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

11 **FOR THE COUNTY OF MARIPOSA**

12 **(UNLIMITED JURISDICTION)**

13 KEVIN LYNUM, on behalf of himself and all
14 others similarly situated, and as an “aggrieved
15 employee” on behalf of other “aggrieved
16 employees” under the Labor Code Private
Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19 PROSPECT HOTEL SERVICES, LLC, a
20 Delaware limited liability company; PROSPECT
21 HOTEL MANAGEMENT LLC, a Delaware
22 limited liability company; and DOES 1–50,
inclusive,

23 *Defendant(s).*

Case No. 23-CVCV-0012034

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



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

3 **I. INTRODUCTION**

4 Plaintiff Kevin Lynam (“Plaintiff”) submits this memorandum of points and authorities
5 in support of his unopposed motion for preliminary approval of the Class Action and PAGA
6 Settlement Agreement and Class Notice (the “Settlement”)², which provides for a Gross
7 Settlement Amount (“GSA”) of \$429,000.00 in compromise of all disputed claims on behalf of
8 all persons currently or formerly employed by Defendants PROSPECT HOTEL SERVICES,
9 LLC and PROSPECT HOTEL MANAGEMENT, LLC (collectively “Defendants”) in California
10 and classified as hourly, non-exempt employees who worked for Defendants at any time between
11 September 25, 2019 through the date of preliminary approval of this Settlement. Through this
12 Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-defined
13 Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve
14 the Settlement; (3) preliminarily appoint Plaintiff as Class Representative; (4) appoint David
15 Spivak of The Spivak Law Firm and Walter L. Haines of United Employees Law Group as Class
16 Counsel; (5) approve the proposed notice procedures and related forms; and (6) schedule a final
17 approval hearing.

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

28 ///

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



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1
2 **II. BACKGROUND**

3 Defendants manage several hotels and luxury campgrounds including AutoCamp.
4 AutoCamp has at least four locations in California. DS, ¶ 4. Defendants employed Plaintiff as a
housekeeper from about May 20, 2023 until June 12, 2023. *Id.*

5 **A. The Claims and Procedural History**

6 On September 25, 2023, Plaintiff notified Defendants and the California Labor and
7 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
8 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

9 On September 25, 2023, Plaintiff filed a Class Action Complaint in the Mariposa County
10 Superior Court, Case No. 23-CVCV-0012034, against Defendants on behalf of himself and others
11 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages
12 Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide
13 Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code
14 §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
15 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
16 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex.3. On
17 December 4, 2023, Plaintiff filed his First Amended Complaint adding a claim under PAGA. DS,
18 ¶ 6, Ex. 4. On February 9, 2024, Defendants filed an answer to Plaintiff’s First Amended
19 Complaint. DS, ¶ 6, Ex. 5. Defendants deny all of Plaintiff’s allegations and strongly contend that
20 their wage and hour policies, practices and procedures are fully compliant with all applicable
laws. DS, ¶ 6.

21 **B. Mediation**

22 The Parties thereafter engaged in an informal, voluntary exchange of information in the
23 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
24 Plaintiff’s entire personnel file (including policies and agreements he signed and acknowledged),
25 copies of their relevant company written policies, time-keeping records, and payroll data for
26 Plaintiff and a random sample of putative class members specifically selected by Plaintiff’s
counsel. DS, ¶ 7.

27 On July 08, 2024, following much of the foregoing informal discovery and exchange of
28 information, the Parties participated in a mediation session presided over by Mediator Henry



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Bongiovi, an experienced class action mediator. During the mediation, the Parties had a full day of productive negotiations and reached agreement on a class-wide settlement. . During the mediation session, each side, represented by his/their respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the Action and all other matters covered by this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 8.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement defines the call as all persons currently or formerly employed by Defendants in California and classified as hourly, non-exempt employees who worked for Defendants at any time during the Class Period. “Class Period” means the period from September 25, 2019 through the date of preliminary approval of this Settlement. Settlement §§ 1.5 and 1.12.

B. Monetary Terms

Except as otherwise provided by Paragraph 9 of the Settlement Agreement, Defendants promise to pay \$429,000 as the Gross Settlement Amount. In no event will Defendants be required to pay more than the Gross Settlement Amount, except to separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual Class Payments. None of the Gross Settlement Amount will revert to Defendants. Settlement § 3.

Based on their records, Defendants estimate that, as of the date of this Settlement Agreement, (1) there are 284 Class Members who worked a total of 14,283 Work Weeks during the Class period and (2) there are 139 Aggrieved Employees who worked a total of 3,000 PAGA Pay Periods during the PAGA Period. If the Work Weeks and/or Class Members as of the date the Court approves the settlement exceeds the referenced 14,283 Work Weeks and/or 284 Class Members by more than 10%, the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class Representative Payment, and the LWDA payment, will increase proportionally according to the number of additional Work Weeks or Class Members, whichever results in a higher increase in the Gross Settlement Amount. Settlement § 9.

The Administrator will make and deduct the following payments from the Gross Settlement Amount, in the amounts specified by the Court in the Final Approval:

To Plaintiff: Class Representative Service Payment to the Class Representative of not more than \$15,000 (in addition to any Individual Class Payment and any Individual PAGA Payment the Class Representative is entitled to receive as a Participating Class Member). Defendants will not oppose Plaintiff’s request for a Class Representative Service Payment that



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1 does not exceed this amount. As part of the motion for Class Counsel Fees Payment and Class
2 Litigation Expenses Payment, Plaintiff will seek Court approval for any Class Representative
3 Service Payments no later than 16 court days prior to the Final Approval Hearing. If the Court
4 approves a Class Representative Service Payment less than the amount requested, the
5 Administrator will retain the remainder in the Net Settlement Amount. The Administrator will
6 pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full
responsibility and liability for employee taxes owed on the Class Representative Service Payment.

7 **To Class Counsel:** A Class Counsel Fees Payment of not more than 33.33%, which is
8 currently estimated to be \$143,000 and a Class Counsel Litigation Expenses Payment of not more
9 than \$15,000. Defendants will not oppose requests for these payments provided that do not exceed
10 these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel Fees Payment
11 and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval
12 Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation
13 Expenses Payment less than the amounts requested, the Administrator will allocate the remainder
14 to the Net Settlement Amount. Released Parties shall have no liability to Class Counsel or any
15 other Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment
16 and/or Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel
17 Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms. Class
18 Counsel assumes full responsibility and liability for taxes owed on the Class Counsel Fees
19 Payment and the Class Counsel Litigation Expenses Payment and holds Defendants harmless,
20 and indemnifies Defendants, from any dispute or controversy regarding any division or sharing
of any of these Payments.

21 **To the Administrator:** An Administrator Expenses Payment not to exceed \$10,000
22 except for a showing of good cause and as approved by the Court. To the extent the
23 Administration Expenses are less or the Court approves payment less than \$10,000, the
Administrator will retain the remainder in the Net Settlement Amount.

24 **To Each Participating Class Member:** The Settlement Administrator will calculate the
25 total number of Work Weeks for all Participating Class Members who worked during the Class
26 Period. An Individual Class Payment is calculated by (a) dividing the Net Settlement Amount by
27 the total number of Work Weeks worked by all Participating Class Members during the Class
28 Period and (b) multiplying the result by each Participating Class Member's Work Weeks. The



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1 Settlement Administrator will determine the total number of Work Weeks worked during the
2 Class Period for each Participating Class Member. 20% of each Participating Class Member's
3 Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion").
4 The Wage Portions are subject to tax withholdings customarily made from an employee's wages
5 and all other authorized and required withholdings and will be reported on an IRS W-2 Form. The
6 80% of each Participating Class Member's Individual Class Payment will be allocated to
7 settlement of claims for statutory damages, reimbursements, interest and penalties (the "Non-
8 Wage Portion"). The Non-Wage Portions shall be subject to all authorized and required
9 withholdings other than the tax withholdings customarily made from employees' wages and shall
10 be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and
11 liability for any employee taxes owed on their Individual Class Payment. Defendants shall not
12 make as part of this Settlement, nor be required to make, any deductions, nor pay any monthly
13 contributions for any insurance, retirement, 401(k) or profit-sharing plans, or any benefit plans
14 related to monies paid as a result of this Settlement. Non-Participating Class Members will not
15 receive any Individual Class Payments. The Administrator will retain amounts equal to their
16 Individual Class Payments in the Net Settlement Amount for distribution to Participating Class
17 Members on a pro rata basis.

16 **To the LWDA and Aggrieved Employees:** PAGA Penalties in the amount of \$5,000 to
17 be paid from the Gross Settlement Amount, with 75% (\$3,750) allocated to the LWDA PAGA
18 Payment and 25% (\$1,250) allocated to the Individual PAGA Payments. The Administrator will
19 calculate each Individual PAGA Payment for all Aggrieved Employees worked during the PAGA
20 Period by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties
21 \$1,250 by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the
22 PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Pay Periods.
23 The Settlement Administrator will determine the total number of Pay Periods worked during the
24 PAGA Period for each Aggrieved Employee. Aggrieved Employees assume full responsibility
25 and liability for any taxes owed on their Individual PAGA Payment. If the Court approves PAGA
26 Penalties of less than the amount requested, the Administrator will allocate the remainder to the
27 Net Settlement Amount. The Administrator will report the Individual PAGA Payments on IRS
28 1099 Forms.

Settlement § 3.



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1
2 **C. Timing of Payments**

3 Not later than 15 days after the Court grants Preliminary Approval of the Settlement,
4 Defendants will simultaneously deliver the Class Data to the Administrator, in the form of a
5 Microsoft Excel spreadsheet. To protect Class Members' privacy rights, the Administrator must
6 maintain the Class Data in confidence, use the Class Data only for purposes of this Settlement
7 and for no other purpose, and restrict access to the Class Data to Administrator employees who
8 need access to the Class Data to effect and perform under this Agreement. The Class Data shall
9 not be disclosed to Plaintiff, Class Counsel or any other person without prior approval from
10 Defendants' counsel. However, for purposes of determining whether the escalation provision of
11 Section 9 of this Settlement is triggered, the Administrator will disclose to Class Counsel the
12 number of Class Members, Aggrieved Employees, Work Weeks, and PAGA Pay Periods before
13 notifying the Class of the Settlement. Defendants have a continuing duty to immediately notify
14 Class Counsel if they discover that the Class Data omitted class member identifying information
15 and to provide corrected or updated Class Data as soon as reasonably feasible. Without any
16 extension of the deadline by which Defendants must send the Class Data to the Administrator,
17 the Parties and their counsel will expeditiously use best efforts, in good faith, to reconstruct or
18 otherwise resolve any issues related to missing or omitted Class Data. Defendants shall fully fund
19 the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendants'
20 share of payroll taxes by transmitting the funds to the Administrator no later than 14 days after
21 the Effective Date. Within 14 days after Defendants fund the Gross Settlement Amount, the
22 Administrator will mail checks for all Individual Class Payments, all Individual PAGA
23 Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel
24 Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative
25 Service Payment. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation
26 Expenses Payment and the Class Representative Service Payment shall not precede disbursement
27 of Individual Class Payments and Individual PAGA Payments. The Administrator will issue
28 checks for the Individual Class Payments and/or Individual PAGA Payments and send them to
the Class Members via First Class U.S. Mail, postage prepaid. The face of each check shall
prominently state the date (not less than 180 days after the date of mailing) when the check will
be voided. The Administrator will cancel all checks not cashed by the void date. The



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1 Administrator will send checks for Individual Settlement Payments to all Participating Class
2 Members (including those for whom Notice Packet was returned undelivered). The
3 Administrator will send checks for Individual PAGA Payments to all Aggrieved Employees
4 including Non-Participating Class Members who qualify as Aggrieved Employees (including
5 those for whom Notice Packet was returned undelivered). The Administrator may send
6 Participating Class Members a single check combining the Individual Class Payment and the
7 Individual PAGA Payment. Before mailing any checks, the Administrator must update the
8 recipients' mailing addresses using the National Change of Address Database.

8 Settlement § 4.

9 **D. Calculation of Settlement Shares**

10 The Settlement Administrator will calculate the total number of Work Weeks for all
11 Participating Class Members who worked during the Class Period. An Individual Class Payment
12 is calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks
13 worked by all Participating Class Members during the Class Period and (b) multiplying the result
14 by each Participating Class Member's Work Weeks. The Settlement Administrator will
15 determine the total number of Work Weeks worked during the Class Period for each Participating
16 Class Member. The Administrator will calculate each Individual PAGA Payment for all
17 Aggrieved Employees worked during the PAGA Period by (a) dividing the amount of the
18 Aggrieved Employees' 25% share of PAGA Penalties \$1,250 by the total number of PAGA Pay
19 Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the
20 result by each Aggrieved Employee's PAGA Pay Periods. The Settlement Administrator will
21 determine the total number of Pay Periods worked during the PAGA Period for each Aggrieved
22 Employee. Aggrieved Employees assume full responsibility and liability for any taxes owed on
23 their Individual PAGA Payment. Settlement § 3.

24 **E. Apportionment of Settlement Shares**

25 20% of each Participating Class Member's Individual Class Payment will be allocated to
26 settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax
27 withholdings customarily made from an employee's wages and all other authorized and required
28 withholdings and will be reported on an IRS W-2 Form. The 80% of each Participating Class
Member's Individual Class Payment will be allocated to settlement of claims for statutory
damages, reimbursements, interest and penalties (the "Non-Wage Portion"). The Non-Wage
Portions shall be subject to all authorized and required withholdings other than the tax



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1 withholdings customarily made from employees' wages and shall be reported on IRS 1099 Forms.
2 Settlement § 3.2.4.1.

3 **F. The Releases**

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

8 **Plaintiff's Release.** Plaintiff and his respective former and present spouses,
9 representatives, agents, attorneys, heirs, administrators, predecessors, successors, and assigns
10 generally, forever release and discharge Released Parties from any and all claims, transactions,
11 debts, liabilities, demands, actions, causes of action or occurrences of every nature and description
12 that accrued during the Class Period, under state law and the Wage Orders of the California
13 Industrial Welfare Commission, that were alleged or which could have been alleged based on the
14 factual allegations in the First Amended Complaint in the Action, including, but not limited to:
15 (a) all claims that were, or reasonably could have been, alleged, based on the facts contained, in
16 the Operative Complaint, (b) all PAGA claims that were, or reasonably could have been, alleged
17 based on facts contained in the Operative Complaint, Plaintiff's PAGA Notice, or ascertained
18 during the Action and released under 6.2, below and (c) all claims arising under California Labor
19 Code Sections 201-204, 206, 218.6, 226, 226.7, 510, 512, 1182.12, 1194, 1194.2, 1197, 1198,
20 2800, 2802, and/or those arising under the Industrial Welfare Commission Wage Orders,
21 California Business and Professions Code section 17200 et seq., California Code of Regulations,
22 title 8, Section 11160, California Civil Code sections 3287, 3289, and 3294, and California Code
23 of Civil Procedure section 1021.5. ("Plaintiff's Release.") Plaintiff's Release does not extend to
24 any claims or actions to enforce this Agreement, or to any claims for vested benefits,
25 unemployment benefits, disability benefits, social security benefits, workers' compensation
26 benefits that arose at any time, or based on occurrences outside the Class Period. Plaintiff
27 acknowledges that Plaintiff may discover facts or law different from, or in addition to, the facts
28 or law that Plaintiff now knows or believes to be true but agrees, nonetheless, that Plaintiff's
Release shall be and remain effective in all respects, notwithstanding such different or additional
facts or Plaintiff's discovery of them. The above release language shall also be included in the
Class Notice.



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1 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of
2 Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits,
3 if any, of section 1542 of the California Civil Code, which reads:

4 A general release does not extend to claims that the creditor or releasing party does not
5 know or suspect to exist in his or her favor at the time of executing the release, and that if
6 known by him or her would have materially affected his or her settlement with the debtor
7 or Released Party.

8 Thus, subject to and in accordance with this Agreement, even if Plaintiff may hereafter
9 discover facts in addition to or different from those she now knows or believes to be true, Plaintiff,
10 upon the Effective Date, shall be deemed to have fully, finally, and forever settled and released
11 any and all claims against the Released Parties that were alleged or could have been alleged in
12 the Action, as well as any other claims, whether known or unknown, suspected or unsuspected,
13 contingent or non-contingent, that now exist, upon any theory of law or equity, including without
14 limitation, conduct which is negligent, intentional, with or without malice, or a breach of any
15 duty, law, or rule, without regard to the subsequent discovery or existence of such different or
16 additional facts.

17 **Release by Participating Class Members:** All Participating Class Members, on behalf
18 of themselves and their respective former and present representatives, agents, attorneys, heirs,
19 administrators, successors, and assigns, release Released Parties from (i) all claims transactions,
20 debts, liabilities, demands, actions, causes of action or occurrences of every nature and description
21 that accrued during the Class Period, under state law and the Wage Orders of the California
22 Industrial Welfare Commission, that were alleged or which could have been alleged based on the
23 factual allegations in the First Amended Complaint in the Action, including, but not limited to:
24 failure to pay wages, failure to authorize and permit rest periods, failure to indemnify for business
25 expenses, failure to issue proper wage statements, failure to timely pay wages, failure to properly
26 pay vacation time, failure to provide meal periods, and related allegations for the Class Period.
27 This shall include all claims arising from the factual allegations in the First Amended Complaint
28 in the Action that can support violations of California Labor Code Sections 201-204, 206, 218.6,
226, 226.7, 510, 512, 1182.12, 1194, 1194.2, 1197, 1198, 2800, 2802, and/or those arising under
the Industrial Welfare Commission Wage Orders, California Business and Professions Code



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1 section 17200 et seq., California Code of Regulations, title 8, Section 11160, California Civil
2 Code sections 3287, 3289, and 3294, and California Code of Civil Procedure section 1021.5.
3 Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release
4 any other claims, including claims for vested benefits, wrongful termination, violation of the Fair
5 Employment and Housing Act, unemployment insurance, disability, social security, workers'
6 compensation, or claims based on facts occurring outside the Class Period. The above release
7 language shall also be included in the Class Notice.

8 **Release by Non-Participating Class Members Who Are Aggrieved Employees:** All
9 Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf
10 of themselves and their respective former and present representatives, agents, attorneys, heirs,
11 administrators, successors, and assigns, the Released Parties from any and all claims, debts,
12 liabilities, demands, actions, or causes of action of every nature and description that accrued
13 during the PAGA Period, under state law and the California Labor Code, that were alleged or
14 which could have been alleged based on the exhausted claims and factual allegations in Plaintiff's
15 notices sent to the LWDA and alleged in the operative complaint, regardless of whether the
16 Aggrieved Employees opt-out of the Settlement Agreement, including claims for civil penalties
17 based on unpaid wages, including but not limited to failure to pay minimum wages, straight time
18 compensation, overtime compensation, double time compensation and interest; failure to timely
19 pay regular and final wages; failure to reimburse business expenses; failure to properly pay
20 vacation time; missed meal period and rest period wages and premiums; meal period waivers and
21 on-duty meal period waivers; payment for all hours worked; wage statements and paystubs,
22 including wage statements and paystubs furnished or available in physical, electronic, or other
23 forms; failure to keep accurate records; penalties, including recordkeeping penalties, wage
24 statement penalties, minimum-wage penalties, and waiting-time penalties; statutory penalties and
25 civil penalties; and attorneys' fees and costs. This shall include all claims arising from the factual
26 allegations in the First Amended Complaint in the Action that can support recovery of civil
27 penalties for violations of California Labor Code Sections 201, 202, 203, 204, 206, 210, 226,
28 226.3, 226.7, 227.3, 246, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1198, 2698 et seq.,
2800, and 2802, and/or those arising under the Industrial Welfare Commission Wage Orders;
PAGA; and/or those arising under the Industrial Welfare Commission Wage Orders; California
Code of Regulations, title 8, Section 11160; and California Code of Civil Procedure section



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1021.5 (“PAGA Released Claims”). The above release language shall also be included in the Class Notice.

Settlement § 6.

G. Notice and Claims Process and Procedures

No later than three (3) business days after receipt of the Class Data, the Administrator shall notify Class Counsel that the list has been received and state the number of Class Members, PAGA Members, Work Weeks, and PAGA Pay Periods in the Class Data. Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service (“USPS”) mail, the Notice Packet with Spanish and translation, of the forms attached to this Agreement as Exhibits A, B, C, and D. The first page of the Class Notice shall prominently estimate the dollar amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and the number of Work Weeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses using the National Change of Address database. Not later than three (3) business days after the Administrator’s receipt of any Notice Packet returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet using any forwarding address provided by the USPS. If the USPS does not provide a forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail the Notice Packet to the most current address obtained. The Administrator has no obligation to make further attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by the USPS a second time. The deadlines for Class Members’ written objections, Challenges to Work Weeks and/or PAGA Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 60 days otherwise provided in the Notice Packet for all Class Members whose notice is re-mailed. The Administrator will inform the Class Member of the extended deadline with the re-mailed Notice Packet.

Settlement § 8.4.

1. Class Member Disputes

Each Class Member shall have 60 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class Members whose Notice Packet is re-mailed) to challenge the number of Class Work Weeks and/or PAGA Pay Periods (if any) allocated to the Class Member in the Class Notice. This is also known as a dispute. A Work Week Dispute form,



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1 attached as Exhibit C, may be used for this purpose but is not required. The Class Member may
2 challenge the allocation by communicating with the Administrator via fax, email or mail. All
3 written disputes must contain the Class Member's address, telephone number, and a reference to
4 the Action. The Administrator must encourage the challenging Class Member to submit
5 supporting documentation. In the absence of any contrary documentation, the Administrator is
6 entitled to presume that the Work Weeks contained in the Class Notice are correct so long as they
7 are consistent with the Class Data. The Administrator's determination of each Class Member's
8 allocation of Work Weeks and/or PAGA Pay Periods shall be final and not appealable or
9 otherwise susceptible to challenge. The Administrator shall promptly provide copies of all
10 challenges to calculation of Work Weeks and/or PAGA Pay Periods to Defense Counsel and Class
Counsel and the Administrator's determination the challenges. Settlement § 8.6.

11 **2. Opting Out**

12 Plaintiff may not request exclusion from the Class. Class Members who wish to exclude
13 themselves (opt-out of) the Class Settlement must send the Administrator, by fax, email, or mail,
14 a signed written Request for Exclusion not later than 60 days after the Administrator mails the
Notice Packet (plus an additional 14 days for Class Members whose Notice Packet is re-mailed).
15 A Request for Exclusion is a letter from a Class Member or his/her representative that reasonably
16 communicates the Class Member's election to be excluded from the Settlement and includes the
17 Class Member's name, address and email address or telephone number. To be valid, a Request
18 for Exclusion must be timely faxed, emailed, or postmarked by the Response Deadline. An
19 Election Not to Participate in Settlement form, attached as Exhibit B, may be used for this purpose
20 but is not required. The date of the initial mailing of the Notice Packet, and the date the signed
21 request for exclusion was postmarked, shall be conclusively determined according to the records
22 of the Settlement Administrator. The Settlement Administrator shall immediately provide copies
23 of all Requests for Exclusion to Class Counsel and Defense Counsel and shall report the number
24 of Requests for Exclusion that it receives, to the Court, in its declaration to be provided in advance
of the Final Approval Hearing. Settlement § 8.5.

25 **3. Objecting**

26 The Plaintiff may not object to the Settlement. Only Participating Class Members may
27 object to the class action components of the Settlement and/or this Agreement, including
28 contesting the fairness of the Settlement, and/or amounts requested for the Class Counsel Fees
Payment, Class Counsel Litigation Expenses Payment and/or Class Representative Service



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1 Payment. Participating Class Members may send written objections, signed by the Objecting
2 Class Member or his or her attorney, along with supporting papers, to the Administrator, by fax,
3 email, or mail. All written objections must contain the Class Member's address, telephone
4 number, and reference to the Action. In the alternative, Participating Class Members may appear
5 in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval
6 Hearing. A Participating Class Member who elects to send a written objection to the
7 Administrator must do so not later than 60 days after the Administrator's mailing of the Notice
8 Packet (plus an additional 14 days for Class Members whose Notice Packet was re-mailed). The
9 Objection form attached as Exhibit D may be used for this purpose but is not required. The date
10 of the initial mailing of the Notice Packet, and the date the signed objection was postmarked, shall
11 be conclusively determined according to the records of the Settlement Administrator. The
12 Settlement Administrator shall send any objections it receives to Defense Counsel and Class
13 Counsel within five (5) business days of receipt. The Court retains final authority with respect to
14 consideration and admissibility of any Class Member objections. If a Class Member objects to
15 the Settlement, the Class Member will remain a member of the Class and if the Court approves
16 this Agreement, the Class Member will be bound by the terms of the Settlement in the same way
17 and to the same extent as a Class Member who does not object. Non-Participating Class Members
18 have no right to object to any of the class action components of the Settlement. Settlement § 8.7.

17 **H. Uncashed Checks**

18 For any Class Member whose Individual Class Payment check or Individual PAGA
19 Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the
20 funds represented by such checks to the California Controller's Unclaimed Property Fund in the
21 name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of
22 California Code of Civil Procedure Section 384, subd. (b). Settlement § 4.4.3.

22 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

23 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
24 and its members are too numerous for joinder to be practical; (2) the representative and absent
25 class members share a community of interest and questions of law and fact common to the class
26 predominate over questions unique to individual class members; (3) the representative's claims
27 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
28 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
in the settlement context, the Court can use a lesser standard to determine the appropriateness of



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1 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
2 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

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

4 A class is ascertainable when it may be readily identified without unreasonable expense
5 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
6 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
7 defined Class is ascertainable because its members may be identified by reference to Defendants'
8 records and Defendants have agreed to share the relevant information from their records to
9 facilitate the settlement process. DS, ¶ 9; Settlement, § 4.2. Therefore, the Settlement Class is
ascertainable.

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

11 The Settlement Class has sufficiently numerous members to render joinder impractical.
12 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
13 (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 284 Class
14 Members. DS, ¶ 10. Plaintiff maintains that it would be impractical and economically inefficient
15 to require each Class Member to separately maintain an individual action or be joined as a named
16 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
17 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
the Settlement Class' membership is sufficiently numerous. DS, ¶ 10. *See Daar v. Yellow Cab*
Co. (1967) 67 Cal.2d 695.

18 **C. Class Members Share a Well-Defined Community of Interest**

19 The community of interest requirement "embodies three factors: (1) predominant common
20 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
21 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
22 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
23 uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
24 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and
25 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
renders class certification appropriate." *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

26 To justify certification, the class proponent "must show ... that questions of law or fact
27 common to the class predominate over the questions affecting the individual members" *See,*
28 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank,*



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1 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for
2 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
3 the claims of the Class Members all stem from the same sources. Settlement, § 13.1.

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

22 **D. Plaintiff Is Typical of the Settlement Class**

23 The class representative must be similarly situated to the rest of the purported class. See
24 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating "it has never been the law in California
25 that the class representative must have identical interests with the class members. The only
26 requirements are ... that the class representative be *similarly* situated") (emphasis in original); See
27 also Newberg, § 3:29 (typicality "focuses on whether there exists a relationship between the
28 Plaintiff's claims and the claims alleged on behalf of the class"). Plaintiff contends that his claims
are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent
Class Members was subject to the same relevant policies and procedures governing his
compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was



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1 subject to the same general course of conduct as absent Class Members, resolving the common
2 questions as they apply to Plaintiff will determine Defendants' *prima facie* liability to all Class
3 Members. Moreover, Plaintiff's claims could potentially be subject to the same primary
4 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical
of the Class. DS, ¶ 12.

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

6 The adequacy requirement is met where the plaintiff is represented by counsel qualified
7 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
8 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
9 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 13.

10 First, Class Counsel have supplied the Court with declarations to show that they are
11 adequate to represent the Settlement Class and that they have significant experience in
12 employment litigation generally, and wage and hour and employment-related class action
13 litigation specifically. See DS, ¶¶ 14-22; Declaration of Walter L. Haines ("Haines Decl.") ¶ 3.
14 Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

15 Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
16 Class Members have strong and co-extensive interests in this litigation because they all worked
17 for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
18 the same alleged course of conduct, and there is no evidence of any conflict of interest between
19 Plaintiff and the Class Members. DS, ¶ 14. Moreover, Plaintiff has demonstrated his commitment
20 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
21 with documents and extensively speaking with them to assist in identifying the claims asserted in
22 this case, assisting them in identifying witnesses, as well as exposing himself to the risk of
23 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 14. Thus,
24 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
25 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
Code of Civil Procedure § 382.

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1 **F. Class Action Treatment Is the Superior Means For Resolving The Claims Of**
2 **The Class Members**

3 Plaintiff further contends that a class action is also superior to other means adjudicating
4 the issues in this action. The predominance of common legal and factual questions shows that this
5 Court could fairly adjudicate the claims of Class Members through a single class action. In view
6 of the *theoretical* alternatives that proposed class members could potentially utilize—
7 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
8 claims through the Division of Labor Standards Enforcement (where there would be relatively
9 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
10 superior to all of them. Thus, this consideration supports conditional class action treatment for
11 purposes of this Settlement only. DS, ¶ 23.

12 **V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL BECAUSE THE**
13 **SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

14 **A. Legal Standard**

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

24 **B. The Settlement Is Presumptively Fair**

25 In assessing preliminary approval, a court evaluates if the settlement process has certain
26 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
27 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
28 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
29 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
30 48 Cal.App.4th at 1794.

31 The class settlement here satisfies all of these factors. DS, ¶ 24. The Settlement resulted
32 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a



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1 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
2 weaknesses of their respective cases and Defendants' estimated exposure. *Id.*

3 Plaintiff prepared "damages" estimates in advance of the mediation. DS, ¶ 25, Ex. 6. In
4 advance of the mediation, Plaintiff determined Defendants' maximum exposure for restitution
5 and penalties to be approximately \$6,207,499.43 (consisting of \$672,683.59 in unpaid wages,
6 \$920,170.97 in missed meal period premium wages, \$1,101,040.06 in missed rest break premium
7 wages, \$117,834.75 in unreimbursed business expenses, \$293,050.00 for wage statement
8 penalties, \$825,509.25 for waiting time penalties, and \$1,650,000.00 for civil penalties). Plaintiff
9 calculated the damages based on the number of workweeks and pay periods provided by
10 Defendants, Plaintiff's reports, and the sample data. *Id.* Plaintiff also considered the possibility
11 that Defendants could launch a *Pick Up Stix* campaign and pursue individual release agreements
12 from the Class Members. Plaintiff also considered the fact that Defendants could gather
13 declarations from Defendants' current employees regarding Plaintiff's claims, that were favorable
14 to Defendants with respect to the relevant factual issues at issue in Plaintiff's action. Plaintiff's
15 Counsel applied discounts to the maximum exposure to account for all other risks discussed
16 below. While it is difficult to assign anything but crudely-determined percentages of risk to any
17 of the claims, it is safe to say that the risk that the Court could deny class certification and that a
18 *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone
19 justifies a significant discount because Defendants would likely by trial have gathered releases
20 from the majority of the Class Members. A settlement for approximately 6.91% of the potential
21 recovery is reasonable.³ *Id.* Plaintiff's initial estimates do not realistically account for the risks
22 outlined below or the risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class
23 settlement for \$429,000.00 is fair and reasonable. *Id.*

24 ³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
25 ("[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
26 be within the targeted range of reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
27 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
28 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) ("a settlement for fourteen percent recovery
of Plaintiffs' maximum recovery is reasonable"); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
1036, 1042 (N.D. Cal. 2008) (approving settlement amount that "is just over 9% of the maximum
potential recovery asserted by either party.").



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

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

10 **1. Evaluation of Plaintiff’s Case**

11 **a. Risks Associated with the Unpaid Wages Claim**

12 There is a risk that Plaintiff’s recovery for unpaid wages would be extremely limited at
13 best, largely because Defendants’ policies throughout the relevant time period required the
14 employees to record all hours worked and prohibited off-the-clock work. DS, ¶ 26. Off-the-clock
15 claims are difficult where a defendant requires in its written policies that all work must take place
16 while clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer
17 must have notice of off-the-clock work for it to be compensable). *Id.* In their written employment
18 policies, Defendants mandate that employees must record all time worked accurately on their time
19 records. DS, ¶ 26. Moreover, while Defendants dispute that off-the-clock work occurred, they
20 contend that any time spent off the clock was *de minimis*. The California Supreme Court in
21 *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and minute periods
22 of time may still be subject to a *de minimis* defense even if compensable. (Stating that “We do
23 not decide whether there are circumstances where compensable time is so minute or irregular that
24 it is unreasonable to expect the time to be recorded.”). Following *Troester*, Defendants contend
25 that the *de minimis* doctrine may apply here because the time spent off the clock were minute and
26 insignificant. Accordingly, a large award of penalties seems unlikely with respect to this claim.
27 *Id.*

28 The difficulty inherent in proving that off-the-clock work occurred poses a significant
hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
Generally, a court will not certify a class unless it can determine an appropriate classwide
methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given



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1 the lack of records indicating when such off-the-clock work may have taken place. Individualized
2 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
3 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
4 risk that the Court would consider this evidentiary showing insufficient as a classwide
5 methodology. Further, regarding the rounding claim, the court could fine the rounding policy to
6 be legal. DS, ¶ 27.

7 **b. Risks Associated with the Meal Period Claims**

8 There are risks to Plaintiff’s meal period claim. DS, ¶ 28. Defendants contend that, to
9 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
10 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
11 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
12 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
13 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
14 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
15 to the meal break claim is the reason that a particular employee may have failed to take a meal
16 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

17 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
18 from taking their meal or rest periods. DS, ¶ 29. Defendants’ policies mandate that employees
19 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
20 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
21 sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
22 taken. *Id.* Of the time records that show a late, short or no lunch, individualized evidence may be
23 necessary to determine whether they occurred due to conduct of the Defendants or each of the
24 employees concerned. Accordingly, there is a significant risk that the value of Plaintiff’s meal
25 period claim would be substantially reduced at trial. *Id.*

26 **c. Risks Associated with the Rest Break Claims**

27 There are risks to Plaintiff’s rest period claim. DS, ¶ 30. Employers are not required to
28 record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
employees the opportunity to take rest periods in accordance with California law. Further,
Defendants’ written policies on meal and rest periods are consistent with the Wage Order. *Id.*
Thus, unlike meal periods, where there are often records showing whether an employee clocked
out or not, there is no such evidence to prove a missed rest period or that the employer refused to



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1 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
2 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
3 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
4 a trial management and due process perspective. *Id.*, See *Duran v. U.S. Bank National Assn.*,
5 (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class
6 certification, it may be possible to manage individual issues through the use of surveys and
7 statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
Corporation v. Behrend (2013) 133 S.Ct. 1426.

8 **d. Risks Associated with the Failure to Indemnify Claim**

9 There is a risk that the Court may consider Plaintiff’s claims as to Defendants’ alleged
10 failure to indemnify for business expenses to be individual in nature and thus decline to certify
11 the class. DS, ¶ 31. Plaintiff alleges that Defendants required Plaintiff and the Class Members to
12 use their personal items including cellular phones and failed to indemnify them for these business
13 expenses. *Id.* Defendants argued that they have supplied their employees with radios and
14 cellphones and had an expense reimbursement policy. As such, there is a risk that the Court may
15 consider Plaintiff’s claims to be individual in nature and unfit for class wide resolution. *Id.*

16 **e. Risks Associated with the Statutory “Wage Statement”
17 Penalty Claims**

18 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
19 PAGA penalties. Under Labor Code section 226, wage statements must include various
20 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
21 DS, ¶ 32. Here, Plaintiff’s wage statement claim has the same underlying risks as the above
22 claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants
23 comply with the requirements of Labor Code § 226.

24 **f. Risks Associated with The Waiting Time Penalties Claim**

25 Plaintiff’s claim for untimely wages is predicated on Labor Code section 201 to 203. Like
26 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
27 The evidence of good faith Defendants put forth will defeat this claim. DS, ¶ 33.

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

7 **h. Risks Associated With A Pick-Up Stix Campaign**

8 An employer enjoys the right to settle a putative class member's disputed wage claims
9 individually, without the consent or involvement of class counsel. DS, ¶ 37. (See *Chindarah v.*
10 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
11 a "pick off" settlement campaign to pursue individual release agreements from the Class
12 Members, thereby potentially narrowing the size of the Settlement Class – 284 members - until it
13 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
14 number of employees to represent. This led to a significant reduction of claim value in settlement
negotiations. *Id.*

15 While the evidence gathered through Plaintiff's discovery supports the merits of the
16 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
17 presents significant risks that support a downward departure from Defendants' estimated liability
18 exposure. DS, ¶ 38. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
19 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
20 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*

21 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
22 the damages caused by that injury or set of injuries.

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

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

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



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

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

9 The settlement of PAGA penalties in the sum of \$5,000.00, of which 75% (\$3,750.00)
10 will be paid to the LWDA and 25% (\$1,250.00) will be distributed to the Class, is reasonable and
11 appropriate under the circumstances. DS, ¶ 39. The Parties negotiated a good faith amount for
12 PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
13 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
14 "negotiate[] a good faith amount" for PAGA penalties and "there is no indication that this amount
15 was the result of self-interest at the expense of other Class Members," such amounts are generally
16 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
17 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
18 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
19 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
20 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
21 trial court's award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
22 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
23 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
24 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
25 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
26 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
27 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
28 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
(approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys 'R' Us-Delaware, Inc.*, (C.D.
Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case



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1 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
2 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
3 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
4 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

5 **3. Presence of Governmental Participant**

6 As required under Labor Code section 2699(l)(2), Plaintiffs will provide notice of this
7 settlement to the LWDA. DS, ¶ 48, Ex. 13.

8 **4. Reaction of Class Members to Proposed Settlement**

9 If the settlement is preliminarily approved, Class Members will be provided with the
10 Notice Packet (attached as Exhibits A and F to the Settlement) and an opportunity to object. The
11 parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
12 will allow Class Members to make informed responses to the proposed settlement. *Id.*

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

17 The Individual Settlement Payments will be paid to each Class Member based on his or
18 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 44, Settlement § 1.23. Because
19 this method compensates Class Members based on the extent of their potential injuries, in that
20 Class Members who worked for Defendants longer would have been subject to more alleged
21 violations, it is fair, adequate, and reasonable. *Id.*

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

24 The Settlement states Class Counsel may seek attorneys' fees of \$143,000.00 (one-third
25 of the GSA) and up to \$15,000.00 for actual reasonable litigation costs and expenses incurred in
26 prosecuting the Action. Settlement § 3.2.2. These amounts are reasonable, given the facts and
27 circumstances of the case. DS, ¶¶ 40-42.

28 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
Beneficial Cal., Inc. (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
v. Moses (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82



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1 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
2 of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee
3 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
4 (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D.
5 Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust*
6 *Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

7 The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
8 took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
9 skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
10 value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
11 down to devote time to this matter. DS, ¶ 41. Class Counsel interviewed and obtained information
12 from putative class members, met and conferred with Defendants' counsel on numerous
13 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
14 Defendants and obtained through other sources, researched applicable law, and provided
15 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

16 Class Counsel have borne all the risks and costs of litigation and will receive no
17 compensation until recovery is obtained. DS, ¶ 42. Class Counsel are well-experienced in wage-
18 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
19 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
20 the requested fees and costs are reasonable and should be awarded. *Id.*

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

24 Courts routinely approve incentive awards to compensate named plaintiffs for the services
25 they provide and the risks they incur during class action litigation, often in much higher amounts
26 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
27 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
28 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
action and the risks he undertook on behalf of Class Members. DS, ¶ 43. Plaintiff has devoted
many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among



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1 other things, retaining experienced counsel, providing them with information about his work
2 history with Defendants and Defendants' policies and practices with respect to the wage and hour
3 claims at issue, participating in mediation, and being actively involved in the settlement process
4 to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
5 to significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if
6 this action had been unsuccessful (See Labor Code §§ 218.5-218.6). The efforts and risks that
7 Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
8 Representative Service Payment is fair, adequate, and reasonable, and thus warrants preliminary
9 approval. DS, ¶ 43.

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

13 With regard to the settlement administration costs provision, it is reasonable. Before
14 agreeing to Phoenix Class Action Administration Solutions and its bid of \$7,000.00, the Parties
15 sought and reviewed bids from other reputable third-party administrators which provided higher
16 bids. DS, ¶ 46-47, Exs. 9, 10, 11, and 12. Thus, the settlement administration costs provision
17 should be given preliminary approval.

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

22 This Court should approve the proposed plans for giving notice to the Settlement Class
23 and administering the Settlement. The standard for determining the adequacy of notice is whether
24 the notice has "a reasonable chance of reaching a substantial percentage of the class members."
25 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
26 measures to ensure that as many Class Members as practicable receive actual notice of the
27 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
28 the Notice by First Class U.S. mail only. Settlement, § 8. Although there are current employee
Class Members, it is uncertain whether Defendants' records of their contact information include
email addresses and Class Members, who perform all of their work away from a desk, are not in
a position to check their emails. As such, notice by mail alone is fair, adequate, and reasonable.
DS, ¶ 45.



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1 With respect to its content, “[The] notice given to the class must fairly apprise the class
2 members of the terms of the proposed compromise and of the options open to dissenting class
3 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
4 The purpose of the notice in class settlement context is to give class members sufficient
5 information to decide whether they should accept the benefits offered, opt out and pursue their
6 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
7 Class Members with all pertinent information that they need to fully evaluate their options and
8 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
9 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
10 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
11 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
12 payments to Class Members will be calculated; (8) how to dispute number of work weeks and
13 how the disputes will be resolved; and (9) the individual Settlement Class Member’s estimated
14 payment. Additionally, the Class Notice will include the number of Work Weeks a Class Member
15 had during the Class Period. Accordingly, the Notice should be approved because it describes the
16 Settlement with sufficient clarity and specificity to explain to Class Members what this action is
17 about, their rights under the Settlement, and how to exercise those rights. DS, ¶ 45.

16 **XI. CONCLUSION**

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

19 Respectfully submitted,

20 THE SPIVAK LAW FIRM

21
22 Dated: November 22, 2024

By:



23 DAVID G. SPIVAK, Attorneys for
24 Plaintiff(s), KEVIN LYNUM, and all
25 others similarly situated



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