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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KARIM BENZAKOUR, individually, on
behalf of all others similarly situated,

Plaintiff,

v.

F45 TRAINING INCORPORATED, a
domestic corporation; and DOES 1 through
50, inclusive,

Defendant.

Case No.: 20STCV49535

[The Honorable Laura A. Seigle, Dept. 17]

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

Date: February 7, 2025

Time: 9:00 a.m.

Dept.: SS-17

Complaint Filed: December 29, 2020

Trial Date: None Set

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 7, 2025, at 9:00 AM in Department 17 of the
3 above-entitled court, Plaintiff Karim Benzakour (“Plaintiff”) will, and hereby does, move the
4 Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court
5 for an order:

6 1. Granting final approval of the settlement in the case pursuant to the Class Action and
7 PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed
8 Declaration of Frank H. Kim as Exhibit “1”;

9 2. Affirming Kim Legal APC and Helen Kim Law, APC as Class Counsel;

10 3. Affirming Karim Benzakour as Class Representative and awarding an enhancement
11 award of \$10,000.00;

12 4. Awarding Phoenix Settlement Administrators claims administration fees of \$8,950.00
13 for its services as Administrator; and,

14 5. Entering judgment.

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

18 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
19 and Authorities, the Declarations of Frank H. Kim, Helen U. Kim, Karim Benzakour, Lluvia Islas,
20 all other papers and records on file in this action, and on such oral and documentary evidence as
21 may be presented at the hearing on this Motion.

22 DATED: January 15, 2025

KIM LEGAL, APC

23
24 By: /s/ Frank Kim

25 Frank Kim
26 Attorneys for Plaintiff Karim Benzakour and
27 the Proposed Class
28

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	FACTUAL BACKGROUND.....	6
A.	Litigation Overview and Procedural History	6
B.	Preliminary Approval.....	8
III.	THE PRELIMINARILY APPROVED SETTLEMENT	8
A.	The Settlement Class	8
B.	The Aggrieved Employees	8
C.	Gross Settlement Amount.....	9
D.	Individual Settlement Payments.....	10
E.	Class Notice	10
F.	Check Mailed Settlement – No Reversion	11
IV.	THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT	11
A.	The Settlement is Entitled to a Presumption of Fairness.....	11
B.	The Court Should Approve This Class Action Settlement Because it Satisfies Each of the <i>Kullar</i> Factors	12
C.	The Strength of Plaintiff’s Case	13
a.	The Risks Associated with the Misclassification Theory	13
b.	The Risks Associated with Unpaid Wages/Overtime Claim	14
c.	The Risks Associated with the Meal and Rest Break Claims	15
d.	The Risks Associated with the Wage Statement Claim.....	16
e.	The Risks Associated with the Waiting Time Penalty Claim	17
f.	The Risks Associated with the PAGA Claim	18
D.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	18
E.	The Risk Associated With a Potential <i>Pick-Up Stix</i> Campaign	19
F.	The Risk of Maintaining Class Action Status through Trial	19
G.	The Amount Offered in Settlement	19
a.	Plaintiff’s Assessment of Defendant’s Maximum Exposure.....	19
H.	The Experience and Views of Counsel	21
I.	The PAGA Allocation is Reasonable	21
J.	The Class Payment Allocation Is Fair and Reasonable.....	22

V.	THE SERVICE AWARD TO THE NAMED PLAINTIFF	22
VI.	SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY.	23
VII.	CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 7	17
Carrington v. Starbucks Corporation (2018) 30 Cal.App.5th 504, 529	18
Chindarah v. Pick Up Stix, Inc. (2009), 171 Cal.App.4th 796	19
Diaz v. Grill Concepts Services, Inc. (2018) 23 Cal.App.5th 859	17
Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801	11, 12
Duran v. U.S. Bank National Assn., 59 Cal.4th 1, 31 (2014)	16
Glass v. UBS Financial Services, Inc., Case No. C-06-4068 MMC, 2007 WL 227862,	23
Gonzalez v. San Gabriel Transit, Inc. (2019) 40 Cal.App.5th 1131, 1157	13
Helix Energy Solutions Group, Inc. v. Hewitt (2023) 598 U.S. 39.....	15
Hill v. Walmart Inc., 32 F.4th 811 (9th Cir. 2022).....	17
Ingram v. The Coca-Cola Company, 200 F.R.D. 685, 694 (N.D. Ga 2001)	22
Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 128	12
Mamika v. Barca (1998) 68 Cal.App.4th 487, 492.).....	17
Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 76.....	21, 22
Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles (2010) 186 Cal. App. 4th 399, 409	13

Naranjo v. Spectrum Security Services, Inc. (Cal., May 6, 2024) 2024 Daily Journal D.A.R. 3799.....	17, 18
O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135.....	21
Officers for Justice v. Civil Service Comm'n (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.....	22
S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 350.....	13
Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995)	22, 23
Washington v. Joe's Crab Shack (N.D. Cal. 2010) 271 F.R.D. 629, 641.....	15

STATUTES

Cal. Code Regs. § 11120.....	15
California Assembly Bill 5	13
California Code of Civil Procedure § 1781(f)	11
Code of Civil Procedure § 382.....	11
Labor Code § 203.....	17
Labor Code § 204.....	17
Labor Code § 226.....	17
Labor Code § 226.7(b)	15
Labor Code § 226.8.....	14, 21
Labor Code § 226(a)(2)	16
Labor Code § 226(a)(9)	16
Labor Code § 2699(e)(2)	18
Labor Code § 515(d)(2)	15
Labor Code 210.....	17
Labor Code section 512	15
Wage Order No. 12-2001, subd. 7	14

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Karim Benzakour (“Plaintiff”) submits this Motion for Final Approval of Class
4 Settlement and requests that the Court:

5 1. Grant final approval of the settlement in this case pursuant to the Class Action and PAGA
6 Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed
7 Declaration of Frank H. Kim as Exhibit “1”;

8 2. Award attorneys’ fees and costs as detailed in the concurrently-filed Motion for
9 Attorneys’ Fees and Costs;

10 3. Award Phoenix Settlement Administrators claims administration fees of \$8,950.00 for
11 its services as Administrator;

12 4. Affirm named Plaintiff Karim Benzakour as Class Representative and award a
13 cumulative Class Representative payment of \$10,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

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

17 Plaintiff provided services for Defendant F45 Training Incorporated (“Defendant”) as a
18 model for two separate photoshoots on June 6, 2019 and August 7, 2020. Plaintiff alleges that he,
19 and other Class Members, was misclassified by Defendant as independent contractors instead of
20 his true status as an employee (Declaration of Frank Kim (“Kim Decl.”) ¶ 4.)

21 On December 29, 2020, former plaintiff Kerttu Karon (“Ms. Karon”) filed a class action
22 complaint with the following claims: (1) Failure to Provide Meal Breaks; (2) Failure to Provide
23 Rest Breaks; (3) Waiting Time Penalties; (4) Failure to Provide Accurate Wage Statements; and
24 (5) Unlawful and Unfair Business Practices. (Kim Decl. ¶ 5.) On April 12, 2021, Ms. Karon filed
25 a substantially identical First Amended Complaint (“FAC”), except it added a cause of action for
26 penalties pursuant to California’s Private Attorneys General Act of 2004 (“PAGA”) (Kim Decl. ¶
27 6.)

1 On August 10, 2021, Ms. Karon filed a Second Amended Complaint to add Plaintiff Karim
2 Benzakour as an additional class plaintiff. On September 24, 2021, the Court granted Ms. Karon's
3 request to dismiss her class and PAGA claims without prejudice (Kim Decl. ¶ 7.) On October 20,
4 2021, Plaintiff Benzakour filed a Third Amended Complaint ("TAC") to add a claim under PAGA
5 and to remove Ms. Karon as a plaintiff. (Kim Decl. ¶ 8.) On November 19, 2021, Defendant filed
6 an Answer to the TAC. (Kim Decl. ¶ 9.)

7 **1. Motion for Summary Judgment**

8 After the matter was at issue, the Court on its own motion set a hearing for a Motion for
9 Summary Judgment on the limited issue of whether Plaintiff was properly classified as an
10 independent contractor, and provided for limited discovery on this issue. (Kim Decl. ¶ 10.)

11 From about September 2, 2021, the Parties engaged in formal discovery. Discovery was
12 protracted and contentious. (Kim Decl. ¶ 11.) Plaintiff participated in at least two informal
13 discovery conferences, filed a motion for compel further responses, and an *ex parte* application to
14 continue the motion deadline in order to obtain further discovery. (Kim Decl. ¶ 12.) Plaintiff served
15 multiple sets of written discovery and took the depositions of three witnesses and Defendant's
16 corporate representative. (Kim Decl. ¶ 13.)

17 On December 21, 2022, the Court denied Defendant's Motion for Summary Judgment.
18 (Kim Decl. ¶ 14.) Shortly thereafter, Plaintiff conducted class discovery on all independent
19 contractor models who provided services to Defendant during the limitations period. (Kim Decl.
20 ¶ 15.) In or around December 2023, the parties engaged in settlement discussions based on the
21 class discovery. (Kim Decl. ¶ 16.) On or about December 13, 2023, the parties reached a
22 settlement, as provided herein, to settle Plaintiff's claims on a class-wide and representative basis.
23 (Kim Decl. ¶ 17.)

24 Defendant denies any liability or wrongdoing of any kind associated with the claims
25 alleged in the lawsuit, disputes the damages and penalties claimed by Plaintiff, and further
26 contends that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class
27 or representative action treatment (Kim Decl. ¶ 18.) Defendant contends, among other things, that,
28

1 at all times, it has complied with the California Labor Code, and the Industrial Wage Commission
2 Orders (Kim Decl. ¶ 19.)

3 Based on their own independent investigation and evaluation, Class Counsel is of the
4 opinion that the Settlement Agreement with Defendant is fair, reasonable and adequate, and in the
5 best interest of the settlement classes in light of all known facts and circumstances, including the
6 risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and
7 representative action trial on the merits, and numerous potential appellate issues. (Kim Decl. ¶
8 20.) Although Defendant denies any liability, Defendant is agreeing to this Settlement Agreement
9 solely to avoid the cost of litigation (Kim Decl. ¶ 21.) Accordingly, the Parties and their counsel
10 desire to fully, finally, and forever settle, compromise and discharge all disputes and claims arising
11 from or relating to the Action on the terms set forth here (Kim Decl. ¶ 22.)

12 **B. Preliminary Approval**

13 On October 16, 2024, the Court issued an Order preliminarily approving the settlement in
14 this case, approving the proposed Class Notice, ordering that the Administrator send notice to the
15 Class, and setting a date for the Final Approval and Fairness Hearing (Kim Decl. ¶ 23.) On
16 November 18, 2024, the Court signed an amended order (“Amended Order”) based on the parties’
17 stipulation (Kim Decl. ¶24.) The Amended Order amends the original Order by correcting the
18 date of preliminary approval (the Order incorrectly states that preliminary approval was granted
19 on September 25, 2024, not October 16, 2024), as well as all corresponding deadlines, and nothing
20 else. (*Id.*)

21 **III. THE PRELIMINARILY APPROVED SETTLEMENT**

22 **A. The Settlement Class**

23 For purposes of the Settlement Agreement, the settlement class is defined as: “all Models
24 who were engaged for at least one Shoot during the Class Period” of December 29, 2016 through
25 the date the Settlement is preliminarily approved by the Court (“Settlement Class Members” or
26 “Class Members”). (Kim Decl. ¶ 25; Settlement Agreement, Ex. 1 at ¶¶ 1.5, 1.12.)

27 **B. The Aggrieved Employees**

28

For purposes of the Settlement Agreement, the definition of the PAGA settlement group is defined as: “any Model who was engaged for at least one Shoot during the PAGA Period” from December 15, 2019 through the date the Settlement is preliminarily approved by the Court (“Aggrieved Employee”) (Kim Decl. ¶ 26; Settlement Agreement, Ex. 1 at ¶¶ 1.4, 1.30.) Based on documents and other information produced by Defendant, there are approximately 153 Aggrieved Employees. (Kim Decl. ¶ 27; Ex. 1 at ¶ 9.)

C. Gross Settlement Amount

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$375,000.00, which includes the sum of the Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Litigation Expenses Payment, Class Representative Service Payment and the Administrator’s Expenses. (Kim Decl. ¶ 28; Ex. 1 at ¶ 1.21.)

The Net Settlement Amount is the Gross Settlement Amount, less the Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment,¹ Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. (Kim Decl. ¶ 29; Ex. 1 ¶ 1.28.)

Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to determine the Net Settlement Amount for distribution to the Class as follows:

Gross Settlement Amount	\$375,000.00
Less Class Representative Enhancement	\$10,000.00
Less Class Counsel Fees	\$123,750.00
Less Class Counsel’s Litigation Expenses	\$35,000.00
Less PAGA Payment	\$25,000.00
	<i>(\$18,750 to the LWDA and \$6,250 to remain in the Net Settlement Fund for PAGA Settlement Group)</i>
<u>Less Administrator Costs</u>	<u>\$8,950.00</u>

¹ The Class Counsel Fee Payment will be divided equally among Class Counsel (Kim Legal, APC and Helen Kim Law, APC) pursuant to a written agreement signed by Plaintiff as per Prof. Rules of Conduct, Rule 1.5.1. (Kim Decl. ¶ 29; Declaration of Karim Benzakour, (“Benzakour Decl.”) ¶ 5.)

1 **Net Settlement Amount**

\$172,300.00

2 **D. Individual Settlement Payments**

3 The Individual Class Payment amount of each Participating Class Member will be
4 calculated by dividing the Net Settlement Amount by the Shoot Services Total, and multiplying
5 the result by the number of Shoots at which the individual Participating Class Member provided
6 services during the Class Period. (Ex. 1 ¶ 3.2.4; *see also* Ex. A to the Settlement Agreement [Class
7 Notice], Ex. B [List of Shoots].)

8 The Individual PAGA Payment will also be paid on a pro-rata basis. The Individual PAGA
9 Payment will be calculated by dividing the amount of the Aggrieved Employees' 25% share of
10 PAGA Penalties (\$6,250.00) by the PAGA Shoot Services Total, and multiplying the result by the
11 number of Shoots at which the individual Aggrieved Employee provided services during the
12 PAGA Period. (See Ex. 1 at ¶ 3.2.5.)

13 The Individual Class Payment will be deemed payment for settlement of claims for
14 penalties and interest not subject to withholdings. (See Ex. 1 at ¶ 3.2.4.) All Individual Settlement
15 Payments to PAGA Settlement Group Members shall be allocated as 100% non-wage payment for
16 civil penalties. (Ex. 1 at ¶ 3.2.5.1.)

17 Based on these calculations, the average potential recovery is \$468.07 per Class Member.
18 (Declaration of Lluvia Islas, ("Islas Decl.") ¶ 14.)

19 **E. Class Notice**

20 The Court approved the proposed Class Notice, and directed the mailing of the Notice by
21 first-class mail to Class Members in accordance with the proposed implementation schedule. (Kim
22 Decl. ¶ 30.) The procedures for giving notice to the Class Members, as set forth in the Agreement
23 and Plaintiffs' Motion for Preliminary Approval and approved by the Court, have been fully and
24 properly carried out. (Islas Decl. ¶¶ 2-12.)

25 To date, Phoenix Settlement Administrators received zero (0) requests to be excluded
26 ("opt-outs") from the proposed Agreement and zero (0) objections. (Islas Decl. ¶¶ 10-12.) Plaintiff
27 will submit an updated declaration from Phoenix Settlement Administrators prior to the hearing.
28

1 **F. Check Mailed Settlement – No Reversion**

2 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
3 without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every
4 Class Member will receive a settlement check and Class Members do not need to submit a claim
5 in order to receive a settlement check. Any funds that remain uncashed after the void date shall
6 be turned over by the Administrator, with information for each Class Member who failed to timely
7 cash his/her settlement check, to the State of California Controller’s Office Unclaimed Property
8 Fund. (Ex. 1 at ¶ 4.4.3.)

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

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

16 **A. The Settlement is Entitled to a Presumption of Fairness**

17 “A presumption of fairness exists where: (1) the settlement is reached through arm’s length
18 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
19 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
20 small.” (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The proposed Settlement in the present case
21 meets all of the *Dunk* factors and is therefore entitled to a presumption of fairness.

22 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
23 arm’s-length negotiations overseen by an experienced mediator. All settlement discussions were
24 made by experienced and informed counsel, who believe that this settlement represents a favorable
25 resolution for the Class Members. (Kim Decl. ¶ 31.) The settlement negotiations have been, at all
26 times, adversarial and non-collusive, with the aid of a mediator, and no self-dealing or other type
27 of misconduct by either side has taken place. (Kim Decl. ¶ 32.)

1 Second, the Parties engaged in formal discovery that permitted Class Counsel to fairly
2 evaluate the strength of the case and the risks associated with ongoing litigation. Specifically,
3 Defendant produced over 87,000 pages of documents in class discovery, including all pay data for
4 the models who worked for Defendant as independent contractors and all applicable policy
5 documents. (Kim Decl. ¶ 33.) Receipt of appropriate discovery allowed Class Counsel to fairly
6 evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Kim Decl. ¶
7 34.)

8 Third, Class Counsel have significant experience in cases of this type, including several
9 years prosecuting wage, hour, and working condition violations. (Kim Decl. ¶ 35; Declaration of
10 Helen Kim, (“H. Kim Decl.”) ¶¶ 2-4.) Class Counsel is thus qualified to evaluate the class claims
11 and viability of the defenses. Class Counsel believes that the settlement is fair, reasonable,
12 adequate, and in the best interests of the class and that the average recovery for each Class Member
13 of approximately \$385.35 is substantial, given the risks inherent in litigation and the defenses
14 asserted and that most of the Class Members worked a single day for Defendant. (Kim Decl. ¶ 36.)

15 Finally, the fourth *Dunk* factor considers the percentage of objectors. To date, there were
16 zero (0) request to be excluded and no objectors. (Islas Decl. ¶¶ 10-12.)² As all of the *Dunk* factors
17 are satisfied, this settlement is entitled to a presumption of fairness.

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

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

27 ² Plaintiff will submit an updated and final declaration from Phoenix Administrators prior
28 to the hearing.

1 In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399,
2 409, the court clarified that a Kullar showing does not require the parties to submit the outer
3 reaches of maximum possible recovery without taking into account the actual risks of certification,
4 decertification, dispositive motions, and trial, so long as there is a record which allows “an
5 understanding of the amount that is in controversy and the realistic range of outcomes of the
6 litigation.” *Munoz*, 186 Cal. App. 4th at 409.

7 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
8 informal discovery before entering into meaningful settlement negotiations in this matter. (Kim
9 Decl. ¶37.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and
10 the risks associated with ongoing litigation. (*Id.*) Class Counsel is experienced in handling wage
11 and hour class actions and, after weighing all of the following factors, supports this Agreement.
12 (Kim Decl. ¶ 38; H. Kim Decl. ¶ 2-4.)

13 **C. The Strength of Plaintiff’s Case**

14 **a. The Risks Associated with the Misclassification Theory**

15 Plaintiff’s recovery for their misclassification claim faces significant risks. First, Plaintiff
16 must establish misclassification under two standards: the standard set forth in *Dynamex*
17 *Operations W. v. Superior Court* (2018) 4 Cal.5th 903 and codified in California Assembly Bill 5
18 (“AB 5”) (the “ABC test”), or the one set forth in *S.G. Borello & Sons, Inc. v. Department of*
19 *Industrial Relations* (1989) 48 Cal.3d 341, 350 (the “*Borello* multi-factor test”).

20 Since Plaintiff’s allegations arise from work that occurred in June 2019 and August 2020,
21 the ABC test would apply for Plaintiff’s claims for violations of the Wage Order, which includes
22 his claim for unpaid overtime, meal and rest breaks, and itemized wage statements. (Kim Decl. ¶
23 39.) (*Gonzalez v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, 1157; Wage Order No.
24 12-2001, subd. 7 (requiring employers provide “itemized statement[s]” to workers), subd. 11 and
25 12 (regulating meal breaks and rest breaks for covered workers). Meanwhile, Plaintiff’s claim for
26 waiting time penalties, which does not arise from the Wage Order, is governed by the *Borello*

1 common law employment test. The *Borello* test would also apply to Plaintiff's PAGA and UCL
2 claims to the extent they are derivative of the waiting time penalties claim.

3 The *Borello* multi-factor test is a more difficult test for Plaintiff than the ABC test, in large
4 part because it does not place the burden on the defendant to refute the presumption of an
5 employer-employee relationship and because no single factor controls. Accordingly, should the
6 Court determine that the *Borello* multi-factor test applies to Plaintiff and the Class, Plaintiff's
7 claims for misclassification would be subject to an even greater risk of failure.

8 There are specific risks to the Plaintiff's largest civil penalties claim under Labor Code §
9 226.8. Recovery of civil penalties under Labor Code section 226.8 depends on a finding that an
10 employer engaged in "willful" misclassification of employees as independent contractors. Thus,
11 the risks to Plaintiff's misclassification claim are twofold: first, there is a risk that the Court could
12 find that Defendant properly classified Plaintiff and the Class Members as independent contractors
13 and deny recovery on this basis. If the Court were to do so, Plaintiff would lose. Second, if the
14 Court found that Defendant did not *willfully* misclassify Plaintiffs and the Class Members, it would
15 eliminate the Plaintiff's largest monetary remedy.

16 The Court could also determine that Defendant willfully misclassified Plaintiff and the
17 class but did not engage in a pattern or practice of doing so. Plaintiff contends Defendant engaged
18 in a willful pattern and practice of misclassifying the Class Members. However, Plaintiff
19 recognizes the significant risks outlined above. Accounting for such risks required a significant
20 reduction in Plaintiff's initial demand. (Kim Decl. ¶ 40.)

21 **b. The Risks Associated with Unpaid Wages/Overtime Claim**

22 Even assuming *arguendo* the Court were to find that Plaintiff and the Class Members were
23 misclassified and legally employed by Defendant, there is a further risk that Plaintiff's recovery
24 for unpaid wages or overtime would be limited at best. In order to prevail, Plaintiff must establish
25 that his payment of \$250 and \$350 for his first and second day of work, respectively, each qualified
26 as a "fixed salary" under Labor Code § 515(d)(2), and therefore only accounts for payment for his
27 non-overtime hours, and that he should be paid separately for overtime hours. (Kim Decl. ¶ 41.)
28

(Cal. Lab. Code § 515(d)(2).) In opposition, Defendant would argue that Section 515(d)(2) applies only to “weekly” salaries, not a daily salary, that the term “salary” is not defined in the Labor Code or the Wage Orders, and that Plaintiff was not paid a salary under the recent Supreme Court case of *Helix Energy Solutions Group, Inc. v. Hewitt* (2023) 598 U.S. 39 (holding that a “daily rate” worker did not meet the “salary basis test” under the FSLA) (Kim Decl. ¶42.) If Defendant prevails on one of these arguments, Plaintiff’s entire claim for unpaid wages would fail. Accounting for such risks required a significant reduction in Plaintiff’s initial demand. (Kim Decl. ¶ 43.)

c. The Risks Associated with the Meal and Rest Break Claims

Employers must pay one hour at the employee’s “regular rate of compensation” as a penalty when they fail to provide a thirty-minute uninterrupted meal period as required by Labor Code section 512. (See Labor Code § 226.7(b).) They must also authorize and permit non-exempt employees covered by the wage orders to take a 10-minute rest break every four hours of work or major fraction thereof. (*Id.*; see also 8 Cal. Code Regs. § 11120.)

Plaintiff claims that Defendant improperly failed to pay him and the Settlement Class premium wages as a result of misclassifying them as independent contractors. (Kim Decl. ¶ 44.) Accordingly, success on these claims is contingent on the Court finding that Defendant misclassified Plaintiff and the Settlement Class and failed to authorize and permit meal and rest breaks.

Moreover, Defendant will contend that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. (Kim Decl. ¶ 45.) (*Brinker*, 53 Cal.4th at 1004.) So long as an employer provides employees with a “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal breaks and ensure no work thereafter is performed.” (*Id.* at 1040-41.) Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break.” (*Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641.)

1 There are also risks to Plaintiff’s rest period claim. Employers are not required to record
2 rest periods and such rest periods are paid. Thus, unlike meal periods, where there are often records
3 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
4 period or that the employer refused to authorize and permit one. Managing such claims at trial may
5 be exceedingly difficult. Plaintiff will depend on sample witness testimony and surveys to prove
6 the claims. (Kim Decl. ¶ 46.) While a victory with such evidence is certainly possible, relevant
7 caselaw makes such claims risky from a trial management and due process perspective. (*See Duran*
8 *v. U.S. Bank National Assn.*, 59 Cal.4th 1, 31 (2014) (explaining “[I]f sufficient common questions
9 exist to support class certification, it may be possible to manage individual issues through the use
10 of surveys and statistical sampling”).)

11 Risks to the both the meal and rest period claims arise from fact that Defendant engaged
12 the Class Members to perform modeling services at photo and video shoots (Kim Decl. ¶ 47.)
13 Unlike a workforce in a factory that are under the direct and constant supervision of their managers,
14 the Class Members spent a significant amount of time on their own while they waited for
15 instruction from Defendant (*Id.*) Defendant will argue that this freedom of movement and lack of
16 oversight will inhibit any claim that they prevented the Class Members from taking duty-free rest
17 and meal periods – to the extent that they were entitled to any such meal or rest periods (Kim Decl.
18 ¶ 48.)

19 **d. The Risks Associated with the Wage Statement Claim**

20 Labor Code § 226(a)(2) requires that every employer shall furnish each of his or her
21 employees an accurate itemized statement in writing showing total hours worked by the employee.
22 Labor Code § 226(a)(9) requires the wage statement to display all applicable hourly rates in effect
23 during the pay period and the corresponding number of hours worked at each hourly rate by the
24 employee.

25 Plaintiff acknowledged risk posed by Defendant’s argument that he was not misclassified
26 as an independent contractor under the ABC test, which would completely bar any recovery under
27 this claim. While Plaintiff believed his wage statement claim was relatively strong given that he
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1 did not receive any statement associated with his payment, there was still risk that a Court would
2 find no liability as to this issue.³ (Kim Decl. ¶ 49.)

3 **e. The Risks Associated with the Waiting Time Penalty Claim**

4 Under Labor Code § 203, if an employer fails to provide wages at the time of an employee's
5 termination or within 72 hours of resignation, then the employee's wages shall continue as a
6 penalty for up to 30 days. Section 203 reflects a public policy that favors the full and prompt
7 payment of earned wages. (*See Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7;
8 *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) Similarly, under Labor Code §§ 204 and 210,
9 an employee may seek a penalty for not being paid timely after the close of a payroll period.

10 Here, Plaintiff provided services as a model for two days on June 6, 2019 and August 7,
11 2020 and argues that he is owed waiting time penalties due to Defendant's failure to pay
12 appropriate overtime wages and meal period premiums. (*See Diaz v. Grill Concepts Services, Inc.*
13 (2018) 23 Cal.App.5th 859.) (Kim Decl. ¶ 50.)

14 In evaluating settlement, Plaintiff considered Defendant's argument that a good-faith belief
15 exception applies because they had a good faith belief (1) that Plaintiff was properly classified as
16 an independent contractor, (2) that Defendant was not an employer, and (3) that Defendant's
17 payment calculations did not result in underpayment. (Kim Decl. ¶ 51.) (*See, e.g., Hill v. Walmart*
18 *Inc.*, 32 F.4th 811 (9th Cir. 2022) (finding that a good faith dispute about whether a model was
19 properly classified as an independent contractor precluded waiting time penalties.) Significantly,
20 Plaintiff recognized that Defendant need not prevail on any of these defenses; rather, in order to
21 establish a good faith defense, Defendant only need to establish an objectively reasonable basis
22 for a defense based on the facts and law as it existed in November 2019 (Kim Decl. ¶ 52.) Thus,
23 even if Plaintiff were to establish that he had an employment relationship with Defendant, and
24 even if he were to establish the underlying wage violations as alleged in the TAC, Defendant could
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26 ³ Although neither party contemplated this risk at the time of settlement, there is additional
27 risk posed by *Naranjo v. Spectrum Security Services, Inc.* (Cal., May 6, 2024) 2024 Daily Journal
28 D.A.R. 3799, where the California Supreme Court recently upheld a "good faith" defense to a
wage statement claim under Labor Code § 226.

1 still avoid paying waiting time penalties. (Kim Decl. ¶ 52) (*Naranjo v. Spectrum Security Services,*
2 *Inc.* (Cal., May 6, 2024) 2024 Daily Journal D.A.R. 3799.) Since the waiting time penalties amount
3 to over 70% of class damages, Plaintiff believed that a significant discount on this claim was
4 reasonable given the attendant risks (Kim Decl. ¶ 53).

5 **f. The Risks Associated with the PAGA Claim**

6 Plaintiff is cognizant of risks associated with their PAGA claim and have therefore agreed
7 to discount this claim for multiple reasons (Kim Decl. ¶ 54). First, the aggrieved employees’
8 PAGA claims arise from the same violations as the foregoing class claims and bear the same risks
9 on the merits (Kim Decl. ¶ 55). Second, the Court has discretion to award less than the maximum
10 penalty, which Defendant argued would be appropriate considering the low amount of direct wage
11 damages, even if Plaintiff prevails (Kim Decl. ¶ 56). (*See* Labor Code § 2699(e)(2) [“a court may
12 award a lesser amount than the maximum civil penalty amount specified by this part if, based on
13 the facts and circumstances of the particular case, to do otherwise would result in an award that is
14 unjust, arbitrary and oppressive, or confiscatory”]; *Carrington v. Starbucks Corporation* (2018)
15 30 Cal.App.5th 504, 529 [affirming award of 10% of maximum PAGA penalty].) Finally, the
16 Settlement Class is compensated for these violations in the proposed Settlement Agreement, and
17 thus any PAGA recovery for these same violations would be duplicative. Thus, PAGA did not
18 make up a significant percentage of the overall potential liability compared to other claims. (Kim
19 Decl. ¶ 57.) As such, the Settlement Agreement’s contemplated PAGA payment of \$25,000 is
20 appropriate. (*Id.*)

21 **D. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

22 There is significant expense associated with the class certification process, which the
23 Parties can avoid by entering into the contemplated Settlement Agreement now. (Kim Decl. ¶ 58.)
24 If the Court did eventually certify a class, trial of a case involving approximately 369 Settlement
25 Class Members would require the retention of expensive expert witnesses, the accrual of extensive
26 litigation costs, and a significant time overlay by the Parties. (Kim Decl. ¶ 59.) Moreover, given
27 the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial
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1 would have resulted in a lengthy and costly appeal. (Kim Decl. ¶ 60.) An appeal would result in
2 further delay for the Settlement Class Members who are waiting for a resolution in this matter.
3 (*Id.*)

4 **E. The Risk Associated With a Potential *Pick-Up Stix* Campaign**

5 There is also a risk that Defendant could engage in an individual settlement campaign
6 pursuant to *Chindarah v. Pick Up Stix, Inc.* (2009), 171 Cal.App.4th 796. Given the financial strain
7 that Defendant's workers are no doubt experiencing due to the COVID-19 pandemic, there is a
8 significant risk that, if Defendant were to engage in such a campaign, many if not all of the models
9 would choose to accept Defendant's individual settlement offers. If this were to occur, Plaintiff
10 could be left without a sufficiently numerous class to represent a class action.

11 **F. The Risk of Maintaining Class Action Status through Trial**

12 This case has not yet been certified to be tried as a class action. (Kim Decl. ¶ 61.) While
13 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
14 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
15 decertification is always a possibility. (*Id.*) In attempting to certify a class, the Parties would need
16 to conduct multiple depositions regarding Defendant's policies. (*Id.*) There is a risk for both sides
17 as to what these depositions will reveal and whether they will support class certification to the
18 extent expected. (*Id.*)

19 **G. The Amount Offered in Settlement**

20 It was very difficult for the Parties to reach this Settlement of \$375,000.00. (Kim Decl. ¶
21 62.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Kim
22 Decl. ¶ 63.) The Parties arrived at it after extensive investigation and discovery, careful evaluation
23 of the law, risks, and all information substantiating the amount of penalties reasonably likely to be
24 awarded to the class were the trier of fact to find Defendant liable. (*Id.*)

25 **a. Plaintiff's Assessment of Defendant's Maximum Exposure**

26 Plaintiff assessed full value of the Meal Period claim and Rest Period claim, without any
27 discount, each at approximately \$13,837.50. (Kim Decl. ¶ 64.) Plaintiff used an hourly average
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1 rate of \$37.50 and assumed that the 369 Class Members worked at least a 5-hour shift. (Kim Decl.
2 ¶ 65.)

3 Plaintiff valued the Wage Statement Claim, without discount, at approximately
4 \$18,450.00. (Kim Decl. ¶ 66.) This is based on the fact that almost all the Class Members worked
5 one Workweek during the limitations period. (*Id.*)

6 Plaintiff valued the Waiting Time Claim, tied to the claims for unpaid wages, at
7 \$3,321,000.00. (Kim Decl. ¶ 67.) This was based on the full amount of waiting time penalties due
8 to Defendants' failure to pay premium wages. (*Id.*) Considering the derivate nature of Labor Code
9 section 203 and the disputes over willfulness, Plaintiff determined that accepting a steep discount
10 on this claim was appropriate. (Kim Decl. ¶ 68.)

11 Finally, Plaintiff calculated the value of the PAGA claim at \$61,200 for approximately 153
12 Aggrieved Employees, the majority of whom worked at one Shoot. (Kim Decl. ¶ 69.) With Labor
13 Code § 226.8, which provides for penalties from \$5,000 to \$15,000, the value of the PAGA claim
14 could increase from \$765,000.00 to \$2,295,000.00. However, Plaintiff will need to first establish
15 that Defendant's misclassification of the Aggrieved Employees was "willful," which is far from
16 certain. Regarding the PAGA claim as a whole, there is the additional risk that the penalty award
17 is discretionary in nature. (Kim Decl. ¶ 70.) The court could award the statutory maximum of one
18 hundred (\$100) dollars for the initial violation and two hundred (\$200) dollars thereafter or – in
19 theory – one cent per wage statement. (Kim Decl. ¶ 71.) While there is a dearth of available
20 authority, in Plaintiff's view, were they to succeed on any of the underlying Labor Code violations
21 (especially waiting time penalties), it is not likely that the Court would also award a large amount
22 of PAGA penalties on top of damages. (Kim Decl. ¶ 72.)

23 Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the
24 Settlement Class Members' claims was approximately \$4,179,487.50 to \$5,709,487.50. (Kim
25 Decl. ¶ 73.) However, if Defendant can establish that its failure to pay was not "willful" under the
26 law and that it had a good faith belief that the Settlement Class Members were not misclassified
27 as independent contractors, then there would be no recovery for waiting time penalties and
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penalties under Labor Code § 226.8, and the maximum potential value of all of Plaintiff's and the Settlement Class members' claims would be approximately \$93,487.50. As a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Fund of \$375,000.00 is fair and reasonable. (Kim Decl. ¶ 74.)

H. The Experience and Views of Counsel

Finally, counsel's experience and success in similar class actions also weigh in favor of preliminary approval. (See *Wershba*, *supra*, 91 Cal.App.4th at 245.) Class Counsel is very experienced in prosecuting complex employment litigation and have focused their practice on complex wage, hour, and working condition violations. (Kim Decl. ¶¶ 81-85; H. Kim Decl. ¶¶ 2-4.) Class Counsel is well versed in class action litigation and has diligently and aggressively pursued this action. (Kim Decl. ¶ 82.) Class Counsel currently serves as Class Counsel for multiple pending class action lawsuits throughout California. (Kim Decl. ¶ 82; H. Kim Decl. ¶4.) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Kim Decl. ¶ 82; H. Kim Decl. ¶ 2.)

I. The PAGA Allocation is Reasonable

The "trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76.) A PAGA allocation, even if a small portion of the gross settlement, could be reasonable if the settlement of the underlying wage and hour claims is robust and serves the deterrent purpose of the PAGA statute. (*O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135.)

Here, \$25,000 is allocated to PAGA Penalties. (Kim Decl. ¶ 75.) Given that Defendant will pay a total of \$375,000 as a result of the alleged violations, the class and PAGA settlement is a large disincentive for Defendant to engage in similar Labor Code violations in the future. (Kim Decl. ¶ 76.) And, because all Class Members will receive a Class Notice with contact information for Class Counsel, those employees will know to contact Class Counsel in the future if Defendant

1 attempts to engage in similar practices. (*Id.*) These factors – the payment of a large sum and
2 employee notice of violations and potential violations – serve to maximize enforcement of state
3 labor laws. (Kim Decl. ¶77.) Also, unlike in *Moniz*, here there is no unsubstantiated and
4 disproportionate allocation of civil penalties between different groups of employees. (Kim Decl ¶
5 78.) Each Aggrieved Employee will receive the same amount of civil penalty because each worked
6 one Shoot during the PAGA Period. (Kim Decl. ¶ 79.) Based on the foregoing, the PAGA
7 allocation and the individual PAGA payment satisfies policies underlying California’s wage and
8 hour laws (Kim Decl ¶ 80).

9 **J. The Class Payment Allocation Is Fair and Reasonable**

10 Plans of allocation are subject to the same standard of review as class action settlements;
11 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
12 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
13 compensates Settlement Class Members pro rata based on the Net Settlement Amount. The
14 payment to each member of the Settlement Class not excluding him/ herself will be determined by
15 dividing the Net Settlement Amount by Shoot Services Total, and multiplying the result by the
16 number of Shoots at which the individual Participating Class Members provided services during
17 the Class Period. This allocation distributes Settlement funds proportionally to each class
18 member’s damages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at
19 ¶ 3.2.4.)

20 **V. THE SERVICE AWARD TO THE NAMED PLAINTIFF**

21 Plaintiff’s Counsel request an enhancement of \$10,000.00 to the Class Representative
22 Karim Benzakour for his work on behalf of the Class. (Kim Decl. ¶ 117.) “Courts routinely approve
23 incentive awards to compensate named plaintiffs for the services they provide and the risks they
24 incurred during the course of the class action litigation.” (*Ingram v. The Coca-Cola Company*, 200
25 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations omitted); *see also Van Vranken*
26 *v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).) In *Coca-Cola*, the Court
27 approved service awards of \$300,000 to each named plaintiff in recognition of the services they
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provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

Mr. Benzakour is an adequate class representative because he has diligently, adequately and fairly represented the Class and has not placed his interests above any member of the Class. (Benzakour Decl. ¶7; Kim Decl. ¶ 118.)

Here, Class Counsel requests an enhancement for Mr. Benzakour’s valiant effort and time expended in this matter. Mr. Benzakour dedicated over 60 hours in this litigation, which includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work for Defendant; compiling relevant documents; working closely with Class Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the status of the case with Class Counsel; discussing the case via telephone with many Settlement Class Members; making himself available for two separate days of deposition testimony; producing over 1,700 documents in formal discovery; and responding promptly to Class Counsel’s communications regarding settlement. (Kim Decl. ¶ 119; Benzakour Decl. ¶¶ 10-14.)

Class Counsel considers this to be a fair and reasonable enhancement. (Kim Decl. ¶ 120.) The enhancement takes into consideration the time, effort, and expense incurred by Mr. Benzakour in coming forward to litigate this matter on behalf of all Class Members. (Kim Decl. ¶ 121.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees and costs in the event that Defendant prevailed at trial. (Kim Decl. ¶ 122.)

VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY

As indicated on the Proof of Service, Plaintiff’s Motion for Approval of Class Action Settlement will be concurrently uploaded to the Labor and Workforce Development Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of submission of

1 Plaintiff's Motion, and copy of the email from the LWDA confirming receipt is attached to the
2 Declaration Frank H. Kim as Exhibit 6. (Kim Decl. ¶ 126.)

3 **VII. CONCLUSION**

4 Plaintiff respectfully submits that the proposed Settlement Agreement is fair, adequate,
5 reasonable, and in the best interest of the Settlement Class Members. Therefore, the Parties
6 respectfully request that the Court (1) grant final approval of the Joint Stipulation of Class Action
7 Settlement and Release of Claims, and all of its terms; (2) award attorneys' fees and costs; (3)
8 award Phoenix Settlement Administrators claims administration fees of \$8,950.00; (4) award the
9 Class Representative an enhancement of \$10,000.00; and (5) enter judgment.

10 DATED: January 15, 2025

KIM LEGAL, APC

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12 By: /s/ Frank Kim
13 Frank Kim
14 Attorneys for Plaintiff Karim Benzakour and
the Proposed Class
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3435 Wilshire Blvd., Suite 2700, Los Angeles, CA 90010.

On January 16, 2025, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** as follows:

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing (“EF”) System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

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

Executed on January 16, 2025, at Los Angeles, California.

/s/ Frank Kim

Frank Kim