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RAMONA SILVA-HEREDIA, and all others similarly situated
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 **(UNLIMITED JURISDICTION)**

12 RAMONA SILVA-HEREDIA, on behalf of
13 herself, all others similarly situated, the general
14 public, and as an “aggrieved employee” on behalf
of other “aggrieved employees” under the Labor
Code Private Attorneys General Act of 2004,

15 *Plaintiff(s),*

16 vs.

17
18 TACOS LOS DESVELADOS, a California
19 corporation; TACOS LOS DESVELADOS
20 GLENDALE, INC., a California corporation;
TACOS LOS DESVELADOS WEST COVINA,
21 INC., a California corporation; TACOS LOS
DESVELADOS WHITTIER, INC., a California
22 corporation; ADOLFO VALENZUELA, an
individual; and DOES 1–50, inclusive,

23 *Defendants.*
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28

Case No. 21STCV11103

**PLAINTIFF’S SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR
PRELIMINARY APPROVAL OF
FIRST AMENDED CLASS ACTION
AND PAGA SETTLEMENT
AGREEMENT**

Hearing Date: October 31, 2023
Hearing Time: 9:00 a.m.
Hearing Dept.: 17, The Honorable
Maren E. Nelson

Action filed: March 19, 2021
Trial Date: Not set

**Submitted Herewith Under Separate
Cover:**

1. Supplemental Declaration of David Spivak;
2. Declaration of Ramona Silva-Heredia
3. Declaration of Michael Moore; and
4. [Proposed] Order.



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1 **PLAINTIFF RAMONA SILVA-HEREDIA'S SUPPLEMENTAL MEMORANDUM OF**
2 **POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR**
3 **PRELIMINARY APPROVAL OF FIRST AMENDED CLASS ACTION AND PAGA**
4 **SETTLEMENT AGREEMENT**

5 Plaintiff Ramona Silva-Heredia ("Plaintiff") submits this supplemental briefing in
6 support for her Motion for Preliminary Approval of Class Action Settlement with Defendants
7 Tacos Los Desvelados, Tacos Los Desvelados Glendale, Inc., Tacos Los Desvelados West
8 Covina, Inc., Tacos Los Desvelados Whittier, Inc., and Adolfo Valenzuela (collectively
9 "Defendants"). Pursuant to the Court's minute order dated May 15, 2023 (Supplemental
10 Declaration of David G. Spivak ("Suppl. Decl. DS"), ¶ 3, Ex. 14), the Parties amended the original
11 Class Action and PAGA Settlement Agreement and Class Notice (Suppl. Decl. DS, ¶ 4, Ex. 15)
12 to address the Court's concerns. The Parties seek approval of this new settlement agreement,
13 entitled First Amended Class Action and PAGA Settlement Agreement and Class Notice ("First
14 Amended Settlement"). Suppl. Decl. DS, ¶ 5, Exs. 16 (clean) and 17 (redline). The Plaintiff also
15 proposes a new preliminary approval order for the First Amended Settlement, submitted herewith
16 under separate cover ("Proposed Order"). Each of the Court's comments in the minute order of
17 May 15, 2023 are recited below in bold, followed by a discussion of the Plaintiff's response to the
18 comment/question. Plaintiff has reviewed the Los Angeles Superior Court, Complex Civil
19 Department Checklist for Preliminary Approval of Class Action Settlement ("Checklist") and has
20 concluded that the responses to the Court's order of May 15, 2023 referenced comply with the
21 Checklist. Suppl. Decl. DS, ¶ 6. Pursuant to Lab. Code § 2699(1)(2), Plaintiff submitted a copy of
22 the First Amended Settlement with the Labor and Workforce Development Agency ("LWDA")
23 at the same time as Plaintiffs' supplemental briefing is being filed with the Court. Suppl. Decl.
24 DS, ¶ 20, Ex. 22.

25 1. ***Dunk/Kullar Analysis:* There is an inadequate discussion regarding the factual**
26 **bases for the claims asserted or the discovery undertaken. While the Memorandum of Points**
27 **and Authorities indicates that plaintiff was employed as a cook in a restaurant and cites as**
28 **evidence Paragraph 4 of the Spivak Declaration, Mr. Spivak represented at hearing that the**
plaintiff was employed as a server. The Declaration of Spivak at Ex. 6 contains a damages
analysis but the factual bases for the assumptions in the analysis is not shown. Mr. Spivak
represented in his Declaration and at hearing that he reviewed time and payroll data for a
random sample of putative class members. (Spivak Decl. ¶ 7.) There is no information as to
the percentage of data reviewed, why the sampling was statistically significant, and whether
expert analysis supported the conclusion that the sampling was sufficient to provide reliable
data. See Court's Checklist for Preliminary Approval at Item B. ("If counsel's analysis was



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1 informed by a data sample, show that the sample is statistically reliable”); *Duran v. US Bank*
2 *National Assn.* (2014) 58 Cal.4th 1, 42 (“If sampling is used to estimate the extent of a party’s
3 liability, care must be taken to ensure that the methodology produced reliable results. With
4 input from the parties’ experts, the court must determine that a chosen sample size is
statistically appropriate and capable of producing valid results within a reasonable margin
of error.”)

5 At issue in this class and representative action is Defendant’s liability to its non-exempt
6 hourly employees for its failures to (1) pay all overtime at time-and-a-half or double time, as
7 applicable; (2) pay regular and overtime pay for all hours worked; (3) provide timely,
8 uninterrupted, duty-free 30-minute meal periods or pay premium wages in lieu thereof; (4) provide
9 timely, uninterrupted, duty-free 10-minute rest period or pay premium wages in lieu thereof, and
10 (5) reimburse all necessary business expenses, including, without limitation, mileage
reimbursement for errands required by Defendant. Suppl. Decl. DS, ¶ 7.

11 At the hearing for preliminary approval on May 15, 2023, Mr. Spivak inadvertently
12 represented that Plaintiff was employed as a server. Plaintiff was employed by Defendants as a
13 cook at their restaurant located at 5306 Atlantic Boulevard, Maywood, California, from March
14 2016, until on or about March 21, 2020. Suppl. Decl. DS, ¶ 8.

15 Defendants operate Mexican restaurants in Maywood, Glendale, West Covina, and
16 Whittier, California. The restaurants are open 7 days a week from 11 a.m. to 10 p.m. Defendants
17 first opened their first restaurant in 2015. The Glendale and West Covina locations were opened
18 in January and July 2020, respectively, and the Whittier location in late 2022. Defendants
19 employed approximately 140 Class Members, including 85 PAGA employees, during the relevant
20 time period. Class Members received approximately 6,426 paychecks, and PAGA employees
21 received approximately 2,519 paychecks. Suppl. Decl. DS, ¶ 9. The following are the factual bases
for Plaintiff’s claims:

22 **Unpaid overtime premium wages.** Plaintiffs allege Defendants issued wages to Plaintiff
23 and the Class Members on a weekly basis and paid them at an hourly rate of pay. Plaintiff was
24 compensated \$12 per hour. Plaintiff and the Class Members often worked 7 days in a workweek,
25 and between 8 and 16 hours per workday. Plaintiff reports that Defendants sometimes assigned
her with shifts from 7 a.m. to 12 a.m. Defendants, however, paid Plaintiff and the Class Members
26 at the regular rate of pay for all hours and failed to pay overtime wages at least one and a half 1½
27 times their hourly rates of pay for all hours in excess of forty (40) in a week, all hours in excess
28 of eight (8) in a day, and all hours on the seventh (7th) day worked in a workweek. Additionally,



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1 Defendants failed to pay Plaintiff and the Class Members at least twice their hourly rates of pay
2 when they worked over twelve (12) hours in a workday or for hours in excess of eight (8) on the
3 seventh (7th) workday of the workweek.

4 Plaintiffs allege Defendants informed Plaintiff and the Class Members that they could only
5 pay them for 40 hours at the regular rate of pay per workweek. The supervisor (Teresa Rivera)
6 also told Plaintiff and the Class Members that any additional hours over 40 would be paid to the
7 employees in personal checks in the owner's name (Adolfo Valenzuela), as opposed to regular
8 paystubs from the business, because Defendants did not want to pay premium rates for overtime
9 hours. None of Plaintiff's earning statements (provided by Defendants as part of confidential
10 mediation production) display any earned overtime hours whatsoever. Plaintiff and the Class
11 Members frequently complained about this system, but Defendants made no changes.

12 **Off the clock work.** Plaintiffs allege Defendants required Plaintiff and the Class Members
13 to perform work while clock-out and failed to compensate them for this time. Due to the workload
14 and failure to hire sufficient staff members, Defendants often requested that Plaintiff and the Class
15 Members return to work after they had clocked-out and left the restaurant. Defendants generally
16 requested Plaintiff and the Class Members to work off-the-clock for approximately one hour after
17 they had already clocked-out and completed their shifts. Plaintiff reports that her supervisors,
18 Teresa Rivera, and Francisco (last name unknown), would call her back to work after she had left,
19 or ask her to stay after she clocked-out, to prepare food orders and kitchen necessities. This
20 occurred two to three time during a workweek. Defendants failed to compensate Plaintiff and the
21 Class Members for this work performed off-the-clock.

22 **Unprovided Meal and Rest Breaks.** Plaintiffs allege Defendants failed to provide
23 Plaintiff and the Class Members with all required timely, uninterrupted, off-duty meal periods and
24 paid rest breaks. This is largely the result of Defendants' practice of understaffing their restaurants
25 and assigning an unduly heavy workload to their employees. Defendants also failed to provide
26 Plaintiff and the Class Members with a second duty-free, 30-minute meal period when they
27 worked more than 10 or 12 hours in a workday. The Class Members report that Defendants did
28 not hire a sufficient number of employees to cover for Plaintiff and the Class Members to have
timely, duty-free meal and rest breaks. Plaintiff reports that only 3 to 6 employees worked during
one shift (cooks, servers and a cashier), and that 3 to 4 additional employees would have been
needed to allow other employees to take compliant meal periods and rest breaks. Defendants



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1 required Plaintiff and the Class Members to clock-out for timely 30-minute meal breaks even
2 though Defendants required Plaintiff and the Class Members to work through their meal periods.
3 Also, if Class Members did attempt to take a meal break, they only truly lasted 10 to 15 minutes
4 because Defendants' management (Teresa Rivera) often interrupted them with demands for help
5 in serving customers, cleaning, or other related job duties. Defendants required Plaintiff and the
6 Class Members to clock-out for their meal breaks and falsely indicate that they took 30-minute
7 lunch breaks even when they worked through them, or when they lasted much less than 30-
8 minutes. The supervisors told the employees to never leave their work station unattended, and due
9 to understaffing, this means that Plaintiff and the Class Members could rarely, if ever, take off-
10 duty breaks. Plaintiff and the Class Members complained about the lack of rest breaks and
11 compliant meal periods, but Defendants did not make any changes. Further, Defendants did not
12 pay Plaintiff and the Class Members all premium wages required for all meal and rest periods not
provided to them throughout the relevant period.

13 Plaintiffs allege Defendants required Plaintiff and the Class Members to remain at the
14 restaurant during their rest breaks, ensuring that Plaintiff and the Class Members would be
15 required to assist customers and managers at all times. Consequently, required such on-premises
16 rest periods invariably led to interruptions of Plaintiff and the Class Members' on-site rest breaks.
17 Defendants' failure to relinquish all control over Plaintiff and the Class Members during their rest
18 breaks violation the Wage Order and Labor Code § 226.7. Defendants' requirement that its
19 employees remain on work premises during rest period not only deprived Plaintiff and the Class
20 Members of duty-free rest breaks, but also deprived them of the statutorily-mandated 10-minute
21 period of time during which they must be free of Defendants' control. Defendants' policy
22 prevented Plaintiff and the Class Members from taking short walks outside of their work premises
for pleasure or exercise, or for getting food or drink.

23 **Unreimbursed Expenses.** Plaintiffs allege Defendants required Plaintiff and the Class
24 Members to make trips to the grocery store and buy restaurant items when TLD ran out of them.
25 Plaintiff and the Class Members purchased products such as milk, tomato sauce, eggs, and lemons,
26 among others. Defendants often did not reimburse Plaintiff and the Class Members for such
expenses, nor did they reimburse them for mileage expenses. Suppl. Decl. DS, ¶ 9.

27 On June 17, 2021, Plaintiff requested that Defendants informally disclose documents and
28 data to enable Plaintiff to prepare for settlement discussions, including the number of putative



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1 class members and aggrieved employees, and the number of paychecks and workweeks for the
2 various limitation periods applicable to Plaintiff's claims. Suppl. Decl. DS, ¶ 10. Plaintiff also
3 requested a reasonable, randomly selected sample of Defendants' time, payroll, and expense
4 records, and related personnel records. *Id.* Finally, Plaintiff requested Defendants' policies
5 applicable to the claims at hand and asked Defendants identify any and all comparable claims
6 against them. *Id.* The Parties thereafter engaged in an informal, voluntary exchange of information
7 in the context of privileged settlement discussions to facilitate an early mediation. Defendant
8 produced Plaintiff's entire personnel file and copies of its relevant company written policies
(employee handbook), as well as Plaintiff's earning statements and time records. *Id.*

9 Before the initial settlement, Defendants contended that they employed approximately 140
10 putative class members and that they produced the records of 20% of the putative class members
11 (every fifth employee). Suppl. Decl. DS, ¶ 11, Ex. 18. Defendants contend that they
12 employed these 140 putative class members during the period of March 19, 2017 to May 31, 2022
13 (the "Class Period"). Based on this total, Plaintiff analyzed the payroll records of 23 employees
14 the time records of 12 employees for which Defendants produced records (8.6% of the putative
class members). *Id.*

15 Plaintiff retained Sridhar Srinivasan, a data analyst, to analyze the sample. Suppl. Decl.
16 DS, ¶ 12, Ex. 19. Plaintiff also employed the Raosoft—Sample Size calculator¹
17 (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically
18 reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014)
19 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable
20 whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using
21 a margin of error of 32%, a confidence level of 95%, and a population size of 140, the
22 Raosoft Sample Size Calculator recommended a sample of 9. Suppl. Decl. DS, ¶ 12, Ex. 20.
23 Thus, the sample population (12 employees) that Plaintiff's data analyst evaluated is statistically
24 reliable. *Id.*

25
26
¹ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the Internet, InterForm, SurveyWin, EZReport and Rapid
Report innovative survey software programs for information gathering and analysis. The family of survey
software supports data collection and reporting for any form-based data. Support is for web-surveys and forms, email
distribution, diskette, PDA, laptop or pen-based: all types of distribution." The Raosoft webpage advertises that it is
"database web survey software for gathering information." <http://www.raosoft.com/>. It also advertises, "The
parameters of the sample size calculation are something that you
choose." <http://www.raosoft.com/suggestreading.html>.



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2 **2. Defendant's Financial Condition:** As the settlement is predicated on a
3 payment plan (¶4.3) and Defendants' financial situation, admissible evidence of Defendants'
4 financial situation should be provided, including appropriate financial documents such as a
5 balance sheet, statement of cash flows, profit and loss statement, and the like. See Checklist
6 Item B.

7 At the mediation and in negotiations that followed, it became clear that that
8 Defendants had insufficient resources to cover the full extent of liability. Suppl. Decl. DS, ¶ 11.
9 As part of the settlement negotiations, Defendants disclosed their tax returns, bank statements,
10 and related information. The following business financial records were disclosed: Tacos Los
11 Desvelados 2018, 2019, and 2020 Tax Returns; Tacos Los Desvelados West Covina 2020 Tax
12 Return; Tacos Los Desvelados 2021 Bank Statements; Tacos Los Desvelados Glendale 2021 Bank
13 Statements; and Tacos Los Desvelados West Covina 2021 Bank Statements. Also, the following
14 personal financial records were disclosed: Adolfo Valenzuela's 2018, 2019, and 2020 Tax
15 Returns. Suppl. Decl. DS, ¶ 13, Ex. 21. Plaintiff's Counsel has reviewed the financial
16 records. *Id.* The information provided was sufficient to demonstrate the financial condition of the
17 Defendants and that they are unlikely to be able to afford payment of a larger amount than the
18 Gross Settlement Amount. Based on such records, Plaintiff, on her own behalf and on behalf of
19 the Class Members, has agreed to settle the lawsuit on the terms set forth in the Settlement. *Id.*

20 **3. Adequacy:** Plaintiff should provide a declaration evidencing that she
21 understands the obligations of being an adequate class representative, the details of what
22 she has done or will do to demonstrate the adequacy of her representation, and the
23 substantial burden she will undertake to represent the putative class in this case.

24 Plaintiff's declaration regarding her adequacy has been submitted herewith under
25 separate cover, followed by a certified translation in English, as Plaintiff is a Spanish speaker.
26 Suppl. Decl. DS, ¶ 14.

27 **4. Settlement Distribution**

- 28 **a. Settlement Agreement** ¶1.22 states "There will be a distribution within 60
days of each installment payment." Does this mean a proportionate
distribution of the class and PAGA payments, or *all* payments due under the
settlement (i.e., attorney fees, administration costs, etc.)? This should be
clearly detailed in the Settlement Agreement. Also, if it is intended to mean *all*
payments under the settlement, then why would it be appropriate for counsel
to receive a portion of their fees before the class is fully paid out?



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1 The First Amended Settlement Agreement has been revised at ¶ 1.22 to state that
2 a proportionate distribution of the funds will take place:

3 There will be a proportionate distribution within 60 days of each installment payment.
4 Class Counsel will only receive their fees proportionally to the amounts received by the
5 Class. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation
6 Expenses Payment and the Class Representative Service Payment shall not precede
7 disbursement of Individual Class Payments and Individual PAGA Payments.
8

9 First Amended Settlement Agreement, ¶ 1.22. Suppl. Decl. DS, ¶ 15. The Class Notice attached
10 as Exhibit A to the First Amended Settlement, and the Proposed Order submitted herewith under
11 separate cover have also been modified to reflect these revisions. *Id.*

12
13 **b. Note that ¶1.22 also conflicts with ¶4.4, which states: Within 14 days after**
14 **Defendants fund the Gross Settlement Amount, the Administrator will mail**
15 **all checks for all Individual Class Payments, all Individual PAGA Payments,**
16 **[etc.] ...” Please resolve.**

17 Paragraph 4.4 of the First Amended Settlement Agreement has been modified to
18 state “60 days” instead of “14 days.” First Amended Settlement Agreement, ¶ 4.4, Suppl. Decl.
19 DS, ¶ 16.

20 **5. Release Language: See ¶8.5.4 – the reference to “Paragraph 6.4” appears to be**
21 **inaccurate as that ¶ is not within this settlement agreement.**

22 Paragraph 8.5.4 of the First Amended Settlement Agreement has been modified to
23 reference “Paragraph 6.3” instead of “Paragraph 6.4”. First Amended Settlement Agreement, ¶
24 8.5.4. Suppl. Decl. DS, ¶ 17.

25 **6. Settlement Administration: Provide a declaration from the settlement administrator**
26 **that provides the qualification and experience of the administrator and affirms that**
27 **the administrator has sufficient safeguards in place to protect the data and funds**
28 **entrusted to it (e.g., insurance for the theft of money or data) and has no relationship**
to any counsel.



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1 A declaration from the settlement administrator has been submitted herewith under
2 separate cover. The Declaration of Michael Moore on Behalf of Phoenix Class Settlement
3 Administration provides the requisite qualifications and assurances. Suppl. Decl. DS, ¶ 18.

4 **7. Counsel shall brief why the delay is not prejudicial to the proposed class given the**
5 **representations in the 7/27/22 filing by counsel.**

6 Although a Notice of Settlement was filed on July 27, 2022, the delay is not prejudicial
7 to the Class, because the Class Period (March 19, 2017 to May 31, 2022) has remained the same
8 for all Class Members, and as such, the value of each settlement share will not change. Suppl.
9 Decl. DS, ¶ 19.

10
11 Respectfully submitted,

12 THE SPIVAK LAW FIRM

13 Dated: September 18, 2023

14 By:



15 DAVID G. SPIVAK
16 MAYA CHEAITANI, Attorneys for
17 Plaintiff RAMONA SILVA-
18 HEREDIA, and all others similarly
19 situated
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