

Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Benjamin H. Haber (SBN 315664)
benjamin@wilshirelawfirm.com
Arrash T. Fattahi (SBN 333676)
afattahi@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

RAUL FRIAS-ESTRADA, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

TREK RETAIL CORPORATION, a Wisconsin
corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. MSC20-01916

CLASS ACTION

[Assigned for all purposes to: Hon. Edward
G. Weil, Dept. 39]

**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 LATLC
President Steven Vartazarian; and [Proposed]
Order Granting Plaintiff's Motion for
Preliminary Approval of Class Action
Settlement]

PRELIMINARY APPROVAL HEARING

Date:
Time: 9:00 a.m.
Dept: 39

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

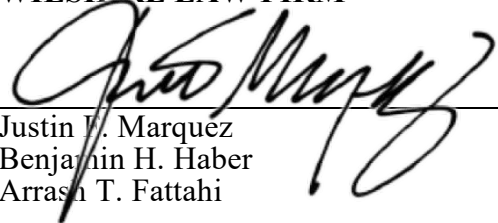
2 PLEASE TAKE NOTICE that on TBD, at 9:00 a.m., in Department 39 of the Contra Costa
3 Superior Court, 725 Court Street, Martinez, California 94553, pursuant to Code of Civil Procedure
4 § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff Raul Frias-Estrada (“Plaintiff”) will
5 move the Court for an Order granting preliminary approval of the proposed class action settlement
6 between Plaintiff and Defendant Trek Retail Corporation. Plaintiff further moves the Court for an
7 Order:

- 8 1. Granting preliminary approval of the Stipulation for Class Action Settlement and First
9 Amendment to Joint Stipulation Re: Class Settlement;
- 10 2. Certifying a Class for settlement purposes;
- 11 3. Approving the Notice and Settlement Information Form (collectively, the “Notice
12 Packet”) and the plan for distribution of the Notice Packet to Settlement Class
13 Members;
- 14 4. Appointing Plaintiff Raul Frias-Estrada as Class Representative for settlement purposes;
- 15 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
16 settlement purposes;
- 17 6. Appointing Phoenix Settlement Administrators as the Settlement Administrator; and
18 7. Scheduling a Final Approval Hearing.

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

23 Dated: August 26, 2022

WILSHIRE LAW FIRM

24
25 By: 

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

26
27 Attorneys for Plaintiff
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Raul Frias-Estada (“Plaintiff”) seeks preliminary approval of a proposed \$675,000.00 non-reversionary, wage and hour class action settlement with Defendant Trek Retail Corporation (“Defendant,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 491 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, Jeffrey Krivis, Esq., 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 and First Amendment to Joint Stipulation Re: Class Settlement, certify the proposed settlement class, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class action and 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 bicycle and cycling product manufacturing and operates nationwide with its headquarters in Waterloo, Wisconsin. (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 and rest period premiums. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff

1 asserts claims against Defendant for failure to pay minimum and straight time wages, failure to
2 pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods,
3 failure to timely pay all final wages at termination, failure to provide accurate itemized wage
4 statements, failure to indemnify employees for expenditures, unfair business practices, and civil
5 penalties under PAGA. (*Id.* at ¶ 3.)

6 On September 21, 2020, Plaintiff filed a putative wage-and-hour class action complaint
7 against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§
8 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and
9 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to
10 authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages
11 at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage
12 statements (Cal. Lab. Code § 226); (7) failure to indemnify employees for expenditures (Cal.
13 Lab. Code § 2802); and (8) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*).
14 (*Id.* at ¶ 4.) On June 14, 2022, Plaintiff filed a First Amended Class and Representative Action
15 Complaint adding a claim for civil penalties under PAGA, as well as claims for violation of
16 Labor Code sections 204, 210, 246, and 925.

17 **B. Discovery and Investigation**

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

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

1 (Id.)

2 **C. Settlement Negotiations**

3 On October 1, 2021, the Parties participated in private mediation with experienced class
4 action mediator, Jeffrey Krivis, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The
5 settlement negotiations were at arm’s length and, although conducted in a professional manner,
6 were adversarial. The Parties went into the mediation willing to explore the potential for a
7 settlement of the dispute, but each side was also prepared to litigate their position through trial
8 and appeal if a settlement had not been reached. (*Id.*)

9 After extensive negotiations and discussions regarding the strengths and weaknesses of
10 Plaintiff’s claims and Defendant’s defenses, the Parties were able to reach a resolution, the
11 material terms of which are encompassed within the Settlement Agreement and First
12 Amendment to the Settlement Agreement (collectively referred herein as the “Settlement”). (*Id.*
13 at ¶ 8; Ex. 1 [Joint Stipulation Re: Class Settlement (“Settlement Agreement”)]; Ex. 2 [First
14 Amendment to Joint Stipulation Re: Class Settlement (“First Amendment to Settlement
15 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 \$675,000.00 Settlement represents approximately **85% of the realistic**
23 **maximum recovery of \$794,845.00.** (*Id.* at ¶ 24.) Although Class Counsel estimated that
24 Defendant’s maximum potential liability for all claims was approximately \$5.7 million, when
25 the risk of prevailing at certification and trial are factored into the equation, Class Counsel
26 believes that Defendant’s realistic exposure was \$794,845.00, meaning the Settlement achieves
27 a significant recovery. (*Id.* at ¶¶ 18-24.) Considering the risk and uncertainty of prevailing at
28 class certification and at 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 \$675,000.00 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 any Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period (together, collectively referred to as the "Class Members")." (Settlement Agreement, § I (R).)

2. Settlement Period: The Settlement Period means the period from September 22, 2016 through December 1, 2021. (Settlement Agreement, § I (S).)

3. Gross Settlement Amount: This amount is \$675,000.00, 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 Agreement, § I (Q).)

4. No Reversion: This is a non-reversionary settlement. Settlement checks will be valid for one hundred and eighty (180) days from the date of issuance. Pursuant to California Code of Civil Procedure § 384(a), any unpaid cash residue or unclaimed or abandoned class member funds, plus any accrued interest thereon, will be sent to the Los Angeles Trial Lawyers' Charities ("LATLC"), 2708 Wilshire Boulevard, Suite 391, Santa Monica, CA 90403. (First Amendment to Settlement Agreement, § 1.) Neither Plaintiff or Class Counsel have any interest, financial or otherwise, in the proposed *cy pres* recipient. (Marquez Decl., ¶¶ 12-13.)

5. Release as to All Settlement Class Members: The class release is limited to "any and all wage-related 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, officers,

1 directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns,
2 subrogees, executors, partners, parents, subsidiaries, joint employers, insurers, and related
3 corporations, including the following claims: (1) all claims alleged in the operative complaint,
4 under any legal theory of liability, for the failure to pay all wages of any kind, including any
5 minimum or straight time wages, owed pursuant to California Labor Code §§ 204, 510, 1194,
6 1194.2, and 1197, the California Industrial Welfare Commission (“IWC”) Wage Orders, or any
7 comparable federal statute under any theory of liability; (2) all claims alleged in the operative
8 complaint, under any legal theory of liability, for the failure to pay overtime or double time wages
9 owed pursuant to California Labor Code §§ 204, 510, 1194, and 1198, the IWC Wage Orders, or
10 any comparable federal statute under any theory of liability; (3) all claims alleged in the operative
11 complaint, under any legal theory of liability, for the failure to provide meal periods pursuant to
12 California Labor Code §§ 226.7 and 512, and the IWC Wage Orders; (4) all claims alleged in the
13 operative complaint, under any legal theory of liability, for the failure to provide rest periods
14 pursuant to California Labor Code § 226.7, and the IWC Wage Orders; (5) all claims alleged in
15 the operative complaint, under any legal theory of liability, for the failure to properly calculate any
16 premiums owed and/or paid pursuant to California Labor Code § 226.7(b); (6) all claims alleged
17 in the operative complaint, under any legal theory of liability, for any penalties of any kind arising
18 from an alleged failure to pay final wages or other amounts allegedly owed to Class Members
19 pursuant to California Labor Code §§ 201-204; (7) all claims alleged in the operative complaint,
20 under any legal theory of liability, for any penalties of any kind arising from an alleged wage
21 statement violation pursuant to California Labor Code §§ 226 and 1174.5; (8) all claims alleged in
22 the operative complaint, under any legal theory of liability, for failure to indemnify employees for
23 expenditures pursuant to California Labor Code § 2802; (9) all claims alleged in the operative
24 complaint, under any legal theory of liability, for violation of Business & Professions Code §§
25 17200, *et seq.*; (10) all claims alleged in the operative complaint and Plaintiff’s PAGA letter, under
26 any legal theory of liability, for penalties pursuant to the PAGA (Labor Code §§ 2698, *et seq.*);
27 and (11) all claims alleged in the operative complaint, under any legal theory of liability, for any
28 penalties or any another amounts that could be potentially owed to Class Members during the

Settlement Period, including penalties owed pursuant to California Labor Code §§ 210, 226.3, 246, 558, 925, and 1197.1.” (Settlement Agreement, § VII (A).)

6. PAGA Allocation: The settlement includes \$10,000.00 allocated to Plaintiff’s claims under PAGA, with 75% of which (\$7,500.00) being paid to the LWDA and 25% (\$2,500.00) being paid to the participating PAGA Members. (Settlement Agreement, § XVI.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

7. 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) amount paid to the LWDA. (Settlement Agreement, § I (K).)

8. 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 (5), above, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section XI(A) of the Settlement Agreement.

9. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 50% wages and 50% penalties and interest. (Settlement Agreement, § XV.)

10. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed \$10,000.00. (Settlement Agreement, § XIV.) 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 Agreement, § VII (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 Agreement, § XIV.)

11. Attorneys’ Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% (\$225,000.00) of the Gross Settlement Amount, plus out-of-

1 pocket costs not to exceed \$15,000.00. (Settlement Agreement, § XIII.) At this time, Class
2 Counsel's costs are approximately \$13,837.05. (Marquez Decl., ¶ 39.)

3 12. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
4 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
5 fees, costs, and service award being sought, and an explanation of how the settlement allocations
6 are calculated. (Settlement Agreement, Ex. A.) The Notice also sets forth the approximate amount
7 of money the class members would receive in the event all class members participate in the
8 settlement. (*Id.*) The Notice also includes an opt-out form that class members can complete in the
9 event they decide to not participate in the settlement. (*Id.*) Class Members will be notified by first
10 class mail of the settlement. (Settlement Agreement, § IX (C).) Phoenix Settlement
11 Administrators, the proposed Settlement Administrator, will undertake its best efforts to ensure
12 that the notice is provided to the current addresses of class members, including conducting a
13 national change of address search and re-mailing the notice to updated addresses. (*Id.*) Notice
14 will be provided in English and Spanish. (Marquez Decl., ¶ 11; Ex. 3 [Settlement Administrator
15 Bid].)

16 13. Workweek Dispute Form: The Workweek Dispute Form sets forth each class
17 member's total workweeks and permits class members to dispute their number of workweeks or
18 opt-out of the settlement. (Settlement Agreement, Ex. B.)

19 **III. DISCUSSION**

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

27 In considering whether a settlement is reasonable, the trial court should consider relevant
28 factors, which may include the strength of Plaintiff's case, the risk, expense, complexity and likely

1 duration of further litigation, the risk of maintaining class action status through trial, the amount
2 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
3 experience and views of counsel, the presence of a governmental participant, and the reaction of
4 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
5 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
6 that the class settlement is within the “ballpark” of reasonableness. (*Id.* at p. 133.) The record
7 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*
8 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not
9 require “an explicit statement of the maximum amount the plaintiff class could recover if it
10 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy
11 and the realistic range of outcomes of the litigation.”].)

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

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

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

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

26 The Settlement was reached following extensive negotiations following a full day of
27 mediation with experienced employment mediator Jeffrey Krivis, Esq. (Marquez Decl., ¶¶ 7-8.)
28 The settlement negotiations were at arm’s length and, although conducted in a professional manner,

1 were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a
2 settlement of the dispute, but each side was also prepared to litigate their or its position through
3 trial and appeal if a settlement had not been reached. (*Id.*)

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

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

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

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

28 ///

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

6 The proposed settlement of \$675,000.00 therefore represents a substantial recovery when
7 compared to Plaintiff's reasonably forecasted recovery. (*Id.* at ¶¶ 17-28.) Because of the proposed
8 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
9 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
10 achieving class certification, the burdens of proof necessary to establish liability, the probability
11 of appeal of a favorable judgment, it is clear that the settlement amount of \$675,000.00 is within
12 the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
13 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
14 ***\$826.37.*** (*Id.* at ¶ 27.)

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

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

21 B. The Proposed Class Notice of Settlement Should Be Approved

22 The Notice of Proposed Class Action Settlement and Workweek Dispute Form, in the form
23 attached to the Settlement Agreement as Exhibits A and B, should be approved for dissemination
24 to the class. The Notice and Workweek Dispute Form inform the class of the terms of the
25 settlement and of their rights to be excluded from the settlement. And if there are class members
26 who wish to object to this proposed class action settlement, they will have the opportunity to file
27 their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice
28 and Workweek Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of

1 Court.

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

3 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
4 Counsel reasonable attorneys' fees in amount of \$225,000.00, which is 33 1/3% of the gross
5 Settlement Amount, and up to \$15,000.00 in costs. These amounts are disclosed to all class
6 members in the Notice of Proposed Class Action Settlement and are reasonable.

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

9 California courts have long awarded attorneys' fees as a percentage of the benefit created
10 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when
11 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
12 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
13 or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d
14 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

15 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common
16 fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all
17 the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*,
18 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
19 Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund
20 from which others derive benefits may require those passive beneficiaries to bear a fair share of
21 the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
22 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
23 has been applied "consistently in California when an action brought by one party creates a fund in
24 which other persons are entitled to share." (*Id.* at p. 110.)

25 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc.* (2016)
26 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the
27 class members, and the trial court in its equitable powers awards class counsel a fee out of that
28 fund, the court may determine the amount of a reasonable fee by choosing an appropriate

percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts.” (*Id.* [internal citations omitted].)

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

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

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

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

Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime compensation, including interest thereon, reasonable attorneys’ fees, and costs of suit.” Under this section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were

larger than the total class recovery at the conclusion of this case. This settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Marquez Decl., ¶¶ 35-38.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class ahead of all other concerns.

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

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

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

D. The Service Award to Named Plaintiff Is Reasonable

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which

1 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
2 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir.
3 2009) 563 F.3d 948, 958-59.)

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

14 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
15 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for
16 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
17 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
18 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class
19 Counsel during the mediation. (Marquez Decl., ¶¶ 29-33.) This amount is reasonable particularly
20 in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl*
21 *Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel
22 Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339 class members,
23 and the court approved a \$25,000.00 class representative incentive award for each named plaintiff.
24 (Marquez Decl., ¶ 33)

25 When compared with the amounts awarded in typical class action cases, the amount
26 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
27 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
28 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore

1 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
2 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
3 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
4 while named plaintiffs in other employment class actions received an average award of \$12,121
5 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
6 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
7 compensating them for the high costs of their service to the class, including risks of stigmatization
8 or retaliation on the job.” (*Id.* at p. 1308.)

9 E. **There is Good Cause for Selecting Los Angeles Trial Lawyers’ Charities As**
10 **the *Cy Pres* Recipient.**

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

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

22 Here, in the event settlement checks remain uncashed after 180 days, those funds shall be
23 donated to the LATLC as a *cy pres* beneficiary. (First Amendment to Settlement Agreement, § 1.)
24 In the past, LATLC has been the *cy pres* recipient in several wage and hour class action settlements.
25 (Declaration of LATLC President Steven R. Vartazarian [“Vartazarian Decl.”], ¶ 5.) “In
26 connection with this *cy pres* wage and hour award, LATLC will allocate the award to specific
27 charitable efforts specifically related to employment and professional development and monitor
28 those charitable efforts to ensure the *cy pres* funds are indeed utilized for the earmarked purposes.”

(*Id.* at ¶ 7.) “Since it began in 2006, LATLC has donated \$2,778,784.69 to organizations helping people seek employment and promoting educational and professional opportunities.” (*Id.* at ¶ 8.)

IV. CERTIFICATION FOR SETTLEMENT PURPOSES 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 Cal. 3d 462, 470.)

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

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1 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
2 **Settlement Purposes.**

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

4 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
5 approximately 491 employees of Defendant.

6 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
7 precise criteria. Because class members are identified using specific criteria in the regular business
8 records of Defendant (i.e., job position), the class is ascertainable. (*Wilner v. Sunset Life Ins. Co.*
9 (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the
10 subject of the lawsuit is sufficient to make the class ascertainable].)

11 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
12 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
13 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
14 may be maintained as a class action even where the parties are numerous and it is in fact practicable
15 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
16 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
17 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
18 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
19 Plaintiff contends that numerosity is plainly satisfied.

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

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

26 Here, the employment practices at issue are: whether Defendant had legally compliant
27 policies and practices for all hours worked, including overtime wages; whether Defendant had
28 legally compliant policies and practices to provide employees with meal periods; whether

1 Defendant had legally compliant policies and practices authorizing and permitting its employees
2 to take rest periods; whether final payment of wages was untimely and excluded unpaid wages,
3 including meal period premium and rest period premium wages; whether the wage statements were
4 consequently non-compliant; and whether Defendant adequately reimbursed employees for
5 business expenditures. Plaintiff contends that the factual and legal issues are the same for all of
6 the identified class members, including Plaintiff. Further, all class members suffered from, and
7 seek redress for, the same alleged injuries.

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

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

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

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

24 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
25 with extensive experience in prosecuting complex class actions, including similar class actions that
26 previously settled. (Marquez Decl., ¶¶ 40-50.) Class Counsel unquestionably is "qualified,
27 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
28 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,

1 litigated this case and diligently reviewed the settlement terms, showing their dedication.
2 Plaintiff's willingness to serve as a representative demonstrates his serious commitment to bringing
3 about the best results possible for the class and subclass. (*McGhee, supra*, 60 Cal.App.3d at p.
4 451.)

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

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

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

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

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

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

27 The Notice of Proposed Class Action Settlement should be approved. It will be
28 disseminated through direct U.S. first class mail to the last known address for each Class Member.

1 It informs the Class Members of the terms of the settlement and their right to be excluded from the
2 Settlement. And if there are Class Members who wish to object to this proposed class action
3 settlement, they will have the opportunity to file their objections and be heard at the Final Approval
4 Hearing.

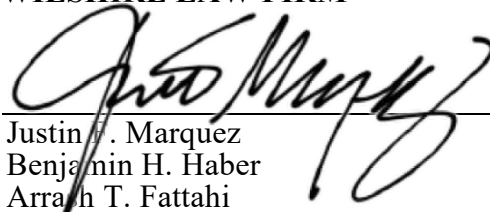
5 The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg,
6 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
7 terms and conditions of the settlement agreement, in an informative and coherent manner. It
8 makes clear that the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

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
15 approval of the proposed settlement and set a Final Approval Hearing in TBD 2022.

16
17 Dated: August 26, 2022

WILSHIRE LAW FIRM

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19 By: 

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

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21 Attorneys for Plaintiff
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Frias-Estrada v. Trek Retail Corporation, et al.
MSC20-01916

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.

Jennifer N. Lutz, Esq. (SBN 190460)
jlutz@pettitkohn.com
 Rio F. Schwarting, Esq. (SBN 323363)
rschwarting@pettitkohn.com
 Michelle Guerrero
mguerrero@pettitkohn.com
 Kimberly Wood
kwood@pettitkohn.com
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC
 11622 El Camino Real, Suite 300
 San Diego, California 92130
 Telephone: (858) 755-8500
 Facsimile: (858) 755-8504

Attorneys for Defendant Trek Retail Corporation

- (X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.
- (X) **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the email addresses listed above using File & ServeXpress.

I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on **August 26, 2022**, at Los Angeles, California.

Ashley Narinyans
Type or Print Name

Signature