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18 **SUPERIOR COURT OF CALIFORNIA**

19 **COUNTY OF MONTEREY**

20 MARIA ELENA CAMPOS,
21
22 Plaintiff,

23 v.

24 JOSE ASCENSION TREJO, individually
25 and dba TACOS EL PARIENTE and
26 TACOS EL PARIENTE #2; ADRIANA
27 BEATRIZ TREJO, individually and dba
28 TACOS EL PARIENTE and TACOS EL
PARIENTE #2; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 21CV002049

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEY GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: June 9, 2023

Time: 8:30 a.m.

Dept.: 15

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 9, 2023, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Thomas W. Wills, judge presiding, in
4 Department 15 of the above-referenced Court located at 1200 Aguajito Road, Monterey,
5 California, Plaintiff Maria Elena Campos ("Plaintiff") will seek an Order approving the
6 concurrently filed Stipulation of Representative Action Settlement and Release of PAGA
7 Claims ("Settlement Agreement"), pursuant to the procedures set forth in Labor Code § 2698,
8 *et seq.*

9 This motion will be based on this notice of motion, the attached memorandum of
10 points and authorities, the accompanying declarations of B. James Fitzpatrick, Laura L.
11 Franklin, and Plaintiff, the records and file herein, and on such other evidence as may be
12 presented at the hearing of the motion.

13
14 Dated: May 11, 2023

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

15
16 By: _____

17 B. James Fitzpatrick
18 Laura L. Franklin
19 Larry W. Lee
20 Attorneys for Plaintiff,
21 Maria Elena Campos
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor
4 Code § 2698, *et seq.*, Plaintiff Maria Elena Campos (“Plaintiff”) hereby moves the Court for
5 an order approving the non-reversionary PAGA settlement as set forth in the concurrently filed
6 Stipulation of Representative Action Settlement and Release of PAGA Claims (the
7 “Settlement Agreement” or “Settlement”).¹

8 Plaintiff asserts PAGA claims against Defendants arising from various violations of the
9 California Labor Code. Specifically, Plaintiff alleges violations of Labor Code §§ 201-203,
10 204, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2802 as a result of Defendants’ failure
11 to pay all minimum and/or overtime wages owed for all hours worked, including on-call time,
12 time spent making or receiving mandatory work calls while off-the-clock, and reporting time
13 pay for days when employees were required to call in but not report to work; failure to provide
14 off-duty meal and rest breaks; failure to provide accurate itemized wage statements; failure to
15 pay earned wages upon termination to separating employees; and failure to reimburse
16 employees for expenses associated with the required work-related use of their personal cell
17 phones. (*See* Complaint at ¶¶ 27-44.) Pursuant to the PAGA, Plaintiff seeks to recover civil
18 penalties against Defendants on behalf of the State of California and other similarly aggrieved
19 employees. (*Id.* at ¶¶ 159-163.)

20 As will be explained in further detail below, based on the California Supreme Court’s
21 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
22 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as
23 called for under PAGA on behalf of the State of California and other similarly situated
24 aggrieved employees, without seeking class certification or meeting the requirements of class
25 certification (*i.e.*, numerosity, typicality, commonality, and adequacy). As such, while the
26 PAGA settlement reached herein is on behalf of the State of California and other aggrieved

27 ¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of Laura
28 L. Franklin (“Franklin Decl.”) as **Exhibit B**. Unless otherwise indicated, capitalized terms
used herein have the same meaning as defined in the Settlement Agreement.

1 employees, the usual two-step preliminary and final approval process is not required. Rather,
2 as called for under Labor Code § 2699(l), all that is required is an approval by this Court of
3 any settlement of the PAGA claims by the Parties. The Parties have reached such a PAGA
4 settlement, and now seek this Court's approval of the settlement which provides for the
5 payment of civil penalties under the PAGA.

6 Pursuant to the terms of the proposed Settlement Agreement, Defendants will pay the
7 total amount of \$30,000.00 (the "Gross Settlement Amount") in connection with just 42
8 Aggrieved Employees. This equates to a raw average payout of \$89.29 per Aggrieved
9 Employee after deduction for the LWDA PAGA Payment (75% of the Net Settlement
10 Amount, or \$11,250.00), attorneys' fees (\$10,000.00), litigation costs (\$2,500.00), and
11 settlement administration costs (\$2,500.00). Pursuant to the PAGA, 25% of the Net
12 Settlement Amount, or \$3,750.00, will be paid to the Aggrieved Employees ("Individual
13 PAGA Payments"), providing for a payment of approximately \$5.01 per pay period worked by
14 each Aggrieved Employee during the PAGA Period.

15 As demonstrated below, the proposed settlement warrants the Court's approval, as it
16 was reached as a result of extensive, good faith negotiations by the Parties, following formal
17 discovery and a thorough investigation and analysis by Plaintiff's counsel of the claims at
18 issue, as well as Defendants' alleged defenses and financial limitations. In addition, the
19 proposed settlement has an appropriately limited and tailored release for PAGA Settlement
20 Members that does not release any of their substantive claims.

21 In light of the above, the proposed settlement constitutes an adequate, fair, and
22 reasonable settlement on behalf of the State of California and the Aggrieved Employees, and it
23 accomplishes the goals of PAGA. Thus, the Court should grant approval of the settlement.

24 **II. FACTUAL AND PROCEDURAL BACKGROUND**

25 **A. Summary of the Litigation**

26 On June 24, 2021, Plaintiff submitted written notice under Labor Code § 2699.3 (the
27 "PAGA Notice") to the California Labor and Workforce Development Agency ("LWDA")
28 and Defendants Jose Ascension Trejo, individually and dba Tacos El Pariente and Tacos El

1 Pariente #2; and Adriana Beatriz Trejo, individually and dba Tacos El Pariente and Tacos El
2 Pariente #2 (“Defendants”). (Franklin Decl. ¶ 2.) As set forth in the PAGA Notice, Plaintiff
3 alleges that Defendants violated numerous provisions of California Labor Code, including
4 Labor Code §§ 201-203, 204, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2802, based
5 on Defendants’ failure to pay all minimum and/or overtime wages owed for all hours worked,
6 including on-call time, time spent making or receiving mandatory work calls while off-the-
7 clock, and reporting time pay for days when employees were required to call in or remain
8 available for a call but not report to work; failure to provide off-duty meal and rest breaks;
9 failure to provide accurate itemized wage statements; failure to pay earned wages upon
10 termination to separating employees; and failure to reimburse employees for expenses
11 associated with the required work-related use of their personal cell phones. (Franklin Decl. ¶ 2,
12 Ex. A.) The LWDA did not elect to investigate or directly pursue the alleged violations.
13 (Franklin Decl. ¶ 3)

14 On June 25, 2021, Plaintiff filed her Individual and Representative Action complaint
15 (“Complaint”), which remains operative and asserts seventeen causes of action against
16 Defendants, including a representative cause of action for violation of the PAGA based on the
17 allegations in the PAGA Notice. (Franklin Decl. ¶ 4; see Complaint at ¶¶ 27-44; 159-163.)
18 Specifically, Plaintiff’s Sixteenth Cause of Action for violation of the PAGA, Labor Code §
19 2698, et seq. (the “PAGA Action”) is predicated on underlying violations of Labor Code §§
20 201-203, 204, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2802. (Complaint at ¶¶ 159-
21 163.) The remaining causes of action the Complaint are asserted by Plaintiff in her individual
22 capacity and arise from alleged violations of the California Labor Code and the California Fair
23 Employment and Housing Act (“FEHA”). (Franklin Decl. ¶ 4.)

24 **B. Discovery and Investigation**

25 The Parties exchanged written discovery and Plaintiff took the deposition of Defendant
26 Jose Ascencion Trejo. Defendant Trejo’s testimony affirmed that he is the sole proprietor of
27 the Tacos El Pariente restaurants named in this action. Specifically, Defendant Trejo testified
28 that he is the sole owner and operator of the Tacos El Pariente restaurant in Salinas, California

1 and one food truck that operates under the same name in the Salinas/Prunedale area. (Franklin
2 Decl. ¶ 5.) Defendant Trejo further testified that he was the sole owner of the Tacos El
3 Pariente restaurant formerly located in Watsonville, California, but that the restaurant had
4 permanently closed two years prior, in 2020. (*Id.*)

5 Plaintiff's allegations of unpaid wages stem largely from Defendants' failure to pay
6 Plaintiff and other employees for time associated with the requirement that they remain
7 available each day to report to work, sometimes immediately, if and when they receive a call
8 from Defendants telling them to come in that day. (Franklin Decl. ¶ 6.) Deposition testimony
9 provided by Defendant Trejo affirmed that it was Defendants' practice to not schedule
10 employees' workdays in advance; rather, Defendants would decide each morning who they
11 needed to work that day and then call those employees to come in. (*Id.*) Plaintiff alleges that
12 this practice resulted in unpaid hours for time when she and other employees were required to
13 either call-in to find out if and when they should report to work or be on controlled standby
14 while they waited each day for a potential call from their employer telling them to report to
15 work. (*Id.*) Plaintiff further alleges reporting time pay for days when the employees were
16 required call in or remain available for a call from the employer but were not told to report to
17 work that day, as well as reimbursement owed for work-related expenses associated with the
18 required use of the employees' personal cell phones to make or be available to receive such
19 calls each day. (*Id.*)

20 Plaintiff also alleges PAGA violations associated with Defendants' failure to
21 accurately record and pay for daily and weekly overtime hours worked. Defendants do not
22 dispute that they failed to keep copies of time records showing the hours worked by Plaintiff
23 and the Aggrieved Employees. (Franklin Decl. ¶ 7.) Defendant Trejo also confirmed in his
24 deposition testimony that he paid Plaintiff in cash for hours worked over eight in a workday,
25 and that such hours were paid at Plaintiff's regular hourly rate of pay rather than at the
26 applicable overtime premium rate. (*Id.*) However, Defendant Trejo insisted that this practice
27 of paying cash payments for hours worked was unique to Plaintiff, asserting that Plaintiff was
28 the only employee who failed to follow Defendants' policy that employees must stop working

1 at or before the end of their eighth hour of work to avoid incurring overtime hours. (*Id.*)

2 There is no question that Defendants failed to maintain legally compliant written
3 policies as to most, if not all, of the underlying claims at issue. (Franklin Decl. ¶ 8.)
4 Defendants’ written discovery responses and deposition testimony confirm that it did not
5 provide Plaintiff with an employee handbook or any written policies during her employment.
6 (*Id.*) Defendants have identified only one policy-related document in existence pertaining to
7 the underlying wage claims, which Defendant Trejo described in his deposition testimony
8 (through an interpreter) as a “large sign that tells [the employees] that it is their responsibility
9 to keep track of their work hours and to take their breaks and their lunch.” (*Id.*) Defendants
10 dispute that Plaintiff and other employees were unable to take timely, off-duty meal and rest
11 breaks, despite being forced to acknowledge that Defendants failed to keep copies of employee
12 timecards or any other records affirming that such breaks were taken. (*Id.*)

13 Through written discovery, Defendant Trejo’s deposition testimony, and data
14 voluntarily provided by Defendants in furtherance of settlement discussions, Plaintiff’s
15 counsel acquired the necessary information to analyze Defendants’ liability and potential
16 exposure for PAGA penalties. (Franklin Decl. ¶ 9.) Defendants provided information
17 concerning the size of the PAGA group and the number of pay periods at issue, as well as
18 Defendants’ policies, practices, and procedures regarding meal and rest breaks, timekeeping,
19 scheduling, recordkeeping, and the payment of wages. (*Id.*)

20 Plaintiff’s counsel also investigated information and documents voluntarily provided
21 by Defendants concerning asserted financial hardships impacting both the Tacos El Pariente
22 business and Defendant Trejo, individually. (Franklin Decl. ¶ 10.) Defendant Trejo
23 voluntarily produced information and documents reflecting his lack of personal assets and
24 significant personal and business liabilities, including tax liability. (*Id.*) Defendant Trejo also
25 testified that the Watsonville restaurant had permanently closed in 2020, during the COVID-
26 19 pandemic, and that the Salinas restaurant closed for a significant period of time in 2022 due
27 to a fire. (*Id.*) Defendants represented that such financial liabilities and hardships limit their
28 ability to fund a substantial judgment or protracted litigation. (*Id.*)

1 **C. The Proposed Settlement Was Reached Through Good Faith Negotiations**

2 The Parties engaged in settlement discussions, off and on, beginning in or around May
3 2022, while simultaneously engaging in formal discovery. (Franklin Decl. ¶ 11.) Because of
4 Defendants’ alleged financial hardship, as described above, Defendants were not amenable to
5 participating in private mediation, expressing a desire to direct all available funds toward a
6 settlement fund rather than private mediation costs. (Franklin Decl. ¶ 11.) Accordingly,
7 counsel for Plaintiff and Defendants worked together directly over the course of several
8 months to negotiate a fair and reasonable settlement, which is now before this Court. (*Id.*)

9 During their settlement discussions, the Parties spoke at length about the strengths and
10 weaknesses of each side’s claims and defenses and their respective positions as to the scope of
11 Defendants’ liability. (Franklin Decl. ¶ 12.) The data and other information provided by
12 Defendants in the discovery and settlement negotiation process allowed Plaintiff to analyze
13 liability and calculate Defendant’s potential PAGA claim exposure, as detailed in Section IV-
14 E below. (Franklin Decl. ¶ 12.)

15 Based on the foregoing and on their own independent investigation and evaluation,
16 Plaintiff’s counsel is of the opinion that the PAGA settlement with Defendants for the
17 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and
18 adequate, and is in the best interests of Plaintiff, the State of California, and the Aggrieved
19 Employees. (Franklin Decl. ¶ 31.) Accordingly, the Parties desire to settle, compromise, and
20 discharge Plaintiff’s PAGA claims as set forth in the Settlement Agreement.

21 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

22 The material terms of the Settlement are described below and set forth in detail in the
23 Settlement Agreement. (*See* Exhibit B to Franklin Decl.)

24 **A. The Aggrieved Employees**

25 The Aggrieved Employees affected by this Settlement are defined as “all individuals
26 who worked for Defendants in this Action as non-exempt employees in California at any point
27 during the PAGA Period.” (Settlement Agreement ¶ A.2.) The PAGA Period is defined as
28 “the period between June 24, 2020 and September 9, 2022.” (Settlement Agreement ¶ A.16.)

1 Based upon their records, Defendants represent that there are only 42 Aggrieved
2 Employees at issue, and that such employees collectively worked 748 pay periods at issue
3 during the PAGA Period. (Settlement Agreement ¶ C.1.b.)

4 **B. Settlement Sum and Allocation**

5 The Settlement Agreement requires Defendants to pay the Gross Settlement Amount of
6 Thirty Thousand Dollars (\$30,000.00). (Settlement Agreement ¶ C.1.a.) This amount
7 encompasses a settlement of PAGA claims asserted in this lawsuit, attorneys' fees and partial
8 reimbursement of litigation expenses to Plaintiff's counsel, and settlement administration
9 costs. (Franklin Decl. ¶ 17; Settlement Agreement ¶¶ C.9.a-b, f-h.) Plaintiff is not requesting
10 an incentive award in connection with this Settlement. (Franklin Decl. ¶ 17.)

11 The balance of the Gross Settlement Amount remaining after deduction of the
12 administrative expenses and the approved award to Plaintiff's counsel for fees and litigation
13 expenses will be available for distribution to the LWDA and Aggrieved Employees pursuant
14 to the PAGA (the balance of the Gross Settlement Amount remaining after the above
15 deductions is referred to as the "Net Settlement Amount"). Seventy-five percent (75%) of the
16 Net Settlement Amount, or approximately \$11,250.00, will be paid to the LWDA. The
17 remaining twenty-five percent (25%) of the Net Settlement Amount, or approximately
18 \$3,750.00, will be distributed to Aggrieved Employees on a pro rata basis. (Settlement
19 Agreement ¶¶ A.12; C.9.a.) The amount of each Individual PAGA Payment will be based on
20 the number of PAGA Period Pay periods each Aggrieved Employee worked during the PAGA
21 Period. (*Id.*)

22 Based on the number of Aggrieved Employees, employees will be entitled to recover,
23 *on average*, approximately **\$89.29** each, after accounting for three quarters of the Net
24 Settlement Amount going to the State. (Franklin Decl. ¶ 20.) Because of the pro rata payment
25 structure noted above, the amount any particular Aggrieved Employee will be entitled to
26 recover may be greater or lower than this average depending on the number of PAGA Period
27 Pay periods he or she worked during the PAGA Period. This is fair, as it directly allocates
28 greater penalties to individual Aggrieved Employees who were employed longer and thus

1 allegedly suffered greater harm. (*Id.*)

2 As part of the Settlement Agreement, Defendants do not object to Plaintiff's counsel's
3 request for attorneys' fees of approximately one-third (1/3) of the Gross Settlement Amount,
4 *i.e.*, Ten Thousand Dollars (\$10,000.00), plus reimbursement of litigation costs in a maximum
5 amount of Two Thousand, Five Hundred Dollars (\$2,500.00), subject to the Court approving
6 this Settlement. (Settlement Agreement ¶ C.9.g.) Any portion of the attorneys' fees and costs
7 not approved by the Court will be added to the Net Settlement Amount. (*Id.*)

8 Finally, the Settlement Agreement provides for the payment of the fees and expenses
9 reasonably incurred by the Settlement Administrator, which are estimated at Two Thousand,
10 Five Hundred Dollars (\$2,500.00). (Settlement Agreement ¶ C.9.h.) The Parties have agreed
11 to utilize Phoenix Settlement Administrators, a well-known third-party settlement
12 administrator, to administer the Settlement, with the administration costs estimated not to
13 exceed \$2,500.00. (Settlement Agreement ¶ A.26; Franklin Decl. ¶ 21.)

14 **C. Scope of the Released Claims**

15 In exchange for the payments described above, Plaintiff and Aggrieved Employees will
16 release the Released Parties from the following limited release ("Released PAGA Claims"):

17 [A]ll claims for civil penalties under PAGA arising from the same
18 facts and/or claims alleged in Plaintiffs Individual and
19 Representative Action Complaint, as well those included in
20 Plaintiffs June 24, 2021 letter to the LWDA, that were pled or that
could have been pled based on the facts alleged in the said complaint
and letter during the PAGA Period, together "Complaints."

21 (Settlement Agreement ¶ A.23.) The Settlement does not release Defendants from violations
22 of any predicate statutes other than PAGA and will not affect a waiver of individual claims by
23 Aggrieved Employees against Defendants for any of the underlying Labor Code claims. The
24 release is expressly limited to claims for civil penalties under the PAGA pertaining to the
25 PAGA allegations raised in the lawsuit that accrued during the PAGA Period. (Settlement
26 Agreement ¶¶ A.23; C.2.)

27 //

28 //

1 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

2 **A. PAGA Overview**

3 Prior to the enactment of PAGA, many of the penalties provided against employers for
4 violations of certain Labor Code provisions were solely within the province of the California
5 Department of Labor to seek, enforce, and assess. *Arias v. Superior Court* (2009) 46 Cal. 4th
6 969, 980. However, due to the lack of financing to California's agencies and the potential
7 number of Labor Code violations by California employers, the California Legislature found
8 that it was in the public interest to allow aggrieved employees to act as private attorneys
9 general and to enforce and recover penalties on behalf of other similarly situated aggrieved
10 employees for Labor Code violations committed by their employers. *Id.* As such, PAGA was
11 enacted to allow such enforcement and recovery by private individuals who have been
12 aggrieved by their employers. Under the PAGA, 75% of any penalties recovered under PAGA
13 by an aggrieved employee is to be paid to the state agency, the LWDA, and the remaining
14 25% is to be shared amongst the aggrieved employees. Cal. Lab. Code § 2699, subd. (i).

15 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
16 employee must first provide written notice to the LWDA and the employer of the particular
17 Labor Code violation(s) alleged to have been violated by the employer. *See* Cal. Labor Code §
18 2699.3, subd. (a)(1). Once the LWDA notifies the aggrieved employee that it does not intend
19 to investigate the alleged violations or the time for the LWDA to investigate the violations
20 passes, the aggrieved employee is allowed to proceed in a civil action against the employer on
21 behalf of all other similarly aggrieved employees. *See* Cal. Labor Code § 2699.3, subd.
22 (a)(2)(A).

23 In 2009, the California Supreme Court considered the issue of whether an aggrieved
24 employee who brings a PAGA claim needs to meet class certification requirements. *Arias*, 46
25 Cal. 4th at p. 976. After a substantial review of the legislative history of PAGA, the California
26 Supreme Court held that an aggrieved employee's representative action brought on behalf of
27 other similarly aggrieved employees against an employer for PAGA violations do not need to
28 meet the requirements for class certification. *Id.* at pp. 975, 980-88. As held by the California

1 Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or agent of
2 California's labor law enforcement agencies. *Id.* at p. 986. Because an employee's PAGA
3 action functions as a substitute for an action brought by the government itself, a judgment in
4 the PAGA action binds all those who would be bound by a judgment in an action brought by
5 the government. *Id.*

6 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
7 Superior Court must "review and approve any settlement of any civil action filed pursuant to"
8 PAGA. Cal. Lab. Code § 2699, subd. (1)(2). As the Parties to this current PAGA action have
9 reached such an agreement, the Parties now seek this Court's approval as to the settlement of
10 the penalties amount.

11 **B. Class Action Settlement Standards Do Not Govern the Settlement Approval**
12 **Process for PAGA Claims**

13 In class action cases, the purpose of the Court's preliminary evaluation of the
14 settlement is to determine whether it is within the "range of reasonableness," and thus whether
15 notice to the class of the terms and conditions of the settlement, and the scheduling of a formal
16 fairness hearing, are worthwhile. *See* 4 Alba Conte & Herbert B. Newberg (4th ed. 2002 and
17 Supp. 2004) *Newberg on Class Actions* § 11.25, *et seq.* and § 13.64 ("*Newberg*"). The "judge
18 must make a preliminary determination on the fairness, reasonableness, and adequacy of the
19 settlement terms and must direct the preparation of notice of the certification, proposed
20 settlement, and date of the final fairness hearing." *Manual for Complex Litigation, Fourth*
21 (Fed. Jud. Ctr., 4th ed. 2004) § 21.632. To make the preliminary fairness determination, courts
22 may consider several relevant factors, including "the strength of the plaintiff's case; the risk,
23 expense, complexity, and likely duration of further litigation; the risk of maintaining class
24 action status through trial; the amount offered in settlement; the extent of discovery completed
25 and the stage of the proceedings; [and] the experience and views of counsel..." *See Hanlon v.*
26 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.

27 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
28 Labor Code, which provides, in relevant part: "The court shall review and approve any

1 penalties sought as part of a proposed settlement agreement pursuant to this part.” The Parties
2 are not obligated to “satisfy class action requirements,” including the standards for class action
3 settlement approval. *Arias*, 46 Cal. 4th at pp. 980-988 (affirming lower court’s holding that
4 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).

5 Notably, unlike the class action settlement approval process, there is also no statutory
6 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
7 2699, subd. (1). In addition, “[u]nnamed employees need not be given notice of the PAGA
8 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
9 settlement, if any, reached between the parties.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*
10 (N.D. Cal. 2010) 2010 WL 1340777, p. *13.

11 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

12 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
13 ultimately receive as a result of a settlement, but instead, on whether the total settlement
14 amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
15 supplement agency funding for purposes of education of employers and employees and
16 enforcement of labor laws and rights. *See* Cal. Lab. Code § 2699, subd. (i). Here, the
17 settlement provides monetary recovery for the Aggrieved Employees and the State of
18 California and accomplishes PAGA’s primary objective to enforce the Labor Code, and thus
19 the Settlement certainly effectuates PAGA’s purpose. *See O’Connor v. Uber Techs, Inc.* (N.D.
20 Cal. August 18, 2016) 2016 WL 4398271, at p. *18 (noting that deterring noncompliance with
21 the Labor Code is one of PAGA’s objectives).

22 The Settlement is also consistent with the State’s public policy favoring resolution of
23 disputes. “California law favors the settlement of disputes as our high court clarified in
24 *Neary*[]. Settlement is efficient; it reduces costs, saves resources, and minimizes court
25 congestion. [] The parties are best positioned to understand their interests and resolve a dispute
26 in a mutually beneficial manner without court intervention into the settlement.” *Consumer*
27 *Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal. App. 4th 46, 62-63 (citing *Neary v. Regents*
28 *of Univ. of Cal.* (1992) 3 Cal. 4th 273, 277- 278).

1 **D. The Scope of the Release is Appropriately Limited**

2 The limited scope of the release supports approval of this PAGA settlement. If
3 approved, the Settlement would release the Released Parties from PAGA claims based on the
4 facts stated in the operative Complaint and the PAGA Notice, that accrued during the PAGA
5 Period, and nothing more. (Settlement Agreement ¶¶ A.23; C.2.) The Settlement would *not*
6 impact any other Aggrieved Employees’ ability to pursue PAGA claims predicated on other
7 allegations aside from those raised in this lawsuit or any Labor Code claims not predicated on
8 the PAGA.

9 Because an aggrieved employee’s PAGA action is a substitute for an action brought by
10 the government, “judgment in [a PAGA] action is binding not only on the named employee
11 plaintiff but also on government agencies and any aggrieved employee not a party to the
12 proceeding.” *Arias*, 46 Cal. 4th at p. 986. However, “the nonparty employees, because they
13 were not given notice of the action or afforded any opportunity to be heard, would not be
14 bound by the judgment as to remedies other than civil penalties.” *Id.* at p. 987; *see also*, Cal.
15 Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all rights “to pursue or recover
16 other remedies available under state or federal law, either separately or concurrently with an
17 action taken under this part”).

18 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
19 confined to the civil penalties available under PAGA based on the facts stated in the operative
20 Complaint and the PAGA Notice. (Settlement Agreement ¶¶ A.23; C.2.) The release is
21 therefore appropriately tailored.

22 **E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of**
23 **Litigation and Post-Judgment Collection**

24 Although Plaintiff is reasonably confident that she would prevail at trial, proceeding in
25 litigation entails significant risk on the underlying merits of Plaintiff’s theory, in addition to
26 the still-developing law under PAGA, including the Court’s discretion to reduce an award of
27 PAGA penalties. As discussed below, the proposed Settlement also takes into consideration
28 the enhanced risk of post-judgment collection in light of Defendants’ asserted financial

1 limitations, which weighed in favor of Plaintiff's counsel's determination that the present
2 settlement is fair and reasonable and in the best interest of the Aggrieved Employees and the
3 State. (Franklin Decl. ¶ 23.)

4 **1. Potential Civil Penalties**

5 The PAGA Period in this Settlement is limited to the period between June 24, 2020
6 and September 9, 2022. (Settlement ¶ A.16.) At the time this Settlement was negotiated,
7 Defendants represented that, based on their records, there are just 42 employees who comprise
8 the Aggrieved Employees and approximately 748 total pay periods at issue during the PAGA
9 Period (*see* Settlement ¶ C.1.b), and Defendant has since affirmed that such numbers remain
10 unchanged. (Franklin Decl. ¶ 16.)

11 Based on the data provided by Defendant, Plaintiff has calculated the maximum
12 potential exposure for all PAGA claims to be \$486,200.00 in penalties based on the following:

- 13 • Estimated \$74,800.00 for PAGA penalties with respect to minimum wage and
14 violations (based on approximately 748 pay periods during the PAGA period x
15 \$100 initial violation per pay period);
- 16 • Estimated \$74,800.00 for PAGA penalties with respect to overtime violations
17 (based on approximately 748 pay periods during the PAGA period x \$100 initial
18 violation per pay period);
- 19 • Estimated \$74,800.00 for PAGA penalties with respect to rest period violations
20 (based on approximately 748 pay periods during the PAGA period x \$100 initial
21 violation per pay period);
- 22 • Estimated \$74,800.00 for PAGA penalties with respect to meal period violations
23 (based on approximately 748 pay periods during the PAGA period x \$100 initial
24 violation per pay period);and
- 25 • Estimated \$187,000.00 for PAGA penalties with respect to wage statement
26 violations (calculated based on approximately 748 pay periods during the PAGA
27 period x \$250 violation penalty under Labor Code § 226.3 pursuant to *Raines v.*
28 *Coastal Pac. Food Dist.* (2018) 23 Cal. App. 5th 667).

1 (Franklin Decl. ¶ 24.)

2 Alternatively, Plaintiff calculated a more modest maximum civil penalty recovery of
3 \$74,800.00 (\$100 penalty x 748 pay periods) in the event the Court elected to not “stack”
4 penalties – i.e., not impose penalties for multiple PAGA violations per pay period. (Franklin
5 Decl. ¶ 25.) Based on this more modest maximum penalty calculation, **the proposed**
6 **Settlement amounts to 40.11% of Defendants’ probable maximum penalty exposure.**

7 This more modest maximum penalty calculation acknowledges that, even if Plaintiff
8 were to prevail on the merits of her PAGA claim, the potential civil recovery is uncertain
9 given the Court’s discretion to reduce PAGA penalties where “if, based on the facts and
10 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
11 arbitrary and oppressive, or confiscatory.” Labor Code § 2699(2). Indeed, as shown in the
12 Court of Appeal’s decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App 5th 504, 517,
13 while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
14 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at
15 complying with the law. Upon review, the Court of Appeal found such reduction to be proper.
16 (*Id.* at p. 539; *see O’Connor*, 2016 WL 4398271, at p. *17 (noting that even if PAGA penalties
17 amounted to \$1 billion, such award “could well be reduced, as a court may reduce the penalty
18 when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
19 confiscatory”).)

20 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
21 penalties. However, Plaintiff is aware that Defendants could make a compelling argument to
22 the contrary, given that there have been no prior notices of PAGA violations filed with the
23 LWDA pertaining to Defendants. Even if there were a finding of liability, Defendants have
24 argued that these violations were not intentional violations of the law and did not occur every
25 pay period or apply to all employees. (Franklin Decl. ¶ 26.) As such, the Court may be
26 disinclined to award full PAGA penalties. On this basis, the Court again may find there is
27 reason to significantly reduce the PAGA penalties awarded.

28 The Court’s assessment of the proposed Settlement must take into account that any

1 penalties awarded may be subject to substantial reduction. When this is considered, in
2 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
3 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced
4 value allows for the distribution of penalties in an amount which accounts for the risk of
5 continued litigation, and Defendant's likely arguments that higher penalties would have been
6 confiscatory. It also sufficiently deters Defendants from engaging in similar conduct in the
7 future, which is one of the primary goals of PAGA.

8 **2. Plaintiff's Claims are Contested**

9 Plaintiff asserts that her representative PAGA claims are based on the allegations that
10 Defendants failed to pay all minimum and/or overtime wages owed for all hours worked,
11 including on-call time, time spent making or receiving mandatory work calls while off-the-
12 clock, and reporting time pay for days when employees were required to call in but not report
13 to work; failed to provide off-duty meal and rest breaks; failed to provide accurate itemized
14 wage statements; failed to pay earned wages upon termination to separating employees; and
15 failed to reimburse employees for expenses associated with the required work-related use of
16 their personal cell phones. (*See* Complaint at ¶¶ 27-44.)

17 Defendants have denied violations of any applicable laws and deny liability for any
18 claims asserted in the Action. (Franklin Decl. ¶ 27.) While Defendant Trejo admitted during
19 his deposition that employees were typically called into work on an as-needed basis each day,
20 Defendants deny that the employees were required to call in or remain on-call to receive such
21 calls. (*Id.*) Further, Defendants assert Plaintiff and the other employees knew that it was their
22 responsibility to take their meal and rest breaks and that they did so during their employment.
23 (*Id.*) While Defendant Trejo admitted in his deposition testimony that he paid Plaintiff in cash
24 at her regular hourly rate of pay for hours worked over eight in a workday, he refutes that this
25 practice occurred with any other employees. (Franklin Decl. ¶ 7.)

26 **3. Defendants' Asserted Financial Hardship Weighs in Favor**

27 As discussed in Section II-B above, Defendants provided documents and information,
28 both voluntarily and via the deposition of Defendant Trejo, concerning significant financial

1 liabilities and hardships impacting both the Tacos El Pariente business and Defendant Trejo,
2 individually. (Franklin Decl. ¶ 10.) The proposed Settlement takes into consideration the
3 enhanced risk of post-judgment collection in light of such financial hardships and limitations,
4 which weighed in favor of Plaintiff's counsel's determination that the present settlement is fair
5 and reasonable and in the best interest of the Aggrieved Employees and the State. (Franklin
6 Decl. ¶ 23.)

7 **F. The Attorneys' Fees are Reasonable**

8 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code
9 § 2699, subd. (g). Similar to awarding fees in a class action, California state and federal courts
10 have recognized that an appropriate method for determining award of attorneys' fees for
11 representative actions is to use a percentage of the total value of benefits to class members by
12 the settlement. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v.*
13 *Priest* (1977) 20 Cal. 3d 25, 34 ("*Serrano III*"); *Boeing Co. v. Van Gemert* (1980) 444 U.S.
14 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769. The purpose of
15 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
16 proportionally among all the beneficiaries so that the active beneficiary does not bear the
17 entire burden alone." *Vincent*, 557 F. 2d at p. 769.

18 The Common Fund Doctrine is predicated on the principle of preventing unjust
19 enrichment. When a litigant's efforts create or preserve a fund from which others derive
20 benefits, he may require the passive beneficiaries to compensate those who created the fund.
21 Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at
22 p. 35; *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*
23 (1995) 12 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund
24 doctrine has been applied "consistently in California when an action brought by one party
25 creates a fund in which other persons are entitled to share." The reasons for applying the
26 Common Fund Doctrine include: "fairness to the successful litigant, who might otherwise
27 receive no benefit because his recovery might be consumed by the expenses; correlative
28 prevention of an unfair advantage to the others who are entitled to share in the fund and who

1 should bear their share of the burden of its recovery; encouragement of the attorney for the
2 successful litigant who will be more willing to undertake and diligently prosecute proper
3 litigation for the protection or recovery of the fund if he is assured that he will be properly and
4 directly compensated should his efforts be successful.” *Id.*

5 Indeed, most recently, the California Supreme Court has also held that the award of
6 attorneys’ fees in common fund wage and hour class action settlements should start with the
7 percentage method. *See Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (“We join the
8 overwhelming majority of federal and state courts in holding that when class action litigation
9 establishes a monetary fund for the benefit of the class members, and the trial court in its
10 equitable powers awards class counsel a fee out of that fund, the court may determine the
11 amount of a reasonable fee by choosing an appropriate percentage of the fund created.”).

12 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
13 percent of the fund. *Laffitte*, 1 Cal.5th at p. 506. And this was based on a lodestar amount that
14 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
15 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
16 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at p.
17 505.

18 As a secondary support for the percentage of the fund method, when fees are allocated
19 by percentage method, courts have discretion to “cross-check” the fees awarded through the
20 lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation,
21 when used in this manner, does not override the trial court’s primary determination of the fee
22 as a percentage of the common fund and thus does not impose an absolute maximum or
23 minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at p. 505 (emphasis added); *In re*
24 *Rite Aid Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check
25 does not trump the primary reliance on the percentage of common fund method”).

26 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
27 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
28 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable

1 range, but the court is not necessarily required to make such an adjustment.” *Id.* Thus, a
2 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
3 required; in many cases, performing a cross-check “undermines” one of the primary reasons
4 for using the percentage method: aligning counsel’s incentives with the benefits delivered to
5 the class and discouraging protracted litigation. *Id.* at p. 506 (finding trial courts “retain the
6 discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
7 *Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao*, 82 Cal. App. 4th 19, pp. 29-30
8 (citing the recommendations of the Third Circuit Task Force with approval and observing that
9 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
10 authorities, who have been most vocal about the manner in which it exacerbates the problem
11 of ‘cheap settlements’ and burdens already overworked trial judge”).

12 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
13 to 4 or even higher.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see*
14 *also, e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying
15 a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
16 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*
17 (1988) 203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).

18 With respect to Plaintiff’s counsel’s lodestar, to date, approximately 84.4 hours have
19 been expended to date by Plaintiff’s counsel this matter. (Fitzpatrick Decl. ¶ 5, Ex. A;
20 Declaration of Larry W. Lee (“Lee Decl.”) ¶ 7, Ex. A.) The courts are quite liberal in the
21 evidence required to prove an attorney’s hours. Detailed time records are not required. An
22 attorney’s testimony alone may suffice: “Testimony of an attorney as to the number of hours
23 worked on a particular case is sufficient evidence to support an award of attorney fees, even in
24 the absence of detailed time records.” *Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.

25 Reasonable hours include, in addition to time spent during litigation, the time spent
26 before the action is filed, including time spent interviewing the clients, investigating the facts
27 and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey* (1980)
28 447 U.S. 54, 62. Further, the fee award should include fees incurred to establish and defend

1 the attorneys' fee claim. *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 [*Serrano IV*].

2 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
3 experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084,
4 1095. The court may consider other factors when determining a reasonable hourly rate, *e.g.*,
5 the attorney's skill and experience, the nature of the work performed, the relevant area of
6 expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*
7 (1998) 61 Cal. App. 4th 629, 632-33.

8 Plaintiff's counsel's skill and experience justify the requested rate. As shown in the
9 supporting declarations, Plaintiff's counsel have significant experience in the area of
10 employment and wage and hour class actions. Specifically, Plaintiff's counsel's practice
11 focuses on representing employees in employment matters, particularly wage and hour cases.
12 (Franklin Decl. ¶¶ 29-31; Fitzpatrick Decl. ¶ 10; Lee Decl. ¶¶ 5-6.)

13 Once the court establishes the lodestar amount, it may enhance the fee award by a
14 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at p. 48. The
15 pertinent factors include the difficulty of the questions involved and the skill in presenting
16 them, the contingent nature of the fee award, the extent to which the litigation precluded other
17 employment, and the percentage-of-the-fund the attorney would have received on the fair
18 market. *Id.*; *Lealao*, 82 Cal. App. 4th at p. 49. However, this list is not exhaustive, and the
19 court can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*
20 (2001) 24 Cal. 4th 1122, 1139.

21 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
22 the-benefit, namely, no objections by class members, commendable conduct by counsel, and
23 significant recoveries by class members, all of which were previously detailed above. *Lealao*,
24 82 Cal. App. 4th at 51-53. The extreme effort undertaken by counsel, as shown by their hours
25 and the significantly high amount of each claim being paid out, shows commendable conduct.

26 It is also critical to note that prompt settlement cannot be used to diminish the fee or
27 the enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal.App.4th at p. 52 (the
28 promptness of settlement "cannot be used to justify the refusal to apply a multiplier").

1 According to *Lealao*, courts placed “an extraordinarily high value” on settlement, and counsel
2 should be rewarded, not punished, for achieving this goal in a timely fashion. *Id.*

3 Here, based upon Plaintiff’s counsel’s lodestar of \$60,168.50, Plaintiff’s request for a
4 fee award of \$10,000.00 is more than reasonable and fair. As the Court can see, the lodestar
5 well exceeds the requested fee amount, such that it would result in a negative multiplier.

6 As such, the requested fee award in the amount of \$10,000.00 is fair and reasonable,
7 and should be awarded in its entirety.

8 **G. The Costs are Reasonable**

9 Additionally, Plaintiff’s counsel’s request for reimbursement of litigation costs in the
10 amount of \$2,500.00 is also reasonable. As set forth in Plaintiff’s counsel’s declaration,
11 Plaintiff’s counsel incurred actual litigation costs in the amount of \$4,207.05. (Fitzpatrick
12 Decl. ¶ 9, Ex. B; Lee Decl. ¶ 10, Ex. B.) All such costs were reasonable and necessary to the
13 effective prosecution of this matter. (*Id.*) The Parties agreed that Plaintiff’s counsel may seek
14 up to \$2,500.00 as reimbursement for litigation costs under the Settlement Agreement.
15 (Settlement Agreement ¶¶ A.21, C.9.g.) Counsel advanced costs with no guarantee that any of
16 the costs advanced would be recovered. (Fitzpatrick Decl. ¶ 9.) As such, the requested costs
17 of \$2,500.00 should be awarded as fair and reasonable.

18 **H. The Settlement Administrator’s Fees Should be Approved**

19 The Parties have agreed to pay actual costs of administration, which are estimated to be
20 \$2,500.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
21 this Settlement. (Settlement Agreement ¶¶ A.27, C.9.h.) The Parties believe that the
22 administration fee is reasonable and should be approved.

23 **I. Notice to the LWDA Has Been Provided**

24 Pursuant to California Labor Code § 2699(1), on May 8, 2023, Plaintiff uploaded the
25 instant motion, Settlement Agreement, and proposed order to the LWDA’s website.
26 (Fitzpatrick Decl. ¶ 13.) In addition, Plaintiff shall submit to the LWDA a copy of the Court’s
27 judgment and order approving the Settlement Agreement within ten (10) days after entry of
28 judgment or order. (*Id.*)

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1 **PROOF OF SERVICE**

2 I am employed in the County of Monterey, State of California. I am over the age of 18
3 and not a party to the within action; my business address is FITZPATRICK & SWANSTON,
4 555 S. Main Street, Salinas, California 93901.

5 On the date written below, I served the foregoing document(s), described as
6 **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT**
7 **AGREEMENT PURSUANT TO THE PRIVATE ATTORNEY GENERAL ACT;**
8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
9 on the interested parties in this action as indicated below and by the following means:

10 Larry W. Lee (SBN: 228175)
11 Howard Magee
12 DIVERSITY LAW GROUP, P.C.
13 515 South Figueroa Street, Suite 1250
14 Los Angeles, California 90071
15 Telephone: (213) 488-6555
16 Facsimile (213) 488-6554
17 lwlee@diversitylaw.com
18 himagee@diversitylaw.com

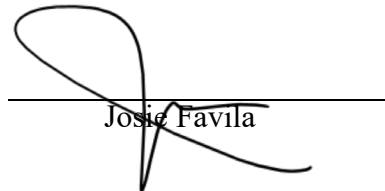
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Attorneys for Defendants

19 Attorneys for Plaintiffs

20 xx

(BY ELECTRONIC SERVICE) Pursuant to CCP § 1010.6 and Cal.
Rules of Court, Rule 2.251, I caused the document(s) to be served
through the Odyssey eFileCA portal (www.california.tylerhost.net),
addressed to the person(s) at the e-mail address(es) listed above. I did
not receive within a reasonable time after e-service, any electronic
message or other indication that e-service was unsuccessful.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct, and that this declaration was executed on May 11, 2023, at
23 Salinas, California.

24 
25 Josie Favila
26
27
28