

B. James Fitzpatrick (SBN: 129056)
Laura L. Franklin (SBN: 282642)
FITZPATRICK & SWANSTON
555 S. Main Street
Salinas, CA 93901
Telephone: (831) 755-1311
Facsimile: (831) 755-1319

Larry W. Lee (SBN: 228175)
Max W. Gavron (SBN: 291697)
DIVERSITY LAW GROUP, P.C.
515 South Figueroa Street, Suite 1250
Los Angeles, California 90071
Telephone: (213) 488-6555
Facsimile (213) 488-6554

Attorneys for Plaintiff,
KARINA MOSQUEDA, on behalf of herself and all similarly situated employees

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

KARINA MOSQUEDA, on behalf of
herself and all similarly aggrieved
employees,

Plaintiff,

v.

SANSEI GARDENS, INC.; NEW IMAGE
LANDSCAPE COMPANY; and DOES 1
through 50, inclusive,

Defendants.

Case No. 21CV000325

(Assigned to the Hon. Thomas W. Wills, Dept.
15)

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

Date: February 10, 2023

Time: 8:30 A.M.

Dept.: 15

Complaint Filed: February 3, 2021

FAC Filed: September 27, 2022

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on February 10, 2023, at 8:30 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Thomas W. Wills, judge
4 presiding, in Department 15 of the above referenced Court, located at 1200 Aguajito Road,
5 Monterey, California 93940, Plaintiff Karina Mosqueda (“Plaintiff”) will and hereby move
6 this Court for the following relief with respect to the Joint Stipulation and Settlement of
7 PAGA and Class Action Claims (“Stipulation” or “Settlement Agreement”) entered into by
8 Plaintiff and Defendants Sansei Gardens, Inc. and New Image Landscaping Company
9 (together, “Defendants”) (Plaintiff and Defendants shall collectively be referred to as the
10 “Parties”):

- 11 1. That the Court approve the Stipulation referenced above;
- 12 2. That the Court certify the following Class for settlement purposes: all
13 individuals who are or were employed as hourly, non-exempt employees by Defendants during
14 the Class Period, who have not signed Defendants’ December 2020 Arbitration Agreement
15 (the “Class”);
- 16 3. That Plaintiff Karina Mosqueda be appointed as the Class Representative and B.
17 James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston and Larry W. Lee and Max
18 W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;
- 19 4. That the Court preliminarily approve the Stipulation and the Gross Settlement
20 Amount in the amount of One Million Dollars and Zero Cents (\$1,000,000.00);
- 21 5. That the Court finds on a preliminary basis that the Stipulation appears to be
22 within the range of reasonableness of a settlement, including the amount of the PAGA
23 penalties, Class Representative enhancement award, attorneys’ fees and costs, settlement
24 administration costs, and the allocation of payments to Settlement Class Members, that could
25 ultimately be given final approval by this Court;
- 26 6. That the Court approve the mailing of the proposed “Notice of Pendency of
27 Class Action” (“Notice”) to be sent to Class Members;
- 28 7. That the Court appoint Phoenix Settlement Administrators as the Settlement

1 Administrator; and

2 8. That the Court schedule the matter for a Final Fairness and Final Approval
3 hearing.

4 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
5 provides for court approval of the settlement of a purported class action and allows the Court
6 to preliminarily certify a class for settlement purposes.

7 The basis for this Motion, filed without any opposition from Defendants, is that the
8 proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the
9 Parties are adequate to ensure the opportunity of Class Members to participate in, opt-out of,
10 or object to the settlement.

11 This Motion will be based on the attached Memorandum of Points and Authorities, the
12 Settlement Agreement and the proposed Notice, and the supporting Declarations of B. James
13 Fitzpatrick, Laura L. Franklin, Larry W. Lee, Max W. Gavron, and Plaintiff Karina Mosqueda,
14 upon the oral arguments of counsel (should there be any), and on the complete records and file
15 herein.

16
17 Dated: January 19, 2023

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

18
19 By: /s/ Max W. Gavron

20 B. James Fitzpatrick
21 Larry W. Lee
22 Max W. Gavron
23 Attorneys for Plaintiff,
24 KARINA MOSQUEDA, on behalf of
25 herself and all similarly situated employees
26
27
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	8
II. DISCUSSION	9
A. Proposed Class Definition	11
B. Settlement Terms and Evaluation	11
1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive.....	16
2. The Calculation of the Individual PAGA Payments.....	17
3. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants.....	18
4. Scope of the Release of Class Members' Claims	18
5. Tax Treatment of Settlement Amounts.....	19
6. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.....	19
C. Notice to Class Members	19
D. Typicality and Adequacy of Representation	20
1. Class Representative's Claims are Typical of the Class.....	20
2. Class Counsel Have Adequately Represented the Class and Have Experience with Wage and Hour Class Actions.....	21
E. Costs and Fees	21
1. Attorneys' Fees and Costs	21
2. Proposed Payment to the Class Representative	22
3. Settlement Administration Costs.....	23
III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL & NOTICE TO LWDA	23

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157, 1209 (2008)	15
<i>Brinker Rest. Corp. v. Superior Ct.</i> , 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012)	14
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018).....	15
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	21, 22
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	20
<i>Duran v. U.S. Bank Nat’l Ass’n</i> , 59 Cal.4th 1 (2014).....	16
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	22
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	20
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	21
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	20
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	20

Federal Cases

<i>Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.</i> 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009)	15
<i>Apodaca v. Costco Wholesale Corp.</i> , 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014)	14
<i>Bernstein v. Virgin Am., Inc.</i> , 3 F.4th 1127, 1144 (9th Cir. 2021).....	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	21
<i>Chavez v. Converse, Inc.</i> , 2020 WL 1233919, at *1 (N.D. Cal. 2020).....	13
<i>Dalton v. Lee Publ’ns, Inc.</i> , 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011).....	14
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	12
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	20
<i>Harris v. Vector Mktg. Corp.</i> , 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009)	13
<i>Hill v. Walmart, Inc.</i> , 32 F. 4th 811 (9th Cir. 2022)	13
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	12
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	12

1	<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987).....	12
2	<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004).....	12
3	<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	12
4	<i>Ricaldai v. U.S. Investigations Servs., LLC</i> , 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012)	14
5	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> , 79 F.R.D. 571 (E.D. Pa. 1978).....	12
6	<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	12
7	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	21
8	<i>Wright v. Adventures Rolling Cross Country, Inc.</i> , 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013).....	14
9		
10	Statutes	
11	Business & Professions Code § 17200, <i>et seq.</i>	9, 18
12	Labor Code § 1174.....	9, 17, 18
13	Labor Code § 1175.....	9
14	Labor Code § 1194.....	9, 17, 18
15	Labor Code § 1198.....	9, 17, 18
16	Labor Code § 1770, <i>et seq.</i>	9, 17, 18
17	Labor Code § 201.....	9, 17, 18
18	Labor Code § 202.....	9, 17, 18
19	Labor Code § 203.....	9, 17, 18
20	Labor Code § 226.....	9, 17, 18
21	Labor Code § 226(a)	13
22	Labor Code § 226.7.....	9, 17, 18
23	Labor Code § 2698, <i>et seq.</i>	passim
24	Labor Code § 2699(e)(2).....	15
25	Labor Code § 2802.....	9, 17, 18
26	Other Authorities	
27	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)..	10, 11
28	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	11

1	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.47	12
2	Manual for Complex Litigation (Third) § 30.41	10

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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative PAGA action arising from Defendants
3 Sansei Gardens, Inc. and New Image Landscaping Company's (together, "Defendants")
4 alleged Labor Code violations. Specifically, Plaintiff Karina Mosqueda ("Plaintiff") asserted
5 that Defendant failed to pay for all hours worked, including minimum and overtime wages,
6 pay the prevailing rate of wages for all public works, pay premiums for missed meal and rest
7 periods, and pay all earned wages when due and upon separation of employment; Defendants
8 also failed to provide off-duty meal and rest breaks, reimburse work-related expenses, provide
9 accurate wage statements, and keep accurate records. Based on these claims, Plaintiff asserts
10 violations of the Labor Code and the Wage Order. Defendants deny each, every, and all of the
11 allegations of the complaint and contends that their wage and hour practices comply with the
12 Labor Code.

13 Prior to the settlement of this action, Plaintiff and Defendants (jointly referred to as the
14 "Parties") thoroughly investigated the facts relating to the claims alleged in the operative
15 Complaint against Defendants, including, but not limited to, review of payroll
16 data/information for members of the Class. Thereafter, the Parties commenced settlement
17 negotiations through a private mediator and were ultimately able to reach the current
18 settlement. Significantly, this entire amount is non-reversionary, such that no monies will
19 revert to Defendants. The Parties believe that this amount is fair, adequate, and reasonable,
20 especially given the risks and uncertainty of class certification and the merits of this case.

21 While Plaintiff and her counsel are confident that they could prevail on class
22 certification and on the merits of the claims at trial, they recognize the inherent risks in drawn-
23 out litigation and the specific risk that Plaintiff could fail to establish liability or that
24 certification is appropriate. Based on their own independent investigation and evaluation, the
25 Parties and their respective counsel are of the opinion that the Settlement for the consideration
26 and on the terms set forth in the Joint Stipulation and Settlement of PAGA and Class Action
27 Claims (the "Stipulation" or "Settlement Agreement") is fair, reasonable, and adequate and is
28 in the best interests of the Class and Defendants in light of all known circumstances and the

1 expenses and risks inherent in litigation. Therefore, the Parties respectfully request that the
2 Court grant this Motion for Preliminary Approval of Class Action Settlement.

3 **II. DISCUSSION**

4 On February 3, 2021, Plaintiff filed a representative action complaint in the Monterey
5 County Superior Court on behalf of herself and all similarly aggrieved employees against
6 Defendants Sansei Gardens, Inc. and New Image Landscape Company. Declaration of Max
7 W. Gavron (“Gavron Decl.”) ¶ 2. The complaint alleges a single cause of action for violation
8 of the Private Attorneys General Act of 2004 (the “PAGA”), Labor Code § 2698, *et seq.* *Id.*

9 On September 27, 2022, Plaintiff filed a first amended complaint, adding class action
10 claims. The first amended complaint is the operative Complaint (“Complaint”). *Id.* ¶ 3. The
11 first amended complaint asserts claims for: (1) violation of Labor Code §§ 226.7 and 1198; (2)
12 violation of Labor Code §§ 226.7 and 1198; (3) violation of Labor Code §§ 1194 and 1198; (4)
13 violation of Labor Code § 1770, *et seq.*; (5) violation of Labor Code §§ 226, 1174, and 1175;
14 (6) violation of Labor Code §§ 201, 202, and 203; (7) violation of Labor Code § 2802; (8)
15 violation of Business & Professions Code § 17200, *et seq.* (“UCL”); and (9) violation of Labor
16 Code § 2698, *et seq.* *Id.* ¶ 3. Specifically, Plaintiff alleges that Defendant failed to pay for all
17 hours worked, including minimum and overtime wages, for participating in mandatory
18 orientation and safety training and other off-the-clock work; failed to pay the prevailing rate of
19 wages for work on all public works; failed to provide off-duty meal and rest breaks and/or pay
20 premiums for missed meal and rest breaks; failed to reimburse work-related expenses such as
21 cell phone costs; failed to pay overtime wages at the correct regular rate; failed to pay all
22 earned wages when due and upon separation of employment; and failed to provide accurate
23 wage statements and keep accurate records. *Id.* ¶ 3. Plaintiff’s PAGA claim is predicated on
24 the foregoing violations of the Labor Code. *Id.*

25 Since the initiation of the lawsuit, the Parties have engaged in formal and informal
26 discovery. Plaintiff has reviewed Defendants’ production of relevant policies and practices,
27 payroll data, and punch data records. *Id.* ¶ 4. This investigation enabled Plaintiff to perform
28 an analysis of the putative class and Defendants’ liability. *Id.*

1 On August 9, 2022, the Parties engaged in private mediation with experienced wage
2 and hour neutral Russ Wunderli, Esq. *Id.* ¶ 5. After thorough investigation and evaluation of
3 the facts and claims, as well as arm’s length negotiation, the Parties reached an agreement in
4 principle and entered into a memorandum of understanding. *Id.* ¶ 5. After further negotiation,
5 the Parties entered the proposed settlement presented to the Court for preliminary approval
6 now. *Id.* ¶ 5.

7 The Parties recognize the risk, expense, and delay in continuing litigation with the
8 class and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate.
9 Gavron Decl. ¶ 23. Accordingly, the Parties desire to settle, compromise, and discharge all
10 disputes and claims arising from or relating to the afore-referenced claims.

11 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
12 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
13 review after notice has been distributed to the class members for their comment or objections.
14 The *Manual for Complex Litigation, Third* § 30.41 states:

15 Approval of class action settlements involves a two-step process. First, counsel
16 submits the proposed terms of settlement and the court makes a preliminary
17 fairness evaluation. If the preliminary evaluation of the proposed settlement does
18 not disclose grounds to doubt its fairness or other obvious deficiencies, such as
19 unduly preferential treatment of class representatives or of segments of the class,
or excessive compensation for attorneys, and appears to fall within the range of
possible approval, the court should direct that notice...be given to the class
members of a formal fairness hearing, at which arguments and evidence may be
presented in support of and in opposition to the settlement.

20 (Fed. Jud. Ctr., 3rd ed. 1995).

21 Thus, the preliminary approval by the trial court is simply a conditional finding that the
22 settlement appears to be within the range of acceptable settlements. As Professor Newberg
23 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or
24 conference concerning a tentative settlement proposal may vary. The court may find that the
25 settlement proposal contains some merit, is within the range of reasonableness required for a
26 settlement offer, or is presumptively valid subject only to any objections that may be raised at
27 a final hearing.” Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th
28 ed. 2002).

1 The procedures for the parties' submission of a proposed settlement for preliminary
2 approval by the court also are discussed in 4 *Newberg on Class Actions*:

3 When the parties to an action reach a monetary settlement, they will usually
4 prepare and execute a joint stipulation of settlement, which is submitted to the
5 court for preliminary approval. The stipulation should set forth the central terms
6 of the agreement, including but not limited to, the amount of settlement, form of
payment, manner of determining the effective date of settlement and any
recapture clause.

7 *Id.* § 11.24.

8 Here, the Parties have reached such an agreement and have submitted to this Court in
9 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
10 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties,
11 which include, among other things, the method for calculating the Class Members' individual
12 portions of the Gross Settlement Amount.

13 **A. Proposed Class Definition**

14 The current settlement is being settled on behalf of "all individuals who are or were
15 employed as hourly, non-exempt employees by Defendants during the Class Period, who have
16 not signed Defendants' December 2020 Arbitration Agreement" (the "Class" or "Class
17 Members"). See Stipulation ¶ 5. The Class Period is defined as "February 3, 2017, through
18 the date the Court grants preliminary approval of this Settlement, subject to the escalator
19 provision set forth in Paragraph 47." See Stipulation ¶ 7. The escalator clause provides
20 Defendants the option of closing the end date of the Class Period on "either (ii)(a) October 8,
21 2022 (which is 60 days from the date of mediation), or (ii)(b) August 9, 2022, the date of
22 mediation," to the extent that the number of Class Workweeks exceeds those represented in
23 the Agreement. Stipulation ¶ 47.

24 Pursuant to the Stipulation, Defendants have represented that Class Members worked
25 approximately 36,112 workweeks during the Class Period. See Stipulation ¶ 47.

26 **B. Settlement Terms and Evaluation**

27 Courts presume the absence of fraud or collusion in the negotiation of settlement
28 unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir.

1 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682
2 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts
3 do not substitute their judgment for that of the proponents, particularly where, as here,
4 settlement has been reached with the participation of experienced counsel familiar with the
5 litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.
6 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp.
7 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979);
8 *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

9 While the recommendations of counsel proposing the settlement are not conclusive, the
10 Court can properly take them into account, particularly where, as here, they have been
11 involved in informal discovery and negotiations for some period of time, appear to be
12 competent, have experience with this type of litigation, and have exchanged substantial
13 evidence from the opposing party. *See Newberg on Class Actions*, *supra* § 11.47; *Nat'l Rural*
14 *Telecomms. Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length
15 negotiation process is preserved, however, a strong initial presumption of fairness attaches to
16 the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of
17 counsel, who are most closely acquainted with the facts of the underlying litigation”).

18 Here, both Plaintiff’s and Defendants’ counsel have a great deal of experience in wage
19 and hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a
20 number of wage and hour class actions and have extensive litigation experience. Declaration
21 of B. James Fitzpatrick (“Fitzpatrick Decl.”) ¶ 4; Declaration of Laura L. Franklin (“Franklin
22 Decl.”) ¶ 3; Declaration of Larry W. Lee (“Lee Decl.”) ¶ 3; Gavron Decl. ¶ 21. Each side has
23 apprised the other of their respective factual contentions, legal theories, and defenses, resulting
24 in negotiations taking place between the Parties. Gavron Decl. ¶ 22.

25 Based on the class data provided by Defendants, Plaintiff estimated that Defendants
26 would face potential maximum liability of up to approximately \$10 million for Plaintiff’s class
27 claims, if Plaintiff was successful in all of her claims and obtained certification. Gavron Decl.
28 ¶ 9. Plaintiff calculated this amount based on the following approximate breakdowns for each

class claim:

- \$1.7 million for meal period violations (50% violation rate (~180,000 shifts x .5) x \$19.00 (average rate of pay));
- \$1.7 million for rest period violations (50% violation rate (~180,000 shifts x .5) x \$19.00 (average rate of pay));
- \$850,000 for unpaid wages, including minimum, overtime, and prevailing (~180,000 shifts x ((.1 (6 minutes) x \$19.00) + (.1 (6 minutes) x \$28.50));
- \$950,000 for Labor Code § 226(e) penalties (~9,663 pay periods x \$100 penalty);
- \$180,000 for unreimbursed business expenses (36,122 workweeks x \$5.00); and
- \$4.5 million in waiting time penalties (~1,000 former employees x (30 days x 8 hours x \$19.00)).

See Gavron Decl. ¶ 9.

Each of Plaintiff’s putative class claims faced unique challenges from Defendants. For one, Defendants would have argued that the waiting time penalties, which comprise a significant portion of the estimated damages, are subject to a complete defense. Defendants would have argued that a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiff and the class members considering Defendants’ legally compliant policies. If Defendants were successful on their good faith defense, the Court may not have awarded waiting time penalties at all, reducing the exposure by \$4.5 million. *Hill v. Walmart, Inc.*, 32 F. 4th 811 (9th Cir. 2022) (upholding good faith defense because defendant reasonably believed wages were not due and owing at time of separation of employment); *Chavez v. Converse, Inc.*, 2020 WL 1233919, at *1 (N.D. Cal. 2020) (holding that an employer’s failure to pay is not willful where there is uncertainty in the law or a “good faith mistaken belief that wages are not owed”).

Similarly, on Plaintiff’s wage statement claim, Plaintiff would face the additional burden of demonstrating that any alleged omission of information from the wage statements was a “knowing and intentional failure” by Defendants to comply with Labor Code § 226(a). See *Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct was not “knowing and

1 intentional”); Defendant also would have argued that penalties under Section 226 are subject
2 to a similar “good faith” defense as articulated above in the context of Plaintiffs’ claims for
3 waiting time penalties. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at
4 *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in
5 violation of Section 226, any violation is not knowing and intentional.”); *Wright v. Adventures*
6 *Rolling Cross Country, Inc.*, 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same);
7 *Ricaldai v. U.S. Investigations Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012)
8 (same); *Dalton v. Lee Publ’ns, Inc.*, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011)
9 (same).

10 Defendants also would have argued that Plaintiff could not demonstrate an underlying
11 violation of the Labor Code to support her meal and rest period claims. *See Brinker Rest.*
12 *Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand,
13 the employer is not obligated to police meal breaks and ensure no work thereafter is
14 performed.”). Defendants would have argued that their legally compliant written policies
15 satisfied *Brinker* and that any failure to take a legally compliant meal or rest period by
16 employees was the result of individual choice and thus not capable of class resolution.

17 Defendants also contended that they paid employees all minimum, overtime, and
18 prevailing wages. Defendants argued that any work performed off the clock was unauthorized
19 and not subject to a uniform policy and thus would not be susceptible of class resolution.
20 Similarly, Defendants could have argued that because not all of their projects were subject to a
21 prevailing wage requirement, Plaintiff’s claims were not suitable to the class vehicle.

22 On Plaintiff’s reimbursement claim, Defendants argued that employees were not
23 required to use personal cell phones to communicate for purposes of employment. While
24 Plaintiff contended she was required to use her phone, Defendants would have argued that any
25 decision to use her cell phone for work purposes of voluntary and/or unique to her.

26 Plaintiff calculated Defendants’ potential maximum exposure under the PAGA as
27 approximately \$950,000 (9,663 pay periods x \$100 penalty). This assumes complete victory
28 at trial and that the Court would award the maximum penalty of \$100 per pay period, which is

1 far from certain as discussed above. Further, while the PAGA provides for a heightened
2 penalty for a “subsequent violation,” courts are hesitant to award the heightened penalty absent
3 a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209
4 (2008); accord *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009
5 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) (“[u]nder California law, courts have held that
6 employers are not subject to heightened penalties for subsequent violations unless and until a
7 court or commissioner notifies the employer that it is in violation of the Labor Code”); see
8 also *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
9 penalty unless prior citation or court ruling).

10 Even assuming Plaintiff ultimately prevailed on her PAGA claims, the Court still has
11 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can
12 decline to award PAGA penalties where “if, based on the facts and circumstances of the
13 particular case, to do otherwise, would result in an award that is unjust, arbitrary and
14 oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
15 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on
16 his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by
17 90%, citing the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon
18 review, the Court of Appeal found such reduction to be proper. *Id.* at p. 539. Thus, even if
19 Plaintiff was to successfully prove her claims at trial, there is a possibility that the Court may
20 only award a small percentage of PAGA penalties, as the Court has discretion to do so.

21 While Plaintiff believes in the merits of the alleged claims, Plaintiff is aware that
22 Defendants may raise some of the defenses to the claims addressed above that could persuade
23 the Court to reduce the PAGA penalties. Gavron Decl. ¶ 17. The Gross Settlement Amount
24 was premised with this risk in mind, associated with the possibility of the Court significantly
25 reducing Plaintiff’s PAGA penalties, along with other attendant risks. *Id.*

26 Although Plaintiff believes that the class can be certified, Plaintiff also believes in the
27 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
28 involved in not prevailing on one or more of the causes of action or theories alleged in the

operative Complaint, the possibility of non-certification, and the potential for appeals. Gavron Decl. ¶ 18. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, the costs of pursuing such litigation, and the risks associated with the Court's discretion to reduce PAGA penalties. The settlement is the result of extensive arm's-length negotiations between the Parties and their counsel and was facilitated by an experienced and neutral mediator. Gavron Decl. ¶ 5.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Pendency of Class Action ("Notice"), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement. *See* Notice, attached as **Exhibit A** to the Stipulation. Moreover, as set forth in the Notice, Class Members are advised of their right to attend the final approval hearing and/or object to any of the terms contained in the Stipulation. *Id.*

1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive

The Stipulation provides for One Million Dollars (\$1,000,000.00) as the total Gross Settlement Amount. *See* Stipulation ¶ 46. The Net Settlement Amount (calculated after deduction of Attorneys' Fees (up to \$333,333.33), Attorneys' Costs (up to \$25,000.00), Class Representative Enhancement Award (up to \$5,000.00), PAGA Award (\$75,000.00), and Settlement Administration Costs (up to \$15,000.00)) is estimated to be approximately \$546,666.67. *See* Stipulation ¶¶ 3, 4, 14, 16, 20, 23, 32. Each Class Member that does not

1 opt-out of the Settlement will be awarded a portion of the Net Settlement Amount on a pro-
2 rata basis, based upon the total number of workweeks he or she worked during the Class
3 Period. *See* Stipulation ¶ 49.a.

4 Based thereon, on a raw average, each Settlement Class Member potentially may
5 recover approximately \$399.32. Gavron Decl. ¶ 8. The amount actually paid to each
6 Settlement Class Member will increase or decrease depending on the actual number of
7 workweeks he or she worked during the Class Period. Finally, funds from any checks that
8 have not been cashed within 180 days of issuance shall be paid to the designated *cy pres*
9 recipient: Watsonville Law Center, a non-profit organization that provides free legal services
10 to low-income individuals. *See* Stipulation ¶ 49.e. Class counsel does not have any conflicts
11 of interest with this designated recipient. Gavron Decl. ¶ 34; Lee Decl. ¶ 10; Fitzpatrick Decl.
12 ¶ 6; Franklin Decl. ¶ 6.

13 2. The Calculation of the Individual PAGA Payments

14 Consistent with the requirements of PAGA, the Stipulation requires that twenty-five
15 percent of the PAGA Award (the “Total Aggrieved Employee Payment”) will be paid to
16 Aggrieved Employees. Stipulation ¶ 34. Aggrieved Employees are defined as “all individuals
17 who are or were employed as hourly, non-exempt employees by Defendants during the PAGA
18 Period, who have not signed Defendants’ December 2020 Arbitration Agreement.” *Id.* ¶ 2.
19 The amount allocated to each Aggrieved Employee will be based on the number of pay
20 periods he or she worked during the PAGA Period. *Id.* ¶ 54.a. All Individual PAGA
21 Payments shall be allocated 100% as penalties and interest. *Id.* ¶ 54.b.

22 Further, Aggrieved Employees may not opt-out of or object to the PAGA portion of the
23 settlement. Stipulation ¶ 63. In exchange for the Individual PAGA Payment, Aggrieved
24 Employees will release:

25 all potential and/or actual claims that were or may have been raised in the Action
26 or that are reasonably related to the factual allegations in the Action, including all
27 claims for civil penalties under Labor Code §§ 2698, 2699, 2699.3, and 2699.5 for
28 any alleged violations of Labor Code §§ 201, 202, 203, 204, 207, 208, 209, 210,
216, 218, 218.5, 218.6, 223, 225.5, 226, 226.3, 226.7, 246, 510, 512, 558, 1770, *et*
seq., 1174, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, and 2802, California
Industrial Welfare Commission Wage Orders, Cal. Code Regs., tit. 8, § 11040, *et*

1 *seq.*, and all meal or rest period claims, meal or rest period premium payment
2 claims, claims for unpaid wages, overtime, minimum wages, including but not
3 limited to claims for failing to properly calculate the regular rate of pay for
4 purposes of paying overtime, sick pay, and meal and rest period premium
5 payments, failing to pay all minimum and overtime wages for hours worked,
6 failure to pay all wages owed upon separation of employment, and failing to
7 provide accurate itemized wage statements and complete payments of wages at
separation or termination, failure to provide accurate and itemized wage
statements, claims for waiting time penalties, interest, fees, costs, and any other
claims that may have been raised in the PAGA Action or that reasonably relate to
the allegations therein during the PAGA Period.

8 *Id.* ¶ 28.

9 **3. Whether, and Under What Circumstances, Amounts Available for**
10 **Payment in Settlement Might Not Be Paid to Class Members or Might**
11 **Revert to the Defendants**

12 None of the settlement funds will revert to Defendants. *See* Stipulation ¶ 46.

13 **4. Scope of the Release of Class Members' Claims**

14 As a condition of participating in this class action settlement, Settlement Class
15 Members shall release:

16 all potential and/or actual claims that were or may have been raised in the Action
17 or that are reasonably related to the factual allegations in the Action, including
18 claims under Labor Code §§ 201, 202, 203, 204, 207, 208, 209, 210, 216, 218,
19 218.5, 218.6, 223, 225.5, 226, 226.3, 226.7, 246, 510, 512, 558, 1770, *et seq.*,
20 1174, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, 2802, 2698, 2699, 2699.3,
21 and 2699.5, California Industrial Welfare Commission Wage Orders, Cal. Code
22 Regs., tit. 8, § 11040, *et seq.*, California Business and Professions Code § 17200,
23 *et seq.*, and all meal or rest period claims, meal or rest period premium payment
24 claims, claims for unpaid wages, overtime, minimum wages, including but not
25 limited to claims for failing to properly calculate the regular rate of pay for
26 purposes of paying overtime, sick pay, and meal and rest period premium
payments, failing to pay all minimum and overtime wages for hours worked,
failure to pay all wages owed upon separation of employment, and failing to
provide accurate itemized wage statements and complete payments of wages at
separation or termination, failure to provide accurate and itemized wage
statements, unfair competition based on the foregoing, unlawful business
practices based on the foregoing, fraudulent business practices based on the
foregoing, claims for waiting time penalties, civil penalties based on the
foregoing, interest, fees, costs, and any other claims that may have been raised in
the Action or that reasonably relate to the allegations therein during the Class
Period.

27 *See* Stipulation ¶¶ 29, 69. The release is limited to claims as pled in the Action.
28

1 **5. Tax Treatment of Settlement Amounts**

2 The Parties have agreed that thirty-three percent (33%) of the Individual Settlement
3 Payments to Class Members shall be classified as wages and subject to required withholdings
4 and deductions for payments. Stipulation ¶ 49.c. The remaining sixty-seven percent (67%) of
5 the Individual Settlement Payments shall be classified as penalties and interest. *Id.*

6 **6. Affirmative Obligations to be Undertaken by Class Members or Class
7 Counsel and the Reasons for Any Such Obligations**

8 As stated above, Class Members do not need to do anything should they wish to
9 receive their share of the settlement funds. Class Members will not be required to make a
10 submission to participate in the settlement. This substantially decreases the amount of burden
11 each Class Member must bear in order to receive their settlement payment. If a Class Member
12 does not wish to take part in this settlement and be bound by the release, the Class Member
13 must submit a request for exclusion. *See* Stipulation ¶¶ 62-63.

14 **C. Notice to Class Members**

15 Should the Court grant the instant motion, Defendants will provide the Settlement
16 Administrator with a list containing each Class Member's name, last known address, Social
17 Security Number, number of Class Workweeks worked during the Class Period, and number
18 of PAGA Workweeks worked during the PAGA Period ("Class Member List") within fourteen
19 (14) calendar days of preliminary approval. Stipulation ¶ 57. Upon receipt of the information
20 and prior to mailing the Notice of Proposed Settlement to Class Members, the Settlement
21 Administrator shall perform a search based on the National Change of Address Database for
22 information to update and correct for any known or identifiable address changes. Stipulation ¶
23 59. Within ten (10) calendar days of receipt of the Class Member List from Defendants, the
24 Settlement Administrator will mail the Notice out to Settlement Class Members. *Id.* Any
25 Notice returned to the Settlement Administrator as non-deliverable on or before the opt-out
26 deadline shall be sent via regular first-class U.S. mail to the forwarding address affixed
27 thereto. *Id.* If no forwarding address is provided, the Settlement Administrator shall perform
28 an advanced skip trace to locate the most current address and resend the Notice within five (5)
 calendar days. *Id.* As set forth in the Notice, Class Members will be allowed to opt out of the

1 settlement by a certain deadline, or object to the settlement. Stipulation, Ex. A.

2 **D. Typicality and Adequacy of Representation**

3 **1. Class Representative's Claims are Typical of the Class**

4 The commonality requirement is met when there are questions of law and fact common
5 to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of
6 shared legal issues with divergent legal factual predicates is sufficient, as is a common core of
7 salient facts couple with disparate legal remedies within the class”). Commonality requires
8 only that some common legal or factual questions exist; the plaintiffs need not show that all
9 issues in the litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462,
10 473 (1981). Defendant’s conduct is central to the commonality inquiry. *See City of San Jose*
11 *v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-
12 13 (1971). Where the employer’s conduct is uniformly directed at a class of employees, as it
13 is here, the class wide impact of the defendant’s policies satisfies the commonality
14 requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

15 Plaintiff alleges that Defendants, as a matter of their corporate policy, practice, or
16 procedure violated the Labor Code by failing to pay for all hours worked, including minimum
17 and overtime wages, pay the prevailing rate of wages for all public works, pay premiums for
18 missed meal and rest periods, pay all earned wages when due and upon separation of
19 employment, provide off-duty meal and rest breaks, reimburse work-related expenses, provide
20 accurate wage statements, and keep accurate records. Declaration of Karina Mosqueda
21 (“Mosqueda Decl.”) ¶ 3. Plaintiff contends that she was subjected to the same policy and
22 practice as other Class Members and that her claims are typical to those of the Class.

23 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
24 issues been raised or presented. Mosqueda Decl. ¶ 9. Plaintiff has taken all necessary steps to
25 represent the interests of the Class, and by providing information and documents to Plaintiff’s
26 counsel. *Id.* ¶ 10. For such reasons, Plaintiff has adequately represented the Class Members
27 and will continue to do so.

28 //

1 **2. Class Counsel Have Adequately Represented the Class and Have**
2 **Experience with Wage and Hour Class Actions**

3 From the inception of the case, Class Counsel have zealously represented the interests
4 of the class. The settlement was obtained for the benefit of the Class, as opposed to the
5 individual Class Representative. Further, Class Counsel have been approved as class counsel
6 on a number of prior cases, have litigated numerous other class action cases, and are
7 competent to represent the class. Fitzpatrick Decl. ¶ 4; Franklin Decl. ¶ 3; Lee Decl. ¶ 7-9;
8 Gavron Decl. ¶¶ 26-32.

9 **E. Costs and Fees**

10 **1. Attorneys' Fees and Costs**

11 California state and federal courts have recognized that an appropriate method for
12 determining award of attorneys' fees is based on a percentage of the total value of benefits to
13 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
14 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
15 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose
16 of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation
17 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
18 entire burden alone." *Vincent*, 557 F.2d at 769.

19 The Common Fund doctrine is predicated on the principle of preventing unjust
20 enrichment. When a litigant's efforts create or preserve a fund from which others derive
21 benefits, she may require the passive beneficiaries to compensate those who created the fund.
22 Both California state and federal courts have embraced this doctrine. *Serrano*, 20 Cal. 3d at
23 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.
24 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine
25 has been applied "consistently in California when an action brought by one party creates a
26 fund in which other persons are entitled to share." The reasons for applying the common fund
27 doctrine include: "fairness to the successful litigant, who might otherwise receive no benefit
28 because his recovery might be consumed by the expenses; correlative prevention of an unfair

1 advantage to the others who are entitled to share in the fund and who should bear their share of
2 the burden of its recovery; encouragement of the attorney for the successful litigant who will
3 be more willing to undertake and diligently prosecute proper litigation for the protection or
4 recovery of the fund if he is assured that he will be properly and directly compensated should
5 his efforts be successful.” *Id.*

6 Indeed, most recently, the California Supreme Court has also now held that the award
7 of attorneys’ fees in common fund wage and hour class action settlements should start with the
8 percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“We join the
9 overwhelming majority of federal and state courts in holding that when class action litigation
10 establishes a monetary fund for the benefit of the class members, and the trial court in its
11 equitable powers awards class counsel a fee out of that fund, the court may determine the
12 amount of a reasonable fee by choosing an appropriate percentage of the fund created”).

13 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
14 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
15 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
16 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
17 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

18 The Parties have agreed to a payment of a maximum of one-third of the Gross
19 Settlement Amount, or \$333,333.33, for payment to Class Counsel as attorneys’ fees.
20 Stipulation ¶ 52. The Parties have agreed to a payment of the foregoing attorneys’ fees and,
21 thus, this payment should be presumed to be fair. Further, the parties have agreed to
22 reimbursement of Class Counsel’s litigation costs up to \$25,000.00. *Id.* Class Counsel have,
23 at their own risk, expended costs, for example, to file this instant action, effectuate service of
24 process, pay mediation fees, and pay other litigation-related costs. Based on the foregoing, the
25 Court should preliminarily approve the attorneys’ fees and costs being requested by the
26 Parties.

27 2. Proposed Payment to the Class Representative

28 Class Representative Karina Mosqueda requests an enhancement of \$5,000.00.

1 Stipulation ¶ 53. The Class Representative met and conferred with Class Counsel on a number
2 of occasions to discuss the case, provided documents and information to Class Counsel, and
3 reviewed the Settlement Agreement. As part of her duties as the Class Representative,
4 Plaintiff provided invaluable information, evidence, and documents that resulted in this
5 settlement. Mosqueda Decl. ¶ 10. In addition to the invaluable services that Plaintiff
6 provided, she also took a significant risk, both professionally and monetarily, in acting as the
7 Class Representative and seeking benefits on behalf of the Class. Because the claims alleged
8 by the Class Representative involved the payment of costs to the prevailing party, Plaintiff
9 could have possibly faced paying the costs of Defendants, had she not prevailed in this action.

10 Furthermore, given that future employers are much less likely to hire individuals who
11 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
12 prejudice in the future from other potential employers. Plaintiff took this risk upon herself and
13 the whole class benefited from these risks taken by Plaintiff. Class Members did not have to
14 file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did
15 they have to face the potential for retaliation and not getting future employment had they filed
16 a public lawsuit.

17 **3. Settlement Administration Costs**

18 The Parties have agreed to an estimated payment of \$15,000.00 to the Settlement
19 Administrator, Phoenix Settlement Administrators, to send notices and administer this
20 settlement, which shall be paid out of the Gross Settlement Amount. Stipulation ¶ 51.
21 Phoenix Settlement Administrators is a well-recognized class action settlement administrator.
22 The Parties believe that the administration fee is reasonable and should be approved.

23 **III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR 24 PRELIMINARY APPROVAL & NOTICE TO LWDA**

25 Here, the proposed settlement is fair, adequate, and reasonable. Plaintiff provided
26 notice of the proposed settlement to the LWDA in conjunction with this filing. Gavron Decl. ¶
27 35.

28 It will result in both substantial monetary benefits to Class Members; it is non-
collusive; and it was achieved as the result of informed, extensive, and arm's length

1 negotiations conducted by counsel for the respective parties who are experienced in wage and
2 hour class action litigation. For the foregoing reasons, Plaintiff respectfully requests that the
3 Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve
4 and authorize mailing of the proposed Class Notice, and set a date for a final approval hearing.
5

6 Dated: January 19, 2023

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

7
8 By: /s/ Max W. Gavron

9 B. James Fitzpatrick

Larry W. Lee

10 Max W. Gavron

Attorneys for Plaintiff,

11 KARINA MOSQUEDA, on behalf of

12 herself and all similarly situated employees
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1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On January 19, 2023, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
12 **APPROVAL OF CLASS ACTION SETTLEMENT; AND MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT**
- 14 **2. DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
- 17 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
18 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 19 **4. DECLARATION OF LAURA L. FRANKLIN IN SUPPORT OF PLAINTIFF'S**
20 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
21 **SETTLEMENT**
- 22 **5. DECLARATION OF B. JAMES FITZPATRICK IN SUPPORT OF PLAINTIFF'S**
23 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
24 **SETTLEMENT**
- 25 **6. DECLARATION OF KARINA MOSQUEDA IN SUPPORT OF PLAINTIFF'S**
26 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
27 **SETTLEMENT**
- 28 **7. [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS**
ACTION SETTLEMENT AND SETTING A SETTLEMENT FAIRNESS
HEARING

on the interested parties in this action as follows:

Brian D. Bertossa
Alexis M. Gabrielson

1 Cook Brown, LLP
2 2407 J Street, 2nd Floor
3 Sacramento, California 95816
4 *Attorneys for Defendants Sansei Gardens, Inc. and New Image Landscape Company*

5 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
6 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
7 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
8 the above-entitled case. The service transmission was reported as complete and a copy of the
9 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
10 in this office.

11 I declare under penalty of perjury under the laws of the State of California that the
12 above is true and correct. Executed on January 19, 2023, at Los Angeles, California.

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Erika Mejia