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

JESUS A. RIOS an individual, on behalf of
himself and others similarly situated,

PLAINTIFF,

v.

ALL STAR SEED; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. ECU08770

[Case Assigned for All Purposes to Hon. Jeffrey
B. Jones in Dept. 07]

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with Declaration of Liane
Ly and Proposed Order]*

Date: May 8, 2020

Time: 8:30 a.m.

Dept.: 07

Complaint Filed: June 18, 2015

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

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CASE #ECU08770 RECEIPT #: 1200403D2104 DATE PAID : 04/3/20 8:25 AM TOTAL : 90.00 TYPE : EFT

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 8, 2020 at 8:30 a.m. in Department 07 of the
3 above-entitled court, Plaintiff JESUS A. RIOS (“Plaintiff”) will move the Court for an Order of
4 Preliminary Approval of the Joint Stipulation of Class Action Settlement and Release
5 (“Settlement Agreement”), a copy of which is filed concurrently herewith.

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

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Liane Katzenstein Ly, the Settlement Agreement and
10 Release, all other papers and records on file in this action, and on such oral and documentary
11 evidence as may be presented at the hearing on this Motion.

12 DATED: April 2, 2020

KINGSLEY & KINGSLEY, APC

13
14 By: _____

Liane Katzenstein Ly
Attorneys for Plaintiff JESUS A. RIOS and the
proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff JESUS A. RIOS (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Joint Stipulation of
5 Class Action Settlement and Release (“Settlement Agreement”) reached between Plaintiff and
6 Defendant ALL STAR SEED (“Defendant”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Joint Stipulation of Class Action
9 Settlement and Release (“Settlement” or “Settlement Agreement”). A true and correct copy of
10 the Settlement Agreement is attached to the concurrently filed declaration as Exhibit “A”;

11 (2) Approve the proposed Notice of Class Action Settlement and the Court-approved
12 Claim Form, copies of which are attached to the Settlement Agreement as Exhibit “1” and
13 Exhibit “2,” respectively, and direct that the Notice be sent to Class Members in the manner set
14 forth in the Stipulation of Resolution; and,

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

18 **II. FACTUAL BACKGROUND**

19 A. Litigation Overview and Procedural History

20 Plaintiff filed this class action case on July 18, 2015 alleging the following: (1) Failure to
21 Pay Wages and/or Overtime under Labor Code §§ 510, 1194, and 1199; (2) Violation of Labor
22 Code § 226(a); (3) Penalties pursuant to Labor Code §203; and (4) Violation of Business &
23 Professions Code § 17200. (Declaration of Liane Katzenstein Ly at ¶4.)(hereafter “Ly Decl. at”).
24 Plaintiff subsequently filed a First Amended Complaint on July 28, 2015 adding a cause of
25 action for penalties pursuant to the Private Attorney General Act of 2007 (“PAGA”) (Lab. Code
26 § 2699 et seq.). (*Ibid.*) Defendant filed an Answer on October 7, 2015.

27 On October 19, 2016, the Parties filed a stipulation permitting Plaintiff to file a Second
28 Amended Complaint adding a cause of action for failure to provide meal periods. (Ly Decl. at

¶5.) The Court granted this Stipulation on October 25, 2016. (*Ibid.*) The Second Amended Complaint is the operative complaint. (*Ibid.*)

Both Parties have vigorously litigated this Action. (Ly Decl. at ¶6.) Plaintiff has had to compel Defendant to produce documents using this Court's resources on many occasions. (*Ibid.*) The Parties stipulated to move Plaintiff's Motion for Class Certification several times. (*Ibid.*) Plaintiff deposed Defendant's PMK, Cinthia Perez, on March 14, 2017. (*Ibid.*)

Plaintiff successfully filed its Motion for Class Certification on November 9, 2017. (Ly Decl. at ¶7.) This Court granted Plaintiff's Motion on May 17, 2018. (*Ibid.*)

After certifying the classes, Plaintiff and Defendant prepared and provided Notice to Class Members on September 27, 2018. (Ly Decl. at ¶8.) On November 26, 2018, the Parties received the finalized non-opt out list comprised of 408 class members. (*Ibid.*)

Plaintiff served class discovery on December 26, 2018, on Defendant. (Ly Decl. at ¶9.) After continuous meet and confer efforts, Defendant ultimately provided Plaintiff the pay and time date for the 408 class members. (*Ibid.*) Plaintiff deposed Defendant's PMK Timothy Castelli on June 28, 2019. (Ly Decl. at ¶10.)

The Parties had previously reached a settlement in this case on the eve of trial, however, Defendant failed to sign the agreement. (Ly Decl. at ¶11.) The case was re-scheduled for trial for March 11, 2020. (Ly Decl. at ¶12.) The Parties reached an agreement and signed the Joint Stipulation of Class Action on the first day of trial. (*Ibid.*; Settlement Agreement.)

B. The Certified Settlement Class

Defendant engages in the practice of processing and manufacturing forage products. It currently operates in two locations, Silsbee and Imperial. (Ly Decl. at ¶13.) Since the inception of this lawsuit, Plaintiff alleges that Defendant failed to maintain any written meal period policy. (Ly Decl. at ¶14.) Additionally, Plaintiff alleges that Defendant controlled the timing and length of all meal periods and rounded all meal periods of less than thirty minutes to thirty minutes. (Ly Decl. at ¶15.) As a result, Plaintiff alleges that he and the Class are owed meal penalties for late meal periods and wages/overtime for the rounded meal periods. (Ly Decl. at ¶16.)

On May 17, 2018, this Court granted Plaintiff's Motion, certifying the First Meal Period

Subclass and the Meal Auto-Deduct Subclass, defined as follows:

Meal Period Subclass: All individuals who have been employed, or are currently employed, by Defendant All Star Seed as “hourly employees” or similar titles, from July 28, 2011 to November 26, 2018, who worked a shift of five (5) hours or longer and were not provided with a duty-free meal period of at least thirty (30) minutes.

Meal Auto-Deduct Subclass: All individuals who have been employed, or are currently employed, by Defendant All Star Seed as “hourly employees” or similar titles, from July 28, 2011 to November 26, 2018, who clocked in and out for a meal period that was less than thirty (30) minutes in length but who had thirty (30) minutes or more of time deducted from their time.

(See Ly Decl. at ¶17.)

For purpose of the Settlement, the Class Members are consolidated and defined as “all individuals who have been employed, or are currently employed, by Defendant All Star Seed as ‘hourly employees’ or similar titles, from July 28, 2014 to June 30, 2018 who were mailed class notice and did not opt out.” (Ly Decl. at ¶18; Settlement Agreement §1 at ¶ G.) The number of Class Members is 408 and include the employees who were mailed Class Notice in September 2018 and who did not opt out of the certified class action. (Ly Decl. at ¶19; Settlement Agreement §1 at ¶M.)

C. The Discovery Process

The Parties have conducted significant investigation of the facts and law. (Ly Decl. at ¶20; Settlement Agreement §II. at ¶B.) Such discovery and investigation included interviews with the Class Representative and other percipient witnesses as well as the review of documents and data necessary to calculate potential damages. (Ly Decl. at ¶21; Settlement Agreement §II. at ¶B.) Defendant produced all time and pay data for the vast majority of the Certified Class Members and all policy documents utilized during the Class Period. (Ly Decl. at ¶22; Settlement Agreement §II. at ¶B.) Additionally, Plaintiff deposed two corporate representatives. (Ly Decl. at ¶23; Settlement Agreement §II. at ¶B.) This case settled on the eve of trial after Class Counsel had the time and pay data analyzed by an expert who was prepared to testify at trial. (Ly Decl. at ¶24; Settlement Agreement §II. at ¶B.) Counsel for the Parties investigated the law as applied to the facts discovered regarding the alleged claims of the Class Members and potential defenses thereto, and the damages claimed by the Class Members. (Settlement Agreement §II. at ¶B.)

Careful review and analysis of this confirmatory discovery confirmed that Plaintiff's Counsel believes the proposed Settlement is adequate, fair, and reasonable, and is appropriate for approval by the Court. (Ly Decl. at ¶26; Settlement Agreement §II. at ¶B.)

III. THE SETTLEMENT

A. Maximum Settlement Amount

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Maximum Settlement Amount of \$1,000,000.00. The Settlement provides for the following:

Maximum Settlement Amount	\$	1,000,000.00
Class Counsel's Fees (1/3 of Maximum Settlement Amount)	\$	350,000.00
Class Counsel's Cost	\$	90,000.00
Request Enhancement to Class Representative	\$	12,000.00
Claims Administrator	\$	25,000.00 (not to exceed)
PAGA Payment	\$	10,000.00
		<i>(\$7,500.00 to the LWDA and \$2,500.00 to remain in the Net Settlement Amount)</i>
Net Settlement Amount	\$	515,500.00

(see Settlement Agreement at §III at ¶E.)

The Net Settlement Amount is the Maximum Settlement Amount minus any award of attorneys' fees and Litigation costs, Claims Administration Costs, enhancement to the Class Representative, and penalties recoverable pursuant to California's Private Attorney General Act ("PAGA"). (Settlement Agreement §III at ¶E.)

The Claims Administrator will calculate pro rata Settlement Payments to Class Members from the Net Settlement Fund based on the following formulas for allocating the Settlement Payments, which the parties and their counsel believe are reasonable and are designed to provide a fair apportionment of the settlement funds to the Class: first, Defendant will provide the Claims Administrator with the number of Qualified Work Weeks worked by each Class Member; second, the Claims Administrator shall divide the Net Settlement Fund by the Total Qualified Work Weeks, thereby determining the Qualified Work Week Value; and third, the Claims Administrator will pay each Qualified Claimant the sum of the number of Qualified Work Weeks

1 worked by the Qualified Claimant times the Qualified Work Week Value, plus a pro rata share of
2 any unawarded portion of Class Counsel's attorneys' fees, litigation costs, or the Class
3 Representative's Incentive Award Payment. (Settlement Agreement at §III at ¶F.)

4 B. This is a Claims Made Settlement

5 This is a claims made settlement. (Settlement Agreement at §III at ¶E.7.) This means
6 that Class Members will need to complete and mail in a claim form in order to receive a share of
7 the Net Settlement Amount. (Settlement Agreement at §III at ¶E.7.) Any portion of the Net
8 Settlement Amount that is not claimed by the Class Members will revert to Defendant, however,
9 Defendant must pay at least 60% of the Net Settlement Amount. (Settlement Agreement at §III
10 at ¶E.7.) If less than 60% of the Net Settlement Amount is claimed by the Class Members,
11 Defendant will pay 60% of the Net Settlement Amount and the Net Settlement Amount will be
12 distributed to the Class Members on a pro rata basis. (Settlement Agreement at §III at ¶E.7.)

13 C. Process for Administering Settlement after Preliminary Approval

14 The detailed Notice Procedure established by the Settlement Agreement will efficiently
15 and accurately ensure that Notice is provided to the Settlement Class Members. (Settlement
16 Agreement at § IV at ¶D.)

17 The Parties agreed to use a reputable third-party claims administrator, JND Legal, to
18 administer the Settlement Agreement. (Settlement Agreement § IV at ¶A.)

19 D. Process for Settlement Class Members to Respond to Class Notice

20 Settlement Class Members will have an opportunity to request exclusion from the
21 Settlement Class (i.e. opt out) and to object to the Settlement at the Final Approval Hearing.
22 (Settlement Agreement § IV.)

23 Class Members who do not opt out of the Settlement Class may object to the Settlement
24 by mailing written objections to the Settlement Claims Administrator no later than sixty (60)
25 calendar days after the mailing of the Notice Packet. (Settlement Agreement § IV at ¶ D.) This
26 deadline applies notwithstanding any argument regarding alleged late receipt or non-receipt of
27 the Notice Packet. (Settlement Agreement § IV at ¶ J.) Any Class Member who fails to timely
28 mail written objections in this manner shall be deemed to have waived any objections and shall

1 be foreclosed from making any objection to the Settlement and from filing any appeal from any
2 order granting final approval issued by the Court. (*Ibid.*)

3 Class Members who timely and validly return a Request for Exclusion from the
4 Settlement shall have no right to object and shall be foreclosed from making any objection to the
5 Settlement. (*Ibid.*) The Settlement Claims Administrator shall promptly provide any such
6 objections to Class Counsel and Defendant's Counsel, who in turn shall file them with the Court
7 in connection with the final approval motion. (*Ibid.*)

8 Any Class Member wishing to appear at the final approval hearing to object to the
9 Settlement shall expressly indicate this in his or her written objections. (*Ibid.*) The making of an
10 objection to this Settlement does not affect the Class Members' ability to return a valid Claim
11 Form and become a Qualified Claimant if the Settlement is finally approved. (*Ibid.*)

12 E. This Settlement Will be Paid on a Payment Plan

13 Defendant has raised significant financial constraints that it alleges making pay this
14 Settlement, or a judgment of more than this amount, very difficult. (Ly Decl. at ¶27.) Defendant
15 provided financial documents to Plaintiff and Plaintiff had them analyzed by an accountant. (Ly
16 Decl. at ¶28.) Plaintiff agrees that there is a strong risk that Defendant could declare bankruptcy
17 or fail to pay the Settlement if accommodations are not made. As such, this Settlement shall be
18 paid in installments. (Settlement Agreement § IV at ¶ I.) The first installment of \$125,000.00
19 was already paid on March 12, 2020. (Settlement Agreement § IV at ¶ I.) The remaining
20 fourteen (14) payments shall be paid on a quarterly basis with the last possible payment due on
21 September 11, 2023. (Settlement Agreement § IV at ¶ I.) If Defendant is late in making any of
22 these payments, Plaintiff can move to collect on the judgment in this matter. (Settlement
23 Agreement § IV at ¶ I.)

24 F. Notice Has Been Given to the LWDA

25 Given that there is a PAGA component to this Settlement, Plaintiff will concurrently
26 serve this Motion electronically on the LWDA through its online portal.

27 **IV. ARGUMENT**

28 A. Plaintiff Requests Approval of This Class Action Settlement

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

8 The proposed settlement satisfies each of these factors. Class Counsel conducted
9 extensive informal discovery before entering into meaningful settlement negotiations in this
10 matter. (Ly Decl. at ¶29; *Id* at ¶¶6-10 and 20-26.) This discovery permitted Class Counsel to
11 fairly evaluate the strength of the case and the risks associated with ongoing litigation. (*Ibid.*)
12 Class Counsel is experienced in handling wage and hour class actions and supports this
13 Settlement. (Ly Decl. at ¶30.)

14 1. The Strength of Plaintiff's Case

15 a) The Risks Associated with the Meal Break Claims

16 (1) Failure to Provide Lawful Meal Period

17 Labor Code § 512 provides:

18 An employer may not employ an employee for a work period of more than
19 five hours per day without providing the employee with a meal period of
20 not less than 30 minutes An employer may not employ an employee
21 for a work period of more than 10 hours per day without providing the
employee with a second meal period of not less than 30 minutes, except
that if the total hours worked is no more than 12 hours, the second meal
period may be waived by mutual consent of the employer and the
employee only if the first meal period was not waived.

22 Under this rule, “[e]mployers must afford employees uninterrupted half-hour periods in
23 which they are relieved of any duty or employer control and are free to come and go as they
24 please.” (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.) In order for a
25 meal period to qualify as a lawful break under California law, an employer must (1) relieve its
26 employees of all duty; (2) relinquish control over their activities; (3) permit them a reasonable
27 opportunity to take an uninterrupted 30-minute break; and (4) not impede or discourage them
28 from doing so. (*Id.* at p. 1040.)

1 The applicable wage order requires employers not only to provide meal periods in the
2 manner described above, but also “to record having done so.” (*Brinker, supra*, 53 Cal.4th at pp.
3 1052-53 (J. Werdegarr, concurring) [citations omitted].) A long-standing application of burden-
4 shifting occurs when an employer’s records are so incomplete or inaccurate that an employee
5 cannot prove his or her damages. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680,
6 687-88; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188-1190; *Safeway, Inc. v.*
7 *Superior Court of Los Angeles Cnty.* (2015) 238 Cal.App.4th 1138.)

8 Plaintiff alleges that Defendant is responsible for setting the times for which hourly
9 employees take their meal periods and that Defendant failed to maintain any written meal period
10 policy. (Ly Decl. at ¶31.) The California Supreme Court, in *Brinker*, unequivocally established
11 “[a]n employer is required to authorize and permit the amount of rest break time called for under
12 the wage order for its industry. If it does not-if, for example, it adopts a uniform policy
13 authorizing and permitting only one rest break for employees working a seven hour shift when
14 two are required-it has violated the wage order and is liable. (*Brinker Restaruant Corp. v.*
15 *Superior Court* (2012) 53 Cal.4th 1004, 1033.)

16 Following *Brinker*, the Court of Appeal has routinely confirmed that liability for meal
17 period violations arise when an employer adopts a uniform policy that fails to expressly provide
18 a meal period as required by Labor Code section 512. For example, in *Faulkinbury*, the Court
19 applied *Brinker*, stating, “In *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal
20 break policy was unlawful, [defendant]’s uniform on-duty meal break policy was unlawful.”
21 (*Faulkinbury v. Boyd Associates, Inc.* (2013) 216 Cal.App.4th 220, 235.) The Court added that
22 “the employer’s liability arises by adopting a uniform policy that violates the wage and hour
23 laws. Whether or not the employee was able to take the required break goes to damages...” (*Ibid.*
24 [citations omitted]; see also *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th
25 701, 708.)

26 In *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, the California
27 Court of Appeal emphatically held that a meal and rest policy must specifically advise
28 employees of the proper timing of meal and rest periods. In *Alberts*, the meal break policy stated

1 employees are entitled to “an unpaid thirty-minute break for a meal period, approximately
2 halfway between the beginning and the ending of the employee’s shift.” (*Ibid.*) The court, in
3 accordance with *Brinker*, found the defendant’s meal break policy violated California law
4 because it did not specify “that a meal break be provided during the first five hours of an
5 employee’s shift.” (*Ibid*, citing *Brinker*, *supra*, 53 Cal.4th at pp. 1048-1049.)

6 If an employer fails to provide an employee with a meal period in accordance with the
7 law, “the employer shall pay the employee one additional hour of pay at the employee’s regular
8 rate of compensation for each work day that the meal period was not provided.” (Code Regs. Tit.
9 13, sub. 11130(11)(D).) The Industrial Welfare Commission (“IWC”) is the “state agency
10 empowered to formulate regulations (known as wage orders) governing minimum wages,
11 maximum hours, and overtime pay in the State of California. The IWC’s wage orders, although
12 at times patterned after federal regulations, also sometimes provide greater protection than is
13 provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal
14 regulations.” (*Ramirez v. Yosemite Water Co., Inc.*(1999) 20 Cal. 4th 785, 795.)

15 Here, Defendant created a uniform policy that did not authorize and permit employees to
16 take meal periods pursuant to the Labor Code. (Ly Decl. at ¶32.) Instead, Defendant failed to
17 provide a written meal policy to its employees entirely. (Ly Decl. at ¶33.) It continues to lack a
18 written meal policy to this date. (Ly Decl. at ¶34.) It alleges that it maintained an oral policy that
19 required employees to take meal periods before the end of the fifth hour of work. However, meal
20 periods for all hourly employees were scheduled by a supervisor and were “late” over 70% of the
21 time. (Ly Decl. at ¶35.) Thus, Defendant retained full control over authorizing meal breaks. (Ly
22 Decl. at ¶36.) This practice clearly shows that Defendant failed to maintain a lawful meal period
23 policy and practice for its hourly employees and is thus liable. (Ly Decl. at ¶37.)

24 Defendant maintained an unlawful meal policy of authorizing/permitting meal periods
25 that were less than 30 minutes in length. The time records produced by Defendant indicate that
26 hourly employees clocked back in for lunch one after the other and had to wait “in line” to clock
27 back in. (Ly Decl. at ¶38.) Since these meal periods were scheduled by the supervisor,
28 employees had no choice but to clock back in when their supervisor called for it.

1 Defendant may seek to argue that employees chose to take meal periods that were less
2 than thirty minutes at their own will. However, break times were set by the supervisor.
3 Therefore, it is evident that Defendant's hourly employees had no choice but to clock back in
4 from lunch when Defendant's supervisor called for operations to begin, which routinely was
5 before a full thirty-minute meal period. Furthermore, Defendant failed to pay meal period
6 premiums for unlawful meal breaks for the entirety of the class period.

7 Plaintiff believes Defendant is liable for failing to provide lawful meal periods to class
8 members and must pay meal period premiums for each day that the meal period was unlawful.

9 Although Plaintiff certified the meal period class, it cannot be ignored that there are
10 significant risks associated with moving forward. (Ly Decl. at ¶39.) Most importantly, Plaintiff
11 has to acknowledge that the Court might find that Defendant did in fact maintain an accurate oral
12 meal period policy. (Ly Decl. at ¶40.) With this analysis in mind, there is significant risk that the
13 Court could have determined that the oral meal period policy does comply with California law.
14 As Plaintiff's analysis of the data above may suggest, the extent to which Defendant actually
15 "provided" employees with lawful breaks according to its policy would be highly disputed were
16 the case to have continued, a considerable discount from the maximum settlement value of this
17 claim was required. (Ly Decl. at ¶41.)

18 (2) Automatically Deducting 30 Minutes for Meal Periods

19 Plaintiff and the other Class Members were subjected to Defendant's unlawful policy of
20 automatically deducting thirty minutes for a meal period even when an employee's punch
21 showed that her or she took considerably less than thirty minutes. (Ly Decl. at ¶42.)

22 As a general matter, California employees are entitled to compensation for all hours
23 worked. Labor Code section 510, provides that employees are entitled to overtime pay for work
24 in excess of 8 hours in one day or 40 hours in one week. "The purpose behind the overtime pay
25 requirement is two-fold: (1) to spread employment by encouraging employers to avoid overtime
26 work and thereby employ additional workers on a regular basis; and (2) where the employer
27 prefers overtime work, to compensate the employee for the burden of working longer hours...an
28 employee is entitled to overtime pay at one and one-half times the 'regular rate' for work in

1 excess of eight hours in one day and twice the ‘regular rate’ for work in excess of 12 hours in
2 one day.” (*Huntington Mem’l Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 902.)

3 According to the applicable Wage Order, every employer must compensate an employee
4 at the minimum wage rate (or higher) for all hours worked. (Code Regs., tit. 13, subd.
5 11130(4)(B)[“Every employer shall pay to each employee, on the established payday for the
6 period involved, not less than the applicable wage for all hours worked in the payroll period,
7 whether the remuneration is measures by time, piece, commission, or otherwise”].) Wage Order
8 No. 13 provides that employees must be compensated at a rate of “one and one-half (1 ½) times
9 the employee’s regular rate of pay for all hours worked in excess of eight (8) hours.” (Code
10 Regs., tit. 13, sub. 11130(3)(A).) The Order defines “hours worked” as “the timing during which
11 an employee is subject to the control of an employer, and includes all the time the employee is
12 suffered or permitted to work, whether or not required to do so.” (*Id.*, subd. (2)(G).)

13 Furthermore, Courts have long held that rounding policies which “systematically
14 undercompensate employees” are unlawful. (*Silva v. See’s Candy Shops, Inc.* (2016) 7
15 Cal.App.5th 235, 249.)

16 All Star maintained an unlawful rounding policy that essentially resulted in wage theft
17 from its hourly employees. (Ly Decl. at ¶43.) Plaintiff believes he will be able to establish that
18 Defendant maintained a policy in which it automatically deducted thirty minutes for a meal
19 period even when an employee’s actual punches showed that he or she took considerably less
20 than thirty minutes. (Ly Decl. at ¶44.)

21 Defendant may seek to argue that it authorized and permitted thirty minutes for a meal
22 period per Labor Code section 512 and Wage Order No. 13(11)(B). Defendant may further seek
23 to claim that if an employee decided to take a meal break that was under thirty minutes, it was a
24 personal decision and not one for which the company is liable.

25 Additionally, the Wage Orders define “employ” as “engage, suffer, or permit to work.”
26 (Code Regs., tit. 13, sub. 11130(2)(D).) As such, even if the Court believes that Defendant
27 provided the opportunity to take a 30 minute meal, which the evidence greatly disproves,
28 Defendant is still liable for the time that it suffered/permitted the Class Members to work.

1 Plaintiff alleges that Defendant cannot maintain its burden in showing that it authorized
2 and permitted a meal period of thirty-minutes. (*Brinker, supra*, 53 Cal.4th at p. 1033.) Defendant
3 had knowledge that employees were clocking in early from their breaks and going back to work.
4 A review of its own time records reveal this. (Ly Decl. at ¶45.)

5 b) The Risks Associated with Plaintiff's Waiting Time Claim

6 Labor Code section 203 provides that if an employer fails to provide wages at the time of
7 an employee's termination or within 72 hours of his/her resignation, then said employee's wages
8 shall continue as a penalty for up to thirty (30) days. (Lab. Code § 203 ["If an employer willfully
9 fails to pay, without abatement or reduction...any wages of an employee who is discharged or
10 who quits, the wages of such employee shall continue as a penalty from the due date thereof at
11 the same rate until paid...but such wages shall not continue for more than 30 days."].) Since
12 Defendant failed to provide all wages to Plaintiff and the Class Members, Defendant has failed to
13 pay wages at the time of termination. Therefore, under California Law, so called "waiting time"
14 penalties would be triggered. Section 203 reflects a public policy concern that favors the full and
15 prompt payment of earned wages. (*See, e.g., Barnhill v. Robert Saunders & Co.* (1981) 125
16 Cal.App.3d 1, 7; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.)

17 Although Class Counsel believes it had a good chance of succeeding on the above claims,
18 the bulk of potential damages in this matter stemmed from Plaintiff's claims for penalties, which
19 might apply if Plaintiff and the Class prevailed on their wage claims. (Ly Decl. at ¶46.) More
20 specifically, there was a risk associated with Labor Code § 203 Waiting Time Penalties. In order
21 to establish liability for these penalties, Plaintiff would have to establish that Defendant's
22 conduct was willful. Labor Code § 203 states "if an employer willfully fails to pay . . . any
23 wages of an employee who is discharged or who quits, the wages of the employee shall continue
24 as a penalty. . ." for up to 30 days. (Lab. Code § 203; *see also Mamika v. Barca*, (1998) 68
25 Cal.App.4th 487.) With these penalties, there is always the risk that the trier of fact would not
26 have held that Defendant's actions were done "willfully." As discussed above, Plaintiff alleges
27 that Defendant failed to provide meal periods. The Class Members are entitled to these wages,
28 which they were not paid at the time of their termination or resignation. (*See, e.g., Ghory v. Al-*

1 *Lahham* (1998) 209 Cal.App.3d 1487, 1492 (noting that “if [an employee] is entitled to overtime
2 compensation, he is entitled to penalty wages as well”).) As such, if Plaintiff is successful on his
3 claims for failure to pay wages, the penalties pursuant to Labor Code § 203 shall attach.
4 Defendant may have been able to establish that its alleged failure to provide the proper
5 compensation was not “willful.” (Ly Decl. at ¶47.)

6 c) The Risks Associated with Plaintiffs’ PAGA Claim

7 California’s Private Attorneys General Act (“PAGA”), Labor Code section 2698, *et seq.*,
8 permits private litigants to recover civil penalties for violations of the Labor Code. PAGA
9 provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if
10 none were established, plaintiffs may recover default penalties provided in section 2699(f) in the
11 amount of \$100 per employee per pay period for the initial violation and \$200 for subsequent
12 violations.

13 A violation of section 226(a) results in civil penalties under Labor Code § 2699(a) equal
14 to “\$250 per employee per violation in an initial citation and one thousand dollars (\$1,000) per
15 employee for each violation in a subsequent citation” (*Raines v. Coastal Pacific Foods*, 23
16 Cal.App.5th 667, 679 (2018) (citing to Labor Code § 226.3).)

17 Plaintiff’s expert determined PAGA penalties for violations of Labor Code sections 510,
18 1194, and 1199 to be \$628,799.00 and penalties for violations of Labor Code section 226(a) to
19 be \$1,571,997.00. (*Ibid.*)

20 Plaintiff discounted the PAGA claim for multiple reasons. The court has discretion to
21 award less than the maximum civil penalty. (*Raines v. Coastal Pacific Food Distributions, Inc.*,
22 23 Cal.App.5th at 681.) Defendant maintains that imposing a civil penalty of \$250 per wages
23 statement for a purely technical violation with no real harm would be unjust. (Ly Decl. at ¶48.)
24 Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty
25 amount specified by this part if, based on the facts and circumstances of the particular case, to do
26 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). See
27 *e.g.*, *Carrington v. Starbucks Corporation*, 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (2018)
28 (affirming award of 10% of maximum PAGA penalty); *Sanchez et al. v. McDonald’s*

1 *Restaurants of California Inc. et al.*, No. BC499888, 2017 WL 4620746, at *14 (Super. Ct. Los
2 Angeles Jul 6, 2017) (awarding \$700,270 in PAGA penalties based upon underlying wage
3 violations when Plaintiff sought eight-figure penalty award).

4 There is a high risk that the Court would significantly reduce the PAGA claim in the
5 interest of justice, so Class Counsel felt a deep discount of the value of the PAGA claim was
6 warranted. (Ly Decl. at ¶49.)

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

8 Even though the Court granted class certification on November 9, 2017, trial of a case
9 involving over 405 Class Members would require extensive litigation costs, and a significant
10 time overlay by the parties. (Ly Decl. at ¶50.) Given the complexity and unsettled nature of the
11 issues, it is likely that any outcome at trial would have resulted in a lengthy and costly appeal,
12 further delaying any relief to the class. (Ly Decl. at ¶51.) Furthermore, Defendant maintained
13 that it would not be able to withstand a judgment of over \$1,000,000.00. (Ly Decl. at ¶52.)
14 After having an accountant review financial documents, including profit and loss sheets, Plaintiff
15 agrees. (Ly Decl. at ¶53.) There is a real risk of bankruptcy or failure to pay if the Settlement or
16 a Judgment at trial is too large. (Ly Decl. at ¶54.)

17 3. The Risk of Maintaining Class Action Status through Trial

18 Plaintiff does not feel that decertification was likely given that this case settled on the
19 first day of trial. (Ly Decl. at ¶55.)

20 4. The Amount Offered in Settlement

21 It was very difficult for the Parties to reach this Settlement. (Ly Decl. at ¶56.) This case
22 settled on the eve of trial after Class Counsel had the time and pay data analyzed by an expert
23 who was prepared to testify at trial. (Ly Decl. at ¶57.; Settlement Agreement § II at ¶B.) As
24 such, there can be no doubt that this settlement is the result of adversarial, non-collusive, and
25 arm's-length negotiations.

26 Plaintiff's Expert calculated damages using data provided by Defendant. (Ly Decl. at
27 ¶58.) Plaintiff's expert calculated damages for unpaid meal premiums by multiplying the number
28 of workdays in which a missed meal premium is owed by the regular rate of pay. (Ly Decl. at

¶59.) Plaintiff's Expert's calculations determined that the unpaid meal premiums due to late first meal periods plus pre-judgment interest was \$1,782,988.00. (Ly Decl. at ¶60.) Plaintiff's Expert calculated damages for shaved time plus pre-judgment interest as \$204,141.00. (Ly Decl. at ¶61.) In total, this amounts to \$1,987,128.00 for unpaid meal period premiums and wages/overtime. (Ly Decl. at ¶62.) Plaintiff's Expert Calculated Labor Code section 203 penalties to be \$628,328.00. (Ly Decl. at ¶63.)

The Parties have agreed on a Maximum Settlement Amount of \$1,000,000.00. After attorneys' costs and fees, claims administration, PAGA payments to the LWDA, and an enhancement to the Class Representative, the Net Settlement amount is approximately \$515,500.00. (Ly Decl. at ¶64.)

5. The Experience and Views of Counsel

Kingsley & Kingsley, APC is experienced in prosecuting employment litigation, and the firm has focused a substantial percentage of its practice since the year 2000 on wage, hour, and working condition violations. (Ly Decl. ¶66-67.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Liane Katzenstein Ly. (*Ibid.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶68.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Class Members on a pro rata basis. The lump sum payment to each member of the Settlement Class not excluding him/ herself will be determined by dividing the Net Settlement Fund by the Total Qualified Work Weeks, thereby determining the Qualified Work Week Value as determined by the Claims Administrator. This allocation distributes Settlement funds

proportionally to each class member's damages, and should therefore be approved as fair, adequate, and reasonable. (Settlement Agreement § III at ¶F.)

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

Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address of all Settlement Class Members, or to an updated address if one is located. (Settlement at § IV. ¶C-D.). If any Notices are returned with a forwarding address for the recipient, the Claims Administrator shall re-mail the Notice Packet to that address. (*Ibid.*) As such, the Notice is likely to reach most, if not all, Settlement Class Members.

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

Here, the Notice clearly explains the proposed Settlement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Settlement at § IV. ¶¶C-D.) In short, the Court should approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Class Members to make an informed choice regarding whether to participate.

V. THE SERVICE AWARD TO THE CLASS REPRESENTATIVE

The Class Representative is entitled to an enhancement for his valiant effort and time expended in this matter. (Ly Decl. at ¶69.) The time spent by JESUS A. RIOS includes providing information to Class Counsel regarding the nature of the work at ALL STAR SEED, compiling documents, meeting with his attorneys to discuss the status of the case, the theories of

liability, and responding promptly to Class Counsel's communications regarding settlement. (Ly Decl. at ¶70.) Thus, in addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of \$12,000.00, to be paid from the Maximum Settlement Amount. (Ly Decl. at ¶71; Settlement Agreement § I at ¶AA.)

Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. at ¶72.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Class Counsel. (Ly Decl. at ¶73.) Plaintiff will provide a detailed declaration with the Final Approval Motion detailing his participation and further justification for the enhancement. (Ly Decl. at ¶74.)

VI. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and in the best interest of the Class. Therefore, the Parties respectfully request that the Court (1) grant preliminary approval of the Joint Stipulation of Class Action Settlement and Release, and all of its terms; (2) approve the proposed Notice of Class Action Settlement and the Court-approved Claim Form, copies of which are attached to the Settlement Agreement as Exhibit "1" and Exhibit "2," respectively, and direct that the Notice be sent to Class Members in the manner set forth in the Stipulation of Resolution; and (3) schedule a hearing on final approval of the Settlement and Class Counsel's application for an award of attorney's fees and litigation costs

DATED: April 2, 2020

KINGSLEY & KINGSLEY, APC

By: _____

Liane Katzenstein Ly
Attorneys for Plaintiff JESUS A. RIOS and the
proposed class