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

LETICIA RODRIGUEZ, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

MODESTO RESTAURANT GROUP, LLC, a
California limited liability corporation; and DOES
1 through 10, inclusive,

Defendants.

Case No. CV-21-000269

CLASS ACTION

*[Assigned for all purposes to the Honorable
Sonny S. Sandhu, Dept. 24]*

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

*[Filed with Memorandum of Points and
Authorities the Declaration of Justin F.
Marquez, and Proposed Order]*

PRELIMINARY APPROVAL HEARING

Date: March 8, 2022

Time: 8:30 a.m.

Dept: 24

1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

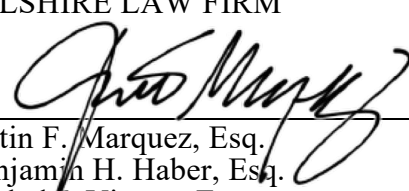
2 PLEASE TAKE NOTICE that on March 8, 2022 at 8:30 a.m., in Department 24 of the
3 Stanislaus Superior Court, City Towers Courthouse, at 801 10th Street, 4th Floor, Modesto,
4 California 95354, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769
5 *et seq.*, Plaintiff Leticia Rodriguez will move the Court for an Order granting preliminary
6 approval of the proposed class action settlement between Plaintiff and Defendant Modesto
7 Restaurant Group, LLC. Plaintiff further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Stipulation for Class Action Settlement;
- 9 2. Certifying a Class for settlement purposes;
- 10 3. Approving the Notice and Settlement Information Form (collectively, “Notice
11 Packet”) and the plan for distribution of the Notice Packet to Settlement Class
12 Members;
- 13 4. Appointing Plaintiff Leticia Rodriguez as Class Representative for settlement
14 purposes;
- 15 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
16 settlement purposes;
- 17 6. Appointing Phoenix Class Action Administration Solutions as the Settlement
18 Administrator; and
- 19 7. Scheduling a final approval hearing.

20 The motion will be based upon this notice, the attached memorandum of points and
21 authorities, the Declaration of Justin F. Marquez, filed concurrently herewith, the records and
22 files in this action, and any other further evidence or argument that the Court may properly
23 receive at or before the hearing.

24 Dated: February 10, 2022

WILSHIRE LAW FIRM

25
26 By: 

Justin F. Marquez, Esq.
Benjamin H. Haber, Esq.
Rachel J. Vinson, Esq.
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Leticia Rodriguez (“Plaintiff”) seeks preliminary approval of a proposed \$600,000 non-reversionary, wage and hour class action settlement with Defendant Modesto Restaurant Group, LLC (“Defendant”). The Settlement will provide substantial monetary payments to approximately 1,260 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Kelly Knight, over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class action and PAGA representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant manages Carl’s Jr. fast food locations in Modesto, California and the surrounding area. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (Declaration of Justin F. Marquez [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts and only paying for 8 hours of work for each workday, regardless of whether an employee worked overtime. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay overtime wages, failure to pay minimum and straight time wages, failure to provide meal periods, failure to authorize and permit rest periods, inaccurate wage statements, failure to pay

1 all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.*
2 at ¶ 3.)

3 On January 21, 2021, Plaintiff filed a putative wage-and-hour class action complaint
4 against Defendant Modesto Restaurant Group, LLC for: (1) failure to pay minimum and
5 straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime
6 wages (Labor Code §§ 1194, and 1198); (3) failure to provide meal periods (Labor Code §§
7 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code §§ 226.7); (5)
8 failure to timely pay final wages at termination (Labor Code §§ 201-203); (6) failure to
9 provide accurate itemized wage statements (Labor Code § 226); and (7) unfair business
10 practices (Business and Professions Code 17200 et seq.). On February 8, 2022, Plaintiff filed a
11 Joint Stipulation and [Proposed] Order for Leave to file First Amended Complaint, and the
12 First Amended Complaint adding a claim for civil penalties under Private Attorneys General
13 Act “PAGA” (Labor Code § 2698 et seq.). The Court has yet to sign the Proposed Order.
14 (Marquez Decl., ¶ 4.)

15 **B. Discovery and Investigation**

16 Following the filing of the Complaint, the parties exchanged documents and
17 information before mediating this action. Defendant produced a sample of time and pay
18 records for class members. Defendant also provided documents of its wage and hour policies
19 and practices during the class period, and information regarding the total number of current
20 and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

21 After reviewing documents regarding Defendant’s wage and hour policies and
22 practices, analyzing Defendant’s timekeeping and payroll records, and interviewing Class
23 Members, Class Counsel was able to evaluate the probability of class certification, success on
24 the merits, and Defendant’s maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class
25 Counsel also investigated the applicable law regarding the claims and defenses asserted in the
26 litigation. (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior
27 to mediation. (*Id.*)

28 ///

1 **C. Settlement Negotiations**

2 On November 30, 2021, the parties participated in private mediation with experienced
3 class action mediator Kelly Knight. (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
4 After extensive negotiations and discussions regarding the strengths and weaknesses of
5 Plaintiff’s claims and Defendant’s defenses, Mr. Knight issued a mediator’s proposal that was
6 accepted by all parties, the material terms of which are encompassed within the Settlement.
7 (*Id.* at ¶ 7, Ex. 1 [Joint Stipulation for Class Action Settlement].)

8 Class Counsel has conducted a thorough investigation into the facts of this case. Based
9 on the foregoing discovery and their own independent investigation and evaluation, Class
10 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
11 interests of the Settlement Class Members in light of all known facts and circumstances, the
12 risk of significant delay, the defenses that could be asserted by Defendant both to certification
13 and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 14.)

14 Indeed, the \$600,000 Settlement represents **63.6% of the realistic maximum recovery**
15 **of \$942,959.92.** (*Id.* at ¶ 22.) Although Class Counsel estimated that Defendant’s maximum
16 potential liability for all claims was approximately \$7.2 million, when the risk of prevailing at
17 certification and trial are factored into the equation, Class Counsel believes that Defendant’s
18 realistic exposure was \$942,959.92, meaning the Settlement achieves a significant recovery.
19 (*Id.* at ¶¶ 17-26.) Considering the risk and uncertainty of prevailing at class certification and at
20 trial, this is an excellent result for the Class. (*Id.* at ¶ 22.) Indeed, because of the proposed
21 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
22 unfavorable judgment.

23 **D. Key Terms of the Proposed Settlement**

24 Under the Settlement, Defendant will pay \$600,000 to resolve this litigation. This
25 amount is all-inclusive. The Settlement’s key terms include:

- 26 1. Settlement Class: For settlement purposes only, the Parties agree to the
27 certification of a class pursuant to California Code of Civil Procedure § 382 defined as: “All
28 persons who worked for Defendant in California as an hourly-paid or non-exempt employee

1 during the Settlement Period of January 21, 2017 through the date the Court grants preliminary
2 approval of the settlement or April 1, 2022, whichever is earlier (together, collectively referred to
3 as the “Class Members”). (Settlement, § I(T).)

4 2. Settlement Period: The Settlement Period means the period from January 21, 2017
5 through date the Court grants preliminary approval or April 1, 2022, whichever is earlier.
6 (Settlement, § I(U).)

7 3. Settlement Amount: This amount is \$600,000, which shall be paid by Defendant
8 and from which all Net Settlement Payments, Court-approved attorneys’ fees and Litigation costs
9 pursuant to Section XIII, Administrative Costs pursuant to Section VIII, enhancement to Named
10 Plaintiff pursuant to Section XIV, statutory penalties, interest, and PAGA Settlement pursuant to
11 Section XVI shall be paid, except as provided herein. (Settlement, § I(S).)

12 4. No Reversion: This is a non-reversionary settlement. Settlement checks will be
13 valid for 180 days. Pursuant to Code of Civil Procedure § 384(a), any unpaid cash residue or
14 unclaimed or abandoned class member funds, plus any accrued interest thereon will be sent to
15 California Rural Legal Assistance, Inc. pursuant to Code of Civil Procedure Section 384(a).
16 (Settlement, § XI(D).)

17 5. Release: The class release is limited to “all claims for damages, attorneys’ fees
18 and costs, expenses, penalties, and injunctive relief, that were alleged in the Litigation or which
19 could have been alleged in the Litigation based on the facts asserted in the Litigation arising
20 during the Settlement Period.” (Settlement, § VII(A).)

21 6. PAGA Settlement: The settlement includes \$25,000 allocated to Plaintiff’s claims
22 under PAGA, with 75% of which (\$18,750) will be paid to the LWDA and 25% (\$6,250) will be
23 paid to eligible members of the PAGA Class. (Settlement, § I(O).) Class Counsel submitted the
24 proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez
25 Decl., ¶ 8.)

26 7. Net Class Settlement Amount: The Net Settlement Fund is the Settlement Amount
27 minus any award of attorneys’ fees and Litigation costs, Administrative Costs, enhancement to
28 the Named Plaintiff, and penalties recoverable pursuant to California’s Private Attorney General

1 Act. (Settlement, § I(K).)

2 8. Distribution Formula: Members of the Settlement Class not opting out will receive
3 a lump sum payment as good and valuable consideration for the waiver and release of claims set
4 forth in Section VII(A), above, in an amount determined by the Settlement Administrator in
5 accordance with the provisions of this Agreement. The lump sum payment to each member of the
6 Settlement Class not excluding him/ herself will be determined in accordance with the procedure
7 set forth in Section X. (Settlement, § XI(A).)

8 9. Taxation and Allocation: Any settlement money paid to Settlement Class
9 Members will be allocated as 33 1/3 % as wages, 66 2/3 % as penalties and interest. (Settlement,
10 § XV.)

11 10. Enhancement Award: Subject to Court approval, Plaintiff shall be paid an
12 enhancement award not to exceed \$8,000. (Settlement, § XV.) This amount is for Plaintiff's
13 time and effort in bringing and presenting the action, and in exchange for a general release of all
14 claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § VIII (B).) If
15 the Court approves a lesser enhancement, then the unapproved portion or portions shall revert
16 into the Net Settlement Amount to be distributed between the participating Settlement Class
17 Members on a pro-rata basis. (Settlement, § XV.)

18 11. Attorneys' Fees and Costs: The Settlement provides that Defendant will not
19 oppose a fee application of up to 33 1/3% (\$200,000) of the Settlement Amount, plus out-of-
20 pocket costs not to exceed \$25,000 (Settlement, § XIII.) At this time, Class Counsel's costs are
21 approximately \$16,967.80. (Marquez Decl., ¶ 9, Ex. 2.)

22 12. Notice of Proposed Settlement: The Notice sets forth in plain terms, a statement of
23 the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees,
24 costs, and service awards being sought, and an explanation of how the settlement allocations are
25 calculated. (Settlement, Ex. A.) The Notice also sets forth each class member's total
26 workweeks, as well as the approximate amount of money they would receive in the event all
27 class members participate in the settlement. The Notice also includes an opt-out form. (*Id.*)
28 Class Members will be notified by first class mail of the settlement. (Settlement, § IX (A).)

1 Phoenix Settlement Administrators, the proposed Settlement Administrator, will undertake its
2 best efforts to ensure that the notice is provided to the current addresses of class members,
3 including conducting a national change of address search and re-mailing the notice to updated
4 addresses. (Settlement, § X (B)-(D).) Notice will be provided in English and Spanish.
5 (Marquez Decl., ¶ 10; Ex. 3.)

6 13. Dispute Procedure: Class Notice will include a procedure by which a Class
7 Member may dispute the number of workweeks or opt-out of the settlement. (Settlement, Ex. B.)

8 **III. DISCUSSION**

9 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
10 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
11 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v.*
12 *Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is
13 reached through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the
14 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
15 objectors is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

16 In considering whether a settlement is reasonable, the trial court should consider relevant
17 factors, which may include the strength of plaintiff's case, the risk, expense, complexity and
18 likely duration of further litigation, the risk of maintaining class action status through trial, the
19 amount offered in settlement, the extent of discovery completed and the stage of the proceedings,
20 the experience and views of counsel, the presence of a governmental participant, and the reaction
21 of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
22 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
23 that the class settlement is within the "ballpark" of reasonableness. (*Id.* at p. 133.) The record
24 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI*
25 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar*
26 does not require "an explicit statement of the maximum amount the plaintiff class could recover
27 if it prevailed on all its claims", but instead, only an "understanding of the amount that is in
28 controversy and the realistic range of outcomes of the litigation."].)

As discussed below, Class Counsel has provided information exceeding the threshold required to provide this Court with materials and information necessary to determine that the proposed settlement is fair, adequate, and reasonable.

A. The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation

1. The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm's-Length Negotiations

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption here that the negotiations were conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.) Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The fact that a plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.”].)

The Settlement was reached following extensive negotiations following a full day of mediation with experienced employment mediator, Kelly Knight. (Marquez Decl. ¶ 7.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll records, Defendant's policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses

1 asserted in the litigation. (*Id.*) Thus, Plaintiff and her counsel were able to act intelligently and
2 effectively in negotiating the proposed Settlement. (*Id.*)

3 Class Counsel also has considerable experience and has demonstrated competence with
4 litigating wage and hour class actions. (*Id.* at ¶¶ 41-52.) Again, this supports the position that
5 the terms of the Settlement are premised on objective evidence that has been considered and
6 weighed in light of the risks, expenses, and time consumption to both sides of continued
7 litigation of this action.

8 **2. The Settlement Is Fair and Reasonable in Light of the Parties’**
9 **Respective Legal Positions**

10 A settlement is not judged against what might plaintiff recover had she prevailed at trial,
11 nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.
12 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is
13 inherent and necessary in the settlement process...even if the relief afforded by the proposed
14 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
15 this is no bar to a class settlement because the public interest may indeed be served by a
16 voluntary settlement in which each side gives ground in the interest of avoiding litigation.”].)

17 This settlement avoids the risks and the accompanying expense of further litigation.
18 (Marquez Decl., ¶ 23.) While Plaintiff is confident in the merits of their claims, a legitimate
19 controversy exists as to each cause of action. (*Id.* at ¶ 23.) Plaintiff also recognizes that proving
20 the amount of wages due to each class member would be an expensive, time-consuming, and
21 uncertain proposition. (*Id.*)

22 The proposed settlement of \$600,000 therefore represents a substantial recovery when
23 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-26.) Because of the
24 proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk
25 of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved
26 in achieving class certification, the burdens of proof necessary to establish liability, the
27 probability of appeal of a favorable judgment, it is clear that the settlement amount of \$600,000
28 is within the “ballpark” of reasonableness, and preliminary settlement approval is appropriate.

1 (*Id.*) *Indeed, each Settlement Class Member is eligible to receive an average net benefit of*
2 *approximately \$280.42. (Id. at ¶ 25.)*

3 **3. Class Counsel Has Extensive Experience in Class Action Litigation**

4 The settlement negotiations were conducted by highly capable and experienced counsel.
5 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
6 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 38-
7 49.) Although Plaintiff and her counsel were prepared to litigate the claims alleged in the
8 litigation, they support the proposed Settlement as being in the best interests of the class.

9 **B. The Proposed Class Notice of Settlement Should Be Approved**

10 The proposed Notice and Workweek Dispute Form, in the form attached to the Settlement
11 Agreement as Exhibit A, should be approved for dissemination to the class and sub-class. The
12 Notice and Workweek Dispute Form informs the class of the terms of the settlement and of their
13 rights to be excluded from the settlement. And if there are class members who wish to object to
14 this proposed class action settlement, they will have the opportunity to file their objections and
15 be heard at the Final Approval Hearing. Accordingly, the proposed Notice and Workweek
16 Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of Court.

17 **C. The Proposed Attorneys' Fees and Costs Are Reasonable**

18 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
19 Counsel reasonable attorneys' fees in amount of \$200,000, which is 33 1/3% of the gross
20 Settlement Amount, and up to \$25,000 in costs. These amounts are disclosed to all class
21 members in the proposed Notice and are reasonable.

22 **1. Class Counsel Request an Award of Fees Based on the "Common**
23 **Fund" Method**

24 California courts have long awarded attorneys' fees as a percentage of the benefit created
25 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that
26 "when a number of persons is entitled in common to a specific fund, and an action brought by a
27 plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such
28 plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977))

20 Cal.3d 25, 34, quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

Class Counsel seek an award of attorneys’ fees on the “percentage of recovery/ common fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent, supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” (*Id.* at p. 110.)

The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts.” (*Id.* [internal citations omitted].)

2. The Requested Fee Award Is in Line with Typical Cases

According to a leading treatise on class actions, “No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.” (*See Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.) Attorneys’ fees that are fifty percent of the fund are typically considered the upper

1 limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively
2 small. (*Id.*; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp.
3 294 [stating that most cases where 30-50 percent was awarded involved “smaller” settlement
4 funds of under \$10 million].)

5 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
6 is in line with the prevailing guidelines established in California case law and academic
7 literature, and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162
8 Cal.App.4th 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage
9 method or the lodestar method is used, fee awards in class actions average around one-third of
10 the recovery.”].) Accordingly, Plaintiff respectfully requests that the Court approve the
11 attorneys’ fees as negotiated by the parties and requested herein.

12 **3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code**

13 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
14 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
15 section, Plaintiff would be permitted to recover her actual attorneys’ fees, even if those fees were
16 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
17 that it limits the risk of continued expenses and consumption of time, energy, and resources
18 facing Defendant while at the same time rewarding Class Counsel for their decision to assume
19 risk by taking on this matter. In fact, prosecution of this action involved significant financial risk
20 for Class Counsel. (Marquez Decl., ¶¶ 34-36.) Class Counsel undertook this matter solely on a
21 contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on
22 behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary
23 duty to the Class ahead of all other concerns.

24 **4. The Experience, Reputation and Ability of Class Counsel Support the** 25 **Requested Fee Award**

26 As demonstrated by their past experience in pursuing class actions on behalf of
27 consumers and employees, Class Counsel possess considerable expertise in litigating class
28 actions. (Marquez Decl., ¶¶ 38-49.) Class Counsel has been involved as lead counsel or co-

1 counsel in several class actions that resulted in millions in recovery. (*Id.*) Because it is
2 reasonable to compensate class counsel commensurate with their skill, reputation and experience,
3 Class Counsel’s requested fee award is supported here.

4 Class Counsel’s experience in wage and hour class actions was integral in evaluating the
5 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
6 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
7 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
8 action litigation. Based on these and other factors, Class Counsel has frequently received fee
9 awards of this percentage from the gross recovery for the class. Therefore, the requested fee
10 award is reasonable and fair.

11 **D. The Service Award to Named Plaintiff Is Reasonable**

12 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
13 compensate them for the expense or risk they have incurred in conferring a benefit on other
14 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
15 of class action settlement agreements containing enhancements for the class representatives, which
16 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
17 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
18 2009) 563 F.3d 948, 958-59.)

19 Service awards are particularly important to plaintiffs in wage and hour cases because they
20 promote the important public policies underlying the wage and hour laws. This strong policy is
21 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to
22 vigorously enforce minimum labor standards in order to ensure employees are not required or
23 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
24 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
25 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
26 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
27 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
28 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

1 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
2 a Service Award in the amount of \$8,000 to Plaintiff. This amount is also in exchange for
3 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
4 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
5 very frequently for litigation and to prepare for mediation, and was frequently in contact with
6 Class Counsel during the mediation. (Marquez Decl., ¶¶ 27-31.) This amount is reasonable
7 particularly in light of the substantial benefits Plaintiff generated for all class members. (*Id.*)
8 Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB,
9 Class Counsel Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339
10 class members, and the court approved a \$25,000 class representative incentive award for each
11 named plaintiff. (Marquez Decl., ¶ 31.)

12 When compared with the amounts awarded in typical class action cases, the amount
13 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
14 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
15 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
16 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
17 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
18 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
19 while named plaintiffs in other employment class actions received an average award of \$12,121
20 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
21 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
22 compensating them for the high costs of their service to the class, including risks of stigmatization
23 or retaliation on the job.” (*Id.* at p. 1308.)

24 **E. There is Good Cause for Selecting California Rural Legal Assistance, Inc. As**
25 **the Cy Pres Recipient.**

26 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
27 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six*
28 *Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure

1 that the settlement retains some connection to the plaintiff class and the underlying claims,
2 however, a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly
3 to class members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six*
4 *Mexican Workers*, 904 F.2d at 1308.)

5 Moreover, in the class action context, California Code of Civil Procedure permits unpaid
6 cash residues in a class action settlement to be distributed to a *cy pres* recipient “in a manner
7 designed either to further the purposes of the underlying class action or causes of action, or to
8 promote justice for all Californians.” (Cal. Civ. Proc. Code § 384.)

9 Here, under the terms of the settlement agreement, in the event settlement checks remain
10 uncashed after 180 days, those funds shall be donated to California Rural Legal Assistance, Inc.
11 (Settlement, § XI(D).) California Rural Legal Assistance, Inc. furthers the purpose of this case
12 and promotes justice for all Californians by providing “low-income rural Californians with free
13 legal assistance and a variety of community education and outreach programs.” (*See*
14 <https://archive.crla.org/about-us.html>.)

15 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

16 **A. Legal Standard**

17 The proposed Settlement Class is well suited for class certification. All of the claims
18 derive from a core set of alleged violations of California’s wage and hour laws and regulations.
19 For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
20 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
21 the question is one of a common or general interest, of many persons, or when the parties are
22 numerous, and it is impracticable to bring them all before the court, one or more may sue or
23 defend for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section
24 382: “(1) There must be an ascertainable class; and (2) there must be a well-defined community
25 of interest in the questions of law and fact involved affecting the parties to be represented.”
26 (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these
27 requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to
28 explain that the community-of-interest requirement itself embodies three factors: “(1)

1 predominant questions of law or fact; (2) class representatives with claims or defenses typical of
2 the class; and (3) class representatives who can adequately represent the class.” (*Richmond v.*
3 *Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470.)

4 California law and policy favor the fullest and most flexible use of the class action device.
5 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
6 means to prevent a failure of justice in our judicial system” particularly where the rights of
7 consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434.) Any doubt as to
8 the appropriateness of class treatment should be resolved in favor of certification. (*Richmond,*
9 *supra*, 29 Cal.3d at pp. 473-75.)

10 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
11 **Settlement Purposes.**

12 **1. The Classes Are Ascertainable and Numerous**

13 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
14 approximately 1,260 employees of Defendant.

15 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
16 precise criteria. Because class members are identified using specific criteria in the regular
17 business records of Defendant, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life*
18 *Ins. Co.* (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product
19 that is the subject of the lawsuit is sufficient to make the class ascertainable].)

20 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
21 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
22 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an
23 action may be maintained as a class action even where the parties are numerous and it is in fact
24 practicable to join them all.” (*Id.*) “No set number is required as a matter of law for the
25 maintenance of a class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing
26 the 10 beneficiaries of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v.*
27 *Super. Ct.* (1955) 44 Cal.2d 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35
28 member class.]) Therefore, Plaintiff contends that numerosity is plainly satisfied.

1 **2. There are Many Common Issues of Law and Fact Which Predominate**

2 The Court should grant conditional class certification for settlement purposes here on the
3 grounds that questions of law and fact common to all class and subclass predominate over any
4 individual questions. This inquiry tests whether proposed classes are sufficiently cohesive to
5 warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
6 Cal.App.3d 605.)

7 Here, the employment practices at issue are: whether Defendant had legally compliant
8 policies and practices to provide employees with meal periods; whether Defendant had legally
9 compliant policies and practices authorizing and permitting its employees to take rest periods;
10 whether Defendant had legally compliant policies and practices for all hours worked, including
11 overtime wages; whether Defendant paid terminated employees all vacation wages at the correct
12 rate of pay; whether final payment of wages was untimely and excluded unpaid wages, including
13 meal period premium wages, and rest period premium wages; and whether the wage statements
14 were consequently non-compliant. Plaintiff contends that the factual and legal issues are the
15 same for all of the identified class members, including Plaintiff. Further, all class members
16 suffered from, and seek redress for, the same alleged injuries.

17 **3. Plaintiff's Claims Are Typical of the Claims of the Class**

18 The typicality requirement does not focus on the individual characteristics or
19 circumstances of the representative plaintiff compared to those of the remainder of the class, but
20 rather upon the typicality of the proposed representative's claims as they relate to the defendant's
21 conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 ["[t]he only
22 requirements are that common questions of law and fact predominate and that the class
23 representative be similarly situated" vis-à-vis the class.].) A representative plaintiff's claims are
24 typical of the class if they arise from the same event, practice or course of conduct, and if the
25 claims rest on the same legal theories. (*Id.*) That is precisely the case here. Plaintiff is a former
26 employee of Defendant; as such, she alleges that she was subject to the same policies and
27 practices as other similarly situated employees.

28 ///

1 **4. Plaintiff and Her Counsel Meet the Adequacy Requirement**

2 The adequacy of representation requirements is met by fulfilling two conditions: first, a
3 named plaintiff must be represented by counsel qualified to conduct the pending litigation;
4 second, a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v.*
5 *Bank of America* (1976) 60 Cal.App.3d 442, 451.)

6 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
7 with extensive experience in prosecuting complex class actions, including similar class actions
8 that previously settled. (Marquez Decl., ¶¶ 38-49.) Class Counsel unquestionably is "qualified,
9 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
10 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
11 litigated this case and diligently reviewed the settlement terms, showing their dedication.
12 Plaintiff's willingness to serve as a representative demonstrates her serious commitment to
13 bringing about the best results possible for the class and subclass. (*McGhee, supra*, 60
14 Cal.App.3d at p. 451.)

15 **5. A Class Action is Superior to a Multiplicity of Litigation**

16 Finally, in making its class certification decision, the Court must determine that a class
17 action would be superior to alternative means for the fair and efficient adjudication of the
18 litigation. By consolidating many potential individual actions into a single proceeding, this
19 Court's use of the class action device enables it to manage this litigation in a manner that serves
20 the economics of time, effort and expense for the litigants and the judicial system. Absent class
21 treatment, similarly-situated employees with small but nevertheless meritorious claims for
22 damages would, as a practical matter, have no means of redress because of the time, effort and
23 expense required to prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443,
24 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of
25 settlement, the superiority concerns are essentially non-existent.

26 **V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND**

27 **A. The Proposed Notice Plan Satisfies Due Process**

28 Notice requirements are set forth in the California Rules of Court. Cal. Rules of Court,

1 Rule 3.766 (e) and (f). California law vests the Court with broad discretion in fashioning an
2 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
3 statutory or due process requirement that all class members receive actual notice, but in this
4 matter, the class members will receive direct mailed notice. As the Court of Appeals has
5 explained, “[t]he notice given should have a reasonable chance of reaching a substantial
6 percentage of the Class Members” (*Id.* at p. 974.) In this case, notice of the proposed
7 settlement will be provided by direct mailing, the best possible form of notice.

8 **B. The Notice is Accurate and Informative**

9 The proposed Notice should be approved. It will be disseminated through direct U.S. first
10 class mail to the last known address for each Class Member. It informs the Class Members of the
11 terms of the settlement and their right to be excluded from the Settlement. And if there are Class
12 Members who wish to object to this proposed class action settlement, they will have the
13 opportunity to file their objections and be heard at the Final Approval Hearing.

14 The Notice also fulfills the requirement of neutrality in class notices. (Conte &
15 Newberg, *Newberg on Class Actions* (3rd Ed.) § 8.39.) It summarizes the proceedings to date
16 and the terms and conditions of the settlement agreement, in an informative and coherent
17 manner. It makes clear that the settlement agreement does not constitute an admission of
18 liability by the Defendant, who deny all liability, and it recognizes that this Court has not
19 ruled on the merits of the action. It also states that the final settlement approval decision has
20 yet to be made. Accordingly, the Notice complies with the standards of fairness,
21 completeness, and neutrality required of a combined settlement-certification class notice.

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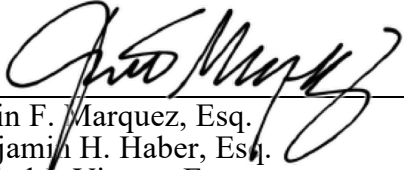
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1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
3 approval of the proposed settlement and set a Final Approval Hearing for July 27, 2022.
4

5 Dated: February 10, 2022

WILSHIRE LAW FIRM

6
7 By:  _____

Justin F. Marquez, Esq.
Benjamin H. Haber, Esq.
Rachel J. Vinson, Esq.

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Rodriguez v. Modesto Restaurant Group, LLC et al.
CV-21-000269

I, Min Jee Kim, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is minjee@wilshirelawfirm.com.

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(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

Executed on **February 10, 2022** at Los Angeles, California.

1 PROOF OF SERVICE