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*Additional Counsel Listed on Next Page*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES- SPRING STREET COURTHOUSE**

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| MARIO ANGEL MENDOZA, an individual and on behalf of himself and all others similarly situated; EDIN MARROQUIN, an individual, on behalf of himself and all others similarly situated, and on behalf of the State of California and other aggrieved persons,<br><br>Plaintiffs,<br><br>v.<br><br>AMUSEMENT INDUSTRY, INC., a California corporation; and DOES 1 through 100, inclusive,<br><br>Defendants. | CASE NO.: 21STCV09790<br><br>[Assigned to the Hon. Carolyn B. Kuhl, in Dept. 12]<br><br>**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND REPRESENTATIVE ACTION SETTLEMENT; ENHANCEMENT AWARD; REASONABLE ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DAVID D. BIBIYAN, VEDANG J. PATEL, PLAINTIFF AND NICOLE BENCH IN SUPPORT THEREOF**<br><br><u>HEARING INFORMATION:</u><br>DATE: March 23, 2023<br>TIME: 10:30 a.m.<br>DEPT: 12 |

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on behalf of himself and all others similarly situated and aggrieved

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on March 21, 2023 at 10:30 a.m., or as soon thereafter as they may be heard in Department 12 of the Superior Court of the State of California for the County of Los Angeles, plaintiffs Mario Angel Mendoza ("Plaintiff Mendoza") and Edin Marroquin ("Plaintiff Marroquin" and with Plaintiff Mendoza, "Plaintiffs") on behalf of themselves and all others similarly situated and aggrieved, and as preliminarily approved class representative of the Settlement Class, will and hereby does move for this Court for entry of an Order:

1. Finally certifying the Settlement Class;
2. Finally approving Plaintiffs as Class Representatives;
3. Finally approving David D. Bibiyan and Diego Aviles of Bibiyan Law Group, P.C., as well as Justin F. Marquez of Wilshire Law Firm, as Class Counsel;
4. Finally approving the settlement claims under the terms set forth in the Joint Stipulation re: Class Action and Representative Action Settlement ("Settlement," "Agreement" "Settlement Agreement");[1]
5. Finally approving payment of the Gross Settlement Amount of $1,118,580.00[2].
6. Finally approving the payment of $11,275.00 for settlement administration to ILYM Group, Inc. ("ILYM", or "Settlement Administrator") from the Gross Settlement Amount;
7. Finally approving an enhancement award of $7,500.00 each to Plaintiff Mendoza and Plaintiff Marroquin, for a total of $15,000.00 to Plaintiffs, in consideration for Plaintiff's extensive efforts in prosecuting this case;
8. Finally approving payment of reasonable attorneys' fees to Class Counsel in the amount of thirty-five (35%) of the Gross Settlement Amount which, unless escalated pursuant to the Settlement

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[1] A true and correct copy of the Settlement Agreement is attached without its exhibit(s) as Exhibit "1" to the Declaration of Vedang J. Patel for the Court's convenience.

[2] The Settlement was based on Defendant's representation that there were no more than 37,296 Workweeks worked during the Class Period. In the event the number of Workweeks worked by Class Members during the Class Period increased by more than 10%, or 3,729 Workweeks, then the Gross Settlement Amount would have been increased proportionally by the Workweeks in excess of 37,296 Workweeks multiplied by the Workweek Value. The Workweek Value shall be calculated by dividing the originally agreed-upon Gross Settlement Amount ($1,118,580.00) by 37,296, which amounts to a Workweek Value of $30.00 per Workweek. However, pursuant to the Declaration of Nicole Bench, the total number of Workweeks did not exceed 37,296 Workweeks and thus the Gross Settlement Amount was not increased.

Agreement amounts to $391,503.00;

9. Finally approving reimbursement of Class Counsel's costs in the amount of $27,847.31 from the Gross Settlement Amount;

10. Finally approving PAGA penalties in the amount of $50,000.00, seventy-five percent (75%) or $37,500.00, of which will be paid to the Labor and Workforce Development Agency out of the Gross Settlement Amount, and twenty-five percent (25%) or $12,500.00, of which will be distributed to Aggrieved Employees, defined as Class Members working for Defendant during the period between April 12, 2020 through February 10, 2022 ("PAGA Period") as non-exempt, hourly-paid employees in California;

11. Finally approving the Technician Settlement Amount of $100,000 to be distributed to Technician Class Members; and

12. Entering a Final Judgment consistent with the terms of the Settlement Agreement.

Good cause exists for granting this Motion in that the proposed settlement is fair, reasonable and adequate.

This Motion will be based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Declarations of David D. Bibiyan, Vedang J. Patel, Plaintiff and Nicole Bench, exhibits attached thereto, argument of counsel and upon such other material contained in the file and pleadings of this action, including, without limitation, any and all documents submitted in support of Plaintiffs' Motion for Preliminary Approval of Class and Representative Action Settlement and Provisional Class Certification for Settlement Purposes Only ("Motion for Preliminary Approval").

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Dated: February 27, 2023

BIBIYAN LAW GROUP, P.C.

BY: *Vedang J. Patel*
DAVID D. BIBIYAN
VEDANG J. PATEL

Attorneys for Plaintiffs on behalf of themselves and all others similarly situated and aggrieved

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs Mario Angel Mendoza ("Plaintiff Mendoza") and Edin Marroquin ("Plaintiff Marroquin" and with Plaintiff Mendoza, "Plaintiffs") on behalf of themselves and all others similarly situated and aggrieved, seek final approval of a proposed settlement of this wage-and-hour class action and representative action (the "Action") under the Labor Code Private Attorneys' General Act, codified at Labor Code section 2698, *et seq.* ("PAGA") against defendant Amusement Industry, Inc. doing business as Westland Real Estate Group ("Defendant"). As this court previously found in preliminarily approving the Settlement on October 12, 2022, the Settlement Agreement provides a substantial benefit to the Settlement Class in the form of monetary compensation, particularly in light of the obstacles to certification had the case proceeded on a class basis, the risks in succeeding on the merits even if the matter had been certified on any theory, potential issues of manageability of the Action on a class and/or PAGA basis, and the discretionary nature of the award of civil penalties under PAGA.

Pursuant to the terms of the Settlement Agreement, and as set forth in the Declaration of Nicole Bench of ILYM, the Settlement Administrator issued a Notice Packet in English and Spanish to the Settlement Class. According to the Notice Packet, a true and correct copy of which appears at Exhibit "A" of the Settlement Administrator's Declaration, the deadline for Class Members to opt out or object to the Settlement was February 6, 2023. Pursuant to her declaration, of 366 Class Members[3] on the class list provided by Defendant to the Settlement Administrator, <u>zero 0 Class Members opted out of the Settlement and zero (0) have objected to the Settlement</u>. Therefore, 100% of Class Members are part of the Settlement Class. This is because the Settlement is plainly fair, reasonable, and adequate in light of the probable outcome of further litigation relating to liability and damages issued.

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[3] "Class Members" means: (1) All current and former non-exempt, hourly-paid employees who worked in for defendant Amusement Industry, Inc. doing business as Westland Real Estate Group ("Defendant") at any time during the period between March 12, 2017 through February 10, 2022 ("Class Period") in California ("Class Members"); (2) All Participating Class Members who performed technician duties including, but not limited to performing maintenance and repair, plumbing, electrical, carpentry, painting, cleaning, and responding to emergency maintenance requests, and worked for Defendant in California at any time during the Class Period ("Technician Class Members").

As this Court knows from the Motion for Preliminary Approval, the Parties were able to reach a settlement resolving the dispute in this matter after extensive exchange of documents and information, discussions between counsel about the strengths and weaknesses of the claims and defenses, a full-day mediation before Mark S. Rudy, Esquire, and months of subsequent negotiations between the Parties to agree upon a long form settlement agreement.

Specifically, Class Counsel – comprised of David D. Bibiyan and Diego Aviles of Bibiyan Law Group, P.C., as well as Justin F. Marquez of Wilshire Law Firm, – concluded, after considering the sharply disputed factual and legal issues involved in the Action, including, without limitation, the obstacles to certification should the case have proceeded on a class basis; the risks in succeeding on the merits even if the matter had been certified on any theory; potential hurdles to manageability of the Action on a class or representative basis; and the discretionary nature of civil penalties under PAGA, on the one hand; and the substantial benefits to be received pursuant to the compromise and settlement of the Action as set forth in the Settlement Agreement, on the other hand; and that settlement on the terms set forth herein is in the best interest of the Settlement Class, and is fair, reasonable and adequate.

In summary, Class Counsel have achieved a great result in this litigation under the circumstances, embodied in the Settlement Agreement, achieving an average net payment to Class Members (including the Technician Class) of approximately $1,702.06 with the highest estimated payment to be $4,691.58. The proposed class settlement provides substantial monetary benefit to Class Members and is a product of diligent, aggressive and expeditious efforts of Class Counsel to obtain the best possible result for the Settlement Class. And this is evidenced by the fact that, <u>zero (0) of 366 Class Members opted out and zero (0) of 366 Class Members submitted any objection.</u>

For all the reasons expressed herein, Plaintiff respectfully submits that the Settlement Agreement, already approved by this Court at the preliminary approval proceedings, meets the applicable criteria for this Court's final approval, and that it is fair, adequate, reasonable and in the best interest of the Settlement Class. Accordingly, final approval of the class action and representative action should be granted pursuant to Code of Civil Procedure section 382, rule 3.769 of the California Rules of Court, and Labor Code section 2699, subdivision (l)(1).

## II. PROCEDURAL HISTORY

On March 12, 2021, Plaintiff Mendoza filed this putative wage-and-hour class action in the alleging that defendant Amusement Industry, Inc. doing business as Westland Real Estate Group. ("Defendant"): (1) failed to pay overtime wages; (2) failed to pay minimum wages; (3) failed to provide meal periods or compensation in lieu thereof; (4) failed to provide rest periods, or compensation in lieu thereof; (5) failed to timely pay all wages due upon separation from employment; (6) failed to provide accurate wage statements; (7) failed to reimburse employees for business expenses; (8) engaged in unfair competition; and (9) violated Labor Code Section 227.3 (the "Mendoza Action").

On April 9, 2021, Plaintiff Marroquin filed a separate putative wage-and-hour class action against Defendant, bringing substantially similar allegations as Plaintiff Mendoza in his class action (the "Marroquin Class Action").

On April 12, 2021, Plaintiff Marroquin filed with the Labor and Workforce Development Agency ("LWDA") and served on Defendant, a notice under Labor Code section 2699.3 stating he intended to serve as a proxy of the LWDA to recover civil penalties on behalf of himself and other non-exempt, hourly-paid employees of Defendant under the Labor Code Private Attorneys' General Act of 2004, codified at Labor Code section 2698, et seq. ("PAGA"), for various Labor Code violations ("Marroquin PAGA Notice").

After sixty-five (65) days had passed without any action by the LWDA with respect to the Labor Code violations alleged in the Marroquin PAGA Notice, on September 22, 2022, Plaintiff Marroquin amended his complaint in the Marroquin Action to seek civil penalties against Defendant under PAGA for the Labor Code violations in the Marroquin PAGA Notice.

Thereafter, Plaintiffs and Defendant (collectively, the "Parties") agreed to exchange informal discovery and attend an early mediation. Prior to mediation, Plaintiffs were provided with, among other things: (1) a 20% sampling of time and payroll records for the estimated 459 putative class members; (2) data points for the putative class which included hire dates, termination dates, and average rates of pay; (3) all employment policies and procedures in Defendant's possession, custody, or control; and (4) all documents pertaining to Plaintiffs in

Defendant's possession, custody, or control.

On February 10, 2022, the Parties participated in a full-day mediation before Mark S. Rudy Esquire, a well-regarded mediator experienced in mediating complex labor and employment matters. With the aid of the mediator's evaluation, the Parties reached the Settlement to resolve the Action and the claims asserted in the Marroquin PAGA Notice. As part and parcel to the Settlement, the Parties agreed to file a Second Amended Complaint in the Mendoza Action (hereinafter, the "Action" or "Litigation" or "Lawsuit") in order to effectively consolidate the Mendoza Action and Marroquin Action, including Plaintiff Marroquin's PAGA cause of action.

The Parties had strong positions at mediation regarding the certifiability of Plaintiffs' claims, the merits thereof, the manageability of a trial, and the likelihood of recovering civil penalties for aggrieved employees. Nevertheless, the Parties concluded, after considering the sharply disputed factual and legal issues involved in this Litigation, the risks associated with further prosecution, and the substantial benefits to be received pursuant to the compromise and settlement of the Lawsuit as set forth in the Settlement Agreement, that settlement on the terms set forth herein is in the best interest of Plaintiffs, putative class members, aggrieved employees, and Defendant, and is fair, reasonable, and adequate.

On October 12, 2022, this Court preliminarily approved the Settlement and ordered administration of the Class Notice for feedback from Class Members. The Settlement Administrator, on December 23, 2022, administered the Class Notice in English and Spanish, providing Class Members until February 6, 2023 (*i.e.,* 45 days) to opt-out or submit a written objection. In response, zero (0) of 366 Class Members opted-out of the Settlement and zero (0) of 366 Class Members objected to the Settlement.

## III. <u>TERMS OF THE SETTLEMENT</u>

The terms of the Settlement are as follows:

- Certification of two (2) classes defined as:
    1. All current and former non-exempt, hourly-paid employees who worked in for defendant Amusement Industry, Inc. doing business as Westland Real Estate Group ("Defendant") at any time during the period between

March 12, 2017 through February 10, 2022 ("Class Period") in California ("Class Members").

2. All Participating Class Members[4] who performed technician duties including, but not limited to performing maintenance and repair, plumbing, electrical, carpentry, painting, cleaning, and responding to emergency maintenance requests, and worked for Defendant in California at any time during the Class Period ("Technician Class Members").

- Defendant will pay $1,118,580.00[5] (the "Gross Settlement Amount" or "GSA") to resolve the matter.
- $100,000 of the Gross Settlement Amount shall be allocated towards payment to Technician Class Members.
- The Gross Settlement Amount expressly excludes Employer Taxes, which will be paid by Defendant separate and apart from the Gross Settlement Amount.
- This is a non-reversionary settlement.
- Class Members and Technician Class Members will be paid their *pro rata* share of the class action settlement based on the total number of Workweeks[6] worked during the Class Period.
- The Settlement Administration costs of $11,275.00 will be paid out of the Gross Settlement Amount.

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[4] "Participating Class Members" means all Class Members and Technician Class Members who do not submit a timely and valid Request for Exclusion.

[5] The Settlement was based on Defendant's that there were no more than 37,296 Workweeks worked during the Class Period. In the event the number of Workweeks worked by Class Members during the Class Period increased by more than 10%, or 3,729 Workweeks, then the Gross Settlement Amount would have been increased proportionally by the Workweeks in excess of 37,296 Workweeks multiplied by the Workweek Value. The Workweek Value shall be calculated by dividing the originally agreed-upon Gross Settlement Amount ($1,118,580.00) by 37,296, which amounts to a Workweek Value of $30.00 per Workweek. However, pursuant to the Declaration of Nicole Bench, the total number of Workweeks did not exceed 37,296 Workweeks and thus the Gross Settlement Amount was not increased.

[6] "Workweeks" means the number of workweeks that a Settlement Class Member was employed by and worked for the Defendant in a non-exempt, hourly position in California during the Class Period, based on hire dates, re-hire dates, and termination dates, and worked at least one shift during each such workweek.

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- Class Counsel, comprised of David D. Bibiyan and Diego Aviles of Bibiyan Law Group, P.C., as well as Justin F. Marquez of Wilshire Law Firm, hereby apply for, and Defendant will not oppose, attorneys' fees of up to thirty-five percent (35%) of the Gross Settlement Amount which, unless escalated pursuant to the Settlement Agreement, amounts to $391,503.00, and actual costs incurred of $27,847.31 all of which will be paid out of the Gross Settlement Amount.
- Class Counsel hereby apply for, and Defendant will not oppose, an enhancement award of $7,500.00 each for the Class Representatives, for a total of $15,000.00, which will be paid out of the Gross Settlement Amount.
- Defendant has agreed to pay $50,000.00 as PAGA penalties, seventy-five percent (75%) or $37,500.00 of which will be paid to the LWDA out of the Gross Settlement Amount, and twenty-five percent (25%) or $12,500.00 of which will be distributed to Aggrieved Employees, defined as Class Members working for Defendant during the period from July 2, 2020 through the end of the Class Period ("PAGA Period") as non-exempt, hourly-paid employees in California; and
- $100,000.00 of the Gross Settlement Amount shall be allocated towards payment to the approximate 201 Technician Class Members.
- Any checks from this distribution that are not cashed by Participating Class Members within one-hundred-eighty (180) calendar days from the date of their issuance shall be canceled and funds associated with such checks shall be considered unpaid, unclaimed or abandoned cash residue pursuant to Code of Civil Procedure section 384 ("Unpaid Residue"). The Unpaid Residue plus accrued interest, if any, as provided in Code of Civil Procedure section 384, shall be transmitted to Legal Aid at Work, 180 Montgomery Street, Suite 600, San Francisco, California 94104, the *cy pres recipient*, for use in Los Angeles County.

## IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE

"In approving the settlement of a class action, a court exercises its discretion in determining whether the settlement is fair and reasonable." (*Oldham v. California Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 431; *see also Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 244-245.) A presumption of fairness exists where: (1) the settlement is reached through arms'-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (citing *Newberg on Class Actions* §11.41 (31d ed. 1992)); *see also Wershba*, 91 Cal.App.4th at 245; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52.) Where there is no extrinsic evidence of fraud or collusion, the Court should assume that settlement negotiations were conducted in good faith. (Newberg on Class Actions (3rd ed.), § 11.51.)

### A. The Settlement is the Product of Arm's Length and Informed Negotiations

The Settlement that has been reached, subject to this Court's approval, is the product of substantial effort by the Parties and their counsel. The Settlement was reached after extensive factual and legal investigation and research; substantial negotiation regarding the scope of informal discovery; an exchange of documents and information that included review of time and pay records and analysis thereof with the aid of Plaintiffs and expert consultants; an analysis of shifts and Workweeks worked by Class Members in the Class Period, analysis of the number of pay periods and number of Aggrieved Employees in the PAGA Period for calculating PAGA penalties, number of Class Members eligible for wage statement penalties and waiting time penalties; analysis of Plaintiffs' employment records; extensive correspondence and communication between counsel; a review of pleadings, evidence and rulings in similar actions litigated elsewhere in the state; a review of similar cases in the same industry elsewhere in the country; and preparation for and attendance at a full-day session of mediation, followed by months of further negotiations to finalize the terms and conditions of the general settlement parameters agreed to by the Parties. The settlement amount is a compromise figure. It considered the risks related to certifiability, liability, and manageability.

Class Counsel assert that the wage and hour claims and the claims for resulting penalties would be certified. On the other hand, Class Counsel understand from the mediator and the mediation process that Defendant argued that Plaintiffs cannot meet the requirements of class certification because Plaintiffs have not identified any evidence to support any of the claims she asserted on behalf of herself or the other alleged class members and aggrieved employees; the vast majority of alleged class members were part-time employees who did not work overtime, who were paid at or above the minimum wage for all hours worked, whose expenses were reimbursed, and whose uncontrolled, offsite work schedules allowed them to take uninterrupted rest breaks and meal periods whenever they wanted and for however long they wanted; any wage discrepancies are not the product of an overarching policy that was uniformly applied; that Class Members were paid for all hours under Defendant's control, or otherwise suffered or permitted to work by Defendant; that meal periods were provided and rest periods were authorized and/or permitted; that Defendant's meal and rest period policies were compliant; that Defendant did not deter Class Members from taking meal and rest periods and any untimely or missed meal periods were elections by Class Members and not caused by Defendant or Class Members were paid the required premiums; and that Defendant thus provided all pay owed to Class Members by separation of employment and issued accurate wage statements to Class Members. Defendant further contends that class certification would not be warranted because individual liability issues predominate over any class-wide allegations.

Class Counsel and Defendant's Counsel aggressively advanced the Parties' respective positions through the litigation and settlement negotiations. The negotiations were conducted, as discussed herein, after considerable investigation and analysis by capable and experienced Class Counsel. Class Counsel and Plaintiffs have concluded that it is in the best interest of the Class Members to settle this class action for the substantial benefit obtained for the Class Members under the Settlement Agreement and the costs inherent in extensive additional discovery. As such, the Parties ultimately recognized that the inherent expense, delay and uncertainty of trial present a real danger that an ultimate victory by either side may be of substantially less value than the Settlement.

### B. The Settlement was Reached after Extensive Litigation, Factual Investigation, and Legal Analysis of the Class Claims

Counsel for the Parties engaged in extensive informal discovery, investigation, and discussions about the strengths and weaknesses of the claims and defenses, including a full-day mediation session. This yielded information and documentation concerning the claims set forth in the Action. Defendant provided sufficient information to determine the number of Class Members in the Class Period, the number of Class Members in the Class Period who would be eligible for PAGA penalties, the number of pay periods in the Class Period, Class Members' average rates of pay, penalties for wage statement violations, waiting time penalties and unpaid wages. Class Counsel was also provided with and painstakingly reviewed and analyzed voluminous corresponding time and payroll records, as well as policies and procedures in effect during the Class Period. The foregoing analysis permitted Class Counsel to analyze, among others, the number of late, or unprovided meal periods and rest periods and the sufficiency of Defendant's meal and rest period policies. In addition, counsel for the Parties have investigated the law as applied to the facts discovered regarding the alleged claims of Plaintiffs and potential defenses thereto, and the potential damages claimed by Plaintiffs.

Based on this thorough investigation of the facts, Class Counsel believe that the Gross Settlement Amount of $1,118,580.00 is not only within the reasonable standard but constitutes an excellent result as it has been shown by the fact that <u>100% of the Class Members are participating in the settlement and zero (0) are objecting to it</u>. Furthermore, in light of the inherent difficulty and risks of litigation, the proposed settlement terms herein are eminently reasonable. It is equally well settled that a proposed settlement is not to be measured against a hypothetical ideal result that might have been achieved. (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150, quot. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 ["This court has aptly held that it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators."]; *Cotton v. Hinton* (5th Cir. 1977) 559 F.2d 1326, 1330, quot. *Milstein v. Werner*

(S.D.N.Y. 1972) 57 F.R.D. 515, 524-525 ["The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes."].)

Given the nature of any litigation, especially class action litigation, further litigation would involve extensive written discovery, numerous depositions, expert discovery, discovery disputes, class certification and summary judgment and/or summary adjudication motions. This case would be particularly time-consuming and expensive given Plaintiffs' claims that Class Members were not given regular thirty-minute meal periods, meal periods were often interrupted and not duty-free, as well as failure to provide regular, uninterrupted rest periods.

Further litigation of these claims would likely have seen the deposition of tens of Class Members to achieve certification or defend against attempts of decertification. Moreover, proving any individual damages would be a lengthy and burdensome process. Thus, after carefully analyzing Plaintiffs' claims, Class Counsel and Plaintiffs concluded that this Settlement is in the best interest of the Settlement Class.

### C. Plaintiffs' Cases Contain Significant Risks

As set forth at length above, in contrast to the certain financial benefits that the proposed Settlement provides to the Settlement Class, continued litigation of this Action would involve substantial risks for the Settlement Class. Defendant asserted a number of potentially dispositive defenses and could potentially pursue summary judgment with regard to one or more of these defenses should the litigation continue, including, without limitation, the contentions that Plaintiffs' unpaid wages claims are purely speculative.

While Class Counsel believe that there is a strong possibility that they would ultimately have prevailed in a motion for class certification and trial in this case, the result is, by nature, highly uncertain. Class Counsel therefore recognized that the prospects of certification and liability are far from certain, and the risks of litigation are substantial. If Defendant successfully opposed certification, prevailed on the merits, proved that the Action was not manageable, and/or avoided imposition of discretionary penalties under PAGA, a judgment would be entered for Defendant, and the Settlement Class would receive nothing. The proposed Settlement, in contrast, offers significant value to the Settlement Class that fairly and reasonably accounts for the very real risks of continued litigation.

### D. The Settlement Provides Substantial Benefits to the Settlement Class

The relief provided to the Settlement Class by this Settlement is significant and substantial. As noted above, 100% of the Class Members have agreed to participate in the Settlement and none have objected. Moreover, based on the Settlement Administrator's analysis, the average net payment to each Participating Class Member is estimated at $1,702.06 and the highest net payment to a Participating Class Member is estimated at $4,691.58. Accordingly, the Settlement Agreement provides a significant benefit to the Settlement Class.

### E. Class Counsel are Experienced Class and PAGA Action Litigators

Class Counsel, comprised of David D. Bibiyan and Diego Aviles of Bibiyan Law Group, P.C., as well as Justin F. Marquez of Wilshire Law Firm, are respected members of the California Bar with a strong record of vigorous and effective advocacy of their clients, and are experienced in handling complex class action litigation. Class Counsel has filed motions for class certification in contested class actions in the past and have been appointed class counsel on tens of wage-and-hour class actions. Bibiyan Law Group, P.C., is also currently acting as lead counsel in tens of other wage-and-hour class actions and PAGA actions. Thus, Class Counsel are sufficiently experienced and qualified to evaluate the Class Members' claims and viability of Defendant's defenses.

The recovery for each Class Member is well within the acceptable range for this type of action. Class Counsel and Plaintiffs were prepared to litigate the claims in this Action, but they strongly and unequivocally support the proposed Settlement as being in the best interest of the Settlement Class based on the circumstances referenced herein. This Settlement is favorable given that the Settlement Class will receive compensation promptly rather than facing uncertainties inherent in further litigation and waiting years for this Action to be tried. Furthermore, the Settlement Class has overwhelmingly supported the Settlement on the terms set forth in the Settlement Agreement, as evidenced by the 100% participation rate by the Settlement Class. Thus, this Settlement is highly favorable and is in the best interests of the Settlement Class.

### F. There are Zero Objections and One Opt-Out

A lack of or small number of objections and opt-outs likewise indicates that the Settlement is fair, reasonable, and adequate. (*Laskey v. Intl Union* (6th Cir. 1981) 638 F.2d 954, 957 ["[s]ignificantly, only seven out of 109 made any kind of objection and the objections made indicated these employees did not want to compromise at all but wanted full benefits, rather than making any complaint directed to the adequacy of their legal representation"); *Shlensky v. Dorsey* (3rd Cir. 1979) 574 F.2d 131, 148 [concluding that settlement was fair where, among other things, "very few" class members objected]; *In re SmithKline Beckman Corp. Sec. Litig.* (E.D. Pa. 1990) 751 F. Supp. 525, 530 ["[t]he Court ordered that class members be notified by mail and publication, and not one has lodged an objection to the settlement's terms. Both the utter absence of objections and the nominal number of shareholders who have exercised their right to opt out of this litigation militate strongly in favor of approval of the settlement"].)

In the instant matter, to date, <u>there are zero (0) opt-out out of 366 Class Members. In addition, there are zero (0) objections submitted out of 366 Class Members</u>. This reception by Class Members weighs strongly in favor of final approval.

### G. Conclusion

In sum, all relevant factors support final approval of the settlement. The Parties engaged in mediation at arm's-length and in good faith under the supervision of an experienced and well-respected mediator. Class Counsel also engaged in extensive investigation, informal discovery and analysis of class claims. Moreover, Class Counsel, who are experienced class action litigators, strongly believe that this Settlement provides a great result to the Settlement Class under the circumstances, the result of analysis of time and payroll records, the policies at play, the strength of Plaintiffs' claims and the chances of certification. Lastly, the fact that there have been *zero* objections filed and *zero* opt-out militate strongly in favor of approval of the Settlement. For the foregoing reasons, this Court should conclude that under the circumstances of this case, the proposed settlement is fair, adequate, and well within the range of reasonableness.

## V. <u>THE PAYMENT TO THE SETTLEMENT ADMINISTRATOR IS REASONABLE</u>

The Settlement Administrator fulfilled its duty to prepare and send the Notice to all Settlement Class Members in English and Spanish. The Settlement Administrator has also prepared a report which details the efforts taken to reach Class Members, the number of opt-outs (or lack thereof) and objections received (or lack thereof), the total number of Class Members and number of shifts worked by Class Members, as well as the highest estimated payment, average estimated payment, and lowest estimated payment to be made to Class Members.

The Settlement Administrator will also, as part of its duties upon final approval, have to: (1) set up a bank account in which funds will be deposited; (2) calculate the employer's share of taxes owed by Defendant; (3) work with Defendant's Counsel to fund the settlement and employer's share of taxes; (4) send out checks to all recipients, including the LWDA, Plaintiffs, and Class Counsel; (5) cancel uncashed checks and transmit the funds to the Court Appointed Special Advocates for Children of San Bernardino County; and (6) work with Class Counsel, Defendant's Counsel and Class Members to answer questions, and re-mail checks, as necessary. The Settlement Administrator states that a fee of $11,275.00 is the total cost of administration of the Settlement, which is fair and reasonable. Thus, Plaintiffs and Class Counsel request that the Court approve payment of the final total cost of administration to ILYM Group, Inc. ("ILYM") to be deducted from the Gross Settlement Amount.

## VI. <u>THE NAMED PLAINTIFF SHOULD BE AWARDED THE REQUESTED ENHANCEMENT AWARD</u>

Plaintiffs, who served as named Plaintiffs for the Class and Representative Action, and Class Counsel request that the Court finally approve an enhancement award of $7,500.00 each to Plaintiff Mendoza and Plaintiff Marroquin, for a total of $15,000.00 to Plaintiffs, from the Gross Settlement Amount for the time and effort they undertook in participating in the Action. Because a named plaintiff is an essential ingredient of any class action, an enhancement award is appropriate to induce individuals to step forward and assume the burdens and obligations of representing the class. In deciding the amount of an enhancement award for class representatives, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. (*Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1015.)

Particularly, in employment class actions, such as discrimination or wage claims, the named plaintiffs should be entitled to an enhancement award as an incentive to take the risks associated with pursuing employment claims on behalf of other employees. "We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination." (*Thornton v. East Texas Motor Freight* (6th Cir. 1974) 497 F.2d 416, 420.) The guiding standard in determining the amount of an incentive award is to evaluate the special circumstances, the personal risk attached to being named plaintiffs, the time spent assisting in the litigation, the factual expertise provided, other burdens suffered by the plaintiffs, and the recovery. (*Roberts v. Texaco* (S.D.N.Y. 1997) 979 F. Supp. 185, 201.) Where the plaintiffs are a "present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril, a substantial enhancement award is justified." (*Id.*)

In the instant case, the named Plaintiffs sacrificed greatly on behalf of the Settlement Class. Not only did they risk retaliation but decided to forego what may have been a larger recovery and surely would have been more expedient to benefit fellow Class Members. They provided first-hand knowledge and documentation as to Defendant's timekeeping practices; provided wage statements; and filled in key details regarding the entries thereon and answered key questions at pivotal moments throughout the litigation, including at a full-day mediation session.

In addition, above and beyond the release being provided by other Class Members, Plaintiffs provided a general release and a Civil Code section 1542 release of unknown claims in consideration for the enhancement payment.

In Class Counsel's experience, enhancement awards in wage-and-hour actions typically range from $10,000.00 to $40,000.00. The enhancement award requested for Plaintiffs is in line with, and, in fact, modest, in comparison with the enhancement awards in similar wage-and hour-class actions considering the burden this Action has caused Plaintiffs, the risk of retaliation they faced, the broader release they had to provide, the intrusive questioning to which they were subjected, the tens of hours contributed and the constant attention to this matter to remain abreast of current events as class representative. Considering that Plaintiffs likely could have received a greater amount in a much faster fashion had they pursued their claims individually and because the request is unopposed by Defendant, Class Counsel hereby request that this Court finally approve an enhancement of $7,500.00 each to Plaintiff Mendoza and Plaintiff Marroquin, for a total of $15,000.00 to Plaintiffs.

## VII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE FAIR, REASONABLE AND APPROPRIATE

Class Counsel's application for an award of attorneys' fees in an amount of thirty-five (35%) of the Gross Settlement Amount is fair and reasonable. The requested fee falls on the lower end of the Ninth Circuit's historical benchmark for attorneys' fees of 20% to 50% of a common fund and is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis.

Further, through the notice sent to the Settlement Class, all members of the Settlement Class were advised of the amount of attorneys' fees requested and zero (0) member of the Settlement Class objected to the Settlement and request for attorneys' fees. This is evidence of the Settlement Class' belief that the requested attorneys' fee percentage is reasonable.

The requested fees are very reasonable, and the results achieved for the Settlement Class are excellent. Class Counsel respectfully requests that this Court enter an Order to that effect. Class Counsel seeks a fee award calculated as a percentage of the total value of the Settlement Amount for the successful prosecution and resolution of this action. California state and federal courts have recognized that an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to the Settlement Class by the settlement. (*Laffitte v. Robert Half Int'l Inc.* (2016) [*Laffitte*] 1 Ca1.5th 480; *Serrano v. Priest* (1977) [*Serrano*] 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472 [*Boeing*], 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 577 F.2d 759, 769.) The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Id.* at 769.)

The California Supreme Court in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, a wage-and-hour class action wherein class counsel obtained a $19 million non-reversionary settlement on behalf of the class, approved the use of the percentage of fund or common fund method to award 33.33% of the settlement amount or $6,333,333.33 to class counsel for attorneys' fees.

The Court stated:

> "[w]hatever doubts may have been created by Serrano III, supra, 20 Cal.3d 25, [], or the Court of Appeal cases that followed, we clarify today that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund, does not in itself constitute an abuse of discretion. We join the overwhelming majority of federal and state courts in holding that when class action litigation established a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. 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."

1 Cal.5th 480, 503.

Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorneys' fee from the fund as a whole." (*Boeing*, *supra*, 444 U.S. 472 at 478.) The California Supreme Court explained: "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." (*Id.*)

Thus, the common fund doctrine ensures that each member of the Settlement Class contributes proportionately to the payment of the attorneys' fees recovered from monetary payments that the prevailing party recovered in the lawsuit. "Put another way, in common fund cases, a variant of the usual rule applies, and the winning party pays his or her own attorneys' fees; in fee-shifting cases, the usual rule is rejected and the losing party covers the bill." (*Stanton v. Boeing* (9th Cir. 2003) 327 F.3d 938, 967, citing *Wininger v. SI Mgmt. L.P.* (9th Cir. 2002) 301 F.3d 1115.)

The common fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits, the court may spread litigation costs proportionately among all the beneficiaries to compensate those who created the fund. Further, the *Rutter Group California Practice Guide: Civil Trials and Evidence* acknowledges the applicability of the common fund doctrine and describes it as follows: "When the lawsuit results in the recovery of a fund or property benefitting others as well as the plaintiffs (e.g., a class action), the court has inherent equitable power to order Plaintiffs' attorneys' fees paid out of the common fund or property." (*See Serrano*, *supra*, 20 Cal.3d at 35, and *Laffitte*, *supra*, 1 Cal.5th 480, 503.)

Such "fee spreading" assures that all those benefitted by the litigation pay their fair share of obtaining the recovery. (*Lealao v. Beneficial Calif. Inc.* (2000) 82 Cal.App.4th 19, 26 ["[p]ercentage fees have traditionally been allowed in such common fund cases".) The California Supreme Court has approved of awarding fees as a percentage of the settlement. (*Laffitte*, *supra*, 1 Cal.5th at 503; *Serrano*, *supra*, 20 Cal.3d at 35.)

Since *Serrano*, there has been a "groundswell of support for mandating the percentage-of-the-fund approach in common fund cases." (*Id.*; *see also Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726, 765 [approved a 25% fee award in a wage-and-hour class case].) For instance, in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, the Court discussed the common fund doctrine developed by the California Supreme Court at length. It stated that: "The common fund doctrine, frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class, to allow a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or the property itself or directly from other parties enjoying the benefit." (*Id.* at 397).

For Class Counsel, the fees here were wholly contingent in nature. There was the prospect of the enormous cost inherent in class action and representative litigation, as well as a long battle with Defendant. That prospect had become reality as hundreds of hours have been spent in connection with this Action, including in:

- The investigation of the matter, including meeting with Plaintiffs, reviewing policies, Plaintiffs' time and pay records, Plaintiffs' personnel file, and exploring Defendant's corporate structure;
- Filing and serving pleadings in the Action, including the initial Complaint and the First Amended Complaint;
- Compliance with prerequisites in connection with Plaintiffs' cause of action under PAGA;
- Discussing the potential merits of mediation, as well as negotiating the parameters thereof and the informal discovery to be exchanged beforehand, which involved various iterations of written correspondence back and forth, and several telephone discussions between counsel regarding the potential scope of discovery, as well as the scope of the pleadings;
- Obtaining and reviewing informal discovery;
- Selecting a mediator and mediation date;
- Working with opposing counsel and consultants for the receipt of a representative sampling and analyzing the same with the aid of expert consultants and Plaintiffs to perform analyses of liability and exposure prior to attendance of the mediations in this matter;
- attendance at a full-day mediation;
- months of subsequent negotiations after mediation;
- communicating with Plaintiffs and providing regular updates regarding the events and happenings occurring in the Action;
- negotiating, finalizing and fully executing the Settlement Agreement, in which multiple drafts were distributed;

- preparing a draft class notice and obtaining bids for administration;
- preparation of the Motion for Preliminary Approval;
- Reviewing and analyzing the Settlement Administrator's final report to provide the information necessary for the Court's review of the Motion for Final Approval; and
- Preparing the instant Motion for Final Approval.

Moreover, over $27,000.00 of costs have been expended in connection with said investigations, analyses, and mediations. Indeed, Class Counsel risked *and incurred* not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Class Members. Based on the foregoing, Class Counsel respectfully requests that the Court award attorneys' fees in the amount of $391,503.00, and costs of $27,847.31 as further detailed in the Declarations of David D. Bibiyan and Justin F. Maquez in support of this Motion.

**A. An Award of Attorneys' Fees as Requested is Appropriate Under the Lodestar Method**

Under either theory of awarding fees, the case that should govern the court's decision is *Lealao v. Beneficial Calif. Inc.* (2000) [*Lealao*] 82 Cal.App.4th 19. *Lealao* stands for the proposition that the court-awarded attorneys' fees should approximate what counsel could get on the free market for the same services. (*Id.* at 50.) Specifically, *Lealao* holds that if the Court sets fees under a lodestar, the multiplier should consider what counsel would have earned on the free market. The free market is determined by the percentage of the common fund, not the lodestar amount. (*Id.*) Accordingly, whatever method this Court uses to set fees, the Court should look to what the free market would bear under the circumstances. Even if the Court awards fees under the lodestar method, under *Lealao*, the lodestar fees should be adjusted by a multiplier to reflect the percentage of the fund. (*Id.* at 19, 50.)

Here, Class Counsel earned the requested fee, as this case was vigorously litigated. Almost 586 hours will have been expended by Bibiyan Law Group, P.C.'s, and Wilshire Law Firm, attorneys and staff to date. The issue in this motion is not why the Court should award a fee commensurate with thirty-five (35%) of the fund, but why the Court should not award such a fee considering the herein described work performed while the viability of wage-and-hour class actions and representative actions under PAGA continue to be questioned, and defenses asserted by Defendant to the potential certification, manageability and merits of Plaintiffs' case. These facts, as well as others discussed below, warrant approval of the requested fee.

Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. The base amount is then adjusted in light of various factors. (*Serrano*, *supra*, 20 Cal. 3d at 48.)

To summarize Class Counsel's lodestar request, Class Counsel will have collectively worked approximately 681.3 hours. Bibiyan Law Group, PC's hourly rate in this case for David D. Bibiyan is $825 per hour (approx. 63.7 hours); Diego Aviles is $600 per hour (approx. 174.6 hours); Jeffrey Klein is $700 (approx. 8.3 hours) Joshua Shirian is $400 (approx. 21.3 hours); Sara Ehsani-Nia is $400 per hour (approx.  33.2 hours); Robert Payalsyan is $350 (approx.. 73.8 hours); Blanca Chavez is $325 (approx.. 9.7 hours) Vedang J. Patel is $450 per hour (approx. 54.3 hours); Anton Swain-Gil is $350 per hour (approx. 34.0 hours); Iona Levin is $400 per hour (approx. 18.9 hours); Paralegals are $150 per hour (approx. 9.5 hours); and Legal Assistants are $75 per hour (approx. 5.0 hours). This results in a total lodestar amount of $259,600.00 for Bibiyan Law Group, PC.

Wilshire Law Firm, PLC's hourly rate in this case for Justin F. Marquez is $850 (approx 40.00 hours); Benjamin H. Haber is $650 (approx. 50.00 hours); Arrash T. Fattahi is $450 (approx. 75.00 hours) and paralegal Min Jee Kim is $150 (approx. 10.00 hours).  This results in a total lodestar amount of $101,750.00

At Class Counsel's hourly rates, this results in a total lodestar amount of $361,350.00.

**B. Class Counsel's Hourly Rate**

Class Counsel's hourly rates for attorneys are $850, $825, $700, $650, $600, $550, $450, $400, $350 and $300. Their paralegal and legal assistant's hourly rates are $150 and $75, respectively. At this requested rate, this results in a total lodestar amount of $361,350.00. A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) The Court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. (*Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.)

One difficulty in determining the hourly rate of attorneys of similar skill and experience in the relevant community is the scarcity of hourly fee-paying clients in class action litigation. As a practical matter, few if any consumers, pay attorneys' fees on an hourly basis for such extensive litigation, and thus retainer agreements in such cases are based on a contingency fee relationship. Although there is no customary billing rate, the nature of class action work should be strongly considered by the court. Courts have upheld rates as high as $450[7] per hour (in 1993) in employment matters. (*Bihun v. AT&T Information Systems. Inc.* (1993) 13 Cal. App. 4th 976, overruled on other grounds.)

A survey conducted by the National Law Journal for the year 2002 provides a sample of a billing rate for California Lawyers. In that survey, six California firms provided their hourly billing rates. Of those six firms, five regularly charge in excess of $500.00 per hour for their partners. In fact, four of the firms charge as high as $600.00, $620.00, $650.00, and up to $850.00 per hour. These firms are located in Orange County, Los Angeles County, San Francisco County and San Diego County, and are the types of firms that Plaintiffs' Counsel regularly opposes in these class action cases. (*See* National Law Journal Survey, attached as Exhibit "2" to the Declaration of Vedang J. Patel.). The only difference is that these defense attorneys are paid on a monthly basis and do not have to advance any costs on a case.

Finally, Class Counsel attach the Declaration of Richard Pearl in support of the Motion for Final Approval in the case of *Rosa Cantu, et al v. Pacific Bell Telephone Company*, Los Angeles Superior Court Case No. BC441237, dated January 4, 2011. (*See* Declaration of Richard Pearl attached as Exhibit "3" to Declaration of Vedang J. Patel.). Mr. Pearl specializes in issues related to cost-award attorney's fees, including the representation of parties in fee litigation and appeals, serving as an expert witness, mediator and arbitrator in disputes concerning attorney's fees and related issues. Mr. Pearl is also the author of California Attorney's Fee Awards (3d ed. Cal. CEB 2010), as well as the author of the Second Edition, years 1994 through 2008. He has also authored

[7] Adjusted for inflation, $450 in 1993 equals over $860 in 2022.

numerous other publications on attorney's fees, as set forth in his Declaration.

Mr. Pearl has reviewed the comparable hourly rates of attorney fees in California. He confirms that courts have approved hourly rates of attorneys as follows:

- Rates of up to $875.00 in *Savaglio, et al. v. Wal-Mart*, Alameda County Superior Court, Case No. C-835687-7 (before applying a 2.36 multiplier);
- Rates of up to $750.00 in *Kashmiri et al. v. Regents of UC*, San Francisco County Superior Court (before applying a 3.7 multiplier); and
- Rates of up to $750.00 in *Environmental Law Foundation v. Laidlaw Transit, Inc.*, San Francisco Superior Court, Case No. CGC-06-451832 (before applying a 1.25 multiplier). (*Id* at pages 4 and 5.)

Additionally, Mr. Pearl has reviewed numerous declarations, depositions, and surveys of legal rates on a non-contingent basis for the year 2009 and found hourly rates of up to $775.00, $795.00, $800.00, $855.00, $950.00, etc. (*Id.* at pp. 6-12). These are non-contingent rates where payment in full is expected promptly upon billing. (*Id.* at p. 13)

Class Counsel's hourly rates are in line with, and, in fact, modest, compared with the hourly rates of other counsel in similar actions. Thus, Class Counsel's hourly rates are more than reasonable.

### C. Class Counsel's Hours Spent on the Case

Class Counsel have already spent over 680 hours litigating this case to date and bringing it to fruition. Tens of hours were spent on this case prior to litigation understanding Defendant's business structure, officers, directors, stockholders and managing agents' policies. Tens of hours were spent meeting and conferring with opposing counsel. Many hours were spent negotiating the parameters of mediation, agreeing to a mediator, and determining what informal discovery would be exchanged beforehand. Tens of hours were spent performing informal discovery, including obtaining and reviewing Defendant's policies, as well as obtaining and reviewing, with the aid of expert consultants, the voluminous time and pay records from Defendant, the compliance rate of meal and rest periods, and contacting Class Members. Tens of hours were spent preparing for and attending mediation. Tens of hours were spent negotiating a long form settlement agreement.

Therein, tens more hours were spent preparing a motion for preliminary approval, attending a hearing thereon and working with the administrator to administer Class Notices to Class Members, and most recently preparing this Motion for Final Approval.

And, the over 680 hours expended by the lawyers and staff members of Bibiyan Law Group, P.C., and Wilshire Law Firm, in connection with this Action is only a calculation of efforts made thus far; it does not include the time that will be spent preparing for and attending the final approval hearing, and updating this Court regarding the disposition of uncashed checks and/or amending the judgment, if necessary. Thus, Class Counsel request that the Court find that these hours are reasonable in this litigation.

The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are not required. An attorney's testimony alone may suffice. "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.)

Reasonable hours include, in addition to time spent during litigation, the time spent before the action is filed, including time spent interviewing the clients, investigation of the facts and the law, and preparing the initial pleadings. (*New York Gaslight Club. Inc. v. Carey* (1980) 447 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and defend the attorney's fee claim. (*Serrano v. Priest* (1982) 32 Cal. 3d 621, 639.). Here, Class Counsel has established by declaration testimony the over three hundred (300) hours spent in this case, which suffices for evidentiary purposes.

Once the Court establishes the lodestar amount, it may enhance the fee award by a multiplier in order to make an appropriate fee award. (*Serrano*, 20 Cal.3d at 48). The pertinent factors include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. (*Id.*) However, this list is not exhaustive, and the Court can consider other factors it deems important in setting the multiplier. (*Id.*at 40.) A limitation in setting the multiplier is that the Court cannot duplicate factors already included in the lodestar. (*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1139.).

In applying the multiplier, *Newberg on Class Actions* states that "[m]ultipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award may warrant an even larger multiplier." (*Id.*, Vol. 3, §14.03, pp. 14-5, Dec. 1992.)

Here, Class Counsel is requesting a modest multiplier of 1.09 (391,503 / 361,350).

**1. Plaintiffs are Entitled to a Multiplier Based on a Percentage-of-the-Fund to Ensure that the Fee Awarded is Within the Range of Fees Freely Negotiated in the Legal Marketplace in Comparable Litigation**

If members of the Settlement Class were paid the fees that the market would bear, they would pay a fee of 33.33% to 50% of any recovery. Since this is the market rate, the Court in *Lealao* indicates that the fee should be enhanced to reflect what the members of the Settlement Class would pay on the open market. The Court in *Lealao* held that a trial court should award lodestar fees by examining the percentage-of-the-benefit and adjusting the lodestar calculation accordingly. (*Id* at 49, 53.) The Court in *Lealao* indicated that this is an upward adjustment and should be akin to a contingency fee recovery. The Court stated that "an adjustment reflecting the amount of the Class recovery is not significantly different from an adjustment reflecting a percentage of that amount, and California courts have evaluated a lodestar as a percentage of the benefit." (*Id* at 46.) The *Lealao* Court's method appears particularly appropriate because class actions generally are contingency fee cases for plaintiffs and the class action clients do not expect to pay an hourly fee.

The rationale of *Lealao* comports with the purpose of the multiplier. The multiplier is "primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases." (*Ketchum v. Moses*, 24 Cal.4$^{th}$ 1122, 1138.) The Court in *Lealao* reasoned likewise that "the law should mimic the market". It stated:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for Defendants to increase injurious behavior. [Citations]. It has therefore been urged (most persistently by

> Judge Richard Posner) that in defining a "reasonable fee" in such representative actions the law should 'mimic the market.' [Citations].
>
> 'In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if urgency costs were low is to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes."

*Lealao*, supra, 82 Cal.App.4th at 47-48.

Here, a multiplier is necessary, and is justified to compensate Class Counsel at a rate reflecting the risk of nonpayment in this matter, as Class Counsel's representation of Plaintiffs was purely on a contingent basis. The risk of nonpayment in this Action was particularly acute, too. This is because litigating a wage-and-hour class action through trial takes years and requires the investment of tens (if not hundreds) of thousands of dollars and thousands of hours of time. Litigation costs in the present case for the Bibiyan Law Group, P.C and Wilshire Law Firm, are already over $27,000. Attorneys willing to undertake this risk deserve a high rate of recovery.

Moreover, wage-and-hour laws are still developing, and change in the law always threaten to wipe out the plaintiffs' attorney. In fact, numerous appellate decisions and decisions of both the California and United States Supreme Courts have attacked the validity of wage-and-hour class action cases directly relevant to this case, which could have significantly affected its value. It is this contingent nature of these cases that justify an award when and if plaintiffs' counsel is able to obtain a settlement or verdict, because oftentimes no money is recovered in a case, including plaintiffs' counsel's costs, let alone their time.

**1. An Enhancement Based on a Percentage of the Fund is Justified Based on the Zero Objections and Zero Opt-out from Class Members**

The decision in *Lealao* lists several factors justifying an enhancement of the attorneys' fees awarded based on the lack of opt outs or objections by Class Members. (*Id* at 51.). Members of the Settlement Class were notified of the settlement and attorneys' fees, which resulted in <u>zero (0) Class Members opting out and zero (0) Class Members objecting</u> to the Settlement and specifically the requested attorneys' fees and costs requested.

**2. The Quality of Representation, the Novelty, and Complexity of the**

**Issues and Results Obtained**

Class Counsel used a high level of skill in addressing the difficult questions presented in this case, which involved the contested issues regarding: the compliance of various of Defendant's policies with the Labor Code, including whether all time worked was paid for; whether meal and/or rest breaks were given in compliance with the Labor Code; issues regarding the timeliness of pay, including whether all pay was received by termination or resignation; the sufficiency and accuracy of wage statements (including whether issues therewith, if any, were intentional or injurious); and various other issues. While Class Counsel's experience in complex employment matters is further set out in detail in the Declarations of David D. Bibiyan, proof of Class Counsel's skill in this area of law lies in the size of this Settlement and the recoveries of individual members of the Settlement Class; existence of Plaintiffs' unpaid wages claims are speculative; Defendant's contention that its meal and rest period policies were compliant; and other hurdles encountered by Class Counsel that were traversed in reaching this Settlement. "The recovery in this case is thus a more authentic indication of the value of counsel's contribution than might otherwise be true." (*Id.* at 53.) Therefore, a multiplier is sought, and it is justified by the difficulty of the questions involved and the skill in presenting them shown by Class Counsel.

**3. This Litigation Precluded Other Employment by Class Counsel**

A practitioner can only properly litigate so many cases at one time. The requirements of this case were significant, requiring over 680 hours to be expended to date by Class Counsel, and another twenty-five (25) to fifty (50) hours conservatively expected to be expended in the future in connection with final approval, settlement administration, and updates to this Court regarding uncashed checks. Class Counsel were also most definitely precluded from other employment. This factor should be considered.

## VIII. CONCLUSION

The Settlement is fair, adequate, and reasonable. It will result in substantial payments to members of the Settlement Class and was achieved through extensive, arms-length negotiations by Class Counsel who are experienced in wage and hour class action and representative action litigation.

For the foregoing reasons, Class Counsel and Plaintiffs' request that the Court grant final approval of the Settlement and sign the proposed Order filed concurrently herewith.

Dated: March 2, 2023

BIBIYAN LAW GROUP, P.C.
WILSHIRE LAW FIRM

BY: Vedang J. Patel
DAVID D. BIBIYAN
VEDANG J. PATEL

Attorneys for Plaintiffs on behalf of themselves and all others similarly situated and aggrieved

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 8484 Wilshire Blvd, Suite 500, Beverly Hills, California 90211.

On March 2, 2023, I caused a true and correct copy of the foregoing document(s) described as **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT AND PROVISIONAL CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY; DECLARATION OF DAVID D. BIBIYAN, VEDANG J. PATEL, JUSTIN F. MARQUEZ, AND NICOLE BENCH IN SUPPORT THEREOF;** [PROPOSED] **JUDGMENTAND** [PROPOSED] **ORDER** to be served by electronic transmission via Case Anywhere to the parties and/or counsel who are registered to use Case Anywhere and set forth in the below service list:

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**Counsel for Plaintiff, EDVIN MARROQUIN, on behalf of himself and all others similarly situated and aggrieved**

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

Executed on March 2, 2023 at Beverly Hills, California.

*/s/ Jennifer Echeverria*
Jennifer Echeverria