

DOUGLAS HAN (SBN 232858)
SHUNT TATAVOS-GHARAJEH (SBN 272164)
AREEN BABAJANIAN (SBN 290130)
JUSTICE LAW CORPORATION
751 North Fair Oaks Avenue, Suite 101
Pasadena, California 91103
Telephone: (818) 230-7502
Facsimile: (818) 230-7259

Attorneys for Plaintiffs

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

FRANK FERNANDEZ and DEBBIE
PUMA, individually, and on behalf of
aggrieved employees pursuant to the Private
Attorneys General Act ("PAGA") and on
behalf of other members of the general
public similarly situated;

Plaintiffs,

v.

CONFLUENT MEDICAL
TECHNOLOGIES, INC., a Delaware
Corporation; and DOES 1 through 100,
inclusive;

Defendants.

Case No.: RG19012821

Honorable Brad Seligman
Department 23

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CONDITIONAL
CERTIFICATION, APPROVAL OF CLASS
NOTICE, SETTING OF FINAL
APPROVAL HEARING DATE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Reservation ID: R-2238224]

[Declaration of Proposed Class Counsel
(Douglas Han); and [Proposed] Order filed
concurrently herewith]

Hearing Date: April 13, 2021
Hearing Time: 3:00 p.m.
Hearing Place: Department 23

Action Filed: March 28, 2019
FAC Filed: February 22, 2021
Trial: None Set

1 **PLEASE TAKE NOTICE** that on April 13, 2021 at 3:00 p.m. or as soon as the matter
2 may be heard before the Honorable Brad Seligman in Department 23 of the Alameda County
3 Superior Court, located at 1221 Oak Street, Oakland California 94612, Plaintiff Frank Fernandez
4 and Plaintiff Debbie Puma (“Plaintiffs,” “Plaintiff Fernandez,” and “Plaintiff Puma”) will and
5 hereby move for an order:

- 6 • Granting Preliminary Approval of the proposed class action settlement described
7 herein and as set forth in the Parties’ Joint Stipulation and Settlement Agreement
8 (“Settlement Agreement,” “Settlement,” or “Agreement”), attached as
9 **“EXHIBIT 2”** to the Declaration of Douglas Han, including, and not limited to,
10 the means of allocation and distribution of funds, and the allocations for penalties
11 under the California Labor Code Private Attorneys General Act of 2004
12 (“PAGA”), Attorney Fee Award, Cost Award, Class Representative Enhancement
13 Payment, and the Administration Costs;
- 14 • Conditionally certifying the proposed Class for settlement purposes only;
- 15 • Appointing Plaintiff Fernandez as the Class Representative;
- 16 • Appointing Plaintiff Puma as the Representative Plaintiff;
- 17 • Appointing Justice Law Corporation as Class Counsel;
- 18 • Approving the proposed Notice of Class Action Settlement (“Class Notice”)
19 attached as **“Exhibit A”** to the Settlement Agreement;
- 20 • Approving the Election Not To Participate or Opt-out Form (“Exclusion Form”)
21 attached as **“Exhibit B”** to the Settlement Agreement;
- 22 • Directing the mailing of the proposed Class Notice and Exclusion Form
23 (collectively, known as the “Notice Packets”) with a postage-paid return
24 envelope to the proposed Class;

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- Approving the proposed deadlines for the notice and Settlement Administration process;
- Approving Phoenix Class Action Administration Solutions (“Phoenix”) as the Settlement Administrator; and
- Scheduling a hearing to consider whether to grant Final Approval of the Settlement Agreement, at which time the Court will also consider whether to grant Final Approval of the requests for Attorney Fee Award, Cost Award, Class Representative Enhancement Payment, the Administration Costs, and approval of the allocation for PAGA penalties.

This motion is based upon the following memorandum of points and authorities; the Declaration of the Proposed Class Counsel (Douglas Han); the [Proposed] Order filed concurrently with this motion; the pleadings and other records on file with the Court in this matter; and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: March 17, 2021

JUSTICE LAW CORPORATION

By: 

Douglas Han
Shunt Tatavos-Gharajeh
Areen Babajanian
Attorneys for Plaintiff

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1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a non-reversionary \$2,500,000 proposed wage
3 and hour class action settlement by Plaintiffs on behalf of themselves and all current and former
4 California-based hourly-paid or non-exempt employees (either directly or through any staffing
5 agency or labor contractor with the exception of Ryzen Solutions¹) employed by Defendant
6 Confluent Medical Technologies, Inc. (“Defendant”) at any time during the Class Period
7 (“Class”). The Class Period is the time period from March 28, 2015 to February 3, 2021. (“Class
8 Period”). At the time of this filing, the number of Class Members is currently estimated to be at
9 least eight hundred nine (809).

10 It is requested this Court grant Preliminary Approval, as, when analyzing the strengths
11 and vulnerabilities of the class claims along-side Defendant’s potential liability exposure, this
12 proposed settlement of \$2,500,000 – with an average settlement share amount estimated at
13 \$1,843.63² – is well within the “ballpark” of reasonableness.

14 As the following sections show, Class Counsel is convinced that the proposed Settlement
15 is in the best interests of the Class based on the negotiations and a detailed knowledge of the
16 issues present in this action. The length and risks of trial and perils of litigation that affect the
17 value of the claims were all carefully weighed. In addition, the defenses asserted by Defendant,
18 particularly, the uncertainty of class certification, the difficulties of complex litigation, the
19 lengthy process of establishing specific damages and various possible delays and appeals, were
20 also carefully considered by Class Counsel in arriving at the proposed Settlement.

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27 ¹ Ryzen Solutions workers have been excluded from this lawsuit as it is a subject of a separate wage and hour class
28 action lawsuit pending in Alameda County Superior Court Case No. RG19039158.

² \$1,491,500 (Net Settlement Amount) / 809 (Class Members) = \$1,843.63.

II. BACKGROUND

Defendant manufactures and distributes medical devices and serves customers in the United States from multiple worksites. (Declaration of Douglas Han (“Han Dec.”) at ¶ 9.) This case involves all current and former California-based hourly-paid or non-exempt employees (either directly or through any staffing agency or labor contractor with the exception of Ryzen Solutions) employed by Defendant at any time during the Class Period (*Ibid.*) Plaintiffs allege that at all times during the Class Period, Defendant’s non-exempt employees work and/or worked on an hourly basis. (*Ibid.*)

On March 28, 2019, Plaintiff Fernandez filed his class action lawsuit against Defendant in the Superior Court for the County of Alameda on behalf of himself and all current and former California-based hourly-paid or non-exempt employees (either directly or through any staffing agency or labor contractor) employed by Defendant at any time during the relevant time period. (Han Dec., *supra*, at ¶ 10.) Plaintiff Fernandez’s complaint alleges causes of action for: (1) violation of California Labor Code §§ 510 and 1198 (unpaid overtime); (2) violation of Labor Code §§ 226.7 and 512(a)(unpaid meal period premiums); (3) violation of Labor Code §§ 226.7 (unpaid rest period premiums); (4) violation of California Labor Code §§ 1194 and 1197 (unpaid minimum wages); (5) violation of California Labor Code §§ 201 and 202 (a) (final wages not timely paid); (6) violation of California Labor Code §§ 226(a) (non-compliant wage statements); (7) collection of due and unpaid wages per Labor Code § 229; and (8) violation of Business & Professions Code §§ 17200, et seq. (*Ibid.*)

On September 24, 2020, Plaintiff Puma provided notice to Defendant and the California Labor and Workforce Development Agency (“LWDA”) pursuant to Labor Code section 2698, *et seq.*, the Private Attorneys General Act of 2004 (“PAGA”). (Han Dec., *supra*, at ¶ 11.) The notice letter alleged that Defendant failed to properly pay its hourly-paid or non-exempt employees for all hours worked, failed to properly provide or compensate minimum and overtime wages and for meal and rest breaks, failed to issue compliant wage statements, and failed to reimburse for all necessary business-related costs and expenses. (*Ibid.*) As of this date, Plaintiff Puma has not received a notification from the LWDA indicating it intends to pursue

1 claims against Defendant. (Han Dec., *supra*, at ¶ 11.)

2 Pursuant to the Parties’ stipulation to amend the complaint, Plaintiffs filed a First
3 Amended Complaint including a PAGA cause of action. (Han Dec., *supra*, at ¶ 12.) The Eligible
4 Aggrieved Employees are aggrieved employees eligible to recover the Individual PAGA Shares
5 that consist of current and former California-based hourly-paid or non-exempt employees (either
6 directly or through a staffing agency or labor contractor with the exception of Ryzen Solutions)
7 employed or engaged by Defendant between September 24, 2019 through February 3, 2021
8 (“Eligible Aggrieved Employees” and “PAGA Timeframe”). (*Ibid.*) The incorporated PAGA
9 action alleged failure to provide meal and rest break wages, failure to pay minimum wages and
10 overtime wages, failure to pay timely wages during employment and upon termination, failure to
11 provide complete and accurate wage statements, and failure to reimburse necessary business
12 expenses. (*Ibid.*)

13 The Parties attended mediation on Plaintiffs’ claims on September 22, 2020. (Han Dec.,
14 *supra*, at ¶ 13.) While the parties were unable to settle at mediation, with the mediator’s
15 continued efforts, the Parties accepted the mediator’s proposal on October 1, 2020. (*Ibid.*)

16 Defendant generally and specifically denies any and all liability or wrongdoing of any
17 sort with regard to any of the claims alleged, makes no concessions or admissions of liability of
18 any sort, and contends that for any purpose other than settlement, the Class Action is not
19 appropriate for class treatment. (Han Dec., *supra*, at ¶ 14.) Defendant also asserts a number of
20 defenses to the claims, including the fact that the majority of Class Members were subject to
21 various versions of arbitration agreements with Class Action waivers, and has denied any
22 wrongdoing or liability arising out of any of the alleged facts or conduct in the Class Action.
23 (*Ibid.*)

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III. INVESTIGATION/ LITIGATION HISTORY

a. Discovery, Investigation, and the Parties' Staunchly Conflicting Positions

After the filing of the Complaint, both Parties engaged in discovery. (Han Dec., *supra*, at ¶ 15.) Plaintiff Fernandez propounded one (1) set of form interrogatories, one (1) set of special interrogatories, one (1) set of requests for admissions; and one (1) set of requests for production. (*Ibid.*) Defendant responded to this discovery. (*Ibid.*) Afterwards, the Parties met and conferred regarding this discovery. (*Ibid.*) Defendant also challenged whether Alameda County was a proper venue and sought to compel Plaintiff Fernandez into arbitration and strike the class allegations. (*Ibid.*) Once these issues were put to rest, the Parties agreed to attempt settlement. (*Ibid.*)

Prior to the mediation attended by the Parties on September 22, 2020 before mediator Mark S. Rudy, Esq., the Parties conducted significant investigation and discovery of the facts and law both before and after the Class Action was filed. (Han Dec., *supra*, at ¶ 16.) Prior to mediation, Defendant produced hundreds of documents relating to its policies, practices, and procedures regarding reimbursement of business expenses, paying non-exempt employees for all hours worked, meal and rest period policies, and payroll and operational policies. (*Ibid.*) As part of Defendant's production, Plaintiffs also reviewed time records, pay records, employee handbooks, and information relating to the size and scope of the Class, as well as data permitting Plaintiffs to understand the number of workweeks in the Class Period. (*Ibid.*)

Plaintiffs also interviewed dozens of Class Members who worked for Defendant throughout the Class Period. (Han Dec., *supra*, at ¶ 17.) The Parties agree that the above-described investigation and evaluation, as well as the information exchanged during the settlement negotiations, are more than sufficient to assess the merits of the respective Parties' positions and to compromise the issues on a fair and equitable basis. (*Ibid.*)

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Based upon Defendant's exchange of information and Plaintiffs' investigation, as well as interviews Plaintiffs' counsel had with non-exempt employees, Plaintiffs contends – and Defendant denies – that Defendant failed to compensate hourly-paid or non-exempt employees for all hours worked, including overtime. (Han Dec., *supra*, at ¶ 18.) Specifically, Plaintiffs assert that Defendant's timekeeping procedures use a quarter-hour rounding procedure for beginning shift punches, meal punches, and end of shift punches. (*Ibid.*) Plaintiffs contend that these subjected employees to an unlawful rounding policy that was not neutral across the board that systematically worked against paying them for all hours worked, rounding to the nearest quarter hour. (*Ibid.*) Plaintiffs allege that Defendant also maintained a strict timeliness policy and required employees to start and stop exactly at their scheduled time, but employees had to stand in line before being allowed to check in. (*Ibid.*) Collectively, according to Plaintiffs, this resulted in employees being underpaid two (2) minutes per shift on average. (*Ibid.*) Furthermore, Plaintiffs contend that employees were required to perform pre- and shift-shift duties off-the-clock. (*Ibid.*) Specifically, Plaintiffs contend that employees were expected to don their gown and gloves before clocking in and were only able to doff their gown and gloves after they had already clocked out. (*Ibid.*) Plaintiffs argued that this resulted in employees spending about twenty-five (25) minutes off-the-clock each week walking and donning and doffing. (*Ibid.*) Finally, Plaintiffs contend that employees were required to turn in their gowns to get them washed on every Tuesday and Thursday and were also required on Wednesdays and Fridays to sort through the gowns on the rack to find their correct size. (*Ibid.*) Plaintiffs allege that, since finding an appropriate gown that fit would take about five (5) minutes each time, employees spent about ten (10) minutes each week off-the-clock to find correctly sized gown and gloves. (*Ibid.*) Collectively, according to Plaintiffs, the aggregate amount of compensable time is about one (1) hour per week on average. (*Ibid.*) Finally, Plaintiffs contend that because the employees worked at least eight (8) hours per day, the uncompensated pre- and post-shift off-the-clock worked performed by employees described above is overtime. (*Ibid.*)

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Moreover, Plaintiffs assert – and Defendant denies – that hourly-paid or non-exempt employees were subject to invalid rest period practices and procedures that did not authorize proper rest breaks. (Han Dec., *supra*, at ¶ 19.) Specifically, Plaintiffs argue that due to production quotas and the constant pressure to complete work on the line, hourly-paid or non-exempt employees were not provided with timely, full, uninterrupted rest breaks. (*Ibid.*) Plaintiffs contend that employees were required to remain on the premises, were not free to leave the facility during rest breaks and were subject to the whims of supervisors when it came to rest break scheduling. (*Ibid.*) Additionally, Plaintiffs contend that because Defendant’s machines needed constant supervision because the parts they manufactured had to undergo several chemical baths, employees working weekends never received rest breaks. (*Ibid.*) Plaintiffs contend that Defendant was understaffed on weekdays and were therefore required to wait for someone to relieve them of their duties so that someone could watch the timer on the machines. (*Ibid.*) Furthermore, Plaintiffs allege that their supervisors would request that they take their breaks later and work through them as the work requirements were stringent. (*Ibid.*) Similarly, Plaintiffs contend that other employees who worked as manufacturing technicians worked on the extrusion line that runs constantly throughout the day and requires someone to respond immediately to any problems with the machine. (*Ibid.*) Plaintiffs contend that this forced such employees to cut, miss, or fail to take their meal/rest periods. (*Ibid.*) Consequently, according to Plaintiffs, Defendant’s policies and practices demonstrate that employees were not authorized to take timely, uninterrupted 10-minute rest periods since rest breaks were highly discouraged, employees were required to remain on premises during rest breaks, and employees felt pressured to work through their rest breaks to complete their work assignments. (*Ibid.*) Finally, Plaintiffs contend that Defendant failed to pay rest break premiums required by California law. (*Ibid.*)

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1 Plaintiffs also contend that hourly-paid or non-exempt employees were subject to an
2 unlawful meal period policy and practice that did not authorize timely, full, and uninterrupted
3 meal breaks. (Han Dec., *supra*, at ¶ 20.) Specifically, Plaintiffs contend that employees felt the
4 same pressures discussed above involving rest breaks that prevented them from taking timely,
5 uninterrupted full 30-minute meal breaks. (*Ibid.*) Furthermore, Plaintiffs assert that Defendant
6 maintained a policy to systematically auto-deduct meal breaks as of January 2017. (*Ibid.*) As a
7 result, according to Plaintiffs’ analysis, approximately eighty-five percent (85.6%) of shifts
8 longer than five (5) hours were auto-deducted across the Class Period, and about sixty-eight
9 percent (68.5%) of shifts were subject to auto-deductions prior to January 2017. (*Ibid.*) This
10 resulted in about ninety-seven percent (97.4%) of shifts to have unique meal period violations
11 across the entire Class Period, according to Plaintiffs’ analysis. (*Ibid.*) Finally, Plaintiffs contend
12 that Defendant failed to pay meal break premiums required by California law. (*Ibid.*)

13 Furthermore, Plaintiffs contend – and Defendant denies – that Defendant’s policies
14 operated to deprive employees of wages due and owing them, including meal period premiums,
15 rest break premiums, overtime wages, and minimum wages. (Han Dec., *supra*, at ¶ 21.) As a
16 result, according to Plaintiffs, these earned wages were not paid or recorded, resulting in a failure
17 to maintain accurate records. (*Ibid.*) Thus, Plaintiffs assert Defendant failed to provide accurate
18 wage statements in violation of section 226(a). (*Ibid.*)

19 Plaintiffs contend – and Defendant denies – that Defendant is liable for waiting time
20 penalties pursuant to section 203. (Han Dec., *supra*, at ¶ 22.) Specifically, Plaintiffs assert that
21 Defendant’s hourly-paid or non-exempt employees are entitled to back underpaid compensation
22 for all time worked as well as missed meal and rest breaks, thereby triggering waiting time
23 penalties under section 203. (*Ibid.*) Thus, Plaintiffs contend that Defendant owes compensation
24 for unpaid work and missed meal and rest breaks as a matter of fact and law. (*Ibid.*) Further,
25 according to Plaintiffs, Defendant intentionally failed or refused to perform an act, which was
26 required to be done, constituting “willful” conduct and justifying “waiting-time” penalties under
27 section 203. (*Ibid.*)

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1 Finally, Plaintiff contends – and Defendant denies – that Defendant failed to reimburse
2 employees for necessary business expenses. (Han Dec., *supra*, at ¶ 23.) Specifically, Plaintiffs
3 contend that employees were required to use their personal cell phones for business-related
4 reasons. (*Ibid.*) According to Plaintiffs, this included supervisors contacting employees via text
5 messages and phone calls on their personal cell phones to talk to them about work or to assign
6 them different tasks to complete. (*Ibid.*) Defendant did not reimburse employees for the usage of
7 their personal cell phones for such purposes, such as discussing work with their colleagues and
8 supervisors. (*Ibid.*)

9 Defendant denies Plaintiffs’ contentions in their entirety. (Han Dec., *supra*, at ¶ 24.)
10 Among other things, Defendant denies Plaintiffs’ rest and meal break contentions, on the
11 grounds that it provided rest and meal periods within compliant times, scheduled non-exempt
12 employees’ meal periods and/or gave non-exempt employees discretion as to when to take their
13 rest and meal periods. (*Ibid.*) Defendant also contends that its rest and meal period policies
14 complied with California law and that non-exempt employees were allowed to use their rest
15 period and meal period time for their own purposes. (*Ibid.*) Defendant further contends that
16 whether non-exempt employees took meal and rest periods during compliant time frames and
17 were relieved of all duties are questions that could only be resolved by resorting to
18 individualized inquiries to each non-exempt employee and, therefore, class certification would
19 not be appropriate. (*Ibid.*) Defendant also asserts it paid its employees for all time worked,
20 including overtime, minimum, and premium wages. (*Ibid.*) Defendant also asserts that it
21 reimbursed employees for all business expenses. (*Ibid.*) Furthermore, Defendant argues that any
22 failure to comply with California labor laws was an honest mistake made in good faith and,
23 therefore, could not be deemed “willful” under section 203. (*Ibid.*) Finally, Defendant reiterated
24 that the arbitration agreements would limit any class action because while Plaintiff Fernandez
25 was subject to a different version of the arbitration agreement, other Class Members were subject
26 to versions that did not suffer from the defect the Court identified in its order denying
27 Defendants’ motion to compel arbitration.

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1 As demonstrated above, the Parties took staunchly conflicting positions concerning
2 Defendant's policies and procedures and their effect on hourly-paid and non-exempt employees.

3 **b. The Parties Were Able to Reach an Agreement on Settlement of the Action**

4 **i. The Parties Attended Mediation Which Led to the Joint Stipulation**
5 **and Settlement Agreement**

6 The Parties agreed to go to mediation with experienced wage and hour mediator, Mark S.
7 Rudy, Esq. (Han Dec., *supra*, at ¶ 25.) The mediation took place on September 22, 2020. (*Ibid.*)
8 During the mediation, the Parties discussed the risks of continued litigation, risks of certification,
9 and risks on the merits of the claims versus the benefits of settlement. (*Ibid.*) Following the
10 mediation, the Parties accepted the mediator's proposal on October 1, 2020, the terms of which
11 were memorialized in the Settlement Agreement that the Parties now seek Preliminary Approval
12 of in the instant motion. (*Ibid.*; Exhibit 2.)

13 **ii. The Settlement Was Reached as a Result of Arm's-Length**
14 **Negotiations**

15 The Settlement Agreement was reached as a result of arm's-length negotiations. (Han
16 Dec., *supra*, at ¶ 41.) Though cordial and professional, the settlement negotiations have been, at
17 all times, adversarial and non-collusive in nature. (*Ibid.*) At the mediation, Counsel for the
18 Parties conducted extensive arm's length settlement negotiations until an agreement was
19 ultimately reached by all Parties. (*Ibid.*)

20 Plaintiffs and Class Counsel believe in the merits of the case but also recognize the
21 expense and length of continued proceedings necessary to continue the litigation against
22 Defendant through class certification and trial and through any possible appeals. (Han Dec.,
23 *supra*, at ¶ 42.) Plaintiffs and Class Counsel also have taken into account the uncertainty and risk
24 of further litigation, the potential outcome, and the difficulties and delays inherent in such
25 litigation. (*Ibid.*) Plaintiffs and Class Counsel have conducted extensive settlement negotiations,
26 including formal mediation on September 22, 2020. (*Ibid.*) Based on the foregoing, Plaintiffs
27 and Class Counsel believe the Settlement set forth in the Settlement Agreement is a fair,
28 adequate, and reasonable settlement, and is in the best interests of the Class Members. (Han

Dec., *supra*, at ¶ 42.)

iii. The Settlement Is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed settlement, and engaged in sufficient investigation, research, and discovery to support the settlement. (Han Dec., *supra*, at ¶ 43.) The proposed settlement was only possible following significant discovery and evaluation of Defendant’s relevant policies and procedures, as well as the data they produced for the putative Class, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. (*Ibid.*) Furthermore, this case has reached the stage where “the Parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the Settlement. (*Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 617.) (*Ibid.*)

c. Terms of the Proposed Settlement

i. Deductions from the Settlement

The Parties have agreed (subject to and contingent upon the Court’s approval) that this action be settled and compromised for the non-reversionary total sum of \$2,500,000 (“Gross Settlement Amount” or “GSA”) which includes, subject to Court approval: (a) Attorney Fee Award in an amount not to exceed \$875,000 (thirty-five percent (35%) of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement and securing Court approval; (b) Cost Award for actual litigation costs not to exceed \$30,000³; (c) Class Representative Enhancement Payment to the named Class Representative in an amount not exceed \$10,000 to Plaintiff Fernandez in recognition of his work and efforts in obtaining the benefits for the Class

³ The actual amount of actual litigation costs will be provided to the Court in conjunction with Plaintiffs’ motion for final approval. (Han Dec., *supra*, at ¶ 27.) At that time, Plaintiffs will ask the Court to approve the amount of these costs. If Plaintiffs’ actual litigation costs exceed \$30,000, Plaintiffs will only seek reimbursement in the amount of \$30,000. (*Ibid.*) In the event the Court does not approve the entirety of the application for the Attorney Fee Award and/or Cost Award, the Settlement Administrator shall pay whatever amount the Court awards, and neither Defendant nor the Settlement Administrator shall be responsible for paying the difference between the amount requested and the amount awarded. (*Ibid.*) If the amount awarded is less than the amount requested by Class Counsel for the Attorney Fee Award and/or Cost Award, the difference shall become part of the NSA and be available for distribution to all Class Members who do not submit a valid and timely request to exclude themselves from the Settlement (“Participating Class Members”). (*Ibid.*)

1 and undertaking the risk for the payment of costs in the event this matter had not successfully
2 resolved; (d) Administration Costs to Phoenix, the Settlement Administrator, that are estimated
3 at approximately \$18,500 but not to exceed \$25,000; and (e) PAGA Payment of \$100,000,
4 seventy-five percent (75%) of which (\$75,000) be paid to the LWDA and twenty-five percent
5 (25%) of which (\$25,000) will be part of the Net Settlement Amount to be distributed to Eligible
6 Aggrieved Employees on a pro rata basis. (Han Dec., *supra*, at ¶ 26.)

7 **ii. Calculation of the Settlement Payments to Class Members**

8 After all Court-approved deductions from the GSA, it is estimated that \$1,491,500 (“Net
9 Settlement Amount” or “NSA”) will be distributed to Class Members – with an average
10 settlement share estimated at \$1,843.63. (Han Dec., *supra*, at ¶ 28.) The Settlement
11 Administrator will pay the amount of the Participating Class Members’ portion of normal payroll
12 withholding taxes out of each person’s Individual Settlement Share. (*Ibid.*) The Settlement
13 Administrator will also calculate the amount of the Participating Class Members’ and
14 Defendant’s portion of payroll withholding taxes and pay those amounts from the GSA. (*Ibid.*)
15 Finally, the Settlement Administrator will submit Defendant’s portion of payroll withholding tax
16 and forward those amounts along with each person’s Individual Settlement Share withholdings to
17 the appropriate taxing authorities. (*Ibid.*) Subject to the terms and conditions of the Settlement,
18 the Settlement Administrator will pay an Individual Settlement Share from the Net Settlement
19 Amount for settlement of non-PAGA claims to each Participating Class Member based on the
20 following formula:

21 Each Participating Class Member will receive a proportionate share of the Net
22 Settlement Amount that is equal to (i) the number of weeks he or she was actively
23 employed as a non-exempt employee during the respective Class Periods based on
24 the Class data provided by Defendant, divided by (ii) the total number of weeks
25 any and all Class Members in the Class were actively employed during the Class
Period based on the same Class data, which is then multiplied by the Net
Settlement Amount. One day worked in a given week will be credited as a week
for purposes of this calculation. (*Ibid.*)

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1 Subject to the terms and conditions of the Settlement, the Settlement Administrator will
2 also pay an Individual PAGA Share to each Eligible Aggrieved Employee from the portion of
3 the PAGA Payment allocated to Eligible Aggrieved Employees (i.e., \$25,000) for settlement of
4 PAGA claims. (Han Dec., *supra*, at ¶ 29.) The Individual PAGA Share will be calculated
5 according to the following methodology:

6 (i) \$25,000 will be divided by the aggregate number of pay periods that Eligible
7 Aggrieved Employees were actively employed during the PAGA Timeframe, based on
8 the Class data provided by Defendant; and (ii) for each Eligible Aggrieved Employee,
9 that quotient will be multiplied by such Eligible Aggrieved Employee's total number of
10 pay periods actively employed during the PAGA Timeframe to determine the amount of
11 such individual's Individual PAGA Share. (*Ibid.*)

12 The precise number of compensable weeks worked per Class Member will not be known
13 until Defendant has tabulated them, following preliminary approval. (Han Dec., *supra*, at ¶ 30.)
14 No portion of the Gross Settlement Amount will revert to Defendant for any reason. (*Ibid.*)

15 **iii. Notice to the Class**

16 Within thirty (30) calendar days after entry of the Preliminary Approval Order,
17 Defendant shall deliver to the Settlement Administrator an electronic database, which will list for
18 each Class Member: (1) first and last name; (2) last known mailing address; (3) social security
19 number; and (4) the total number of weeks during which the Class Member was actively
20 employed during the Class Period as a member of the Class ("Database"). (Han Dec., *supra*, at ¶
21 31.)

22 Within fourteen (14) calendar days after the receipt of the Class Member Database, the
23 Settlement Administrator will mail the Notice Packets to all identified Class Members via first-
24 class regular U.S. Mail, using the mailing address information provided by Defendant and the
25 results of the skip trace performed on all former Defendant employee Class Members. (Han
26 Dec., *supra*, at ¶ 32.) Class Members are not required to submit a claim form to receive their
27 Individual Settlement Shares pursuant to the Settlement Agreement. (*Ibid.*) The proposed Class
28 Notice and Exclusion Form are attached as Exhibits A and B to the Settlement Agreement, which
is Exhibit 2 to the Declaration of Douglas Han. (*Ibid.*)

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1 **iv. Distribution of Funds**

2 No later than twenty-one (21) calendar days after the Effective Final Settlement Date,
3 Defendant shall deposit the Gross Settlement Amount of \$2,500,000 needed to pay the entire
4 GSA by wiring the funds to the Settlement Administrator. (Han Dec., *supra*, at ¶ 33.)

5 Within fourteen (14) calendar days after the Funding of the Settlement, the Settlement
6 Administrator shall calculate and pay all payments due under the Settlement Agreement,
7 including all Individual Settlement Shares, the Attorney Fee Award, the Cost Award, the Class
8 Representative Enhancement Payment, the PAGA Payment, and the Administration Costs. (Han
9 Dec., *supra*, at ¶ 34.) The Settlement Administrator will also forward a check for seventy-five
10 percent (75%) of the PAGA Payment to the LWDA for settlement of the PAGA claim. (*Ibid.*)

11 Participating Class Members must cash or deposit their Individual Settlement Share
12 checks within one hundred eighty (180) calendar days after the checks are mailed to them. (Han
13 Dec., *supra*, at ¶ 35.) If any checks are not redeemed or deposited within ninety (90) calendar
14 days after mailing, the Settlement Administrator will send a reminder postcard. (*Ibid.*) If any
15 checks remain uncashed or not deposited by the expiration of the 90-day period after mailing the
16 reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after
17 the checks are mailed, pay the amount of the Individual Settlement Share to Legal Aid at Work,
18 a *cypres* designee. (*Ibid.*)

19 **v. Release of Claims**

20 As of the Effective Final Settlement Date, Class Members who do not submit a timely
21 and valid request for exclusion, will release, remise and forever discharge the Released Parties
22 from the Released Non-PAGA Claims for the Class Period. Participating Class Members agree
23 not to sue or otherwise make a claim against any of the Released Parties for any of the Released
24 Non-PAGA Claims (“Released Non-PAGA Claims”). See Exhibit 2, §§ (I)(GG) and (III)(P).
25 (Han Dec., *supra*, at ¶ 36.)

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1 As of the Effective Final Settlement Date, this settlement forever bars Plaintiffs, the
2 LWDA, and any other representative, proxy, or agent thereof, including, but not limited to, any
3 and all Eligible Aggrieved Employees during the PAGA Timeframe, from pursuing any action
4 under the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor Code
5 §§ 2698, *et seq.*, against, the Released Parties based on or arising out of the Labor Code
6 violations alleged in the First Amended Complaint and the PAGA Notice (“Released PAGA
7 Claims”). *See* Exhibit 2, §§ (I)(HH) and (III)(Q). (Han Dec., *supra*, at ¶ 37.)

8 The Released Parties include Defendant; each of the Defendant’s respective past, present,
9 and future parent companies, subsidiaries, affiliates, principals, and divisions; any other person,
10 corporation, association or partnership responsible or potentially responsible for any claims made
11 or that could have been made in the class litigation, including any individual or entity which
12 could be determined to be jointly liable with Defendant; and the past, present and future
13 shareholders, directors, officers, agents, employees, heirs, representatives, accountants, auditors,
14 consultants, attorneys, insurers and reinsurers, predecessors, and successors and assigns of any of
15 the foregoing. *See* Exhibit 2, § (I)(II). (Han Dec., *supra*, at ¶ 38.)

16 Finally, as of the Effective Final Settlement Date, and in exchange for the Class
17 Representative Enhancement Payment to Plaintiff Fernandez, in recognition of his work and
18 efforts in obtaining the benefits for the Class, and undertaking the risk for the payment of costs in
19 the event this matter had not successfully resolved, Plaintiff Fernandez will provide a general
20 release of claims. *See* Exhibit 2, § (III)(S). (Han Dec., *supra*, at ¶ 39.)

21 Plaintiff Puma has also executed a separate individual settlement agreement in exchange
22 for a General Release. (Han Dec. at ¶ 40; Exhibit 3.)

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1 **d. Counsel for Both Parties Are Experienced in Similar Litigation**

2 Both Plaintiffs’ counsel and Defendant’s counsel are particularly experienced in wage
3 and hour employment law and class actions. Plaintiffs’ counsel has significant experience in
4 litigating unpaid wages, non-compliant meal period, and non-compliant rest period class actions.
5 (Han Dec., *supra*, at ¶¶ 2-7, Exhibit 1.)

6 Plaintiffs’ counsel has prosecuted numerous cases on behalf of employees for California
7 Labor Code violations and thus are experienced and qualified to evaluate the class claims, to
8 evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the
9 defenses. (Han Dec., *supra*, at ¶¶ 2-7, Exhibit 1.) This experience instructed Plaintiffs’ counsel
10 on the risks and uncertainties of further litigation and guided their determination to endorse the
11 proposed Settlement.⁴ (*Ibid.*)

12 **IV. ARGUMENT**

13 **a. Class Action Settlements Are Subject to Court Review**

14 California Rule of Court 3.769 requires court approval for class action settlements.⁵
15 “Before final approval, the court must conduct an inquiry into the fairness of the proposed
16 settlement.” (California Rules of Court, Rule 3.769(g).) Rule 3.769 further requires a noticed
17 motion for preliminary approval of class settlements:

18 (a) A settlement or compromise of an entire class action, or a cause of action
19 in a class action, or as to a party, requires the approval of the court after
20 hearing.

21 ...

22 (b) Any party to a settlement agreement may serve and file a written notice of
23 motion for preliminary approval of the settlement. The settlement
24 agreement and proposed notice to class members must be filed with the
25 motion, and the proposed order must be lodged with the motion.

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⁴ The final factor mentioned in *Dunk* – the number of objectors – is not determinable until the Notice of Class Action Settlement has been provided to the Class and they have had an opportunity to respond. This information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

⁵The California Supreme Court also has authorized California’s trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; see *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.) Where appropriate, therefore, the Parties cite Federal Rule 23 and federal case law in addition to California law.

Courts act within their discretion in approving settlements that are fair, not collusive, and take into account “all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions.” (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.2d 167, 179, cert. den. *sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass’n* (1981) 452 U.S. 905.)

b. The Proposed Settlement Is a Reasonable Compromise of Claims

An understanding of the amount in controversy is an important factor in whether the settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.) The most important factor in this regard is “the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” (*Ibid.*)

In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.” (*Kullar, supra*, 168 Cal.App.4th at p. 133.) Finally, *Kullar* does not require an explicit statement of the maximum amount the class could recover if the plaintiff prevailed on all his claims, provided there is a record that allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Munoz, supra*, 186 Cal.App.4th at p. 409.) Put differently, “as the court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of reasonableness.” (*Kullar, supra*, 168 Cal.App.4th at p. 133 (citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500).)

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As the following subsections show, the Parties' investigation and discovery revealed numerous reasons to discount claims and agree to the Settlement.

i. The Settlement Is Fair and Reasonable

The proposed Settlement was only possible following significant discovery and evaluation of Defendant's relevant policies and procedures, as well as the data Defendant produced for the putative Class as referenced in Section III above, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. (Han Dec., *supra*, at ¶ 43.)

This discovery resulted in Plaintiffs' central theories of liability, which are predicated on Plaintiffs' claims that Defendant has failed to pay overtime wages, has failed to provide meal and rest breaks, has failed to pay premium wages for missed meal and rest breaks, has failed to pay minimum wages, has failed to pay final wages in a timely manner, has provided non-compliant wage statements, has a collection of due and unpaid wages, failed to reimburse business expenses, has violated PAGA, and has violated California Business & Professions Code section 17200, et seq. (Han Dec., *supra*, at ¶ 44.)

Defendant vehemently denies Plaintiffs' theories of liability and contends, as stated above, that all meal and rest periods were provided in compliance with California law, that all wages were properly paid to Class Members, that it provided final wages in a timely manner, that it provided wage statements in compliance with Labor Code section 226, and that it satisfied its obligation to reimburse business expenses. (Han Dec., *supra*, at ¶ 45.) Defendant further contends that any mistakes made were honest rather than willful. (*Ibid.*) Finally, Defendant argues that if litigation were to continue, it feels confident that it would prevail. (*Ibid.*)

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1 Although Plaintiffs believe the case is suitable for certification on the basis that there are
2 company-wide policies that Plaintiffs contend violate California law and uniformly affect the
3 putative Class Members; uncertainties with respect to certification are always present. (Han
4 Dec., *supra*, at ¶ 46.) As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004)
5 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. (*Ibid.*)
6 Decisions following *Sav-On* have reached different conclusions concerning certification of wage
7 and hour claims.⁶ (*Ibid.*)

8 Although remaining confident in the strengths of his claims, all of these factors led
9 Plaintiffs to discount the following calculations of potential damage claims.

10 **ii. The Settlement Amount of \$2,500,000 Is Reasonable**

11 In addition to being able to discover the strengths and vulnerabilities associated with
12 Plaintiffs' claims, in preparing for mediation, Defendant provided Plaintiffs with a sampling of
13 time and pay records and information regarding the estimated number of workweeks worked by
14 putative Class Members and the average hourly rate for class members. (Han Dec., *supra*, at ¶
15 46.) Based on this information, there were approximately 114,147 workweeks worked by Class
16 Members. (*Ibid.*) Plaintiffs were also able to determine that the average hourly rate for Class
17 Members was \$24.74. (*Ibid.*)

18 Specifically, Plaintiffs contends that Defendant failed to compensate hourly-paid or non-
19 exempt employees for all hours worked, including overtime. (Han Dec., *supra*, at ¶ 18.) Based
20 on a reasonable estimate that Class Members were able to prove that they worked approximately
21 one (1) hour off-the clock work per week, a reasonable estimate of damages at trial would be
22 \$2,823,996.78 (114,147 workweeks x 1 hours x \$24.74 average hourly rate). If using the
23 overtime rate as certain shifts exceeded eight (8) hours per day or forty (40) hours per week,
24 estimated damages at trial would be \$4,235,995.17 (114,147 workweeks x 1 hours x rate of

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26 ⁶(See, e.g., *Harris v. Superior Court* (2007) 154 Cal.App.4th 164 (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), review granted Nov. 28, 2007, 171
28 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*,
148 Cal.App.4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*
(2006) 144 Cal.App.4th 121 (reversing denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal.App.4th
1422 (affirming denial of certification).)

1 \$37.11).

2 Moreover, Plaintiffs assert that Defendant's timekeeping procedures use a quarter-hour
3 rounding procedure. (Han Dec., *supra*, at ¶ 18.) Consequently, rounding procedure subjected
4 employees to an unlawful rounding policy that was not neutral across the board. Plaintiffs'
5 expert's analysis calculated that the total amount of unpaid wages due to Defendant's unlawful
6 rounding practice is approximately \$830,923.

7 Plaintiffs also assert that hourly-paid or non-exempt employees were subject to invalid
8 rest break practices and procedures that did not authorize proper rest breaks. (Han Dec., *supra*,
9 at ¶ 19.) Specifically, employees were forced to either take late rest breaks or forgo them
10 entirely. Plaintiffs also assert that Defendant did not pay premium wages for rest breaks. (*Ibid.*)
11 Analysis of Defendant's time records revealed that there were 555,483 shifts that were eligible
12 for rest breaks. Based on the theories described above, Defendant's exposure for rest break
13 premiums would likely be approximately \$2,748,529.88 ((555,483 shifts x 20% violation rate) x
14 \$24.74).

15 Moreover, Plaintiffs also assert that that hourly-paid or non-exempt employees were
16 subject to invalid meal break policies and procedures that did not authorize timely, full, and
17 uninterrupted meal breaks. (Han Dec., *supra*, at ¶ 20.) Specifically, in addition to being forced to
18 take late meal breaks or skip them entirely due pressures from supervisors, Defendant maintained
19 a policy to auto-deduct meal breaks. (*Ibid.*) Plaintiff's expert analyzed that there were 468,451
20 shifts that had an automatically deducted meal break. It is arguable that ½ of the 468,451 shifts
21 subjected to auto-deduction were not provided meal breaks, which would amount to 234,226
22 shifts. If proven, Defendant's exposure for meal break premiums would likely be \$5,794,751.24
23 ((234,226 shifts x \$24.74)

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Furthermore, Plaintiffs claim – and Defendant denies – that Defendant is liable for wage statement penalties pursuant to section 226(a). (Han Dec., *supra*, at ¶ 21.) Plaintiffs calculate Defendant’s maximum potential exposure as to this claim to be approximately \$890,300 ($[1 \times \$50] + [14 \times \$100] \times 614 \text{ employees}$) (based on 15 average pay periods)).

Plaintiffs also claim – and Defendant denies – that Plaintiff and the Class Members are entitled to waiting time penalties under section 203 due to Defendant’s failure to pay its hourly-paid and non-exempt employees for overtime, time worked off-the-clock, and missed rest and meal breaks. (Han Dec., *supra*, at ¶ 22.) Plaintiffs calculate Defendant’s maximum potential exposure as to this claim to be approximately \$2,903,486.40 (8 hours x \$24.74 average hourly rate x approximately 489 former non-exempt employees x 30 days).

Finally, Plaintiffs assert that Defendant failed to reimburse employees for necessary business expenses. (Han Dec., *supra*, at ¶ 23.) Specifically, Plaintiffs assert that, despite Defendant requiring employees to use their personal cell phones to communicate with their supervisors, employees were not reimbursed for this usage. (*Ibid.*) Arguably, at least twenty percent (20%) of the personal cell phone charges are attributed to work. Using an average monthly charge of \$80.00, each monthly cost would be approximately \$16.00 per month. As a result, the total amount that must be reimbursed is \$421,472 (26,342 months x \$16.00).

The provisions of the Labor Code potentially triggering PAGA penalties in this case include but are not limited to Labor Code sections 201, 202, 226(a), 226.7, 510, 512(a), 1194, 1197, 1197.1, 1198, and 2802. (Han Dec., *supra*, at ¶ 48.) Defendant asserted that, regardless of the results of the underlying causes of action, PAGA penalties are not mandatory but permissive and discretionary. (*Ibid.*) Defendant maintained that, in addition to its strong arguments against the underlying claims, it had a strong argument that it would be unjust to award maximum PAGA penalties given the current unsettled state of law. (*Ibid.*)

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1 Class Counsel calculated penalties under this cause of action by multiplying the number
2 of active Class Members (because of the shortened statutory period for this claim), by the civil
3 penalties that each could be awarded for the Labor Code sections enumerated under Labor Code
4 section 2699.5 that were applicable in this case. (Han Dec., *supra*, at ¶ 49.) Class Counsel then
5 applied discounts in light of the countervailing arguments with regard to the other causes of
6 action, as well as the Court’s power to award “a lesser amount than the maximum civil liability.”
7 (*Id.* (citing Lab. Code § 2699(e)(2)).)

8 Given the state of the law and the range of PAGA penalties requested and actually
9 awarded in California courts, it is difficult to determine a reasonable value and actual exposure
10 for PAGA penalties. (Han Dec., *supra*, at ¶ 50.) However, if PAGA penalties are granted on
11 any one of the violations alleged in Plaintiffs’ operative complaint, the total penalties exposure
12 for the eligible pay periods could be approximately \$1,845,000 ([1 x \$100] x [22 x \$200] x 410
13 employees). (*Ibid.*) Plaintiffs calculated Defendant’s PAGA exposure using one hundred percent
14 (100%) violation rate based on the average number of pay periods (23) during the one-year
15 statutory period. (*Ibid.*) Multiplying the PAGA exposure by the number of alleged violations
16 under the PAGA theories of recovery (6) gives potential civil penalties of \$11,070,000. (*Ibid.*)

17 Although Plaintiffs argued they could obtain over \$11 million for PAGA penalties, it
18 seems highly unlikely that the Court would award such a large amount. (Han Dec., *supra*, at ¶
19 51.) PAGA’s plain language indicates that an employer will be assessed a lower, “initial” penalty
20 for each initial pay period in which a violation occurs, and a higher, “subsequent” penalty for
21 each subsequent pay period in which a violation occurs. (Lab. Code, § 2699, subd. (f)(2).) In
22 *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157; however, the court held, “Until the
23 employer has been notified that it is violating a Labor Code provision (whether or not the
24 commissioner or court chooses to impose penalties), the employer cannot be presumed to be
25 aware that its continuing underpayment of employees is a ‘violation’ subject to penalties [and
26 will be assessed only the ‘initial’ violation rate].” (*Amaral, supra*, 163 Cal.App.4th at 1209.)
27 This language could be interpreted as indicating that until the Labor Commissioner or a court
28 informs an employer that it has violated the Labor Code, the employer can only be assessed the

1 “initial” violation rate. Under this interpretation, the maximum individual civil penalty for one
2 statutory violation is \$41,000 (410 employees x 100 (initial violation), and for all possible Labor
3 Code violations is \$246,000.

4 Furthermore, PAGA’s statutory language is unclear as to whether PAGA penalties may
5 be “stacked” – that is, whether multiple civil penalties can be recovered in the same pay period
6 for different Labor Code violations. On the one hand, Labor Code section 2699, subdivision (f)
7 establishes “a civil penalty for a violation” (emphasis added), implying a separate civil penalty
8 for each violation. On the other hand, employers cite Labor Code section 2699, subdivision
9 (g)(1), which states that “an aggrieved employee may recover the civil penalty described in
10 subdivision (f)...on behalf of himself or herself and other current or former employees against
11 whom one or more of the alleged violations was committed” (emphasis added). However,
12 Defendants contended that the Ninth Circuit’s opinions in *Ubrino v. Orkin Svcs. of Calif., Inc.*
13 (9th Cir. 2013) 726 F.3d 118 and *Yocupicio v. PAE Grp., LLC* (9th Cir. 2015) 795 F.3d 1057,
14 which, preclude the aggregation of PAGA penalties for purposes of removal, prevents “stacking”
15 of PAGA penalties. Without stacking and limited to the initial violation, the PAGA penalties
16 would be limited to \$41,000 on the low end and \$246,000 on the high end based on six (6) major
17 theories of recovery.

18 To the extent Defendants’ exposure remains in the hundreds of thousands of dollars, the
19 civil penalties would certainly be “unjust, arbitrary and oppressive, or confiscatory.” In fact,
20 many courts have taken liberties to dramatically reduce the civil penalties. (See e.g. *Viceral v.*
21 *Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, 2016 WL 5907869 at 9* [preliminarily approving
22 class action settlement that included a PAGA set-aside of just 0.15 percent of the PAGA claims’
23 full potential value, where “Plaintiffs face[d] a substantial risk of recovering nothing on either
24 class or PAGA claims”]; *Costter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037
25 [preliminarily approving class action settlement allocating a PAGA set-aside worth a fraction of
26 the PAGA claims’ potential value, where the defendant’s obligations were “genuinely unclear”
27 and there was no evidence the defendant acted deliberately or negligently failed to learn about its
28 obligations].).

1 Under a more conservative approach described in detail above, Plaintiffs’ counsel
2 considered the possibility that the Court could assess only the initial violation rate, bringing the
3 basic PAGA penalty to \$246,000 [410 employees x \$100 x 6 theories of recovery]. (Han Dec.,
4 *supra*, at ¶ 51.)

5 Plaintiffs also recognized the risk that any PAGA award could be significantly reduced.
6 (Han Dec., *supra*, at ¶ 52.) Many of the causes of action brought were duplicative of the
7 statutory claims such as violations of California Labor Code §§ 226.7, 510, 512(a), 1194, 1198,
8 and 2802. (*Ibid.*) Thus, the maximum penalties for each pay period are not justified. (*Ibid.*) It
9 was indeed arguable whether the Court would award the maximum penalties under the law.
10 (*Ibid.*) Thus, allocating \$100,000 to PAGA civil penalties was reasonable based on a rate of
11 \$10.78 per pay period [$\$100,000 \div 9,276$ Pay Periods in PAGA Date Range = \$10.78], given the
12 fact that Defendant is also paying an additional \$2,400,000 in the Class settlement. (*Id.* (citing
13 see *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (affirming a rate of \$5 per
14 violation and a total PAGA penalty of \$150,000 while the plaintiff requested a rate of \$25 to \$75
15 per violation and a total PAGA penalty of \$70,000,000).)) Where PAGA penalties are
16 negotiated in good faith and “there is no indication that [the] amount was the result of self-
17 interest at the expense of other Class Members,” such amounts are generally considered
18 reasonable. (*Id.* (citing *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) Case No. 08-
19 00844, 2009 U.S. Dist. LEXIS 33900, at *24; see, e.g., *Nordstrom Com. Cases* (2010) 186
20 Cal.App.4th 576, 579 (“[T]rial court did not abuse its discretion in approving a settlement which
21 does not allocate any damages to the PAGA claims.”).)

22 Accordingly, taking into consideration Defendant’s defenses, its supporting evidence, and
23 its position that the Action is not suitable for class treatment, the settlement amount of
24 \$2,500,000—with an average Individual Settlement Share estimated at \$1,843.63—is reasonable
25 and fair.

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c. Discount Analysis Justifies the Settlement

Excluding the civil penalties, which could be completely discretionary, for the reasons stated the total estimated potential exposure, assuming certification and prevailing at trial, would be approximately \$16,413,459.30 on the low end and \$17,825,457.69 on the high end. (Han Dec., *supra*, at ¶ 53.)

Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Rest Break Premiums	\$2,748,529.88	60%	50%	\$549,705.98
Meal Break Premiums	\$5,794,751.24	30%	50%	\$2,028,162.93
Overtime/Minimum Wage: Off-the-Clock	\$2,823,996.78 to \$4,235,995.17	25%	50%	\$1,058,998.79 to \$1,588,498.19
Overtime/Minimum Wage: Rounding	\$830,923	25%	25%	\$467,394.19
Waiting Time Penalty	\$2,903,486.40	25%	50%	\$1,088,807.40
Wage Statement Penalty	\$890,300	25%	50%	\$333,862.50
Unreimbursed Business Expenses	\$421,472	25%	80%	\$63,220.80
MAXIMUM TOTAL EXPOSURE	\$16,413,459.30 to \$17,825,457.69			\$5,590,152.59 to \$6,119,651.99

Based on the rest period theories described above, Class Counsel applies sixty percent (60%) certification risk and fifty percent (50%) merits risk for rest break exposure. (Han Dec., *supra*, at ¶ 54.) This is because Class Counsel also understands that obtaining certification for non-compliant rest breaks even with a problematic policy can be difficult. (*Ibid.*) Defendant may also produce evidence and testimony that employees were provided reasonable opportunities to take their rest breaks but simply chose to skip them. (*Ibid.*) Defendant could also produce evidence that employees waived their breaks altogether. (Han Dec., *supra*, at ¶ 54.) Finally, Defendant could assert that since rest breaks are not recorded, it will be difficult for Plaintiff to show that employees were actually deprived of compliant rest breaks. Therefore, Class Counsel believes this justifies a sixty percent (60%) certification risk and fifty percent (50%) merits risk. (*Ibid.*)

1 Class Counsel also apply a thirty percent (30%) certification risk and fifty percent (50%)
2 merits risk for meal breaks. (Han Dec., *supra*, at ¶ 55.) Class Counsel believes that an automatic
3 deduction theory and short meal break theories are one of the better claims to certify as a class
4 action. Class Counsel, however, understand that there are always risks associated with
5 certification. (*Ibid.*) Defendant can produce evidence at trial that it had an effective clock in and
6 clock out system that did not pressure employees to cut their meal breaks short. (*Ibid.*)
7 Furthermore, any employees who opted to skip, interrupt, or take late meal breaks did so at their
8 own volition without Defendant's knowledge. (*Ibid.*) Also, Defendant could assert that the
9 existence of an automatic-deduction for meal breaks does not necessarily mean that employees
10 were not provided meal breaks. (*Ibid.*) Therefore, Class Counsel believes the even if certified,
11 the additional fifty percent (50%) risk on the merits are warranted. (*Ibid.*)

12 For unpaid wages involving off-the-clock work, including overtime work, Class Counsel
13 believes a twenty-five percent (25%) certification risk and a fifty percent (50%) merits risk are
14 justified. (Han Dec., *supra*, at ¶ 56.) Defendant required employees to don doff their gown and
15 gloves before clocking in and after they had already clocked out, wait in lengthy lines to clock in
16 and out, and sort through the gowns on the rack to find their correct sizes twice a week. (*Ibid.*)
17 Collectively, this resulted one (1) hour of off-the-clock work each week. (*Ibid.*) Moreover, since
18 employees worked at least eight (8) hours per day, their off-the-clock work described above
19 constitutes overtime work that was uncompensated. (*Ibid.*) At trial, however, Defendant may be
20 able to show that only a small number of employees were actually required to work off-the-clock
21 donning and doffing their gown and gloves, waiting to clock in and out, and finding gowns that
22 fit their size. (*Ibid.*) In other words, the number of employees actually working off-the-clock
23 was negligible, which Class Counsel believes justifies a twenty-five percent (25%) certification
24 risk. (Han Dec., *supra*, at ¶ 56.) Defendant may also assert that employees who actually worked
25 off-the-clock were compensated, including overtime wages. (*Ibid.*) Finally, Defendant will
26 likely assert that any discrepancies involving its timekeeping procedures was minimal at best and
27 did not result in most employees being undercompensated. (*Ibid.*) Thus, Class Counsel believes
28 an additional fifty percent (50%) risk on the merits is also justified. (*Ibid.*)

Moreover, Class Counsel believes a twenty-five percent (25%) certification risk and additional twenty-five percent (25%) risk on the merits is warranted. (Han Dec., *supra*, at ¶ 57.) Defendant did implement a quarter-hour rounding procedure for all clocks ins and clock outs. (*Ibid.*) Consequently, this created inaccurate clock ins and clock outs that was not neutral across the board and resulted in employees not being compensated for all their hours worked. (*Ibid.*) However, obtaining certification for off-the-clock work due to an improper rounding policy is difficult. (*Ibid.*) Defendant may also present evidence and testimony at trial that while it did maintain a quarter-hour rounding procedure, it was neutral across the board that did not systematically work against paying employees for all hours worked. (*Ibid.*) Thus, Class Counsel believes this justifies a twenty-five percent (25%) certification risk and twenty-five percent (25%) risk on the merits. (*Ibid.*)

Plaintiffs' section 203 claim for waiting time penalties is based on Plaintiffs' claims for unpaid overtime, time worked off-the-clock, and missed rest and meal breaks. (Han Dec., *supra*, at ¶ 58.) If Plaintiffs prevail on these underlying claims, it will lead to waiting time penalties. (*Ibid.*) However, Defendant may argue that any failure to pay wages due and owing to employees in a timely manner was not "willful" under section 203 and was instead an honest mistake made in good faith. (*Ibid.*) For these reasons and the reasons explained in the previous sections, Class Counsel believes a twenty-five percent (25%) certification risk and fifty percent (50%) risk on the merits are justified. (*Ibid.*)

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1 Plaintiffs' section 226(a) claim for wage statement penalties is based on Defendant's
2 failure to maintain accurate records. (Han Dec., *supra*, at ¶ 59.) In other words, Defendant failed
3 to accurately record hours worked by putative Class Members. (*Ibid.*) This subsequently
4 resulted in Defendant issuing wage statements that failed to accurately state the numbers of hours
5 worked in violation of the California Labor Code. (*Ibid.*) However, Defendant's error most
6 likely did not affect all employees. (*Ibid.*) In addition, Defendant may argue that its failure to
7 provide accurate wage statements was not "knowing and intentional" under section 226(a).
8 (*Ibid.*) Thus, Class Counsel believes a twenty-five percent (25%) certification risk and fifty
9 percent (50%) risk on the merits are warranted. (*Ibid.*)

10 Finally, Plaintiff believes that a twenty-five percent (25%) certification risk and eighty
11 percent (80%) merits risk for unreimbursed business expenses are justified. (Han Dec., *supra*, at
12 ¶ 60.) Defendant required employees to use their personal cell phones to communicate with
13 supervisors about their work. Defendant did not reimburse them for this personal cell phone
14 usage. (*Ibid.*) However, Defendant can present evidence that only a small percentage of
15 employees actually used their personal cell phones to communicate with their supervisors.
16 (*Ibid.*) Moreover, Defendant could even present evidence and testimony that the small number of
17 employees who did use their personal cell phones were reimbursed. (*Ibid.*) Thus, Class Counsel
18 believes this justifies a twenty-five percent (25%) certification risk and eighty percent (80%)
19 merits risk. (*Ibid.*)

20 Based on this analysis, the realistic recovery for this case is \$5,590,152.59 on the low end
21 and \$6,119,651.99 on the high end. (Han Dec., *supra*, at ¶ 61.) The Gross Settlement Amount of
22 \$2,500,000 is approximately fourteen percent (14.0%) of the maximum potential exposure and
23 approximately forty percent (40.9%) of the maximum realistic exposure at trial, which is in the
24 ballpark of reasonableness. (*Ibid.*)

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1 The only question at preliminary approval is whether the settlement is within the range of
2 possible approval. (*In re Tableware Antitrust Litig.* (N.D. Cal. 2007) 484 F.Supp.2d 1078,
3 1079.) “The fact that a proposed settlement may only amount to a fraction of the potential
4 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
5 should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448,
6 455; see also *Linney v. Ceullar Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“[I]t is
7 the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation
8 that induce consensual settlements. The proposed settlement is not to be judged against a
9 hypothetical or speculative measure of what might have been achieved by the negotiators.”).)

10 **d. Conditional Certification of the Class Is Appropriate**

11 For settlement purposes only, the requisites for establishing conditional class certification
12 are met. Code of Civil Procedure Section 382 “authorizes class actions ‘when the question is
13 one of a common or general interest, of many persons, or when the parties are numerous, and it
14 is impracticable to bring them all before the court.’” (*Sav-On Drug Stores, Inc. v. Superior Court*
15 (2004) 34 Cal. 4th 319, 326.) California courts certify class actions where the plaintiff identifies
16 “both [1] an ascertainable class and [2] a well-defined community of interest among class
17 members.” (*Ibid.*)

18 Here, the proposed Class is ascertainable and numerous as to make it impracticable to
19 join all Class Members, and there are common questions of law and fact that predominate over
20 any questions affecting any individual Class Member. (Han Dec., *supra*, at ¶ 62.) Plaintiffs’
21 claims are typical of the claims of the Class Members, and Class Counsel will fairly and
22 adequately protect the interests of the Class. (*Ibid.*) Further, prosecution of separate actions by
23 individual Class Members would create the risk of inconsistent or varying adjudications, and a
24 class action is superior to other available means for the fair and efficient adjudication of the case.
25 (*Ibid.*) As discussed below, this case is amenable to class certification. (*Ibid.*)

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1 **i. The Proposed Class Is Ascertainable and Sufficiently Numerous**

2 “Ascertainability is required in order to give notice to putative class members as to whom
3 the judgment in the action will be res judicata.” (*Hicks v. Kaufman & Broad Home Corp.* (2001)
4 89 Cal.App.4th 908, 914.) “A class is ascertainable if it identifies a group of unnamed plaintiffs
5 by describing a set of common characteristics sufficient to allow a member of that group to
6 identify himself or herself as having a right to recover based on the description.” (*Bartold v.*
7 *Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) The proposed class must also be
8 sufficiently numerous. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

9 The Class Action involves approximately eight hundred nine (809) Class Members. (Han
10 Dec., *supra*, at ¶ 63.) This Class is sufficiently numerous. (*Id.* (citing see *Ghazaryan v. Diva*
11 *Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531, n.5 (finding that a proposed class of “as
12 many as 190 current and former employees” is sufficiently numerous).) Furthermore, all Class
13 Members can and will be identified by Defendant to the Settlement Administrator through a
14 review of Defendant’s employment records concerning hourly-paid and non-exempt employees
15 employed by Defendant within the State of California during the Class Period. (Han Dec.,
16 *supra*, at ¶ 63.)

17 **ii. The Class Members Share a Well-Defined Community of Interest**

18 The community of interest requirement “embodies three factors: (1) predominant
19 common questions of law or fact; (2) class representatives with claims or defenses typical of the
20 class; and (3) class representatives who can adequately represent the class.” (*Sav-On Drugs,*
21 *supra*, 34 Cal.4th at p. 326.) “[T]he community of interest requirement for certification *does not*
22 *mandate that class members have uniform or identical claims.*” (*Capitol People First v.*
23 *Department of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original).)
24 Rather, courts focus on the Defendant’s internal policies and “pattern and practice . . . in order to
25 assess whether that common behavior toward similarly situated plaintiffs renders class
26 certification appropriate.” (*Id.* (citing *Sav-On Drugs, supra*, 34 Cal.4th at p. 333).) The
27 application of each of these factors is discussed below.

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1. Common Issues Predominate

The “common issues” requirement “involves analysis of whether the proponent’s ‘theory of recovery’ is likely to prove compatible with class treatment.” (*Capitol People First, supra*, 155 Cal.App.4th at p. 690 (emphasis added) (citing *Sav-On, supra*, 34 Cal.4th at p. 327).) In other words, courts determine whether the elements necessary to establish liability are susceptible to common proof, even if the class members must individually prove their damages. (*Brinker, supra*, 53 Cal.4th at p. 1024). These types of claims are regularly granted class certification when the plaintiff can present evidence of common policies. (See, e.g., *Jones v. JGC Dallas LLC* (N.D. Tex. 2014) Case No. 3:11-cv-02743 (certified collective action involving 190 dancers); *Espinoza v. Galardi South Enterprises Inc.* (S.D. Fla. 2016) Case No. 1:14-cv-21244 (court certified class of dancers on state law claims).)

Plaintiffs assert that common issues of fact and law predominate as to each of the claims alleged by Plaintiffs. (Han Dec., *supra*, at ¶ 64.) All hourly-paid and non-exempt employees who worked for Defendant during the Class Period were subject to the same or similar employment practices, policies, and procedures. (*Ibid.*) All of Plaintiffs’ claims surround Defendant’s common practice and scheme of failing to maintain compliant rest and meal break policies and practices and failing to fully and properly compensate employees, *inter alia*, for non-compliant rest and meal breaks, off-the-clock work, overtime work, associated wage statement and waiting time penalties, and unreimbursed business expenses. (*Ibid.*)

2. Plaintiffs’ Claims Are Typical of the Class Claims

Typical claims rely on legal theories and facts that are substantially similar to other class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) Here, Plaintiffs were non-exempt employees and allege that they and the Class Members were employed by the same company and injured by Defendant’s common policies and practices related to rest and meal breaks, uncompensated off-the-clock work, unpaid overtime, untimely paid wages, and inaccurate wage statements. (Han Dec., *supra*, at ¶ 65.) Plaintiffs seek relief for these claims and derivative claims on behalf of all Class Members. (*Ibid.*) Consequently, Plaintiffs’ claims arise from the same employment practices and are based on the same legal theories as those applicable to the

1 other Class Members. (Han Dec., *supra*, at ¶ 65.)

2 **3. Plaintiff Fernandez is Adequate to Represent the Class**

3 Plaintiff Fernandez have proven to be an adequate Class Representative. (Han Dec.,
4 *supra*, at ¶ 66.) He has conducted himself diligently and responsibly in representing the Class in
5 this litigation, understands his fiduciary obligations, and has actively participated in the
6 prosecution of this case. (*Ibid.*) Plaintiff Fernandez has spent time in meetings and conferences
7 with counsel to provide counsel with a complete understanding of his work environment and
8 requirements. (*Ibid.*) Further, Plaintiff Fernandez does not have any interest that is adverse to the
9 interest of other Class Members. (*Ibid.*) Moreover, the proposed Class Counsel is adequate to
10 represent the Class. (Han Dec., *supra*, at ¶¶ 2-7, Exhibit 1.)

11 **4. Class Action is Superior for the Fair and Efficient**

12 **Adjudication of this Controversy**

13 A class action is superior to other available means for the fair and efficient adjudication
14 of this controversy. Joinder of all members of the proposed class is impractical. Class treatment
15 will permit a large number of similarly-situation persons to prosecute their common claims in a
16 single forum simultaneously for settlement purposes without the necessary duplication of effort
17 and expense that numerous individual actions would engender. Moreover, because a number of
18 the class members are current employees, the fear of retaliation further support superiority of
19 class-wide relief because that fear of retaliation often discourages victims from seeking legal
20 redress while currently employed by the same employer.

21 **e. The Settlement Is Fair, Reasonable, and Adequate**

22 In deciding whether to approve a proposed class action settlement under Code of Civil
23 Procedure § 382, the Court must find that a proposed settlement is “fair, adequate and
24 reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) A proposed class
25 action settlement is presumed fair under the following circumstances: (1) the parties reached
26 settlement after arm’s-length negotiations; (2) investigation and discovery were sufficient to
27 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
28 and (4) the percentage of objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th

1 1802.) As the foregoing analysis shows, all of these elements are present here. Thus, Plaintiffs
2 request that this Court grant his motion for Preliminary Approval.

3 **f. Notice to Class Members Complies with California Rule of Court 3.769(f)**

4 California Rule of Court, No. 3.769(f), provides:

5 If the court has certified the action as a class action, notice of the final approval
6 hearing must be given to class members in the manner specified by the court. The
7 notice must contain an explanation of the proposed settlement and procedures for
8 class members to follow in filing written objections to it and in arranging to
9 appear at the settlement hearing and state any objections to the proposed
10 settlement.

11 The proposed Notice Packet meets all of these requirements. The proposed Notice
12 Packet advises the Class Members of their right to participate in the Settlement; how and when to
13 object to or request exclusion from the Settlement; and the date, time, and location of the Final
14 Approval hearing. (See Han Dec., *supra*; Exhibit A to Exhibit 2.)

15 **V. CONCLUSION**

16 Plaintiffs respectfully submit that the proposed Settlement is in the best interests of the
17 Class, as it is fair, adequate, and reasonable. Under the applicable class action criteria and
18 guidelines, the proposed Settlement should be preliminarily approved by the Court, the Class
19 should be conditionally certified for purposes of settlement only, and the Notice Packet should
20 be approved.

21 Dated: March 17, 2021

JUSTICE LAW CORPORATION

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23 Douglas Han
24 Shunt Tatavos-Gharajeh
25 Areen Babajanian
26 *Attorneys for Plaintiff*
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PROOF OF SERVICE
1013A(3) CCP

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 and not a party to the within action. My business address is 751 N. Fair Oaks Avenue, Suite 101, Pasadena, California 91103 and my electronic service address is arivera@justicelawcorp.com

On March 17, 21, I served the foregoing document described as

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION,
APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING
DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

for the following case: **Fernandez v. Confluent Medical Technologies, Inc.**
LWDA/Court Case No.: **LWDA-CM-807621-20**
RG19012821
Alameda County Superior Court

on interested parties in this action by electronically submitting as follows:

State of California
Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, California 95814

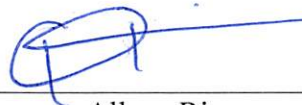
[X] BY ELECTRONIC SUBMISSION

Pursuant to California Senate Bill No. 836, I caused the documents described above to be electronically submitted by and through the procedure stated on the website of the State of California Labor and Workforce Development Agency.

[X] STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 17, 2021, at Pasadena, California.



Allana Rivera