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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN**

JOSE AGUILAR SANDOVAL, individually,
and on behalf of all others similarly situated,

Plaintiff,

v.

MADLAND TOYOTA-LIFT, INC., a California
corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. BCV-20-100810-TSC

CLASS ACTION

*[Assigned for all purposes to the Honorable
Thomas S. Clark, Dept. 17]*

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

*[Filed with Memorandum of Points and
Authorities the Declaration of Justin F.
Marquez, and Proposed Order]*

PRELIMINARY APPROVAL HEARING

Date: October 26, 2021

Time: 8:30 a.m.

Dept: 17

1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

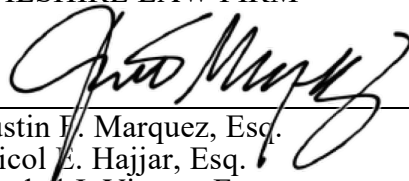
2 PLEASE TAKE NOTICE that on October 26, 2021, at 8:30 a.m., in Department 17 of the
3 Kern Superior Court, Bakersfield Court, 1415 Truxtun Avenue, Bakersfield, California 93301,
4 pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*, Plaintiff
5 Jose Aguilar Sandoval will move the Court for an Order granting preliminary approval of the
6 proposed class action settlement between Plaintiff and Defendant Madland Toyota-Lift, Inc.
7 Plaintiff further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Stipulation for Class Action Settlement;
- 9 2. Certifying a Class for settlement purposes;
- 10 3. Approving the Notice and Settlement Information Form (collectively, “Notice
11 Packet”) and the plan for distribution of the Notice Packet to Settlement Class
12 Members;
- 13 4. Appointing Plaintiff Jose Aguilar Sandoval as Class Representative for settlement
14 purposes;
- 15 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
16 settlement purposes;
- 17 6. Appointing ILYM Group, Inc. as the Settlement Administrator; and
- 18 7. Scheduling a final approval hearing.

19 The motion will be based upon this notice, the attached memorandum of points and
20 authorities, the Declaration of Justin F. Marquez, filed concurrently herewith, the records and
21 files in this action, and any other further evidence or argument that the Court may properly
22 receive at or before the hearing.

23 Dated: September 16, 2021

WILSHIRE LAW FIRM

24
25 By: 

26 Justin F. Marquez, Esq.
27 Nicol E. Hajjar, Esq.
Rachel J. Vinson, Esq.
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jose Aguilar Sandoval (“Plaintiff”) seeks preliminary approval of a proposed \$325,000.00 non-reversionary, wage and hour class action settlement with Defendant Madland Toyota-Lift, Inc., (“Defendant”). The Settlement will provide substantial monetary payments to approximately 110 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Kelly A. Knight, over the course of a full day of mediation of mediation that were conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class action and PAGA representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant delivers Toyota Forklifts & material handling equipment to central California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (Declaration of Justin F. Marquez [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts and only paying for 8 hours of work for each workday, regardless of whether an employee worked overtime. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay overtime wages, failure to pay minimum and straight time wages, failure to provide meal periods, failure to authorize and permit rest periods, inaccurate wage statements, failure to pay

1 all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.*
2 at ¶ 3.)

3 On March 20, 2020, Plaintiff filed a putative wage-and-hour class action complaint
4 against Defendant Madland Toyota-Lift, Inc. for: (1) failure to pay minimum and straight time
5 wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor
6 Code §§ 1194, and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512);
7 (4) failure to authorize and permit rest periods (Labor Code §§ 226.7); (5) failure to timely
8 pay final wages at termination (Labor Code §§ 201-203); (6) failure to provide accurate
9 itemized wage statements (Labor Code § 226); and (7) unfair business practices (Business and
10 Professions Code 17200 et seq.). On September 28, 2020, Plaintiff filed a First Amended
11 Complaint adding a claim for civil penalties under Private Attorneys General Act “PAGA”
12 (Labor Code § 2698 et seq.). (Marquez Decl., ¶ 4.)

13 **B. Discovery and Investigation**

14 Following the filing of the Complaint, the parties exchanged documents and
15 information before mediating this action. Defendant produced a sample of time and pay
16 records for class members. Defendant also provided documents of their wage and hour
17 policies and practices during the class period, and information regarding the total number of
18 current and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

19 After reviewing documents regarding Defendant’s wage and hour policies and
20 practices, analyzing Defendant’s timekeeping and payroll records, and interviewing Class
21 Members, Class Counsel was able to evaluate the probability of class certification, success on
22 the merits, and Defendant’s maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class
23 Counsel also investigated the applicable law regarding the claims and defenses asserted in the
24 litigation. (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior
25 to mediation. (*Id.*)

26 **C. Settlement Negotiations**

27 On July 16, 2021 the parties participated in private mediation with experienced class
28 action mediator Kelly A. Knight. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The

1 settlement negotiations were at arm's length and, although conducted in a professional
2 manner, were adversarial. The parties went into the mediation willing to explore the potential
3 for a settlement of the dispute, but each side was also prepared to litigate their position
4 through trial and appeal if a settlement had not been reached. (*Id.*)

5 After extensive negotiations and discussions regarding the strengths and weaknesses of
6 Plaintiff's claims and Defendant's defenses, Mr. Knight issued a mediator's proposal during
7 the July 16, 2021 mediation. The mediator's proposal was accepted by all parties, the material
8 terms of which are encompassed within the Settlement. (*Id.* at ¶ 8, Ex. 1 [Joint Stipulation for
9 Class Action Settlement].)

10 Class Counsel has conducted a thorough investigation into the facts of this case. Based
11 on the foregoing discovery and their own independent investigation and evaluation, Class
12 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
13 interests of the Settlement Class Members in light of all known facts and circumstances, the
14 risk of significant delay, the defenses that could be asserted by Defendant both to certification
15 and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 15.)

16 Indeed, the \$325,000.00 Settlement represents **55.3% of the realistic maximum**
17 **recovery of \$587,744.00.** (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendant's
18 maximum potential liability for all claims was approximately \$3.3 million, when the risk of
19 prevailing at certification and trial are factored into the equation, Class Counsel believes that
20 Defendant's realistic exposure was \$587,744.00, meaning the Settlement achieves a
21 significant recovery. (*Id.* at ¶¶ 17-23.) Considering the risk and uncertainty of prevailing at
22 class certification and at trial, particularly in light of many class members being subject to
23 arbitration agreements and class action waivers, this is an excellent result for the Class.
24 Indeed, because of the proposed Settlement, class members will receive timely, guaranteed
25 relief and will avoid the risk of an unfavorable judgment.

26 **D. Key Terms of the Proposed Settlement**

27 Under the Settlement, Defendant will pay \$325,000.00 to resolve this litigation. This
28 amount is all-inclusive. The Settlement's key terms include:

1 1. Settlement Class: For settlement purposes only, the Parties agree to the
2 certification of a class pursuant to California Code of Civil Procedure § 382 defined as: “All
3 Class Members who have not requested to be excluded or have not opted out of the Class by
4 submitting a valid and timely Request for Exclusion” (together, collectively referred to as the
5 “Class Members”). (Settlement, ¶ 32.)

6 2. Class Period: The Class Period means the period from March 20, 2016 up to and
7 including the Preliminary Approval Date. (Settlement, ¶ 7.)

8 3. Gross Settlement Amount: This amount is \$325,000.00, for all claims, including
9 wages, interest, the Class Counsel Award, Settlement Administration Costs, payment to the
10 Labor and Workforce Development Agency (LWDA”) for the alleged PAGA penalties, all other
11 penalties, and the Class Representative Service Awards. (Settlement, ¶ 14.)

12 4. No Reversion: This is a non-reversionary settlement. Settlement checks will be
13 valid for 180 days from the date of issuance. The sum of any and all unclaimed Individual
14 Settlement Payment checks after One-Hundred Eighty (180) days from issuance shall be paid to
15 Settlement Class Members who negotiated their checks within One-Hundred Eighty (180) days
16 from issuance, on a pro rata basis according to the formula set forth herein. The payment of
17 reapportioned amounts is referred to as the “Reapportioned Settlement Payments.” The
18 Reapportioned Settlement Payments shall be mailed to Settlement Class Members within Two-
19 Hundred and Ten (210) days of issuance of the initial Individual Settlement Payment checks (i.e.,
20 30 days after the negotiable check time period expires). Pursuant to Code of Civil Procedure §
21 384(a), any portion of the Reapportioned Settlement Payments that is not negotiated by
22 Settlement Class Members will be sent to the Los Angeles Trial Lawyers’ Charities, 2708
23 Wilshire Boulevard, Suite 391, Santa Monica, CA 90403 pursuant to Code of Civil Procedure
24 Section 384(a). (Settlement, ¶ 54 (c).)

25 5. Released Claims by Settlement Class Members: The class release is limited to “all
26 claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys’ fees,
27 damages, action or causes of action contingent or accrued for, arising out of the allegations and
28 claims asserted in the operative Complaint, including without limitation to, any and all claims for

1 alleged unpaid wages (including but not limited to overtime, final pay upon termination, and
2 minimum wage), alleged unpaid meal, rest and recovery period premiums, itemized wage
3 statement penalties, waiting time penalties, and other claims and penalties under the California
4 Labor Code or Business & Professions Code (including Section 17200 *et seq.*), claims and
5 penalties under the California Labor Code Private Attorneys General Act and claims for
6 restitution, disgorgement of profits, injunctive relief, and other equitable relief, liquidated
7 damages, punitive damages, or statutory and civil penalties, and any other benefit claimed on
8 account of the allegations asserted in the operative Complaint. All Class Members who do not
9 submit a valid Request for Exclusion or Opt-out by the time period set forth under this
10 Agreement shall be subject to the Release and all other terms of this Settlement.” (Settlement, ¶
11 26.)

12 6. Payment to LWDA: The settlement includes \$10,000 allocated to Plaintiff’s
13 claims under PAGA, with 75% of which (\$7,500) will be paid to the LWDA and 25% (\$2,500)
14 will be paid to eligible members of the PAGA Class. (Settlement, ¶ 54(i).) Class Counsel
15 submitted the proposed settlement to the LWDA before filing this Motion for Preliminary
16 Approval. (Marquez Decl., ¶ 9.)

17 7. Net Settlement Amount: The Net Settlement Amount is the amount that remains
18 and that shall be paid to Settlement Class Members after the following amounts are subtracted:
19 (1) attorneys’ fees and litigation costs, (2) enhancement to Named Plaintiff, (3) amount paid to
20 the LWDA, and (4) administrative costs. (Settlement, ¶ 17.)

21 8. Allocation of Settlement: Individual Settlement Payments will be paid from the
22 Net Settlement Amount and shall be paid pursuant to the settlement formula. Individual
23 Settlement Payments. Defendant and the Settlement Administrator will calculate the total
24 Compensable Work Weeks for all Settlement Class Members. The respective Compensable
25 Work Weeks for each Settlement Class Member will be divided by the total Compensable Work
26 Weeks for all Settlement Class Members, resulting in the Payment Ratio for each Settlement
27 Class Member. Each Settlement Class Member’s Payment Ratio is then multiplied by the Net
28 Settlement Amount to determine his or her Individual Settlement Payment. (Settlement, ¶ 54.)

1 9. Tax Allocation: Any settlement money paid to Settlement Class Members will be
2 allocated as 33.33% as wages and 66.66% as penalties and interest. (Settlement, ¶ 54 (b).)

3 10. Class Representative Service Award: Subject to Court approval, Plaintiff shall be
4 paid an enhancement award not to exceed \$10,000. (Settlement, ¶ 54 (f).) This amount is for
5 Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general
6 release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, ¶ 8.)
7 If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert
8 into the Net Settlement Amount to be distributed between the participating Settlement Class
9 Members on a pro-rata basis. (Settlement, ¶ 54 (f).)

10 11. Class Counsel Award: The Settlement provides that Defendant will not oppose a
11 fee application of up to 33 1/3% (\$108,333.33) of the Settlement Amount, plus out-of-pocket
12 costs not to exceed \$20,000.00 (Settlement, ¶ 54 (g).) At this time, Class Counsel's costs are
13 approximately \$10,452.99. (Marquez Decl., ¶ 38.)

14 12. Notice of Proposed Settlement: The Notice sets forth in plain terms, a statement of
15 the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees,
16 costs, and service awards being sought, and an explanation of how the settlement allocations are
17 calculated. (Settlement, Ex. 1.) The Notice also sets forth each class member's total workweeks,
18 as well as the approximate amount of money they would receive in the event all class members
19 participate in the settlement. The Notice also includes an opt-out form. (*Id.*) Class Members
20 will be notified by first class mail of the settlement. (Settlement, ¶ 52.) ILYM Group, Inc., the
21 proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is
22 provided to the current addresses of class members, including conducting a national change of
23 address search and re-mailing the notice to updated addresses. (Settlement, ¶ 52.) Notice will
24 be provided in English and Spanish. (Marquez Decl., ¶ 11; Ex. 2.)

25 13. Workweek Dispute Form: The Workweek Dispute Form will permit class
26 members to dispute their number of workweeks or opt-out of the settlement. (Settlement, Ex. 2.)

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28 ///

1 **III. DISCUSSION**

2 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
3 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
4 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v.*
5 *Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is
6 reached through arm’s-length bargaining; (2) investigation is sufficient to allow counsel and the
7 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
8 objectors is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

9 In considering whether a settlement is reasonable, the trial court should consider relevant
10 factors, which may include the strength of plaintiff’s case, the risk, expense, complexity and
11 likely duration of further litigation, the risk of maintaining class action status through trial, the
12 amount offered in settlement, the extent of discovery completed and the stage of the proceedings,
13 the experience and views of counsel, the presence of a governmental participant, and the reaction
14 of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
15 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
16 that the class settlement is within the “ballpark” of reasonableness. (*Id.* at p. 133.) The record
17 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI*
18 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar*
19 does not require “an explicit statement of the maximum amount the plaintiff class could recover
20 if it prevailed on all its claims”, but instead, only an “understanding of the amount that is in
21 controversy and the realistic range of outcomes of the litigation.”].)

22 As discussed below, Class Counsel has provided information exceeding the threshold
23 required to provide this Court with materials and information necessary to determine that the
24 proposed settlement is fair, adequate, and reasonable.

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28 ///

1 **A. The Settlement Is Fair, Reasonable, Adequate, and the Product of**
2 **Investigation, Litigation, and Negotiation**

3 **1. The Settlement Is the Product of Discovery, Investigation, and**
4 **Informed and Non-Collusive Arm’s-Length Negotiations**

5 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
6 evidence to the contrary is offered; thus, there is a presumption here that the negotiations were
7 conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.)
8 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super.*
9 *Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
10 fact that a plaintiff might have received more if the case had been fully litigated is no reason not
11 to approve the settlement.”].)

12 The Settlement was reached following extensive negotiations following a full day of
13 mediation and a half day of mediation with experienced employment mediator Kelly A. Knight.
14 (Marquez Decl., ¶¶ 7-9.) The settlement negotiations were at arm’s length and, although
15 conducted in a professional manner, were adversarial. (*Id.*) The parties went into the mediation
16 willing to explore the potential for a settlement of the dispute, but each side was also prepared to
17 litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

18 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
19 the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll
20 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
21 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
22 as information regarding the number of putative class members and the mix of current versus
23 former employees, the wage rates in effect, and the amount of meal and rest period premium
24 wages paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual
25 investigation, Class Counsel investigated the applicable law regarding the claims and defenses
26 asserted in the litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and
27 effectively in negotiating the proposed Settlement. (*Id.*)

28 ///

1 Class Counsel also has considerable experience and has demonstrated competence with
2 litigating wage and hour class actions. (*Id.* at ¶¶ 39-50.) Again, this supports the position that
3 the terms of the Settlement are premised on objective evidence that has been considered and
4 weighed in light of the risks, expenses, and time consumption to both sides of continued
5 litigation of this action.

6 **2. The Settlement Is Fair and Reasonable in Light of the Parties’**
7 **Respective Legal Positions**

8 A settlement is not judged against what might plaintiff recover had he prevailed at trial,
9 nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.
10 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is
11 inherent and necessary in the settlement process...even if the relief afforded by the proposed
12 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
13 this is no bar to a class settlement because the public interest may indeed be served by a
14 voluntary settlement in which each side gives ground in the interest of avoiding litigation.”].)

15 This settlement avoids the risks and the accompanying expense of further litigation.
16 (*Marquez Decl.*, ¶ 25.) While Plaintiff is confident in the merits of their claims, a legitimate
17 controversy exists as to each cause of action. (*Id.* at ¶ 24.) Plaintiff also recognizes that proving
18 the amount of wages due to each class member would be an expensive, time-consuming, and
19 uncertain proposition. (*Id.*) Additionally, approximately 75% of all class members are subject to
20 arbitration agreements and class action waivers. (*Id.* at ¶17.)

21 The proposed settlement of \$325,000.00 therefore represents a substantial recovery when
22 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-27.) Because of the
23 proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk
24 of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved
25 in achieving class certification, the burdens of proof necessary to establish liability, the
26 probability of appeal of a favorable judgment, it is clear that the settlement amount of \$325,000
27 is within the “ballpark” of reasonableness, and preliminary settlement approval is appropriate.

1 *(Id.) Indeed, each Settlement Class Member is eligible to receive an average net benefit*
2 *of approximately \$1,524.24. (Id. at ¶ 26.)*

3 **3. Class Counsel Has Extensive Experience in Class Action Litigation**

4 The settlement negotiations were conducted by highly capable and experienced counsel.
5 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
6 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 39-
7 50.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the
8 litigation, they support the proposed Settlement as being in the best interests of the class.

9 **B. The Proposed Class Notice of Settlement Should Be Approved**

10 The proposed Notice and Workweek Dispute Form, in the form attached to the Settlement
11 Agreement as Exhibits 1 and 2, should be approved for dissemination to the class and sub-class.
12 The Notice and Workweek Dispute Form informs the class of the terms of the settlement and of
13 their rights to be excluded from the settlement. And if there are class members who wish to
14 object to this proposed class action settlement, they will have the opportunity to file their
15 objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice and
16 Workweek Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of
17 Court.

18 **C. The Proposed Attorneys' Fees and Costs Are Reasonable**

19 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
20 Counsel reasonable attorneys' fees in amount of \$108,333.33, which is 33 1/3% of the gross
21 Settlement Amount, and up to \$20,000.00 in costs. These amounts are disclosed to all class
22 members in the proposed Notice and are reasonable.

23 **1. Class Counsel Request an Award of Fees Based on the "Common**
24 **Fund" Method**

25 California courts have long awarded attorneys' fees as a percentage of the benefit created
26 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that
27 "when a number of persons is entitled in common to a specific fund, and an action brought by a
28 plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such

1 plaintiff or plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977)
2 20 Cal.3d 25, 34, quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

3 Class Counsel seek an award of attorneys’ fees on the “percentage of recovery/ common
4 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
5 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,
6 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
7 Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
8 from which others derive benefits may require those passive beneficiaries to bear a fair share of
9 the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
10 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
11 has been applied “consistently in California when an action brought by one party creates a fund
12 in which other persons are entitled to share.” (*Id.* at p. 110.)

13 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016)
14 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the
15 class members, and the trial court in its equitable powers awards class counsel a fee out of that
16 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
17 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized
18 advantages of the percentage method—including relative ease of calculation, alignment of
19 incentives between counsel and the class, a better approximation of market conditions in a
20 contingency case, and the encouragement it provides counsel to seek an early settlement and
21 avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable
22 tool that should not be denied our trial courts.” (*Id.* [internal citations omitted].)

23 2. The Requested Fee Award Is in Line with Typical Cases

24 According to a leading treatise on class actions, “No general rule can be articulated on
25 what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit
26 on a reasonable fee award from a common fund in order to assure that the fees do not consume a
27 disproportionate part of the recovery obtained for the class, although somewhat larger
28 percentages are not unprecedented.” (*See* Conte & Newberg, *Newberg on Class Actions* (3rd

1 Ed.) § 14.03.) Attorneys’ fees that are fifty percent of the fund are typically considered the upper
2 limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively
3 small. (*Id*; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp.
4 294 [stating that most cases where 30-50 percent was awarded involved “smaller” settlement
5 funds of under \$10 million].)

6 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
7 is in line with the prevailing guidelines established in California case law and academic
8 literature, and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162
9 Cal.App.4th 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage
10 method or the lodestar method is used, fee awards in class actions average around one-third of
11 the recovery.”].) Accordingly, Plaintiff respectfully requests that the Court approve the
12 attorneys’ fees as negotiated by the parties and requested herein.

13 3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code

14 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
15 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
16 section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were
17 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
18 that it limits the risk of continued expenses and consumption of time, energy, and resources
19 facing Defendant while at the same time rewarding Class Counsel for their decision to assume
20 risk by taking on this matter. In fact, prosecution of this action involved significant financial risk
21 for Class Counsel. (Marquez Decl., ¶¶ 36-38.) Class Counsel undertook this matter solely on a
22 contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on
23 behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary
24 duty to the Class ahead of all other concerns.

25 4. The Experience, Reputation and Ability of Class Counsel Support the 26 Requested Fee Award

27 As demonstrated by their past experience in pursuing class actions on behalf of
28 consumers and employees, Class Counsel possess considerable expertise in litigating class

1 actions. (Marquez Decl., ¶¶ 39-50.) Class Counsel has been involved as lead counsel or co-
2 counsel in several class actions that resulted in millions in recovery. (*Id.*) Because it is
3 reasonable to compensate class counsel commensurate with their skill, reputation and experience,
4 Class Counsel’s requested fee award is supported here.

5 Class Counsel’s experience in wage and hour class actions was integral in evaluating the
6 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
7 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
8 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
9 action litigation. Based on these and other factors, Class Counsel has frequently received fee
10 awards of this percentage from the gross recovery for the class. Therefore, the requested fee
11 award is reasonable and fair.

12 **D. The Service Award to Named Plaintiff Is Reasonable**

13 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
14 compensate them for the expense or risk they have incurred in conferring a benefit on other
15 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
16 of class action settlement agreements containing enhancements for the class representatives, which
17 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
18 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
19 2009) 563 F.3d 948, 958-59.)

20 Service awards are particularly important to plaintiffs in wage and hour cases because they
21 promote the important public policies underlying the wage and hour laws. This strong policy is
22 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to
23 vigorously enforce minimum labor standards in order to ensure employees are not required or
24 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
25 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
26 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
27 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should

1 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
2 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

3 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
4 a Service Award in the amount of \$10,000 to Plaintiff. This amount is also in exchange for
5 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
6 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
7 very frequently for litigation and to prepare for mediation, and was frequently in contact with
8 Class Counsel during the mediation. (Marquez Decl., ¶¶ 28-32.) This amount is reasonable
9 particularly in light of the substantial benefits Plaintiff generated for all class members. (*Id.*)
10 Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB,
11 Class Counsel Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339
12 class members, and the court approved a \$25,000 class representative incentive award for each
13 named plaintiff. (Marquez Decl., ¶ 32)

14 When compared with the amounts awarded in typical class action cases, the amount
15 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
16 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
17 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
18 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
19 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
20 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
21 while named plaintiffs in other employment class actions received an average award of \$12,121
22 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
23 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
24 compensating them for the high costs of their service to the class, including risks of stigmatization
25 or retaliation on the job.” (*Id.* at p. 1308.)

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1 **E. There is Good Cause for Selecting Los Angeles Trial Lawyers’ Charities at**
2 **Work As the Cy Pres Recipient.**

3 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
4 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six*
5 *Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure
6 that the settlement retains some connection to the plaintiff class and the underlying claims,
7 however, a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly
8 to class members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six*
9 *Mexican Workers*, 904 F.2d at 1308.)

10 Moreover, in the class action context, California Code of Civil Procedure permits unpaid
11 cash residues in a class action settlement to be distributed to a *cy pres* recipient “in a manner
12 designed either to further the purposes of the underlying class action or causes of action, or to
13 promote justice for all Californians.” (Cal. Civ. Proc. Code § 384.)

14 Here, under the terms of the settlement agreement, in the event settlement checks remain
15 uncashed after 180 days, those funds shall be donated to Los Angeles Trial Lawyers’ Charities as
16 a *cy pres* beneficiary. (Settlement, ¶ 54(c)(2).) In the past, LATLC has been the *cy pres* recipient
17 in several wage and hour class action settlements. (Declaration of LATLC President Daniel
18 Kramer [“Kramer Decl.”], ¶ 5.) “In connection with this *cy pres* wage and hour award, LATLC
19 will allocate the award to specific charitable efforts specifically related to employment and
20 professional development and monitor those charitable efforts to ensure the *cy pres* funds are
21 indeed utilized for the earmarked purposes.” (*Id.* at ¶ 7.) “Since it began in 2006, LATLC has
22 donated \$2,778,784.69 to organizations helping people seek employment and promoting
23 educational and professional opportunities.” (*Id.* at ¶ 8.)

24 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

25 **A. Legal Standard**

26 The proposed Settlement Class is well suited for class certification. All of the claims
27 derive from a core set of alleged violations of California’s wage and hour laws and regulations.
28 For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the

1 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
2 the question is one of a common or general interest, of many persons, or when the parties are
3 numerous, and it is impracticable to bring them all before the court, one or more may sue or
4 defend for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section
5 382: “(1) There must be an ascertainable class; and (2) there must be a well-defined community
6 of interest in the questions of law and fact involved affecting the parties to be represented.”
7 (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these
8 requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to
9 explain that the community-of-interest requirement itself embodies three factors: “(1)
10 predominant questions of law or fact; (2) class representatives with claims or defenses typical of
11 the class; and (3) class representatives who can adequately represent the class.” (*Richmond v.*
12 *Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470.)

13 California law and policy favor the fullest and most flexible use of the class action device.
14 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
15 means to prevent a failure of justice in our judicial system” particularly where the rights of
16 consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434.) Any doubt as to
17 the appropriateness of class treatment should be resolved in favor of certification. (*Richmond,*
18 *supra*, 29 Cal.3d at pp. 473-75.)

19 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
20 **Settlement Purposes.**

21 **1. The Classes Are Ascertainable and Numerous**

22 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
23 approximately 110 employees of Defendant.

24 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
25 precise criteria. Because class members are identified using specific criteria in the regular
26 business records of Defendant, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life*
27 *Ins. Co.* (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product
28 that is the subject of the lawsuit is sufficient to make the class ascertainable].)

1 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
2 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
3 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an
4 action may be maintained as a class action even where the parties are numerous and it is in fact
5 practicable to join them all.” (*Id.*) “No set number is required as a matter of law for the
6 maintenance of a class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing
7 the 10 beneficiaries of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v.*
8 *Super. Ct.* (1955) 44 Cal.2d 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35
9 member class.]) Therefore, Plaintiff contends that numerosity is plainly satisfied.

10 **2. There are Many Common Issues of Law and Fact Which Predominate**

11 The Court should grant conditional class certification for settlement purposes here on the
12 grounds that questions of law and fact common to all class and subclass predominate over any
13 individual questions. This inquiry tests whether proposed classes are sufficiently cohesive to
14 warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
15 Cal.App.3d 605.)

16 Here, the employment practices at issue are: whether Defendant had legally compliant
17 policies and practices to provide employees with meal periods; whether Defendant had legally
18 compliant policies and practices authorizing and permitting its employees to take rest periods;
19 whether Defendant had legally compliant policies and practices for all hours worked, including
20 overtime wages; whether Defendant paid terminated employees all vacation wages at the correct
21 rate of pay; whether final payment of wages was untimely and excluded unpaid wages, including
22 meal period premium wages, and rest period premium wages; and whether the wage statements
23 were consequently non-compliant. Plaintiff contends that the factual and legal issues are the
24 same for all of the identified class members, including Plaintiff. Further, all class members
25 suffered from, and seek redress for, the same alleged injuries.

26 **3. Plaintiff’s Claims Are Typical of the Claims of the Class**

27 The typicality requirement does not focus on the individual characteristics or
28 circumstances of the representative plaintiff compared to those of the remainder of the class, but

1 rather upon the typicality of the proposed representative’s claims as they relate to the defendant’s
2 conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 “[t]he only
3 requirements are that common questions of law and fact predominate and that the class
4 representative be similarly situated” vis-à-vis the class.].) A representative plaintiff’s claims are
5 typical of the class if they arise from the same event, practice or course of conduct, and if the
6 claims rest on the same legal theories. (*Id.*) That is precisely the case here. Plaintiff is a former
7 employee of Defendant; as such, he alleges that he was subject to the same policies and practices
8 as other similarly situated employees.

9 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

10 The adequacy of representation requirements is met by fulfilling two conditions: first, a
11 named plaintiff must be represented by counsel qualified to conduct the pending litigation;
12 second, a named plaintiff’s interests cannot be antagonistic to those of the class. (*McGhee v.*
13 *Bank of America* (1976) 60 Cal.App.3d 442, 451.)

14 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
15 with extensive experience in prosecuting complex class actions, including similar class actions
16 that previously settled. (Marquez Decl., ¶¶ 39-50.) Class Counsel unquestionably is “qualified,
17 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148
18 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
19 litigated this case and diligently reviewed the settlement terms, showing their dedication.
20 Plaintiff’s willingness to serve as a representative demonstrates his serious commitment to
21 bringing about the best results possible for the class and subclass. (*McGhee, supra*, 60
22 Cal.App.3d at p. 451.)

23 **5. A Class Action is Superior to a Multiplicity of Litigation**

24 Finally, in making its class certification decision, the Court must determine that a class
25 action would be superior to alternative means for the fair and efficient adjudication of the
26 litigation. By consolidating many potential individual actions into a single proceeding, this
27 Court’s use of the class action device enables it to manage this litigation in a manner that serves
28 the economics of time, effort and expense for the litigants and the judicial system. Absent class

1 treatment, similarly-situated employees with small but nevertheless meritorious claims for
2 damages would, as a practical matter, have no means of redress because of the time, effort and
3 expense required to prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443,
4 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of
5 settlement, the superiority concerns are essentially non-existent.

6 **V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND**

7 **A. The Proposed Notice Plan Satisfies Due Process**

8 Notice requirements are set forth in the California Rules of Court. Cal. Rules of Court,
9 Rule 3.766 (e) and (f). California law vests the Court with broad discretion in fashioning an
10 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
11 statutory or due process requirement that all class members receive actual notice, but in this
12 matter, the class members will receive direct mailed notice. As the Court of Appeals has
13 explained, “[t]he notice given should have a reasonable chance of reaching a substantial
14 percentage of the Class Members” (*Id.* at p. 974.) In this case, notice of the proposed
15 settlement will be provided by direct mailing, the best possible form of notice.

16 **B. The Notice is Accurate and Informative**

17 The proposed Notice should be approved. It will be disseminated through direct U.S. first
18 class mail to the last known address for each Class Member. It informs the Class Members of the
19 terms of the settlement and their right to be excluded from the Settlement. And if there are Class
20 Members who wish to object to this proposed class action settlement, they will have the
21 opportunity to file their objections and be heard at the Final Approval Hearing.

22 The Notice also fulfills the requirement of neutrality in class notices. (Conte &
23 Newberg, *Newberg on Class Actions* (3rd Ed.) § 8.39.) It summarizes the proceedings to date
24 and the terms and conditions of the settlement agreement, in an informative and coherent
25 manner. It makes clear that the settlement agreement does not constitute an admission of
26 liability by the Defendant, who deny all liability, and it recognizes that this Court has not
27 ruled on the merits of the action. It also states that the final settlement approval decision has
28 yet to be made. Accordingly, the Notice complies with the standards of fairness,

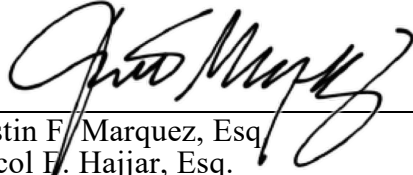
1 completeness, and neutrality required of a combined settlement-certification class notice.

2 **VI. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
4 approval of the proposed settlement and set a Final Approval Hearing in February 2022.

5
6 Dated: September 16, 2021

WILSHIRE LAW FIRM

7
8 By:  _____

9 Justin F. Marquez, Esq.
10 Nicol E. Hajjar, Esq.
11 Rachel J. Vinson, Esq.
12 *Attorneys for Plaintiff*
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Jose Aguilar Sandoval v. Madland Toyota-Lift, Inc., et al.
BCV-20-100810-TSC

I, Min Jee Kim, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is minjee@wilshirelawfirm.com.

On September 16, 2021, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

MADLAND TOYOTA-LIFT, INC.

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

///

1 I declare under the penalty of perjury under the laws of the State of California, that the
2 foregoing is true and correct.

3 Executed on **September 16, 2021**, at Los Angeles, California.

4 Min Jee Kim
5 _____
6 Type or Print Name

7 
8 _____
9 Signature