KINGSLEY SZAMET
EMPLOYMENT LAWYERS
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleylawyers.com
KELSEY M. SZAMET, Esq. (SBN 260264)
kelsey@kingsleylawyers.com
JESSI BULAON, Esq., (SBN 340749)
jessi@kingsleylawyers.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Tel: (818) 990-8300, Fax (818) 990-2903

ABRAMSON LABOR GROUP
WILLIAM ZEV ABRAMSON, Esq. (SBN 289387)
Wza@abramsonlabor.com
1700 W Burbank Blvd.,
Burbank, CA 91506
Tel: (213) 493-6300, Fax (213) 382-4083

Attorneys for Plaintiff and the Proposed Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

ERNESTINE JIMENEZ, an individual, on behalf of herself and others similarly situated, PLAINTIFF, v. MOM365 NEWBORN PHOTOGRAPHY; and DOES 1 thru 50, inclusive, DEFENDANTS.	CASE NO. CV-23-003097 [Consolidated with Case No. CV-23-004587] [Case Assigned for All Purposes to Hon. John R. Mayne in Dept. 21] **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** *[Filed concurrently with Declaration of Kelsey M. Szamet, Declaration of Ernestine Jimenez, and Proposed Order]* Date: August 19, 2025 Time: 8:30 A.M. Dept.: 21 Complaint Filed: June 2, 2023 Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 19, 2025, at 8:30 A.M. in Department 21 of the above-entitled court, Plaintiff ERNESTINE JIMENEZ will move the Court for an Order of Preliminary Approval of the Class Action and PAGA Settlement Agreement ("Agreement"), a copy of which is filed concurrently herewith.

The Motion will be made on the grounds that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Class and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Kelsey M. Szamet, the Agreement and Release, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: July 10, 2025

KINGSLEY SZAMET EMPLOYMENT LAWYERS

By: ______________________

Kelsey M. Szamet
Attorneys for Plaintiff ERNESTINE JIMENEZ and the proposed class

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Regulations

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ERNESTINE JIMENEZ ("Plaintiff") submits this Memorandum of Points and Authorities in support of Plaintiff's Motion for Preliminary Approval of the Class Action and PAGA Settlement Agreement reached between Plaintiff and Defendant Mom365 Newborn Photography ("Defendant") (Plaintiff and Defendant together, the "Parties").

By this Motion, Plaintiff requests that the Court:

(1) Grant preliminary approval of the fully-executed Class Action and PAGA Settlement Agreement ("Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit "1";

(2) Approve the proposed Notice to Class Members, a copy of which is attached to the Agreement as Exhibit "A," and direct that the Notice be sent to Class Members in the manner set forth in the Agreement;

(3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff's counsel's application for an award of attorney's fees and litigation costs at which Class Members may be heard ("Final Approval Hearing").

II. FACTUAL BACKGROUND

A. Litigation Overview and Procedural History

Mom365 Newborn Photography is a Missouri corporation operating within the State of California that employs photographers to take photos of newborns and sell photo packages at various hospitals statewide.

On June 2, 2023, Plaintiff filed this wage and hour class action lawsuit in Stanislaus Superior Court Case No. CV-23-003097 ("Class Action Complaint"), alleging seven causes of action, including: (1) failed to pay wages and/or overtime under Labor Code sections 510, 1194, and 1199; (2) failure to pay minimum wage pursuant to Labor Code section 1194; (3) failure to provide rest breaks pursuant to Labor Code section 226.7; (4) failure to reimburse expenses pursuant to Labor Code section 2802; (5) failure to issue accurate itemized wage statements pursuant to Labor Code section 226(a); (6) penalties under Labor Code section 203; and (7) violation of Business & Professions Code section 17200. ("Declaration of Kelsey M. Szamet, "Szamet Decl.") ¶4.) Also on June 2, 2023, Plaintiff sent a notice letter, pursuant to Labor Code section 2699 ("PAGA"), to the Labor Workforce Development Agency ("LWDA") regarding her intent to seek civil penalties for the same Labor Code violations listed above and alleging additional Labor Code violations, under Labor Code section 2699, *et seq*. (Szamet Decl. ¶5.)

On July 27, 2023, Defendant filed a Motion to Compel Binding Arbitration, which was denied by the Court on October 5, 2023. (Szamet Decl. ¶6.)

On August 15, 2023, Plaintiff filed a Representative Action Complaint, Stanislaus Superior Court Case No. CV-23-004587, ("PAGA Complaint") with a single cause of action for penalties pursuant to Labor Code § 2699, et seq., the Private Attorneys General Act ("PAGA") for violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 1194, 1194.2, 1199 and 2802. (Szamet Decl. ¶7.)

On September 7, 2023, Plaintiff filed a First Amended Class and Representative Action Complaint ("FAC"), consolidating the Class Action Complaint and PAGA Complaint. (Hereafter, the "Action".) (Szamet Decl. ¶8.)

B. <u>The Discovery Process and Mediation</u>

The Parties have yet to engage in formal discovery, instead focusing their efforts on resolving this case through early mediation. (Szamet Decl. ¶9.) On January 14, 2025, the Parties participated in an all-day mediation presided over by Henry Bongiovi, which led to the Agreement to settle the Action. (Szamet Decl. ¶10.)

Prior to mediation, Plaintiff obtained, through informal discovery, Plaintiff's personnel file, time and pay records, employment records, employee handbooks, and Class data, including time and pay records and employment dates. (Szamet Decl. ¶11.) Plaintiff's investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc*. (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129-130 ("*Dunk/Kullar*")

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or representative action treatment. (Szamet Decl. ¶12.) Defendant contends, among other things, that, at all times, it has complied with the California Labor Code, and the Industrial Wage Commission Orders. (*Id.*)

Based on their own independent investigation and evaluation, Class Counsel is of the opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest of the settlement classes in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl. ¶13.) Although Defendant denies any liability, Defendant is agreeing to this Agreement solely to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and their counsel desire to fully, finally, and forever settle, compromise and discharge all disputes and claims arising from or relating to the Action on the terms set forth here. (*Id.*)

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever "the question [in a case] 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 . . . ." (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an important function by "establishing a technique whereby the claims of many individuals can be resolved at the same time" thereby "eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress." (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine "whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

The California Supreme Court has identified three certification requirements: (1) "the existence of an ascertainable and sufficiently numerous class"; (2) "a well-defined community of interest"; and, (3) "substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The "community of interest" requirement includes three additional requirements: (1) common questions of law or fact predominant over individual questions; (2) the class representatives have claims or defenses typical of the class; and (3) the class representatives can adequately represent the class. (*Ibid*, *citing Fireside Bank, supra,* 40 Cal.4th at 1089.)

Class certification for settlement purposes is proper in this case as the proposed Settlement Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this Court should certify the putative settlement class.

A. The Proposed Settlement Class Is Ascertainable and Sufficiently Numerous

1. Ascertainability

Putative class members are deemed "ascertainable" when 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.) In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

Here, Plaintiff maintains that the proposed Settlement Class is ascertainable for several reasons: First, Defendant has agreed in the Agreement to provide a class list to the Administrator containing the name, last known mailing address, social security number, and number of Class Period Workweeks and PAGA Pay Periods for all putative class members after issuance of the preliminary approval order. (Szamet Decl. ¶14; Ex. 1 at ¶1.8.) Second, Settlement Class Member consist of Defendant's non-exempt employees, and Defendant is required to keep records of its non-exempt employees' names, home addresses, and social security numbers. (*See* Wage Order 4-

2001, subsection 7(c); Szamet Decl. ¶15.) Third and finally, Defendant informally produced personnel file, time and pay records, employment records, employee handbooks, and Class data, including time and pay records and employment dates for Settlement Class Members containing class member contact information, which confirms that all Settlement Class Member may be readily identified based on Defendant's records. (Szamet Decl. ¶16.)

2. <u>Numerosity</u>

There is no set number that is required as a matter of law to maintain a class action. (*See, e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Settlement Class contains, based upon information and belief, approximately 487 hourly non-exempt employees in the State of California. (Ex. 1 at ¶4.1.) Therefore, Plaintiff is confident she will be able to establish that the proposed Settlement Class is ascertainable and sufficiently numerous. (Szamet Decl. ¶17.)

B. <u>There Is a Well-Defined Community of Interest</u>

1. <u>There Are Predominant Questions of Law and Fact</u>

In deciding whether questions of common or general interest predominate, a court must determine whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *accord*, *Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general matter, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord*, *Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

Here, Plaintiff argues that there are questions of law and fact common to the proposed Settlement Class that predominate over any questions affecting only individual Class Members. (Szamet Decl. ¶18.) These common questions include:

1) Whether Defendant failed to pay all wages and/or overtime compensation;

2) Whether Defendant failed to pay all minimum wages;

3) Whether Defendant failed to provide lawfully required ***paid*** rest periods and/or failed to compensate employees one (1) hour's wages in lieu thereof;

4) Whether Defendant failed to reimburse business-related expenses;

5) Whether Defendant failed to provide accurate itemized wage statements;

6) Whether Defendant failed to pay compensation due and owning upon termination of employment;

7) Whether Defendant engaged in unfair competition; and,

8) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the acts previously alleged.

(Szamet Decl. ¶19.)

Plaintiff's challenge to Defendant's uniform policies and practices involves common factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶20.) As the California Supreme Court has emphasized, "[c]aims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker*, *supra*, 53 Cal.4th at 1033; *see also Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of similarly situated employees may be certified based on common questions of fact or law, even if each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at 340.)

Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same injuries, in the same manner in that: (1) Settlement Class Members were not paid all wages/overtime, (2) Settlement Class Members were not paid all minimum wages; (3) Settlement Class Members did not receive their ***paid*** rest periods as required; (4) Settlement Class Members were not provided accurate itemized wage statements; (5) Settlement Class Members were not reimbursed for business-related expenses; (6) Settlement Class Members did not receive timely wages; and (7) Settlement Class Members were not paid all wages owed upon termination/resignation. (Szamet Decl. ¶21.) Plaintiff alleges that Settlement Class Members worked in the same capacity for the same employer and were subject to the same employment policies and practices, the questions of fact and claims regarding the status of these employees are the same for each member of the Settlement Class. (Szamet Decl. ¶22.) Accordingly, for purposes of settlement, certification for settlement purposes is appropriate. (Szamet Decl. ¶23.)

2. The Class Representative Has Claims Typical of the Proposed Class

A putative class representative's claim must be "typical," but not necessarily identical, to the claims of other class members. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the Class Representatives, and whether other class members have been injured by the same course of conduct." (*Seastrom v. Neways, Inc*. (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*Seastrom v. Neways, Inc*. (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*See, e.g.*, *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) It is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc. (*2001) 91 Cal.App.4th 224, 238.)

Plaintiff worked as an "non-exempt employee" for Defendant as a newborn photographer in California. (Szamet Decl. ¶24.) Plaintiff alleges that she: (1) worked without being paid all wages and/or overtime, (2) worked without being paid all minimum wages; (3) worked without being provided ***paid*** rest periods as required by law; (4) worked without being reimbursed for costs associated with personal cell-phone usage; (5) worked without being provided accurate itemized wage statements; and (6) worked without being paid all wages due upon separation. She also alleges that she experienced derivative claims for unfair business competition (B&P Code §17200) and Labor Code §2699, et seq. (Szamet Decl. ¶25.) Plaintiff also contends that her claims are typical of those of the Settlement Class. (Szamet Decl. ¶26.)

3. Plaintiff Contends That As The Class Representative She Has and Will Fairly Represent the Interests of the Settlement Class Members

A putative class representative must show that they can adequately represent the class.

(*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

Plaintiff believes that she is capable of fairly representing and adequately protecting the interests of the proposed Settlement Class Members. (Szamet Decl. ¶27.) Plaintiff's interests in this litigation are coextensive with the interests of the proposed Settlement Class Members. The members of the proposed Settlement Class all worked for Defendant during the relevant time period and incurred the same type of alleged damages with regard to Defendant's alleged violations of the law. (Szamet Decl. ¶28.) Moreover, Plaintiff has agreed to serve as Class Representative and has retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Szamet Decl. ¶29.) This demonstrates her commitment to bringing about the best possible results for the benefit of the proposed Settlement Class. (Szamet Decl. ¶30.) Plaintiff has provided her Counsel with all necessary and pertinent information. (Szamet Decl. ¶31.) Plaintiff has been a very active participant in the litigation including having frequent contact with Settlement Class Members, and working closely with Class Counsel to develop the theories of liability. (Szamet Decl. ¶32.) Plaintiff also made herself available for the full-day mediation in this matter and was informed of and involved in all of the Settlement negotiations. Therefore, Plaintiff believes that she has and will continue to adequately represent the proposed Settlement Class Members. (Szamet Decl. ¶33.)

C. <u>The Class Action Vehicle Is Superior to the Alternatives</u>

"The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Lockheed Martin*, *supra*, 29 Cal.App.4th at 1104–1105.) The California Supreme Court has directed the courts to utilize the class action device to fashion "an effective and inclusive group remedy." (*Richmond v. Dart Indus., Inc*. (1981) 29 Cal.3d 462, 469.) Normally, in making its class certification decision, the Court must determine that a class action would be superior to alternate means for a fair and efficient adjudication. If the causes of action may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting duplication of effort, class certification is superior to individual litigation. (*See, e.g.*, *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need as there would be in an ordinary motion for class certification for the Court to determine that the case can be manageably tried.

Plaintiff maintains that class treatment would be the superior method of managing this case. A class action is superior to individual litigation "when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In cases such as this, where individual damages may be small, the class action device is the most feasible method of recovery. (*See, e.g. Lockheed Martin*, *supra*, 29 Cal.4th at 1131.) In this regard, the superiority of class treatment is evident here because individual pursuit of class members' claims may not be economically viable. (Szamet Decl. ¶34.) The only alternative to certification would be to force over 487 employees to join this action, file individual, uniform actions, or abandon their legal rights altogether. (Szamet Decl. ¶35.) Plaintiff maintains that this economic reality would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶36.)

IV. THE PROPOSED SETTLEMENT

A. <u>The Settlement Class</u>

For purposes of Agreement, the settlement class is defined as: "all non-exempt employees who worked for Defendant in California at any time between June 2, 2019 through March 15, 2025." ("Class"). (Szamet Decl. ¶37; Ex. 1 at ¶1.5.)

The Class Period is June 2, 2019 through March 15, 2025. (Szamet Decl. ¶38; Ex. 1 at § ¶1.12.) As of January 14, 2025, (the date of mediation), and based on documents and other information produced by Defendant, there are approximately 487 Settlement Class Members who worked a total of 14,280 Workweeks. (Szamet Decl. ¶39; Ex. 1 at ¶4.1.)

///

B. Aggrieved Employees

For purposes of the Agreement, the Aggrieved Employees are defined as: "all non-exempt employees who worked for Defendant in California at any time between June 2, 2022 through March 15, 2025." ("Aggrieved Employees") (Szamet Decl. ¶40; Settlement, Ex. 1 at ¶1.4.) The PAGA Period is June 2, 2022 through March 15, 2025. (Szamet Decl. ¶41; Ex. 1 at ¶1.31.) Based on documents and other information produced by Defendant in connection with the mediation and the negotiation of the Settlement Agreement, there are approximately 151 Aggrieved Employees who collectively worked a total of 2,162 PAGA Pay Periods. (Szamet Decl. ¶42; Ex. 1 at ¶4.1.)

C. Gross Settlement Amount

As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of $392,700.00, which includes the sum of the Individual Class Payments, the Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶43; Ex. 1 at ¶3.1.)

The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award, Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs. (Szamet Decl. ¶44; Ex. 1 at ¶3.2.)

The Parties estimate the amount of the Net Settlement Amount as follows:

Gross Settlement Amount:	$	392,700.00
Less Class Representative Enhancement:	$	5,000.00
Less Class Counsel's Fees:	$	130,900.00
Less Class Counsel's Costs:	$	25,000.00
Less PAGA Payment:	$	10,000.00 *($7,500.00 to the LWDA and $2,500.00 to remain in the Net Settlement Amount)*
Less Administrator Costs:	$	10,750.00
Anticipated Net Settlement Amount	$	211,050.00

(Ex. 1 at ¶3.)

D. Individual Settlement Payments

The amount of each Class Member's Individual Class Payment is an individualized amount that is based on the number of compensable workweeks worked by the Class Member during the Class Period. (Ex. 1 at ¶3.2.4; *see also* Ex. A to the Agreement at pp. 3 [Class Notice].) This individual amount shall be determined according to the settlement payment formula set forth in the Agreement. (*See* Ex. 1 at ¶3.2.4; *Id*. at Ex. A to the Agreement [Class Notice].) The Agreement provides for a specific and detailed Work Week dispute process. (*See* Ex. 1 at ¶7.6.)

The Individual PAGA Payment is an individualized amount based on the number of PAGA Period Pay Periods worked by the aggrieved employee during the PAGA Period. (Ex. 1 at ¶3.2.5.1; *see also* Ex. A to the Agreement at pp. 3 [Class Notice].) It shall be calculated as follows: twenty-five percent (25%) of the PAGA Payment (or $2,500) divided by the total number of PAGA Period Pay Periods worked by all aggrieved employees during the PAGA Period and multiplying the result by each aggrieved employee's PAGA Period Pay Periods. (*See* Ex. 1 at ¶3.2.5.1; *Id*. at Ex. A to the Agreement [Class Notice].)

E. <u>Process for Administering Settlement after Preliminary Approval</u>

The detailed Notice Procedure established by the Agreement will efficiently and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at ¶7.4.) The Parties have agreed to use a reputable third-party claims administrator, Phoenix Class Action Administration Solutions, to administer the Agreement because their bid was the most cost effective for the Settlement Class Members. (Ex. 1 at ¶7.1.)

F. <u>Process for Settlement Class Members to Respond to Class Notice</u>

As detailed in the Agreement, Settlement Class Members will have an opportunity to request exclusion from the Agreement (i.e. opt out) and to object to the Agreement at the Final Approval Hearing. (*See* Ex. 1 at ¶¶7.5-7.7; *see also* Ex. A to the Agreement at pp. 1, 2 and 4 [Class Notice].) The Agreement and Class Notice contain details about the process to request exclusion or object. (*Id* at Ex. 1; *see also* Ex. A to the Agreement at pp. 3-4 [Class Notice].)

G. <u>The Release</u>

The Released Claims are defined in the Agreement as: "claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, or causes of action which were alleged or which could have been alleged based on the factual allegations in the Operative Complaint or causes of action which were alleged or which could have been alleged based on the factual allegations in the Operative Complaint and Plaintiff's June 2, 2023 notice letter to the

LWDA, arising during the Class Period, under any federal, state, or local law, which arose during the Class Period set forth in Paragraph 6, below ("Released Class Claims"). Released Class Claims include, but are not limited to, all of the following claims for relief: (a) failure to pay all minimum wages and overtime wages due; (b) failure to provide accurate itemized wage statements; (c) waiting time penalties; (d) failure to permit meal and rest periods, or provide premium pay in lieu thereof; (e) failure to reimburse necessary business-related costs; and (f) unfair business practices in violation of California Labor Code Sections 201, 202, 203, 226(a), 226.7, 510, 512, 1194, 1194.2, 1199, 2802, and Industrial Welfare Commission Wage Orders, including inter alia, Wage Order 4-2001, and all claims for attorneys' fees and costs and statutory interest in connection therewith, California Business and Professions Code sections 17200, et seq., and any other claims, including claims for statutory penalties, pertaining to the Class Members." (Ex. 1 at ¶5.2.)

The Release by Non-Participating Class Members Who Are Aggrieved Employees is defined as: "any and all claims arising from any of the factual allegations that were pled in the Action, or which could have reasonably been alleged based on the factual allegations in the Operative Complaint and Plaintiff's June 2, 2023 notice letter to the LWDA, which arose during the PAGA Period for civil penalties under the Private Attorneys General Act of 2004, California Labor Code Sections 2698 et seq. The Aggrieved Employees' Released PAGA Claims include all claims for attorneys' fees and costs related thereto, for Defendant's alleged failure to pay all minimum wages and overtime wages due; (b) failure to provide accurate itemized wage statements; (c) waiting time penalties; (d) failure to permit meal and rest periods, or provide premium pay in lieu thereof; (e) failure to reimburse necessary business- related costs in violation of California Labor Code Sections 201, 202, 203, 226(a), 226.7, 510, 512, 1194, 1194.2, 1199, 2802, and Industrial Welfare Commission Wage Orders, including inter alia, Wage Order 4-2001." (Ex. 1 at ¶5.3.)

V. ARGUMENT

A. Plaintiff Requests Approval of This Class Action Settlement

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

The proposed settlement satisfies each of these factors. (Szamet Decl. ¶45.) Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at Szamet Decl. ¶¶9-13.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Szamet Decl. ¶46.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Szamet Decl. ¶47.)

1. <u>The Strength of Plaintiff's Case</u>

a) The Risks Associated with Unpaid Wages Claim and the Minimum Wage Claim

"California employees are entitled to compensation for all hours worked, which means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Title 8 Cal. Code of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp*. (2018) 5 Cal.5th 829, 845, as modified on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is "subject to the control of an employer" even if not working, or if an employee "is suffered or permitted to work" even if not "under the employer's control, provided the employer has or should have knowledge of the employee's work." (*Frlekin v. Apple Inc*. (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the employer directs an employee and the employee is unable to use their time how they wish. (Id. at p. 1047.) Other factors courts may consider include whether the activity is required, "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures." (Id. at p. 1056; *Cf. Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No.

17CV01513DMSAGS) 2020 WL 42768, at *9 (denying Defendant's motion for summary judgment when Plaintiff-employees conducted off-the-clock pre-shift activity in preparation to start work right when they clocked in).)

In *Troester*, employees spent four to ten minutes completing tasks to close up the store, such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held that California law prohibits employers from requiring employees to work off the clock, even for minutes, without compensation. (*Id.* at p. 848.) The Court explained:

> An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine. As the facts here demonstrate, a few extra minutes of work each day can add up. . . . .What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages.

(*Id.* at p. 847.)

Additionally, California workers are statutorily entitled to overtime compensation, unless they are properly classified as falling within one of the narrow exemption categories. Under California law, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek…shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Furthermore, "[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).)

"Under California's minimum wage law, employees must be compensated for each hour worked at either the legal minimum for the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation." *Bluford*, 216 Cal. App. 4th at 872. Labor Code § 1194(a) provides that it is unlawful to pay less than the minimum wage established by law. Defendant's failure to pay minimum wage and required by IWC Wage Order 4 violates Labor Code § 1194(a) and is therefore unlawful. Labor Code § 1194.2 further provides that in any action under to recover wages because of the payment of a wage less than minimum wage, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

Throughout the relevant period, Plaintiff maintains that she and other Class Members were required to work on a regular and consistent basis without receiving compensation for all hours worked at the appropriate rate of pay. (Szamet Decl. ¶48.) Plaintiff contends she was working off the clock during that time and is owed wages. (Szamet Decl. ¶49.) Specifically, Plaintiff contends that the time spent performing cash-to-check duties was all done off the clock because she was not permitted to remain clocked in if she left the hospital premises. (Szamet Decl. ¶50.) She also alleges that there is additional unpaid off-the-clock time due to lengthy clock-in/out procedures per shift. (Szamet Decl. ¶51.) Plaintiff estimates clocking in and out using the hospital landline took approximately 5 minutes. (Szamet Decl. ¶52.) Additionally, Plaintiff contends there are potential issues arising from Defendant's guaranteed "fallback pay" policy and the way this time is shown on employees' wage statements. (Szamet Decl. ¶53.) Plaintiff contends that Defendant would need to prove that it applied Plaintiff's appropriate blended rate when calculating her overtime rate. (Szamet Decl. ¶54.)

Plaintiff also alleged that there are numerous shifts where employees made less than the minimum wage even with the guaranteed fallback pay. (Szamet Decl. ¶55.) Specifically, Plaintiff estimates that shifts where she did go to the bank and convert the cash to check, it took her approximately 45 minutes to one hour off the clock. (Szamet Decl. ¶56.) Thus, even if Plaintiff received guaranteed fallback pay because she did not make enough in commissions, she still would have been paid less than the minimum wage when dividing her pay by all hours worked. (Szamet Decl. ¶57.)

First, Defendant vehemently denied this claim and argued that its labor policies prohibit off-the-clock work and Class Members were not working off the clock. (Szamet Decl. ¶58.) Second, Defendant argued that Plaintiff's theory of liability would be extremely difficult to prove on a classwide basis because Plaintiff will not be able to rely on the time records because – by definition – the alleged work is performed while not clocked in. (Szamet Decl. ¶59.) Defendant argued that this case would devolve into a series of mini-trials wherein each Class Member would have to testify as to whether he or she ever performed work off the clock. (Szamet Decl. ¶60.) Of course, Defendant argued that this would defeat class certification altogether. (Szamet Decl. ¶61.) *See Brinker*, 53 Cal. 4th at 1051-52 (holding that in the absence of a uniform, companywide policy, proof of liability is individual); *Amey v. Cinemark USA Inc.*, No. 13-CV-05669-WHO, 2015 WL 2251504, at *12 (N.D. Cal. May 13, 2015) (denying certification of off-the-clock claim because plaintiffs' work requirements depended on the manager); *Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587 YGR, 2014 WL 5877695, at *12 (N.D. Cal. Nov. 12, 2014) (denying certification based on policy requiring employees to finish closing duties within 30 minutes, because the court would still be left with numerous individual issues); *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 532-33 (C.D. Cal. 2011) (denying certification of off-the-clock claim).

Plaintiff acknowledges that this can be a highly difficult type of claim to prove because there are no time records to substantiate or evaluate the claim. (Szamet Decl. ¶62.) Instead, Defendant would argue that if there was any such issue of working off the clock, it would necessitate speaking to each and every Settlement Class Member about their experiences day to day and whether any off the clock time was ever worked and if so, why it was worked, when this allegedly occur, and for what amount of time. (Szamet Decl. ¶63.) This type of inquiry, Defendant would argue, makes its very difficult to establish liability based on common proof. (Szamet Decl. ¶64.) Based on this acute risk, Plaintiff believed it was appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶65.)

b) The Risks Associated with the Rest Break Claim

Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a paid rest period according to law. Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11040, subd. 12(A).)

Plaintiff and the Proposed Class Members' rest period claims arise from a common allegation that Defendant did not provide employees with the opportunity to take first, second, and/or third 10-minute paid rest breaks in compliance with California law. The California Supreme Court has held: "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on." (*Brinker Rest. Corp v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied the two paid rest breaks in a day is "essentially perform[ing] 20 minutes of 'free' work." (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1104).

The Court has also clarified what steps an employer must take to make rest breaks available to its employees:

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.

(*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1033 (emphasis added.).)

Employers must authorize and permit a net ten-minute paid rest period for every four hours, or major fraction thereof, of work for its employees. If an employer does not, then the employer must pay the employee one hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11160, subd. 12(B).)

Moreover, commission-based employees are entitled to be paid for their rest breaks. In *Vaquero v. Stoneledge Furniture LLC* (2017), the court held that employers must separately compensate employees for rest periods when they are paid by commission. The court held that the wage order requiring employers to count "rest period time" as "hours worked for which there shall be no deduction from wages" applies to commissioned employees, and the commission plan must separately pay for rest periods. (*Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017).)

Here, Plaintiff contends that the nature of the work did not permit Plaintiff and the Proposed Class to take their rest periods. (Szamet Decl. ¶66.) Because Plaintiff needed to make sales, Plaintiff was tasked with selling as many newborn photography packages as possible throughout her shift. (Szamet Decl. ¶67.) As expected when working with newborns, sometimes Plaintiff would spend a lot of time with a prospective client, waiting for the baby to be fed, to stop being fussy, etc. (Szamet Decl. ¶68.) Oftentimes, even after Plaintiff took the photos, the families would decide against purchasing a photo package. (Szamet Decl. ¶69.) As such, Plaintiff would make no commission during this time but could have spent hours with a single prospective client and was unable to take a lawful rest break. (Szamet Decl. ¶70.)

Arguably, *Vaquero* applies here when employees were paid solely commission, i.e. did not need guaranteed fallback pay. (Szamet Decl. ¶71.) If an employee was "trued up" via guaranteed fallback pay, then the employee was essentially paid for any rest breaks taken. (*Id.*) However, if an employee was paid solely commissions, then the employee would need to have been paid separately for rest periods under *Vaquero*. (*Id.*) As such, Plaintiff maintained that Defendant's commission plan is unlawful under *Vaquero*, because it does not separately pay for rest periods. (*Id.*)

In its defense, Defendant would have argued that Plaintiffs' rest period claim was not appropriate for certification because California law does not require employees to record rest periods. Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, Defendant would have argued that there was simply no way to know (1) whether a break was taken; and (2) if not, why not. (Szamet Decl. ¶72.) For each instance where an employee did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still have to determine why that particular employee had less than their full allotment of rest time. (Szamet Decl. ¶73.) Defendant accordingly would have argued that rest break claims are inherently individualized in nature because employers only need to "authorize and permit" breaks; they need not ensure that rest breaks are taken. *Brinker*, 53 Cal. 4th at 1004. To succeed, "[a]n employee must show that the employer prevented the employee from taking breaks; mere proof of knowledge that the employee was forgoing breaks is insufficient." As such, Plaintiff had to acknowledge that it could potentially by easy for Defendant to defeat certification of this claim if it was able to gather testimonial evidence from class members indicating that they were able to take all required rest breaks each day. (Szamet Decl. ¶74.) Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for the Class. (Szamet Decl. ¶75.) There is certainly risk as to both sides as to what declarations and depositions of class members might reveal. (Szamet Decl. ¶76.)

c) The Risks Associated with the Reimbursement Claim

Under California Labor Code§ 2802(a) an employer "shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." An employee acts in "discharge of his duties," for purposes of this Section when the employee acts within the "course and scope of employment." See *O'Hara v. Teamsters Union Local No. 856,* C.A.9 (Cal.)1998, 151 F.3d 1152.

Plaintiff alleges that Defendant failed to reimburse Plaintiff and the Proposed Class for all necessary business expenses. (Szamet Decl. ¶77.) Specifically, Defendant failed to reimburse Plaintiff for all mileage incurred when performing cash-to-check duties when she drove to her bank from the hospital and back. (Szamet Decl. ¶78.) Defendant's written mileage reimbursement policy states that it only reimburses for travel between hospitals, thereby failing to inform Plaintiff and the Proposed Class that they were entitled to reimbursement for any mileage incurred for work-related purposes. (Szamet Decl. ¶79.) Plaintiff also argued that Defendant encouraged employees to purchase props for the newborn photoshoots as a way to entice customers to purchase photo packages, but never reimbursed Plaintiff for these costs. (*Id.*) Additionally, Plaintiff contends that Defendant's written policies impose an unlawful timeframe upon its employees to seek reimbursement for work-related expenses. (Szamet Decl. ¶80.) This timeframe is invalid under Sections 2802 and 2804 of the Labor Code. (*Id.*)

Defendant argued that its reimbursement policy was lawful and, in fact, clearly stated that it reimbursed for travel between hospitals. (Szamet Decl. ¶81.) Defendant would also argue that its timeframe for reimbursement requests was reasonable to ensure that all requests were submitted and timely paid. (Szamet Decl. ¶82.) Defendant would argue that it cannot reimburse for mileage that it is not aware of or that is not timely submitted. (Szamet Decl. ¶83.) Finally, Defendant would again argue this claim is not amenable to certification because it is a highly individualized inquiry as to whether some class members, like Plaintiff, may have taken trips to the bank or perhaps bought their own props. (Szamet Decl. ¶84.) Defendant would argue that you would need to inquire of each class member whether they contend they are owed reimbursement for any outstanding travel and if so, for how much. (Szamet Decl. ¶85.) As to the props, Defendant would maintain it never required the purchase of props and if employees chose to do that, it was not something they were aware so could not reimburse for it. (Szamet Decl. ¶86.)

Taken together, Plaintiff recognized that there was acute risk to this claim and ultimately believed a discount was resolution purposes was appropriate. (Szamet Decl. ¶87.)

d) The Risks Associated with the Inaccurate Wage Statement Claim

Labor Code § 226(a) provides:

> An employer … shall furnish to his or her employee … an accurate itemized statement in writing showing … (2) total hours worked by the employee…, (4) all deductions from the employees' wages…, (6) the inclusive dates for each pay period, (7) the last four digits of the employees' social security number or the employees' identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee….

These statements must be appended to the detachable part of the check for the employee's wages twice per month, or each time wages are paid.

Labor Code § 226(a) specifically requires that the employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing total hours worked by the employee, and showing all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. (Szamet Decl. ¶88.) Penalties for wage statement violations are calculated according to the formula provided by Labor Code section 226(e)(1): An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or 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 $4,000.

Specifically, Plaintiff contends that she and the Proposed Class are issued wage statements that do not include all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee in violation of Labor Code §§ 226(a)(2) and (9). (Szamet Decl. ¶89.) All of Plaintiff's wage statements do not show any applicable pay rate and instead show "$0.0000" or is left entirely blank. (Szamet Decl. ¶90.) As such, Defendant's failure to provide accurate itemized wage statements according to Labor Code § 226(a) was done on a regular and consistent basis. Thus, Defendant has knowingly and intentionally failed to comply with Labor Code section § 226(a) by failing to issue accurate itemized wage statements to Plaintiff.

Although wage statement claims are readily certifiable, they are vulnerable to an unfavorable disposition on summary judgment as defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which Class Members suffer no injury. Before Section 226(e) was amended, the dispositive issue was whether "suffering injury" was satisfied by the deprivation of a legal right (i.e., an employer's provision of non-compliant wage statements), or by consequential damages caused by the non-compliant wage statements. Employers had frequently prevailed in arguing for the latter interpretation. Even after the enactment of section 226(e), some courts have held that this amendment merely clarifies existing law and have held that plaintiffs must demonstrate actual injury. *See Loud v. Eden Med. Ctr.*, 2013 U.S. Dist. LEXIS 122873, **36-53 (N.D. Cal. Aug. 28, 2013) (granting summary judgment on wage statement claim because plaintiff could not show injury due to defects and that incorrect wage information is not willful).

Plaintiff also anticipated that Defendant would argue that the "subsequent" penalty applies only after a determination that the employer has violated the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008) ("Although common sense might suggest a "subsequent" violation is nothing more than a violation that occurs at a later point in time after an "initial" violation, this definition is inadequate because the statutes provide for multiple penalties for "each failure to pay each employee" incurred in an initial violation . . . Until the employer has been notified that it is violating a Labor Code provision (whether or not the Commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a "violation" subject to penalties.").

e) The Risks Associated with the Waiting Time Penalty Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee's termination or within seventy-two (72) hours of resignation, then the employee's wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co*. (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

///

Under Labor Code § 203, a "'willful' failure to pay wages … occurs when an employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs., tit. 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 ("willful" simply means that "the employer intentionally failed or refused to perform an act which was required to be done[.] Willful … does not necessarily imply anything blameable, or any malice or wrong toward the other party").

Here, Plaintiff contends that Defendant failed to properly pay overtime for any work in excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶91.) The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claim discussed above as derivative waiting-time penalties are only as strong as the underlying predicate claims, and are subject to good faith defenses. (Szamet Decl. ¶92.) If Defendant could prove, as it contends, that class members were properly paid for all hours worked, there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶93.)

Plaintiff also alleged that Defendant owes waiting time penalties by not paying former alleged employees all wages owed and all premium payments for non-compliant meal or rest periods, Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc*. (2002) 40 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute "wages" under Labor Code § 203. ("We hold that section 226.7's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage, not a penalty"). (Szamet Decl. ¶94.)

The bigger risk that Plaintiff analyzed, however, is that to establish liability for waiting time penalties, Plaintiff would have to establish not only that the underlying violations occurred, but also that Defendant's conduct was "willful." (Labor Code § 203; Szamet Decl. ¶95.) If Defendant could establish that any alleged failure to blend was the result of mistake or oversight and not "willful", then it is possible that Plaintiff would not be able to recover penalties for this claim. (Szamet Decl. ¶96.) Because of this risk, Plaintiff determined that accepting a discount for settlement purposes was appropriate. (Szamet Decl. ¶97.)

f) The Risks Associated with the PAGA Claim

California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq*., permits private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of $100 per employee per pay period for the initial violation and $200 for subsequent violations.[1]

Plaintiff discounted the PAGA claim for multiple reasons. First, the aggrieved employees' PAGA claims are arguably derivative of all the foregoing class claims. (Szamet Decl. ¶98.) If Plaintiff cannot establish liability on the underlying claim (taking into account the risks discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*) Second, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶99.) (Labor Code § 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"). *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Third, the likelihood of the Court reducing the PAGA damages awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to each of Plaintiff's claims – is also higher in this case where these same individuals will also be receiving money for the same unlawful conduct under the class claims. (Szamet Decl. ¶100.) (s*ee Avila v.*

[1] The comprehensive reform of California's Private Attorneys General Act is now the law (AB 2288 and SB 92). The PAGA reform took effect immediately and applies to cases filed after June 19, 2024. Though it does not apply here as this was prior-filed, it is instructive to courts and practitioners on many issues including when "Subsequent' Penalties" may apply.

Where a penalty was not provided for under the PAGA, the default penalty was $100 for an initial violation and $200 for a subsequent violation. Plaintiffs argued that "subsequent" meant any violation after the first violation. Defendants generally argued, often citing *Gunther v. Alaska Airlines, Inc*., 72 Cal. App. 5th 334 (2021) that a subsequent violation could only occur after an initial violation was found to have occurred by a court or the Labor Commissioner.

The PAGA reform clarifies that the default $100 penalty applies to all violations, unless (1) a court or the Labor Commissioner finds that the employer's practice or policy violated the law within the last five years, or (2) a court determines that the employer acted "maliciously, fraudulently, or oppressively." The new law does not define what constitutes "maliciously, fraudulently, or oppressively." But, if either of the above apply, the default penalty will increase to $200 for subsequent violations.

Cold Spring Granite Co. (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO, 2018 U.S. Dist. LEXIS 6142 *17 ("Because the PAGA penalties sought are at least partially duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential PAGA penalties are highly uncertain."); and see Nordstrom Commissions Cases, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating $0 of $6.4 million settlement to PAGA penalties)..

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶101.) If the Court did eventually certify a meal or wage statement class, trial of a case involving approximately 487 Settlement Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶102.) Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶103.) An appeal would result in further delay for the Settlement Class Members who are waiting for a resolution in this matter. (*Id*.)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Szamet Decl. ¶104.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses (especially a rest period class), certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id*.) In attempting to certify a class, the parties would need to conduct multiple depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's meal and rest policies. (*Id*.) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Id*.)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement of $392,700.00. (Szamet Decl.

¶105.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Szamet Decl. ¶106.) The Parties arrived at it after extensive investigation and discovery, careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance of an experienced mediator, Henry Bongiovi, Esq. (*Id.*)

a) Plaintiff's Assessment of Defendant's Maximum Exposure

Plaintiff was provided with a data sample for mediation purposes and had it analyzed by an expert.[2] (Szamet Decl. ¶107.) There were 61 employees in the sample and the expert extrapolated the sample to 550 employees for purpose of analysis.[3] (Szamet Decl. ¶108.)

Working with the data expert, Plaintiff assessed the full value of the minimum wage/overtime claim, without any discount, at approximately $6,271. (Szamet Decl. ¶109.) Out of the sample of 61 employees, 10 appeared to have a small underpayment totaling 45 hours and when analyzed the approximate underpayment for those employees was $565. (Szamet Decl. ¶110.) Extrapolated to 550 employees this alleged underpayment was 496 hours and the exposure estimated at $6,271. (*Id.*)

Plaintiff assessed the full value of the rest period claim, without any discount, at approximately $206,818. (Szamet Decl. ¶111.) This amount is based upon 13,660 shifts of over 3.5 hours with each and every shift assumed to have a violation. (Szamet Decl. ¶112.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Szamet Decl. ¶113.)

With regard to the reimbursement claim analysis, Plaintiff believed that it was reasonable to value the potential reimbursement at $50 per month, per employee, per month. (Szamet Decl. ¶114.) These assumptions spanned 2,796 months as extrapolated bringing the damages for this claim to $139,800.00. (Szamet Decl. ¶115.)

///

---

[2] Of the 61 employees in the sample, 55 were former employees; the data set covered the time period June 2, 2019 to December 26, 2023; and it included 2,520 shifts, 435 pay periods, and 811 workweeks. The average hourly rate was $16.16. (Szamet Decl. ¶108.)

[3] Noticeably, the analysis and the figures discussed below are actually somewhat overstated because there are actually only 487 Settlement Class Members. (Szamet Decl. ¶109.)

Plaintiff valued the wage statement claim, without discount, at $178,633. (Szamet Decl. ¶116.) Plaintiff used $100 for each wage statement issued for 1,975 pay periods in the sample with an alleged violation. (Szamet Decl. ¶117.) Due to the risk discussed above that 226(a) liability would not attach under *Naranjo* and *Maldonado*, Plaintiff determined that a discount of this claim was fair for settlement purposes. (Szamet Decl. ¶118.)

Plaintiff valued the waiting time claim, tied to the wages/overtime claim, at $1,922,758. (Szamet Decl. ¶119.) Considering the derivate nature of Labor Code §203 and the dispute over whether class members were actually owed any wages, Plaintiff determined that accepting a steep discount on this claim was appropriate. (Szamet Decl. ¶120.)

As to the exposure for PAGA penalties under Labor Code §2699, et seq., Plaintiff valued this claim at approximately $197,500. (Szamet Decl. ¶121.) This was based upon expert analysis of the number of pay periods at issue during the PAGA relevant time period beginning June 2, 2022, multiplied by $100 per pay period (1,975 pay periods in the data x $100 = $197,500. (Szamet Decl. ¶122.) Plaintiff's exposure analysis assumes that she can prove there was an underlying Labor Code in each and every pay period that would trigger a civil penalty under PAGA. (Szamet Decl. ¶123.)

Thus, per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the Settlement Class Members' claims was approximately $2,651,780.00. (Szamet Decl. ¶124.) However, in looking at just the core damages related to the claims for alleged unpaid wages, rest period violations, and reimbursement, the maximum exposure was $352,889. (Szamet Decl. ¶125.) The amount attributable to statutory and civil penalties far outweighs the exposure on the underlying claims. (Szamet Decl. ¶126.) Plaintiff and Class Counsel believe that examining the core exposure together with the significant foregoing risks on the merits, supports a finding that the Gross Settlement Amount of $392,700.00 is fair and reasonable. (Szamet Decl. ¶127.)

b) Defendant's Financial Status

In addition to the risks considered above, one of the factors affecting settlement of this action was Defendant's financial status. (Szamet Decl. ¶128.) Defendant is an in-hospital newborn photography company which has faced declining sales in recent years due in part to photographer services not being offered by hospitals for a period of time due to the COVID-19 pandemic. (Szamet Decl. ¶129.) Class Counsel worked closely with the mediator and Counsel for Defendant the day of the mediation to verify the information and representations made by Defendant regarding their financial condition. (Szamet Decl. ¶130.) Class Counsel determined that obtaining a settlement on behalf of the Settlement Class now as opposed to protracted litigation with the uncertainty of Defendant's ability to pay made the most practical sense. (Szamet Decl. ¶131.)

5. The Experience and Views of Counsel

Finally, counsel's experience and success in similar class actions also weigh in favor of preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley Szamet Employment Lawyers is a well-established firm and very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶132-134.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id.*) Kingsley Szamet Employment Lawyers currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley Szamet Employment Lawyers has handled is included in the accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶135.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (*See, e.g.*, *Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of compensable work weeks worked by the Settlement Class Member during the Class Period. The lump sum payment to each Settlement Class Member not excluding him/ herself will be determined on an individualized basis based upon the compensable pay periods worked by that individual. (Ex. 1 at ¶3.2.4.) This allocation distributes Agreement funds proportionally to each class member's potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶136.)

7. The Proposed Notice Fairly Apprises the Settlement Class Members of the Terms of the Settlement and of the Class Members' Rights under the Settlement

Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address of all Settlement Class Members, or to an updated address if one is located in the National Change of Address Database. (Ex. 1 at ¶7.4.2). If any Notices are returned as undeliverable, the Administrator will undertake another reasonable address verification measure to locate a valid mailing address and will promptly send the Notice to the new address. (*Id.*) As such, the Notice is likely to reach most, if not all, Settlement Class Members.

With respect to the contents of the Notice, the "notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." (*Trotsky v. L.A. Fed. Sav. & Loan Ass'n* (1975) 48 Cal.App.3d 134, 151–52.) The purpose of a class notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Ibid.*)

Here, the Notice clearly explains the proposed Agreement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Ex. 1 at ¶7.5; ¶7.7 ; *see also* Ex. A to the Agreement at pp. 1-2, 4 [Class Notice].) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Settlement Class Members to make an informed choice regarding whether to participate.

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF

The Class Representative is entitled to an enhancement for her valiant effort and time expended in this matter. (Szamet Decl. ¶137.) The time spent by Ernestine Jimenez is significant and includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with many Settlement Class Members; making herself available for a full-day of mediation; and responding promptly to Class Counsel's communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of $5,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at ¶3.2.1.) As set forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶138; Ex. 1 at ¶5.1.1.)

Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶139.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff will provide a detailed declaration with the Final Approval Motion detailing her participation and further justification for the enhancement. (*Id.*)

VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY

As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "2." (Szamet Decl. ¶140.)

VIII. CONCLUSION

Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members. Therefore, the Parties respectfully request that the Court (1) grant preliminary approval of the Class Action and PAGA Settlement Agreement, and all of its terms; (2) approve the proposed form of notice, and direct that the Notice be sent to Settlement Class Members in the manner set forth in the Class Action and PAGA Settlement Agreement; and (3) schedule a hearing on final approval of the Agreement and Class Counsel's application for an award of attorney's fees and litigation costs.

DATED: July 10, 2025

KINGSLEY SZAMET EMPLOYMENT LAWYERS

By: ______________________

Kelsey M. Szamet
Attorneys for Plaintiff ERNESTINE JIMENEZ AND the Proposed Class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On July 10, 2025, I served all interested parties in this action the following documents described as **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Gordon Rees Scully Mansukhani, LLP Jennifer Jambor-Delgado Debra Ellwood Meppen Rebecca Marsden Delia Guerrero jjambordelgado@grsm.com rmarsden@grsm.com dmeppen@grsm.com dmguerrero@grsm.com 633 W. Fifth., 52nd Floor, Los Angeles, CA 90071 cc : mtabizon@grsm.com *Attorneys for Defendant*	**ABRAMSON LABOR GROUP** WILLIAM ZEV ABRAMSON, Esq. wza@abramsonlabor.com 1700 W Burbank Blvd, Burbank, CA 91506 *Attorneys for Plaintiff*

[XX] BY ELECTRONIC MAIL TRANSMISSION: I caused the document to be sent to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 10, 2025, at Chino, California.

Leslie Sanchez