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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF TULARE

MARIA ROCHA, an individual, on behalf of
herself and others similarly situated, and as a
private attorney general on behalf of the State
of California,

PLAINTIFF,

vs.

GRAPES FLC, a California Corporation, and
DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. VCU289872

[Assigned For All Purposes to the Hon. Bret
Hillman, Dept. 7]

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

*[Filed concurrently with the Declaration of David
S. Winston, the Declaration of Maria Rocha, the
Declaration of Lisa Mullins, the Declaration of
Iralda Acevedo and the [Proposed] Order]*

Date: October 25, 2022

Time: 8:30 a.m.

Dept.: 7

Date Filed: December 22, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on October 25, 2022 at 8:30 a.m. in Department 7 of the
3 above-entitled court, located at 221 South Mooney Blvd, Visalia, CA 93291, Plaintiff Maria Rocha
4 will move the Court for Preliminary Approval of the Proposed Class Settlement. The Motion will be
5 made on the grounds that the proposed Class Settlement is fair, adequate, reasonable, and in the best
6 interest of the Class and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points and
8 Authorities, the Declaration of David S. Winston, the Declaration of Maria Rocha, the Declaration of
9 Lisa Mullins, the Declaration of Iralda Acevedo, the Joint Stipulation of Class Action Settlement
10 attached to the Declaration of David S. Winston, all other papers and records on file in this action,
11 and on such oral and documentary evidence as may be presented at the hearing on this Motion.

12
13 Dated: September 28, 2022

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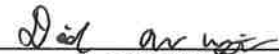
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15 By: 
16 DAVID S. WINSTON
17 Attorney for Plaintiff Maria Rocha, the
18 Proposed Class, and the aggrieved employees
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TABLE OF CONTENTS

I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
A. Litigation Overview	2
III. THE SETTLEMENT	3
A. The Settlement Class and Release	3
B. Settlement Payments	3
C. Process for Administering Settlement after Preliminary Approval	5
D. Process for Class Members to Respond to Class Notice	5
E. The PAGA Aggrieved Employees Cannot Opt-Out of the PAGA Settlement	6
IV. THE PROPOSED SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS	7
V. THE PROPOSED SETTLEMENT IS FAIR AND SHOULD BE APPROVED	8
1. The Strength and Risks Associated with Plaintiff's Case	9
a. The Strength of and Risks Associated with Plaintiff's Off-the-Clock Minimum Wage and Overtime Claims	9
b. The Strength of and Risks Associated with Plaintiff's Meal Period Claim	11
c. The Strength of and Risks Associated With the Rest Period Claims	12
d. The Strength of and Risks Associated With the Claim for Labor Code § 226(e) Penalties	14
e. The Strength of and Risks Associated With the Claim for Labor Code § 203 Penalties	14
f. The Strength of and Risks Associated with Plaintiff's Claim for Defendant's Failure to Reimburse Business Expenses in Violation of Labor Code § 2802	15
g. The Strength of and Risks Associated with the PAGA Claim	17
2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation	18
3. The Risk of Maintaining Class Action Status Through Trial	19
4. The Amount Offered in Settlement	19

1	5. The Experience and Views of Counsel.....	20
2	6. The Proposed Plan of Allocation Is Fair and Reasonable.....	21
3	7. The Proposed Notice Fairly Apprises the Class Members of the Terms of the	
4	Settlement and of the Class Members' Rights under the Settlement.....	21
5	B. The Proposed Settlement Class Should Be Certified For Settlement Purposes.....	22
6	1. Ascertainability	22
7	2. Numerosity.....	22
8	3. There Is a Well-Defined Community of Interest	23
9	a. There Are Predominant Questions of Law and Fact.....	23
10	b. The Class Representative Has Claims Typical of the Proposed Class	24
11	c. The Class Representative Will Adequately Represent the Proposed Classes.....	25
12	4. The Class Action Vehicle Is Superior to the Alternatives	25
13	C. The Proposed Attorneys' Fees Sought Are Reasonable	26
14	D. Plaintiff's Requested Service Award Is Reasonable.....	27
15	E. Compliance with Code of Civ. Proc. § 384	28
16	F. Final Approval Hearing Timing.....	29
17	VI. CONCLUSION	29

TABLE OF AUTHORITIES

STATE CASES

<i>Alberts v. Aurora Behavioral Health Care</i>	241 Cal. App. 4th 388 (2015).....	11
<i>Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.</i>	46 Cal.4th 993 (2009)	6
<i>Bell v. Farmers Ins. Exch.</i>	115 Cal.App.4th 715 (2004)	24
<i>Benton v. Telecom Network Specialists, Inc.</i>	220 Cal. App. 4th 701 (2013).....	11
<i>Bradley v. Networkers International, LLC</i>	211 Cal.App.4th 1129 (2012)	11
<i>Brinker Rest. Corp. v. Sup. Ct.</i>	53 Cal.4th 1004 (2012)	11
<i>Carrington v. Starbucks Corp.</i>	30 Cal. App. 5th 504 (2018)	17
<i>Cartt v. Sup. Ct.</i>	50 Cal. App. 3d 960 (1975)	21
<i>Classen v. Weller</i>	145 Cal.App.3d 27 (1983)	24
<i>Cochran v. Schwan's Home Serv., Inc.</i>	228 Cal. App. 4th 113 (2014)	15
<i>Collins v. Rocha</i>	7 Cal.3d 232 (1972).....	22
<i>Donohue v. Amn Servs.</i>	11 Cal.5th 58 (2021).....	12
<i>Dunk v. Ford Motor Co.</i>	48 Cal.App.4th 1794 (1996)	7, 8
<i>Faulkinbury v. Boyd & Associates, Inc.</i>	216 Cal.App.4th 220 (2013)	11
<i>Ferra v. Loews Hollywood Hotel, LLC</i>	40 Cal. App. 5th 1239 (2019)	18
<i>Hernandez v. Restoration Hardware, Inc.</i>	4 Cal.5th 260 (2018).....	19
<i>Hicks v. Kaufman & Broad Home Corp.</i>	89 Cal.App.4th 908 (2001).....	23
<i>Kim v. Reins International California, Inc.</i>	9 Cal.5th 73 (2020).....	6
<i>Knapp v. AT & T Wireless Services, Inc.</i>	195 Cal. App. 4th 932 (2011).....	23
<i>Kullar v. Foot Locker Retail, Inc.</i>	168 Cal.App.4th 116 (2008).....	8
<i>Laffitte v. Robert Half Internat., Inc.</i>	1 Cal. 5th 480 (2016).....	26
<i>Lampe v. Queen of the Valley Medical Center</i>	19 Cal.App.5th 832 (2018).....	12
<i>Lockheed Martin Corp. v. Sup. Ct.</i>	29 Cal.App.4th 1096 (2003)	25
<i>Malibu Outrigger Bd. of Governors v. Sup. Ct.</i>	103 Cal.App.3d 573 (1980).....	7
<i>Mallick v. Sup. Ct.</i>	89 Cal.App.3d 434 (1979).....	7

1	<i>Miller v. Woods</i> , 148 Cal.App.3d 862 (1983).....	22
2	<i>Munoz v. BCI Coca-Cola Bottling Co.</i> , 186 Cal. App. 4th 399 (2010).....	19
3	<i>Nordstrom Com. Cases</i> , 186 Cal.App.4th 576 (2010).....	17, 21
4	<i>Robinson v. S. Ctys. Oil Co.</i> , 53 Cal. App. 5th 476 (2020)	7
5	<i>Rose v. City of Hayward</i> , 126 Cal. App. 3d 926 (1981)	22
6	<i>Sav-On Drug Stores, Inc. v. Superior Court</i> , 34 Cal.4th 319 (2004).....	22, 24
7	<i>Seastrom v. Neways, Inc.</i> , 149 Cal.App.4th 1496 (2007)	24
8	<i>Simons v. Horowitz</i> , 151 Cal.App.3d 834 (1984)	25
9	<i>Troester v. Starbucks Corp.</i> , 5 Cal.5th 829 (2018).....	9
10	<i>Trotsky v. L.A. Fed. Sav. & Loan Ass’n</i> , 48 Cal.App.3d 134 (1975).....	21
11	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001).....	19, 24
12	FEDERAL CASES	
13	<i>Altamirano v. Shaw Industries, Inc.</i> , 2015 WL 4512372 (2015).....	19
14	<i>Amaro v. Gerawan Farming, Inc.</i> , 2016 U.S. Dist. LEXIS 66842 (E.D. Cal. May 19, 2016).....	13
15	<i>Amtel Corp. Derivative Litig.</i> , No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551 (N.D. Cal.	
16	June 25, 2008).....	7
17	<i>Apple Computer, Inc. Derivative Litig.</i> , No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS, 108195	
18	(N.D. Cal. Nov. 5, 2008).....	7
19	<i>Autozone, Inc.</i> , No. 3:10-md-02159-CRB, 2016 U.S. Dist. LEXIS 10574 (N.D.Cal. Aug. 10, 2016)	
20		18
21	<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F.3d 1117 (9th Cir. 2014)	7
22	<i>Bond v. Ferguson Enterprises, Inc.</i> , No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 (E.D. Cal.	
23	June 30, 2011).....	27
24	<i>Campbell v. Best Buy Store, L.P.</i> , U.S. Dist. LEXIS 137792 (2013)	13
25	<i>D’Amato v. Deutsche Bank</i> , 236 F.3d 78 (2nd Cir. 2001)	8
26	<i>Garnett v. ADT LLC</i> , 139 F. Supp. 3d 1121 (E.D. Cal. Oct. 6, 2015).....	14
27	<i>Hopson v. Hanesbrands Inc.</i> , No. CV-08-0844 EDL, 2009 WL 928133 (N.D. Cal. Apr. 3, 2009)..	17,
28	21	

1	<i>Jack v. Hartford Fire Ins. Co.</i> , No. 09cv1683 MMA (JMA), 2011 WL 4899942 (S.D. Cal. Oct. 13,	
2	2011)	17, 21
3	<i>McCrary v. Elations Co., LLC</i> , 2016 U.S. Dist. LEXIS 24050 (C.D. Cal. Feb. 25, 2016)	26
4	<i>Munoz v. Giumarra Vineyards Corp.</i> , No. 1:09-CV-00703-AWI, 2012 WL 2617553 (E.D. Cal. July	
5	5, 2012)	16
6	<i>Munoz v. Giumarra Vineyards Corp</i> , No. CIV-F-09-0703 AWI, 2013 WL 2421599 (E.D. Cal. June	
7	3, 2013)	16
8	<i>Officers for Justice v. Civil Serv. Comm’n.</i> , 688 F.2d 615 (9th Cir. 1982), 459 U.S. 1217 (1983). 7, 8,	
9	20	
10	<i>Ordonez v. Radio Shack, Inc.</i> , 2013 U.S. Dist. LEXIS 7868 (C.D. Cal. Jan. 17, 2013).....	13
11	<i>Rojas v. Marko Zaninovich, Inc.</i> , No. 1:09-CV-00705 AWI, 2012 WL 1232273, (E.D. Cal. Apr. 12,	
12	2012)	10
13	<i>Rojas v. Marko Zaninovich, Inc.</i> , No. 1:09-CV-00705 AWI, 2012 WL 439398 (E.D. Cal. Feb. 9,	
14	2012)	10
15	<i>Romero v. Producers Dairy Foods, Inc.</i> , 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841 (E.D.	
16	Cal. Nov. 14, 2007).....	26
17	<i>Singer v. Becton Dickinson & Co.</i> , No. 08cv821 IEG (BLM), 2010 WL 2196104 (S.D. Cal. June 1,	
18	2010)	17, 21
19	<i>Stuart v. RadioShack Corp.</i> , 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010).....	26
20	<i>Vasquez v. Coast Valley Roofing, Inc.</i> , 266 F.R.D. 482 (E.D. Cal. 2010).....	27

STATUTES

22	C.C.P. § 382	8
23	C.C.P. § 384	31
24	C.C.P. § 1781	8
25	Lab. Code § 226	15
26	Lab. Code § 512	12
27	Lab. Code § 2699.3	19

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION**

2 **I. INTRODUCTION**

3 Plaintiff Maria Rocha (“Plaintiff”) submits this Memorandum of Points and Authorities in
4 support of her unopposed Motion for Preliminary Approval of Class Settlement reached between
5 Plaintiff and Defendant Grapes FLC (hereafter “Defendant” or “Grapes”). By this Motion, Plaintiff
6 requests that the Court:

7 (1) Grant preliminary approval of the Joint Stipulation of Class Action Settlement (“Joint
8 Stipulation” or “Settlement Agreement”). A true and correct copy of the Joint Stipulation of Class
9 Action Settlement is attached to the Declaration of David S. Winston ¶ 16, Exh. 1;

10 (2) Approve the proposed Notice to Class Members (“Notice of Settlement”), a copy of
11 which is attached to the Settlement Agreement as Exhibit A and direct that the Notice of Settlement be
12 sent to Class Members in the manner set forth in the Joint Stipulation; and

13 (3) Schedule a hearing on final approval of the settlement (“Settlement”) and Plaintiff’s
14 Counsel’s application for an award of attorneys’ fees and litigation costs at which Class Members may
15 be heard (“Final Approval Hearing”).

16 This Settlement reflects the maximum amount that a third-party financial expert determined that
17 Defendant might be able to pay and despite the fact that Defendant’s bank account was overdrawn by
18 over \$100,000. Winston Decl., ¶ 35, Exh. 3 at p. 3-4 (“the most the Company and its shareholder can
19 afford without destroying the business is \$178,000. The company would not be able to afford anything
20 more.”). In other words, while Defendant’s potential liability was significantly higher, independent of
21 this Settlement Plaintiff and the Class likely would have achieved a pyrrhic victory at best as
22 Defendant likely would have filed for bankruptcy or ceased operations. *Id.* Therefore, under the
23 circumstances the Parties’ Proposed Settlement represents the best possible result according to a third-
24 party finance expert in light of Defendant’s severe financial challenges and the incumbent risks.
25 Winston Decl., ¶ 35, Exh. 3. As such, Plaintiff believes that the proposed Settlement is fair, reasonable,
26 adequate, and in the best interests of the Class.

1 **II. FACTUAL BACKGROUND**

2 **A. Litigation Overview**

3 On October 27, 2021, Plaintiff filed and served a PAGA notice alleging that Defendant
4 violated Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5,
5 1194, 1197, 1197.1, 1198, 2802 as well as IWC Wage Orders Nos. 13-2001 and 14-2001. Winston
6 Decl., 9. Concurrently to serving her PAGA Notice, Plaintiff submitted a record request to Defendant.
7 *Id.* Shortly thereafter, on December 22, 2021, Plaintiff filed a class action complaint alleging that
8 Defendant 1) failed to pay minimum wages for all hours worked; 2) failed to pay overtime wages for
9 all hours worked including for the time associated with washing grape trays; 3) failed to provide
10 lawful meal periods; 4) failed to provide lawful rest periods; 5) failed to provide accurate itemized
11 wage statements; 6) failed to timely pay all wages owed upon separation; 7) failed to reimburse
12 expenses associated with the use of vehicles and/or tools needed to complete their job duties
13 including but not limited to gloves and scissors to pick grapes and masks during the COVID-19
14 pandemic; 8) engaged in unfair competition in violation of Bus. & Prof. Code section 17200; and 9)
15 sought PAGA penalties for these alleged violations as well as for failing to timely pay wages during
16 employment. Winston Decl., ¶ 10.

17 The Parties began discussing the possibility of early mediation and participated in a mediation
18 with the Hon. Howard Broadman (Ret.) on June 16, 2022. Winston Decl., ¶ 11. In advance of the
19 Mediation, Defendant provided Plaintiff with information about the number of class members, the
20 number of allegedly aggrieved employees, as well as a sample of time and pay records for 200 Class
21 Members. Winston Decl., ¶ 12. Plaintiff retained a third-party data and damages expert to analyze the
22 sample produced by Defendant and to calculate the potential exposure informed by an analysis of the
23 sample time and pay records. *Id.* at ¶ 13. In addition to drawing upon his own experience in litigating
24 employment class actions in the grape industry in California, Class Counsel also researched and
25 analyzed other decisions involving similar claims in preparation for the Mediation. *Id.* at ¶ 14. At the
26 Mediation, Judge Broadman helped to manage the Parties expectations and provided a useful, neutral
27 analysis of the issues and risks to both sides. *Id.* at ¶ 15. With assistance from the Mediator and the
28 benefit of a mediator's proposal, the Parties agreed to the proposed non-reversionary, checks-mailed

Settlement presently pending before the Court. *Id.* Class Counsel believes that the proposed Settlement is fair and reasonable and in the best interest of the Parties and the Class. *Id.* at ¶ 8.

III. THE SETTLEMENT

A. The Settlement Class and Release

This Action concerns, and the Proposed Settlement Class is defined as all non-exempt employees employed by Grapes FLC from January 1, 2018 through June 30, 2022. Winston Decl., ¶¶ 16-17, Exh. 1 at § I(F). There are 8,556 Class Members. *Id.* Under the terms of the Parties' Settlement Agreement, the Class Period is defined as January 1, 2018 through June 30, 2022. Winston Decl., ¶ 16, Exh. 1 at § I(I).

Under the terms of the Proposed Settlement, the participating Class Members will release Grapes FLC and all of its affiliated entities, parents, subsidiaries, owners, officers, shareholders, executives, managers, joint employers, and clients (the "Released Parties) from:

all claims alleged in Plaintiff's December 22, 2021 Complaint ("Complaint") or that could have been alleged for (1) failure to pay minimum wages in violation of Labor Code §§ 1194 and 1194.2; 2) failure to pay overtime wages in violation of Labor Code § 510; 3) failure to provide lawful meal periods or pay meal period premiums in violation of Labor Code §§ 226.7 and 512 as well as IWC Wage Order Nos. 13-2001 and 14-2001; 4) failure to provide lawful rest periods or pay rest period premiums in violation of Labor Code § 226.7 and IWC Wage Order Nos. 13-2001 and 14-2001; 5) failure to provide accurate itemized wage statements in violation of Labor Code § 226; 6) failure to timely pay wages upon separation in violation of Labor Code §§ 201-203; (8) violation of Bus. & Prof. Code § 17200 based upon the foregoing (the "Class Released Claims"). The Class Members shall release the Released Parties for all such claims through the date of the final approval of the Settlement. The Class Members shall release the Released Parties for all such claims during the Class Period.

Winston Decl., ¶ 16, Exh. 1 at §§ I(M), I(X), and X(A).

In addition to the Class claims, the State of California will also release the Released Parties from "any claim for PAGA penalties under Labor Code section 2699 for violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1198, 2802, and IWC Wage Order Nos. 13-2001 and 14-2001" for alleged Labor Code violations committed against the aggrieved employees. Winston Decl., ¶ 16, Exh. 1 at §§ I(Y) and (X)(B).

B. Settlement Payments

As detailed fully in the Joint Stipulation, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$178,000.00. Winston Decl., ¶¶ 16 and 18, Exh. 1 at §§ I(T) and IV(A).

Pursuant to the Joint Stipulation, Class Counsel proposes the following allocation of the

Settlement to determine the Net Settlement Amount:

Gross Settlement Amount:	\$178,000.00
Attorneys' Fees (1/3):	up to \$59,333.33
Estimated Case Costs:	up to \$10,000.00
Estimated Service Award:	up to \$5,000.00
Estimated Cost of Administration:	up to \$30,000.00
PAGA Payment To the LWDA (\$4,000 total in PAGA Penalties):	\$3,000.00
Estimated Net Settlement Amount	\$70,666.67

The Estimated Net Settlement Amount (\$70,666.67) is the amount distributable to Participating Class Members and consists of the Gross Settlement Amount minus Court Approved Class Counsel's attorneys' fees and litigation costs, Settlement Administrator Costs, the LWDA's portion of the PAGA penalties as well as Service Award for the Class Representative. Winston Decl. ¶¶ 16 and 19, Exh. 1, at §§ IV(A-F) and VII(A). The Settlement is non-reversionary, and Defendant will pay 100 percent of the Gross Settlement Amount. *Id.* at ¶¶ 16 and 20, Exh. 1 at p. 2 and § I(T). This is a checks mailed settlement meaning that Class Members do not need to submit a claim form and will receive a check as long as the Settlement is approved. *Id.* at ¶ 16, Exh. 1 at p. 2.

Each Participating Class Member will share pro-rata in the settlement fund based upon the number of pay periods worked within the Class Period and those Class Members who worked for Defendant during the PAGA period will receive a share of the PAGA penalties based upon the number of pay periods worked during the PAGA period. Winston Decl., ¶¶ 16 and 21, Exh. 1, § VII(B). The estimated average net settlement award each Class Member is expected to receive is approximately \$8.26 ($\$70,666.67/8,556$ Class Members), the maximum estimated net settlement award is \$258.23 ($((235 \text{ pay periods worked during the class period}/64,309 \text{ total pay periods}^1) \times \$70,666.67)$), and the minimum estimated settlement award is \$1.10 ($((1 \text{ pay period worked during the class period}/64,309 \text{ total pay periods}) \times \$70,666.67)$). *Id.* at ¶ 22. Plaintiff's estimated net settlement share is \$40.65 ($(37$

¹ Pay periods and workweeks are interchangeable because as a farm labor contractor, Defendant paid employees on a weekly basis.

1 pay periods worked during the Class Period/64,309 total pay periods) x \$70,666.67). *Id.* at ¶ 23. The
2 proposed method of allocation is fair and reasonable. *Id.* at ¶ 24.

3 **C. Process for Administering Settlement after Preliminary Approval**

4 The Notice of Settlement procedure established by the Joint Stipulation will efficiently and
5 accurately ensure that the Notice of Settlement is provided to the Class Members. The Parties have
6 agreed to use a reputable third-party claims administrator ILYM Group, Inc. to administer the
7 Settlement. Winston Decl., ¶¶ 16 and 26, Exh. 1 at § I(HH). The Declaration of Lisa Mullins details
8 ILYM’s qualifications and experience as a settlement administrator as well as the costs of Settlement
9 Administration. Mullins Decl., ¶¶ 1 and 10. Defendant must provide ILYM Group, Inc. with the Class
10 List and Notice data within fourteen (14) business days of the Preliminary Approval Order. Winston
11 Decl., ¶¶ 16 and 27, Exh. 1 at § VI(B). Within twenty-eight (28) days after preliminary approval,
12 ILYM Group, Inc. will perform a national change of address search for each Class Member, update the
13 addresses per the results of the search, populate the data for the estimated Net Settlement Award for
14 each Class Member and mail the Notice of Settlement to all Class Members via first-class, United
15 States Mail. *Id.* at ¶¶ 16 and 28, Exh. 1 at § (VI)(B). The Notice of Settlement will be substantially in
16 the form attached to the Settlement Agreement as Exhibit A. *Id.* at ¶ 16, Exh. 1 at Exh. A.

17 With respect to those Class Members whose Notice of Settlement is returned to the Settlement
18 Administrator as undeliverable, the Settlement Administrator shall resend the class notice to any
19 available forwarding address and run a skip-trace in an effort to attempt to ascertain the current address
20 of the Class Member. Winston Decl., ¶ 29.

21 **D. Process for Class Members to Respond to Class Notice**

22 Class Members will have an opportunity to request exclusion from the Settlement Class (*i.e.*,
23 opt out) or to object to the Settlement at the Final Approval Hearing. Winston Decl., ¶¶ 16 and 30, Exh.
24 1 at §§ VI(B), (C), and (D). Class Members will have sixty (60) calendar days from the date of mailing
25 the Notices of Settlement within which to exclude themselves or file an objection to the Settlement. *Id.*

26 To request exclusion, a Class Member must submit a letter or postcard to the Settlement
27 Administrator by the Response Deadline that includes “the Settlement Class Member’s name and
28 address for correspondence and identity verification purposes, signature, and should state words to the

1 effect of, “I WISH TO BE EXCLUDED FROM THE SETTLEMENT CLASS IN ROCHA VS.
2 GRAPES FLC.” Winston Decl., ¶¶ 16 and 31, Exh. 1 at § VI(B). If an opt-out is deficient, the
3 Settlement Administrator shall send a deficiency notice to the Class Member. *Id.* In addition, the
4 Settlement Agreement permits the Court to accept a late request for exclusion for good cause. *Id.*

5 Class Members will also be provided an opportunity to object. To object, a Class Member
6 should send to the Settlement Administrator a written objection that should “include the Class
7 Member’s name, current address for correspondence and identity verification purposes, provide each
8 specific reason in support of the objection, be signed by the Class Member, and be postmarked by the
9 Response Deadline.” Winston Decl., ¶ 16, Exh. 1 at § VI(D). Class Members need not include legal
10 arguments for their written objections to be considered. *Id.* If an objector also wishes to appear at the
11 Final Approval and Fairness Hearing, in person or through an attorney, he or she need not file a notice
12 of intention to appear at the same time as the objection is filed. *Id.* Filing the notice of intention to
13 appear is not necessary to preserve the right to appear at the Final Approval and Fairness Hearing.
14 Defendant will not discourage Class Members from participating in the Settlement or encourage or
15 advise Class Members to opt out or object to the settlement. *Id.*

16 In addition, Class Members may dispute Defendant’s records of the number of pay periods
17 worked during the Class Members by notifying the Settlement Administrator that they dispute the
18 amount of pay periods listed in their Class Notice by the Response Deadline. Winston Decl., ¶¶ 16 and
19 33, Exh. 1 at § VI(4). Moreover, Defendant will not retaliate against employees for participating in the
20 settlement and will not encourage or advise Class Members to opt out or object to the Settlement. *Id.* at
21 XII(E).

22 **E. The PAGA Aggrieved Employees Cannot Opt-Out of the PAGA Settlement**

23 In a prior case in Tulare County, Class Counsel was asked to explain why an aggrieved
24 employee cannot opt-out of the PAGA component of the Settlement. An aggrieved employee cannot
25 opt-out of a PAGA settlement because the state serves as the real party in interest in a PAGA action
26 and the aggrieved employees never owned any property rights to begin with. *Amalgamated Transit*
27 *Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003 (2009); (holding that “[PAGA] does not
28

1 create property rights or any other substantive rights.”).² As the California Court of Appeal explained
2 in *Robinson v. S. Cty. Oil Co.*, 53 Cal. App. 5th 476, 482 (2020), “[w]hile Robison was free to, and
3 did, opt out of the class settlement of any individual claims he may have had, there is no mechanism for
4 opting out of the judgment entered on the PAGA claim.” *Id*; *Baumann v. Chase Inv. Servs. Corp.*, 747
5 F.3d 1117, 1122 (9th Cir. 2014) (“has no notice requirements for unnamed aggrieved employees, nor
6 may such employees opt out of a PAGA action.”). Simply put, an aggrieved employee cannot opt-out
7 of a PAGA settlement because they never possessed any property interest in a PAGA action to begin
8 with.

9 However, since the State is the real party in interest, PAGA requires that the LWDA receive
10 notice of the proposed notice. Consistent with PAGA, Plaintiff submitted the proposed settlement to
11 the LWDA. Winston Decl., ¶ 34, Exh. 2.

12 **IV. THE PROPOSED SETTLEMENT IS ENTITLED TO A PRESUMPTION OF** 13 **FAIRNESS**

14 A presumption of fairness exists where: (1) the settlement is reached through arm’s length
15 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
16 intelligently; and (3) counsel is experienced in similar litigation, *Dunk*, 48 Cal.App.4th at 1802. To
17 prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires
18 court approval. *Malibu Outrigger Bd. of Governors v. Sup. Ct.*, 103 Cal.App.3d 573, 578-79 (1980).
19 The purpose of the requirement is the protection of those class members, including the named plaintiff,
20 whose rights may not have been given due regard by the negotiating parties. *Officers for Justice*, 688
21 F.2d at 624. The trial court has broad powers to determine whether a proposed class action settlement is
22 fair. *Mallick v. Sup. Ct.*, 89 Cal.App.3d 434 (1979).

23 The Settlement Agreement was the product of thorough, arms-length negotiations conducted by
24 experienced and informed counsel and represents a favorable resolution of the Class claims. Winston
25 Decl., ¶ 35. The Parties only reached the Settlement following an analysis of Defendant’s finances by a
26 third-party expert and following a mediator’s proposal from the Hon. Howard Broadman (Ret.). A
27

28 ² *Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 81 (2020) (“A PAGA claim is legally and conceptually different from an employee’s own suit for damages and statutory”).

mediator's participation in a settlement negotiation weighs considerably against any inference of collusion.³ Accordingly, the Parties' Proposed Settlement is entitled to a presumption of fairness.

V. THE PROPOSED SETTLEMENT IS FAIR AND SHOULD BE APPROVED

Pursuant to California Rule of Civil Procedure § 1781(f), "a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the Class in such manner as the court directs..." C.C.P. § 1781(f). In deciding whether to grant approval to a proposed class action settlement under C.C.P. § 382, the court's overriding concern is whether the proposed settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (quoting *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied 459 U.S. 1217 (1983)).

The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008), sets forth several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

The proposed settlement satisfies each of these factors. Plaintiff and Class Counsel conducted meaningful informal discovery before entering into settlement negotiations in this matter. Winston Decl., at ¶ 37. In advance of the Mediation, Defendant provided Plaintiff with information about the number of class members, the number of allegedly aggrieved employees, as well as a sample of time and pay records for 200 Class Members. *Id.* at ¶ 38. Plaintiff retained a third-party data and damages expert to analyze the sample produced by Defendant and to calculate the potential exposure informed by an analysis of the sample time and pay records. *Id.* at ¶ 39.

³ *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS, 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement); *In re Amtel Corp. Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551 (N.D. Cal. June 25, 2008) (same); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2nd Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.").

1 A third-party finance expert also provided a neutral analysis regarding Defendant and its
2 shareholders assets and financial state. The Parties' proposed settlement represents the maximum
3 amount that the third-party financial expert determined that Defendant might be able to pay. Winston
4 Decl., ¶¶ 35 and 40, Exh. 3 at p. 3-4 ("the most the Company and its shareholder can afford without
5 destroying the business is \$178,000. The company would not be able to afford anything more.").

6 The informal discovery permitted Class Counsel to fairly evaluate the strength of the case and
7 the risks associated with ongoing litigation. Winston Decl., ¶ 41. Class Counsel is experienced in
8 handling wage and hour class actions and supports this Settlement based upon the unique facts of this
9 case and Defendant's dire financial status. *Id.* at ¶¶ 6 and 42.

10 **1. The Strength and Risks Associated with Plaintiffs' Case**

11 As an initial matter, regardless of the legal strength of Plaintiff's claims, Defendant's financial
12 condition presented a substantial obstacle in this litigation that likely would've resulted in a bankruptcy
13 independent of this Settlement. Winston Decl., ¶¶ 35 and 43, Exh. 3. Given that Defendant did not
14 possess insurance coverage for this matter and in light of its financial struggles, real risk existed that a
15 significant judgment could result in a pyrrhic or paper victory and that further litigation could dilute the
16 Class' potential recovery or result in no recovery at all. *Id.* at ¶ 44. Nevertheless, to comply with
17 *Kullar*, Plaintiff also wishes to provide a claim specific analysis of the legal strength and risks
18 associated with each claim.

19 a. **The Strength of and Risks Associated with Plaintiff's Off-the-Clock
Minimum Wage and Overtime Claims**

20 Under California law an employer must compensate an employee for each and every minute
21 worked. *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018) (finding that there is no *de minimis* doctrine
22 under California law and that California law does "not allow employers to require employees to
23 routinely work for minutes off the clock without compensation.").

24 Plaintiff alleged that Defendant required Plaintiff, the Class, and the aggrieved employees to
25 perform work off-the-clock for which they received no compensation including showing up to work
26 early and performing work while off-the-clock, picking up and purchasing supplies (including gloves,
27 scissors, and masks for which no reimbursement was received), and washing grape trays while at
28 home. Winston Decl., ¶ 45. Plaintiff also alleged that Defendant's rounded the time punches associated

1 with meal periods. *Id.* An analysis of prior similar cases demonstrates that in seeking to certify this
2 issue, courts focus on the availability of grape tray washing machines as a method of demonstrating
3 commonality or a lack thereof. In *Rojas v. Marko Zaninovich, Inc.*, No. 1:09-CV-00705 AWI, 2012
4 WL 1232273, at *18 (E.D. Cal. Apr. 12, 2012), two different federal court judges—the Magistrate and
5 District Court Judge—in the Eastern District upheld the certification of a Grape Tray Washing Class
6 for workers based upon the availability of washing machines during the harvest season. In *Rojas*, the
7 evidence indicated that:

8 Prior to 2002, employees were asked to take trays home and bring them back the next day—
9 although not all employees did so. **During this time, Crew Bosses in the North and South**
10 **did not direct employees to wash trays at home.** Beginning in 2003, Sunview instituted a
11 policy that employees were not allowed to take trays home.

12 *Rojas v. Marko Zaninovich, Inc.*, No. 1:09-CV-00705 AWI, 2012 WL 439398, at *21 (E.D. Cal. Feb. 9,
13 2012), report and recommendation adopted in part, No. 1:09-CV-00705 AWI, 2012 WL 1232273 (E.D.
14 Cal. Apr. 12, 2012) (emphasis added).

15 Here, as in *Rojas* Plaintiff believed that she could certify her off-the-clock related claims
16 because Defendant failed to secure the necessary supplies to wash the grape trays, ensure that their
17 clients maintained the necessary facilities, or provide compensation for the time associated with
18 washing grape trays. In order to certify this claim, Plaintiff would only need to demonstrate that
19 Defendant did not provide the necessary tools or implements to wash the trays. Winston Decl., ¶ 46.
20 Assuming Plaintiff certified this claim and prevailed at trial, Plaintiff’s data expert determine the value
21 of the minimum wage and overtime claims to be \$2,225,230.00.⁴ *Id.* Nevertheless, independent of
22 Defendant’s financial issues serious risk still existed that Defendant’s might prevail on this claim
23 and/or defeat certification. For instance, the plaintiff failed to certify *Troester* ever after the California
24 Supreme Court ruled in their favor on liability regarding their off-the-clock claims. Winston Decl., ¶
25 47, Exh. 4 (“Order Granting Defendant’s Motion for Partial Summary Judgment and Denying
26 Plaintiff’s Motion for Class Certification”).

27 Moreover, while the California Supreme Court ultimately ended up depublishing *Cirrinzione v.*
28 *Am. Scissor Lift, Inc.*, 288 Cal. Rptr. 3d 539 (Ct. App. 2021), as modified (Jan. 4, 2022), review denied
and ordered not to be officially published (Apr. 13, 2022), the trial court’s decision, which the appellate

⁴ The damage calculations performed by Plaintiff’s expert include the interest associated with each non-penalty based claims.

1 court upheld, nevertheless demonstrates the significant certification risk associated with off-the-clock.
2 Winston Decl., ¶ 48. In *Cirrincione*, the Court saw “nothing inappropriate in the trial court’s rejection
3 of plaintiff’s unsupported assertion that an employer’s practicing of rounding employees’ work time
4 violates California law in the absence of a uniform, written rounding policy.” *Cirrincione*, 288 Cal.
5 Rptr. 3d at 552.

6 In light of the foregoing, it is possible that either Plaintiff or Defendant could have prevailed at
7 certification and/or on the merits of this claim.

8 b. The Strength of and Risks Associated with Plaintiff’s Meal Period Claim

9 Labor Code § 512 requires employers to provide employees with thirty (30) minute
10 uninterrupted and duty-free meal period within the first five (5) hours of work. Labor Code § 512
11 states that “[a]n employer shall not employ an employee for a work period of more than five hours
12 per day without providing the employee with a meal period of not less than 30 minutes.” Similarly,
13 IWC Wage Order Nos. 13-2001 and 14-2001 prohibit an employer from “employ[ing] any person for
14 a work period of more than five (5) hours without a meal period of not less than 30 minutes.”

15 If an employer maintains a uniform policy that does not authorize and permit the amount of
16 mealtime called for under the law (as specified in the applicable Wage Order), “it has violated the
17 wage order and is liable.” *Brinker*, 53 Cal.4th at 1033 (2012). *See also Faulkinbury v. Boyd &*
18 *Associates, Inc.*, 216 Cal.App.4th 220, 236 (2013); *accord Benton v. Telecom Network Specialists,*
19 *Inc.* 220 Cal. App. 4th 701, 728 (2013); *Bradley v. Networkers International, LLC* 211 Cal.App.4th
20 1129, 1151 (2012);. Moreover, a lawful meal period policy must specifically advise employees of the
21 proper timing of meal periods. *See Alberts v. Aurora Behavioral Health Care* 241 Cal. App. 4th 388,
22 410 (2015).

23 Plaintiff asserted that Defendant violated Labor Code § 512 by failing to authorize and permit
24 Plaintiff, the Class, and the aggrieved employees to receive lawful meal periods, failed to advise them
25 of their right to such meal periods, failed to authorize and permit them to take timely first meal
26 periods, failed to authorize and permit them to take a second meal period when they worked shifts in
27 excess of ten (10) hours in a day, and/or twelve (12) hours in a day. Winston Decl., ¶ 49. Defendant
28 failed to produce any meal period policy as part of the informal discovery and represented that none

1 existed. *Id.* If Plaintiff certified the claim and the Class prevailed at trial, Plaintiff’s third-party data
2 and damages expert determined the maximum value of this claim to be \$3,882,663.00. Winston
3 Decl., ¶ 50.

4 Real risk existed that a court could find that individualized issues existed or that no common
5 method of proof existed as an appellate court recently did in *Cacho v. Eurostar, Inc.*, 43 Cal.App.5th
6 885 (2019). Winston Decl., ¶ 51. While the California Supreme Court depublished *Cacho*, it did not
7 grant review of the decision meaning that at least a modest degree of risk existed that another court
8 might reach the same factual conclusions as the *Cacho* trial court even if *Cacho* itself is not good law.
9 Winston Decl., ¶ 51. Moreover, even if Plaintiff could establish a high violation rate, it is still not
10 certain whether or not Plaintiff could successfully certify this claim. For instance in *Lampe v. Queen*
11 *of the Valley Medical Center*, 19 Cal.App.5th 832, 851 (2018), the Court of Appeal upheld the denial
12 of certification even though 11.1% of the employees’ time punches for meal periods were within the
13 first 5 hours because individualized issues existed as to the reasons for the late meal periods. While
14 both of these cases predated the California Supreme Court’s recent decision in *Donohue v. Amn*
15 *Servs.*, 11 Cal.5th 58, 81 (2021) that seemingly calls both of these cases into doubt, this area of law
16 remains fluid and serious risk existed as to the certification and viability of the claims and whether or
17 not a new case could dramatically alter the Parties’ position as it did in *Donohue* which came out a
18 few weeks after Plaintiff filed his initial PAGA notice. Winston Decl., ¶ 51. Indeed, in the non-
19 overturned, but since depublished case of *Cirrincone*, the Court of Appeal considered the
20 applicability of *Donhue* and still held that the trial court did not error when it found that
21 individualized issues existed concerning the defendant’s affirmative defenses. Winston Decl., ¶ 51
22 (referencing *Cirrincone*, 288 Cal. Rptr. 3d at 558 (Ct. App. 2021)).

23 As such, at least some risk existed that Defendant might prevail at certification and/or on the
24 merits. Winston Decl., ¶ 51.

25 c. The Strength of and Risks Associated With the Rest Period Claims

26 Labor Code § 226.7 provides “an employer shall not require an employee to work during a
27 meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation,
28 standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage Order Nos. 13-
2001 and 14-2001, an employer must authorize and permit all employees to take ten (10) minute duty

1 free rest periods for every major fraction of four hours worked. Although Plaintiff was confident that
2 she could establish liability for the third rest period claim since Defendant's timesheets only
3 addressed first and second rest periods, it is possible that a court could find that individualized issues
4 existed or that no common method of proof existed as an appellate court recently did in *Cacho v.*
5 *Eurostar, Inc.*, 43 Cal.App.5th 885 (2019). Winston Decl., ¶ 52. While the California Supreme Court
6 depublished *Cacho*, it did not grant review of the decision meaning that at least a modest degree of
7 risk existed that another court might reach the same factual conclusions as the *Cacho* trial court even
8 if *Cacho* itself is not good law. *Id.* Moreover, it is not uncommon for defendants in rest period cases
9 to obtain numerous or even hundreds of declarations from employees showing differences in rest
10 period practices. *See e.g. Amaro v. Gerawan Farming, Inc.*, 2016 U.S. Dist. LEXIS 66842 (E.D. Cal.
11 May 19, 2016); *Ordonez v. Radio Shack, Inc.*, 2013 U.S. Dist. LEXIS 7868, *35-41 (C.D. Cal. Jan.
12 17, 2013). Moreover, some courts have found that rest period violations are not suitable for class
13 adjudication because they raised too many individualized issues. *See e.g. Campbell v. Best Buy Store,*
14 *L.P.*, U.S. Dist. LEXIS 137792 (2013) (denying certification of proposed rest break class due to a
15 lack of a uniform policy); *Ordonez*, U.S. Dist. LEXIS 7868 at *35-41(2013) (denying certification
16 even though the plaintiff submitted evidence of a facially unlawful policy regarding rest breaks
17 because the predominance and superiority elements were not met based upon the employer's
18 presentation of anecdotal evidence of lawful compliance notwithstanding the unlawful policy.).
19 Accordingly, Plaintiff and Class Counsel understood that some risk existed when it came to certifying
20 this claim. Winston Decl., ¶ 52

21 Assuming that Plaintiff certified and achieved complete and total victory on the rest period
22 claim, Plaintiff's data and damages expert determined the maximum value of this claim to be
23 \$4,046,116.00. Winston Decl., ¶ 53. Nevertheless, given the trial court outcome in *Cacho* as well as
24 the possibility that the Defendant might be able to establish less in actual damages through
25 testimonial evidence obtained by Class Members, real risk existed that Defendant might prevail on
26 this claim at certification or trial. *Id.*

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d. The Strength of and Risks Associated With the Claim for Labor Code § 226(e) Penalties

Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing: (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned;...;(9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...“A claim for damages under Section 226(e) requires a showing of three elements: (1) a violation of Section 226(a); (2) that is “knowing and intentional”; and (3) a resulting injury.” *Garnett v. ADT LLC*, 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015)

With respect to the derivative wage statements claims, if Plaintiff prevailed on her minimum wage, overtime, meal period, or rest period claims, Plaintiff was confident that the Class would certify and prevail on these claims. Winston Decl., ¶ 54. In addition to the derivative claims, during at least some of the pay periods, the itemized wage statements issued by Defendant to Plaintiff, the Class, and the aggrieved employees included non-sensical pay categories and mathematical non-sequiturs. *Id.* For instance, for the pay period of August 24, 2020 to August 30, 2020, Defendant issued Plaintiff a wage statement that included the pay category of “Min Wage” for which Plaintiff allegedly worked 0.00 hours at 1.00 Units and a rate of \$40.26. *Id.* Simply put, the minimum wage is and has never been \$40.26 for a single hour. Accordingly, Plaintiff believed she could establish that the Class could not determine from their wage statements alone all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

Plaintiff’s data and damages expert determined the value of this claim to be \$2,277,600.00. Winston Decl., ¶ 55. Nevertheless, Plaintiff did not view this as a remotely plausible outcome in light of Defendant’s dire financial condition. *Id.* It was possible that if Plaintiff litigated this issue to certification that Defendant would go bankrupt or cease operations. Winston Decl., 35, Exh. 3. As such, this Settlement represents a fair resolution of the claims due to Defendant’s challenging financial conditions.

e. The Strength of and Risks Associated With the Claim for Labor Code § 203 Penalties

Plaintiff also alleged that Defendant violated Labor Code §§ 201-202 as to those Class Members

1 whose employment ended because they left their employment without receiving all minimum wages,
2 overtime wages, meal period premiums, and rest periods premiums owed. Winston Decl., ¶ 59. Since
3 these claims were derivative in nature, Defendant possessed the same defenses to these claims with the
4 underlying claims. *Id.* Plaintiff's expert determined the maximum value of this claim to be \$13,230,000.
5 *Id.* However, Plaintiff did not view this amount as realistic given Defendant's dire financial condition.
6 *Id.*

7 f. The Strength of and Risks Associated with Plaintiff's Claim for
8 Defendant's Failure to Reimburse Business Expenses in Violation of
9 Labor Code § 2802

10 Labor Code § 2802 provides that "[a]n employer shall indemnify his or her employee for all
11 necessary expenditures or losses incurred by the employee in direct consequence of the discharge of
12 his or her duties, or of his or her obedience to the directions of the employer, even though unlawful,
13 unless the employee, at the time of obeying the directions, believed them to be unlawful." Further,
14 California law requires an employer to reimburse employees for losses incurred through the use of
15 their own electronic devices even if the use would not cause the employee to exceed their data limit.
16 *See Cochran v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 113 (2014) ("We hold that when
17 employees must use their personal cell phones for work-related calls, Labor Code section 2802
18 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited
19 minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone
20 bills.").

21 Plaintiff alleged that Defendant required and/or expected the Class and aggrieved employees to
22 use gloves and scissors when picking and/or packing grapes and failed to provide such tools. Winston
23 Decl., ¶ 60. Plaintiff also alleged that Defendant failed to provide any masks and/or other safety
24 equipment as required by California law during the COVID-19 pandemic and made employees
25 provide their own masks. *Id.* Plaintiff further alleged that by failing to provide Plaintiff, the Class, and
26 the aggrieved employees with masks, water/soaps for washing the grape trays, gloves, scissors,
27 Defendant caused Plaintiff and the other aggrieved employees to make expenditures and incur losses
28 in the direct consequence of the discharge of their job duties. *Id.* Moreover, Plaintiff also alleged that
Defendant expected Plaintiff, the Class, and the aggrieved employees to use their personal vehicles for

1 business purposes and for which they did not receive reimbursement. *Id.* This includes, but is not
2 limited, to requiring Plaintiff and other aggrieved employees with trucks to move the porta potties
3 used by the employees. *Id.*

4 Similar cases have been successfully litigated within the grape industry in California over the
5 past fifteen years. For instance, in 2012 several employees of Giumarra Vineyards alleged that they
6 and the other employees were not provided with grape washing trays or pins, pruning scissors, picking
7 clippers, holsters, googles, gloves, and pillows or were provided with inadequate tools. *Munoz v.*
8 *Giumarra Vineyards Corp.*, No. 1:09-CV-00703-AWI, 2012 WL 2617553, at *31 (E.D. Cal. July 5,
9 2012), report and recommendation adopted, No. CIV-F-09-0703 AWI, 2013 WL 2421599 (E.D. Cal.
10 June 3, 2013). The defendant presented a number of declarations evidencing some variance in the
11 experiences of employees. This included declarations evidencing that the company purchased
12 \$300,000 in tools, provided tools to some employees, but not others, and in some instances did not
13 provide the employees with any tools. The named plaintiffs themselves admitted to different
14 experiences with respect to some of the issues related to alleged failure to provide tools or adequate
15 tools. However, in certifying the claim the Court explained common methods of proof existed because
16 the defendant either did not replace any lost tools or charged deposits.

17 Here, as in *Giumarra*, Plaintiff believed that she could establish the validity of her Labor Code
18 section 2802 claim at least on a PAGA basis because Defendant's did not promulgate a COVID-19
19 Illness Prevention Plan that would specify that it provided masks, failed to produce receipts indicating
20 that it purchased masks, scissors, or gloves for employees, and failed to produce evidence that class
21 members were reimbursed a single dollar. Winston Decl., ¶ 61. Some risk existed that the Court could
22 view commonality differently than in *Giumarra*. *Id.* In addition, from a strategic perspective, given the
23 uncertainty in calculating the class damages and the likelihood that the \$100 per pay period PAGA
24 penalty significantly outweighs the value of the expense reimbursement claim, Plaintiff may not have
25 even attempted to certify the claim to avoid any predominance challenges at the certification stage.
26 Given that Plaintiff would likely need to rely upon survey evidence at the certification and trial phase
27 if she pursued the non-PAGA elements of this claim, it was possible that Defendant might be able to
28 prevail on the non-PAGA portion of this claim at the certification stage. *Id.* Plaintiff's damages expert

1 determined the maximum value of this claim if the Class prevailed at trial to be \$185,657.00 *Id.* at ¶
2 62.

3 g. The Strength of and Risks Associated with the PAGA Claim

4 In addition to the derivative minimum wage, overtime, reimbursement, meal/rest period, wage
5 statement, and waiting time penalty issues discussed above, Plaintiff also alleged derivative PAGA
6 claims contending that Defendant failed to timely pay wages and failed to maintain accurate time
7 records. Winston Decl., ¶ 63. The same defenses existed with respect to these derivative claims as
8 with the underlying claims. *Id.*

9 Moreover, as with any PAGA case, significant risk exists with respect to the amount of PAGA
10 penalties that a Court may award given their discretionary nature. Winston Decl., ¶ 64. Under Labor
11 Code § 2699.3(e)(2), “a court may award a lesser amount than the maximum civil penalty amount
12 specified by this part if, based on the facts and circumstances of the particular case, to do otherwise
13 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Given Defendant’s
14 severe financial condition, Plaintiff believed that it was likely that the Court would not award a
15 significant amount of PAGA penalties. Winston Decl., ¶ 64. Further, even where the defendant is a
16 Fortune 500 Company and is not experiencing any financial challenges, Courts can still exercise their
17 discretion to reduce the amount of penalties awarded. *Carrington v. Starbucks Corp.*, 30 Cal. App.
18 5th 504, 529 (2018) (the trial court declined to stack PAGA penalties and the Court of Appeal
19 affirmed the reduction of the PAGA penalties to \$5.00 per pay period). As such, it was likely that the
20 Court would exercise at least some discretion when awarding PAGA penalties. *In re Nordstrom Com.*
21 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and
22 hour class action).⁵ Plaintiff’s damages expert determined the maximum value of the PAGA claim—
23 when including stacked penalties meaning more than one per pay period—to be \$12,250,000.00.
24 Winston Decl., ¶ 65.

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26 _____
27 ⁵ See also *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011)
28 (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, No. 08cv821 IEG
(BLM), 2010 WL 2196104, at *2 (S.D. Cal. June 1, 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement);
Hopson v. Hanesbrands Inc., No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009) (approving \$1,500
PAGA allocation in \$1,026,000 settlement).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There are also always risks attendant to wage and hour cases given the evolving nature of such claims. Winston Decl., ¶ 66. Given the ever-evolving landscape of wage and hour law, there are always risks that a new case will come out that will clarify and/or potentially limit employees' claims. *Id.* For example, although generally it was well-established that employees could recover both wage statement and waiting time penalties based upon an employer's failure to provide lawful meal/rest periods, a recent appellate case held that such penalties are not recoverable before it was overturned during the pendency of this Action. *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444 (2019); *aff'd in part, rev'd in part and remanded* 13 Cal. 5th 93, (2022). Similarly, in another recent decision the California Court of Appeal held that employers could pay employees meal/rest period premiums at the employee's hourly base rate instead of at their regular rate before that decision was also overturned by the California Supreme Court. *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th 1239 (2019) *rev'd*, 11 Cal. 5th 858 (2021). While Plaintiff was confident that she would prevail on her claims based upon present law, the plaintiffs in *Ferra* and *Naranjo* likely believed they would have as well and actually did on their derivative claims prior to the California Court of Appeal's recent ruling and before each matter was eventually reversed by the California Supreme Court. Winston Decl., ¶ 67. As the California Court of Appeal explained in the now overturned *Naranjo* decision, "[a]lthough wage and hour lawsuits are ubiquitous in state courts, most settle before trial. Consequently, our appellate courts have not had much opportunity to publish decisions addressing the derivative wage claim issue[s]." *Naranjo*, 40 Cal. App. 5th at 468. While Plaintiff acknowledges that the California Supreme Court reversed in both cases, each nevertheless are emblematic of the inherent risk associated with litigating wage and hour cases and the fact that a new appellate decision can dramatically alter the strength of the employees' claims at any time.

Further, given Defendant's dire financial state and limited financial resources, it is likely that independent of this Settlement that the Company could have ceased operations or declared bankruptcy. Winston Decl., ¶ 35, Exh. 3 at p. 3-4 ("the most the Company and its shareholder can afford without destroying the business is \$178,000. The company would not be able to afford anything more."). Thus,

1 this Settlement represents the maximum amount that a third-party financial expert determined
2 Defendant could afford to pay without “destroying the business.”

3 **3. The Risk of Maintaining Class Action Status Through Trial**

4 This case has not been certified to be tried as a class action. Winston Decl., ¶ 68. While there is
5 strong evidence to support certification, certification is always hard fought and subject to judicial
6 discretion. *Id.* Moreover, in class actions, decertification is always a possibility. *Id.*; *In re Autozone,*
7 *Inc.*, No. 3:10-md-02159-CRB, 2016 U.S. Dist. LEXIS 10574 (N.D.Cal. Aug. 10, 2016) (decertifying a
8 rest period class due to the absence of a lack of a uniform policy or common measure of damages). In
9 attempting to certify a class, the Parties would need to conduct deposition of the named Plaintiff and of
10 the person most knowledgeable regarding Defendant’s policies and practices related to the claims.
11 Winston Decl., ¶ 69. There is a risk for both sides as to what these depositions will reveal and whether
12 they will support class certification. *Id.*

13 **4. The Amount Offered in Settlement**

14 A trial court should not evaluate a proposed settlement “against a hypothetical or speculative
15 measure of what might have been achieved had plaintiffs prevailed at trial.” *Munoz v. BCI Coca-Cola*
16 *Bottling Co.*, 186 Cal. App. 4th 399, 409 (2010). “The test is not the maximum amount plaintiffs might
17 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the
18 circumstances.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001), disapproved on
19 another ground in *Hernandez v. Restoration Hardware, Inc.* 4 Cal.5th 260, 269 (2018). Nor does a
20 *Kullar* showing require parties to submit the outer reaches of maximum possible recovery without taking
21 into account various risks. *Munoz*, 186 Cal. App. 4th at 409; *Altamirano v. Shaw Industries, Inc.*, 2015
22 WL 4512372, at *9 (N.D. Cal. 2015) (preliminarily approving wage and hour class action settlement,
23 stating, “[a]lthough 15% represents a modest fraction of the hypothetical maximum recovery estimated by
24 Plaintiff, that figure is sufficient for the Court to grant preliminary approval.”).

25 Nevertheless, to allow the Court to analyze the reasonableness of the Parties’ Proposed
26 Settlement, Plaintiff analyzed the maximum possible value of the claims at issue in this action.
27 Plaintiff’s damages expert determined the maximum exposure on the claims to be \$38,097,237. Winston
28 Decl., ¶ 70. However, Plaintiff and her Counsel did not believe that this presented a remotely realistic

outcome given Defendant's significant defenses, even without taking into account the risks posed by Defendant's financial challenges. *Id.* As explained above in the section of the *Kullar* analysis that discusses the strength and weaknesses associated with each claim and Defendant's financial challenges, the amount offered in settlement reflects the maximum amount that Defendant and its shareholder could pay without destroying the business. Winston Decl., ¶ 35, Exh. 3 at p. 3-4 ("the most the Company and its shareholder can afford without destroying the business is \$178,000. The company would not be able to afford anything more."). Due to Defendant's severe financial challenges, the risk adjusted value of the claims might have been as low as \$0.00 as the cost of defense might have consumed the entirety of Defendant's resources. *Id.* at ¶ 71. Notably, the settlement reflects not just the maximum of what Defendant can afford to pay, but also what its shareholder can afford. Winston Decl., ¶ 35, Exh. 3 at p. 3-4 ("the most the Company **and its shareholder** can afford without destroying the business is \$178,000. The company would not be able to afford anything more.") (emphasis added).

After weighing the other benefits and risks associated with each of the claims in light of the factual challenges, Defendant's potential defenses, and Defendant's financial challenges, the financial expert's determination that "the most the Company and its shareholder can afford without destroying the business is \$178,000," Class Counsel determined the amount offered in settlement was fair and reasonable considering the risks and the likelihood of success on the merits and Defendant's issues as verified by a third-party finance expert. Winston Decl., ¶¶ 35 and 72, Exh. 3.

5. **The Experience and Views of Counsel**

Class Counsel is experienced in wage-and-hour class actions and has served as Class and/or PAGA Counsel in numerous wage and hour class actions. Winston Decl., ¶¶ 6 and 73. The Parties' Counsel, operating at arm's length and with the assistance of the Mediator, weighed the strengths and risks of this case, and unanimously share the view that this is a fair and reasonable settlement in light of the nature of the claims, realistic risk adjusted value of damages, complexities of the case, the state of the law, the uncertainties of class certification and litigation, and Defendant's severe financial challenges. *Id.* at ¶ 74. After factoring in the risks explained herein, Class Counsel believes that the proposed Settlement is fair and reasonable under these unique circumstances. *Id.* at ¶ 75.

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6. **The Proposed Plan of Allocation Is Fair and Reasonable**

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” See e.g., *Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615, 624–625, 629–630 (9th Cir. 1982). Here, the Net Settlement Amount shall be allocated among Settlement Class members on a pro rata basis based upon the number of pay periods worked during the Class Period. Winston Decl., ¶¶ 16 and 77, Exh. 1 at § III(C). The proposed method of allocation is fair and reasonable and reflects the strength and value of the claims at issue in this action. *Id.*

The proposed PAGA allocation reflects the discretionary nature of the penalties as well as Defendant’s dire financial condition. Winston Decl., ¶ 78. Even though the Parties allocated \$4,000 to PAGA, the California Court of Appeal has previously found that a wage and hour class action settlement that ascribes zero value to the PAGA claims was valid. See *In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class action). And, courts routinely approve similar or even significantly less PAGA valuations where there is a significant recovery for the Class even where the aggrieved employees do not necessarily obtain any non-monetary relief. See *Jack v. Hartford Fire Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, No. 08cv821 IEG (BLM), 2010 WL 2196104, at *2 (S.D. Cal. June 1, 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement).

7. **The Proposed Notice Fairly Apprises the Class Members of the Terms of the Settlement and of the Class Members’ Rights under the Settlement**

Plaintiff requests that the Court approve the proposed plan and form of Notice of Settlement. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Sup. Ct.*, 50 Cal. App. 3d 960, 974 (1975). With respect to the contents of the Notice of Settlement, the “notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.” *Trotsky v. L.A. Fed. Sav. & Loan Ass’n*, 48 Cal.App.3d 134, 151–52

(1975). As discussed in detail in Section III(C) and III(D) of this Motion, Class Members will receive a detailed notice that provides Class Members with sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the Settlement. Winston Decl., ¶¶ 16 and 80, Exh. 1 at § VI(B), (C), (D) and Exh. A. In addition, the class notice will be distributed in English and Spanish. *Id.* at ¶¶ 16 and 81, Exh. 1 at Exh. A. In short, the Court should approve the proposed Notice of Settlement because it describes the proposed Settlement with enough specificity to allow Class Members to make an informed choice regarding whether to participate. *Id.* at ¶ 82.

B. The Proposed Settlement Class Should Be Certified For Settlement Purposes⁶

1. Ascertainability

Putative class members are deemed “ascertainable” when they may be “readily identified without unreasonable expense or time by reference to official records.” *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 933 (1981). In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. *Miller v. Woods*, 148 Cal.App.3d 862, 873 (1983).

Here, Plaintiff seeks to represent a clear and distinct class of Defendant’s employees defined as all non-exempt employees employed by Grapes FLC from January 1, 2018 through June 30, 2022. Winston Decl., ¶¶ 16 and 83, Exh. 1 at § I(F). There are 8,556 Class Members. *Id.* Thus, the Class Members can be readily identified by Defendant’s own records, and have been.

2. Numerosity

There is no set number that is required as a matter of law to maintain a class action. *Rose*, 126 Cal.App.3d at 934. Where a question is of common interest to “many” persons, an action may be maintained as a class action even where the parties are numerous and it is in fact practicable to join them all. *Id.* In the case at hand, the Class consisted of approximately 8,556 Class Members. Winston Decl., ¶¶ 16 and 83, Exh. 1 at § I(F). This is more than enough for class certification.

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⁶ Defendant contends that class certification is appropriate only for purposes of settlement.

1 **3. There Is a Well-Defined Community of Interest**

2 a. There Are Predominant Questions of Law and Fact

3 In deciding whether questions of common or general interest predominate, a court must
4 determine whether “the issues which may be jointly tried, when compared with those requiring separate
5 adjudication, are so numerous or substantial that the maintenance of a class action would be
6 advantageous to the judicial process and to the litigants.” *Collins v. Rocha*, 7 Cal.3d 232, 238 (1972);
7 accord *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326 (2004). As a general matter, if
8 the defendant’s liability can be determined by facts common to all members of the class, a class will be
9 certified even if the members must individually prove their damages.” *Hicks v. Kaufman & Broad*
10 *Home Corp.*, 89 Cal.App.4th 908, 916 (2001); accord, *Knapp v. AT & T Wireless Services, Inc.* 195
11 Cal. App. 4th 932, 941 (2011).

12 In the case at hand, Plaintiff contends that there are clear and common questions of law and fact
13 that can be decided with one stroke:

14 a. Whether Defendant failed to pay minimum wages for all hours worked as
15 required by Labor Code §§ 1194, 1194.2, and 1197 as well as IWC Wage Order Nos. 13-2001 and
16 14-2001 to the Class;

17 b. Whether Defendant failed to pay wages and/or overtime compensation and at
18 the correct rate as required by Labor Code § 510 to the Class;

19 c. Whether Defendant violated Labor Code §§ 226.7 and IWC Wage Order Nos.
20 13-2001 and 14-2001, by failing to authorize and the Class to take a timely meal period within the
21 first five (5) hours of their shift, failure to provide second meal periods for shifts worked in excess of
22 ten (10) hours to the Class as well as their failure to pay the Class one additional hour of pay at the
23 employees’ at their regular rate of compensation when they did not receive a compliant meal period;

24 d. Whether Defendant violated Labor Code § 226.7 and IWC Nos. 13-2001 and
25 14-2001, by failing to inform Plaintiff and the Class of their right to receive a ten (10) minute duty-
26 free rest period for every four hours of work or major fraction thereof, failing to authorize and permit
27 employees’ to leave the premises during rest periods and/or relieve employees of all control during
28 rest periods, and by failing to compensate said employees one (1) additional hour of pay at the
employee’s regular rate of compensation in lieu of rest periods;

1 e. Whether Defendant violated Labor Code § 226(a) and (e) as well as IWC
2 Wage Order Nos. 13-2001 and 14-2001 by failing to provide an accurate itemized wage statements
3 that accurately indicate, the gross wages earned, all deductions from wages, the net wages earned, as
4 well as all applicable hourly rates in effect during the pay period and the corresponding number of
5 hours worked at each hourly rate by the employee to the Class;

6 f. Whether Defendant violated §§ 201-203 of the Labor Code by failing to pay
7 compensation due and owing at the time that the Class' employment with Defendant concluded;

8 g. Whether Defendant violated Labor Code § 2802 by failing to provide Plaintiff
9 and the Class with all tools and implements needed to discharge his or her duties; and

10 h. Whether Defendant violated § 17200 et seq. of the Business & Professions
11 Code by engaging in the acts previously alleged against the Class.

12 Winston Decl., ¶ 84.

13 Moreover, a class of similarly situated employees may be certified based on common questions
14 of fact or law, even if each employee has to establish the amount of his or her damages. *See Bell v.*
15 *Farmers Ins. Exch.*, 115 Cal.App.4th 715, 741 (2004); *Sav-On Drug Stores, Inc.*, 34 Cal.4th at 340.
16 Here, Plaintiff contends that the proposed Class Members suffered the same injuries, in the same
17 manner: they were not paid for all hours worked, were not provided with lawful meal periods or lawful
18 rest periods, were not provided with accurate itemized wage statements, were not paid all wages owed
19 at the end of their employment, and were not reimbursed for all business expenses. Winston Decl., ¶
20 85. Because the proposed Class Members worked in the same capacity for the same employer and were
21 subject to the same employment policies and practices, Plaintiff contends that the questions of fact and
22 claims are the same for each member of the class. *Id.* Here, Plaintiff contends that she will be able to
23 establish that common questions of law and fact predominate. *Id.*

24 b. The Class Representative Has Claims Typical of the Proposed Class

25 A putative class representative's claim must be "typical," but not necessarily identical, to the
26 claims of other class members. The test of typicality "is whether other members have the same or
27 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
28 whether other class members have been injured by the same course of conduct." *Seastrom v. Neways*,

1 *Inc.*, 149 Cal.App.4th 1496, 1502 (2007). Thus, it is sufficient that the representative is similarly
2 situated so that he or she will have the motive to litigate on behalf of all class members. *See, e.g.,*
3 *Classen v. Weller* 145 Cal.App.3d 27, 45 (1983). It is not necessary that the class representative have
4 personally incurred all of the damages suffered by each of the other class members. *Wershba v. Apple*
5 *Computer, Inc.*, 91 Cal.App.4th 224, 238 (2001).

6 Plaintiff worked as a non-exempt employee for Defendant. Rocha Decl., ¶ 2. Plaintiff alleges
7 that she was not paid for all hours worked (including overtime hours), was not provided with lawful
8 meal periods, was not provided with lawful rest periods, was not provided with accurate itemized wage
9 statements, was not paid all wages owed at the end of her employment, and was not reimbursed for all
10 business expenses incurred during her employment. Rocha Decl., ¶ 2. As such, Plaintiff contends that
11 she is typical of the Class.

12 c. The Class Representative Will Adequately Represent the Proposed Classes

13 A putative class representative must show that she can adequately represent the class. *Lockheed*
14 *Martin Corp. v. Sup. Ct.*, 29 Cal.App.4th 1096, 1104 (2003). The representative, through qualified
15 counsel, must be capable of “vigorously and tenaciously” protecting the interests of the class members.
16 *Simons v. Horowitz*, 151 Cal.App.3d 834, 846 (1984).

17 Plaintiff is capable of and has fairly represented and adequately protected the interests of the
18 proposed Class Members. Winston Decl., ¶ 86. Plaintiff’s interest in this litigation is coextensive with
19 the interests of the proposed Class. *Id.* Plaintiff assisted in gathering facts and information about the
20 case and assisting in the factual development of the case. *Id.* The proposed Class Members all worked
21 for Defendant during the relevant time period and incurred the same type of alleged damages with
22 regard to Defendant’s alleged violations. *Id.* Moreover, Plaintiff has agreed to serve as Class
23 Representative and has retained Counsel who regularly litigates employment cases. *Id.* Plaintiff also
24 participated in a mediation via phone during the COVID-19 pandemic. *Id.* at ¶ 87. This demonstrates
25 her commitment to bringing about the best possible results for the benefit of the proposed Class.
26 Therefore, Plaintiff has and will adequately represent the proposed Settlement Class Members.

27 4. The Class Action Vehicle Is Superior to the Alternatives

28 “The ultimate question in every case of this type is whether . . . the issues which may be jointly

1 tried, when compared with those requiring separate adjudication, are so numerous or substantial that
2 the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
3 *Lockheed Martin Corp.*, 29 Cal.App.4th at 1104–1105. Class certification is appropriate where, as here,
4 substantial duplication of legal and judicial resources will result if the class is not certified. All of the
5 issues of law and fact will be identical for each proposed Class Member. In the event that each person
6 is required to bring an individual action against Defendant, the common factual and legal issues would
7 have to be litigated and tried repeatedly. In this case, the methods of proof to be used will be similar
8 across the Class.

9 **C. The Proposed Attorneys’ Fees Sought Are Reasonable**

10 Although the Court need not and should not make any actual determinations regarding the
11 amount of attorneys’ fees to award until that Motion is pending before the Court, Class Counsel intends
12 to seek an award of attorneys’ fees in the amount of 1/3 of the common fund. In *Laffitte v. Robert Half*
13 *Internat., Inc.*, 1 Cal. 5th 480, 503 (2016) the California Supreme Court “recognized [the] advantages
14 of the percentage method – including relative ease of calculation, alignment of incentives between
15 counsel and the class, a better approximation of market conditions in a contingency case, and the
16 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
17 litigation – convince us the percentage method is a valuable tool that should not be denied by our trial
18 courts.” *Id.* Class Counsel’s intended request for attorneys’ fees in the amount of 1/3 of the common
19 fund falls within the range of attorneys’ fees regularly awarded by courts in similar matters. *McCrory*
20 *v. Elations Co., LLC*, 2016 U.S. Dist. LEXIS 24050, at *2 (C.D. Cal. Feb. 25, 2016) (finding that most
21 fee awards based on either a percentage calculation or lodestar percentage are 33%).⁷

22 Class Counsel believes that a common fund award is appropriate as their efficient and diligent
23 litigation of this case as well as their skill in obtaining a settlement that reduces the Class’ risk posed by
24 Defendant’s financial challenges. Winston Decl., ¶ 94. At this juncture, the Court need only find that it
25 falls within the range of reasonableness and need not actually decide what amount to award.

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27 ⁷ See also *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841, at *4 (E.D. Cal. Nov.
28 14, 2007) (awarding 33% of the settlement fund in a wage-and-hour case involving allegations of unpaid wages after explaining that “fee awards in class actions average around one-third of the recovery.”); *Stuart v. RadioShack Corp.*, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (noting that a fee award of 1/3 of the settlement was “well within the range of percentages which courts have upheld as reasonable in other class action lawsuits.”).

1 Nevertheless, Class Counsel understands from prior cases before the Court that the Court wants
2 lodestar information at preliminary approval. Class Counsel's law firm has spent 99.80 hours on this
3 case as of August 17, 2022 resulting in a negative lodestar multiplier of 0.82 (\$59,333.33 proposed
4 attorney fee award/\$72,355.00 lodestar as of August 17, 2022) at this juncture. Winston Decl., ¶ 95.
5 Class Counsel's lodestar is already negative even though they still must prepare motions for final
6 approval and for attorneys' fees and costs as well as monitor the administration of the case by third-
7 party settlement administrator ILYM. *Id.*

8 With respect to costs, Class Counsel has already incurred and/or expects to incur based upon
9 already provided quotes in the amount of \$7,860.32 as detailed in the concurrently filed declaration.
10 Winston Decl., ¶ 96. Class Counsel and the Class will incur additional costs including when filing this
11 Motion, a CMC Statement for the October 4, 2022 CMC, and filing the Motions for Final Approval
12 and for Attorneys' Fees and Costs, and the Code of Civil Procedure § 384 compliance report and
13 amended judgment. *Id.* at ¶ 97. It is not possible to fully ascertain the amount of costs that will be
14 incurred at this stage, but Class Counsel only intends to seek costs that will and/or can reasonably
15 expected to be incurred (such as for the filing of final approval and for filing the report/amended
16 judgment required for the Code of Civ. Proc. § 384) and any amounts not requested and/or awarded at
17 final approval will be included in the Net Settlement amount. *Id.*

18 **D. Plaintiff's Requested Service Award Is Reasonable**

19 Plaintiff is requesting a service award in an amount of \$5,000.00 in recognition of the broader
20 general release she entered into with Defendant, her time and efforts on behalf of the Class, the fact that
21 her name could become known and it was possible that her involvement in the matter could make it
22 more difficult for her to obtain employment in the future. Winston Decl., ¶ 98; Rocha Decl., ¶¶ 3-10.
23 The requested service award falls well within the range of incentive payments typically awarded to
24 Class Representatives in similar class actions. Winston Decl., ¶ 99; *Bond v. Ferguson Enterprises, Inc.*,
25 No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 (E.D. Cal. June 30, 2011) (approving \$11,250
26 service award to each of the two class representatives wage and hour class action); *Vasquez v. Coast*
27 *Valley Roofing, Inc.*, 266 F.R.D. 482, 493 (E.D. Cal. 2010) (approving service awards in the amount of
28 \$10,000 each from a \$300,000 settlement fund in a wage/hour class action).

1 Plaintiff understands based upon prior cases that the Court considers the number of hours spent
2 on the case to be important when deciding the value of a potential service award; however, Class
3 Counsel believes that this factor is not significant in a case such as this one where the continued
4 litigation of the case could threaten the very existence of the Defendant. Winston Decl., ¶ 100. Such an
5 analysis also does not necessarily ascribe value to the broader general release entered into by the
6 Plaintiff and the possibility that it could impact her future employment. *Id.* While to allow the Court to
7 conduct its analysis Plaintiff is disclosing that she estimates that she spent 43.8 hours on this matter
8 already, at this juncture the Court need not and should not make any such determination. Rocha Decl., ¶
9 6. Rather, it must only find that the proposed service award falls within the range of reasonableness and
10 provide class members with an opportunity to consider the terms of the Settlement, including the
11 potential proposed service award, after receiving notice. Regardless of what the Court finds at
12 preliminary approval, the issue of the value of any service award is appropriate for determination at final
13 approval.

14 Lastly, because Plaintiff understands that the Court historically considers this information when
15 evaluating the proposed service award, Plaintiff's estimated net settlement share is estimated to be
16 \$40.65 ((37 pay periods worked during the Class Period/64,309 total pay periods) x \$70,666.67).
17 Winston Decl., ¶ 23.

18 **E. Compliance with Code of Civ. Proc. § 384**

19 Code of Civ. Proc. § 384 requires that any funds associated with uncashed voided checks issued
20 as part of this settlement be paid "nonprofit organizations or foundations to support projects that will
21 benefit the class or similarly situated persons, or that promote the law consistent with the objectives
22 and purposes of the underlying cause of action, **to child advocacy programs**, or to nonprofit
23 organizations providing civil legal services to the indigent." (emphasis added). In accordance with
24 Code of Civ. Proc. § 384, the Parties propose to designate CASA of Tulare County as the proposed cy
25 pres beneficiary. Winston Decl., ¶¶ 16 and 101, Exh. 1 at § VII(G). CASA of Tulare County is a child
26 advocacy program within the meaning of Code of Civ. Proc. § 384 that provides advocates for foster
27 children and/or children who have been removed from their homes for abuse, neglect, and/or substance
28 abuse. Neither Plaintiff, Defendant, nor their Counsel have any interest and/or involvement with the

1 governance of CASA of Tulare County. Winston Decl., ¶ 101; Rocha Decl., ¶ 11; Iralda Acevedo
2 Decl., ¶ 3.

3 In a prior case, the Court asked why amounts allocated at preliminary approval to class
4 members whose notices are undeliverable are reallocated to the class members instead of the *cy pres*
5 beneficiary. The reason that such amounts are reallocated to the class members as opposed to *cy pres*
6 beneficiary is that such funds—as with the amounts allocated to any class member who opts-out and
7 any unawarded attorneys’ fees and costs or settlement administration costs—are not unclaimed funds
8 within the meaning of Code of Civ. Proc. § 384 but are amounts that the Court merely declined to
9 award as originally proposed at preliminary approval. Code of Civil Procedure § 384 only applies to
10 funds that were awarded at final approval and paid, but not claimed by the Class Members after the
11 funds were awarded and allocated at final approval. Such funds are then considered unclaimed as
12 opposed to those that the Court merely declined to award as proposed to be allocated during the period
13 between preliminary and final approval.

14 **F. Final Approval Hearing Timing**

15 In order to ensure an orderly administration, Plaintiff respectfully requests a final approval
16 hearing on February 28, 2023 or March 7, 2023.

17 **VI. CONCLUSION**

18 Plaintiff respectfully submits that the Proposed Settlement is fair, adequate, reasonable, and in
19 the best interest of the Class. Therefore, Plaintiff respectfully requests that the Court (1) grant
20 preliminary approval of the Settlement and all of its terms; (2) approve the proposed form of Notice of
21 Settlement, and direct that the Notice be sent to Class Members in the manner set forth in the
22 Settlement; and (3) schedule hearings on Final Approval of the Settlement and Class Counsel’s Motion
23 for an award of attorney’s fees and litigation costs.

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1 Dated: September 28, 2022

WINSTON LAW GROUP, P.C.

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3 By: David Winston
4 DAVID S. WINSTON
5 Attorney for Plaintiff Maria Rocha, the
6 Proposed Class, and the aggrieved employees
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