otherwise working a few minutes before their shift started and would be required to complete whatever tasks that they had started when their shift ended, resulting in them working several minutes which were unrecorded and uncompensated. (*Id.*) However, Defendants strenuously deny these allegations and contend that any off-the-clock work performed was *de minimus*. (*Id.*)

To determine Defendants' reasonable exposure to the class for the overtime allegations, Plaintiffs' counsel analyzed the sampled time and pay records provided by Defendants. (Rauchwerger Decl. ¶ 13.) To determine Defendants' exposure for these off-the-clock overtime allegations, Class Counsel assumed that Class Members worked approximately 60 minutes off-the-clock in each workweek. (*Id.*) Using an average hourly rate of $17.00, this results in a loss for each Class Member of $17.00 per workweek. (*Id.*) Multiplying this per-workweek loss by the 19,641 workweeks in the Class Data results in a potential exposure of $333,897. (*Id.*) If the same amount of time is paid at an overtime rate of $25.50 (which is not a certainty, as not all shifts were scheduled for a full eight hours such that any off-the-clock work would result in an entitlement to overtime pay), this results in a loss for each Class Member of $25.50 per workweek. (*Id.*) Multiplying this per-shift loss by the 19,641 workweeks in the Class Data sampling and then extrapolating that figure out to the full class size results in a potential exposure of $500,845.50. (*Id.*)

The risks related to proving these off-the-clock, minimum wage and overtime claims are significant. 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. (Rauchwerger Decl. ¶ 14.) Even if Class Members were permitted to proceed with the overtime claim, Defendant will argue that even assuming Class Members lost time as a result of the off-the-clock allegations, such hours should not necessarily be calculated at an overtime rate, since not all such unpaid work would qualify at an overtime rate, as a significant percentage of the shifts provided in the data sampling were less than 8 hours. (*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 Class Members routinely did not receive lawful and compliant meal periods, nor were they paid meal period premiums when a meal period was short or late. Furthermore, Plaintiffs contend that Class Members frequently did not receive rest breaks or were required to work through such rest breaks due to Defendants' staffing and scheduling policies and practices. The premium owed for failing to provide a legally mandated meal or rest period, providing a short or interrupted meal or rest period, or failing to provide a timely meal or rest period is payment of one hour of wages at the employee's regular rate of pay. Defendants maintain they paid meal premiums in every instance they were due during the entirety of the covered period, and that Defendants obtained valid meal period waiver agreements. Plaintiffs dispute both claims. The range of these claims depends on the number of meal and rest periods that Class Members were denied because of Defendants' policies.

Plaintiffs calculated the amount of meal breaks at issue in this matter by analyzing the sample set of Class Data to determine the number of violations, and then extrapolating the results out to the remainder of the Class Members not included in the data set. (Rauchwerger Decl. ¶ 15.) The sample data provided by Defendants included 45,023 shifts which were eligible for at least one meal period and of those, 104 shifts were eligible for a second meal period. Analysis of the sampling showed that there were 5,041 violations in the sample data, which results in a 11.20% meal period violation rate across the sample period. (*Id.*) These violations included meal periods which were late, cut short, or not provided at all (*Id.*) Extrapolating this violation rate from the sampling which was received for meal periods out to the full class results in approximately 10,998.96 meal period violations across the Class Period (calculated by multiplying 19,641 work weeks by 5 to get the total number of shifts, and then multiplying that amount by the 11.20% violation rate. (*Id.*) At the average class pay rate of $17.00 per hour, this results in a potential exposure of $186,982.32 for meal periods. (*Id.*)

Rest period premiums were calculated in the same fashion as meal periods. (Rauchwerger Decl. ¶ 16.) Estimating that each Class Member did not receive a compliant rest break at the same rate that they were denied meal periods, this would result in approximately in exposure of an additional $186,982.32 for rest break violations. (*Id.*)

There are unique risks particularly with respect to 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 typically records showing whether an employee was subject to a violation, there is little 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)</u>

Plaintiffs also allege that Defendants failed to reimburse Plaintiffs and the other Class Members for certain necessary business expenses, particularly the costs for usage of personal cell phones for work duties, as Plaintiffs contend that they were required to use their personal cell phones to receive calls and texts from their supervisors regarding work issues. Defendants dispute that Plaintiffs or the Class Members were required to use their personal telephones as a part of their job duties.

Where an employer's policies require that mandatory use of employee's personal cell phone, Employers are required under Labor Code section 2802 to reimburse employees for some "reasonable percentage" of their telephone bills. (*Cochran v. Schwan's Home Serv., Inc.* (2014) 228 Cal.App.4th 1137, 1144.) However, the specific amount of a "reasonable" percentage is not and has not been defined by either California Courts or the legislature. Thus, Class Counsel calculated the reasonable exposure of this claim by assuming that employees were entitled to $5.00 per workweek for the reasonable use of their personal cell phones, which is in line with the amounts paid for such expenses by other employers. (Rauchwerger Decl. ¶ 17.) Based on the 19,641 workweeks in the Class Data, Defendants' reasonable exposure for this claim is $98,205. (*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(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

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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.)

hourly rates, and the meal and rest break premiums owed to the Class Members. (Rauchwerger Decl. ¶ 18.) As noted above, there were 285 employees who worked during the PAGA period. (*Id.*) If each of those individuals received the maximum penalty of $4,000, the resulting penalties would be $1,140,000. (*Id.*) However, the actual penalties are likely significant lower since it is highly unlikely all 285 employees worked enough pay periods to receive the full $4,000 penalty. (*Id.*)

There are some hurdles to obtaining class certification for 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. The basis of this claim is largely derivative of the above claims that Defendants failed to compensate Plaintiffs and Class Members for all of the wages and compensation that they were owed.

From the class information provided to Plaintiffs, there are approximately 295 separated employees in the data set (as of the date of the first mediation). (Rauchwerger Decl. ¶¶ 11, 19.) Using the above hourly rate of $17.00, the potential exposure for waiting time penalties is $1,203,600 ($17.00/hour x 8 hours/per day x 30-day maximum x 295 separated employees). (Rauchwerger Decl. ¶ 19.)

As noted above, this claim is largely derivative of the other wage and hour claims analyzed above and Defendants' liability is couched on the presumption that Defendants are liable to

Plaintiffs and the Class for those claims. Moreover, 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.) Unfair Competition (Bus & Prof. Code § 17200 *et. seq.*)

6. <u>Civil Penalties pursuant to the Private Attorney General Act of 2004 ("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 12,908 pay periods in the PAGA period. (Rauchwerger Decl. ¶ 20.) 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 could equal $1,290,800. (*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 **Exhibit 2** to the Rauchwerger Declaration. (Rauchwerger Decl. ¶ 21.) The amount to be paid to the LWDA ($30,000) comports with PAGA settlement amounts approved by other courts.[5]

7. Violations of California Business and Professions Code §§ 17200, et seq.

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 Products 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 Products Co.* (2000) 23 Cal.4th 163, 178.)

IV. CLASS CERTIFICATION ANALYSIS

A. The Class Is Properly Certified For Settlement Purposes.

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."

[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 $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).

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

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. ¶ 22.) Therefore, the proposed Settlement Class should be certified for purposes of settlement.

1. <u>The Proposed Class is Numerous and Ascertainable</u>

The class consists of 339 members with specifically identifiable information. (SA § 4.1.) 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 339 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. ¶ 23.) Furthermore, it would be impracticable to bring all of them before the Court. (*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. <u>The Community of Interest Requirement Is Also Satisfied.</u>

"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. ¶ 23.) 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 a common policy affecting all the putative Class Members and contend that they each had a similar experience to each of the Class Members because they were all subjected to common policies and practices by Defendants. (Hannett Decl. ¶ 4; Burciaga Decl. ¶ 4.)

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

Class Counsel has extensive experience in similar cases and believes that the proposed Settlement is adequate, reasonable, fair, and in the best interests of all class members. (Rauchwerger Decl. ¶¶ 24-25; Parker-Fawley Decl. ¶¶ 2-7.)

C. <u>The Class Representative Is Adequate.</u>

The Plaintiffs do not have any conflicts of interest with the absent Class Members and will be adequate Class Representatives. (Rauchwerger Decl. ¶ 26.) Plaintiffs and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between the Plaintiffs and the Class Members. (*Id.)* Moreover, Plaintiffs have demonstrated commitment to the Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with counsel to assist in identifying the claims asserted in this case, having their depositions taken, meaningfully participating in the mediation, and exposing themselves to the risk of attorneys' fees and costs awarded against them if this lawsuit had been unsuccessful. (Rauchwerger Decl. ¶ 26; Hannett Decl. ¶ 5; Burciaga Decl. ¶ 5) Plaintiffs have remained intricately involved in this lawsuit and has understood their responsibilities with respect to the class. (Hannett Decl. ¶ 5; Burciaga Decl. ¶ 5.) Plaintiffs understood from the beginning that they had a duty to look out for the best interests of the Class, and they understood that by taking on this case, they were agreeing to take on significant responsibility, which included being deposed and providing 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. (Hannett Decl. ¶ 6; Burciaga 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. (Hannett Decl. ¶ 7; Burciaga Decl. ¶ 7.)

D. The Proposed Enhancement Payments to Plaintiffs Are Reasonable.

In connection with the final approval hearing, Class Counsel will request approval of the Class Representative Enhancement Payments of $7,500 to Plaintiffs Hannett and Burciaga for their service as class representatives and in consideration for a general release of all claims against Defendants. This amount is 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, participating in mediation, having depositions taken, reviewing the settlement agreement and having related discussions. (*See* e.g., Hannett Decl. ¶¶ 5-6; Burciaga Decl. ¶¶ 5-6.). 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 Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393.)

E. Settlement Administration Costs are Reasonable.

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 $10,000[6]. Plaintiffs respectfully request that the Court approve the appointment of Phoenix Class Action Administration Solutions as the Settlement Administrator. (*See*, e.g., Declaration of Jodey Lawrence of Phoenix Administrators ("Phoenix Decl.") ¶¶ 5-15.)

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[6] While the bid from Phoenix is only $8,950, we have built in an additional buffer up to $10,000 in the event that the number of class members is greater than the estimated 339, which may cause the cost of the administration fees to increase. The Motion for Final Approval will request and clarify the actual cost to the administrator to administer the settlement if it ends up being less than $10,000.

V. THE PROPOSED SETTLEMENT

A. The Settlement Class & Released Claims

Class & Class Size: The "Class," or "Class Members" is defined as: "all current and former hourly-paid or non-exempt employees of Defendants in California employed during the Class Period." (SA § 1.5.) The "Class Period" means the period from February 19, 2017 to March 1, 2024. (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 § 1.35.)

Release: The scope of the release is limited only to those claims that were, or reasonably could have been alleged, based on the allegations contained in the initial and Operative Complaints and arising during the Class Period. (SA § 6.2.) Settlement 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. The named Plaintiffs have agreed to a broader release, which only applies to the named Plaintiffs. (SA § 6.1.) Aggrieved Employees release claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts contained in the Operative Complaint, as well as two PAGA notices that were filed on behalf of each Plaintiff on August 25, 2021 and June 22, 2023. (SA § 6.3.)

B. The Settlement Fund.

Defendants will, through the Settlement Administrator, create a ***non-reversionary*** settlement fund in the amount of Three Hundred Twenty-Five Thousand Dollars and Zero Cents ($325,000.00) ("Gross Settlement Amount"). (SA § 3.1.) The "Effective Date" means the later of (a) the day after the last day on which any appeal might be filed with respect to the Final Approval Order and Judgment, assuming no appeal is filed, or (b) the date of successful resolution of any appeal(s) with respect to Final Approval Order and Judgment – including expiration of any time to seek reconsideration of further review. (SA § 1.18.) Defendants will transmit the entirety of the Gross Settlement Amount plus an additional amount sufficient for Defendants' portion of the applicable payroll taxes, to the Administrator within fourteen (14) days of the Effective Date of the Agreement. (SA § 4.3.)

C. Payments from Gross Settlement Amount

All expenses associated with the Settlement are to be paid from the Settlement's Gross Settlement Amount (SA § 3.2 *et. seq.*), including up to 38% of the Gross Settlement Amount, or $123,500.00, to Class Counsel for attorneys' fees (SA § 3.2.2.), up to $25,000.00 to Class Counsel for reimbursement of litigation expenses incurred (SA § 3.2.2.); Settlement Administration expenses not to exceed $10,000 to be paid to the qualified Settlement Administrator Phoenix Settlement Administrators to administer the notice and process payments (SA § 3.2.3.); a Class Representative Service Payment of $7,500 each to Plaintiffs Hannett and Burciaga for their service as the class representative and in consideration for a general release of all claims against Defendant (SA § 3.2.1.).

1. Calculating Participating Class Members' Individual Class Payments

All Settlement Class Members will receive a payment for their Individual Settlement Share. After deducting the amount of the fees award, the costs award, the enhancement award to Plaintiffs, and the Settlement Administrator expenses that are finally approved by the Court, the remaining "Net Settlement Amount" will be distributed to the Settlement Class Members through "Individual Class Payments." (SA §§ 1.28; 3.24.)

Individual Class Payments will be paid from the Net Settlement Amount. (SA § 1.23, 1.28, 3.2.4 *et. seq.*) Individual Class Payments shall be calculated by the Settlement Administrator by calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (SA § 3.2.4.) Therefore, the value of each Individual Settlement Share ties directly to the amount of Class Period Workweeks that he or she worked. (*Id.*) The estimated Net Settlement Amount will be approximately $121,500.[7] (Rauchwerger Decl. ¶ 27.) Based on these figures, the average

[7] The estimated Net Settlement Amount of $121,500 is calculated by taking the $325,000 Gross Settlement Amount and subtracting: the requested attorneys' fees of 38% of the Gross Settlement Amount ($123,500), reimbursement of

Individual Settlement Payment is approximately $358.41. (*Id.*)

All Individual Class Payments will be allocated as follows: (i) Fifty Percent (50%) of each Individual Class 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) Fifty Percent (50%) 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 Shares to Settlement 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 Settlement Class Member. (Rauchwerger Decl. ¶ 28.)

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

No claim form will be required for the Individual Settlement Payment to be sent. Defendant has agreed to fund the Gross Settlement Amount within fourteen (14) days of the Effective Date of the Settlement Agreement, and the Administrator will issue checks for each expense listed above and for Individual Class Payments within fourteen (14) days after the funding of the Gross Settlement Amount. (SA § 4.4.) This means that the Administrator will issue checks for Attorneys' Fees and Costs, the Settlement Administration Costs, the Enhancement Payment and Individual Settlement Shares within twenty-eight (28) calendar days of the Effective Date. (SA §§ 4.3-4.4.) All funds remaining in the Qualified Settlement Fund in connection with canceled checks shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code section 1500 *et seq*., in the names of and for the benefit of those Settlement Class Members who did not cash, deposit, or otherwise negotiate their checks, until such time that they claim their property. (Rauchwerger Decl. ¶ 29.) The Parties agree that this disposition results in no "unpaid residue" under California Civil Procedure Code section 384, as the entire Net Settlement Amount will be paid out to Settlement

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litigation costs (in the maximum amount of $25,000), a Class Representative Enhancement Payment of $7,500 to each of the named Plaintiffs, PAGA Penalties of $30,000 and Settlement Administrator costs of $10,000 (Rauchwerger Decl. ¶ 27.)

Class Members, whether or not they all cash, deposit, or otherwise negotiate their settlement payment checks. (SA § 4.4.3.) The Parties agreed on this method as it ensured that unpaid funds would always be available to the employee who earned or is otherwise entitled to those funds and was determined to be the most fair method of distributing uncashed funds. (Rauchwerger Decl. ¶ 29.)

D. Notice To The Class Members

Attached to the Declaration of Devin Rauchwerger as **Exhibit 3** is the [Proposed] Notice of Class Action Settlement and Hearing Date For Final Court Approval. (Rauchwerger Decl. ¶ 30, **Exhibit 3**.) 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.4th 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 notices 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.)

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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 that is 120 days after the Court grants Preliminary Approval.

Dated: November 1, 2024

Respectfully submitted,
DOMB & RAUCHWERGER LLP

By: Devin Rauchwerger

Zack I. Domb
Devin Rauchwerger
Attorneys for Plaintiffs,
Rebecca Hannett, Mitzi Yaloha Burciaga
and the Proposed Class