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

NELSON CHAVIRA, MICHAEL BIRD,
MICHAEL MCCREVEN, and MICKEY
LATHUM, individually, and on behalf of all
others similarly situated,

Plaintiff,

v.

MARK III CONSTRUCTION, INC., a California
corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 34-2021-00308972-CU-OE-GDS

**CLASS & PAGA REPRESENTATIVE
ACTION**

[Assigned for all purposes to: Hon Jill Talley,
Dept. 23]

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Filed with the Declaration of Benjamin H.
Haber, Declaration of Nelson Chavira,
Declaration of Michael Bird, Declaration of
Michael McCreven, Declaration of Mickey
Lathum, and Proposed Order]

PRELIMINARY APPROVAL HEARING

Date: June 6, 2025
Time: 9:00 a.m.
Dept: 23

Complaint filed: September 21, 2021
Trial date: Not set

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

PLEASE TAKE NOTICE that on June 6, 2025 at 9:00 a.m., in Department 23 of the Gordon D. Schaber Sacramento County Courthouse, located at 720 9th Street, Sacramento, California 95814, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*, Plaintiffs Nelson Chavira, Michael Bird, Michael McCreven, and Mickey Lathum (collectively, “Plaintiffs”) will move the Court for an Order granting preliminary approval of the proposed class action settlement between Plaintiffs and Defendant Mark III Construction, Inc (“Defendant”). Plaintiffs further move the Court for an Order:

1. Granting preliminary approval of the Class Action and PAGA Settlement Agreement and Class Notice;
2. Certifying a Class for settlement purposes;
3. Approving the Notice and the plan for distribution of the Notice;
4. Appointing Plaintiffs Nelson Chavira, Michael Bird, Michael McCreven, and Mickey Lathum as Class Representatives for settlement purposes;
5. Appointing Plaintiffs’ Counsel, Benjamin H. Haber and Daniel J. Kramer of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
6. Appointing ILYM Group, Inc. as the Settlement Administrator; and
7. Scheduling a final approval hearing.

The motion will be based upon this notice, the attached memorandum of points and authorities, the Declarations of Benjamin H. Haber, Nelson Chavira, Michael Bird, Michael McCreven, and Mickey Lathum, filed concurrently herewith, the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

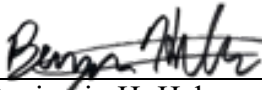
Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative ruling may be downloaded off the court’s website. If the party does not have online access, they may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the

1 tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day
2 before the hearing, no hearing will be held.

3 Respectfully submitted,

4 Dated: May 14, 2025

WILSHIRE LAW FIRM

5 By: 
6 Benjamin H. Haber
7 Daniel J. Kramer
8 Bradford Smith

Attorneys for Plaintiffs

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3	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.)	8, 12, 20
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6	(2006) 53 UCLA L.Rev. 1303	15

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Nelson Chavira, Michael Bird, Michael McCreven, and Mickey Lathum (collectively, “Plaintiffs”) seek preliminary approval of a proposed \$1,175,000.00 non-reversionary, wage and hour class action settlement with Defendant Mark III Construction, Inc. (“Defendant”). The Settlement will provide substantial monetary payments to approximately 1,084 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Brandon McKelvey, over the course of a full day of mediation that was conducted via Zoom. After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiffs’ claims and Defendant’s defenses, the Parties reached a settlement on June 28, 2024. Accordingly, Plaintiffs request that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiffs’ Claims

This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiffs and putative class members worked in California as hourly-paid or non-exempt employees for Defendant during the class period. Defendant is a mechanical, electrical, and plumbing subcontractor and commercial service company with a headquarters in Sacramento and an office in Fresno who has projects throughout California. (Declaration of Benjamin H. Haber in Support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement [“Haber Decl.”], ¶ 2.)

Plaintiffs allege that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiffs allege that Defendant failed to pay for all hours worked. Plaintiffs further allege that Defendant failed to provide employees with legally compliant meal and rest periods, and Defendant failed to reimburse business expenses. Based on these allegations, Plaintiffs assert related claims for failure to provide accurate wage

statements, failure to pay all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On September 29, 2021, Plaintiffs filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194 and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code § 226.7); (5) failure to timely pay final wages at termination (Labor Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Labor Code § 226); (7) failure to indemnify employees for expenditures (Labor Code § 2802); and (8) unfair business practices (Business and Professions Code 17200 et seq.). Plaintiff sent a notice to Defendant and the California Labor & Workforce Development Agency (“LWDA”) alleging similar wage and hour violations pursuant to the PAGA (Cal. Lab. Code §§ 2699, *et seq.*) on September 29, 2021. (Haber Decl., ¶ 4.)

B. Discovery and Investigation

Following the filing of the Complaint, the Parties exchanged documents and information before mediating this action. Defendant produced a sample of time and pay records for class members. Defendant also provided documents of its wage and hour policies and practices during the class period, and information regarding the total number of current and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

After reviewing documents regarding Defendant’s wage and hour policies and practices, analyzing Defendant’s timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendant’s maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id.*)

C. Settlement Negotiations

On June 20, 2024, the parties participated in private mediation with experienced class action mediator Brandon McKelvey. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The

1 settlement negotiations were at arm's length and, although conducted in a professional manner,
2 were adversarial. The Parties went into the mediation willing to explore the potential for a
3 settlement of the dispute, but each side was also prepared to litigate their position through trial
4 and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and
5 discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendant's
6 defenses, the Parties reached a settlement the material terms of which are encompassed within
7 the Settlement. (*Id.* at ¶ 8, Ex. 1 [Class Action and PAGA Settlement Agreement and Class
8 Notice].)

9 Class Counsel has conducted a thorough investigation into the facts of this case. Based
10 on the foregoing discovery and their own independent investigation and evaluation, Class
11 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
12 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
13 of significant delay, the defenses that could be asserted by Defendant both to certification and
14 on the merits, trial risk, and appellate risk. (*Id.* at ¶ 16.)

15 Indeed, the \$1,175,000.00 Settlement represents **50% of the realistic maximum**
16 **recovery of \$2,331,250.75.** (*Id.* at ¶ 25.) Although Class Counsel estimated that Defendant's
17 maximum potential liability for all claims was approximately \$21.5 million, when the risk of
18 prevailing at certification and trial are factored into the equation, Class Counsel believes that
19 Defendant's realistic exposure was \$2,331,250.75, meaning the Settlement achieves a
20 significant recovery. (*Id.* at ¶¶ 16-29.) Considering the risk and uncertainty of prevailing at
21 class certification and at trial, this is an excellent result for the Class. (*Id.* at ¶ 25.) Indeed,
22 because of the proposed Settlement, class members will receive timely, guaranteed relief and
23 will avoid the risk of an unfavorable judgment.

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

25 The Parties used the Los Angeles Superior Court's Form Class Action and PAGA
26 Settlement Agreement and Class Notice. The Settlement's key terms include:

27 1. Class Definition: For settlement purposes only, the Parties agree to the certification
28 of a class pursuant to California Code of Civil Procedure § 382 defined as: "all persons employed

by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during the Class Period.” (Settlement, § 1.5.)

2. Class Period: “means the period from September 29, 2017 to August 30, 2024, or the date the Court grants preliminary approval of the Settlement, whichever is earlier.” (Settlement, § 1.12.)

3. Participating Class Members: “means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement.” (Settlement, § 1.35.)

4. Aggrieved Employees: “means a person employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during the PAGA Period.” (Settlement, § 1.4.)

5. PAGA Period: “means the period from September 29, 2020 to August 30, 2024 or the date the Court preliminarily approves the settlement.” (Settlement, §1.31.)

6. Gross Settlement Amount: “means \$1,175,000.00 which is the total amount Defendant agrees to pay under the Settlement except as provided in Paragraph 9 below. The Gross Settlement Amount will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Payments and the Administrator’s Expenses.” (Settlement, § 1.22.)

7. Uncashed Checks: “For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller’s Unclaimed Property Fund in the name of the Class Member thereby leaving no “unpaid residue” subject to the requirements of California Code of Civil Procedure Section 384, subd. (b).” (Settlement, § 4.4.3.)

8. Release by Participating Class Members: “All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from any and all claims asserted or that could have been asserted based on the facts pled in the operative complaints, including but not limited to, state wage and hour claims for any and all violations of California's

1 Labor Code and Unfair Competition Law based on Defendant's failure to pay for all hours worked
2 (including minimum, straight time, and overtime wages), failure to provide meal periods, failure
3 to authorize and permit rest periods, failure to timely pay final wages at termination, failure to
4 furnish accurate itemized wage statements, and failure to indemnify employees for expenditures
5 based on the alleged Labor Code violations, and all damages, interest, penalties, attorneys' fees,
6 costs, and other amounts recoverable under said causes of action under California law, to the extent
7 permissible, including, but not limited to, the California Labor Code and the applicable Wage
8 Orders. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not
9 release any other claims, including claims for vested benefits, wrongful termination, violation of
10 the Fair Employment and Housing Act, unemployment insurance, disability, social security,
11 workers' compensation, or claims based on facts occurring outside the Class Period.” (Settlement,
12 § 5.2.) This Release will be deemed effective on the date when Defendant fully funds the entire
13 Gross Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the
14 Individual Class Payments. (Settlement, § 5.)

15 9. Release by Aggrieved Employees: “All Aggrieved Employees are deemed to
16 release, on behalf of themselves and their respective former and present representatives, agents,
17 attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for
18 PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA
19 Period facts stated in the Operative Complaint and the PAGA Notice, including any and all claims
20 involving any alleged failure to pay minimum wages or overtime, failure to provide meal and rest
21 periods, failure to provide accurate wage statements, failure to pay all wages due at separation, and
22 failure to reimburse business expenses, including Labor Code sections 201,202,203,210, 216, 223,
23 225.5, 226, 226.3, 226.7, 245-248.5, 256,432,432.5, 432.7, 510, 512, 558, 558.1, 1024.5, 1174,
24 1194, 1197, 1197.1, 1198, 1198.5, 1199,2699,2699.3,2802, 2810.5 during the PAGA Period.
25 Aggrieved Employees only release these claims for the duration of the PAGA Period.”
26 (Settlement, § 5.3.)

27 10. No Reversion: “None of the Gross Settlement Amount will revert to Defendant.”
28 (Settlement, § 3.1.)

1 11. PAGA Allocation: “PAGA Penalties in the amount of \$50,000.00 to be paid from
2 the Gross Settlement Amount, with 75% (\$37,500.00) allocated to the LWDA PAGA Payment and
3 25% (\$12,500.00) allocated to the Individual PAGA Payments.” (Settlement, § 3.2.5.) Class
4 Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary
5 Approval. (Haber Decl., ¶ 10.)

6 12. Net Settlement Amount: “means the Gross Settlement Amount, less the following
7 payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA
8 Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel
9 Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be
10 paid to Participating Class Members as Individual Class Payments.” (Settlement, § 1.28.)

11 13. Distribution Formula: “An Individual Class Payment calculated by (a) dividing the
12 Net Settlement Amount by the total number of Workweeks worked by all Participating Class
13 Members during the Class Period and (b) multiplying the result by each Participating Class
14 Member’s Workweeks.” (Settlement, § 3.2.4.) As to PAGA: “The Administrator will calculate
15 each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees’ 25%
16 share of PAGA Penalties \$12,500.00 by the total number of PAGA Period Pay Periods worked by
17 all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each
18 Aggrieved Employee’s PAGA Period Pay Periods.” (Settlement, § 3.2.5.1.)

19 14. Tax Allocation: Any settlement money paid to Settlement Class Members will be
20 allocated as 20% wages, 80% to penalties and interest. (Settlement, § 3.2.4.1.)

21 15. Class Representative Service Award: Subject to Court approval, Plaintiffs shall be
22 paid an enhancement award not to exceed \$10,000.00 each to named Plaintiffs Nelson Chavira,
23 Michael Bird, Michael McCreven, and Mickey Latham (\$40,000.00 total). (Settlement, § 3.2.1.)
24 This amount is for Plaintiffs’ time and effort in bringing and presenting the action, and in exchange
25 for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542.
26 (Settlement, § 5.1.1.) If the Court approves a lesser enhancement, then the unapproved portion or
27 portions shall revert into the Net Settlement Amount to be distributed between the participating
28 Settlement Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

1 16. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
2 a fee application of up to 33 1/3% (\$391,666.67) of the Gross Settlement Amount, plus out-of-
3 pocket costs not to exceed \$40,000.00. (Settlement, § 3.2.2.)

4 17. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
5 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
6 fees, costs, and service award being sought, and an explanation of how the settlement allocations
7 are calculated. (Settlement, Ex. 1, Class Notice.) Class Members will be notified by first-class
8 mail of the settlement. (Settlement, § 7.4.) ILYM Group, Inc., the proposed Settlement
9 Administrator, will undertake its best efforts to ensure that the notice is provided to the current
10 addresses of class members, including conducting a national change of address search and re-
11 mailing the notice to updated addresses. (*Id.*; Haber Decl., ¶ 11, Ex. 3 [Settlement Administrator
12 Bid].)

13 **III. DISCUSSION**

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

21 In considering whether a settlement is reasonable, the trial court should consider relevant
22 factors, which may include the strength of plaintiff's case, the risk, expense, complexity and likely
23 duration of further litigation, the risk of maintaining class action status through trial, the amount
24 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
25 experience and views of counsel, the presence of a governmental participant, and the reaction of
26 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
27 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
28 that the class settlement is within the "ballpark" of reasonableness. (*Id.* at p. 133.) The record

1 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*
2 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not
3 require “an explicit statement of the maximum amount the plaintiff class could recover if it
4 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy
5 and the realistic range of outcomes of the litigation.”].)

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

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

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

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

20 The Settlement was reached following extensive negotiations following one day of
21 mediation with experienced employment mediator, Brandon McKelvey. (Haber Decl. ¶ 7.) The
22 settlement negotiations were at arm’s length and, although conducted in a professional manner,
23 were adversarial. (*Id.*) The parties went into the mediation willing to explore the potential for a
24 settlement of the dispute, but each side was also prepared to litigate their or its position through
25 trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and
26 discussions regarding the strengths and weaknesses of Plaintiffs’ claims and Defendant’s defenses,
27 the Parties reached an agreement. (Haber Decl. ¶ 8.)

28 ///

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

11 Class Counsel also has considerable experience and has demonstrated competence with
12 litigating wage and hour class actions. (*Id.* at ¶¶ 41-48.) Again, this supports the position that the
13 terms of the Settlement are premised on objective evidence that has been considered and weighed
14 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
15 action.

16 **2. The Settlement Is Fair and Reasonable in Light of the Parties’** 17 **Respective Legal Positions**

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

25 This settlement avoids the risks and the accompanying expense of further litigation. (Haber
26 Decl., ¶ 27.) While Plaintiffs are confident in the merits of their claims, a legitimate controversy
27 exists as to each cause of action. (*Id.* at ¶ 26.) Plaintiffs also recognize that proving the amount
28 of wages due to each class member would be an expensive, time-consuming, and uncertain

1 proposition. (*Id.*)

2 The proposed settlement of \$1,175,000.00 therefore represents a substantial recovery when
3 compared to Plaintiffs’ reasonably forecasted recovery. (*Id.* at ¶¶ 16-29.) Because of the proposed
4 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
5 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
6 achieving class certification, the burdens of proof necessary to establish liability, the probability
7 of appeal of a favorable judgment, it is clear that the settlement amount of \$1,175,000.00 is within
8 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
9 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
10 ***\$588.87.*** (*Id.* at ¶ 28.)

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

12 The settlement negotiations were conducted by highly capable and experienced counsel.
13 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
14 experienced in handling complex wage and hour class action litigation. (Haber Decl., ¶¶ 41-48.)
15 Although Plaintiffs and their counsel were prepared to litigate the claims alleged in the litigation,
16 they support the proposed Settlement as being in the best interests of the class.

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

18 The proposed Notice, in the form attached to the Settlement Agreement, should be approved
19 for dissemination to the class. The Notice informs the class of the terms of the settlement and of
20 their rights to be excluded from the settlement. And if there are class members who wish to object
21 to this proposed class action settlement, they will have the opportunity to file their objections and
22 be heard at the Final Approval Hearing. Accordingly, the proposed Notice meets all the
23 requirements of Rule 3.769(f) of the California Rules of Court.

24 C. The Proposed Attorneys’ Fees and Costs Are Reasonable

25 Under the Settlement, subject to the Court’s approval, Defendant agrees to pay Class
26 Counsel reasonable attorneys’ fees in amount of \$391,666.67, which is 33 1/3% of the gross
27 Settlement Amount, and up to \$40,000.00 in costs. These amounts are disclosed to all class
28 members in the proposed Notice and are reasonable.

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

3 California courts have long awarded attorneys’ fees as a percentage of the benefit created
4 by counsel in creating a common fund. The California Supreme Court held that “when a number
5 of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs
6 for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs
7 may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34,
8 quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

9 Class Counsel seeks an award of attorneys’ fees on the “percentage of recovery/ common
10 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
11 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent v.*
12 *Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995)
13 15 Cal.3d 162, the California Supreme Court stated: “[O]ne who expends attorneys’ fees in
14 winning a suit which creates a fund from which others derive benefits may require those passive
15 beneficiaries to bear a fair share of the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and*
16 *County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized
17 that the common fund doctrine has been applied “consistently in California when an action brought
18 by one party creates a fund in which other persons are entitled to share.” (*Id.* at p. 110.)

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

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

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

12 Here, Plaintiffs request attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
13 is in line with the prevailing guidelines established in California case law and academic literature
14 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
15 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
16 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)
17 Accordingly, Plaintiffs respectfully request that the Court approve the attorneys’ fees as negotiated
18 by the parties and requested herein.

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

20 Labor Code § 1194 (a) provides for the recovery of “minimum wage or overtime
21 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
22 section, Plaintiffs would be permitted to recover their actual attorneys’ fees, even if those fees were
23 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
24 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
25 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
26 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
27 Counsel. (Haber Decl., ¶¶ 38-39.) Class Counsel undertook this matter solely on a contingent
28 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the

1 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
2 ahead of all other concerns.

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

5 As demonstrated by their past experience in pursuing class actions on behalf of consumers
6 and employees, Class Counsel possess considerable expertise in litigating class actions. (Haber
7 Decl., ¶¶ 41-48.) Class Counsel has been involved as lead counsel or co-counsel in several class
8 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
9 counsel commensurate with their skill, reputation and experience, Class Counsel's requested fee
10 award is supported here.

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

18 **D. The PAGA Allocation is Reasonable**

19 Where settlements negotiate a good faith amount for PAGA penalties and "there is no
20 indication that this amount was the result of self-interest at the expense of other" class members,
21 such amounts are generally considered reasonable. (*Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr.
22 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133 at *1, 9.) Courts have approved amounts for
23 PAGA penalties in the range of zero to two percent of the total maximum amount of the Settlement.
24 (*Id.* [approving a PAGA payment of 0.3%, or \$1,500]; see also *Jack v. Hartford Fire Ins. Co.* (S.D.
25 Cal. Oct. 13, 2011) 2011 WL 4899942 at *6 [approving a PAGA payment of 0.25%]; *McKenzie v.*
26 *Fed. Express Corp.* (C.D. Cal. Jan. 23, 2012) 2012 WL 12882124 at *5 [acknowledging that courts
27 approve PAGA claim settlements in the range of zero to two percent of the total settlement].) Here,
28 the amount to be paid to the LWDA is larger than many other PAGA settlement amounts approved

1 by the courts where seemingly nominal amounts were allocated for such claims. (See, e.g. *Zubia*
2 *v. Shamrock Foods Co.* (C.D. Cal. Dec. 21, 2017) No. CV1603128ABAGRX, 2017 WL 10541431,
3 at *14 [approving a PAGA settlement of 0.1%]; *Hopson, supra*, (N.D. Cal. Aug. 8, 2008) 2008
4 WL 3385452, at *1 [approving a PAGA settlement of 0.3% or \$1,500]; *Garcia v. Gordon Trucking,*
5 *Inc.* (E.D. Cal. Oct. 31, 2012) No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *3 [approving
6 a PAGA settlement of 0.27%].) Here, the Parties negotiated a good faith amount of \$50,000.00,
7 75% percent of which (\$37,500.00) will be paid to the LWDA, with 25% (\$12,500.00) to be
8 distributed to the Aggrieved Employees. (Settlement at §1.34.) The \$50,000.00 settlement amount
9 equates to approximately 4.3% of the Gross Settlement Amount, which far exceeds amounts that
10 are routinely approved. The parties negotiated to allocate 4.3% of the Settlement to PAGA
11 penalties in good faith and this amount is reasonable considering that the maximum PAGA
12 penalties were estimated at \$3,097,000.00 (which assumed \$100 per pay period). (Haber Decl. ¶
13 24.)

14 **E. The Service Awards to Named Plaintiffs Are Reasonable**

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

22 Service awards are particularly important to plaintiffs in wage and hour cases because they
23 promote the important public policies underlying the wage and hour laws. This strong policy is
24 codified in California Labor Code § 90.5, which provides, “it is the policy of this state to vigorously
25 enforce minimum labor standards in order to ensure employees are not required or permitted to
26 work under substandard unlawful conditions”) Nonetheless, the California Supreme Court
27 has noted that “retaliation against employees for asserting statutory rights under the Labor Code is
28 widespread,” despite anti-retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.*

1 (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should be rewarded for
2 assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.*
3 (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

4 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
5 Service Awards in the amount of \$10,000.00 each to Plaintiffs Nelson Chavira, Michael Bird,
6 Michael McCreven, and Mickey Lathum (\$40,000 total). This amount is also in exchange for
7 Plaintiffs’ general release of all claims against Defendant. Courts routinely approve a \$10,000
8 enhancement award for plaintiffs represented by Class Counsel. (*See, e.g., Moreno v. Pretium*
9 *Packaging, L.L.C.* (C.D. Cal. Aug. 6, 2021) 2021 WL 3673845, *3 [“The Court concludes a
10 \$10,000 incentive award is appropriate.”]; *Suarez, supra*, 2024 WL 150721 at p. *4 [“The court
11 approves awards of \$10,000 for each class representative.”].) Class Counsel represent that
12 Plaintiffs devoted a great deal of time and work assisting counsel in the case, communicated with
13 counsel very frequently for litigation and to prepare for mediation, and was frequently in contact
14 with Class Counsel during the mediation. (Haber Decl., ¶¶ 30-34.) This amount is reasonable
15 particularly in light of the substantial benefits Plaintiffs generated for all class members. (*Id.*)
16 Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB,
17 a former Wilshire Law Firm Partner, Justin F. Marquez, helped negotiate a \$2.5 million class action
18 settlement for 339 class members, and the court approved a \$25,000 class representative incentive
19 award for each named plaintiff. (Haber Decl., ¶ 34.)

20 When compared with the amounts awarded in typical class action cases, the amount
21 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
22 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
23 representative was \$15,992 and the median award per class representative was \$4,357.” (Eisenberg
24 & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L.Rev.
25 1303, 1308.) That same study found that named plaintiffs in employment discrimination class
26 actions received an average award of \$69,850 and a median award of \$31,081, while named
27 plaintiffs in other employment class actions received an average award of \$12,121 and a median
28 award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards in

1 employment cases reflected the “courts’ wish to make representative plaintiffs whole by
2 compensating them for the high costs of their service to the class, including risks of stigmatization
3 or retaliation on the job.” (*Id.* at p. 1308.)

4 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

5 **A. Legal Standard**

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

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

27 ///

28 ///

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

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

4 The proposed class that Plaintiffs seek to represent is easily ascertainable and includes
5 approximately 1,084 employees of Defendant.

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

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

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

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

26 Here, the employment practices at issue are: whether Defendant had legally compliant
27 policies and practices to provide employees with meal periods; whether Defendant had legally
28 compliant policies and practices authorizing and permitting its employees to take rest periods;

1 whether Defendant had legally compliant policies and practices for all hours worked, including
2 overtime wages; whether Defendant reimbursed employees for business expenses; whether final
3 payment of wages was untimely and excluded unpaid wages, including meal period premium
4 wages, and rest period premium wages; and whether the wage statements were consequently non-
5 compliant. Plaintiffs contend that the factual and legal issues are the same for all of the identified
6 class members, including Plaintiffs. Further, all class members suffered from, and seek redress
7 for, the same alleged injuries.

8 **3. Plaintiffs' Claims Are Typical of the Claims of the Class**

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

19 **4. Plaintiffs and Their Counsel Meet the Adequacy Requirement**

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

24 All of these requirements are met here for settlement purposes. Plaintiffs retained counsel
25 with extensive experience in prosecuting complex class actions, including similar class actions that
26 previously settled. (Haber Decl., ¶¶ 41-48.) Class Counsel unquestionably is "qualified,
27 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
28 Cal.App.3d 862, 875.) In addition, Plaintiffs have no conflicts, and Plaintiffs have, with counsel,

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

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

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

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

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

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

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

26 The proposed Notice should be approved. It will be disseminated through direct U.S. first
27 class mail to the last known address for each Class Member. It informs the Class Members of the
28 terms of the settlement and their right to be excluded from the Settlement. And if there are Class

Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

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

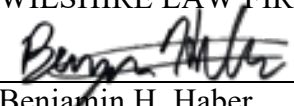
VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement and set a Final Approval Hearing.

Respectfully submitted,

Dated: May 14, 2025

WILSHIRE LAW FIRM

By: 

Benjamin H. Haber
Daniel J. Kramer
Bradford Smith

Attorneys for Plaintiffs

PROOF OF SERVICE

Chavira, et al. v. Mark III Construction, Inc., et al.
34-2022-00314710-CU-OE-GDS

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Rebecca Padilla, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is rebecca.padilla@wilshirelawfirm.com.

On May 14, 2025, I served the foregoing **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Lisa Bradner
LB@castleemploymentlaw.com
Tim Del Castillo
tdc@castleemploymentlaw.com
admin@castleemploymentlaw.com
CASTLE LAW CALIFORNIA EMPLOYMENT COUNSEL, PC
2999 Douglas Blvd., Suite 180
Roseville, CA 95661
Telephone: (916) 587-9106

Attorneys for Defendant

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

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

Executed on May 14, 2025, at Los Angeles, California.



Rebecca Padilla