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10 STEPHANIE FLORES, and all others similarly situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF LOS ANGELES**

13 **(UNLIMITED JURISDICTION)**

14 STEPHANIE FLORES, on behalf of herself, all
15 others similarly situated, the general public, and
16 as an “aggrieved employee” on behalf of other
17 “aggrieved employees” under the Labor Code
18 Private Attorneys General Act of 2004,

19 *Plaintiff(s),*

20 vs.

21 FREEDOM CARE LLC, a New York limited
22 liability company; FREEDOM CARE CA LLC,
23 a New York limited liability company; and
24 DOES 1–50, inclusive,

25 *Defendant(s).*

Case No. 23STCV23051

**PLAINTIFF STEPHANIE FLORES’
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: March 13, 2025

Hearing Time: 10:00 a.m.

Hearing Dept.: 7, The Honorable
Lawrence P. Riff

Action filed: December 08, 2023

Trial Date: Not Set



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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 Stephanie Flores (“Plaintiff”) submits this memorandum of points and authorities
5 in support of her 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 \$226,050.00 in compromise of all disputed claims on behalf of
8 non-exempt during the period of December 8, 2019 through November 6, 2024. Through this
9 Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the below-defined
10 Class for settlement purposes only under Code of Civil Procedure § 382; (2) preliminarily approve
11 the Settlement; (3) preliminarily appoint Plaintiff as Class Representative; (4) appoint David
12 Spivak of The Spivak Law Firm and Louis M. Benowitz of Benowitz Law Corporation as Class
13 Counsel; (5) approve the proposed notice procedures and related forms; and (6) schedule a final
14 approval hearing.

15 This Court should grant Plaintiff’s motion because: (1) for settlement purposes, the
16 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
17 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
18 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
19 Representative; (4) Plaintiff’s attorneys are adequate to serve as Class Counsel; (5) the proposed
20 notice procedures, and related forms, fully comport with due process and adequately apprise Class
21 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
22 Class Members an opportunity to be heard regarding the Settlement and to give it finality.
23 Accordingly, for the reasons detailed below, this Court should grant Plaintiff’s Motion in its
24 entirety and preliminarily approve the Settlement.

25 **II. BACKGROUND**

26 Freedom Care LLC and Freedom Care CA LLC find caregivers for their customers. DS,
27 ¶ 11. Defendants employed Plaintiff in California as an intake coordinator and centralized form
28 specialist from about June 15, 2020 until January 3, 2023. *Id.*

A. The Claims and Procedural History

On September 11, 2023, Plaintiff notified Defendants and the California Labor and

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



1 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
2 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
3 Code violations committed by Defendants. DS, ¶ 12, Ex. 2.

4 On September 21, 2023, Plaintiff filed a Class Action Complaint in the Los Angeles
5 County Superior Court, Case No. 23STCV23051, against Defendants on behalf of herself and
6 others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All
7 Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to
8 Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab.
9 Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage
10 Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§
11 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 13, Ex. 3. On
12 November 20, 2023, Plaintiff filed her First Amended Complaint adding a claim under PAGA.
13 DS, ¶ 13, Ex. 4. Defendants deny all of Plaintiff’s allegations and strongly contends that their
14 wage and hour policies, practices and procedures are fully compliant with all applicable laws. DS,
15 ¶ 13.

16 **B. Sampling**

17 On July 16, 2024, Plaintiff requested that Defendants informally disclose documents and
18 data to enable Plaintiff to prepare for settlement discussions, including the number of putative
19 class members and aggrieved employees, the number of paychecks and workweeks for the various
20 limitations periods applicable to Plaintiff’s claims. DS, ¶ 16. Plaintiff also requested a reasonable,
21 randomly selected sample of Defendants’ time, payroll, and expense records, and related
22 personnel records. *Id.* Finally, Plaintiff requested Defendants’ written policies applicable to the
23 claims at hand and asked that Defendants identify any and all comparable claims against them.

24 The Parties thereafter engaged in an informal, voluntary exchange of information in the
25 context of privileged settlement discussions to facilitate an early mediation. Defendants produced
26 Plaintiff’s entire personnel file (including policies and agreements she signed and acknowledged)
27 and copies of their relevant company written policies. DS, ¶ 15.

28 The Defendants disclosed that there have any comparable claims against it. Defendants
disclosed and/or Plaintiff discovered the following comparable claims: December 22, 2020,
Elizabeth Carr brought a class and FLSA collective action against Freedom Care in the United
States District Court for the North District of New York. The case resolved by settlement in May



of 2022. Case No. 5:20cv1597. DS, ¶ 19.

Defendants contend that they employed 42 putative class members during the period of September 23, 2019 to December 29, 2023. Defendants produced the records of 30.00% of the putative class members for the period of September 23, 2019 to December 29, 2023. There were records for 14 employees in the sample. Defendants chose the sample. The sample was randomly selected. The sample consisted of time and payroll data, and related records. DS, ¶ 16.

Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Plaintiff also employed the Raosoft³ Sample Size calculator (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014) 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using a margin of error of 32.4%, a confidence level of 95%, and a population size of 42, the Raosoft Sample Size Calculator recommended a sample of eight (8) DS, ¶ 17, **Exhibit 5** (Raosoft Sample Size Calculator results print-out). Thus, the sample population that Plaintiff's data analyst evaluated is statistically reliable. *Id.*

C. Mediation

On August 08, 2024, following much of the foregoing informal discovery and exchange of information, the Parties participated in a mediation session presided over by Mediator Jeffrey Fuchsman, 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 after the mediation session. During the mediation sessions, each side, represented by her / 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, ¶ 18.

III. OVERVIEW OF THE SETTLEMENT

A. Settlement Class and Aggrieved Employees Definition

³ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software programs for information gathering and analysis. The family of survey software supports data collection and reporting for any form-based data. Support is for web-surveys and forms, email distribution, diskette, PDA, laptop or pen-based: all types of distribution." The Raosoft webpage advertises that is it "database web survey software for gathering information." <http://www.raosoft.com/>. It also advertises, "The parameters of the sample size calculation are something that you choose." <http://www.raosoft.com/suggestreading.html>.



1 The Settlement defines the Settlement Class as all of Defendants' non-exempt California
2 employees during the Class Period. Settlement, ¶ 1.5. The Class Period is December 08, 2019
3 through November 6, 2024. *Id.* The "Aggrieved Employees" are all of Defendants' non-exempt
4 California employees. The "PAGA Period" begins December 11, 2022 and ends December 06,
5 2024. *Id.*

6 **B. Monetary Terms**

7 Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below,
8 Defendants promise to pay \$226,050.00 and no more as the Gross Settlement Amount and to
9 separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual
10 Class Payments. Defendants have no obligation to pay the Gross Settlement Amount (or any
11 payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator
12 will disburse the entire Gross Settlement Amount without asking or requiring Participating Class
13 Members or Aggrieved Employees to submit any claim as a condition of payment. None of the
14 Gross Settlement Amount will revert to Defendants. Settlement, ¶ 3.1.

15 Payments from the Gross Settlement Amount. The Administrator will make and deduct
16 the following payments from the Gross Settlement Amount, in the amounts specified by the Court
17 in the Final Approval Settlement, ¶ 3.2.:

18 To Plaintiff: Class Representative Service Payment to the Class Representative of not
19 more than \$15,000.00 (in addition to any Individual Class Payment and any Individual PAGA
20 Payment the Class Representative is entitled to receive as a Participating Class Member).
21 Defendants will not oppose Plaintiff's request for a Class Representative Service Payment that
22 does not exceed this amount. As part of the motion for Class Counsel Fees Payment and Class
23 Litigation Expenses Payment, Plaintiff will seek Court approval for any Class Representative
24 Service Payments no later than 16 court days prior to the Final Approval Hearing. If the Court
25 approves a Class Representative Service Payment less than the amount requested, the
26 Administrator will retain the remainder in the Net Settlement Amount. The Administrator will
27 pay the Class Representative Service Payment using IRS Form 1099. Plaintiff assumes full
28 responsibility and liability for employee taxes owed on the Class Representative Service Payment.
Settlement, ¶ 3.2.1.

To Class Counsel: A Class Counsel Fees Payment of not more than 33.33%, which is
currently estimated to be \$75,350.00 and a Class Counsel Litigation Expenses Payment of not





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more than \$17,500.00. Defendants will not oppose requests for these payments provided that do not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or a Class Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any division or sharing of any of these Payments. Settlement, ¶ 3.2.2.

To the Administrator: An Administrator Expenses Payment not to exceed \$5,000.00 except for a showing of good cause and as approved by the Court. To the extent the Administration Expenses are less or the Court approves payment less than \$5,000.00, the Administrator will retain the remainder in the Net Settlement Amount. Settlement, ¶ 3.2.3.

To Each Participating Class Member: An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Work Weeks. Settlement, ¶ 3.2.4.

C. Timing of Payments

Class Work Weeks and Aggrieved Employee Pay Periods. Based on a review of its records to date, Defendants estimate there are 42 Class Members who collectively worked a total of 4,521 Work Weeks, and 23 of Aggrieved Employees who worked a total 918 of PAGA Pay Periods. Settlement, ¶ 4.1.

Class Data. Not later than 15 days⁴ after the Court grants Preliminary Approval of the Settlement, Defendants will simultaneously deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. To protect Class Members' privacy rights, the Administrator must maintain the Class Data in confidence, use the Class Data only for purposes

⁴ All time periods refer to calendar days unless otherwise noted.



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1 of this Settlement and for no other purpose, and restrict access to the Class Data to Administrator
2 employees who need access to the Class Data to effect and perform under this Agreement.
3 Defendants have a continuing duty to immediately notify Class Counsel if they discover that the
4 Class Data omitted class member identifying information and to provide corrected or updated
5 Class Data as soon as reasonably feasible. Without any extension of the deadline by which
6 Defendants must send the Class Data to the Administrator, the Parties and their counsel will
7 expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any issues related
8 to missing or omitted Class Data. Settlement, ¶ 4.2.

8 Funding of Gross Settlement Amount. Defendants shall fully fund the Gross Settlement
9 Amount, and also fund the amounts necessary to fully pay Defendants' share of payroll taxes by
10 transmitting the funds to the Administrator no later than 14 days after the Effective Date.
11 Settlement, ¶ 4.3.

12 Payments from the Gross Settlement Amount. Within 14 days after Defendants fund the
13 Gross Settlement Amount, the Administrator will mail checks for all Individual Class Payments,
14 all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses
15 Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and
16 the Class Representative Service Payment. Disbursement of the Class Counsel Fees Payment, the
17 Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall
18 not precede disbursement of Individual Class Payments and Individual PAGA Payments.
19 Settlement, ¶ 4.4.

20 The Administrator will issue checks for the Individual Class Payments and/or Individual
21 PAGA Payments and send them to the Class Members via First Class U.S. Mail, postage prepaid.
22 The face of each check shall prominently state the date (not less than 180 days after the date of
23 mailing) when the check will be voided. The Administrator will cancel all checks not cashed by
24 the void date. The Administrator will send checks for Individual Settlement Payments to all
25 Participating Class Members (including those for whom Notice Packet was returned undelivered).
26 The Administrator will send checks for Individual PAGA Payments to all Aggrieved Employees
27 including Non-Participating Class Members who qualify as Aggrieved Employees (including
28 those for whom Notice Packet was returned undelivered). The Administrator may send
Participating Class Members a single check combining the Individual Class Payment and the
Individual PAGA Payment. Before mailing any checks, the Administrator must update the

recipients' mailing addresses using the National Change of Address Database. Settlement, ¶ 4.4.1.

The Administrator must conduct a Class Member Address Search for all other Class Members whose checks are returned undelivered without USPS forwarding address. Within 7 days of receiving a returned check the Administrator must re-mail checks to the USPS forwarding address provided or to an address ascertained through the Class Member Address Search. The Administrator need not take further steps to deliver checks to Class Members whose re-mailed checks are returned as undelivered. The Administrator shall promptly send a replacement check to any Class Member whose original check was l

D. Calculation of Settlement Shares

"Individual Class Payment" means the Participating Class Member's pro rata share of the Net Settlement Amount calculated according to the number of Work Weeks worked during the Class Period. Settlement, ¶ 1.23. An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Work Weeks. Id., ¶ 3.2.4.

"Individual PAGA Payment" means the Aggrieved Employee's pro rata share of 25% of the PAGA Penalties calculated according to the number of Work Weeks worked during the PAGA Period. Settlement, ¶ 1.24.

The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties \$1,000.00 by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. Id., ¶ 3.2.5.1.

E. Apportionment of Settlement Shares

Tax Allocation of Individual Class Payments. 20.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 80.00% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed



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1 on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

2 **F. The Releases**

3 Plaintiff's Release. Plaintiff and her respective former and present spouses,
4 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
5 and discharge Released Parties from all claims, transactions, or occurrences that occurred during
6 the Class Period, including, but not limited any and all charges, complaints, claims, liabilities,
7 obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights,
8 demands, costs, losses, debts and expenses (including attorney fees and costs), known or
9 unknown, at law or in equity, which she may now have or may have after the signing of this
10 Agreement, arising out of or in any way connected with her employment with Defendants
11 including, the Released Class Claims, Released PAGA Claims, claims that were asserted or could
12 have been asserted in the Complaint, and any and all transactions, occurrences, or matters between
13 the Parties occurring prior to the date this Agreement is fully executed. Without limiting the
14 generality of the foregoing, this release shall include, but not be limited to, any and all claims
15 under: (a) the Americans with Disabilities Act; (b) Title VII of the Civil Rights Act of 1964; (c)
16 the Age Discrimination in Employment Act; (d) the Fair Labor Standards Act; (e) the Equal Pay
17 Act; (f) the California Fair Employment and Housing Act; (g) the California Labor Code; and any
18 and all other federal, state, and local statutes, ordinances, regulations, rules, and other laws, and
19 any and all claims based on constitutional, statutory, common law, or regulatory grounds.
20 ("Plaintiff's Release.") Plaintiff's Release does not extend to any claims or actions to enforce this
21 Agreement, or to any claims for vested benefits, unemployment benefits, disability benefits,
22 social security benefits, workers' compensation benefits that arose at any time, or based on
23 occurrences outside the Class Period. Plaintiff acknowledges that Plaintiff may discover facts or
24 law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be
25 true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective in all respects,
26 notwithstanding such different or additional facts or Plaintiff's discovery of them. Settlement, ¶
27 6.1.

28 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. For purposes of
Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions, rights, and benefits,
if any, of section 1542 of the California Civil Code, which reads: A general release does not
extend to claims that the creditor or releasing party does not know or suspect to exist in his or her



1 favor at the time of executing the release, and that if known by him or her would have materially
2 affected his or her settlement with the debtor or Released Party. Settlement, ¶ 6.1.1.

3 Release by Participating Class Members: All Participating Class Members, on behalf of
4 themselves and their respective former and present representatives, agents, attorneys, heirs,
5 administrators, successors, and assigns, release Released Parties from all claims stated in the
6 Operative Complaint including but not limited to claims for alleged: failure to pay wages, failure
7 to pay overtime wages, failure to pay vacation wages, failure to provide meal periods, failure to
8 authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
9 proper wage statements, failure to timely pay wages, failure to maintain required payroll records,
10 been brought based on the Operative Complaint. Except as set forth in Section 6.3 of this
11 Agreement, Participating Class Members do not release any other claims, including claims for
12 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
13 unemployment insurance, disability, social security, workers' compensation, or claims based on
14 facts occurring outside the Class Period. Settlement, ¶ 6.2.

15 **G. Notice and Claims Process and Procedures**

16 No later than 3 business days after receipt of the Class Data, the Administrator shall notify
17 Class Counsel that the list has been received and state the number of Class Members, PAGA
18 Members, Work Weeks, and Pay Periods in the Class Data. Settlement, ¶ 8.4.1.

19 Using best efforts to perform as soon as possible, and in no event later than 14 days after
20 receiving the Class Data, the Administrator will send to all Class Members identified in the Class
21 Data, via first-class United States Postal Service ("USPS") mail, the Notice Packet with Spanish
22 translation, if applicable substantially in the forms attached to this Agreement as Exhibits A, B,
23 C, and D. The first page of the Class Notice shall prominently estimate the dollar amounts of any
24 Individual Class Payment and/or Individual PAGA Payment payable to the Class Member, and
25 the number of Work Weeks and PAGA Pay Periods (if applicable) used to calculate these
26 amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses
27 using the National Change of Address database. Settlement, ¶ 8.4.2.

28 Not later than 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



1 to the most current address obtained. The Administrator has no obligation to make further
2 attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by
3 the USPS a second time. Settlement, ¶ 8.4.3.

4 The deadlines for Class Members' written objections, Challenges to Work Weeks and/or
5 Pay Periods (disputes), and Requests for Exclusion will be extended an additional 14 days beyond
6 the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-
7 mailed. The Administrator will inform the Class Member of the extended deadline with the re-
8 mailed Notice Packet. Settlement, ¶ 8.4.4.

9 If the Administrator, Defendants or Class Counsel is contacted by or otherwise discovers
10 any persons who believe they should have been included in the Class Data and should have
11 received Notice Packet, the Parties will expeditiously meet and confer in person or by telephone,
12 and in good faith, in an effort to agree on whether to include them as Class Members. If the Parties
13 agree, such persons will be Class Members entitled to the same rights as other Class Members,
14 and the Administrator will send, via email or overnight delivery, a Class Notice requiring them
15 to exercise options under this Agreement not later than 14 days after receipt of Class Notice, or
16 the deadline dates in the Class Notice, which ever are later. Settlement, ¶8.4.5.

17 **1. Disputes**

18 Challenges to Calculation of Work Weeks. Each Class Member shall have 60 days after
19 the Administrator mails the Notice Packet (plus an additional 14 days for Class Members whose
20 Notice Packet is re-mailed) to challenge the number of Class Work Weeks and PAGA Pay Periods
21 (if any) allocated to the Class Member in the Class Notice. This is also known as a dispute. A
22 Work Week Dispute form, attached as Exhibit C, may be used for this purpose but is not required.
23 The Class Member may challenge the allocation by communicating with the Administrator via
24 fax, email or mail. The Administrator must encourage the challenging Class Member to submit
25 supporting documentation. In the absence of any contrary documentation, the Administrator is
26 entitled to presume that the Work Weeks contained in the Class Notice are correct so long as they
27 are consistent with the Class Data. The Administrator's determination of each Class Member's
28 allocation of Work Weeks and/or Pay Periods shall be final and not appealable or otherwise
susceptible to challenge. The Administrator shall promptly provide copies of all challenges to
calculation of Work Weeks and/or Pay Periods to Defense Counsel and Class Counsel and the
Administrator's determination the challenges. Settlement, ¶ 8.6.



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2. Opting Out

Class Members who wish to exclude themselves (opt-out of) the Class Settlement must send the Administrator, by fax, email, or mail, 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). A Request for Exclusion is a letter from a Class Member or his/her representative that reasonably communicates the Class Member's election to be excluded from the Settlement and includes the Class Member's name, address and email address or telephone number. To be valid, a Request for Exclusion must be timely faxed, emailed, or postmarked by the Response Deadline. An Election Not to Participate in Settlement form, attached as Exhibit B, may be used for this purpose but is not required. Settlement, ¶ 8.5.1.

The Administrator may not reject a Request for Exclusion as invalid because it fails to contain all the information specified in the Class Notice. The Administrator shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of the person as a Class Member and the Class Member's desire to be excluded. The Administrator's determination shall be final and not appealable or otherwise susceptible to challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion, the Administrator may demand additional proof of the Class Member's identity. The Administrator's determination of authenticity shall be final and not appealable or otherwise susceptible to challenge. Settlement, ¶ 8.5.2

Every Class Member who does not submit a timely and valid Request for Exclusion is deemed to be a Participating Class Member under this Agreement, entitled to all benefits and bound by all terms and conditions of the Settlement, including the Participating Class Members' Releases under Paragraphs 6.2 and 6.3 of this Agreement, regardless of whether the Participating Class Member actually receives the Class Notice or objects to the Settlement. ¶ 8.5.3.

Every Class Member who submits a valid and timely Request for Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment or have the right to object to the class action components of the Settlement. Aggrieved Employees are eligible for an Individual PAGA Payment and may not object or opt out to the PAGA portion of the settlement. Settlement, ¶ 8.5.4.

3. Objecting

Only Participating Class Members may object to the class action components of the Settlement and/or this Agreement, including contesting the fairness of the Settlement, and/or



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1 amounts requested for the Class Counsel Fees Payment, Class Counsel Litigation Expenses
2 Payment and/or Class Representative Service Payment. Participating Class Members may not
3 object to the PAGA portion of the settlement. Settlement, ¶ 8.7.1.

4 Participating Class Members may send written objections to the Administrator, by fax,
5 email, or mail. In the alternative, Participating Class Members may appear in Court (or hire an
6 attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
7 Participating Class Member who elects to send a written objection to the Administrator must do
8 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
9 14 days for Class Members whose Notice Packet was re-mailed). An The Objection form attached
as Exhibit D may be used for this purpose but is not required. Settlement, ¶ 8.7.2.

10 Non-Participating Class Members have no right to object to any of the class action
11 components of the Settlement. Settlement, ¶ 8.7.3.

12 **H. Uncashed Checks**

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

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

18 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
19 and its members are too numerous for joinder to be practical; (2) the representative and absent
20 class members share a community of interest and questions of law and fact common to the class
21 predominate over questions unique to individual class members; (3) the representative's claims
22 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
23 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
24 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
25 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.⁵

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

27 ⁵ Defendants do not contest class certification for purposes of Plaintiff's Motion for Preliminary
28 Approval of Class Action Settlement, but preserve all applicable defenses and the right to oppose
class certification in the event the Court does not grant the Motion.

1 A class is ascertainable when it may be readily identified without unreasonable expense
2 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
3 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
4 defined Class is ascertainable because its members may be identified by reference to Defendants'
5 records and Defendants have agreed to share the relevant information from their records to
6 facilitate the settlement process. DS, ¶ 21. Therefore, the Settlement Class is ascertainable.

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

8 The Settlement Class has sufficiently numerous members to render joinder impractical.
9 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
10 (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 42 Class
11 Members. DS, ¶ 22. Plaintiff maintains that it would be impractical and economically inefficient
12 to require each Class Member to separately maintain an individual action or be joined as a named
13 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
14 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
the Settlement Class' membership is sufficiently numerous. DS, ¶ 22. *See Daar v. Yellow Cab*
Co. (1967) 67 Cal.2d 695.

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

16 The community of interest requirement "embodies three factors: (1) predominant common
17 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
18 (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*
19 *Superior Court* (2004) 34 Cal. 4th 319, 326. It "does not mandate that class members have
20 uniform or identical claims." *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
21 Cal. App. 4th 676, 692. Rather, courts focus on the defendant's internal policies and "pattern and
22 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).

23 To justify certification, the class proponent "must show ... that questions of law or fact
24 common to the class predominate over the questions affecting the individual members" *See,*
25 *Arenas v. El Torito Rests., Inc.* (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank,*
26 *FA v. Superior Court* (2001) 248 Cal. 4th 906, 913). In light of the more lenient standard for
27 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
the claims of the Class Members all stem from the same sources. DS, ¶ 23.

28 In this case, Plaintiff asserts all Class Members were subject to the same or similar



1 operations and employment policies, practices, and procedures. The claims arise from
2 Defendants' alleged policy-driven failure to pay wages, failure to provide meal periods, failure to
3 authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
4 proper wage statements, failure to timely pay wages, failure to maintain required payroll records,
5 and related labor law violations, all of which Plaintiff claims constitute unfair business practices
6 and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not
7 limited to: (1) Whether Defendants failed to pay all wages earned to Class Members for all hours
8 worked at the correct rates of pay; (2) Whether Defendants failed to provide the class with all
9 meal and rest periods in compliance with California law; (3) Whether Defendants failed to pay
10 the class one additional hour of pay on workdays they failed to provide the class with one or more
11 meal or rest periods in compliance with California law; (4) Whether Defendants failed to
12 indemnify the class for all necessary business expenditures incurred during the discharge of their
13 duties; (5) Whether Defendants knowingly and intentionally failed to provide the class with
14 accurate wage statements; (6) Whether Defendants willfully failed to provide the class with timely
15 final wages; and (7) Whether Defendants engaged in unfair competition within the meaning of
16 Business and Professions Code section 17200, *et seq.*, with respect to the class. DS, ¶ 23.
17 Therefore, common questions predominate.

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

19 The class representative must be similarly situated to the rest of the purported class. *See*
20 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
21 that the class representative must have identical interests with the class members. The only
22 requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See*
23 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
24 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that her claims
25 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent
26 Class Members was subject to the same relevant policies and procedures governing her
27 compensation, hours of work and meal and rest periods. Because Plaintiff contends that she was
28 subject to the same general course of conduct as absent Class Members, resolving the common
questions as they apply to Plaintiff will determine Defendants’ *prima facie* liability to all Class
Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary
affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical



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of the Class. DS, ¶ 24.

E. Plaintiff Will Adequately Represent the Settlement Class

The adequacy requirement is met where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class' interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 25.

First, Class Counsel have supplied the Court with declarations to show that they are adequate to represent the Settlement Class and that they have significant experience in employment litigation generally, and wage and hour and employment-related class action litigation specifically. *See* DS, ¶¶ 26-34; Declaration of Louis M. Benowitz ("Benowitz Decl.") ¶ 3. Thus, Plaintiff's counsel are adequate to serve as Class Counsel.

Second, Plaintiff contends that she is an adequate class representative. Plaintiff and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiff and the Class Members. DS, ¶ 26. Moreover, Plaintiff has demonstrated her commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing herself to the risk of attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. DS, ¶ 26. Thus, Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should find that Plaintiff and her counsel are adequate to represent the Settlement Class as required under Code of Civil Procedure § 382.

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

Plaintiff further contends that a class action is also superior to other means of adjudicating the issues in this action. The predominance of common legal and factual questions shows that this Court could fairly adjudicate the claims of Class Members through a single class action. In view of the *theoretical* alternatives that proposed class members could potentially utilize—representative PAGA action (where there is less relief available), individual civil lawsuits or wage claims through the Division of Labor Standards Enforcement (where there would be relatively



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1 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
2 superior to all of them. Thus, this consideration supports conditional class action treatment for
3 purposes of this Settlement only. DS, ¶ 35.

4 **V. INTRODUCTION THE COURT SHOULD GRANT PRELIMINARY**
5 **APPROVAL BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND**
6 **REASONABLE**

7 **A. Legal Standard**

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

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

18 In assessing preliminary approval, a court evaluates if the settlement process has certain
19 indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
20 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
21 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage
22 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
23 48 Cal.App.4th at 1794.

24 The class settlement here satisfies all of these factors. DS, ¶ 36. The Settlement resulted
25 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
26 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
27 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.*

28 At issue in this class and Private Attorneys General Act (“PAGA”) action is an in-home
care provider’s liability to approximately 42 hourly, non-exempt employees (hereafter the
“Putative Class Members”) for unpaid vacation pay, unprovided rest and meal periods,
unreimbursed expenses, and related violations of the Labor Code and applicable Wage Order.
DS, ¶ 37. Plaintiff prepared “damages” estimates in advance of the mediation. DS, ¶ 37, Ex. 6.
Plaintiff determined Defendants’ maximum possible exposure for restitution and penalties to be



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1 approximately \$957,853.40 (consisting of \$10,623.10 in unpaid wages, \$162,077.13 in missed
2 meal period premium wages, \$408,254.73 in missed rest break premium wages, \$60,470.89 in
3 unreimbursed expenses, \$63,650.00 for wage statement penalties, \$53,115.48 for waiting time
4 penalties, and \$1,105,400.00 for civil penalties under PAGA. Plaintiff calculated the damages
5 based on the number of workweeks and pay periods provided by Defendants, Plaintiff's reports,
6 and the sample data. *Id.* Defendants dispute Plaintiff's liability calculations.

7 Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix*
8 campaign and pursue individual release agreements from the Class Members. Defendants also
9 represented that they had interviewed all of Defendants' current employees regarding Plaintiff's
10 claims, all of whom would provide declarations, under penalty of perjury, that were favorable to
11 Defendants with respect to the relevant factual issues at issue in Plaintiff's action. Plaintiff's
12 Counsel applied discounts to the maximum possible exposure to account for all other risks
13 discussed below. While it is difficult to assign anything but crudely-determined percentages of
14 risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude
15 recovery for such employees is substantial and alone justifies a significant discount because
16 Defendants would likely by trial have gathered releases from the majority of the Class Members.
17 A settlement for approximately 23.60% of the potential recovery is a proportion substantially in
18 excess of recovery proportions sanctioned by existing case law.⁶ *Id.*

19 Plaintiff is aware of only two significant awards under the PAGA in a contested
20 proceeding, both issued by federal district courts.⁷ DS, ¶ 54. PAGA penalty awards are often

21 ⁶ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
22 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
23 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
24 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
25 proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
26 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
27 of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
28 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
potential recovery asserted by either party.”).

⁷ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
penalties under the PAGA of \$12,277,500.00 where total adjusted damages were
\$18,695,692.58. In this regard, the district court stated,

The plain language of PAGA provides that “a court may award a lesser amount than the
maximum civil penalty amount specified by this part if, *based on the facts and*

1 small even for egregious, intentional violations of the Labor Code.⁸ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
5 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
6 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
7 result could occur here. *Id.*

8 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
9 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a class settlement for
10 \$226,050.00 is fair and reasonable. *Id.*

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

12 The *Kullar* case sets forth several factors a court should consider in determining whether
13 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
14 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
15 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
16 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
17 of a governmental participant; and (8) the reaction of the class members to the proposed

18 *circumstances of the particular case*, to do otherwise would result in an award that is
19 unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code s 2699(e)(2) (emphasis
20 added). The relationship between the amount of total damages and the amount of
21 maximum PAGA penalties is certainly a "circumstance" of the case under the term's
22 ordinary meaning. The weight given to that circumstance is greater in this case because
23 Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs'
24 individual claims except for one. As a general matter, it would be excessively punitive
25 for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed
26 the damages caused by that injury or set of injuries.

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

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

32 ⁸ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
33 case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
34 plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
35 Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
36 the PAGA.



1 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
2 factors.

3 **1. Evaluation of Plaintiff's Case**

4 **a. Risks Associated With the Arbitration Agreements**

5 The arbitration agreements entered into between Defendants on the one hand, and the
6 Class Members, on the other, present a significant risk to the success of Plaintiff's class action
7 litigation. DS ¶ 40. According to Defendants, the majority of the Class entered into arbitration
8 agreements with Defendants. *Id.* As the arbitration agreements in question restrict potential
9 litigants from bringing class actions against Defendants, Plaintiff would be effectively barred
10 from pursuing claims on behalf of the Class in Court. *Id.* Thus, there is a significant risk the Court
11 could determine that those Class Members who have not entered into arbitration agreements with
12 Defendants do not constitute a sufficiently numerous class to justify class action treatment. As
13 such, by continuing to trial on class-wide claims, Plaintiff would run the high risk of suffering
14 defeat due to the existence of the arbitration agreement. Moreover, the arbitration agreements
15 would pose danger to any class certification motion brought by Plaintiff. Because different
16 defenses would apply to some Class Members and not others – i.e., the existence of signed
17 arbitration agreements – there is a risk that the Court could determine that Plaintiff's claims
18 present too many individualized inquiries to justify class certification. *Id.*

19 **b. Risks Associated with the Unpaid Wages Claim**

20 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
21 best, largely because Defendants' written policies throughout the relevant time period prohibited
22 off-the-clock work. DS, ¶ 41. Off-the-clock claims are difficult where a defendant requires in its
23 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
24 *Hospital* (2014) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
25 be compensable). *Id.* In their written employment policies, Defendants mandates that employees
26 must record all time worked accurately on their time records and strictly prohibit employees from
27 performing any work off-the-clock. DS, ¶ 41. Moreover, while Defendants dispute that off-the-
28 clock work occurred, they contends that any time spent off the clock was *de minimis*. The
California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested
that irregular and minute periods of time may still be subject to a *de minimis* defense even if
compensable. (Stating that "We do not decide whether there are circumstances where
compensable time is so minute or irregular that it is unreasonable to expect the time to be



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1 recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here
2 because the time spent off the clock were minute and insignificant. Accordingly, a large award of
3 penalties seems unlikely with respect to this claim. *Id.*

4 The difficulty inherent in proving that off-the-clock work occurred poses a significant
5 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
6 Generally, a court will not certify a class unless it can determine an appropriate classwide
7 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
8 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
9 the lack of records indicating when such off-the-clock work may have taken place. Individualized
10 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
11 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
12 risk that the Court would consider this evidentiary showing insufficient as a classwide
13 methodology. DS, ¶ 42.

14 With regard to the rounding claim, California caselaw still permits employers to round
15 time entries to the nearest quarter hour so long as rounding policies are neutral on their face, and
16 do not systematically under-compensate employees over time. Additionally, as stated above,
17 many of the Class Members signed arbitration agreements in the wake of the lawsuit. This would
18 preclude the wage claim.

19 **c. Risks Associated with the Meal Period Claims**

20 There are risks to Plaintiff’s meal period claim. DS, ¶ 44. The Class Members spent much
21 of the Class Period working from home and other remote locations where they were not under the
22 watchful eye of their managers and had greater control over when they could take meal periods.
23 Also, Class Member time records show that most meal periods were timely, which suggests that
24 Class Members could take meal periods within the first five hours of work if they chose to.
25 Defendants contend that, to establish a violation for missed meal periods, a plaintiff must do more
26 than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer
27 provides employees with a “reasonable opportunity” to take a duty-free meal period, it has no
28 further duty to “police meal breaks and ensure no work thereafter is performed.” *Id.* at 1040-41.
Id. Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee
from taking a proper break, or otherwise failed to release the employee of all control. *Id.* “Thus,
the crucial issue with regard to the meal break claim is the reason that a particular employee may



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1 have failed to take a meal break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D.
2 629, 641. *Id.*

3 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
4 from taking their meal or rest periods. DS, ¶ 45. Defendants’ policies mandate that employees
5 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
6 of their meal breaks each day on their time records. *Id.* The time records that comprise the random
7 sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were
8 taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
9 individualized evidence may be necessary to determine whether they occurred due to conduct of
10 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
the value of Plaintiff’s meal period claim would be substantially reduced at trial. *Id.*

11 **d. Risks Associated with the Rest Break Claims**

12 There are risks to Plaintiff’s rest period claim. DS, ¶ 46. The Class Members spent much
13 of the Class Period working from home and other remote locations where they were not under the
14 watchful eye of their managers and had greater control over when they could take rest periods.
15 Also, Class Member time records show that most meal periods were timely, which suggests that
16 Class Members could take rest periods when they chose to. Employers are not required to record
17 rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt
18 employees the opportunity to take rest periods in accordance with California law. Further,
19 Defendants’ written policies on meal and rest periods are consistent with the Wage Order. *Id.*
20 Thus, unlike meal periods, where there are often records showing whether an employee clocked
21 out or not, there is no such evidence to prove a missed rest period or that the employer refused to
22 authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.*
23 Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a
24 victory with such evidence is certainly possible, relevant caselaw makes such claims risky from
25 a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*,
26 (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class
27 certification, it may be possible to manage individual issues through the use of surveys and
statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast*
Corporation v. Behrend (2013) 133 S.Ct. 1426.

28 **e. Risks Associated with the Failure to Indemnify Claim**

There is a risk that the Court may consider Plaintiff’s claims as to Defendants’ alleged

1 failure to indemnify for business expenses to be individual in nature and thus decline to certify
2 the class. DS, ¶ 47. Defendants provided the Class Members with phones so Class Members only
3 had to use their personal phones when their work phones went down intermittently. Plaintiff
4 alleges that Defendants required Plaintiff and the Class Members to use their personal items
5 including cellular phones, computers and other electronic devices, vehicles, and tools, and failed
6 to indemnify them for these business expenses. *Id.* Defendants presented evidence that they has
7 supplied its employees with tools, equipment, and other supplies and had an expense
8 reimbursement policy. As such, there is a risk that the Court may consider Plaintiff's claims to be
9 individual in nature and unfit for class wide resolution. *Id.*

10 **f. Risks Associated with the Wage Statement Claim.**

11 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
12 PAGA penalties. Under Labor Code section 226, wage statements must include various
13 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
14 DS, ¶ 48.

15 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
16 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
17 with the requirements of Labor Code § 226. DS, ¶ 48.

18 **g. Risks Associated with the Waiting Time Penalty Claims.**

19 Without proof willful behavior, Plaintiff will be unable to recover these penalties.

20 **h. Risks Associated With the PAGA Claim**

21 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
22 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
23 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
24 valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the
25 PAGA claims likewise face significant uncertainty. DS, ¶ 52. There is a risk that the Court would
26 consider the maximum civil penalty available to be confiscatory. Moreover, the current COVID-
27 19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may
28 consider a confiscatory taking. *Id.*

This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a
significant discount for settlement purposes. DS, ¶ 53. For mediation purposes, Plaintiff's counsel
estimated a maximum possible exposure of approximately \$1,105,400.00 in civil penalties. This
estimate did not take into account any of the risks discussed above and assumed a violation for



every single pay period. *Id.* Plaintiff’s counsel also assessed multiple penalties for the same pay period for the same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although two federal district court decisions held that “stacking” PAGA penalties in this fashion may be appropriate to determine the amount in controversy for purposes of removal jurisdiction, Plaintiff’s counsel is not aware of any California state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

i. Risks Associated With A Pick-Up Stix Campaign

An employer enjoys the right to settle a putative class member’s disputed wage claims individually, without the consent or involvement of class counsel. DS, ¶ 56. (See *Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch a “pick off” settlement campaign to pursue individual release agreements from the Class Members, thereby potentially narrowing the size of the Settlement Class – 42 members - until it is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient number of employees to represent. This led to a significant reduction of claim value in settlement negotiations. *Id.*

While the evidence gathered through Plaintiff’s discovery supports the merits of the claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation presents significant risks that support a downward departure from Defendants’ estimated liability exposure. DS, ¶ 57. In view of the risks, the Settlement reflects Plaintiff’s estimate of the total amount of damages, monetary penalties or other relief that the Class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.* It also represents a fair, adequate, and reasonable compromise amount for these claims and warrants preliminary approval. *Id.*

2. Allocation of the PAGA Payment

The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and appropriate under the circumstances. DS, ¶ 58. The Parties negotiated a good faith amount for PAGA Penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount



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1 was the result of self-interest at the expense of other Class Members,” such amounts are generally
2 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
3 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
4 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
5 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
6 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
7 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
8 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
9 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
10 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
11 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
12 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
13 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
14 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
15 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
16 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
17 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
18 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
19 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
20 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
21 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

22 **3. Presence of Governmental Participant**

23 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
24 settlement to the LWDA with the filing and service of this motion. DS, ¶ 108, Ex. 20.

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

26 If the settlement is preliminarily approved, Class Members will be provided with the Class
27 Notice (attached as Exhibits A, B, C, and D to the Settlement) and an opportunity to object. DS,
28 ¶ 87. The parties’ proposed notice fully complies with California Rules of Court 3.766(d) and
3.769(f) and will allow Class Members to make informed responses to the proposed settlement.
Id.

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1 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
2 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
3 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
4 **COMPARED TO OTHER CLASS MEMBERS**

5 The Individual Settlement Payments will be paid to each Class Member based on his or
6 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 77, Settlement § 8.4.2.
7 Because this method compensates Class Members based on the extent of their potential injuries,
8 in that Class Members who worked for Defendants longer would have been subject to more
9 alleged violations, it is fair, adequate, and reasonable. *Id.*

10 Plaintiff estimates that there are 4,521 Work Weeks for the Class Period. So, each Work
11 Week has a value of approximately \$24.15 (\$109,200.00 Net Settlement Amount / 4,521 Work
12 Weeks = \$24.15). Plaintiff had 66 Work Weeks during the Class Period. Based on this, it is
13 anticipated that Plaintiff Stephanie Flores will receive an Individual Class Payment of
14 approximately \$1,594.16 as a Participating Class Member (66 Work Weeks x \$24.15 =
15 \$1,594.16) while the average estimated Individual Class Payment to Participating Class Members
16 will be approximately \$2,600.00. Some Class Members – those who worked more Work Weeks
17 during the Class Period - will receive more, and some less. The highest possible Individual Class
18 Payment to a Participating Class Member (i.e., to those who qualify for all Work Weeks in the
19 Class Period) will be approximately \$3,140.01. The lowest possible Individual Class Payment to
20 a Participating Class Member (i.e., to those who qualify for only one Work Week in the Class
21 Period) will be approximately \$24.15. *See* Decl., ¶ 76.

22 It is anticipated that the average Aggrieved Employee Individual PAGA Payment will
23 be \$43.48. *Id.* Plaintiff's Individual PAGA Payment, her individual share of 25% of the PAGA
24 Penalties, will be less than that of some absent Aggrieved Employees. Under the Settlement,
25 each Aggrieved Employee will receive a *pro rata* distribution of 25% of the PAGA Penalties
26 proportionate to the number of paychecks he or she had with Defendants during the PAGA Period,
27 compared to the total of all paychecks of all Aggrieved Employees during the PAGA Period, as
28 reflected by Defendants' records. Plaintiff estimates that there are 918 Aggrieved Employee
paychecks for the PAGA Period. So, each Aggrieved Employee paycheck from the PAGA
Period has a value of approximately \$1.09 (25% of \$4,000.00 in PAGA Penalties / 918 Aggrieved
Employee paychecks = \$1.09). It is anticipated that Plaintiff Stephanie Flores will receive a
Individual PAGA Payment of approximately \$2.18 as a Aggrieved Employee (2 paychecks during
the PAGA Period x \$1.09 paycheck value = \$1,594.16) while the average estimated Individual



PAGA Payment to an Aggrieved Employee will be approximately \$43.48 (\$1,000.00, 25% of PAGA Penalties / Aggrieved Employee paychecks during the PAGA Period = \$43.48 Individual PAGA Payment). Some Aggrieved Employees – those who had more paychecks during the PAGA Period - will receive more, and some less. The highest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for all paychecks in the PAGA Period) will be approximately \$56.33. The lowest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for only one paycheck in the PAGA Period) will be approximately \$1.09. *See Decl.*, ¶ 78.

VII. ALLOCATION FOR CLASS COUNSEL’S FEE AWARD AND ATTORNEYS’ FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE

The Settlement states Class Counsel may seek attorneys’ fees of \$75,350.00 (one-third of the GSA) and up to \$17,500.00 for actual reasonable litigation costs and expenses incurred in prosecuting the Action. Settlement § 3.2.2. These amounts are reasonable, given the facts and circumstances of the case. DS, ¶¶ 59-62.

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

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned down to devote time to this matter. DS, ¶ 60. Class Counsel interviewed and obtained information



1 from putative class members, met and conferred with Defendants' counsel on numerous
2 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
3 Defendants and obtained through other sources, researched applicable law, and provided
4 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

5 Class Counsel have borne all the risks and costs of litigation and will receive no
6 compensation until recovery is obtained. DS, ¶ 61. Class Counsel are well-experienced in wage-
7 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
8 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
9 the requested fees and costs are reasonable and should be awarded. *Id.*

10 **VIII. THE CLASS REPRESENTATIVE SERVICE PAYMENT TO PLAINTIFF**
11 **SHOULD BE PRELIMINARILY APPROVED BECAUSE IT IS FAIR,**
12 **ADEQUATE, AND REASONABLE**

13 Courts routinely approve incentive awards to compensate named plaintiffs for the services
14 they provide and the risks they incur during class action litigation, often in much higher amounts
15 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
16 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
17 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
18 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
19 Service Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this
20 action and the risks she undertook on behalf of Class Members. DS, ¶ 63. Plaintiff has devoted
21 many hours advancing the interests of the Settlement Class. Plaintiff has done this by, among
22 other things, retaining experienced counsel, providing them with information about her work
23 history with Defendants and Defendants' policies and practices with respect to the wage and hour
24 claims at issue, participating in mediation, and being actively involved in the settlement process
25 to ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
26 to significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if
27 this action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that
28 Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
Representative Service Payment is fair, adequate, and reasonable, and thus warrants preliminary
approval. DS, ¶ 63.

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1 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
2 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE,**
3 **AND REASONABLE**

4 With regard to the settlement administration costs (“Administration Expenses Payment”) provision, it is reasonable. Before agreeing to ILYM Group, Inc. and its bid of \$5,000.00, the
5 Parties sought and reviewed bids from other reputable third-party administrators which provided
6 higher bids. DS, ¶ 100-101, Exs. 16, 17, 18, and 19. Thus, the settlement administration costs provision should be given preliminary approval.

7 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
8 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
9 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
10 **EXERCISE THEIR RIGHTS**

11 This Court should approve the proposed plans for giving notice to the Settlement Class and administering the Settlement. 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.”
12 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
13 measures to ensure that as many Class Members as practicable receive actual notice of the Settlement and have enough time to exercise their rights. The Settlement requires distribution of
14 the Notice by First Class U.S. mail only. Settlement, ¶ 8.4.2. Although there are current employee Class Members, it is uncertain whether Defendants’ records of their contact information include
15 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.
16 DS, ¶ 87.

17 With respect to its content, “[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
18 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152. The purpose of the notice in class settlement context is to give class members sufficient
19 information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
20 Class Members with all pertinent information that they need to fully evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
21 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
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1 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
2 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
3 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
4 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
5 the Notice should be approved because it describes the Settlement with sufficient clarity and
6 specificity to explain to Class Members what this action is about, their rights under the Settlement,
and how to exercise those rights. DS, ¶ 87.

7 **XI. CONCLUSION**

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

10 Respectfully submitted,

11 THE SPIVAK LAW FIRM

12
13 Dated: January 2, 2025

By:



14 DAVID G. SPIVAK, Attorneys for
15 Plaintiff, STEPHANIE FLORES, and
16 all others similarly situated



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