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12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **IN AND FOR THE COUNTY OF MERCED**

14 SHANA WRIGHT individually, and on
15 behalf of all others similarly situated,

16 Plaintiff,

17 vs.

18 WINGANOMICS, INC. d.b.a.
19 WINGSTOP, et al.,

20 Defendants.

Case No. 20CV-00657

CLASS ACTION

**NOTICE OF MOTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S MOTION FOR AN
ORDER:**

- (1) GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
- (2) AWARDING ATTORNEYS' FEES AND
COSTS TO CLASS COUNSEL;
- (3) AWARDING ENHANCEMENT TO THE
REPRESENTATIVE PLAINTIFF; AND
- (4) AWARDING REIMBURSEMENT OF
SETTLEMENT ADMINISTRATION
COSTS

Date: January 19, 2022

Time: 8:15 a.m.

Dept.: 8

21 **NOTICE OF MOTION**

22 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, NOTICE IS**
23 **HEREBY GIVEN** that, on January 19, 2022 at 8:15 a.m., or as soon thereafter as the matter may

1 be heard in Department 8 of the above-entitled Court, located at 627 West 21st Street, Merced, CA
2 95340, Representative Plaintiff Shana Wright will and hereby do apply to this Court for an Order:

- 3 1. Granting final approval of class action settlement agreement;
4 2. Awarding attorneys' fees and costs to Class Counsel;
5 3. Awarding Enhancement/Service Payment to the Representative Plaintiff; and
6 4. Awarding reimbursement of settlement administration fees and costs.

7 This Motion is based upon this Notice of Motion and Motion, the accompanying
8 Memorandum of Points and Authorities, the Declaration of Scott Edward Cole, Esq. and exhibits
9 thereto, the Declaration of class representative Shana Wright, the Declaration of Irvin Garcia (CPT
10 Group), the complete files and records of this action, and any oral argument and documentary
11 evidence as may be presented to the Court at the hearing of this Motion.

12
13 Dated: December 20, 2021

COLE & VAN NOTE

14
15 By:



16 Laura Van Note, Esq.
17 Attorneys for Representative Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL HISTORY

On February 7, 2020 Representative Plaintiff Shana Wright filed a class action Complaint in Merced County Superior Court against Winganomics, Inc. d.b.a. Wingstop, Jason Khan (*Wright I*). In the *Wright I* action, Plaintiff Wright sought individual and class-wide damages and penalties for (1) unlawful failure to pay wages, (2) failure to provide meal and rest periods, (3) failure to provide accurate itemized wage statements, (4) failure to pay wages on termination, and (5) violation of the Unfair Competition Law (Bus. & Prof. Code § 17200).¹ On May 5, Plaintiff filed her First Amended Complaint adding a cause of action under the Private Attorneys' General Act.² Through discovery and further investigation, Plaintiff identified additional entities which she alleges are the employers and/or joint employers of Plaintiff and the putative class.³ On April 1, 2021, Plaintiff filed a new complaint in Merced County Superior Court *Wright v. Right Swing, et al.*, Case No. 21CV-01074 (*Wright II*) alleging similar claims as pled in the *Wright I* action.⁴ On or about September 1, 2021, Plaintiff filed a Consolidated Complaint to include both the *Wright I* and *Wright II* actions.⁵

As a result of consolidation, the parties of class action Complaint in Merced County Superior Court are Representative Plaintiff Wright, individually and on behalf of other similarly situated employees, on one side and Defendants Winganomics, Inc. d.b.a. Wingstop, Jason Khan, Right Swing, Inc. d.b.a. Wingstop, Wingman and Associates, Inc. d.b.a. Wingstop, Wing or Lose, Inc. d.b.a. Wingstop, All I Do Is Wing, Inc. d.b.a. Wingstop, Winging is Everything d.b.a. Wingstop, The Wingman Company d.b.a. Wingstop, King of the Wing, Inc. d.b.a. Wingstop, Spread Your Wings, Inc. d.b.a. Wingstop, Wing Life, Inc. d.b.a. Wingstop, Wingcraft, Inc. d.b.a. Wingstop, Winging Is A Habit, Inc. d.b.a. Wingstop, Wingology, Inc. d.b.a. Wingstop, Wing Me

¹ Cole Decl. ¶ 2.

² Cole Decl. ¶ 3.

³ Cole Decl. ¶ 3.

⁴ Cole Decl. ¶ 3.

⁵ Cole Decl. ¶ 3.

1 Over, Inc. d.b.a. Wingstop, Paul Conway, Aamir Khan, Johnzeb Khan, Nagina Khan, Nargis Khan,
2 Michael James Ryan, and/or James Toal, and/or Does 1 through 100, inclusive (“Wingstop” or
3 “Defendants”).

4 Plaintiff Wright worked for Defendants in various capacities, including as a cashier and
5 shift supervisor at Defendants’ Wingstop-branded facilities in California.⁶ As discovered during
6 litigation, the putative class totaled roughly 1,682 workers.⁷

7 On her own behalf and on behalf of all Wingstop non-exempt restaurant workers, Plaintiff
8 Wright alleged that Defendants’ policies, lack of proper staffing, and other common circumstances
9 prevented her from, *inter alia*, enjoying, timely, full and uninterrupted meal and/or rest breaks.⁸
10 Indeed, the core of her complaint was that these conditions ran afoul of the relevant California
11 Wage Order provisions and Labor Code §§ 226.7 and 512.⁹

12 Even prior to filing the action, Plaintiff’s attorneys at Cole & Van Note (“CVN”) were
13 armed with a detailed factual understanding of Defendants’ operations, Plaintiff’s job duties, and,
14 by extension, the job duties of putative class members.¹⁰ Notably, as a high-profile restaurant
15 chain, much of the sort of information needed for that due diligence investigation was available
16 through a variety of sources online and otherwise.¹¹ Coupled with that, CVN has prosecuted
17 hundreds of wage and hour class actions, a large percentage of which have involved the
18 foodservice industry.¹² Falling back on this experience, CVN concluded that Ms. Wright’s
19 allegations against Defendants were likely shared by remaining members of the putative class.¹³

20 After filing the action, the parties engaged in traditional and informal discovery efforts,
21 including the production of documents detailing Defendants’ business operations, common
22 policies and procedures, wage rates, and payroll information for numerous putative class
23

24 _____
⁶ Cole Decl. ¶ 4.

25 ⁷ Cole Decl. ¶ 4.

26 ⁸ Cole Decl. ¶ 5.

27 ⁹ Cole Decl. ¶ 5.

28 ¹⁰ Cole Decl. ¶ 6.

¹¹ Cole Decl. ¶ 6.

¹² Cole Decl. ¶ 6.

¹³ Cole Decl. ¶ 6.

1 members.¹⁴ The parties attended mediation with Hon. Richard Kramer (Ret.) initially on August
2 26, 2020.¹⁵ At that time, the parties were unable to reach an agreement to resolve the case.¹⁶ After
3 the first mediation session, CVN conducted additional investigation including further interviews
4 of class members, dozens of public records requests, and further formal discovery.¹⁷ To be sure,
5 the information available to CVN prior to the ultimate (second) mediation was sufficiently
6 comprehensive to place the parties' attorneys, each of whom are experienced class action litigators,
7 in a position to explore settlement.¹⁸

8 On April 28, 2021, the parties mediated the matter again before Hon. Richard Kramer
9 (Ret.).¹⁹ At mediation, negotiations were intense and arm's length (lasting roughly 13 hours),
10 ultimately culminating in the settlement agreement accompanying this motion.²⁰

11 The Settlement encompasses a class defined as "all current and former non-exempt
12 employees who worked at any time for Defendants', or any of them, in California from February
13 7, 2016, through the date of Preliminary Approval."²¹

14 A class-wide settlement of the claims of 1,682 putative class members²² for \$1,500,000 is
15 an outstanding result for these untested claims.²³

16 On October 1, 2021, the Representative Plaintiff filed her motion for preliminary approval
17 of the class action settlement achieved in *Wright II*, which this Court granted on October 22, 2021.

18
19 ¹⁴ Cole Decl. ¶ 7. In many class actions, informally-exchanged discovery protects a defendant's proprietary and/or
20 financial information and allows a richer and faster exchange of data calculated to determine the settlement value—
21 often putting the parties in a far better settlement position, so long as plaintiff's counsel knows what to ask for. Indeed,
22 although formal discovery was conducted, it is "not a necessary ticket to the bargaining table." *Linney v. Cellular*
23 *Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998).

24 ¹⁵ Cole Decl. ¶ 8.

25 ¹⁶ Cole Decl. ¶ 8.

26 ¹⁷ Cole Decl. ¶ 8.

27 ¹⁸ Cole Decl. ¶ 8.

28 ¹⁹ Cole Decl. ¶ 9.

²⁰ Cole Decl. ¶ 9.

²¹ Settlement Agreement ¶ 13.

²² Class and Defendants' counsel factored into their settlement evaluation that, between the date of mediation and
the end of the claims release period, there would be some amount of workforce turnover, meaning that the specific
class size would inevitably increase. However, the number of settling class members is close to their predictions.
What's more, most of the calculations that led to this result were based on the number of shifts, not class members.

²³ A copy of the fully-executed Class Action Settlement Agreement and Release of Claims ("Agreement") was
attached to the motion for preliminary approval of class action settlement, filed on January 23, 2020. It is also attached
as Exhibit "A" to Declaration of Scott Edward Cole, Esq., filed herewith, for the Court's reference convenience.

At that time, this Court also preliminarily approved the proposed Class Notice (**Exhibit “E”**) and the Notice dissemination program, Cole & Van Note²⁴ as Class Counsel, Shana Wright as Representative Plaintiff, enhancement award for the Representative Plaintiff, a PAGA payment, and CPT Group as the claims administrator. A copy of that Order was sent to the LWDA on October 25, 2021 and has been posted on the claims administration website for public viewing. The hearing date of January 19, 2022, was thereupon set for final approval of the settlement, and as the opportunity for class members—should any have an objection to, seek clarification of, or otherwise be heard in connection with the settlement—to be heard.

As of the date of this filing, there have been zero objections.²⁵ Should any late-filed objections arise prior to the January 19, 2022 hearing, the claims administrator and Class Counsel will facilitate any class member’s participation in this final fairness hearing telephonically—given potential court closures and/or COVID-19 concerns, and so all members of this vulnerable workforce may, hopefully, be compensated without delay.

Finally, as alluded to above, on November 15, 2021, the class Notice was disseminated and was a highly successful campaign. *Not a single class member objected, and not a single class member opted out*,²⁶ demonstrating tremendous support for this settlement. As a result of the successful notice campaign, the compendium of information available to the parties and their counsel, and Class Counsel’s and class members’ support for this settlement as fair and reasonable, it now merits final approval.

II. SUMMARY OF SETTLEMENT AND NOTICE PROCESS

Under the preliminarily-approved Settlement Agreement, Defendants will pay \$1,500,000 (“Gross Settlement Fund”) for a limited release of class members’ claims: only those claims

²⁴ Notably, CVN co-prosecuted *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257 (2016) (culminating in a worker-friendly California Supreme Court opinion setting the standard for security guards’ entitlement to rest breaks) and has handled hundreds of wage and hour class actions, including dozens of restaurant employees’ class actions.

²⁵ The deadline for class members to submit objections and opt outs is December 27, 2021. Class Counsel will provide an updated declaration with the final number of objections and opt outs after that date has passed, well in advance of the hearing on this Motion.

²⁶ Cole Decl. ¶ 29

1 actually alleged in the action or that could have been alleged based on the facts stated in the
2 operative Complaint,²⁷ consistent with principles of *res judicata*. (See, *Rangel v. PLS Check*
3 *Cashers of California, Inc.*, 899 F.3d 1106 (9th Cir. 2018).²⁸ Further key terms include:

4 **Class Definition.** The Class consists of “all current and former non-exempt employees who
5 worked at any time for Defendants’, or any of them, in California from February 7, 2016 to October
6 22, 2021, excluding any such individuals who opt out of this Settlement.”

7 **Net Settlement Fund.** The \$1,500,000 gross fund is non-reversionary, such that no amount
8 will revert back to Defendants, and the employer’s share of payroll taxes shall be funded
9 independently by the company, so it does not deplete the settlement proceeds. The “Net Settlement
10 Amount” will be distributed to class members who do not opt out and will be calculated by
11 deducting attorneys’ fees and costs, class representative service award, claims administrator costs),
12 and payment to the LWDA for the release of PAGA claims. These distributions are further
13 summarized as follows:

14 **Attorneys’ Fees and Costs.** The settlement provides for an attorneys’ fee award of 35% of
15 the settlement amount, a typical percentage²⁹ in the resolution of common fund wage and hour
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22 ²⁷ In exchange for her option of receiving service award, the Representative Plaintiff also agreed to a § 1542
23 release of all potential claims (whether pled or not). Although Defendants can argue, as defendants often do, that
24 seeking wages under California law and the federal FLSA is double-dipping for the same wages, no one, including
25 the named plaintiff, is releasing any FLSA claims through this settlement.

26 ²⁸ This Motion occasionally cites federal case law and commentaries thereon which construe authority for
27 conditional class certification and settlement approval in California courts. The California Supreme Court has
28 authorized and urged California’s trial courts to use federal resources for guidance in considering class issues. *Vasquez*
v. Superior Court, 4 Cal.3d 800, 821 (1971); *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

²⁹ See, e.g., *Davis v. The Money Store, Inc.*, Case No. 99AS01716 (Sacramento Super. Ct. 2000) (33 1/3 % fee
award); *Haitz v. Meyer, et al.*, No. 572968-3 (Alameda Super. Ct., 1990) (45% fee award); *Ibrahimi v. Walgreen*,
(Contra Costa Super. Ct. 2019) Case No. MSC16-02120) (35% fee award in wage and hour class action); *Rippee v.*
Boston Mkt. Corp., 2006 U.S. Dist. LEXIS 101136 (S.D. Cal. Oct. 10, 2006) (40% fee award); Exhibit “D”
(Compendium of Settlement Item Awards).

cases.³⁰ CVN has devoted numerous hours to and faced significant risk³¹ in the prosecution of these matters and, more importantly, made an extraordinary fund available to a large number of otherwise-underrepresented, low paid workers. CVN also incurred ordinary litigation costs, while the Agreement allowed for a cap for such costs at \$30,000, Class Counsel maintained (and only seeks) costs of \$20,000. Notably, this amount does not account for additional future expenses in overseeing the settlement process, making appearances, filing court documents, ensuring claims administration compliance with this Court's orders, responding to class members, CPAs, etc.,. Since costs in the amount of \$20,000 are reasonable and served to benefit the class, they warrant reimbursement.³²

Enhancement Award. The Settlement also provides for Enhancement Award (aka "service payment") to Representative Plaintiff Shana Wright of \$7,500 for her time, risk, and effort in bringing the lawsuit(s), representing the large class, and in consideration for the claims released.³³ The proposed service payment is also reasonable given the minimal impact this amount will have on any settling class member's level of recovery.

³⁰ California state courts, the Ninth Circuit and the United States Supreme Court are in agreement that awarding attorneys' fees as a percentage of the common fund is the proper method. *Serrano v. Priest*, 20 Cal.3d 25 (1977); *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (in common fund cases, fees are not assessed against the unsuccessful litigant (a.k.a. "fee shifting"), but rather, taken from the fund or damage recovery (a.k.a. "fee spreading")). In fact, the United States Supreme Court has always computed common fund fee awards on a percentage of the fund basis. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939); *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 5 S.Ct. 387 (1885). *Contrast, Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (the lodestar approach, enhanced by a multiplier, can be used as an alternative to the common fund theory when "there is no way to gauge the net value of the settlement or any percentage thereof."; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 & n.5 (9th Cir. 2002) ("[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.").

³¹ Notably, post-judgment, class counsel will be required, *inter alia*, to stay in contact with the claims administrator to ensure payment of the settlement proceeds to all class members, to communicate with the class members themselves, their CPAs, even other attorneys regarding the tax treatment of settlement proceeds (and to answer a host of other questions), and report compliance with the terms of the Court's final approval order. Attorney fee awards in common funds cases are, thus, intended to compensate class counsel for work performed both before and after the date of judgment.

³² *In re United Energy Corp. Sec. Litig., Not Rpt'd in F.Supp.*, 1989 WL 73211, * 6 (C.D. Cal. 1989) ("[a]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved"); 1 Alba Conte, *Attorney Fee Awards* § 2:08 at 50-51 ("The prevailing view is that expenses are awarded in addition to the fee percentage."); *In re Warner Comm. Sec. Litig.*, 618 F.Supp. 735 (S.D.N.Y.1985); *In re GNC Shareholder Litig.: All Actions*, 668 F.Supp. 450, 452 (W.D. Pa. 1987).

³³ See, Declarations of each of the Representative Plaintiffs, submitted herewith.

1 **PAGA Allocation.** The Settlement provides for a payment of \$20,000 for a release of
2 PAGA claims, 75% of which will be remitted to the LWDA and 25% of which will remain in the
3 Net Settlement Fund.³⁴ The \$20,000 allocation for PAGA penalties is reasonable under the
4 circumstances and consistent with PAGA allocations in similar actions.

5 **Settlement Administration Costs.** The settlement administration costs are not to exceed
6 \$15,000—a reasonable amount given the size of the class and the work required to send the Notice,
7 process settlement checks, establish and update a settlement website, and communicate extensively
8 with class members and Class Counsel. As discussed, *infra*, this is a modified amount, adjusted
9 for unforeseen administration work in communicating with this sizable class—including
10 dissemination of a second (corrective) Notice calculated to ensure only relevant class members
11 were included in the settlement group. Even this increased bid, however, is still less than other
12 competitive bids for that work.

13 **Employer’s Share of Payroll Taxes.** Defendants’ share of payroll taxes, including, but not
14 limited to FICA and FUTA, shall be paid separately from the Gross Settlement Fund. While many
15 similar settlements allow the employer taxes to be paid from the Gross Settlement Fund, CVN
16 specifically negotiated against that option.

17 **Tax Treatment of Individual Settlement Shares.** Class members’ settlement shares will
18 be allocated as 15% wages and 85% interest and statutory penalties for tax purposes. This
19 allocation is reasonable given that the majority of the class claims were, arguably, for penalties
20 (e.g., Labor Code §§ 203, 226, 558, 2699), not underlying wages. Obviously, this particular tax
21 treatment provides substantially additional monies to these already low-paid workers.

22 **Results of the Notice Process.** In accordance with the Court’s grant of preliminary
23 approval, the Settlement Administrator sent the Notices by first class mail to all class members at
24 their last known addresses, updated using the National Change of Address (“NCOA”) Database.
25 As detailed below, when Notices were returned by the post office, the claims administrator
26 researched further, performed “skip traces” and then, when possible, re-mailed those Notices to
27

28 ³⁴ *Cal. Labor Code* § 2699(i).

1 better mailing addresses. Challenges to the Notice process and to the Settlement itself were non-
2 existent.

3 ***Distribution to Class.*** The entire Net Settlement Fund will be disbursed to the Settlement
4 Class. Individual settlement shares will be calculated based on the number of compensable pay
5 periods worked by each class member during the class period,³⁵ divided by the total number of
6 compensable pay periods worked by all settling class members during the class period. The Net
7 Settlement Fund shall be distributed based upon the schedule discussed below. Even before the
8 onset of the current viral pandemic, it was specifically negotiated that the Net Settlement Fund
9 would be paid out at the earliest possible time. Indeed, in light of more recent events, these funds
10 are needed by these low wage earners now more than ever.

11 ***Effective Date.*** The Effective Date of the Settlement means 60 days following the date on
12 which the Superior Court's Order granting final approval of Settlement Agreement ("Final
13 Approval order") becomes final. The Superior Court's order "becomes final" upon the last of the
14 following occur:

- 15 a) If there is any objections to the Settlement Agreement, or if any objection is filed and
16 subsequently withdrawn, the date of Entry of Entry of the Final Approval Order. Class
17 Counsel is required to file and/or serve a Notice of Entry of Judgement or Similar Notice
18 for the Effective Date to occur;
- 19 b) If there are objections to the Settlement Agreement, and if an appeal, review, or writ is
20 not sought from the Oder, the 5th day after any deadline to file an appeal of the Final
21 Approval Order has expired; or
- 22 c) If an appeal, review, or writ is sought from the Final Approval Order, the date after the
23 Final Approval Order is affirmed or the appeal, review, or writ is dismissed or denied,
24 and the Final Approval Order is no longer subject to further review or modification.

25 ***Funding.*** No later than the Effective Date, Defendants shall provide payment to the
26 Settlement Administrator to fund the Settlement, and Settlement Administrator shall mail the

27
28 ³⁵ The number of applicable pay periods worked by each class member was included in his/her respective Notice,
such that he/she could challenge them if the number was believed to be inaccurate.

1 payments to the LWDA, the Representative Plaintiffs (for their enhancement award payments),
2 Class Counsel (for its awarded attorneys' fees and expenses), the Settlement Administrator (for its
3 fees and expenses) and Settlement Class Members. Settlement checks will remain valid for 180
4 days from the date of issuance.

5 **Cy Pres.** If a class member does not cash his or her settlement check within 180 days, the
6 uncashed funds would be transmitted in accordance with California Code of Civil Procedure
7 Section 384(b) to Legal Aid at Work in San Francisco, CA.³⁶

8 9 **III. THE SETTLEMENT MERITS FINAL APPROVAL**

10 When evaluating a class action settlement under California Code of Civil Procedure § 382
11 for final approval, a court's inquiry focuses upon whether the settlement is "fair, adequate and
12 reasonable." *Wershba v. Apple Computer Inc.*, 91 Cal.App.4th 224, 244-245 (2004); *Dunk v. Ford*
13 *Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). A settlement is "fair, adequate and reasonable" and
14 therefore merits final approval when "the interests of the class are better served by the settlement
15 than by further litigation." *Manual for Complex Litigation* (4th ed. 2008) § 21.61, 462 ("*Manual*").
16 These conditions are met here.

17 While the Court possesses "broad discretion" in determining whether a proposed class
18 action settlement is fair, the Court's inquiry "must be limited to the extent necessary to reach a
19 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
20 between, the negotiation Parties, and that the settlement, taken as a whole, is fair, reasonable and
21 adequate to all concerned." *Dunk*, 48 Cal.App.4th at 1801 (quoting *Officers for Justice Civil Serv.*
22 *Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). A court's approval of a class action settlement will
23 only be reversed for a clear abuse of discretion. *Dunk*, 48 Cal.App.4th at 1802.

24
25
26 ³⁶ CCP § 384(b) requires that cy pres awards go to organizations that "will benefit the class or similarly situated
27 persons or that promote the law consistent with the objectives and purposes of the underlying cause of action[.]"
28 Between the claims here and Legal Aid at Work there is a "driving nexus," given that this organization represents
"low-wage workers who are victims of wage violations." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012);
<https://legalaidatwork.org/cy-pres/>.

1 **A. THE SETTLEMENT IS PRESUMED FAIR**

2 “[A] presumption of fairness exists where: (1) the settlement is reached through arm’s-
3 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
4 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
5 is small. *Dunk*, 48 Cal.App.4th at 1802 (citing Newberg & Conte, Newberg on Class Actions §
6 11.41, pp. 11-91). Here, the Settlement clearly meets these points and, as this Court noted in its
7 preliminary approval Order, it is, thus, presumed fair.

8 The Settlement was reached through arm’s length negotiations. The Settlement was only
9 reached after significant litigation, a mediation session facilitated by a respected mediator with
10 extensive experience in employment law, and then four additional months of negotiation.³⁷

11 Moreover, Class Counsel conducted a thorough investigation and, well-apprised of the
12 facts and risks, was able to garner a favorable result for the Settlement Class. Discovery efforts
13 included the production and review of relevant documents through formal discovery as well as,
14 informally,³⁸ key data points prior to mediation, a class member outreach campaign resulting in
15 interviews with numerous putative class members. Indeed, the Settlement came at a stage in
16 litigation where Representative Plaintiff and Defendants were informed of the facts relevant to the
17 case as well as the strengths and weaknesses of their respective positions and the risks of continued
18 litigation.

19 The CVN firm has vast experience in similar litigation—having handled several hundred
20 wage and hour class actions, dozens of which were brought against restaurant industry
21 companies.³⁹ Finally, as discussed, *infra* (Section IV), of 1,682 workers, **none of them objected**,
22 and none of them opted out. Accordingly, the presumption that the Settlement is fair applies.

23
24 ³⁷ Indeed, in *Kullar*, the California Court of Appeal agreed that trial courts should give considerable weight to the
25 competency of counsel and the involvement of a neutral mediator. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
26 4th 116, 129 (Cal. App. 1st Dist. 2008).

27 ³⁸ In many class actions, informally-exchanged discovery protects a defendant’s proprietary and/or financial
28 information, oftentimes allowing a richer and faster exchange of data calculated to determine the settlement value—
putting the parties in a far better settlement position, so long as plaintiff’s counsel is skilled in knowing what to request.
Indeed, although formal discovery was indeed conducted, such is “not a necessary ticket to the bargaining table.”
Linney v. Cellular Alaska P’ship, 151 F.3d 1234, 1239 (9th Cir. 1998).

³⁹ Exhibit “B,” CVN’s Professional Resume.

1 **B. AS THIS COURT PREVIOUSLY FOUND, THE RELEVANT CRITERIA**
2 **SUPPORT FINAL APPROVAL**

3 California Courts consider several factors in deciding whether to grant final approval of a
4 class action settlement, including (1) the amount offered in settlement; (2) the risks inherent in
5 continued litigation; (3) the complexity, expense, and likely duration of the litigation absent
6 settlement; (4) the extent of discovery completed and the stage of the proceedings when settlement
7 was reached; (5) the experience and views of class counsel; and (6) the reaction of class members.
8 *Dunk*, 48 Cal.App.4th at 1801; *Wershba*, 91 Cal.App.4th at 244-45; *Kullar v. Foot Locker Retail,*
9 *Inc.*, 168 Cal.App.4th 116, 119 (2008). Here, evaluation on each of these factors favors final
10 approval of the Settlement.

11 **1. The Value of the Settlement and the Risks Inherent in Continued Litigation Favor**
12 **Final Approval**

13 When evaluating the Settlement for fairness, the Court should weigh the immediacy and
14 certainty of substantial settlement proceeds against the risks inherent in continued litigation. In
15 making a fairness determination, “[t]he most important factor is the strength of the case for plaintiff
16 on the merits, balanced against the amount offered in settlement.” *Kullar*, 168 Cal.App.4th 116,
17 128 (2008). This analysis often includes a comparison of the amount of the proposed settlement
18 with the value of the damages potentially recoverable if successful in further litigation,
19 appropriately discounted for the risk of not prevailing. *Dunk*, 48 Cal.App.4th at 1801-1802; *Girsh*
20 *v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 617-619
21 (N.D. Cal. 1979).

22 **a. Missed Meal Breaks**

23 The allegation that Defendants deprived class members of meal and rest periods was the
24 driving force of this litigation. Representative Plaintiff maintained that the violations stemmed
25 more from scheduling practices (versus a *per se* noncompliant policy), whereby many workers
26 were required to remain “on-duty” during their breaks to respond to restaurant or client needs.

27 Despite Representative Plaintiff’s allegations, the arguable lack of a *per se* violative policy
28 presented significant challenges to class certification, as did Defendants’ argument that this large

1 class of workers served a variety of sites and possessed varying levels of training and
2 responsibilities, as did the looming threat that Defendants would require all workers to sign
3 arbitration agreements and/or class action waivers, as it was already starting to do.^{40, 41} And, even
4 if the Court certified the class (or a subclass thereof), Defendants would undoubtedly argue it need
5 only make breaks *available* (i.e., that it had no obligation to *ensure* that breaks were actually
6 taken). *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *White v. Starbucks*
7 *Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. 2007).

8 Nevertheless, based on CVN's interviews with class members, it was determined that the
9 number of missed meal periods could be as high as 21,593. Using this information and data
10 provided by Defendants, including an average class member hourly wage of \$13.00, the liability
11 exposure possible for this claim could be as high as \$2.5 million over the period since February
12 2016. This recovery number is, of course, based on a variety of assumptions, none of which
13 Defendants has agreed to, and on the assumption that all elements of this claim could be proven
14 (as well as its frequency) at trial.

15 Indeed, perhaps the most questionable assumption is that roughly 10 potential meal periods
16 per pay cycle (i.e., a violation every single working day) were actually "missed," not to mention
17 represent a "violation" of Labor Code §512. Given that class members would rarely have made or
18 kept independent records of whether they took complaint breaks, it is likely that many, if not the
19 vast majority, of any breaks missed would be, in fact, punch-in/punch-out errors or class member
20 neglect in punching in/out at all.⁴² That, and given the generally unsophisticated approach by entry-
21 level workers to diligent timekeeping, it is very likely that many workers simply took their breaks
22

23 ⁴⁰ Per the decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Epic Systems Corp. v. Lewis*,
24 584 U.S. (2018), requiring Defendant's security guards to sign properly-styled arbitration agreements and/or class
25 action waivers would, almost unquestionably, have reduced this case to a one-year PAGA claim for penalties only—
leaving a case worth a mere fraction of what Class Counsel successfully argued it to be. And, should settlement of this
case be delayed, that is, without a doubt, what Defendant will do.

26 ⁴¹ While Representative Plaintiff's position that liability and premium wages due for missed meal and rest periods
could be determined using representative sampling, Defendant would certainly attack any proposed methodology and
27 argue the class issues to be unmanageable. What's more, turning to damages, few, if any, records were available which
demonstrated meal or rest period violations, making damages calculations difficult. This damages quantification
would be Representative Plaintiff's burden.

28 ⁴² Cole Decl. ¶ 15.a.

1 without punching out properly or notifying management when they left for a break.⁴³ And, in other
2 situations, it is likely that many class members were afforded the chance for a break but simply
3 elected not to take one for any one of myriad reasons.⁴⁴ These challenges—and the paucity of
4 records to demonstrate the violations—reveals that a substantial discount off CVN’s original
5 damages estimate was appropriate.⁴⁵

6
7 **b. Missed Rest Breaks**

8 As discussed above, the risk of losing class certification, proof of compliant policies and
9 aggressive enforcement measures means CVN was also compelled to deeply discount its rest break
10 damages analysis. Using the same data points enumerated above and based upon its investigation,
11 the liability exposure possible for missed rest periods could also exceed \$2.5 million. Again,
12 however, none of the assumptions supporting this estimate were conceded by Defendants and, for
13 all the reasons set forth above (e.g., whether these were actually “missed” breaks, a lack of
14 independent record-keeping), it is suspect if even a substantial percentage of these occurrences
15 could constitute violations of § 226.7. Add to these uncertainties the fact that employers may
16 require workers to stay on-premises during rest periods, and it becomes even more evident why
17 many workers may simply have chosen not to take off-duty rest breaks. Given all this, the
18 resolution achieved represents an excellent result for the class.

19
20 **c. Waiting Time Penalties**

21 The strongest claims in this case were the meal and rest break claims, neither of which
22 *conclusively* generates a “wage” to which a Labor Code § 203 claim could be tethered. The
23 California Court of Appeal stated, *arguably in dicta*, that a meal break violation under Labor Code
24 § 226.7 cannot support a “waiting time penalty” under Labor Code § 203. *Ling v. P.F. Chang’s*
25 *China Bistro, Inc.*, 245 Cal.App.4th 1242, 1261 (2016); *Serrano v. Bay Bread LLC*, 2016 Cal.

26
27 ⁴³ Cole Decl. ¶ 15.a.

28 ⁴⁴ Cole Decl. ¶ 15.a.

⁴⁵ Cole Decl. ¶ 15.a.

1 Super. LEXIS 8043 at *22 (June 29, 2016) (no published California case holds contrary to *Ling*);
2 *Kirby v. Imoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012) (failure to pay meal and rest period
3 premiums cannot trigger waiting time penalties); *but see, In re Autozone, Inc. Wage and Hour*
4 *Litig.*, Case No. 3:10-md-021590CRB, 2016 WL 4208200 at **6-7 (N.D. Cal. Aug. 10, 2016)
5 (meal period payments constitute “wages,” thus, supporting Labor Code §§ 201-203 claims).

6 More recently, the California Supreme Court has granted review⁴⁶ in *Naranjo v. Spectrum*
7 *Security Services, Inc.* (No. S258966) 40 Cal.App.5th 444 (2020 Cal.App. LEXIS 167), to tackle
8 the question of whether a rest break violation supports an additional penalty under Labor Code §
9 203 and/or 226 or if this would constitute “penalties on penalties.” Finally, Defendants would
10 contend that Representative Plaintiff could not show the requisite “willful[ness]” under § 203.
11 *Willner v. Manpower Inc.*, 35 F.Supp.3d 1116, 1131 (N.D. Cal. 2014); *Amaral v. Cintas Corp. No.*
12 *2*, 163 Cal.App.4th 1157, 1203-04 (2008) (holding the employer did not willfully fail to pay wages
13 under Labor Code § 203 even though the class prevailed on the merits on the underlying claim).

14 Based on a typical eight-hour workday, on records showing that over 1,254 class members
15 were “severed” employees, and that their average (weighted) hourly wage was \$13.00,
16 Defendants’ liability could reach as high as \$3.9 million for waiting time penalties. Given the state
17 of the law, and that an unrealistic full eight-hour workday was used to calculate this penalty for all
18 severed workers, the value of this claim was discounted *significantly*.⁴⁷

19
20 **d. Wage Statement Violations**

21 Although some federal court decisions have held break premiums under Labor Code §
22 226.7 can support a wage statement penalty under Labor Code § 226(e), there are no published
23 California state court decisions issuing a similar holding. *Maldonado v. Epsolon Plastics, Inc.*, 22
24 Cal.App.5th 1308, 1337 (2018) (meal and rest claims cannot support a class-wide claim for
25 inaccurate wage statements); *Finder v. Leprino Foods Co.*, No. 1:13-CV-2059 AWI-BAM, 2015

26
27 ⁴⁶ Should the trial court stay the instant litigation, pending the Supreme Court’s review of *Naranjo*, payments to
class members would be further delayed.

28 ⁴⁷ Cole Decl. ¶ 15.c.

1 U.S. Dist. LEXIS 30652, at *1 (E.D. Cal. March 12, 2015). In light of the California authority
2 explaining that a violation of Labor Code § 226.7 cannot support a § 203 waiting time penalty, the
3 same logic may apply to § 226 wage statement penalties, making those entirely unrecoverable in
4 this litigation. Had this matter not settled, Defendants would have certainly argued this, as well as
5 contended Representative Plaintiff cannot establish an “injury” resulting from Defendants’
6 “knowing and intentional failure” to furnish wage statements (i.e., that included premium pay for
7 missed breaks). Cal. Lab. Code § 226(e)(1).

8 Under § 226, class members may recover \$50.00 for the initial violation and \$100.00 for
9 each subsequent violation. Based on data provided by Defendants and subsequent analysis thereof
10 by CVN, class members stood to potentially recover \$1.3 million if they fully prevailed on these
11 claims at trial. Given the numerous elements Representative Plaintiff would be required to
12 demonstrate, and anticipating Defendants’ “penalties on penalties” argument, CVN’s “reality
13 check” and, thus, significant discount to the potential value of this claim, was appropriate. What’s
14 more, this analysis assumes the penalties for all class members would never have reached the §
15 226 cap of \$4,000—although numerous workers stayed with the company beyond the tipping point
16 where their aggregated per-pay-period penalties would have reached that cap.⁴⁸

17
18 **e. PAGA Penalties**

19 Representative Plaintiff also alleged that Defendants’ conduct created liability under the
20 Labor Code Private Attorneys’ General Act (“PAGA”). PAGA claims are extraordinarily difficult
21 to evaluate because there are several obstacles to the actual award of the civil penalty. First, it is
22 arguably unclear whether penalties continue to accrue until the court finds a violation to exist.
23 Second, Labor Code § 2699(e)(1) and (2) give trial courts immense discretion to access or lower
24 the penalty amount.⁴⁹ Indeed, several courts have exercised their broad discretion and have
25
26

27 ⁴⁸ Cole Decl. ¶ 15.d.

28 ⁴⁹ Cal. Labor Code § 2699(e)(2) (courts have discretion to deny or significantly reduce PAGA penalties, particularly when the prescribed award would be “unjust, arbitrary and oppressive, or confiscatory.”)

dramatically limited PAGA awards.⁵⁰ Third, Defendants routinely argue that, when other statutory penalties have been imposed, additional penalties under PAGA are unjust (e.g., in cases where damages are already “in play” based on underlying wage violation claims, as we have here).

Thus, while the PAGA calculation herein for approximately 14,416 pay periods could reach \$1.3 million, the likelihood of that sum ever being awarded, or anything even close to it, is extremely slim. Despite this potential recovery, given that PAGA penalties would likely be deemed duplicative of other penalties awardable here, given the extreme “haircuts” many courts are giving to PAGA penalties, and given the presence here of class action allegations (the absence of which often being the reason so-called “Plan B” PAGA penalties are sought to begin with), PAGA penalties were significantly discounted.⁵¹

f. Summary

In sum, assuming (liability and class certification) success on each of the claims, at the level hoped for by Representative Plaintiff, the claims could be as high as:

HIGHEST “STARTING PLACE” VALUATIONS					
Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
~\$2.5M	~\$2.5M	~\$3.9	~\$1.3M	~\$1.3M	~\$11.5M

However, based on CVN’s conversations with the named plaintiff, knowledge of workflows and typical conditions within the fast food restaurant industry (with which CVN has

⁵⁰ See e.g., *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *3-4 (C.D. Cal. Aug. 12, 2011) (invoking § (e)(2) and reducing PAGA penalty award from \$2.8 million to \$500,000); *Makabi v. Gedalia*, No. BC468146, (L.A. Super. Ct. May 8, 2013) (trial court invoked § (e)(2) and declined to apply any PAGA penalties, despite finding that defendants violated PAGA); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157 (2008) (approving reduction of penalty amount to one-third of the damages award even though there was “no evidence that Cintas [did] not entertain a good faith belief that the LWO did not apply to workers in Plaintiff’s position”); *Thurman v. Bayshore Transit Mgmt.*, 203 Cal.App.4th 1112, 1135-36 (2012) (reducing penalty amount by 30% where “defendants took their obligations under Wage Order No. 9 seriously and attempted to comply with the law”); *Magadia v. Wal-Mart Associates, Inc.*, 384 F.Supp. 1058 (N.D. Cal. 2019).

⁵¹ Cole Decl. ¶ 15.e.

1 vast experience), and analysis of Defendants' meal and rest break policies, a number of deductions
2 would be appropriate from those totals, due to:

3 Meal/Rest Periods: Many workers worked below the threshold number of hours for meal
4 or rest period entitlements, worked less than five days per week, and only missed breaks (when
5 they did) out of choice or mis-punches. More likely, one to two violations per pay period is more
6 realistic.

7 Waiting Time Penalties: If not all workers had meal/rest period violations to begin with,
8 worked less than 8 hours per day, the starting place for this penalty analysis needs to be discounted.

9 Wage Statement Penalties: For the same reasons as those supporting a Waiting Time
10 Penalty reduction, the top end/potential §226 penalty level should be reduced, even before a
11 liability analysis for them begins.

12 PAGA: The penalties only apply if a predicate violation applies, which it oftentimes likely
13 would not. Given that, the starting place for a PAGA analysis should be reduced.

14 Thus, *before even considering the likelihood of recovering these damages/penalties*, the
15 analysis would look more like this:⁵²

16

17 REALISTIC "STARTING PLACE" VALUATIONS

18 Meal Breaks	Rest Breaks	Waiting Time	Wage Statements	PAGA	TOTAL
19 ~\$250K	~\$500K	~\$250K	~\$500K	~\$500K	~\$2M

20

21 Indeed, while, on its face, the total damages and penalties available to class members under
22 either scenario are certainly higher than the settlement amount, so were the risks and delays
23 inherent in protracted litigation. And further litigation wouldn't necessarily have tipped the scales
24 in favor of either party since (a) significant discovery was already available to them and, as in all
25 litigation, (2) both good and bad facts would inevitably have come to light for each side. What is
26 certain, however, is that Defendants would have fought the action very aggressively, thereby
27

28 ⁵² Cole Decl. ¶ 16-18.

1 delaying the benefits now available through settlement to class members for quite some time.⁵³ As
2 a result, the extraordinary result of a *non-reversionary* \$1,500,000.00 fund is more than reasonable
3 when balanced against the risks of continued litigation.

4 5 **2. The Complexity, Expense and Likely Duration of Continued Litigation Support** 6 **Approval**

7 In evaluating for fairness, the Court should weigh the benefits of settlement against the
8 expense and delay involved in achieving an equivalent or even more favorable result at trial. *Young*
9 *v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *Kullar*, 168 Cal.App.4th 116, 120 (2008). As California
10 jurists have recognized, there exists “an overriding public policy favoring settlement of class
11 actions.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1054 (2003) (citing
12 *Franklin v. Kayrpo Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (“public policy favor[s] the
13 compromise and settlement of disputes”)). The alternative to a class action, namely numerous
14 individual actions, could tax private and judicial resources for years. Given the relatively modest,
15 though not inconsequential, amount of damages individual class members allegedly incurred
16 (many class members worked for Defendants for just a few days or weeks), it would be
17 uneconomical to secure individual legal representation, even for those with the resources to do so.
18 But, here, the Settlement provides *all* class members, regardless of their means, the opportunity of
19 monetary recovery in a prompt and efficient manner, without the risk of the Court denying class
20 certification and/or finding no liability, and these workers recovering nothing at all.

21 Class Counsel also considered that, even if Representative Plaintiff prevailed, on both class
22 certification and liability, the remaining processes could be lengthy and costly, potentially
23 including appeals. What’s more, class action defendants may seek a writ of mandate from an order
24 granting class certification (*See, Cal. Code Civ. Proc.* § 904.1; *In re Cipro Cases I and II*, 121
25 Cal.App.4th 402, 409 (2004)), may drag out the trial through bifurcation of issues, phasing of the
26 trial, challenges to its manageability, and the losing party there may take an appeal of any of these
27

28 ⁵³ Note that *Augustus* was filed in 2005 and not resolved until 2017—*12 years after its inception*.

1 issues. As such, even a successful judicial resolution at the trial court level can be just the
2 beginning of a lengthy, expensive process, stalling payments to class members for years.⁵⁴ This
3 judicial purgatory is compounded by the risk of adverse appellate rulings, which would remand
4 the action to the trial court for further litigation, possibly with negative precedent.⁵⁵ The
5 complexity, expense, and delay of continued litigation in this matter supports final approval of the
6 Settlement.

8 **3. The Discovery and Factual Investigation Support Approval**

9 The Settlement comes at a point in the litigation where counsel for both Representative
10 Plaintiff and Defendants had clear views of the strengths and weaknesses of their respective cases.
11 “[T]he extent of discovery completed and the stage of the proceedings” are factors that courts
12 consider in determining the fairness, adequacy and reasonableness of a settlement. *Dunk*, 48
13 Cal.App.4th at 1794. CVN conducted extensive pre-filing due diligence, including review of
14 publicly available information, conversations with witnesses, and review of prior case files by the
15 CVN firm. Class Counsel then litigated the Merced County action aggressively, knowing the high
16 stakes involved, and obtained discovery formally and informally from several sources (the
17 Defendant, the Plaintiffs, their union, scores of class members through direct contact/interviews
18 as well as via the retention of a professional canvasser, by researching litigation records and
19 settlement documents generated in prior wage and hour class actions against Defendants, through
20 geo-targeted social media campaigns, etc.), all of which produced important evidence in support
21 of the decision to settle. Even post-settlement, informal confirmatory discovery was conducted as
22 Class Counsel conducted significant research regarding Defendants’ corporate structure (so as to
23

24 ⁵⁴ Consider, for example, the plight of the employee-class members in *Savaglio v. Wal-Mart Stores, Inc.*, Case No.
25 C-835687 (Alameda County Super. Ct.). Following four years of litigation and a four-month jury trial, in 2005, a \$172
26 million verdict was entered against Wal-Mart on behalf of over 116,000 class members. Those aggrieved employees,
27 however, did not receive any remuneration until 2011, more than five years later. As this Court is well aware, as of
the date this motion was filed, reaction to the COVID-19 pandemic has sent unemployment rates skyrocketing, with
a particularly painful impact upon more vulnerable segments, such as low skilled workers. Thus, it probably goes
without saying that class members in this case need these settlement funds now more than ever.

28 ⁵⁵ See, e.g., *Chau v. Starbucks Corp.*, 174 Cal.App.4th 688 (2009) (appellate court reversed an \$86 million
restitution award to a certified class of hourly employees).

1 ensure only the right workers were being included in the Notice program). Undoubtedly, the parties
2 have thoroughly investigated, and are sufficiently knowledgeable of the facts to form educated
3 assessments regarding their respective positions and the value of the case.

4 5 **4. The Experience and Views of Counsel Favor Final Approval**

6 Class Counsel supports the Settlement as fair, reasonable, and adequate, and believes it in
7 the best interest of the class as a whole.⁵⁶ Class Counsel has substantial experience prosecuting
8 complex litigation and/or class action lawsuits, has prosecuted hundreds of such cases involving
9 the same issues as presented here, including dozens against restaurant companies.⁵⁷ As discussed
10 above, Class Counsel is intimately familiar with the litigation, having conducted extensive
11 investigation and negotiation on behalf of the class. The endorsement by well-informed and
12 qualified counsel of a settlement as fair, adequate, and reasonable is entitled to significant weight.
13 *Dunk*, 48 Cal.App.4th at 1802; *Ellis Naval Air Rework Facility*, 87 F.R.D. 15 (N.D. Cal. 1980);
14 *Boyd*, 485 F. Supp 610, 617 (N.D. Cal. 1979).

15 16 **5. The Class Members' Reaction Favors Final Approval**

17 Finally, when determining if a settlement is reasonable, a court looks to "the reaction of
18 class members to the proposed settlement." *Dunk*, 48 Cal.App.4th at 1801; *Wershba*, 91
19 Cal.App.4th at 244-245; *Kullar*, 168 Cal.App.4th at 119. Here, class members' response to the
20 settlement has been almost unprecedented; there have been no legitimate objections and a *de*
21 *minimus* number of opt outs, further demonstrating that the Settlement is fair, adequate, and
22 reasonable, and worthy of final approval. As the declaration of Irvin Garcia, Case Manager at CPT
23 Group, Inc., explains, the average opt-out rate in such cases is 1.36% to 2.23% per case. Here, the
24 opt-out rate is roughly 0.01%. This shows tremendous support for the Settlement.

25
26 ⁵⁶"When approving class action settlements, the court must give considerable weight to class counsel's opinions due
27 to counsel's familiarity with the litigation and its previous experience with class action lawsuits." *Alberto v. GMRI,*
Inc., Not Rpt'd in F. Supp. 2d, 2008 WL 4891201 (E.D. Cal. 2008) (citing *Officers for Justice*, 688 F.2d at 625 and *In*
re Washington Public Power Supply System Securities Litigation, 720 F. Supp. 1379, 1392 (D. Ariz. 1989)).

28 ⁵⁷ See, Exhibit "B," CVN's Professional Resume.

1
2 **IV. THE COURT-ORDERED NOTICE PROGRAM IS CONSTITUTIONALLY**
3 **SOUND AND HAS BEEN FULLY IMPLEMENTED**

4 California statutory and case law vests the Court with discretion in fashioning an
5 appropriate notice program. *Cal. Civ. Code* § 1781; *Cartt v. Superior Court*, 50 Cal.App.3d 960,
6 973-974 (1975). To protect the rights of absent class members, the parties must provide the class
7 with the best notice practicable, but due process does not require actual notice to parties who
8 cannot reasonably be identified. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812
9 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (U.S. 1974); *Manual* § 21.311, n. 882 at 432;
10 *Cal. Rules of Ct., Rule 3.766(d)*.

11 The Court-approved Notice program met this standard and has now been fully
12 implemented. The Settlement Administrator mailed and emailed the Notice Package to the entire
13 class on November 15, 2021. Of the 1,748 mailed Notices, only 52 Notices remain undeliverable.
14 This is unquestionably an excellent result for such a large workforce.⁵⁸

15 While the Notice allowed class members 30 days to either opt out or object, no claim form
16 was required for class members to participate in the Settlement. This approach was chosen so as
17 to avoid unnecessary confusion, maximize class member recoveries, and reduce administrative
18 costs.

19 It should be noted that the lack of objections and opt outs is not tantamount to a lack of
20 interest in the Settlement, however. While the claims administrator undoubtedly received far more,
21 Class Counsel's firm fielded dozens of telephone calls from class members. With these calls came
22 myriad questions, largely about the timing of funds distribution, whether class members were
23 required to appear in court show their support, whether unrelated human resources and/or
24 workplace safety complaints would be released through this Settlement (they would not), but *none*
25 demonstrating any concerns over the *sufficiency* of the Settlement. Indeed, not only did class
26 members not reject the Settlement, they embraced it.

27
28 ⁵⁸ Garrido Decl. ¶¶ 7, 11.

V. AN AWARD OF ATTORNEYS' FEES AND COSTS IS APPROPRIATE

A. A COMMON FUND FEE AWARD IS WARRANTED

Public policy promotes approval of fee requests since “[t]he function of an award of attorney’s fees is to encourage the bringing of meritorious...claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.” *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (internal quotation marks and citations omitted). Additionally, attorneys’ fees are awarded based on the value of the common benefit made available to the class, regardless of whether the settlement contains a reversion provision. *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Boeing Co. v. Van Gemert*, 44 U.S. 472, 480-81 (1980). In this case, there will be no reversion of any kind to the Defendants, further rendering the fees request appropriate.

Specifically, the settlement provides for an attorneys’ fee award of 35% of the settlement amount, a typical percentage in the resolution of common fund cases.⁵⁹ CVN has devoted numerous hours to and faced significant risk⁶⁰ in the prosecution of this matter and, more importantly, made an extraordinary fund available to a large number of otherwise-underrepresented, low paid workers.

The “common fund” method, or “percentage-of-the-benefit” analysis, calculates attorneys’ fees based on a percentage of the common benefit to the class. *In re Consumer Privacy Cases*, 175 Cal.App.4th 545 (2009); *Serrano v. Priest*, 20 Cal.3d 25 (1977). In cases where a common fund has been created—i.e., where each class member will “receive a mathematically ascertainable

⁵⁹ See, e.g., *Barbosa v. Cargill Meat Solutions Corp.*, 2013 U.S. Dist. LEXIS 93194 (E.D. Cal. 2013) (33% fee award of gross fund); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9 (C.D. Cal. 2014) (33 1/3% fee award in wage and hour class action); *Morris v. Lifescan, Inc.* 54 Fed.Appx. 663 (9th Cir. 2003) (affirming 33% fee award); *Savage v. California Family Health LLC*, Case No. 34-2016-00192282-CU-OE-GDS (Sacramento Super. Ct. 2017) (1/3 fee award in wage and hour class action); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 (E.D. Cal. 2010) (33 1/3% award in wage and hour class action); See, Exhibit “D” (Compendium of Settlement Item Awards).

⁶⁰ CVN undertook this matter solely on a contingent basis, with no guarantee regarding the potential duration of the litigation or even the ultimate reimbursement of fees or costs. Looking, *ad hoc*, at the fact that a settlement did occur, doesn’t change the risks accepted at the inception of the case or at any point along its timeline. Nor, looking more broadly, does it account for the countless cases that do not settle, do not settle well and/or are dismissed after sometimes thousands of hours of work thereon.

1 payment”⁶¹—California state courts,⁶² the Ninth Circuit⁶³ and the United States Supreme Court⁶⁴
2 agree that awarding attorneys’ fees as a percentage of the common fund is the proper method.⁶⁵

3 As expressed by the Third Circuit’s Task Force on the Selection of Class Counsel,⁶⁶ in
4 Conte and Newberg’s treatise on class actions (“*Newberg*”)⁶⁷ and, *inter alia*, in *Blum v. Stenson*,
5 465 U.S. 886, 900 n.16 (1984), the rationale for this is commonsensical: in common fund cases,
6 fees are not assessed *against* the unsuccessful litigant (a.k.a. “fee shifting”), but rather, are *taken*
7 *from the fund* or damage recovery (a.k.a. “fee spreading”). In contrast to the calculation of a
8 statutory fee, payable by the defendant depending on the extent of success achieved, a common
9 fund is itself the measure of success and represents the benchmark from which a fee will be
10 awarded. 5 *Newberg* § 15.53 at 183. Consequently, the analysis in a common fund case focuses
11 not on the plaintiff’s position as “prevailing parties,” but on a showing that the fund conferred a
12 benefit upon the class which resulted from their efforts. *Id.*, § 2.06 at 40.⁶⁸ As explained above,
13 the United States Supreme Court has specifically endorsed the use of this method in paradigmatic
14 common fund cases such as this.⁶⁹

16 ⁶¹ *Vasquez*, 266 F.R.D. 482 at *491 (E.D. Cal. 2010).

17 ⁶² *Lealao v. Beneficial California*, 82 Cal.App.4th 19 (2000); *Serrano v. Priest*, 20 Cal.3d 25 (1977).

18 ⁶³ *Staten v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

19 ⁶⁴ The United States Supreme Court has always computed common fund fee awards on a percentage of the fund
basis. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Central Railroad & Banking Co. of Georgia v.*
20 *Pettus*, 113 U.S. 116, 5 S.Ct. 387 (1885); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939).

21 ⁶⁵ A lodestar approach (enhanced by a multiplier) can be used as an alternative to the common fund theory when
“there is no way to gauge the net value of the settlement or any percentage thereof.” *Hanlon v. Chrysler Corp.*, 150
22 F.3d 1011, 1029 (9th Cir. 1998).

23 ⁶⁶ See, *Third Circuit Task Force on the Selection of Class Counsel* (Final Report, January 2002), available at
<https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf>
24 (recommending that all fee awards in common fund cases be awarded as a percentage of the fund, but that a lodestar
analysis continue to be the applicable method for determining statutory fee shifting awards); *Report of the Third*
25 *Circuit Task Force*, 108 F.R.D. 237, 255 (hardcopy not exhibited here due to length of document).

26 ⁶⁷ *Newberg on Class Actions* (5th ed. 2017).

27 ⁶⁸ The common fund doctrine is “based on the commonsense notion that the ‘one who expends attorneys’ fees in
winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear
28 a fair share of the litigation costs.’” *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.*, 127
Cal.App.4th 387, 397 (2005) (internal citation omitted); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“a
lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable
attorney’s fee from the fund as a whole,” and class members who benefit from a lawsuit “without contributing to its
cost are unjustly enriched at the successful litigant’s expense.”).

⁶⁹ *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (“... under the “common fund doctrine,” ...a reasonable
[attorneys’] fee is based on a percentage of the fund bestowed on the class...”).

1 The *Serrano* factors further justify the common fund fee award.⁷⁰ *Serrano* explained the
2 trial courts may consider additional factors when considering a fee award: (1) time and labor
3 required; (2) the contingent nature of the fee agreement; (3) extent to which the nature of the
4 litigation precluded other employment by the attorneys; (4) experience, reputation, and ability of
5 the attorneys who performed services in the litigation and their displayed skill; (5) amount
6 involved and the results obtained; and (6) the informed consent of the client to the fee agreement.
7 *Serrano*, 20 Cal.3d at 49.

8 Class Counsel has invested considerable amounts of time and labor in litigating the Class'
9 claims. CVN incurred over 600 hours in prosecuting this litigation. In so doing, Class Counsel
10 drew on its collective experience litigating wage and hour class actions against employers very
11 much like this one⁷¹ in order to minimize wasted effort. Class Counsel's efforts include, *inter alia*,
12 conducting written discovery (both formal and informal), production and review of documents,
13 obtaining data for mediation, interviews with putative class members, a full day mediation session
14 and hard fought negotiations, and creative ways of publicizing this case and reaching witnesses so
15 as to put the maximum pressure on Defendants. CVN harnessed evidence from all available
16 resources, conducted significant discovery, designed an outreach campaign to "fill in the gaps."
17 Only after that work did it use its skills and experience to negotiate an outstanding result for
18 numerous class members.⁷²

19 The fee award is further supported by the contingency risk assumed in prosecuting the case.⁷³ The
20 California Supreme Court has recognized that attorney fee awards should be enhanced to

21 ⁷⁰ *Serrano v. Priest*, 20 Cal.3d 25 (1977); *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794 (1996).

22 ⁷¹ Exhibit "B," CVN's Professional Resume.

23 ⁷² Attorney fee awards in common funds cases are intended to compensate class counsel for work performed both
24 before *and after* the date of judgment. In nearly every class action, the efforts during litigation and in pursuing approval
25 of the settlement are only part of the overall work picture. Post-judgment, class counsel is required to stay in close
26 contact with the claims administrator to ensure payment of the settlement proceeds, to communicate with class
members, with their CPAs (regarding the tax treatment of settlement proceeds), even with other attorneys, to report
compliance with the terms of the Court's final approval order thereon and myriad other tasks. Although rarely
discussed in connection with requests for attorneys' fees and costs, it's not unusual for some of these efforts to take
place years after judgment. With a class of this magnitude, these are efforts that will assuredly be required by CVN.

27 ⁷³ California courts "agree...that 'riskiness,' difficulty or contingent nature of the litigation is a relevant factor in
28 determining a reasonable attorney fee award." *Salton Bay Marina, Inc.*, 172 Cal.App.3d at 955 (citing *La Mesa-Spring
Valley School Dist. of San Diego County v. Nobuo Otsuka*, 57 Cal. 2d 309, 316 (1962); *See also, In re Quantum Health
Resources, Inc. Sec. Litig.*, 962 F. Supp. 1254, 1257 (C.D. Cal. 1997).

1 compensate attorneys for the risks of loss involved in contingency cases. *Ketchum v. Moses*, 24
2 Cal.4th 1122, 1133 (2001); *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal.App.4th 140, 154
3 (2006); *See also, In re Consumer Privacy Cases*, 175 Cal.App.4th at 556.

4 CVN undertook this matter solely on a contingent basis, with no guarantee regarding the
5 potential duration of the litigation or the ultimate recovery of fees or costs. While Class Counsel
6 believes the claims in this case are meritorious, it also recognized the factual and legal challenges
7 involved in complex litigation, generally, as well as the specific risks posed by the facts in this
8 case. While attorneys who represent corporations are routinely paid (often quite handsomely) on
9 an hourly basis, plaintiffs in wage and hour cases can rarely afford to pay their attorneys by the
10 hour, especially if they expect to be represented by a law firm well known for achieving good
11 results. As a firm committed to wage and hour class actions, including the one at hand, Class
12 Counsel must accept these cases on a wholly contingent basis, with no guarantee of recovery of
13 fees, or even the reimbursement of litigation costs. As California case law recognizes, Class
14 Counsel's commitment to this litigation should not be assessed in a vacuum.⁷⁴ The countless hours
15 Class Counsel spent on litigation, investigation and settlement efforts in this case prevented it from
16 pursuing other hourly or contingency fee-based work.

17 The experience and ability of Class Counsel were essential to the settlement achieved here. Class
18 Counsel developed an extensive factual record, convinced Defendants of its exposure, and expertly
19 negotiated the terms of the Settlement. Only counsel well versed in class action litigation and wage
20 and hour law in this jurisdiction could have effectively marshaled the evidence and presented it to
21 achieve this Settlement.⁷⁵ "The overall result and benefit to the class from the litigation is the most
22 critical factor in granting a fee award." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D.

23
24 ⁷⁴ *Glendora Community Redevelopment Agency*, 155 Cal.App.3d at 475 (recognizing that "a busy lawyer" with a
25 good "reputation" might be "reluctant to accept the employment because of the preclusion of other business"); *Cal.*
26 *Rules Prof. Conduct*, R. 4-200 (B)(4) (when determining whether a fee is appropriate, individual attorneys must
consider "[t]he likelihood, if apparent to the client, that the acceptance of the particular employment will preclude
other employment by the member").

27 ⁷⁵ Exhibit "B," CVN's Professional Resume. The fact that CVN has likely handled more restaurant employees' class
28 actions than any firm in California, not to mention having co-prosecuted the ABM litigation over a period of 12 years
was certainly not lost on the defendant here, and undoubtedly demonstrated CVN's commitment to litigate the instant
matter through judgment and appeals if necessary.

1 Cal. 2007). Here, while acknowledging Defendant was indeed making substantial strides toward
2 providing meal and rest breaks consistently to its guards, Class Counsel was still able to secure a
3 great result for class members.

4 Furthermore, the agreement of Representative Plaintiff to enter into contingency fee
5 arrangements supports the requested attorney fee award. *Glendora*, 155 Cal.App.3d at 472. Here,
6 Plaintiff entered into consensual contingency fee agreements and also expressly endorse Class
7 Counsel's request for attorneys' fees and costs. Additionally, class members have been notified of
8 the requested attorneys' fees and costs by means of the Notice, and no one objected. In light of the
9 work performed, risks assumed and results achieved, it is clear that clear that Class Counsel's fee
10 request is supported and should be approved.

11
12 **B. CLASS COUNSEL'S COSTS ARE REASONABLE**

13 Over the course of this litigation, Class Counsel incurred ordinary litigation costs over the
14 past two years totaling \$20,000, and anticipates incurring additional expenses overseeing the
15 settlement process, making future appearances, etc.⁷⁶ While the Settlement provided a ceiling for
16 litigation costs of \$30,000, Class Counsel kept costs at bay and, thus, only seeks costs of \$20,000.
17 Noteably, this amount does not account for additional future expenses in overseeing the settlement
18 process, making appearances, filing court documents, ensuring claims administration compliance
19 with this Court's orders, responding to class members, CPAs, etc. Since these costs are reasonable
20 and served to benefit the class, they warrant reimbursement.⁷⁷

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22
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24
25

⁷⁶ Exhibit "C," CVN's Cost Journal.

26 ⁷⁷ *In re United Energy Corp. Sec. Litig.*, Not Rpt'd in F.Supp., 1989 WL 73211, * 6 (C.D. Cal. 1989) ("[a]n attorney
27 who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive
28 reimbursement of reasonable fees and expenses involved"); 1 Alba Conte, *Attorney Fee Awards* § 2:08 at 50-51 ("The
prevailing view is that expenses are awarded in addition to the fee percentage."); *In re Warner Comm. Sec. Litig.*, 618
F.Supp. 735 (S.D.N.Y.1985); *In re GNC Shareholder Litig.: All Actions*, 668 F.Supp. 450, 452 (W.D. Pa. 1987).

**VI. REPRESENTATIVE PLAINTIFFS DESERVE THE PROPOSED
ENHANCEMENT AWARD**

The Settlement further provides for, and Representative Plaintiff now request, enhancement award (aka service payment) in the aggregate amount of \$7,500. Service awards to the lead plaintiffs in class action litigation are commonplace and are “intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,”⁷⁸ and, sometimes, to recognize their willingness to act as a private attorney general.” Service award “is intended to advance public policy by encouraging individuals to come forward and perform their civic duty in protecting the rights of the class and to compensate class representatives for their time, effort and inconvenience ... Federal authority is in accord.”⁷⁹

Courts in California may consider the following factors in determining the appropriateness of such an award: (1) the risk to the class representative in commencing suit; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

The proposed service award is reasonable⁸⁰ given the work the Representative Plaintiff performed on behalf of fellow class members, the risks she faced and those continued to be faced for her participation in the litigation (e.g., retaliation from future employers), and the minimal

⁷⁸ Plaintiffs risked being “blacklisted” by other future employers for having sued this defendant in a class action. As well stated by a New York Southern District Court: “[T]he fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person . . . Even where there is not a record of actual retaliation, notoriety, or personal difficulties, class representatives merit recognition for assuming the risk of such for the sake of absent class members.” *Guippone v. BH S&B Holdings LLC*, 2011 U.S. Dist. LEXIS 126026, at **4, 20 (S.D.N.Y. Oct. 28, 2011).

⁷⁹ *In re California Indirect Purchases*, 1998 WL 1031494, 11 (Alameda Super. Ct. 1998) (internal citations omitted).

⁸⁰ Indeed, some courts have awarded far higher amounts. *Adewumi vs. GHS Interactive Security LLC.*, No. 34-2017-00210768-CU-OE-GDS (Sacramento Super. Ct. 2019); *Augustus v. ABM Security Services, Inc.*, *supra* (\$50,000 and \$25,000 service payments); *Pangan v. East L.A. Doctors Hospital, LP*, No. BC431371 (Los Angeles County Superior Court May 1, 2012; Judge Wiley Jr.) (awarding \$20,000 incentive award); *See*, Exhibit “D” (Compendium of Settlement Item Awards).

1 impact the request will have on the amount of any class member's level of recovery. As detailed
2 in each Representative Plaintiff's declaration, submitted herewith, she initiated her action and
3 devoted considerable time thereto. This included frequent emails and telephone calls with counsel
4 to address issues surrounding the organizational structure of the company, job duties she and other
5 class members performed, production of documents and communications surrounding mediation
6 and settlement.

7 Plaintiff Shana Wright was "flying solo," serving as the face of this litigation alone, and
8 otherwise committed to championing these issues for tens of hundreds of absent class members.
9 Indeed, the action would never have commenced, or perhaps not commenced for many years more,
10 had plaintiff Shana Wright not stepped forward to pioneer it in the first place. Representative
11 Plaintiffs assumed the risk that future employment prospects might be diminished with her
12 attachment to this class action case and waived rights (e.g., a §1542 release) greater than those
13 waived by the absent class members. Finally, the proposed enhancement award is fair to other
14 class members because it will not significantly reduce the settlement funds available to Class
15 Members. For these reasons, the service award should be approved.

17 **VII. REIMBURSEMENT OF ADMINISTRATION FEES IS APPROPRIATE**

18 Representative Plaintiff respectfully request payment of CPT Group's settlement
19 administration costs and fees be approved. By the time of preliminary settlement approval, CPT
20 Group had submitted a competitive bid of \$15,000—a very reasonable amount given the size of
21 the class and the work required to send the Notice, process settlement checks, establish a website,
22 and communicate with class members and counsel.

24 **VIII. CONCLUSION**

25 Based upon the foregoing, Representative Plaintiff respectfully request the Court grant
26 final approval of the Settlement and approve Class Counsel's application for attorneys' fees and
27
28

COLE & VAN NOTE
ATTORNEYS AT LAW
555 12TH STREET, SUITE 1725
OAKLAND, CA 94607
TEL: (510) 891-9800

1 costs, the requested service award to the named Plaintiff, the PAGA award, and reimbursement of
2 the settlement administration costs.

3
4 Dated: December 20, 2021

COLE & VAN NOTE

5
6 By:



Laura Van Note, Esq.
Attorneys for Representative Plaintiff

PROOF OF SERVICE

I am over 18 years of age, not a party to the above-captioned action, and am employed by the law firm of Cole & Van Note, 555 12th St., Suite 1725, Oakland, California 94607.

On this date, I served a copy of:

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

DECLARATION OF SCOTT EDWARD COLE, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

DECLARATION OF IRVIN GARCIA ON BEHALF OF CPT GROUP, INC. REGARDING NOTICE AND CLAIMS ADMINISTRATION

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

	By depositing the document(s) with the U.S. Postal Service, with postage fully prepaid, addressed as indicated below, in the ordinary course of business.
	By facsimile transmission to the fax number(s) below, before 5:00 p.m. PST.
	By placing the document(s) in a sealed Federal Express envelope, affixing a pre-paid air bill and delivering it to a Federal Express agent.
	By personal delivery.
X	By e-mail transmission to the e-mail address(es) below.
	By electronic filing using the CM/ECF System which will send a Notice of Electronic Filing to the email address(es) listed in the Electronic Mail Notice List.
	By uploading the document(s) to the third-party document management/service company, court-approved for purposes of this litigation.
X	By electronic submission to the Labor and Workforce Development Agency.

on the following person(s):

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I declare under penalty of perjury under the laws of the United States and the State of California the foregoing is true and correct. Executed in Oakland, California on December 20, 2021.

Nicole Randle
Nicole Randle