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

KANEISHA KINGSBURY, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

CARAVAN FOODS II, INC., a corporation;
STERLING BV, INC., a corporation; and DOES
1 through 10, inclusive,

Defendants.

Case No. RG21096357

CLASS ACTION

[Assigned to: Hon. Brad Seligman, Dept. 23]

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

PRELIMINARY APPROVAL HEARING

Date: September 13, 2022

Time: 3:00 p.m.

Dept: 23

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

2 PLEASE TAKE NOTICE that on September 13, 2022, at 3:00 p.m., in Department 23 of
3 the Alameda County Superior Court, 1225 Fallon Street, Oakland, California 94612, pursuant to
4 Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff Kaneisha
5 Kingsbury (“Plaintiff”) will move the Court for an Order granting preliminary approval of the
6 proposed class action settlement between Plaintiff and Defendant Caravan Foods II, Inc. Plaintiff
7 further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Stipulated Settlement Agreement and Release of
9 Claims;
- 10 2. Certifying a Class for settlement purposes only;
- 11 3. Affording Plaintiff leave to file a Second Amended Class and Representative Action
12 Complaint;
- 13 4. Approving the Notice of Pendency of Putative Class Action, Proposed Settlement and
14 Hearing Date for Court Approval (the “Class Notice”) and the plan for distribution of
15 the Class Notice to Settlement Class Members;
- 16 5. Appointing Plaintiff Kaneisha Kingsbury as Class Representative for settlement
17 purposes only;
- 18 6. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
19 settlement purposes only;
- 20 7. Appointing CPT Group, Inc. as the Settlement Administrator; and
- 21 8. Scheduling a Final Approval Hearing.

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

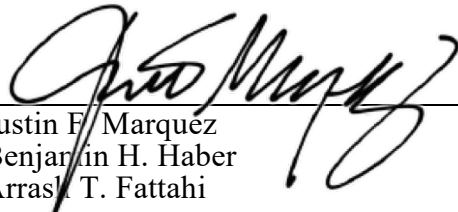
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1 Dated: August 19, 2022

2 **WILSHIRE LAW FIRM**

3 By: 

4 Justin F. Marquez
5 Benjamin H. Haber
6 Arras T. Fattahi

7 Attorneys for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kaneisha Kingsbury (“Plaintiff”) seeks preliminary approval of a proposed \$1,250,000.00 non-reversionary, wage and hour class action settlement with Defendant Caravan Foods II, Inc. (“Defendant,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 1,090 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, Tripper Ortman, 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, certify the proposed settlement class for settlement purposes only, afford Plaintiff leave to file a Second Amended Class and Representative Action Complaint, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant specializes in the development, production, and supply of frozen and fresh bakery products. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts for each workday. Plaintiff further alleges that Defendant failed to include all remuneration in the employees’ overtime rate and meal period premiums. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Plaintiff further alleges that Defendant failed to

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

9 On April 9, 2021, Plaintiff filed a putative wage-and-hour class action complaint against
10 Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§ 204,
11 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and 1198);
12 (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to authorize
13 and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages at
14 termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage
15 statements (Cal. Lab. Code § 226); and (7) unfair business practices (Cal. Bus. & Prof. Code §§
16 17200, *et seq.*). (*Id.* at ¶ 4.) On May 6, 2021, Plaintiff filed a First Amended Class Action
17 Complaint, which removed Sterling Foods, Inc. from the complaint, added Sterling BV, Inc. as
18 a defendant, and added a cause of action for Failure to Indemnify Employees for Expenditures.
19 (*Id.*) As part of the Settlement, the Parties stipulated to Plaintiff being afforded leave to file a
20 Second Amended Class and Representative Action Complaint, which will add a cause of action
21 for civil penalties under PAGA and remove Sterling BV, Inc. as a defendant (while
22 simultaneously dismissing Sterling BV, Inc. from the action) (the “Operative Complaint”). (*Id.*;
23 Settlement, Article VIII.)

24 **B. Discovery and Investigation**

25 Following the filing of the initial Complaint, the Parties exchanged documents and
26 information before mediating this action. Defendant produced timekeeping and payroll records
27 for the putative class members. Defendant also provided documents of their wage and hour
28 policies and practices during the class period, and information regarding the total number of

1 current and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

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

9 **C. Settlement Negotiations**

10 On June 7, 2022, the Parties participated in private mediation with experienced class
11 action mediator, Tripper Ortman, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
12 The settlement negotiations were at arm's length and, although conducted in a professional
13 manner, were adversarial. The Parties went into the mediation willing to explore the potential
14 for a settlement of the dispute, but each side was also prepared to litigate their position through
15 trial and appeal if a settlement had not been reached. (*Id.*)

16 After extensive negotiations and discussions regarding the strengths and weaknesses of
17 Plaintiff's claims and Defendant's defenses, the Parties were able to reach a resolution, the
18 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. 1
19 [Stipulated Settlement Agreement and Release of Claims ("Settlement" or "Settlement
20 Agreement")].)

21 Class Counsel has conducted a thorough investigation into the facts of this case. Based
22 on the foregoing discovery and their own independent investigation and evaluation, Class
23 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
24 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
25 of significant delay, the defenses that could be asserted by Defendant both to certification and
26 on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 13.)

27 Indeed, the \$1,250,000.00 Settlement represents **57.1% of the realistic maximum**
28 **recovery of \$2,189,935.40.** (*Id.* at ¶ 22.) Although Class Counsel estimated that Defendant's

1 maximum potential liability for all claims was approximately \$17.8 million, when the risk of
2 prevailing at certification and trial are factored into the equation, Class Counsel believes that
3 Defendant's realistic exposure was \$1,739,935.40, meaning the Settlement achieves a
4 significant recovery. (*Id.* at ¶¶ 16-22.) Considering the risk and uncertainty of prevailing at
5 class certification and at trial, this is an excellent result for the Class. Indeed, because of the
6 proposed Settlement, class members will receive timely, guaranteed relief and will avoid the
7 risk of an unfavorable judgment.

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

9 Under the Settlement, Defendant will pay \$1,250,000.00 to resolve this Litigation. This
10 amount is all-inclusive. The Settlement's key terms include:

11 1. Settlement Class: For settlement purposes only, the Parties agree to the certification
12 of a class pursuant to California Code of Civil Procedure § 382 defined as: current and former non-
13 exempt, hourly paid employees who were employed by Caravan in the State of California at any
14 time from April 9, 2017 to June 7, 2022. (Settlement, Article III, Definitions, § (g).)

15 2. Settlement Period: The Settlement Period means the period from April 9, 2017
16 through June 7, 2022. (Settlement, Article III, Definitions, § (j).)

17 3. Participating Class Member(s): Participating Class Members means those Class
18 Members who do not submit a valid requests for exclusion. (Settlement, Article III, Definitions,
19 § (z).)

20 4. PAGA Member(s): PAGA Members means current and former non-exempt, hourly
21 paid employees who were employed by Caravan in the State of California at any time from April
22 12, 2020 to June 7, 2022. (Settlement, Article III, Definitions, § (h).)

23 5. Gross Fund Value Amount: This amount is \$1,250,000.00, for all claims, including
24 wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, the
25 PAGA payment, all other penalties, and the Class Representative Service Award. (Settlement,
26 Article III, Definitions, § (s).)

27 6. Uncashed Checks: Uncashed checks not negotiated within 120 days of their
28 issuance are void. If any Settlement Class Member has not cashed his or her Settlement Payment

1 check within 90 days of issuance, the Settlement Administrator shall mail that Settlement Class
2 Member a postcard reminding him/her of the deadline to cash such check and providing
3 information as to how to obtain a reissued check in the even the check was lost, stolen or misplaced.
4 Any checks issued to Settlement Class Members shall remain valid and negotiable for 120 days
5 from the date of issuance. After all settlement funds have been distributed and all checks issued
6 to Settlement Class Members have either been cashed or remained uncashed and gone stale, the
7 Settlement Administrator shall deposit any residual funds from uncashed checks with the
8 California State Controller's Officer – Unclaimed Property. (Settlement, § 5.06 (d)(5).)

9 7. Release as to All Settlement Class Members: Upon the Court's final approval of the
10 class settlement and entry of Final Order and Judgment, each member of the Settlement Class shall
11 be deemed to have released and discharged each Defendant and all of its former and present
12 parents, and affiliates, and their officers, directors, employees, partners, shareholders, attorneys,
13 and agents, and any other successors, assigns or legal representatives from any and all claims that
14 were asserted and that could have been asserted based on the facts contained in the Operative
15 Complaint filed in this Action and which were included leading up to and during mediation,
16 including without limitation to, any and all alleged claims for unpaid wages, unpaid minimum
17 wages, unpaid overtime, regular rate compensation, unpaid meal or rest break premiums, itemized
18 wage statement penalties, unreimbursed business expenses, failure to provide requisite writings,
19 waiting time penalties under the California Labor Code and Business & Professions Code
20 (including Section 17200, *et seq.*); claims for penalties brought under the PAGA; claims for
21 restitution and other equitable relief, liquidated damages, or penalties in their positions as
22 Settlement Class Members during the Class Period. The Settlement Class Members acknowledge
23 that they may hereafter discover claims presently unknown and unsuspected, or facts in addition
24 to or different from those which they now know or believe to be true with respect to claims released
25 herein. Nevertheless, Settlement Class Members acknowledge that a portion of the consideration
26 received herein is for a release with respect to unknown damages and complaints, whether resulting
27 from known injuries and consequences or from unknown injuries or unknown consequences, and
28 agree that it is their intention to fully, finally, and forever to settle and release all matters and all

claims that exist, hereafter may exist, or might have existed based on the facts and allegations set forth in the Operative Complaint. Settlement Class Members who cash or deposit their Individual Settlement Payment checks will also release their Class Claims. (Settlement, § 7.02.)

8. 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 distributed on a pro-rata basis to the PAGA Members. (Settlement, § 5.06 (b)(4).) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

9. Net Fund Value Amount: The "Net Fund Value 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, Article III, Definitions, § (w).)

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 5.06 of the Settlement Agreement.

11. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as wages. (Settlement, § 5.06 (c)(5).)

12. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed \$10,000.00. (Settlement, § 5.06 (b)(3).) 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, § 7.03.)

13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% (\$416,666.67) of the Gross Fund Value Amount, plus out-of-pocket costs not to exceed \$20,000.00. (Settlement, § 5.06 (b)(1).) At this time, Class Counsel's costs are approximately \$15,849.91. (Marquez Decl., ¶ 37.)

1 14. Notice of Pendency of Putative Class Action, Proposed Settlement and Hearing
2 Date for Court Approval: The Class Notice sets forth in plain terms, a statement of the case, the
3 terms of the Settlement Agreement, the approximate amount of attorneys’ fees, costs, and service
4 award being sought, and an explanation of how the settlement allocations are calculated.
5 (Settlement, Ex. A.) Class Members will be notified by first-class mail of the settlement.
6 (Settlement, § 5.03 (b).) CPT Group, Inc., the proposed Settlement Administrator, will undertake
7 its best efforts to ensure that the notice is provided to the current addresses of class members. (*Id.*)
8 Notice will be provided in English and Spanish. (Marquez Decl., ¶ 11; Ex. 2 [Settlement
9 Administrator Bid].)

10 **III. DISCUSSION**

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

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

only an “understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.”].)

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

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

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

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

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

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as class member timekeeping and payroll records, Defendant’s policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid

1 to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation, Class
2 Counsel investigated the applicable law regarding the claims and defenses asserted in the
3 Litigation. (*Id.*) Thus, Plaintiff and her counsel were able to act intelligently and effectively in
4 negotiating the proposed Settlement. (*Id.*)

5 Class Counsel also has considerable experience and has demonstrated competence with
6 litigating wage and hour class actions. (*Id.* at ¶¶ 38-48.) Again, this supports the position that the
7 terms of the Settlement are premised on objective evidence that has been considered and weighed
8 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
9 action.

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

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

19 This settlement avoids the risks and the accompanying expense of further litigation.
20 (Marquez Decl., ¶ 24.) While Plaintiff is confident in the merits of her claims, a legitimate
21 controversy exists as to each cause of action. (*Id.* at ¶ 23.) Plaintiff also recognizes that proving
22 the amount of wages due to each class member would be an expensive, time-consuming, and
23 uncertain proposition. (*Id.*)

24 The proposed settlement of \$1,250,000.00 therefore represents a substantial recovery when
25 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 15-26.) Because of the proposed
26 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
27 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
28 achieving class certification, the burdens of proof necessary to establish liability, the probability

1 of appeal of a favorable judgment, it is clear that the settlement amount of \$1,250,000.00 is within
2 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
3 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
4 ***\$714.53.*** (*Id.* at ¶ 25.)

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

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

11 **B. The Proposed Class Notice Should Be Approved**

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

19 **C. The Proposed Attorneys’ Fees and Costs Are Reasonable**

20 Under the Settlement, subject to the Court’s approval, Defendant agrees to pay Class
21 Counsel reasonable attorneys’ fees in amount of \$416,666.67, which is 33 1/3% of the gross
22 Settlement Amount, and up to \$20,000.00 in Litigation costs. These amounts are disclosed to all
23 class members in the Class Notice and are reasonable.

24 **1. Class Counsel Request an Award of Fees Based on the “Common** 25 **Fund” Method**

26 California courts have long awarded attorneys’ fees as a percentage of the benefit created
27 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that “when
28 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff

1 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
2 or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d
3 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

4 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common
5 fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all
6 the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*,
7 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
8 Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund
9 from which others derive benefits may require those passive beneficiaries to bear a fair share of
10 the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
11 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
12 has been applied "consistently in California when an action brought by one party creates a fund in
13 which other persons are entitled to share." (*Id.* at p. 110.)

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

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

25 According to a leading treatise on class actions, "No general rule can be articulated on what
26 is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a
27 reasonable fee award from a common fund in order to assure that the fees do not consume a
28 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 attorney’s fees, and costs of suit.” Under this section, Plaintiff would be permitted to recover her 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., ¶¶ 33-36.) 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.

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

3 As demonstrated by their past experience in pursuing class actions on behalf of consumers
4 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
5 Decl., ¶¶ 38-48.) Class Counsel has been involved as lead counsel or co-counsel in several class
6 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
7 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee
8 award is supported here.

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

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

17 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
18 compensate them for the expense or risk they have incurred in conferring a benefit on other
19 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
20 of class action settlement agreements containing enhancements for the class representatives, which
21 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
22 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
23 2009) 563 F.3d 948, 958-59.)

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

1 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
2 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
3 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
4 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
5 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

6 Under the Settlement Agreement, subject to the Court’s approval, Defendant agreed to pay
7 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for
8 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
9 devoted a great deal of time and work assisting counsel in the case and communicated with counsel
10 very frequently for litigation and to prepare for mediation. (Marquez Decl., ¶¶ 27-31.) This
11 amount is reasonable particularly in light of the substantial benefits Plaintiff generated for all class
12 members. (*Id.*) Indeed, in *Karl Adams, III, et al. v. Markets tar Corporation, et al.*, No. 2:14-cv-
13 02509-TLN-DB, Class Counsel Justin F. Marquez helped negotiate a \$2.5 million class action
14 settlement for 339 class members, and the court approved a \$25,000.00 class representative
15 incentive award for each named plaintiff. (Marquez Decl., ¶ 31.)

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

1 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED**

2 **A. Legal Standard**

3 The proposed Settlement Class is well suited for class certification. All of the claims derive
4 from a core set of alleged violations of California’s wage and hour laws and regulations. For the
5 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
6 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
7 the question is one of a common or general interest, of many persons, or when the parties are
8 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend
9 for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1)
10 There must be an ascertainable class; and (2) there must be a well-defined community of interest
11 in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow*
12 *Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the
13 California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the
14 community-of-interest requirement itself embodies three factors: “(1) predominant questions of
15 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
16 representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29
17 Cal. 3d 462, 470.)

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

24 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
25 **Settlement Purposes**

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

27 Plaintiff contends that the proposed class that Plaintiff seeks to represent is easily
28 ascertainable, and includes approximately 1,090 employees of Defendant.

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

6 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
7 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
8 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
9 may be maintained as a class action even where the parties are numerous and it is in fact practicable
10 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
11 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
12 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
13 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
14 Plaintiff contends that numerosity is plainly satisfied.

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

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

21 Here, the alleged employment practices at issue are: whether Defendant had legally
22 compliant policies and practices for all hours worked, including overtime wages; whether
23 Defendant had legally compliant policies and practices to provide employees with meal periods;
24 whether Defendant had legally compliant policies and practices authorizing and permitting its
25 employees to take rest periods; whether final payment of wages was untimely and excluded unpaid
26 wages, including meal period premium and rest period premium wages; whether the wage
27 statements were consequently non-compliant; and whether Defendant adequately reimbursed
28 employees for business expenditures. Plaintiff contends that the factual and legal issues are the

1 same for all of the identified class members, including Plaintiff. Further, all class members are
2 alleged to have suffered from, and seek redress for, the same alleged injuries. Defendant denies
3 all allegations.

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

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

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

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

20 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
21 with extensive experience in prosecuting complex class actions, including similar class actions that
22 previously settled. (Marquez Decl., ¶¶ 38-48.) Class Counsel unquestionably is "qualified,
23 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
24 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
25 litigated this case and diligently reviewed the settlement terms, showing their dedication.
26 Plaintiff's willingness to serve as a representative demonstrates her serious commitment to
27 bringing about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

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

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

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

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

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

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

28 The Class Notice also fulfills the requirement of neutrality in class notices. (Conte &

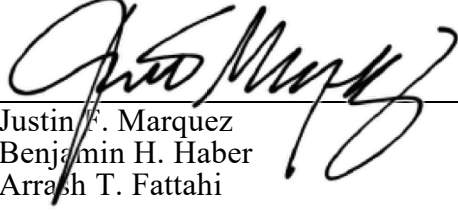
1 Newberg, Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date
2 and the terms and conditions of the Settlement Agreement, in an informative and coherent
3 manner. It makes clear that the Settlement Agreement does not constitute an admission of
4 liability by the Defendant,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

8 **VI. CONCLUSION**

9 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
10 approval of the proposed Settlement and set a Final Approval Hearing in January/February 2023,
11 or the first available date thereafter.

12
13 Dated: August 19, 2022

WILSHIRE LAW FIRM

14
15 By:  _____

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

17 Attorneys for Plaintiff
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STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On **August 19, 2022**, I served the foregoing **PLAINTIFF’S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Samuel S. Hyde, Esq. (SBN 327065)
hydes@gtlaw.com
GREENBERG TRAURIG, LLP
 1201 K Street, Suite 1100
 Sacramento, California 94111
 Telephone: (916) 442-1111
 Facsimile: (916) 448-1709

(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 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 **August 19, 2022**, at Los Angeles, California.


Signature