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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

PABLO SERGIO NEVAREZ, individually, and
on behalf of all others similarly situated,

Plaintiff,

v.

ON-TIME AIR CONDITIONING & HEATING,
LLC, a California limited liability corporation;
and DOES 1 through 10, inclusive,

Defendants.

Case No. 21CV375216

CLASS ACTION

[Assigned for all purposes to: Hon. Sunil R.
Kulkarni, Dept. 1]

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

[Filed concurrently with: Declaration of
Justin F. Marquez in Support of Plaintiff's
Motion for Preliminary Approval of Class
Action Settlement; Declaration of Pablo
Sergio Nevarez in Support of Plaintiff's
Motion for Preliminary Approval of Class
Action Settlement; and [Proposed] Order
Granting Plaintiff's Motion for Preliminary
Approval of Class Action Settlement]

PRELIMINARY APPROVAL HEARING

Date: June 16, 2022

Time: 1:30 p.m.

Dept: 1

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

2 PLEASE TAKE NOTICE that on June 16, 2022, at 1:30 p.m., in Department 1 of the Santa
3 Clara County Superior Court, 191 North First Street, San Jose, California 95113-1090, pursuant to
4 Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff Pablo Sergio
5 Nevarez (“Plaintiff”) will move the Court for an Order granting preliminary approval of the
6 proposed class action settlement between Plaintiff and Defendant On-Time Air Conditioning &
7 Heating, 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 only;
- 10 3. Affording Plaintiff leave to file a First Amended Class and Representative Action
11 Complaint;
- 12 4. Approving the Notice and Settlement Information Form (collectively, the “Notice
13 Packet”) and the plan for distribution of the Notice Packet to Settlement Class
14 Members;
- 15 5. Appointing Plaintiff Pablo Sergio Nevarez as Class Representative for settlement
16 purposes only;
- 17 6. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
18 settlement purposes only;
- 19 7. Appointing Phoenix Settlement Administrators as the Settlement Administrator; and
20 8. Scheduling a Final Approval Hearing.

21 The Motion will be based upon this Notice, the attached Memorandum of Points and
22 Authorities, the Declaration of Justin F. Marquez, and the Declaration of Pablo Sergio Nevarez,
23 filed concurrently herewith, the records and files in this action, and any other further evidence or
24 argument that the Court may properly receive at or before the hearing.

25 Dated: May 24, 2022

WILSHIRE LAW FIRM

26 By: _____

27 Justin F. Marquez
28 Benjamin H. Haber
Arrash T. Fattahi
Attorneys for Plaintiff

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	SUMMARY OF THE LITIGATION AND SETTLEMENT.....	1
A.	Plaintiff’s Claims	1
B.	Discovery and Investigation.....	2
C.	Settlement Negotiations	3
D.	Key Terms of the Proposed Settlement.....	4
III.	DISCUSSION	7
A.	The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation	8
1.	The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm’s-Length Negotiations.....	8
2.	The Settlement Is Fair and Reasonable in Light of the Parties’ Respective Legal Positions.....	9
3.	Class Counsel Has Extensive Experience in Class Action Litigation.....	10
B.	The Proposed Class Notice of Settlement Should Be Approved	10
C.	The Proposed Attorneys’ Fees and Costs Are Reasonable	11
1.	Class Counsel Request an Award of Fees Based on the “Common Fund” Method	11
2.	The Requested Fee Award Is in Line with Typical Cases	12
3.	This Matter Involves A “Fee-Shifting” Provision of the Labor Code	13
4.	The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award	13
D.	The Service Award to Named Plaintiff Is Reasonable.....	14
E.	There is Good Cause for Selecting JVS SoCal As the <i>Cy Pres</i> Recipient.....	15
IV.	CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED.....	16
A.	Legal Standard	16

1	B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for	
2	Settlement Purposes	17
3	1. The Class is Ascertainable and Numerous.....	17
4	2. There are Many Common Issues of Law and Fact Which Predominate.....	17
5	3. Plaintiff’s Claims Are Typical of the Claims of the Class.....	18
6	4. Plaintiff and His Counsel Meet the Adequacy Requirement	18
7	5. A Class Action is Superior to a Multiplicity of Litigation.....	19
8	V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND.....	19
9	A. The Proposed Notice Plan Satisfies Due Process	19
10	B. The Notice is Accurate and Informative	20
11	VI. CONCLUSION	20

TABLE OF AUTHORITIES

STATE CASES

<i>Bowles v. Super. Ct.</i> (1955) 44 Cal.2d 574	17
<i>Cartt v. Super Ct.</i> (1975) 50 Cal.App.3d 960.....	19, 20
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43.....	12
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105.....	11, 12
<i>Classen v. Weller</i> (1983) 145 Cal.App.3d 27	18
<i>Clothesrigger, Inc. v. GTE Corp.</i> (1987) 191 Cal.App.3d 605.....	18
<i>Collins v. Rocha</i> (1972) 7 Cal.3d 232	17
<i>D’Amico v. Bd. of Medical Examiners</i> (1974) 11 Cal.3d 1	11
<i>Daar v. Yellow Cab Co.</i> (1967) 67 Cal. 2d 695.....	16
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	7, 8
<i>Gentry v. Super. Ct.</i> (2007) 42 Cal.4th 443.....	14
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	8
<i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th 480.....	12
<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429.....	17
<i>Mallick v. Super. Ct.</i> (1979) 89 Cal.App.3d 434.....	8
<i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442	19
<i>Miller v. Woods</i> (1983) 148 Cal. App. 3d 862	19
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399	8, 14
<i>Quinn v. State of California</i> (1995) 15 Cal.3d 162.....	11
<i>Richmond v. Dart Indus., Inc.</i> (1981) 29 Cal. 3d 462.....	17
<i>Rodriguez v. W. Publ’g Corp.</i> (9th Cir. 2009) 563 F.3d 948	14
<i>Rose v. City of Hayward</i> (1981) 126 Cal.App.3d 926	17
<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25.....	11
<i>Stamburgh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231	9
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 224.....	10
<i>Wilner v. Sunset Life Ins. Co.</i> (2000) 78 Cal.App.4th 952	17

FEDERAL CASES

<i>Dennis v. Kellogg Co.</i> (9th Cir. 2012) 697 F.3d 858.....	15
<i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174	14
<i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510	19
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438	9
<i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301.....	15
<i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....	12

STATE STATUTES

Cal. Civ. Proc. Code § 382.....	4, 16, 17
Cal. Civ. Proc. Code § 384.....	4, 15
Labor Code § 90.5	14
Labor Code § 1194	13

RULES

California Rules of Court, Rule 3.766.....	19
California Rules of Court, Rule 3.769(f).....	11

TREATISES

Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39	20
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51	8
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03	12

OTHER AUTHORITIES

Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”, 53 UCLA L. Rev. 1303 (2006)	15
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Pablo Sergio Nevarez (“Plaintiff”) seeks preliminary approval of a proposed \$525,000.00 non-reversionary, wage and hour class action settlement with Defendant On-Time Air Conditioning & Heating, LLC (“Defendant,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 638 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, Hon. Peter D. Lichtman (Ret.), 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 for settlement purposes only, afford Plaintiff leave to file a First Amended Class and Representative Action Complaint for settlement purposes only, 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 and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant specializes in heating, ventilation, and air conditioning service and repair throughout California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“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 for each workday. Plaintiff further alleges that Defendant failed to include all remuneration in the employees’ overtime rate and meal period premiums. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Plaintiff further alleges that Defendant failed to

1 reimburse employees for all necessary business-related expenditures. Based on these
2 allegations, Plaintiff asserts claims against Defendant for failure to pay minimum and straight
3 time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize
4 and permit rest periods, failure to timely pay all final wages at termination, failure to provide
5 accurate itemized wage statements, failure to indemnify employees for expenditures, unfair
6 business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.) Defendant denies all
7 allegations, contends that Plaintiff failed to properly file a PAGA complaint, and contends that
8 its employment practices were at all relevant times compliant with applicable California law.

9 On January 14, 2021, Plaintiff filed a putative wage-and-hour class action complaint
10 against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§
11 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and
12 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to
13 authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages
14 at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage
15 statements (Cal. Lab. Code § 226); (7) failure to indemnify employees for expenditures (Cal.
16 Lab. Code § 2802); and (8) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*).
17 (*Id.* at ¶ 4.) For settlement purposes only, the Parties stipulate to Plaintiff being afforded leave
18 to file a First Amended Class and Representative Action Complaint, which will add a cause of
19 action for civil penalties under PAGA. (*Id.*)

20 **B. Discovery and Investigation**

21 Following the filing of the Complaint, the Parties exchanged documents and information
22 before mediating this action. Defendant produced timekeeping and payroll records for the
23 putative class members. Defendant also provided documents of their wage and hour policies
24 and practices during the class period, and information regarding the total number of current and
25 former employees in its informal discovery responses. (*Id.* at ¶ 5.)

26 After reviewing the documents regarding Defendant's wage and hour policies and
27 practices and analyzing Defendant's timekeeping and payroll records, Class Counsel was able
28 to evaluate the probability of class certification, success on the merits, and Defendant's

1 maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the
2 applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Class Counsel
3 reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.
4 (*Id.*)

5 **C. Settlement Negotiations**

6 On November 18, 2021, the Parties participated in private mediation with experienced
7 class action mediator, Hon. Peter D. Lichtman (Ret.). (*Id.* at ¶ 7.) The mediation was conducted
8 via Zoom. The settlement negotiations were at arm’s length and, although conducted in a
9 professional manner, were adversarial. The Parties went into the mediation willing to explore
10 the potential for a settlement of the dispute, but each side was also prepared to litigate their
11 position through trial and appeal if a settlement had not been reached. (*Id.*)

12 After extensive negotiations and discussions regarding the strengths and weaknesses of
13 Plaintiff’s claims and Defendant’s defenses, the Parties were able to reach a resolution, the
14 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. 1
15 [Joint Stipulation Re: Class Settlement (“Settlement” or “Settlement Agreement”)].)

16 Class Counsel has conducted a thorough investigation into the facts of this case. Based
17 on the foregoing discovery and their own independent investigation and evaluation, Class
18 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
19 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
20 of significant delay, the defenses that could be asserted by Defendant both to certification and
21 on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 15.)

22 Indeed, the \$525,000.00 Settlement represents **50% of the realistic maximum recovery**
23 **of \$1,050,710.90**. (*Id.* at ¶ 24.) Although Class Counsel estimated that Defendant’s maximum
24 potential liability for all claims was approximately \$12.4 million, when the risk of prevailing at
25 certification and trial are factored into the equation, Class Counsel believes that Defendant’s
26 realistic exposure was \$1,050,710.90, meaning the Settlement achieves a significant recovery.
27 (*Id.* at ¶¶ 18-24.) Considering the risk and uncertainty of prevailing at class certification and at
28 trial, this is an excellent result for the Class. Indeed, because of the proposed Settlement, class

members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

D. Key Terms of the Proposed Settlement

Under the Settlement, Defendant will pay \$525,000.00 to resolve this Litigation. This amount is all-inclusive. The Settlement's key terms include:

1. Settlement Class: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period (together, collectively referred to as the "Class Members")." (Settlement, § I (R).)

2. Settlement Period: The Settlement Period means the period from January 14, 2017 through October 16, 2021. (Settlement, § I (S).)

3. Participating Class Members: Participating Class Members means all Class Members who do not submit a valid and timely request to exclude themselves from the Settlement. (Settlement, § I (L).)

4. Participating PAGA Members: Participating PAGA Members means all Class Members, as that term is defined in Section I.R of the Settlement Agreement, who worked for Defendant from January 14, 2020 through October 16, 2021. (Settlement, § I (M).)

5. Gross Settlement Amount: This amount is \$525,000.00, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the Labor and Workforce Development Agency ("LWDA") for the alleged PAGA penalties, all other penalties, and the Class Representative Service Award. (Settlement, § I (Q).)

6. Uncashed Checks & Cy Pres: If a settlement check is returned to the Settlement Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a valid mailing address by performing a skip trace search and, if another address is identified, shall mail the check to the newly identified address. Any settlement checks remaining uncashed after one hundred and eighty (180) days shall be deemed unpaid residue pursuant Code of Civil Procedure Section 384(a). Unpaid residue (uncashed or returned checks) will be paid to JVS

SoCal, 6505 Wilshire Blvd., Suite 200, Los Angeles, CA 90048. (Settlement, § XII (C)(2).)

7. Release as to All Settlement Class Members: The class release is limited to “any and claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation arising during the Settlement Period against Defendant, and its divisions, affiliates, predecessors, successors, shareholders, members, managers, officers, directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns, subrogees, executors, partners, parents, subsidiaries, joint employers, insurers, and related corporations, including but not limited to the following claims: (1) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to pay all wages of any kind, including any minimum or straight time wages, owed pursuant to California Labor Code §§ 204, 510, 1194, 1194.2, and 1197, the California Industrial Welfare Commission (“IWC”) Wage Orders, or any comparable federal statute under any theory of liability; (2) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to pay overtime or double time wages owed pursuant to California Labor Code §§ 204, 510, 1194, and 1198, the IWC Wage Orders, or any comparable federal statute under any theory of liability; (3) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to provide meal periods pursuant to California Labor Code §§ 226.7 and 512, and the IWC Wage Orders; (4) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to provide rest periods pursuant to California Labor Code § 226.7, and the IWC Wage Orders; (5) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to properly calculate any premiums owed and/or paid pursuant to California Labor Code § 226.7(b); (6) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties of any kind arising from an alleged failure to pay final wages or other amounts allegedly owed to Class Members pursuant to California Labor Code §§ 201-203; (7) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties of any kind arising from an alleged wage statement violation pursuant to California Labor Code §§ 226 and 1174.5; (8) all claims alleged in the operative complaint, under any legal theory of liability, for failure to indemnify employees for expenditures pursuant to California Labor Code § 2802; (9) all claims alleged in the

operative complaint, under any legal theory of liability, for violation of Business & Professions Code §§ 17200, *et seq.*; (10) all claims alleged in the operative complaint and Plaintiff’s PAGA letter, under any legal theory of liability, for penalties pursuant to the PAGA (Labor Code §§ 2698, *et seq.*); and (11) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties or any other amounts that could be potentially owed to Class Members during the Settlement Period, including penalties owed pursuant to California Labor Code §§ 210, 226.3, 558, and 1197.1.” (Settlement, § VIII (A).) This Release will be deemed effective upon the date the Court’s Final Approval Order becomes “Final” (as that term is defined in the Settlement Agreement, § I (E)). (Settlement, § VIII (A).)

8. PAGA Allocation: The settlement includes \$7,500.00 allocated to Plaintiff’s claims under PAGA, with 75% of which (\$5,625.00) being paid to the LWDA and 25% (\$1,875.00) being paid to the Participating PAGA Members. (Settlement, § XVII.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

9. Net Settlement Fund: The “Net Settlement Fund” or “Net Settlement Amount” is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) attorneys’ fees and Litigation costs, (2) Administrative Costs, (3) enhancement to the Named Plaintiff, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § I (K).)

10. Distribution Formula: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims as set forth in Section D (7), above, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section XII of the Settlement Agreement.

11. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 20% wages, 40% penalties, and 40% interest. (Settlement, § XVI.) The tax allocation breakdown comports with Plaintiff’s *Kullar* analysis, as detailed in Justin F. Marquez’s Declaration. (Marquez Decl., ¶¶ 18-24; *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 128.)

1 12. Class Representative Service Award: Subject to Court approval, Plaintiff shall be
2 paid an enhancement award not to exceed \$10,000.00. (Settlement, § XV.) This amount is for
3 Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general
4 release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § VIII
5 (B).) If the Court approves a lesser enhancement, then the unapproved portion or portions shall
6 revert into the Net Settlement Amount to be distributed between the participating Settlement Class
7 Members on a pro-rata basis. (Settlement, § XV.)

8 13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
9 a fee application of up to 33 1/3% (\$175,000.00) of the Gross Settlement Amount, plus out-of-
10 pocket costs not to exceed \$20,000.00. (Settlement, § XIV.) At this time, Class Counsel's costs
11 are approximately \$14,667.30. (Marquez Decl., ¶ 39.)

12 14. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
13 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
14 fees, costs, and service award being sought, and an explanation of how the settlement allocations
15 are calculated. (Settlement, Ex. A.) The Notice also includes an opt-out form that class members
16 can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members
17 will be notified by first-class mail of the settlement. (Settlement, § X (C).) Phoenix Settlement
18 Administrators, the proposed Settlement Administrator, will undertake its best efforts to ensure
19 that the notice is provided to the current addresses of class members, including conducting a
20 national change of address search and re-mailing the notice to updated addresses. (*Id.*) Notice
21 will be provided in English and Spanish. (Marquez Decl., ¶ 11; Ex. 2 [Settlement Administrator
22 Bid].)

23 15. Workweek Dispute Form: The Workweek Dispute Form sets forth each class
24 member's total workweeks and permits class members to dispute their number of workweeks by
25 following the procedures as outlined in the Workweek Dispute Form. (Settlement, Ex. B.)

26 **III. DISCUSSION**

27 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
28 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This

1 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super.*
2 *Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached
3 through arm’s-length bargaining; (2) investigation is sufficient to allow counsel and the court to
4 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
5 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

6 In considering whether a settlement is reasonable, the trial court should consider relevant
7 factors, which may include the strength of Plaintiff’s case, the risk, expense, complexity and likely
8 duration of further litigation, the risk of maintaining class action status through trial, the amount
9 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
10 experience and views of counsel, the presence of a governmental participant, and the reaction of
11 the class members to the proposed settlement. (*Kullar, supra*, 168 Cal.App.4th at p. 128.) In order
12 to approve a class action settlement, the court must satisfy itself that the class settlement is within
13 the “ballpark” of reasonableness. (*Id.* at p. 133.) The record need not contain an explicit statement
14 of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
15 (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require “an explicit statement of
16 the maximum amount the plaintiff class could recover if it prevailed on all its claims”, but instead,
17 only an “understanding of the amount that is in controversy and the realistic range of outcomes of
18 the litigation.”].)

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

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

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

26 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
27 evidence to the contrary is offered; thus, there is a presumption here that the negotiations were
28 conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.)

1 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super.*
2 *Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
3 fact that a plaintiff might have received more if the case had been fully litigated is no reason not
4 to approve the settlement.”].)

5 The Settlement was reached following extensive negotiations following a full day of
6 mediation with experienced employment mediator, Hon. Peter D. Lichtman (Ret.). (Marquez
7 Decl., ¶¶ 7-8.) The settlement negotiations were at arm’s length and, although conducted in a
8 professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing to explore
9 the potential for a settlement of the dispute, but each side was also prepared to litigate their or its
10 position through trial and appeal if a settlement had not been reached. (*Id.*)

11 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
12 the claims set forth in the Litigation, such as class member timekeeping and payroll records,
13 Defendant’s policies and procedures concerning the payment of wages, the provision of meal and
14 rest breaks, issuance of wage statements, and providing all wages at separation, as well as
15 information regarding the number of putative class members and the mix of current versus former
16 employees, the wage rates in effect, and the amount of meal and rest period premium wages paid
17 to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation, Class
18 Counsel investigated the applicable law regarding the claims and defenses asserted in the
19 Litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and effectively in
20 negotiating the proposed Settlement. (*Id.*)

21 Class Counsel also has considerable experience and has demonstrated competence with
22 litigating wage and hour class actions. (*Id.* at ¶¶ 40-50.) Again, this supports the position that the
23 terms of the Settlement are premised on objective evidence that has been considered and weighed
24 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
25 action.

26 **2. The Settlement Is Fair and Reasonable in Light of the Parties’** 27 **Respective Legal Positions**

28 A settlement is not judged against what might Plaintiff recover had he prevailed at trial, nor

1 does the settlement have to provide 100% of the damages sought to be fair and reasonable.
2 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is inherent
3 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
4 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
5 to a class settlement because the public interest may indeed be served by a voluntary settlement in
6 which each side gives ground in the interest of avoiding litigation.”].)

7 This settlement avoids the risks and the accompanying expense of further litigation.
8 (Marquez Decl., ¶ 26.) While Plaintiff is confident in the merits of his claims, a legitimate
9 controversy exists as to each cause of action. (*Id.* at ¶ 25.) Plaintiff also recognizes that proving
10 the amount of wages due to each class member would be an expensive, time-consuming, and
11 uncertain proposition. (*Id.*)

12 The proposed settlement of \$525,000.00 therefore represents a substantial recovery when
13 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-28.) Because of the proposed
14 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
15 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
16 achieving class certification, the burdens of proof necessary to establish liability, the probability
17 of appeal of a favorable judgment, it is clear that the settlement amount of \$525,000.00 is within
18 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
19 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
20 ***\$474.53.*** (*Id.* at ¶ 27.)

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

22 The settlement negotiations were conducted by highly capable and experienced counsel.
23 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
24 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 40-
25 50.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,
26 they support the proposed Settlement as being in the best interests of the class.

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

28 The Notice of Proposed Class Action Settlement and Workweek Dispute Form, in the form

1 attached to the Settlement Agreement as Exhibits A and B, should be approved for dissemination
2 to the class. The Notice and Workweek Dispute Form inform the class of the terms of the
3 settlement and of their rights to be excluded from the settlement. And if there are class members
4 who wish to object to this proposed class action settlement, they will have the opportunity to file
5 their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice
6 and Workweek Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of
7 Court.

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

9 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
10 Counsel reasonable attorneys' fees in amount of \$175,000.00, which is 33 1/3% of the gross
11 Settlement Amount, and up to \$20,000.00 in costs. These amounts are disclosed to all class
12 members in the Notice of Proposed Class Action Settlement and are reasonable.

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

15 California courts have long awarded attorneys' fees as a percentage of the benefit created
16 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when
17 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
18 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
19 or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d
20 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

21 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common
22 fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all
23 the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*,
24 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
25 Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund
26 from which others derive benefits may require those passive beneficiaries to bear a fair share of
27 the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
28 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine

1 has been applied “consistently in California when an action brought by one party creates a fund in
2 which other persons are entitled to share.” (*Id.* at p. 110.)

3 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016)
4 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the
5 class members, and the trial court in its equitable powers awards class counsel a fee out of that
6 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
7 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages
8 of the percentage method—including relative ease of calculation, alignment of incentives between
9 counsel and the class, a better approximation of market conditions in a contingency case, and the
10 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
11 the litigation—convince us the percentage method is a valuable tool that should not be denied our
12 trial courts.” (*Id.* [internal citations omitted].)

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

14 According to a leading treatise on class actions, “No general rule can be articulated on what
15 is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a
16 reasonable fee award from a common fund in order to assure that the fees do not consume a
17 disproportionate part of the recovery obtained for the class, although somewhat larger percentages
18 are not unprecedented.” (*See* Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 14.03.)
19 Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty
20 to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; see also
21 *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most
22 cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10
23 million].)

24 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
25 is in line with the prevailing guidelines established in California case law and academic literature
26 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
27 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
28 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)

1 Accordingly, Plaintiff respectfully requests that the Court approve the attorneys' fees as negotiated
2 by the Parties and requested herein.

3 **3. This Matter Involves A "Fee-Shifting" Provision of the Labor Code**

4 Labor Code § 1194(a) provides for the recovery of "minimum wage or overtime
5 compensation, including interest thereon, reasonable attorney's fees, and costs of suit." Under this
6 section, Plaintiff would be permitted to recover his actual attorneys' fees, even if those fees were
7 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
8 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
9 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
10 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
11 Counsel. (Marquez Decl., ¶¶ 35-38.) Class Counsel undertook this matter solely on a contingent
12 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the
13 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
14 ahead of all other concerns.

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

17 As demonstrated by their past experience in pursuing class actions on behalf of consumers
18 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
19 Decl., ¶¶ 40-50.) Class Counsel has been involved as lead counsel or co-counsel in several class
20 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
21 counsel commensurate with their skill, reputation and experience, Class Counsel's requested fee
22 award is supported here.

23 Class Counsel's experience in wage and hour class actions was integral in evaluating the
24 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
25 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
26 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
27 action litigation. Based on these and other factors, Class Counsel has frequently received fee
28 awards of this percentage from the gross recovery for the class. Therefore, the requested fee award

1 is reasonable and fair.

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

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

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

20 Under the Settlement Agreement, subject to the Court’s approval, Defendant agreed to pay
21 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for
22 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
23 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
24 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class
25 Counsel during the mediation. (Marquez Decl., ¶¶ 29-33; Declaration of Pablo Sergio Nevarez in
26 Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Nevarez
27 Decl.”], ¶¶ 4-9.) This amount is reasonable particularly in light of the substantial benefits Plaintiff
28 generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation*,

1 *et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez helped negotiate a \$2.5
2 million class action settlement for 339 class members, and the court approved a \$25,000.00 class
3 representative incentive award for each named plaintiff. (Marquez Decl., ¶ 33)

4 When compared with the amounts awarded in typical class action cases, the amount
5 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
6 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
7 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
8 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
9 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
10 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
11 while named plaintiffs in other employment class actions received an average award of \$12,121
12 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
13 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
14 compensating them for the high costs of their service to the class, including risks of stigmatization
15 or retaliation on the job.” (*Id.* at p. 1308.)

16 **E. There is Good Cause for Selecting JVS SoCal As the *Cy Pres* Recipient**

17 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
18 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six Mexican*
19 *Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure that the
20 settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy*
21 *pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class
22 members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican*
23 *Workers*, 904 F.2d at 1308.)

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

28 Here, under the terms of the Settlement Agreement, in the event settlement checks remained

uncashed for 180 days, those funds shall be donated to JVS SoCal (“JVS,” located at 6505 Wilshire Blvd., Suite 200, Los Angeles, CA 90048) as a *cy pres* beneficiary. (Settlement, § XII (C)(2).) JVS is a 501(c)(3) non-profit organization located in Los Angeles, California. JVS provides essential public services which directly relate to the objective and purposes of this matter. The organization’s Mission is to “[empower] individuals to achieve dignity and economic independence through sustainable employment.”¹ JVS provides career training in growing industries for graduates, veteran employment services, skills assessment services to individuals with disabilities, mentorship for women in the workplace, and has placed thousands of underprivileged persons in Los Angeles, California in new careers.²

IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED

A. Legal Standard

The proposed Settlement Class is well suited for class certification. All of the claims derive from a core set of alleged violations of California’s wage and hour laws and regulations. For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1) There must be an ascertainable class; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the community-of-interest requirement itself embodies three factors: “(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29

¹ See “About Us,” accessed May 23, 2022, located at <https://www.jvs-socal.org/about-us/>.

² *Id.*

1 Cal. 3d 462, 470.)

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

8 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
9 **Settlement Purposes**

10 **1. The Class is Ascertainable and Numerous**

11 Plaintiff contends that the proposed class that Plaintiff seeks to represent is easily
12 ascertainable, and includes approximately 638 employees of Defendant.

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

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

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

28 The Court should grant conditional class certification for settlement purposes here on the

1 grounds that questions of law and fact common to all class predominate over any individual
2 questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant
3 adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
4 Cal.App.3d 605.)

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

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

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

27 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

28 The adequacy of representation requirements is met by fulfilling two conditions: first, a

1 named plaintiff must be represented by counsel qualified to conduct the pending litigation; second,
2 a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of*
3 *America* (1976) 60 Cal.App.3d 442, 451.)

4 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
5 with extensive experience in prosecuting complex class actions, including similar class actions that
6 previously settled. (Marquez Decl., ¶¶ 40-50.) Class Counsel unquestionably is "qualified,
7 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
8 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
9 litigated this case and diligently reviewed the settlement terms, showing their dedication.
10 Plaintiff's willingness to serve as a representative demonstrates his serious commitment to bringing
11 about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

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

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

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

25 Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court,
26 Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an
27 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
28 statutory or due process requirement that all class members receive actual notice, but in this matter,

1 the class members will receive direct mailed notice. As the Court of Appeals has explained, “[t]he
2 notice given should have a reasonable chance of reaching a substantial percentage of the Class
3 Members” (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
4 direct mailing, the best possible form of notice.

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

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

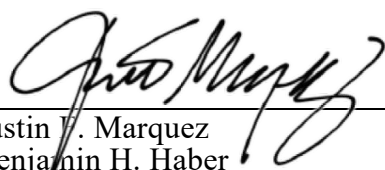
12 The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg,
13 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
14 terms and conditions of the Settlement Agreement, in an informative and coherent manner. It
15 makes clear that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

20 **VI. CONCLUSION**

21 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
22 approval of the proposed Settlement and set a Final Approval Hearing in November 2022, or the
23 first available date thereafter.

24 Dated: May 24, 2022

WILSHIRE LAW FIRM

25
26 By: 

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Nevarez v. On-Time Air Conditioning & Heating, LLC, et al.
21CV375216

I, Ashley Narinyans, 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 anarinyans@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 **May 24, 2022**, at Los Angeles, California.


Signature