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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 FINAL 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 Final Approval of Class Action
Settlement; Declaration of Pablo Sergio
Nevarez in Support of Plaintiff's Motion for
Final Approval of Class Action Settlement;
Declaration of Taylor Mitzner in Support of
Plaintiff's Motion for Final Approval of Class
Action Settlement; and [Proposed] Order
Granting Plaintiff's Motion for Final
Approval of Class Action Settlement]

FINAL APPROVAL HEARING

Date: November 3, 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 November 3, 2022, at 1:30 p.m., in Department 1 of the
3 Santa Clara County Superior Court, 191 North First Street, San Jose, California 95113-1090,
4 pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff
5 Pablo Sergio Nevarez (“Plaintiff”) will move the Court for an Order granting final approval of the
6 proposed class action settlement between Plaintiff and Defendant On-Time Air Conditioning &
7 Heating, LLC (“Defendant,” and together with Plaintiff, the “Parties”). Plaintiff further moves the
8 Court for an Order:

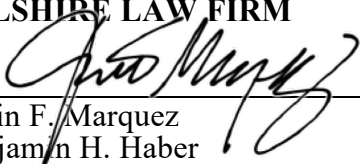
- 9 1. Certifying a Class for settlement purposes;
- 10 2. Approving the settlement as fair and reasonable and finding that class members were
11 given notice of the settlement, and advised of their right to participate in the settlement,
12 object to the settlement, or exclude themselves from the settlement, in a reasonable
13 manner;
- 14 3. Appointing Plaintiff Pablo Sergio Nevarez as Class Representative for settlement
15 purposes, and approving payment of \$10,000 to Plaintiff for his services as the Class
16 Representative;
- 17 4. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
18 settlement purposes only;
- 19 5. Approving payment of settlement administrative expenses to Phoenix Settlement
20 Administrators in the amount of \$9,750;
- 21 6. Approving payment of \$175,000.00 in attorney’s fees, which is 33 1/3% of the
22 Settlement Amount, and costs of \$15,718.12 for litigating this action to Class Counsel;
- 23 7. Approving the PAGA Settlement in the amount of \$7,500.00;
- 24 8. Directing that the clerk of the Court enter the Court’s order as a final judgment; and
- 25 9. Without affecting the finality of the final judgment, reserving continuing jurisdiction
26 over the parties for the purposes of implementing, enforcing and/or administering the
27 Settlement or enforcing the terms of the judgment.

28 The Motion will be based upon this Notice, the attached Memorandum of Points and

1 Authorities, the Declaration of Justin F. Marquez, the Declaration of Taylor Mitzner, and the
2 Declaration of Pablo Sergio Nevarez, filed concurrently herewith, the records and files in this
3 action, and any other further evidence or argument that the Court may properly receive at or before
4 the hearing.

5 Dated: October 12, 2022

WILSHIRE LAW FIRM

6 By: 

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Pablo Sergio Nevarez (“Plaintiff”) seeks final approval of a proposed \$525,000.00
4 non-reversionary, wage and hour class action settlement with Defendant On-Time Air Conditioning
5 & Heating, LLC (“Defendant,” and together with Plaintiff, the “Parties”).

6 The proposed settlement satisfies all the criteria for settlement approval under California law.
7 A presumption of fairness exists as the Settlement was reached through extensive, mediated arm’s-
8 length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently,
9 and Class Counsel is experienced in similar wage-and-hour litigation. The settlement will provide
10 substantial monetary payments to approximately 674 class members. Upon the Court’s approval of
11 the settlement, participating class members will receive an **estimated average net payment of**
12 **\$455.54.** (Declaration of Taylor Mitzner of Phoenix Class Action Administration Solutions in
13 Support of Plaintiff’s Motion for Final Approval of Class Action Settlement [“Mitzner Decl.”], ¶
14 14.) Among the participating class members, the **estimated highest net payment will be \$1,841.29**
15 and the estimated lowest net payment will be \$7.37. (*Id.*) As of filing this Motion, there are no
16 objections to the settlement and only one request for exclusion. (*Id.* at ¶¶ 9-10.) There were also
17 no disputes as to the calculated workweeks for the Class Members. (*Id.* at ¶ 11.) Thus, the proposed
18 Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class
19 Members.

20 Plaintiff’s request for attorneys’ fees in the amount of \$175,000.00, reimbursement of
21 costs and expenses in the amount of \$15,718.12, an enhancement in the amount of \$10,000.00
22 to the Plaintiff, Administrative Costs of \$9,750.00, and a PAGA Settlement of \$7,500.00, with
23 a 75% allocation to the California Labor Workforce Development Agency “LWDA”) in the
24 amount of \$5,625.00 and a 25% allocation to Aggrieved Employees in the amount of \$1,875.00,
25 are also reasonable and thus should be approved by the Court.

26 Accordingly, Plaintiff respectfully requests the Court grant final approval of the
27 Settlement.

28 ///

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 reimburse employees for all necessary business-related expenditures. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, failure to indemnify employees for expenditures, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On January 14, 2021, Plaintiff filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); (7) failure to indemnify employees for expenditures (Cal. Lab. Code § 2802); and (8) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*).

(*Id.* at ¶ 4.) For settlement purposes only, the Parties stipulated to Plaintiff being afforded leave to file a First Amended Class and Representative Action Complaint, which will add a cause of action for civil penalties under PAGA. (*Id.*)

B. Discovery and Investigation

Following the filing of the Complaint, the Parties exchanged documents and information before mediating this action. Defendant produced timekeeping and payroll records for the putative class members. Defendant also provided documents of wage and hour policies and practices during the class period, and information regarding the total number of current and former employees during various time periods. (*Id.* at ¶ 5.)

After reviewing the documents regarding Defendant’s wage and hour policies and practices and analyzing Defendant’s timekeeping and payroll records, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendant’s maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Class Counsel reviewed these records and utilized an expert to prepare a damages analysis prior to mediation. (*Id.*)

C. Settlement Negotiations

On November 18, 2021, the Parties participated in private mediation with experienced class action mediator, Hon. Peter D. Lichtman (Ret.). (*Id.* at ¶ 7.) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff’s claims and Defendant’s defenses, the Parties were able to reach a resolution, the material terms of which are encompassed within the Settlement Agreement. (*Id.*, Ex. 1 [Stipulation of Settlement].)

Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Final Approval. (*Id.* at ¶ 12.)

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

1 of a class pursuant to California Code of Civil Procedure § 382 defined as: “All persons who
2 worked for Defendant in California as an hourly-paid or non-exempt employee during the
3 Settlement Period (together, collectively referred to as the “Class Members”).” (Settlement, § I
4 (R).)

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

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

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

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

17 6. Uncashed Checks & Cy Pres: If a settlement check is returned to the Settlement
18 Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a
19 valid mailing address by performing a skip trace search and, if another address is identified, shall
20 mail the check to the newly identified address. Any settlement checks remaining uncashed after
21 one hundred and eighty (180) days shall be deemed unpaid residue pursuant Code of Civil
22 Procedure Section 384(a). Unpaid residue (uncashed or returned checks) will be paid to JVS
23 SoCal, 6505 Wilshire Blvd., Suite 200, Los Angeles, CA 90048. (Settlement, § XII (C)(2).)

24 7. Release as to All Settlement Class Members: The class release is limited to “any
25 and claims that were alleged in the Litigation or which could have been alleged in the Litigation
26 based on the facts asserted in the Litigation arising during the Settlement Period against Defendant,
27 and its divisions, affiliates, predecessors, successors, shareholders, members, managers, officers,
28 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 submitted with Plaintiff’s previously-filed Motion for Preliminary Approval.

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

1 13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
2 a fee application of up to 33 1/3% (\$175,000.00) of the Gross Settlement Amount, plus out-of-
3 pocket costs not to exceed \$20,000.00. (Settlement, § XIV.) At this time, Class Counsel's costs
4 are approximately \$15,718.12. (Marquez Decl., ¶ 24.)

5 14. Notice of Proposed Class Action Settlement: The Notice set forth in plain terms, a
6 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
7 fees, costs, and service award being sought, and an explanation of how the settlement allocations
8 are calculated. (Settlement, Ex. A.) The Notice also included an opt-out form that class members
9 can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members
10 were notified by first-class mail of the settlement. (Settlement, § X (C).) Phoenix Settlement
11 Administrators, the Settlement Administrator, undertook its best efforts to ensure that the notice
12 was provided to the current addresses of class members, including conducting a national change
13 of address search and re-mailing the notice to updated addresses. (Mitzner Decl. at ¶¶ 5-8.) Notice
14 was provided in English and Spanish. (Mitzner Decl. at ¶ 5, Ex. A.)

15 15. Workweek Dispute Form: The notice procedure also permitted class members to
16 dispute their number of workweeks. (Settlement, Ex. B.)

17 E. Preliminary Settlement Approval, Class Notice, and Settlement
18 Administration.

19 This Court issued a Revised Order Granting Plaintiff's Motion for Preliminary Approval
20 of Class Action Settlement on June 16, 2022. (Marquez Decl., ¶ 11.)

21 Altogether, notices explaining class member rights were mailed out to all 674 class
22 members in English and Spanish. (Mitzner Decl., ¶ 6.) To date, zero notice packets remain
23 undeliverable. (*Id.* at ¶ 7.) ***There are no objections to the settlement and only one request for***
24 ***exclusion.*** (*Id.* at ¶¶ 9-10.) If the Court approves the settlement, participating class members will
25 receive an **estimated average net payment of \$455.54**, with the estimated **highest net payment**
26 **being \$1,841.29** and the estimated lowest net payment being \$7.37. (*Id.* at ¶ 14.)

27 **III. THE SETTLEMENT MERITS FINAL APPROVAL**

28 The law favors the settlement of lawsuits, particularly in class actions and other complex

1 cases. (See e.g., *Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors
2 to be considered in evaluating a class action settlement include “the strength of plaintiffs’ case, the
3 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
4 action status through proceedings, the experience and views of counsel, the presence of a
5 government participant, and the reaction of the class members to the proposed settlement.” (*Kullar*
6 *v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is
7 fair and reasonable exists where, as here, the following four factors are present: “(1) the settlement
8 is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow
9 counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4)
10 the percentage of objectors is small.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th
11 224, 245.)

12 Whether a class action settlement should be approved is a question committed to the trial
13 court’s broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give
14 “[d]ue regard ...to what is otherwise a private consensual agreement between the parties.” (*Dunk*
15 *v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) “The inquiry ‘must be limited to the extent
16 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
17 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
18 whole, is fair, reasonable and adequate to all concerned.” (*Id.* [internal citations omitted].)

19 **A. The Settlement Reflects a Reasonable Compromise.**

20 The Settlement represents a significant percentage of the maximum damages that may have
21 been awarded to the class in this case if they had prevailed at trial. The Settlement, of course,
22 reflects a compromise. The amount of settlement benefits takes into account all the litigation risks
23 related to obtaining class certification, proving Defendant’s liability, and proving Class Members’
24 damages. In light of all the defenses asserted by Defendant which posed substantial litigation risks,
25 a compromise effectively awarding Class Members a significant percentage of the maximum value
26 of their claims is eminently fair and reasonable.

27 Because of the Settlement, and through the efforts of Plaintiff and Class Counsel, Class
28 Members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

1 To be sure, Defendant ultimately has to pay less under the settlement than it would have
2 had to pay if Plaintiff had achieved a judgment on claims at trial. But an ideal settlement requiring
3 a defendant to pay the full amount of its potential damages is rarely achieved. As the Ninth Circuit
4 has observed, “the very essence of a settlement is compromise, ‘a yielding of absolutes and an
5 abandoning of highest hopes.’” (*Officers for Justice v. Civil Service Commission of City and*
6 *County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 624.) Thus, a proposed settlement “is not
7 to be judged against a hypothetical or speculative measure of what might have been achieved by
8 the negotiators.” (*Id.* at p. 625.) A court’s “intrusion upon what is otherwise a private consensual
9 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
10 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
11 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
12 reasonable and adequate to all concerned.” (*Id.*)

13 **B. The Settlement was Reached After Arms-Length Negotiations Following**
14 **Informal Discovery.**

15 The Settlement was reached following extensive negotiations between Class Counsel and
16 Defendant’s counsel. (Marquez Decl., ¶¶ 5-8.) Prior to the mediation, Defendant provided Class
17 Counsel with class-wide information and documents, including its wage and hour policies and
18 practices during the class period and a sampling of time and pay records for class members. (*Id.*)
19 At the mediation, Mr. Lichtman issued a mediator’s proposal that was accepted by all Parties, the
20 material terms of which are encompassed within the Settlement Agreement. (*Id.*, Ex. 1.)

21 Counsel participated in lengthy arms-length settlement negotiations that involved
22 numerous discussions, exchanges of information and candid evaluation of the respective Parties’
23 strengths and weaknesses. (Marquez Decl., ¶ 7.) There is no evidence to suggest that the Parties
24 did not have sufficient information to make informed decisions about the value of this case or that
25 the Settlement is a product of fraud, overreaching or collusion.

26 **C. Plaintiff’s Counsel Has Substantial Class Action Experience.**

27 Class Counsel has considerable experience and has demonstrated competence with
28 litigating wage and hour class actions. (*Id.* at ¶¶ 36-47.) Class Counsel has substantial experience

1 in all facets of litigation in state and federal court, including discovery, law and motion, trial,
2 appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf
3 of plaintiffs and have been lead counsel or otherwise exercised significant case handling
4 responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id.*)

5 Based on Class Counsel's experience as employment and class action attorneys, Class
6 Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of
7 Defendant's defenses against certification, the strength of Defendant's defenses on the merits, and
8 the fairness of the Settlement. Their opinion that final approval of the Settlement would be in the
9 best interests of class members in light of the significant risks of litigation is entitled to great
10 weight. (*See Kullar, supra*, 168 Cal.App.4th at 129 ["The court undoubtedly should give
11 considerable weight to the competency and integrity of counsel and the involvement of a neutral
12 mediator in assuring itself that a settlement agreement represents an arms-length transaction
13 entered without self-dealing or other potential misconduct"].)

14 **D. There Are No Objections To The Settlement.**

15 No class member has objected to the Settlement and only one class member has requested
16 exclusion from the Settlement. (Mitzner Decl., ¶¶ 10-11.) The overwhelmingly positive response
17 of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc.*
18 *Marketing and Sales Practices Litigation* (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few
19 objections and requests for exclusion support approval].)

20 Factors to be considered in evaluating a class action settlement include "the reaction of the
21 class members to the proposed settlement." (*Kullar, supra*, 168 Cal.App.4th at p. 128.) The
22 reaction here has been overwhelmingly positive. Courts have approved class action settlements in
23 lesser circumstances. (*See, e.g., Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S. Dist.
24 LEXIS 5976, 2001 WL 34089697, *8 [court found that the "class members overwhelmingly
25 support[ed] the settlement" where there were over 37,000 notices sent out, 2,745 class members
26 participated in the settlement, "only nine objections were submitted", and there were 86 timely
27 opt-outs and over 20 additional defective or untimely opt-outs, "these indicia of the approval of
28 the class of the terms of the settlement support a finding of fairness under Rule 23"], *citing Hanlon*

1 *v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous objections and appeal by
2 objectors, “fact that the overwhelming majority of the class willingly approved the offer and stayed
3 in the class presents at least some objective positive commentary as to its fairness”, court did not
4 abuse its discretion in approving settlement].)

5 **IV. THE COURT SHOULD AWARD PLAINTIFF THE REQUESTED AMOUNTS OF**
6 **ATTORNEYS’ FEES, COSTS AND AN ENHANCEMENT PAYMENT.**

7 Under the Settlement, subject to the Court’s approval, Defendant has agreed not to oppose
8 Class Counsel’s request for reasonable attorneys’ fees in the amount of \$175,000.00, which is 33
9 1/3% of the Settlement Amount, and Litigation costs in an amount not to exceed \$20,000.00 for
10 litigating this Action, which shall be paid from the Settlement Amount. In addition, Defendant
11 will not oppose an application for the payment of Administrative Costs in the amount of \$10,000.00
12 and a Class Representative Enhancement payment in the amount of \$10,000, to be paid from the
13 Settlement Amount. The proposed attorneys’ fees and expenses were disclosed to the Class
14 Members in the Notice of Proposed Class Action Settlement.

15 “In general, questions whether a settlement was fair and reasonable, whether certification
16 of the class was proper, and whether the attorney fee award was proper are matters addressed to
17 the trial court’s broad discretion.” (*Wershba, supra*, 91 Cal.App.4th at pp. 234-235.) “Courts
18 recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier
19 method and the percentage of recovery method.” (*Id.* at p. 254; *Vincent v. Hughes Air West, Inc.*
20 (9th Cir. 1977) 557 F.2d 759, 769.)

21 **A. Counsel Requests an Award of Fees Based on the “Common Fund” Method.**

22 California courts have long awarded attorneys’ fees as a percentage of the benefit created
23 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that “when
24 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
25 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
26 or plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d
27 25, 34 [quoting *D’Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1.]

28 Class Counsel intends to seek an award of attorneys’ fees on the “percentage of recovery/

1 common fund” theory. The purpose of the common fund/percentage approach is to “spread
2 litigation costs proportionally among all the beneficiaries so that the active beneficiary does not
3 bear the entire burden alone.” (*Vincent v. Hughes Air West, Inc.*(9th Cir. 1977) 557 F.2d 759, 769.)
4 In *Quinn v. State of California* (1995) 15 Cal. 3d 162, 167, the California Supreme Court stated:
5 “[O]ne who expends attorneys’ fees in winning a suit which creates a fund from which others
6 derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs.”
7 Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California
8 Supreme Court recognized that the common fund doctrine has been applied “consistently in
9 California when an action brought by one party creates a fund in which other persons are entitled
10 to share.”

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

21 Several courts have expressed frustration with the alternative “lodestar” approach for
22 deciding fee awards, which usually involves wading through voluminous and often indecipherable
23 time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote: “This
24 court is compelled to ask, ‘Is this process necessary?’ Under a cost-benefit analysis, the answer
25 would be a resounding, ‘No!’” (*In re Activision Securities Litigation* (N.D. Cal 1989) 723 F. Supp.
26 1373, 1375.) The percentage approach is preferable to the lodestar because: (1) it aligns the
27 interests of class counsel and absent class members; (2) it encourages efficient resolution of the
28 litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the

1 demands on judicial resources. (*Id.* at pp. 1378-79) The Ninth Circuit now routinely uses the
2 percentage of the common fund approach to determine the award of attorney’s fees. (*See, e.g., In*
3 *re Pacific Enterprises Securities City and County of San Francisco Litigation* (9th Cir. 1994) 47
4 F.3d 373, 378-79 [approving attorney’s fee of 33 1/3%.])

5 **1. The Standard Fee Award in Class Actions Has Resolved Itself As One-**
6 **Third Of The Recovery In Common Fund Cases.**

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

17 The settled-for 33 1/3% fee award is consistent with the average fee award in class actions.
18 Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a
19 fee award. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 [“Empirical studies
20 show that, regardless whether the percentage method or the lodestar method is used, fee awards in
21 class actions average around one-third of the recovery.”].) Thus, Plaintiff’s fee request is in line
22 with the prevailing guidelines established in California case law and academic literature, and is
23 consistent with awards in California. Accordingly, Plaintiff requests that the Court approve the
24 attorneys’ fees as negotiated by the Parties and requested herein.

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

26 Class Counsel is entitled to recover fees under Labor Code § 1194, which provides, in part:

27 [A]ny employee receiving less than the legal minimum wage or the legal overtime
28 compensation applicable to the employee is entitled to recover in a civil action the

unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(Lab. Code § 1194.)

As this litigation culminated in a settlement that provided for a recovery of unpaid wages, including unpaid minimum wages and overtime compensation, Plaintiff is entitled to recover reasonable attorneys' fees and costs under the California Labor Code.

Class Counsel is also entitled to a fee award under California's private attorney general statute, Code of Civil Procedure § 1021.5. "The award of attorneys fees is proper under Section 1021.5 if '(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" (*Press v. Lucky Stores* (1983) 34 Cal.3d 311, 317-318.) The fundamental objective of the statute is "to encourage suits enforcing public policies by providing substantial attorneys' fees to successful litigants in such cases." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.)

This action resulted in the enforcement of an important right affecting the public interest, as Plaintiff sought to enforce Settlement Class Members' rights to recover statutory wages arising from Defendant's failure to pay all wages and failure to provide meal and rest breaks. (*See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1113 [noting that "health and safety concerns" are what motivated the Industrial Welfare Commission to adopt mandatory meal and rest periods].)

This action also conferred a significant benefit on a large class of persons. Notice was sent to 675 individuals, and no Class Member objected to the Settlement and one individuals requested exclusion. The Settlement provides a significant monetary benefit, in that it permits all persons who worked for Defendant during the applicable class period to obtain significant compensation for unpaid wages and missed meal and rest periods.

Finally, the necessity and financial burden of private enforcement render an award appropriate. Without the incentive of an attorneys' fee award, Plaintiff could not have afforded to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiff's

1 potential recovery. (*See Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th
2 1033, 1044 [“As to the necessity and financial burden of private enforcement, an award is
3 appropriate where the cost of the legal victory transcends the claimants’ personal interest; in other
4 words, where the burden of pursuing the litigation is out of proportion to the plaintiff’s individual
5 stake in the matter.”].)

6 **3. The Experience, Reputation and Ability of Class Counsel Support the**
7 **Fee Award.**

8 As demonstrated by their past experience in pursuing class actions on behalf of consumers
9 and employees, Class Counsel possesses considerable expertise in litigating class action matters.
10 Class Counsel has been involved as lead counsel or co-counsel in dozens of class actions resulting
11 in a multitude of beneficial results to class members in California. Because it is reasonable to
12 compensate class counsel commensurate with their skill, reputation and experience, a fee award of
13 33 1/3% of the Maximum Settlement Amount, a percentage considered within the norm in class
14 action practice, is certainly justified here.

15 Class Counsel’s experience in wage and hour class actions was integral in evaluating the
16 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
17 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
18 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
19 action litigation. Based on these and other factors, Class Counsel has frequently received fee
20 awards amounting to 33 1/3% of the recovery for the class. Therefore, the requested fee award is
21 reasonable and fair.

22 **B. While the Lodestar Method is Not Necessary in Common Fund Cases, Courts**
23 **May Perform a Cross-Check to Award Fees.**

24 “Despite its primacy, the lodestar method is not necessarily utilized in common fund cases.”
25 (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the
26 lodestar method as a drain on the judicial system and a disincentive on attorneys to take on high-
27 risk, challenging cases. (*Id.* at p. 29.) Indeed, the lodestar approach: “(1) ‘increases the workload
28 of an already overtaxed judicial system,’ (2) is ‘insufficiently objective and produce[s] results that

1 are far from homogenous,’ (3) ‘creates a sense of mathematical precision that is unwarranted in
2 terms of the realities of the practice of law,’ (4) ‘is subject to manipulation by judges who prefer
3 to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the
4 plaintiffs or of an overall dollar amount,’ (5) ‘encourages lawyers to expend excessive hours, and
5 . . . engage in duplicative and unjustified work,’ (6) ‘creates a disincentive for the early settlement
6 of cases,’ (7) deprives trial courts of ‘flexibility to reward or deter lawyers so that desirable
7 objectives, such as early settlement, will be fostered,’ (8) ‘works to the particular disadvantage of
8 the public interest bar,’ and (9) results in ‘confusion and lack of predictability.’” (*Id.*)

9 Although California supports the common fund doctrine, the lodestar method can be used
10 to cross-check fee awards. “It may be appropriate in some cases, assuming the class benefit can
11 be monetized with a reasonable degree of certainty, to “cross-check” or adjust the lodestar in
12 comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and
13 within the range of fees freely negotiated in the legal marketplace in comparable litigation.”(*In re*
14 *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

15 Applying the lodestar method requires a two-step process. The first step is to multiply the
16 number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a
17 multiplier to the lodestar to take into account various factors. “The purpose of such adjustment is
18 to fix a fee at the fair market value for the particular action. In effect, the court determines,
19 retrospectively, whether the litigation involved a contingent risk or required extraordinary legal
20 skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate
21 for such services.” (*Id.* at pp. 556-57.) “Under certain circumstances, a lodestar calculation may
22 be enhanced on the basis of a percentage-of-the-benefit analysis.” (*Id.* at p. 557.)

23 Wilshire Law Firm’s current lodestar is \$102,185 based on at least 176.9 hours of reported
24 work performed by Class Counsel. (Marquez Decl., ¶ 15.) Accordingly, the requested fee of
25 \$175,000.00 is reasonable and fair as it is based on a multiplier of 1.7. Additionally, there are
26 additional hours devoted by Class Counsel to this litigation that are not reflected in Class Counsel’s
27 request for attorney’s fees, such as future time that will need to be devoted to ensuring the
28 settlement checks are administered. (Marquez Decl., ¶¶ 16-17.)

1 **1. Class Counsel’s Rates Have Been Approved by Several Courts.**

2 Class Counsel provides a declaration to support their lodestar hourly rates. “Affidavits of
3 the plaintiffs’ attorney and other attorneys regarding prevailing fees in the community, and rate
4 determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are
5 satisfactory evidence of the prevailing market rate.” (*United Steelworkers of America v. Phelps*
6 *Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.) Class Counsel has received final approval of
7 their hourly rates in other wage and hour class action settlements. These rates are not opposed or
8 challenged.

9 **2. The Lawsuit Provided a Public Benefit.**

10 Class Counsel’s choice to litigate this matter provided a public benefit to 712 California
11 employees. Indeed, California Labor Code section 90.5(a) states:

12 It is the policy of this state to vigorously enforce minimum labor standards in order
13 to ensure employees are not required or permitted to work under substandard unlawful
14 conditions...and to protect employers who comply with the law from those who
attempt to gain a competitive advantage at the expense of their workers by failing to
comply with minimum labor standards.

15 Moreover, the California Supreme Court stated that “Labor Code section 1194 confirms “a clear
16 public policy ... that is specifically directed at the enforcement of California's minimum wage and
17 overtime laws for the benefit of workers.” [citation omitted].” (*Sav-on Drug Stores, Inc. v. Super.*
18 *Ct.* (2004) 34 Cal.4th 319, 340.) Given the financial risks and numerous attorney hours attendant
19 to the litigation of Plaintiff’s claims, this factor supports Class Counsel’s fee request and
20 encourages the private enforcement of legal rights for the general good.

21 **C. Costs Are Reasonable.**

22 Class Counsel requests reimbursement of \$15,718.12 in expenses. (Marquez Decl., ¶ 16.)
23 Defendant has agreed that it will not oppose any cost award request up to \$20,000. The categories
24 of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are easily
25 seen to be both reasonable and necessary.

26 **D. The Enhancement Payment to Plaintiff is Reasonable.**

27 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
28 compensate them for the expense or risk they have incurred in conferring a benefit on other

1 members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
2 Cal.App.4th 399.) Courts routinely grant approval of class action settlement agreements
3 containing enhancements for the class representatives, which are necessary to provide incentive to
4 represent the class, and are appropriate given the benefit the class representatives help to bring
5 about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59.)

6 Service awards are particularly important to plaintiffs in wage and hour cases because they
7 promote the important public policies underlying the wage and hour laws. This strong policy is
8 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to
9 vigorously enforce minimum labor standards in order to ensure employees are not required or
10 permitted to work under substandard unlawful conditions....”).

11 Under the Settlement Agreement, subject to the Court’s approval, Defendant agreed not to
12 oppose an enhancement to Plaintiff in the amount of \$10,000. (Settlement, § XIV.) This amount
13 is also in exchange for Plaintiff’s general release of all claims against Defendant. Plaintiff has
14 submitted a declaration demonstrating that he devoted a great deal of time and work assisting
15 counsel in the case, including in-person meetings with Class Counsel and numerous phone calls to
16 discuss the case, case strategy, mediation, and settlement. (*See generally*, Declaration of Plaintiff
17 Pablo Sergio Nevarez [“Nevarez Decl.”] (showing at least 45 hours of estimated time devoted to
18 this case).)

19 When compared with the amounts awarded in typical class action cases, the amount
20 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
21 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
22 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
23 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
24 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
25 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
26 while named plaintiffs in other employment class actions received an average award of \$12,121
27 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
28 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by

1 compensating them for the high costs of their service to the class, including risks of stigmatization
2 or retaliation on the job.” (*Id.* at p. 1308.)

3 Another factor that supports the awarding of service awards is whether the class
4 representative’s service resulted in notoriety or other personal difficulties. (*See, e.g., Schaffer*
5 *v. Litton Loan Servicing, LP* (C.D. Cal. 2012) 2012 WL 10274679, at *18.) The California
6 Supreme Court has recognized that “retaliation against employees for asserting statutory rights
7 under the Labor Code is widespread,” despite anti-retaliation statutes designed to protect
8 employees. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460-61.) In this context, class
9 representatives should be rewarded for assuming the risk of retaliation for the sake of class
10 members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

11 Here, Plaintiff has lent his name to this case and thus subjected himself to public
12 attention. He has also risked his reputation in the community and with regard to future
13 employment opportunities as a result of stepping forward publicly in a class action. When a
14 class representative shoulders some degree of personal risk in joining the litigation, such as
15 workplace retaliation or financial liability, an incentive award is especially important. (*See*
16 *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977; *Weeks v. Kellogg Co.* (C.D. Cal. 2013)
17 2013 WL 6531177, *36.) Plaintiff has been subject to the rigors of litigation and has had to
18 devote his own time and expenses in participating in the case. (*See, generally, Nevarez Decl.;*
19 *see also Marquez Decl., ¶ 25-29.*)

20 **E. Administrative Costs Should be Approved.**

21 Phoenix Settlement Administrators, the Settlement Administrator, estimates that it will
22 incur a total of \$9,750.00 in costs associated with the administration of this Settlement. (Mitzner
23 Decl., ¶ 17.) These expenses are reasonable, based upon the size of the class and the additional
24 tasks associated with claim and exclusion tracking and Class Member payment processing.

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1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval
3 of the proposed settlement.

4
5 Dated: October 12, 2022

WILSHIRE LAW FIRM

6
7 By: _____

Justin F. Marquez
Benjamin H. Haber
Arrash T. Fattahi

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

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 **October 12, 2022**, at Los Angeles, California.

Signature