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Attorneys for Plaintiffs
Mirian Marroquin, et al.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MIRIAN MARROQUIN, HUMBERTO
MORALES, on behalf of themselves and all
similarly situated individuals,

Plaintiffs,

v.

TELEFERIC BARCELONA PA, LLC, and
DOES 1 to 100,

Defendants.

CASE NO. 21CV388821

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
ADAM ROSE; DECLARATION OF KEVIN
LEE; PROPOSED ORDER; PROPOSED
JUDGMENT**

Date: April 13, 2023
Dept: 1
Time: 1:30 p.m.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 13, 2023 at 1:30 p.m. in Department 1 of the
Santa Clara County Superior Court located at 191 N. First St., San Jose, CA 95113, plaintiffs
Mirian Marroquin and Humberto Morales will move the court for final approval of the class action
and PAGA settlement and for attorney fees and costs pursuant to Rule of Court 3.769(g).

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1 The motion is based on this notice, the memorandum of points and authorities, the
2 declaration of Adam Rose (regarding attorney fees and costs), the declaration of Kevin Lee (the
3 settlement administrator), pleadings on file, and arguments at the hearing.

4
5 Date: March 17, 2023

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6
7 /s/ Adam Rose
8 Attorney for Plaintiffs
9 Mirian Marroquin, et al.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As set forth in the motion for preliminary approval that was granted on October 6, 2022, a class action and PAGA settlement of \$150,000 has been reached with defendant Teleferic Barcelona PA, LLC (“Teleferic”), a Spanish restaurant in Palo Alto. The settlement provides a favorable recovery to the 430 class members. The settlement was reached after two alternative dispute resolution sessions with Hon. Patricia Lucas pursuant to Local Rule 3 after a good faith data exchange.

Subsequent to mediation and in conjunction with filing the motion for preliminary approval, a first amended complaint was filed that included all the allegations encompassed in the settlement and corrected the spelling of Ms. Marroquin’s first name.

The settlement is supported by experienced counsel, who considered the strengths of the claims and potential defenses, as well as the expense, complexity, risks, and likely duration of continued litigation. Also as specified in the declaration of Kevin Lee of Phoenix Class Action Settlement Solutions, notice was sent to the class members on January 24, 2023. The addresses were provided to the settlement administrator by Teleferic on November 3, 2022 and December 15, 2022 – there was a slight delay in obtaining the list as some of the class members’ information was on (a now) outdated database. This small delay required continuing the motion for final approval for approximately six weeks.

II. RECITAL OF THE SETTLEMENT TERMS

Teleferic will pay a total of \$150,000 on a non-reversionary basis within fourteen days after the judgment becomes final (i.e., after the appeals period). Of this gross amount, the delineation is the following: 1) \$5,000 as a representative enhancement to plaintiff Mirian Marroquin, 2) \$5,000 as a representative enhancement to plaintiff Humberto Morales, 3) \$15,000 as the PAGA allocation, 4) \$52,500 for attorney fees, 5) \$5,000 for attorney costs, and 6) \$9,250 for settlement administration. It should be noted that the actual attorney costs are \$8,350; hence this motion seeks reimbursement of the additional \$3,350 in costs over the initially projected \$5,000.

1 Calculation of the individual payments will add up the total workweeks, and then the
2 workweeks attributed to each class member will be divided by the total workweeks, resulting in the
3 class members' payment ratios. The payment ratios will then be multiplied by the net settlement
4 amount to calculate the individual settlement payments.

5 For tax purposes, the individual settlement payments are allocated as 15% for wages, and
6 85% for penalties and interest. The wage portion is subject to tax withholdings and the non-wage
7 portion is not. The settlement payments will be mailed to the class members 15 days after the
8 judgment becomes final.

9 Checks that remain uncashed after 180 days will be sent to nonprofit organization Legal Aid
10 at Work, which is based in San Francisco and provides services to workers on a range of issues.
11 Finally, as set forth in the declaration of Kevin Lee of Phoenix Class Action Administration
12 Solutions, the highest individual settlement share is approximately \$607.63 and the lowest
13 individual settlement share is \$9.07; the average share is \$136.71. This is a favorable result.

14 15 **III. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE**

16 Pursuant to Rule of Court 3.769(g), the court conducts a final approval hearing to inquire
17 into the fairness of a settlement. There is a presumption of fairness when the following exist: 1) the
18 settlement was reached through arm's length bargaining, 2) investigation and discovery are
19 sufficient to allow counsel to act intelligently, 3) counsel is experienced in similar litigation, and 4)
20 the percentage of objectors is small. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
21 245.) All the factors are present here. The settlement is the product of significant work and effort
22 by the parties and their counsel.

23 The settlement was reached after two ADR sessions with Hon. Patricia Lucas under Local
24 Rule 3. The data exchanged prior to mediation comprised the plaintiffs answering informal
25 questions from Teleferic, and likewise Teleferic provided the following: 1) excerpts from the 2021
26 iteration of Teleferic's employee handbook that included examples of the "Agreement to Take
27 Lunches and Breaks as Required," 2) an exemplar tip distribution chart for September 2020 that
28 showed how tips were distributed between the restaurant's opening in September 2019 through

1 September 2021 – after September 2021 Teleferic implemented a mandatory service charge policy
2 that did not involve tip pooling, under this policy 50% of the service charges were for the servers
3 and the other 50% were for the “back of house” kitchen staff, 3) a Kitchen Tip Distribution Chart
4 for the class period that showed how the kitchen’s allocation of tips was distributed amongst
5 kitchen staff, which was based on hours worked, and 4) an Excel spreadsheet containing all clock
6 in and clock out records for the class members during the class period, which also reflected
7 Teleferic’s payment of premiums for missed or otherwise facially non-compliant meal periods.

8 This information was used to create a damages model for the maximum liability. During the
9 first day of mediation, which was an all-day session, very extensive discussions took place about
10 the nature of the claims, as well as the defenses. These discussions led to the settlement.

11 Thus, under the *Wershba* criteria the settlement is fair as the settlement was reached after
12 arm’s length bargaining, investigation and discovery were sufficient, counsel is experienced in
13 similar litigation, and there were no objectors (there was one request for exclusion). To provide
14 further substance for the settlement’s fairness, the *Kullar* factors are analyzed below.

15 16 **A. The Kullar Factors Weigh in Favor of Approval**

17 In applying the presumption of fairness, the court examines the following factors: 1) the
18 strength of the case, 2) risk, expense, complexity, and likely duration of further litigation, 3) risk of
19 maintaining class action status through trial, 4) amount offered in settlement, 5) extent of discovery
20 completed and the stage of proceedings, 6) experience and views of counsel, 7) presence of a
21 governmental participant, and 8) reaction of the class members to the settlement. (*Kullar v. Foot*
22 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) Each of the Kullar factors weighs in support
23 of granting the motion for final approval, as explained below:

24 25 **1. Strength of the Case**

26 The test is not the maximum a plaintiff might have obtained at trial, but whether the
27 settlement was reasonable under the circumstances. Plaintiffs asserted three primary theories of
28 liability: 1) that class members worked hours for which they were not paid, 2) missed meal and rest

1 break allegations, and 3) tip allocation violations. The synopsis of the strengths is that the plaintiffs
2 unanimously contended that a supervisor at Teleferic commanded that class members work off the
3 clock and not take meal and rest breaks; on the other hand there was an apparent lack of
4 documentation demonstrating off the clock work and missed breaks.

5 For the tip allocation, the strength is that Plaintiffs apparently were not given explicit
6 direction of how the tips would be allocated among the staff; on the other hand Teleferic kept
7 detailed records of how the tips were allocated and those records showed that no managerial staff
8 or other prohibited categories of employee participated in the tip-pool.

9 10 **2. Risks of Further Litigation**

11 In addition to the risks for the theories above, there was a risk that a trier of fact could find
12 that any nonpayment of wages was not willful, with regard to the waiting time penalty claim.
13 Absent a showing of willfulness, the waiting time penalty would not apply.

14 For wage statement penalties, the risk was that if there was a finding that class members
15 were paid for all their time worked, and if they received premium pay for missed meal and rest
16 breaks, then the wage statements would be compliant. The payroll records showed that Teleferic
17 regularly paid premiums when class members recorded hours worked which qualified for a meal
18 period but did not record a compliant meal period, reducing the likelihood that plaintiffs would
19 have succeeded had they pursued their claim for unpaid rest and meal period premiums to trial.

20 Further, at the time of settlement, *Naranjo v. Spectrum Sec. Servs., Inc.* (2019) 40
21 Cal.App.5th 444 was still pending before the California Supreme Court, causing significant
22 uncertainty regarding the appropriate valuation of plaintiffs' wage-statement and waiting-time
23 penalty claims, as plaintiffs' wage-statement and waiting-time penalty claims were entirely
24 derivative of their underlying claim for unpaid rest and meal break premiums.

25 For the missed break violations, there was a risk that a trier of fact could determine that
26 breaks were made available to the class members. Under *Brinker Restaurant Corp. v. Superior*
27 *Court* (2012) 53 Cal.4th 1004, if breaks are made available to employees, then the employer has
28 satisfied its obligation to provide rest breaks. Similarly, for the tip allocation claim, if Teleferic's

1 records about tip disbursements were reliable evidence, that may have helped to refute the tip
2 allocation allegations. Together, this evidence demonstrates that plaintiffs faced significant risk had
3 they pursued their claims further. These risks lead into the third *Kullar* element discussed below.

4 5 **3. Risk of Maintaining Class Action Status Through Trial**

6 The risk of maintaining class action status through trial hinges on the predominance /
7 commonality requirement, which states that only if the defendant's liability can be determined by
8 facts common to all class members will a class be certified. (*Brinker, supra*, 53 Cal.4th at p. 1022.)
9 However, a class action cannot be maintained where the existence of damage, the cause of damage,
10 and the extent of damage must be determined on an case-by-case basis, even if there are some
11 common questions. (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 119.)

12 The risk is that some class members may testify that they did not miss meal breaks or rest
13 breaks, that they took compliant rest and/or meal breaks, and/or that they were paid for all hours
14 worked. Similarly, class members might not have documentary evidence to show commonality.
15 Additionally, the supervisor whom plaintiffs alleged instructed them not to take their rest and/or
16 meal periods supervised only some of the class members. Moreover, the class is roughly evenly
17 divided between "back-of-house" employees, who prepare food, and "front-of-house" employees,
18 who serve the food and attend to customers. Both named plaintiffs worked as "back-of-house"
19 employees, limiting their familiarity with the wage-and-hour policies and practices that applied to
20 "front-of-house" employees and diminishing their ability to represent those employees. Finally,
21 Teleferic raised the fact that the restaurant was closed or operated at significantly reduced capacity
22 for large parts of the claims period due to the COVID-19 pandemic, which effectively paused the
23 class period for about three quarters of 2020 and at various other times during the claims period.

24 The above posed risks of maintaining class action status through trial. This was another
25 factor which was analyzed to reach the settlement, and it is another factor that weighs in favor of
26 approving the settlement since it provides a favorable recovery to the class members.

27 28 **4. The Amount Offered in Settlement**

1 In determining whether the proposed settlement falls within the range of reasonableness,
2 perhaps the most important factor is a plaintiff's expected recovery balanced against the value of
3 the settlement offer. (*Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 176 F.Supp.3d 390, 395.) This
4 determination requires evaluating the relative strengths and weaknesses of the plaintiff's case; it
5 may be reasonable to settle a weak claim for relatively little, while it might not be reasonable to
6 settle a strong claim for the same amount. (*In re High-Tech Emp. Antitrust Litig.* (N.D. Cal. Aug. 8,
7 2014, No 11-cv-025090-LHK) 2014 WL3917126 at *4.)

8 Plaintiffs' damages model showed a maximum liability, excluding PAGA, at \$2,415,222.
9 That figure assumed no risks. The figure was comprised of \$407,419 for meal break premiums,
10 \$927,624 for rest break premiums, \$924,480 for waiting time penalties, \$374,463 for wage
11 statement penalties.

12 The \$150,000 settlement is 5% of the maximum, unencumbered by the appreciation of the
13 risks above. A settlement of 5% of the maximum is within the range of reasonableness, especially
14 considering the risks outlined above. Generally, this percentage is within the range of
15 reasonableness. (See, e.g., *Stovall-Gusman v. W.W. Granger, Inc.* (N.D. Cal. June 17, 2015) 2015
16 WL 3776765 at *4.)

17 The settlement also merits final approval since the net settlement is non-revisionary and did
18 not require the class members to submit claims.

19 20 **5. Extent of Discovery Completed and Stage of Proceedings**

21 Following the filing and service of the complaint, and before the initial status conference,
22 the parties agreed to use the ADR procedure in Local Rule 3. Sufficient information and data was
23 exchanged in advance of the mediation to allow the parties to effectively work toward a settlement.
24 Further, the plaintiffs were actively involved in the mediation and the steps leading up to it.

25 26 **6. Experience and Views of Counsel**

27 Class counsel are experienced in complex wage and hour and PAGA cases, and believe this
28 settlement is a reasonable compromise given the risks described above.

1 **7. Presence of a Governmental Participant**

2 There are no governmental participants, however the motion for preliminary approval and
3 the settlement agreement were uploaded to the LWDA website. To date, the LWDA has not
4 notified anyone of any perceived deficiency with the settlement or PAGA allocation.

5
6 **8. Reaction of Class Members to the Settlement**

7 There were no objections to the settlement, no disputes regarding the amount of workweeks
8 allotted to the class members, and only one request for exclusion. Declaration of Kevin Lee with
9 Respect to Notice and Settlement Administration, ¶¶ 8-10. This is another *Kullar* factor that
10 weighs in favor of approval.

11
12 **IV. PLAINTIFF’S ATTORNEYS’ FEES AND COSTS ARE RECOVERABLE**

13 Plaintiffs’ attorneys seek 1/3 of the gross settlement fund (one-third is \$52,500), costs of up
14 to \$8,350, settlement administration expenses of \$9,250, and class representative service
15 enhancements of \$5,000 for Mirian Marroquin and \$5,000 for Humberto Morales.

16 The attorney costs exceeded the contemplated \$5,000 as further detailed in the supporting
17 declaration of Adam Rose. Typically, an award of 1/3 of the common fund is the range set by other
18 class action lawsuits; in contingency-based attorneys’ fees in class action cases, with or without
19 lodestar a cross-check, 1/3 of the common fund is accepted and supported by public policy
20 considerations. (*Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 488.)

21 The request for attorneys’ fees is substantiated by the monetary benefits conferred by the
22 settlement, as well as by balancing the risks set for above. Plaintiffs emphasize the importance of
23 contingency fee awards, as fees awarded from common fund settlements are essential for the ability
24 to maintain a practice representing low-wage workers on contingency who are not able to afford
25 fees. (See *Fleury v. Richemont N. Am., Inc.* (N.D. Cal. Apr. 14, 2009) 2009 WL 1010514, *3.)

26
27 **A. Standard for Recovery of Attorney Fees**

28 In the context of a class action, attorneys’ fees may be awarded pursuant to the common

1 fund doctrine when a class settlement agreement establishes a relief fund from which the attorneys’
2 fees are to be drawn. (*Laffitte, supra*, 1 Cal.5th at 488.) Pursuant to the terms of the settlement,
3 Plaintiff requests one-third of the gross settlement, equivalent to \$52,500.

4 One of the principal advantages of the percentage approach for attorneys’ fees in class
5 actions is that it is result-oriented, thereby promoting the more efficient use of attorney time and
6 resources, rather than encouraging attorneys to prolong litigation. Thus, in considering the fairness
7 and reasonableness of the requested fees, the Court should consider the nature of Plaintiffs’
8 counsel’s practice, which is only made possible by this contingency fee structure.

9 Empirical studies have shown that, regardless of whether the percentage method or the
10 lodestar method is used, fee awards in class actions average around one-third of the recovery.
11 (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 65, n. 11 (citations omitted).)

12 There is no definitive set of factors to consider in determining the reasonableness of an
13 attorneys’ fees award, however by example federal courts assessing fee requests have utilized the
14 following: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of
15 work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5)
16 awards made in similar cases. (*Hendricks v. Starkist Co.* (N.D. Cal. Sept. 29, 2016) 2016
17 WL5462423, *11 (citing *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d at 1048-50).) These
18 factors are analyzed below:

19
20 **B. The Results Achieved by this Settlement Support Plaintiffs’ Request**

21 The settlement provides a gross amount of \$150,000 to 430 class members. After
22 deductions for the PAGA allocation, the requested attorney fees and costs, costs of settlement
23 administration, and the requested service representative enhancement, the balance (net settlement
24 amount) will be distributed to the class members on a pro rata bases. The average recovery for a
25 class member is about \$136.71, a favorable amount given the risks set forth above.

26 This monetary relief that would not have been possible without Plaintiffs’ counsel’s
27 significant experience litigating wage and hour cases. Thus, the first factor weighs in favor of the
28 requested attorney fees.

1 **C. The Risks of Litigation**

2 There are many risks inherent in a class action – class certification, potential arbitration
3 provisions, and decisions on the merits are all issues that could result in no recovery. (*Parkinson v.*
4 *Hyundai Motor Am.* (C.D. Cal. 2010) 796 F.Supp.2d 1160, 1166 (“The most important factor is the
5 risk of nonpayment”).) For this reason, courts routinely find that this factor supports a higher
6 fee request. (*Id.* at fn. 4.)

7 The risks of proceeding further included the perceived uncertainty of some aspects of the
8 unpaid off the clock and missed breaks causes of action, which could then potentially affect the
9 derivative penalties. There was also a risk with the tip misappropriation/allocation claim since
10 Teleferic kept records of tip distributions. Thus, given the favorable settlement terms, the second
11 factor weighs in favor of the requested attorneys’ fees.

12
13 **D. Counsel Has Extensive Background in This Field**

14 Prosecuting class actions requires a commitment of time, resources, and energy and, many
15 times, settlements “simply [are not] possible but for the commitment and skill of Class Counsel.”
16 (*Garner v. State Farm Mutual Automobile Insurance Company* (No. CV08-1365-CW, N.D. Cal.
17 Apr. 22, 2010) 2010 WL 1687829, at *2.) Plaintiffs’ counsel’s work and experience with wage and
18 hour and tips issues also weighs in favor of the requested attorney fees.

19
20 **E. Counsel Incurred a Financial Burden in Litigating this Case**

21 The financial burden assumed in a class actions typically justifies a percentage of the
22 common fund since counsel litigates with no payment and no guarantee that the time or money
23 expended will result in any recovery. By incentivizing Plaintiffs’ counsel to take on risky, high-
24 stakes, and important litigation, fee awards serve an important purpose: to provide access to top
25 legal talent for constituencies who would otherwise not be able to assert their rights.

26 The fee awarded in this case will be used to support future cases on behalf of workers, as
27 well as providing compensation for counsel for past and future cases where the risks resulted in no
28 reward. Thus, the fourth factor weighs in favor of the requested attorney fees.

1 **F. Lodestar Cross-Check, if Applied, Supports Plaintiffs' Fee Request**

2 Courts may use a lodestar cross-check on a request for a percentage of the fund fee award.
3 (*Laffitte, supra*, 1 Cal.5th at p.505.) However, a cross-check is not necessarily required. (*Ibid.*)
4 Plaintiff submits that a cross-check is not necessary here; yet the declaration of Adam Rose in
5 support of the hours worked supports the lodestar analysis as well as the amount of costs incurred.

6
7 **V. THE REQUESTED SERVICE ENHANCEMENTS ARE REASONABLE**

8 Named plaintiffs in class actions are generally entitled to a service award for initiating
9 litigation on behalf of absent class members. (*Clark v. Am. Residential Servs. LLC* (2009) 175
10 Cal.App.4th 785.) Criteria to consider in determining whether to make an incentive award include:
11 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the
12 notoriety and personal difficulties encountered by the class representative; 3) the amount of time
13 and effort spent by the class representative; 4) the duration of litigation and; 5) the personal benefit
14 (or lack thereof) enjoyed by the class representative as a result of the litigation.” (*Van Vranken v.*
15 *Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299 (internal citation omitted).)

16 The above factors weigh in favor of granting the requested service award. Plaintiffs could
17 have faced backlash within the restaurant community for standing up against employment law
18 violations. Plaintiffs were always readily available to provide information and assistance with this
19 case and participated in person practically all day for the first mediation session.

20 Further, Plaintiffs submitted declarations in support of the motion for preliminary approval
21 that attest to their commitment to the case, and the case is about a year and a half old. It is
22 estimated that with the informal discovery interviews and mediations each plaintiff spent about 20
23 hours on the case. Thus, the requested service enhancements should be approved.

24
25 **VI. CONCLUSION**

26 Based on the foregoing, and all related filed documents, Plaintiffs respectfully request the
27 Court to grant the motion for final approval and request for attorney fees, costs, and class
28 representative service payments, and to sign the concurrently filed proposed order and judgment.

1 Date: March 17, 2023

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/s/ Adam Rose

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Attorney for Plaintiffs
Mirian Marroquin, et al.

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