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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. 7]

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

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Kelsey M. Szamet, Jesus A. Rios and Stephen
L. Donaldson; Proposed Order; and
Judgment]*

Date: January 5, 2021

Time: 8:30 a.m.

Dept.: 7

Complaint Filed:	June 18, 2015
FAC Filed:	July 28, 2015
SAC Filed:	October 25, 2016
Trial Date:	None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 5, 2021, at 8:30 a.m. in Department 7 of the above-entitled court, Plaintiff JESUS A. RIOS (“Plaintiff” or “Class Representative”) will, and hereby does, move the Court for an Order of Final Approval of the Class Action Settlement in this case. Plaintiff moves the Court for an order:

1. Granting final approval of the settlement in this case pursuant to the Joint Stipulation of Class Action Settlement and Release (“Settlement” or “Settlement Agreement”), a copy of which is attached to the concurrently-filed Declaration of Kelsey M. Szamet as Exhibit “A”;

2. Affirming Kingsley & Kingsley, APC as Class Counsel;

3. Affirming JESUS A. RIOS as Class Representative and awarding an enhancement award of \$12,000.00;

4. Awarding JND Legal Administration claims administration fees of \$25,000.00 for its services as Claims Administrator; and,

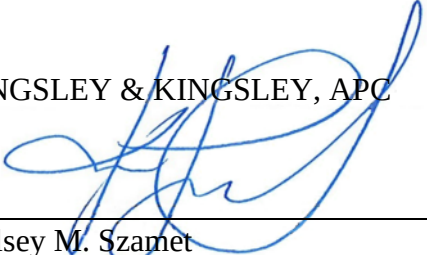
5. Entering judgment.

This Motion will be made pursuant to Code of Civil Procedure section 382 and California Rule of Court, rule 3.769 on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of the Class Members and the parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Jesus A. Rios, Stephen L. Donaldson, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: November 19, 2020

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Zachary D. Greenberg
Attorneys for Plaintiff JESUS A. RIOS and the
Certified Class

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	1
A.	Litigation Overview and Procedural History	1
B.	The Certified Settlement Class	2
C.	The Discovery Process.....	3
D.	Preliminary Approval.....	4
III.	THE PRELIMINARILY APPROVED SETTLEMENT.....	4
A.	The Settlement Class.....	4
B.	Maximum Settlement Amount.....	4
C.	This is a Claims Made Settlement	5
D.	Class Notice	5
E.	This Settlement Will be Paid on a Payment Plan	6
IV.	THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT	6
A.	The Settlement is Entitled to a Presumption of Fairness	6
B.	The Court Should Approve This Class Action Settlement Because it Satisfies Each of the <i>Kullar</i> Factors	7
1.	The Strength of Plaintiffs' Case.....	8
2.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	15
3.	The Risk of Maintaining Class Action Status through Trial.....	15
4.	The Amount Offered in Settlement.....	15
5.	The Extent of Discovery Completed and Stage of the proceedings	16
6.	The Experience and Views of Counsel	16
7.	The Presence of a Governmental Participant.....	16
8.	The Proposed Plan of Allocation Is Fair and Reasonable.....	16
9.	The Reaction of the Class Members to the Proposed Settlement	17
V.	ENHANCEMENT TO PLAINTIFF	17

VI.	SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY.	18
VII.	CONCLUSION.....	19

TABLE OF AUTHORITIES

Federal Cases

Anderson v. Mt. Clemens Pottery Co.,

(1946) 328 U.S. 680..... 9

Ingram v. The Coca-Cola Company,

200 F.R.D. 685 (N.D. Ga 2001)..... 17

Officers for Justice v. Civil Service Comm’n,

(9th Cir. 1982) 688 F.2d 615 16

Van Vranken v. Atlantic Richfield Co.,

901 F. Supp. 294 (N.D. Cal. 1995) 17

State Cases

Alberts v. Aurora Behavioral Health Care,

(2015) 241 Cal.App.4th 388 9, 10

Amaral v. Cintas Corp. No. 2,

(2008) 163 Cal.App.4th 1157 9

Barnhill v. Robert Saunders & Co.,

(1981) 125 Cal.App.3d 1 13

Benton v. Telecom Network Specialists, Inc.,

(2013) 220 Cal.App.4th 701 9

Brinker Rest. Corp. v. Superior Court,

(2012) 53 Cal.4th 1004 8, 9, 10, 12

Carrington v. Starbucks Corporation,

30 Cal.App.5th 504, 241 Cal.Rptr.3d 647 (2018)..... 14

Dunk v. Ford Motor Co.,

(1996) 48 Cal.App.4th 1794 6

Faulkinbury v. Boyd Associates, Inc.,

(2013) 216 Cal.App.4th 220 9

Ghory v. Al-Lahham,

1	(1998) 209 Cal.App.3d 1487	13
2	<u>Huntington Mem'l Hosp. v. Superior Court,</u>	
3	(2005) 131 Cal. App. 4th 893	11, 12
4	<u>Kullar v. Foot Locker Retail, Inc.,</u>	
5	(2008) 168 Cal.App.4th 116	7
6	<u>Mamika v. Barca,</u>	
7	(1998) 68 Cal.App.4th 487	13
8	<u>Raines v. Coastal Pacific Foods,</u>	
9	23 Cal.App.5th 667 (2018)	14
10	<u>Ramirez v. Yosemite Water Co., Inc.,</u>	
11	1999) 20 Cal. 4th 785.....	10
12	<u>Safeway, Inc. v. Superior Court of Los Angeles Cnty.,</u>	
13	(2015) 238 Cal.App.4th 1138	9
14	<u>Sanchez et al. v. McDonald's Restaurants of California Inc.,</u>	
15	et al., No. BC499888, 2017 WL 4620746 (Super. Ct. Los Angeles Jul 6, 2017).....	14
16	<u>Silva v. See's Candy Shops, Inc.,</u>	
17	(2016) 7 Cal.App.5th 235	12
18	<u>State Statutes</u>	
19	Business & Professions Code § 17200	1
20	Code of Civil Procedure § 1542.....	18
21	Code of Civil Procedure § 1781(f).....	6
22	Code of Civil Procedure § 382.....	6
23	Labor Code § 1194.....	1, 11, 14
24	Labor Code § 1199.....	1, 11, 14
25	Labor Code § 203.....	1, 13, 16
26	Labor Code § 226(a)	1, 14
27	Labor Code § 226.3.....	14
28	Labor Code § 2698.....	14

1	Labor Code § 2699.....	1
2	Labor Code § 2699(a)	14
3	Labor Code § 510.....	1, 11, 14
4	Labor Code § 512.....	8, 9, 12

Other Authorities

6	<i>Glass v. UBS Financial Services, Inc., Case No. C-06-4068 MMC,</i>	
7	2007 WL 227862 (N.D. Cal. Jan. 26, 2007)	17

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff JESUS A. RIOS (“Plaintiff” or “Class Representative”) submits this Motion for
4 Final Approval of Class Action Settlement and requests that the Court:

5 1. Grant final approval of the settlement in this case pursuant to the Joint Stipulation
6 of Class Action Settlement and Release (“Settlement” or “Settlement Agreement”), a copy of
7 which is attached to the concurrently-filed Declaration of Kelsey M. Szamet (“Szamet Decl.”) as
8 Exhibit “A”;

9 2. Affirm Kingsley & Kingsley, APC as Class Counsel and award attorneys’ fees and
10 costs as detailed in the concurrently-filed Motion for Attorneys’ Fees and Costs;

11 3. Affirm named Plaintiff JESUS A. RIOS as Class Representative and award a
12 cumulative Class Representative payment of \$12,000.00;

13 4. Award JND Legal Administration claims administration fees of \$25,000.00 for its
14 services as Claims Administrator; and

15 5. Enter judgment.

16 **II. FACTUAL BACKGROUND**

17 **A. Litigation Overview and Procedural History**

18 Plaintiff filed this class action case on June 18, 2015, alleging the following: (1) Failure to
19 Pay Wages and/or Overtime under Labor Code (“Lab. Code”) §§ 510, 1194, and 1199; (2)
20 Violation of Labor Code § 226(a); (3) Penalties pursuant to Labor Code §203; and (4) Violation
21 of Business & Professions Code § 17200. (Szamet Decl. ¶ 5.) Plaintiff subsequently filed a First
22 Amended Complaint on July 28, 2015, adding a cause of action for penalties pursuant to the Private
23 Attorneys General Act of 2004 (“PAGA”) (Lab. Code § 2699 *et seq.*). (Szamet Decl. ¶ 6.)
24 Defendant filed an Answer on October 7, 2015. (Szamet Decl. ¶ 7.)

25 On October 19, 2016, the Parties filed a stipulation permitting Plaintiff to file a Second
26 Amended Complaint adding a cause of action for failure to provide meal periods. (Szamet Decl. ¶
27 8.) The Court approved this Stipulation on October 25, 2016. (Szamet Decl. ¶ 9.) The Second
28 Amended Complaint is the operative complaint in this action. (Szamet Decl. ¶ 10.)

1 Both Plaintiff and Defendant (collectively, the “Parties”) have vigorously litigated this
2 Action. (Szamet Decl. ¶ 11.) Plaintiff has had to compel Defendant to produce documents using
3 this Court’s resources on many occasions. (Szamet Decl. ¶ 12.) The Parties stipulated to move
4 Plaintiff’s Motion for Class Certification several times. (Szamet Decl. ¶ 13.) Plaintiff deposed
5 Defendant’s Person Most Knowledgeable (“PMK”), Cinthia Perez, on March 14, 2017. (Szamet
6 Decl. ¶ 14.)

7 Plaintiff successfully filed its Motion for Class Certification on November 9, 2017.
8 (Szamet Decl. ¶ 15.) This Court granted Plaintiff’s Motion on May 17, 2018. (Szamet Decl. ¶ 16.)

9 After certifying the classes, Plaintiff and Defendant prepared and provided Notice to Class
10 Members on September 27, 2018. (Szamet Decl. ¶ 17.) On November 26, 2018, the Parties
11 received the finalized non-opt out list comprised of 408 class members. (Szamet Decl. ¶ 18.)

12 Plaintiff served class discovery on December 26, 2018, on Defendant. (Szamet Decl. ¶ 19.)
13 After continuous meet and confer efforts, Defendant ultimately provided Plaintiff the pay and time
14 date for the 408 class members. (Szamet Decl. ¶ 20.) Plaintiff deposed Defendant’s PMK Timothy
15 Castelli on June 28, 2019. (Szamet Decl. ¶ 21.)

16 The Parties had previously reached a settlement in this case on the eve of trial, however,
17 Defendant failed to sign the agreement. (Szamet Decl. ¶ 22.) The case was re-scheduled for trial
18 on March 11, 2020. (Szamet Decl. ¶ 23.) The Parties reached an agreement and signed the Joint
19 Stipulation of Class Action on the first day of trial. (Szamet Decl. ¶ 24.)

20 B. The Certified Settlement Class

21 Defendant engages in the practice of processing and manufacturing forage products. It
22 currently operates in two locations, Silsbee and Imperial. (Szamet Decl. ¶ 40.) Since the inception
23 of this lawsuit, Plaintiff alleges that Defendant failed to maintain any written meal period policy.
24 (Szamet Decl. ¶ 25.) Additionally, Plaintiff alleges that Defendant controlled the timing and length
25 of all meal periods and rounded all meal periods of less than thirty (30) minutes to thirty (30)
26 minutes. (Szamet Decl. ¶ 26.) As a result, Plaintiff alleges that he and the Class are owed meal
27 penalties for late meal periods and wages/overtime for the rounded meal periods. (Szamet Decl. ¶
28 27.)

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.

(Szamet Decl. ¶ 28.)

For purpose of the Settlement, the Class Members are 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, 2011 to June 30, 2018 who were mailed class notice and did not opt out.” (Szamet Decl. ¶ 29; Settlement Agreement § 1 at ¶ G.) The Class consists of 408 Class Members and include the employees who were mailed Class Notice in September 2018 and who did not opt out of the certified class action. (Szamet Decl. ¶ 30; Settlement Agreement § 1 at ¶ M.)

C. The Discovery Process

The Parties have conducted significant investigation of the facts and law. (Szamet Decl. ¶ 31; 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. (Szamet Decl. ¶ 32; 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. (Szamet Decl. ¶ 33; Settlement Agreement § II. at ¶ B.) Additionally, Plaintiff deposed two corporate representatives. (Szamet Decl. ¶ 34; 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. (Szamet Decl. ¶ 35; 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. (Szamet Decl. ¶ 36;

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. (Szamet Decl. ¶ 37; Settlement Agreement § II. at ¶ B.)

D. Preliminary Approval

On May 21, 2020, the Court issued an Order preliminarily approving the Settlement. (Szamet Decl. ¶ 38.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

As explained above, 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, 2011 to June 30, 2018, who were mailed class notice and did not opt out." ("Class" or "Class Member".) (Szamet Decl. ¶ 42; Settlement Agreement § 1 at ¶ G.) The Class Period is from July 28, 2011 to June 30, 2018 ("Class Period"). (Szamet Decl. ¶ 43; Settlement Agreement § 1 at ¶ G.)

The final settlement Class contained 390 individuals. (Declaration of Stephen L. Donaldson ("Donaldson Decl.") ¶ 5.)

B. 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 (35% of Maximum Settlement Amount)	\$	350,000.00
Class Counsel's Cost	\$	88,066.69
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	\$	517,433.31

(Szamet Decl. ¶ 44; Settlement Agreement at § III at ¶ E.)

1 The Net Settlement Amount is the Maximum Settlement Amount minus any award of
2 attorneys' fees and Litigation costs, Claims Administration Costs, enhancement to the Class
3 Representative, and penalties recoverable pursuant to PAGA. (Szamet Decl. ¶ 45; Settlement
4 Agreement § III at ¶ E.)

5 The Claims Administrator will calculate pro rata Settlement Payments to Class Members
6 from the Net Settlement Fund based on the following formulas for allocating the Settlement
7 Payments, which the parties and their counsel believe are reasonable and are designed to provide
8 a fair apportionment of the settlement funds to the Class: first, Defendant will provide the Claims
9 Administrator with the number of Qualified Work Weeks worked by each Class Member; second,
10 the Claims Administrator shall divide the Net Settlement Fund by the Total Qualified Work
11 Weeks, thereby determining the Qualified Work Week Value; and third, the Claims Administrator
12 will pay each Qualified Claimant the sum of the number of Qualified Work Weeks worked by the
13 Qualified Claimant times the Qualified Work Week Value, plus a pro rata share of any unawarded
14 portion of Class Counsel's attorneys' fees, litigation costs, or the Class Representative's Incentive
15 Award Payment. (Settlement Agreement at § III at ¶ F.)

16 C. This is a Claims Made Settlement

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

25 D. Class Notice

26 The Court approved the proposed Notice of Class Action Settlement and directed mailing
27 of the Notice by first-class mail to Class Members in accordance with the proposed implementation
28 schedule. (Szamet Decl. ¶ 46.) The procedures for giving notice to the Class Members, as set forth

1 in the Settlement and Plaintiff’s Motion for Preliminary Approval and approved by the Court, have
2 been fully and properly carried out. (Donaldson Decl. ¶ 5.)

3 To date, JND Legal Administration received one (1) request to be excluded (“opt-outs”)
4 from the proposed Settlement and zero (0) objections. (Donaldson Decl. ¶¶ 9-12.)

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

6 Defendant has raised significant financial constraints that it alleges will make paying this
7 Settlement, or a judgment of more than this amount, very difficult. (Szamet Decl. ¶ 47.) Defendant
8 provided financial documents to Plaintiff and Plaintiff had them analyzed by an accountant.
9 (Szamet Decl. ¶ 48.) Plaintiff agrees that there is a strong risk that Defendant could declare
10 bankruptcy or fail to pay the Settlement if accommodations are not made. As such, this Settlement
11 shall be paid in installments. (Szamet Decl. ¶ 49; Settlement Agreement § III at ¶ I.) The first
12 installment of \$125,000.00 was already paid on March 12, 2020. (Szamet Decl. ¶ 50; Settlement
13 Agreement § III at ¶ I.) The remaining fourteen (14) payments shall be paid on a quarterly basis
14 with the last possible payment due on September 11, 2023. (Szamet Decl. ¶ 51; Settlement
15 Agreement § III at ¶ I.) If Defendant is late in making any of these payments, Plaintiff can move
16 to collect on the judgment in this matter. (Szamet Decl. ¶ 52; Settlement Agreement § III at ¶ J.)

17 **IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT**

18 Pursuant to California Code of Civil Procedure § 1781(f), “a class action shall not be
19 dismissed or compromised without the approval of the court, and notice of the proposed dismissal
20 or compromise shall be given to all members of the Class in such manner as the court directs”
21 In deciding whether to grant final approval to a proposed class action settlement under Code of
22 Civil Procedure § 382, the court’s overriding concern is whether the proposed settlement is “fair,
23 adequate, and reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

24 A. The Settlement is Entitled to a Presumption of Fairness

25 “A presumption of fairness exists where: (1) the settlement is reached through arm’s length
26 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
27 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
28 small.” (*Dunk, supra*, 48 Cal.App.4th at 1802.) The proposed Settlement in this case meets all of

1 the *Dunk* factors and is therefore entitled to a presumption of fairness.

2 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
3 arm's-length negotiations. All settlement discussions were made by experienced and informed
4 counsel, who believe that this settlement represents a favorable resolution for the Class Members.
5 (Szamet Decl. ¶ 53.) The settlement negotiations have been, at all times, adversarial and non-
6 collusive, and no self-dealing or other type of misconduct by either side has taken place. (Szamet
7 Decl. ¶ 54.)

8 Second, the Parties engaged in formal discovery that permitted Class Counsel to fairly
9 evaluate the strength of the case and the risks associated with ongoing litigation. This discovery
10 and investigation included several interviews with the Class Representative, including other
11 percipient witnesses, and review of time and pay data and relevant policy documents utilized
12 during the Class Period. (Szamet Decl. ¶ 55.) Receipt of appropriate discovery allowed Class
13 Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit.
14 (Szamet Decl. ¶ 56.)

15 Third, Class Counsel have significant experience in this type of case, including several
16 years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶ 57.) Class
17 Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel
18 believes that the settlement is fair, reasonable, adequate, and in the best interests of the class given
19 the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶ 58.)

20 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there was one
21 (1) request to be excluded and zero (0) objectors. (Donaldson Decl. ¶¶ 9-12.) As all of the *Dunk*
22 factors are satisfied, this settlement is entitled to a presumption of fairness.

23 B. The Court Should Approve This Class Action Settlement Because it Satisfies Each
24 of the *Kullar* Factors

25 In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth
26 several factors that the Court should analyze in determining whether to approve a class action
27 settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense,
28 complexity and likely duration of further litigation; (3) the risk of maintaining class action status

1 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
2 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
3 participant; and (8) the reaction of the class members to the proposed settlement. (Szamet Decl. ¶
4 59.)

5 The proposed Settlement here satisfies each of these factors. Class Counsel conducted
6 extensive informal discovery before entering into meaningful settlement negotiations in this
7 matter. (Szamet Decl. ¶ 60.) This discovery permitted Class Counsel to fairly evaluate the strength
8 of the case and the risks associated with ongoing litigation. (Szamet Decl. ¶ 61.) Class Counsel is
9 experienced in handling wage and hour class actions and supports this Settlement. (Szamet Decl.
10 ¶ 62.)

11 1. The Strength of Plaintiffs' Case

12 a) The Risks Associated with the Meal Break Claims

13 (1) Failure to Provide Lawful Meal Period

14 Labor Code § 512 provides:

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

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

The applicable wage order requires employers not only to provide meal periods in the
manner described above, but also “to record having done so.” (*Brinker, supra*, 53 Cal.4th at pp.
1052-53 (J. Werdegar, concurring) [citations omitted].) A long-standing application of burden-

1 shifting occurs when an employer's records are so incomplete or inaccurate that an employee
2 cannot prove his or her damages. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-
3 88; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188-1190; *Safeway, Inc. v.*
4 *Superior Court of Los Angeles Cnty.* (2015) 238 Cal.App.4th 1138.)

5 Plaintiff alleges that Defendant is responsible for setting the times for which hourly
6 employees take their meal periods and that Defendant failed to maintain any written meal period
7 policy. (Szamet Decl. ¶ 63.) The California Supreme Court, in *Brinker*, unequivocally established
8 "[a]n employer is required to authorize and permit the amount of rest break time called for under
9 the wage order for its industry. If it does not-if, for example, it adopts a uniform policy authorizing
10 and permitting only one rest break for employees working a seven hour shift when two are
11 required-it has violated the wage order and is liable. (*Brinker Restaurant Corp. v. Superior Court*
12 (2012) 53 Cal.4th 1004, 1033.)

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

23 In *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, the California
24 Court of Appeal emphatically held that a meal and rest policy must specifically advise employees
25 of the proper timing of meal and rest periods. In *Alberts*, the meal break policy stated employees
26 are entitled to "an unpaid thirty-minute break for a meal period, approximately halfway between
27 the beginning and the ending of the employee's shift." (*Ibid.*) The court, in accordance with
28 *Brinker*, found the defendant's meal break policy violated California law because it did not specify

1 “that a meal break be provided during the first five hours of an employee’s shift.” (*Ibid*, citing
2 *Brinker, supra*, 53 Cal.4th at pp. 1048-1049.)

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

12 Here, Defendant created a uniform policy that did not authorize and permit employees to
13 take meal periods pursuant to the Labor Code. (Szamet Decl. ¶ 64.) Instead, Defendant failed to
14 provide a written meal policy to its employees entirely. (Szamet Decl. ¶ 65.) It continues to lack a
15 written meal policy to this date. (Szamet Decl. ¶ 66.) It alleges that it maintained an oral policy
16 that required employees to take meal periods before the end of the fifth hour of work. However,
17 meal periods for all hourly employees were scheduled by a supervisor and were “late” over 70%
18 of the time. (Szamet Decl. ¶ 67.) Thus, Defendant retained full control over authorizing meal
19 breaks. (Szamet Decl. ¶ 68.) This practice clearly shows that Defendant failed to maintain a lawful
20 meal period policy and practice for its hourly employees and is thus liable. (Szamet Decl. ¶ 69.)

21 Defendant maintained an unlawful meal policy of authorizing/permitting meal periods that
22 were less than thirty (30) minutes in length. The time records produced by Defendant indicate that
23 hourly employees clocked back in for lunch one after the other and had to wait “in line” to clock
24 back in. (Szamet Decl. ¶ 70.) Since these meal periods were scheduled by the supervisor,
25 employees had no choice but to clock back in when their supervisor called for it.

26 Defendant may seek to argue that employees chose to take meal periods that were less than
27 thirty minutes at their own will. However, break times were set by the supervisor. Therefore, it is
28 evident that Defendant’s hourly employees had no choice but to clock back in from lunch when

1 Defendant's supervisor called for operations to begin, which routinely was before a full thirty (30)
2 minute meal period. Furthermore, Defendant failed to pay meal period premiums for unlawful
3 meal breaks for the entirety of the class period.

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

6 Although Plaintiff certified the meal period class, it cannot be ignored that there are
7 significant risks associated with moving forward. (Szamet Decl. ¶ 71.) Most importantly, Plaintiff
8 has to acknowledge that the Court might find that Defendant did in fact maintain an accurate oral
9 meal period policy. (Szamet Decl. ¶ 72.) With this analysis in mind, there is significant risk that
10 the Court could have determined that the oral meal period policy does comply with California law.
11 As Plaintiff's analysis of the data above may suggest, the extent to which Defendant actually
12 "provided" employees with lawful breaks according to its policy would be highly disputed were
13 the case to have continued, a considerable discount from the maximum settlement value of this
14 claim was required. (Szamet Decl. ¶ 73.)

15 (2) Automatically Deducting 30 Minutes for Meal Periods

16 Plaintiff and the other Class Members were subjected to Defendant's unlawful policy of
17 automatically deducting thirty minutes for a meal period even when an employee's punch showed
18 that her or she took considerably less than thirty (30) minutes. (Szamet Decl. ¶ 74.)

19 As a general matter, California employees are entitled to compensation for all hours
20 worked. Labor Code section 510 provides that employees are entitled to overtime pay for work in
21 excess of eight (8) hours in one (1) day or forty (40) hours in one (1) week. "The purpose behind
22 the overtime pay requirement is two-fold: (1) to spread employment by encouraging employers to
23 avoid overtime work and thereby employ additional workers on a regular basis; and (2) where the
24 employer prefers overtime work, to compensate the employee for the burden of working longer
25 hours...an employee is entitled to overtime pay at one and one-half times the 'regular rate' for
26 work in excess of eight hours in one day and twice the 'regular rate' for work in excess of 12 hours
27 in one day." (*Huntington Mem'l Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 902.)

28 According to the applicable Wage Order, every employer must compensate an employee

1 at the minimum wage rate (or higher) for all hours worked. (Code Regs., tit. 13, subd.
2 11130(4)(B))["Every employer shall pay to each employee, on the established payday for the period
3 involved, not less than the applicable wage for all hours worked in the payroll period, whether the
4 remuneration is measures by time, piece, commission, or otherwise"].) Wage Order No. 13
5 provides that employees must be compensated at a rate of "one and one-half (1½) times the
6 employee's regular rate of pay for all hours worked in excess of eight (8) hours." (Code Regs., tit.
7 13, sub. 11130(3)(A).) The Order defines "hours worked" as "the timing during which an
8 employee is subject to the control of an employer, and includes all the time the employee is
9 suffered or permitted to work, whether or not required to do so." (*Id.*, subd. (2)(G).)

10 Furthermore, Courts have long held that rounding policies which "systematically
11 undercompensate employees" are unlawful. (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th
12 235, 249.)

13 All Star maintained an unlawful rounding policy that essentially resulted in wage theft from
14 its hourly employees. (Szamet Decl. ¶ 75.) Plaintiff believes he will be able to establish that
15 Defendant maintained a policy in which it automatically deducted thirty (30) minutes for a meal
16 period even when an employee's actual punches showed that he or she took considerably less than
17 thirty (30) minutes. (Szamet Decl. ¶ 76.)

18 Defendant may argue that it authorized and permitted thirty (30) minutes for a meal period
19 per Labor Code section 512 and Wage Order No. 13(11)(B). Defendant may further claim that if
20 an employee decided to take a meal break that was under thirty (30) minutes, it was a personal
21 decision and not one for which the company is liable.

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

26 Plaintiff alleges that Defendant cannot maintain its burden in showing that it authorized
27 and permitted a meal period of thirty (30) minutes. (*Brinker, supra*, 53 Cal.4th at 1033.) Defendant
28 had knowledge that employees were clocking in early from their breaks and going back to work.

1 A review of its own time records reveals this. (Szamet Decl. ¶ 77.)

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

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

14 Although Class Counsel believes it has a good chance of succeeding on the above claims,
15 the bulk of potential damages in this matter stemmed from Plaintiff's claims for penalties, which
16 might apply if Plaintiff and the Class prevailed on their wage claims. (Szamet Decl. ¶ 78.) More
17 specifically, there was a risk associated with Labor Code § 203 Waiting Time Penalties. In order
18 to establish liability for these penalties, Plaintiff would have to establish that Defendant's conduct
19 was willful. Labor Code section 203 states "if an employer willfully fails to pay . . . any wages of
20 an employee who is discharged or who quits, the wages of the employee shall continue as a penalty
21 . ." for up to 30 days. (Labor Code § 203; see also *Mamika v. Barca*, (1998) 68 Cal.App.4th 487.)
22 With these penalties, there is always the risk that the trier of fact would not have held that
23 Defendant's actions were done "willfully." As discussed above, Plaintiff alleges that Defendant
24 failed to provide meal periods. The Class Members are entitled to these wages, which they were
25 not paid at the time of their termination or resignation. (See, e.g., *Ghory v. Al-Lahham* (1998) 209
26 Cal.App.3d 1487, 1492 (noting that "if [an employee] is entitled to overtime compensation, he is
27 entitled to penalty wages as well").) As such, if Plaintiff is successful on his claims for failure to
28 pay wages, the penalties pursuant to Labor Code section 203 shall attach. Defendant may have

1 been able to establish that its alleged failure to provide the proper compensation was not “willful.”
2 (Szamet Decl. ¶ 79.)

3 c) The Risks Associated with Plaintiffs’ PAGA Claim

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

9 A violation of section 226(a) results in civil penalties under Labor Code § 2699(a) equal to
10 “\$250 per employee per violation in an initial citation and one thousand dollars (\$1,000) per
11 employee for each violation in a subsequent citation” (*Raines v. Coastal Pacific Foods*, 23
12 Cal.App.5th 667, 679 (2018) (citing to Labor Code § 226.3).)

13 Plaintiff’s expert determined PAGA penalties for violations of Labor Code sections 510,
14 1194, and 1199 to be \$628,799.00 and penalties for violations of Labor Code section 226(a) to be
15 \$1,571,997.00. (Szamet Decl. ¶ 80.)

16 Plaintiff discounted the PAGA claim for multiple reasons. The court has discretion to
17 award less than the maximum civil penalty. (*Raines v. Coastal Pacific Food Distributions, Inc.*,
18 23 Cal.App.5th at 681.) Defendant maintains that imposing a civil penalty of \$250 per wage
19 statement for a purely technical violation with no real harm would be unjust. (Szamet Decl. ¶ 81.)
20 Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty
21 amount specified by this part if, based on the facts and circumstances of the particular case, to do
22 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). *See*
23 *e.g., Carrington v. Starbucks Corporation*, 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (2018)
24 (affirming award of 10% of maximum PAGA penalty); *Sanchez et al. v. McDonald’s Restaurants*
25 *of California Inc. et al.*, No. BC499888, 2017 WL 4620746, at *14 (Super. Ct. Los Angeles Jul 6,
26 2017) (awarding \$700,270 in PAGA penalties based upon underlying wage violations when
27 Plaintiff sought eight-figure penalty award).

28 There is a high risk the Court would significantly reduce the PAGA claim in the interest of

1 justice, so Class Counsel felt a deep discount of the value of the PAGA claim was warranted.
2 (Szamet Decl. ¶ 82.)

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

4 Even though the Court granted class certification on November 9, 2017, trial of a case
5 involving over 405 Class Members would require extensive litigation costs, and a significant time
6 overlay by the parties. (Szamet Decl. ¶ 83.) Given the complexity and unsettled nature of the
7 issues, it is likely that any outcome at trial would have resulted in a lengthy and costly appeal,
8 further delaying any relief to the class. (Szamet Decl. ¶ 84.) Furthermore, Defendant maintained
9 that it would not be able to withstand a judgment of over \$1,000,000.00. (Szamet Decl. ¶ 85.)
10 After having an accountant review financial documents, including profit and loss sheets, Plaintiff
11 agrees. (Szamet Decl. ¶ 86.) There is a real risk of bankruptcy or failure to pay if the settlement or
12 judgment at trial is too large. (Szamet Decl. ¶ 87.)

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

14 Plaintiff does not feel that decertification was likely given that this case settled on the first
15 day of trial. (Szamet Decl. ¶ 88.)

16 4. The Amount Offered in Settlement

17 It was very difficult for the Parties to reach this Settlement. (Szamet Decl. ¶ 89.) This case
18 settled on the eve of trial after Class Counsel had the time and pay data analyzed by an expert who
19 was prepared to testify at trial. (Szamet Decl. ¶ 90; Settlement Agreement § II at ¶ B.) As such,
20 there can be no doubt that this settlement is the result of adversarial, non-collusive, and arm's-
21 length negotiations.

22 Plaintiff's expert calculated damages using data provided by Defendant. (Szamet Decl. ¶
23 91.) Plaintiff's expert calculated damages for unpaid meal premiums by multiplying the number
24 of workdays in which a missed meal premium is owed by the regular rate of pay. (Szamet Decl. ¶
25 92.) Plaintiff's expert's calculations determined that the unpaid meal premiums due to late first
26 meal periods plus pre-judgment interest was \$1,782,988.00. (Szamet Decl. ¶ 93.) Plaintiff's Expert
27 calculated damages for shaved time plus pre-judgment interest as \$204,141.00. (Szamet Decl. ¶
28 94.) In total, this amounts to \$1,987,128.00 for unpaid meal period premiums and wages/overtime.

(Szamet Decl. ¶ 95.) Plaintiff's expert Calculated Labor Code section 203 penalties to be \$628,328.00. (Szamet Decl. ¶ 96.)

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 \$517,433.31. (Szamet Decl. ¶ 97.)

5. The Extent of Discovery Completed and Stage of the proceedings

As outlined above, Class Counsel conducted a thorough investigation into the facts of the claims alleged. (Szamet Decl. ¶ 98.) The agreement to settle did not occur until Class Counsel exchanged and possessed sufficient information to make an informed judgement regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (Szamet Decl. ¶ 99.)

6. 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. (Szamet Decl. ¶ 100.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (Szamet Decl. ¶ 101.) Kingsley & Kingsley, APC, currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (Szamet Decl. ¶ 102.) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶ 103.)

7. The Presence of a Governmental Participant

There is no governmental participant in this action. (Szamet Decl. ¶ 120.)

8. 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

1 Settlement Class not excluding him/herself will be determined by dividing the Net Settlement Fund
2 by the Total Qualified Work Weeks, thereby determining the Qualified Work Week Value as
3 determined by the Claims Administrator. This allocation distributes Settlement funds
4 proportionally to each class member's damages, and should therefore be approved as fair,
5 adequate, and reasonable. (Settlement Agreement § III at ¶ F.)

6 9. The Reaction of the Class Members to the Proposed Settlement

7 To date, there is one (1) request to be excluded from the proposed Settlement and zero (0)
8 objections. (Donaldson Decl. ¶¶ 9-12.) Such indicates that the reaction of Class Members on the
9 whole is positive and weighs in favor of approval.

10 **V. ENHANCEMENT TO PLAINTIFF**

11 Plaintiff's Counsel request an enhancement of \$12,000.00 to the Class Representative Jesus
12 A. Rios for his work on behalf of the settlement Class. (Szamet Decl. ¶ 145.) "Courts routinely
13 approve incentive awards to compensate named plaintiffs for the services they provide and the
14 risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola*
15 *Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations omitted); *see*
16 *also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In *Coca-*
17 *Cola*, the Court approved service awards of \$300,000 to each named plaintiff in recognition of the
18 services they provided to the class by responding to discovery, participating in the mediation
19 process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at
20 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to
21 plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862,
22 at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

23 Mr. Rios is an adequate class representative because he has diligently, adequately and fairly
24 represented the settlement Class and has not placed his interests above any member of the Class.
25 (see Declaration of Jesus A. Rios ("Rios Decl.") ¶¶ 5-16.)

26 Here, Class Counsel requests an enhancement for Mr. Rios' valiant effort and time
27 expended in this matter. The time spent by Jesus A. Rios includes providing information to Class
28 Counsel regarding the nature of the work at All Star Seed, compiling documents, meeting with his

1 attorneys to discuss the status of the case, the theories of liability, and responding promptly to
2 Class Counsel’s communications regarding settlement. (Szamet Decl. ¶ 146.) Thus, in addition to
3 the sums paid to Class Members, Class Representative Rios requests a proposed litigation
4 enhancement in the amount of \$12,000.00, to be paid from the Maximum Settlement Amount.
5 (Szamet Decl. ¶ 147; Rios Decl. ¶¶ 18; Settlement Agreement § I at ¶ AA.). As set forth in the
6 Settlement, Class Representative will also be entering into a general release of liability pursuant
7 to Civil Code Section 1542. (Szamet Decl. ¶ 148; Settlement Agreement § III at ¶B.)

8 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶
9 149.) The enhancement takes into consideration the time, effort, and expense incurred by Mr. Rios
10 in coming forward to litigate this matter on behalf of all Class Members. (Szamet Decl. ¶ 150.)
11 Additionally, the Class Representative was at risk for paying for Defendant’s legal fees and costs
12 in the event that Defendant prevailed at trial. (Szamet Decl. ¶ 151.)

13 **VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

14 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
15 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
16 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
17 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
18 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “C.” (Szamet
19 Decl. ¶ 156.)

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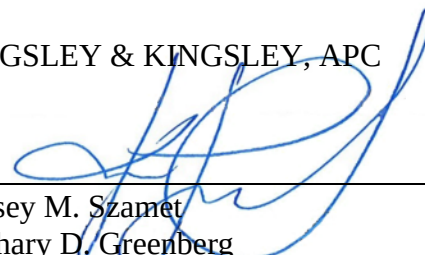
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1 **VII. CONCLUSION**

2 Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and
3 in the best interest of the Class Members. Therefore, Plaintiff respectfully requests that the Court
4 (1) grant Final Approval of the Settlement and all of its terms; (2) award attorneys' fees and costs
5 in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs; (3) award
6 JND Legal Administration claims administration fees of \$25,000.00; and (4) award the Class
7 Representative an enhancement of \$12,000.00; and (5) enter judgment.

8
9 DATED: November 19, 2020

KINGSLEY & KINGSLEY, APC

10
11 By: 

12 Kelsey M. Szamet
13 Zachary D. Greenberg
14 Attorneys for Plaintiff JESUS A. RIOS and the
15 Certified Class
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On November 19, 2020, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Scott C. Lacunza
JACKSON LEWIS, PC
200 Spectrum Center Drive, Suite 500
Irvine, CA 92618
Scott.lacunza@jacksonlewis.com

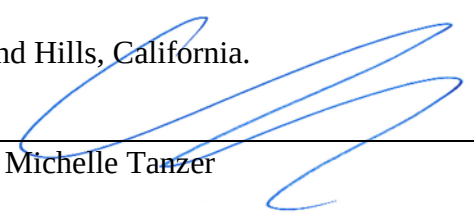
[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/271>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] BY ELECTRONIC MAIL TRANSMISSION: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 19, 2020, at Woodland Hills, California.



Michelle Tanzer