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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

CARMELA REYES, individually, on behalf of  
all others similarly situated, and on behalf of the  
State of California and other aggrieved persons,

*Plaintiff,*

v.

EVERYTABLE, PBC, a Delaware  
corporation; HARVEST FRESH FOODS,  
PBC, an unknown entity, and DOES 1 through  
10, inclusive,

*Defendants.*

Case No. 21STCV35987

**CLASS & REPRESENTATIVE ACTION**

*[Assigned for all purposes to Judge David S.  
Cunningham III]*

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

*[Filed concurrently with: Declaration of  
Justin F. Marquez in Support of Plaintiff's  
Motion for Preliminary Approval of Class  
Action Settlement; and [Proposed] Order  
Granting Plaintiff's Motion for Preliminary  
Approval of Class Action Settlement]*

**PRELIMINARY APPROVAL HEARING**

Date: September 15, 2022

Time: 9:30 a.m.

Dept: 11

Complaint filed: September 30, 2021

FAC filed: August 22, 2022

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

2 PLEASE TAKE NOTICE that on September 15, 2022, at 9:30 a.m., in Department 11 of  
3 the Los Angeles County Superior Court, 312 North Spring Street, Los Angeles, California 90012,  
4 pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff  
5 Carmela Reyes (“Plaintiff”) will move the Court for an Order granting preliminary approval of the  
6 proposed class action settlement between Plaintiff and Defendants Everytable, PBC and Harvest  
7 Fresh Foods, PBC (“Defendants”). Plaintiff further moves the Court for an Order:

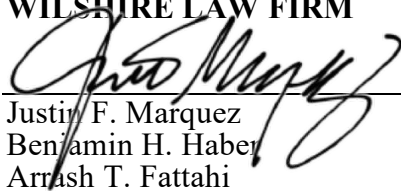
- 8 1. Granting preliminary approval of the Stipulation for Class Action Settlement;
- 9 2. Certifying a Class for settlement purposes only;
- 10 3. Approving the Notice and Settlement Information Form (collectively, the “Notice  
11 Packet”) and the plan for distribution of the Notice Packet to Settlement Class  
12 Members;
- 13 4. Appointing Plaintiff Carmela Reyes as Class Representative for settlement purposes  
14 only;
- 15 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for  
16 settlement purposes only;
- 17 6. Appointing Simpluris as the Settlement Administrator; and
- 18 7. Scheduling a Final Approval Hearing.

19 The Motion will be based upon this Notice, the attached Memorandum of Points and  
20 Authorities, the Declaration of Justin F. Marquez, filed concurrently herewith, the records and files  
21 in this action, and any other further evidence or argument that the Court may properly receive at  
22 or before the hearing.

23 Respectfully submitted,

24 Dated: August 23, 2022

**WILSHIRE LAW FIRM**

25 By: 

26 Justin F. Marquez  
27 Benjamin H. Haber  
28 Arrash T. Fattahi

Attorneys for Plaintiff

**TABLE OF CONTENTS**

|      |                                                                                                                             |    |
|------|-----------------------------------------------------------------------------------------------------------------------------|----|
| I.   | INTRODUCTION.....                                                                                                           | 1  |
| II.  | SUMMARY OF THE LITIGATION AND SETTLEMENT.....                                                                               | 1  |
| A.   | Plaintiff’s Claims .....                                                                                                    | 1  |
| B.   | Discovery and Investigation.....                                                                                            | 2  |
| C.   | Settlement Negotiations .....                                                                                               | 3  |
| D.   | Key Terms of the Proposed Settlement.....                                                                                   | 4  |
| III. | DISCUSSION .....                                                                                                            | 8  |
| A.   | The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation,<br>Litigation, and Negotiation .....        | 9  |
| 1.   | The Settlement Is the Product of Discovery, Investigation, and Informed and<br>Non-Collusive Arm’s-Length Negotiations..... | 9  |
| 2.   | The Settlement Is Fair and Reasonable in Light of the Parties’ Respective<br>Legal Positions.....                           | 10 |
| 3.   | Class Counsel Has Extensive Experience in Class Action Litigation.....                                                      | 11 |
| B.   | The Proposed Class Notice of Settlement Should Be Approved .....                                                            | 11 |
| C.   | The Proposed Attorneys’ Fees and Costs Are Reasonable .....                                                                 | 11 |
| 1.   | Class Counsel Request an Award of Fees Based on the “Common Fund”<br>Method .....                                           | 11 |
| 2.   | The Requested Fee Award Is in Line with Typical Cases .....                                                                 | 12 |
| 3.   | This Matter Involves A “Fee-Shifting” Provision of the Labor Code .....                                                     | 13 |
| 4.   | The Experience, Reputation and Ability of Class Counsel Support the<br>Requested Fee Award .....                            | 13 |
| D.   | The Service Award to Named Plaintiff Is Reasonable.....                                                                     | 14 |
| E.   | There is Good Cause for Selecting Legal Aid at Work As the <i>Cy Pres</i> Recipient .....                                   | 15 |
| IV.  | CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED.....                                                                | 16 |
| A.   | Legal Standard .....                                                                                                        | 16 |

|    |                                                                                    |    |
|----|------------------------------------------------------------------------------------|----|
| 1  | B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for |    |
| 2  | Settlement Purposes .....                                                          | 17 |
| 3  | 1. The Class is Ascertainable and Numerous.....                                    | 17 |
| 4  | 2. There are Many Common Issues of Law and Fact Which Predominate.....             | 18 |
| 5  | 3. Plaintiff’s Claims Are Typical of the Claims of the Class.....                  | 18 |
| 6  | 4. Plaintiff and Her Counsel Meet the Adequacy Requirement.....                    | 19 |
| 7  | 5. A Class Action is Superior to a Multiplicity of Litigation.....                 | 19 |
| 8  | V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND.....                              | 20 |
| 9  | A. The Proposed Notice Plan Satisfies Due Process .....                            | 20 |
| 10 | B. The Notice is Accurate and Informative .....                                    | 20 |
| 11 | VI. CONCLUSION .....                                                               | 21 |

## TABLE OF AUTHORITIES

### STATE CASES

|                                                                                            |       |
|--------------------------------------------------------------------------------------------|-------|
| <i>Bowles v. Super. Ct.</i> (1955) 44 Cal.2d 574 .....                                     | 18    |
| <i>Cartt v. Super Ct.</i> (1975) 50 Cal.App.3d 960.....                                    | 20    |
| <i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43.....                              | 13    |
| <i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105.....                | 12    |
| <i>Classen v. Weller</i> (1983) 145 Cal.App.3d 27 .....                                    | 19    |
| <i>Clothesrigger, Inc. v. GTE Corp.</i> (1987) 191 Cal.App.3d 605.....                     | 18    |
| <i>Collins v. Rocha</i> (1972) 7 Cal.3d 232 .....                                          | 18    |
| <i>D’Amico v. Bd. of Medical Examiners</i> (1974) 11 Cal.3d 1 .....                        | 11    |
| <i>Daar v. Yellow Cab Co.</i> (1967) 67 Cal. 2d 695.....                                   | 17    |
| <i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794 .....                             | 8     |
| <i>Gentry v. Super. Ct.</i> (2007) 42 Cal.4th 443.....                                     | 14    |
| <i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....                  | 8     |
| <i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th 480.....                        | 12    |
| <i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429.....                                | 17    |
| <i>Mallick v. Super. Ct.</i> (1979) 89 Cal.App.3d 434.....                                 | 8     |
| <i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442 .....                            | 19    |
| <i>Miller v. Woods</i> (1983) 148 Cal. App. 3d 862 .....                                   | 19    |
| <i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399 ..... | 8, 14 |
| <i>Quinn v. State of California</i> (1995) 15 Cal.3d 162.....                              | 12    |
| <i>Richmond v. Dart Indus., Inc.</i> (1981) 29 Cal. 3d 462.....                            | 17    |
| <i>Rodriguez v. W. Publ’g Corp.</i> (9th Cir. 2009) 563 F.3d 948 .....                     | 14    |
| <i>Rose v. City of Hayward</i> (1981) 126 Cal.App.3d 926 .....                             | 18    |
| <i>Serrano v. Priest</i> (1977) 20 Cal.3d 25.....                                          | 11    |
| <i>Stamburgh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231 .....                              | 9     |
| <i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 224.....                     | 10    |
| <i>Wilner v. Sunset Life Ins. Co.</i> (2000) 78 Cal.App.4th 952 .....                      | 17    |

**FEDERAL CASES**

|                                                                                         |    |
|-----------------------------------------------------------------------------------------|----|
| <i>Dennis v. Kellogg Co.</i> (9th Cir. 2012) 697 F.3d 858 .....                         | 16 |
| <i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174 .....                  | 14 |
| <i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510 .....                         | 20 |
| <i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438 .....                             | 9  |
| <i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301..... | 15 |
| <i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....  | 13 |

**STATE STATUTES**

|                                    |        |
|------------------------------------|--------|
| Cal. Civ. Proc. Code § 384.....    | 16     |
| Code of Civil Procedure § 382..... | 16, 17 |
| Labor Code § 1194 .....            | 13     |
| Labor Code § 90.5 .....            | 14     |

**RULES**

|                                               |    |
|-----------------------------------------------|----|
| California Rules of Court, Rule 3.766.....    | 20 |
| California Rules of Court, Rule 3.769(f)..... | 11 |

**TREATISES**

|                                                                          |    |
|--------------------------------------------------------------------------|----|
| Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51 ..... | 9  |
| Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03 ..... | 12 |
| Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39 .....  | 20 |

**OTHER AUTHORITIES**

|                                                                                                                                              |    |
|----------------------------------------------------------------------------------------------------------------------------------------------|----|
| Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”, 53 UCLA L. Rev. 1303 (2006) ..... | 15 |
|----------------------------------------------------------------------------------------------------------------------------------------------|----|

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Plaintiff Carmela Reyes (“Plaintiff”) seeks preliminary approval of a proposed \$742,000.00 non-reversionary, wage and hour class action settlement with Defendants Everytable, PBC and Harvest Fresh Foods, PBC (“Defendants,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 772 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Lisa Klerman, Esq., over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class for settlement purposes only, approve the proposed notice, and set a Final Approval Hearing.

### **II. SUMMARY OF THE LITIGATION AND SETTLEMENT**

#### **A. Plaintiff’s Claims**

This is a wage and hour class action and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as hourly-paid, non-exempt employees for Defendants during the class period. Defendants specialize in the meal preparation and subscription industry and serve customers in southern California, including in Los Angeles County. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendants’ payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff further alleges that Defendants failed to pay for all hours worked off-the-clock by the putative class members. Plaintiff also alleges that Defendants failed to provide employees with legally compliant meal and rest periods, and failed to provide its employees with their earned meal period and rest period premiums. In addition, Plaintiff alleges that Defendants failed to reimburse its employees for all necessary business-related

1 expenses. Based on these allegations, Plaintiff asserts claims against Defendants for failure to  
2 pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal  
3 periods, failure to authorize and permit rest periods, failure to timely pay all final wages at  
4 termination, failure to provide accurate itemized wage statements, unfair business practices, and  
5 civil penalties under PAGA. (*Id.* at ¶ 3.) Defendants deny all allegations and contend that its  
6 employment practices were at all relevant times compliant with applicable California law.

7 On September 30, 2021, Plaintiff filed a putative wage-and-hour class action complaint  
8 against Defendants for: (1) failure to pay minimum and straight time wages; (2) failure to pay  
9 overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest  
10 periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate  
11 itemized wage statements; (7) failure to indemnify employees for expenditures; and (8) violation  
12 of California's Unfair Competition Law, California Business and Professions Code §§ 17200,  
13 *et seq.* (*Id.* at ¶ 4.) In addition, Plaintiff filed a First Amended Class and Representative Action  
14 Complaint on August 22, 2022, which adds a cause of action for civil penalties under PAGA,  
15 for which Plaintiff had previously provided notice to Defendants and the California Labor &  
16 Workforce Development Agency on October 1, 2021. (*Id.*)

17 **B. Discovery and Investigation**

18 Following the filing of the Complaint, the Parties exchanged documents and information  
19 before mediating this action. Defendants produced timekeeping and payroll records for the  
20 putative class members. Defendants also provided documents of their wage and hour policies  
21 and practices during the class period, and information regarding the total number of current and  
22 former employees in its informal discovery responses. (*Id.* at ¶ 5.)

23 After reviewing the documents regarding Defendants' wage and hour policies and  
24 practices and analyzing Defendants' timekeeping and payroll records, Class Counsel was able  
25 to evaluate the probability of class certification, success on the merits, and Defendants'  
26 maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the  
27 applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Class Counsel  
28 reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.

1 (*Id.*)

2 **C. Settlement Negotiations**

3 On March 23, 2022, the Parties participated in private mediation with experienced class  
4 action mediator, Lisa Klerman, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The  
5 settlement negotiations were at arm’s length and, although conducted in a professional manner,  
6 were adversarial. The Parties went into the mediation willing to explore the potential for a  
7 settlement of the dispute, but each side was also prepared to litigate their position through trial  
8 and appeal if a settlement had not been reached. (*Id.*)

9 After extensive negotiations and discussions regarding the strengths and weaknesses of  
10 Plaintiff’s claims and Defendants’ defenses, the Parties were able to reach a resolution, the  
11 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. A  
12 [Joint Stipulation of Class Action and PAGA Settlement and Release (“Settlement” or  
13 “Settlement Agreement”)]).)

14 Class Counsel has conducted a thorough investigation into the facts of this case. Based  
15 on the foregoing discovery and their own independent investigation and evaluation, Class  
16 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best  
17 interests of the Settlement Class Members in light of all known facts and circumstances, the risk  
18 of significant delay, the defenses that could be asserted by Defendants both to certification and  
19 on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 15.)

20 Indeed, the \$742,000.00 Settlement represents approximately **65% of the realistic**  
21 **maximum recovery of \$1,147,978.50.** (*Id.* at ¶ 24.) Although Class Counsel estimated that  
22 Defendants’ maximum potential liability for all claims was approximately \$6.9 million, when  
23 the risk of prevailing at certification and trial are factored into the equation, and the likelihood  
24 that maximum penalties would be reduced, Class Counsel believes that Defendants’ realistic  
25 exposure was \$1,147,978.50, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶  
26 17-24.) Considering the risk and uncertainty of prevailing at class certification and at trial, this  
27 is an excellent result for the Class. Indeed, because of the proposed Settlement, class members  
28 will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

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

2           Under the Settlement, Defendants will pay \$742,000.00 to resolve this Litigation. This  
3 amount is all-inclusive. The Settlement’s key terms include:

4           1.     Settlement Class: For settlement purposes only, the Parties agree to the certification  
5 of a class pursuant to California Code of Civil Procedure § 382 defined as: “[A]ll persons who  
6 worked for Defendants in California as an hourly-paid or non-exempt employee during the time  
7 period of April 5, 2017 through May 22, 2022.” (Settlement, § VI, subd. 1.1.)

8           2.     Settlement Period: The Settlement Period means the period from April 5, 2017  
9 through May 22, 2022. (Settlement, § VI, subd. 1.3.)

10          3.     Participating Class Members: Participating Class Members means all Class  
11 Members who do not submit a valid and timely request to exclude themselves from the Settlement.  
12 (Settlement, § VI, subd. 1.24.)

13          4.     PAGA Members: PAGA Members means all Class Members, as that term is defined  
14 in the Settlement Agreement, who worked for Defendants from April 5, 2020 through May 22,  
15 2022. (Settlement, § VI, subd. 1.20.)

16          5.     Gross Settlement Amount: This amount is \$742,000.00, for all claims, including  
17 wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs,  
18 payment to the Labor and Workforce Development Agency (“LWDA”) for the alleged PAGA  
19 penalties, all other penalties, and the Class Representative Service Award. (Settlement, § VI, subd.  
20 1.9.)

21          6.     Uncashed Checks & Cy Pres: If a settlement check is returned to the Settlement  
22 Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a  
23 valid mailing address by performing a skip trace search and, if another address is identified, shall  
24 mail the check to the newly identified address. Any settlement checks remaining uncashed after  
25 one hundred and eighty (180) days shall be deemed unpaid residue pursuant Code of Civil  
26 Procedure Section 384(a). Unpaid residue (uncashed or returned checks) will be paid to Legal Aid  
27 at Work. (Settlement, § VI, subd. 2.8.)

28     ///

1           7.     Release as to All Settlement Class Members: The class release is limited to “all  
2 claims, demands, rights, liabilities and causes of action of every nature and description whatsoever  
3 including without limitation statutory, constitutional, contractual or common law claims, against  
4 the Released Parties [as defined in the Settlement Agreement] and any of them, for relief and  
5 penalties, that accrued during the Class Period, and as a result of Class Members’ employment by  
6 Defendants in California, that arise under any state or local law or state administrative order that  
7 was or could have been pled based on the facts alleged in the Operative Complaint, including  
8 claims of failure to pay for all hours worked (including minimum, straight time, and overtime  
9 wages), failure to provide meal periods, failure to authorize and permit rest periods, failure to  
10 timely pay final wages at termination, failure to furnish accurate itemized wage statements, failure  
11 to indemnify employees for expenditures, and all damages, interest, penalties, attorneys’ fees,  
12 costs, and other amounts recoverable under said causes of action under California law, to the extent  
13 permissible, including, but not limited to, the California Labor Code and the applicable Wage  
14 Orders, including, without limitation, all related claims for restitution and other equitable relief  
15 arising from California Business and Professions Code §§ 17200, *et seq.*, interest on unpaid wages,  
16 unpaid wages, attorneys’ fees or litigation costs, and any other related claims and/or penalties. The  
17 release does not extend to any claims not alleged in the Operative Class Action Complaint and  
18 specifically excludes claims for workers’ compensation, personal injuries, unemployment  
19 insurance, state disability compensation, claims under the Employment Retirement Income  
20 Security Act of 1974, previously vested benefits under any employer sponsored benefits plan,  
21 wrongful termination, discrimination retaliation, and harassment including, but not limited to,  
22 those arising under the Age Discrimination In Employment Act, the California Fair Employment  
23 and Housing Act, Title VII of the Federal Civil Rights Act of 1964, and/or Federal Civil Rights  
24 Act of 1991, or any similar state or federal laws, the California Family Rights Act, the Federal  
25 Family Medical Leave Act, the California Pregnancy Leave Law, or similar state or federal laws,  
26 the Federal Equal Pay Act of 1963, violations of the Americans with Disabilities Act of 1990 or  
27 violations of any other state or federal law, rule or regulation concerning discrimination, retaliation  
28 and/or harassment. This release does not include any of the claims encompassed within the

Released PAGA Claims. (Settlement, § VI, subd. 1.29, subd. 3.5.1.)

8. Release as to All PAGA Members: The PAGA release is limited to “all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever including, without limitation, statutory, constitutional, contractual or common law claims, against the Released Parties [as defined in the Settlement Agreement], and any of them, for civil penalties pursuant to PAGA, that accrued during the PAGA Period, and as a result of PAGA Employees’ employment by Defendants in California, that arise under any state or local law or state administrative order that was or could have been pled based on the facts alleged in the Operative Complaint and the Plaintiff’s notice to the LWDA, including claims of failure to pay for all hours worked (including minimum, straight time, and overtime wages), failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay final wages at termination, failure to furnish accurate itemized wage statements, and failure to indemnify employees for expenditures. (Settlement, § VI, subd. 1.30, subd. 3.5.2.)

9. PAGA Allocation: The settlement includes \$10,000.00 allocated to Plaintiff’s claims under PAGA, with 75% of which (\$7,500.00) being paid to the LWDA and 25% (\$2,500.00) being paid to the PAGA Members. (Settlement, § VI, subd. 1.21.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

10. Net Settlement Fund: The “Net Settlement Fund” or “Net Settlement Amount” is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) attorneys’ fees and Litigation costs, (2) Administrative Costs, (3) enhancement to the Named Plaintiff, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § VI, subd. 1.16.)

11. Distribution Formula: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims as set forth in Sections II.D(7) and (8), above, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section VI, subdivision 2.6 of the Settlement Agreement.

12. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 25% wages and 75% penalties/interest. (Settlement, § VI, subd. 2.5.)

13. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed \$10,000.00. (Settlement, § VI, subd. 2.4.) This amount is for Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § VI, subd. 3.5.3.) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount to be distributed between the participating Settlement Class Members on a pro-rata basis. (Settlement, § VI, subd. 1.16.)

14. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% (\$247,333.33) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed \$20,000.00, subject to Court approval at the Final Approval. (Settlement, § VI, subd. 2.4.) At this time, Class Counsel's costs are approximately \$16,000. (Marquez Decl., ¶ 39.)

15. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and an explanation of how the settlement allocations are calculated. (Settlement, Ex. 1.) The Notice also includes an opt-out form that class members can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members will be notified by first-class mail of the settlement. (Settlement, § VI, subd. 3.2.) Simpluris, the proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the current addresses of class members, including conducting a skip trace if needed and re-mailing the notice to updated addresses. (*Id.*) (Marquez Decl., ¶ 11; Ex. B [Settlement Administrator Bid].)

16. Workweek Dispute Form: The Workweek Dispute Form sets forth each class member's total workweeks and permits class members to dispute their number of workweeks or opt-out of the settlement. (Settlement Agreement, Ex. 2.)

///

1     **III.     DISCUSSION**

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

9             In considering whether a settlement is reasonable, the trial court should consider relevant  
10 factors, which may include the strength of Plaintiff’s case, the risk, expense, complexity and likely  
11 duration of further litigation, the risk of maintaining class action status through trial, the amount  
12 offered in settlement, the extent of discovery completed and the stage of the proceedings, the  
13 experience and views of counsel, the presence of a governmental participant, and the reaction of  
14 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168  
15 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself  
16 that the class settlement is within the “ballpark” of reasonableness. (*Id.* at p. 133.) The record  
17 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*  
18 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not  
19 require “an explicit statement of the maximum amount the plaintiff class could recover if it  
20 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy  
21 and the realistic range of outcomes of the litigation.”].)

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

25     ///

26     ///

27     ///

28     ///

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

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

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

12          The Settlement was reached following extensive negotiations following a full day of  
13          mediation with experienced employment mediator, Lisa Klerman, Esq. (Marquez Decl., ¶¶ 7-8.)  
14          The settlement negotiations were at arm’s length and, although conducted in a professional manner,  
15          were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a  
16          settlement of the dispute, but each side was also prepared to litigate their or its position through  
17          trial and appeal if a settlement had not been reached. (*Id.*)

18          Prior to reaching this settlement, Class Counsel conducted informal discovery concerning  
19          the claims set forth in the Litigation, such as class member timekeeping and payroll records,  
20          Defendants’ policies and procedures concerning the payment of wages, the provision of meal and  
21          rest breaks, issuance of wage statements, and providing all wages at separation, as well as  
22          information regarding the number of putative class members and the mix of current versus former  
23          employees, the wage rates in effect, and the amount of meal and rest period premium wages paid  
24          to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation, Class  
25          Counsel investigated the applicable law regarding the claims and defenses asserted in the  
26          Litigation. (*Id.*) Thus, Plaintiff and her counsel were able to act intelligently and effectively in  
27          negotiating the proposed Settlement. (*Id.*)

28          Class Counsel also has considerable experience and has demonstrated competence with

1 litigating wage and hour class actions. (*Id.* at ¶¶ 40-50.) Again, this supports the position that the  
2 terms of the Settlement are premised on objective evidence that has been considered and weighed  
3 in light of the risks, expenses, and time consumption to both sides of continued litigation of this  
4 action.

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

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

14 This settlement avoids the risks and the accompanying expense of further litigation.  
15 (*Marquez Decl.*, ¶ 26.) While Plaintiff is confident in the merits of her claims, a legitimate  
16 controversy exists as to each cause of action. (*Id.* at ¶ 25.) Plaintiff also recognizes that proving  
17 the amount of wages due to each class member would be an expensive, time-consuming, and  
18 uncertain proposition. (*Id.*)

19 The proposed settlement of \$742,000.00 therefore represents a substantial recovery when  
20 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 15-28.) Because of the proposed  
21 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an  
22 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in  
23 achieving class certification, the burdens of proof necessary to establish liability, the probability  
24 of appeal of a favorable judgment, it is clear that the settlement amount of \$742,000.00 is within  
25 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) Indeed,  
26 each Settlement Class Member is eligible to receive an average net benefit of approximately \$576,  
27 or \$15.60 per workweek. (*Id.* at ¶ 27.)

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1                   **3.       Class Counsel Has Extensive Experience in Class Action Litigation**

2           The settlement negotiations were conducted by highly capable and experienced counsel.  
3   Class Counsel have a strong record of vigorous and effective advocacy for their clients and are  
4   experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 40-  
5   50.) Although Plaintiff and her counsel were prepared to litigate the claims alleged in the litigation,  
6   they support the proposed Settlement as being in the best interests of the class.

7                   **B.       The Proposed Class Notice of Settlement Should Be Approved**

8           The Notice of Proposed Class Action Settlement and Workweek Dispute Form, in the forms  
9   attached to the Settlement Agreement as Exhibits 1 and 2, should be approved for dissemination  
10   to the class. The Notice and Workweek Dispute Form informs the class of the terms of the  
11   settlement and of their rights to be excluded from the settlement. And if there are class members  
12   who wish to object to this proposed class action settlement, they will have the opportunity to file  
13   their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice  
14   and Workweek Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of  
15   Court.

16                   **C.       The Proposed Attorneys' Fees and Costs Are Reasonable**

17           Under the Settlement, subject to the Court's approval, Defendants agree to pay Class  
18   Counsel reasonable attorneys' fees in amount of \$247,333.33, which is 33 1/3% of the gross  
19   Settlement Amount, and up to \$20,000.00 in costs. These amounts are disclosed to all class  
20   members in the Notice of Proposed Class Action Settlement and are reasonable.

21                   **1.       Class Counsel Request an Award of Fees Based on the "Common**  
22                   **Fund" Method**

23           California courts have long awarded attorneys' fees as a percentage of the benefit created  
24   by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when  
25   a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff  
26   or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff  
27   or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d  
28   25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

1 Class Counsel seek an award of attorneys’ fees on the “percentage of recovery/common  
2 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all  
3 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,  
4 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California  
5 Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund  
6 from which others derive benefits may require those passive beneficiaries to bear a fair share of  
7 the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*  
8 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine  
9 has been applied “consistently in California when an action brought by one party creates a fund in  
10 which other persons are entitled to share.” (*Id.* at p. 110.)

11 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016)  
12 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the  
13 class members, and the trial court in its equitable powers awards class counsel a fee out of that  
14 fund, the court may determine the amount of a reasonable fee by choosing an appropriate  
15 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages  
16 of the percentage method—including relative ease of calculation, alignment of incentives between  
17 counsel and the class, a better approximation of market conditions in a contingency case, and the  
18 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging  
19 the litigation—convince us the percentage method is a valuable tool that should not be denied our  
20 trial courts.” (*Id.* [internal citations omitted].)

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

22 According to a leading treatise on class actions, “No general rule can be articulated on what  
23 is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a  
24 reasonable fee award from a common fund in order to assure that the fees do not consume a  
25 disproportionate part of the recovery obtained for the class, although somewhat larger percentages  
26 are not unprecedented.” (*See Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.)  
27 Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty  
28 to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; see also

1 *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most  
2 cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10  
3 million].)

4 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which  
5 is in line with the prevailing guidelines established in California case law and academic literature  
6 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th  
7 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the  
8 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)  
9 Accordingly, Plaintiff respectfully requests that the Court approve the attorneys’ fees as negotiated  
10 by the Parties and requested herein.

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

12 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime  
13 compensation, including interest thereon, reasonable attorneys’ fees, and costs of suit.” Under this  
14 section, Plaintiff would be permitted to recover her actual attorneys’ fees, even if those fees were  
15 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in  
16 that it limits the risk of continued expenses and consumption of time, energy, and resources facing  
17 Defendants while at the same time rewarding Class Counsel for their decision to assume risk by  
18 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class  
19 Counsel. (Marquez Decl., ¶¶ 34-39.) Class Counsel undertook this matter solely on a contingent  
20 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the  
21 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class  
22 ahead of all other concerns.

### 23 **4. The Experience, Reputation and Ability of Class Counsel Support the** 24 **Requested Fee Award**

25 As demonstrated by their past experience in pursuing class actions on behalf of consumers  
26 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez  
27 Decl., ¶¶ 40-50.) Class Counsel has been involved as lead counsel or co-counsel in several class  
28 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class

1 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee  
2 award is supported here.

3 Class Counsel’s experience in wage and hour class actions was integral in evaluating the  
4 strengths and weaknesses of the case against Defendants and the reasonableness of the settlement.  
5 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning  
6 the rapidly evolving substantive law (state and federal), as well as the procedural law of class  
7 action litigation. Based on these and other factors, Class Counsel has frequently received fee  
8 awards of this percentage from the gross recovery for the class. Therefore, the requested fee award  
9 is reasonable and fair.

10 **D. The Service Award to Named Plaintiff Is Reasonable**

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

18 Service awards are particularly important to plaintiffs in wage and hour cases because they  
19 promote the important public policies underlying the wage and hour laws. This strong policy is  
20 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to  
21 vigorously enforce minimum labor standards in order to ensure employees are not required or  
22 permitted to work under substandard unlawful conditions....”). Nonetheless, the California  
23 Supreme Court has noted that “retaliation against employees for asserting statutory rights under  
24 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.  
25 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should  
26 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*  
27 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

28 ///

1 Under the Settlement Agreement, subject to the Court’s approval, Defendants agreed to pay  
2 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for  
3 Plaintiff’s general release of all claims against Defendants. Class Counsel represent that Plaintiff  
4 devoted a great deal of time and work assisting counsel in the case, communicated with counsel  
5 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class  
6 Counsel during the mediation. (Marquez Decl., ¶¶ 29-33.) This amount is reasonable particularly  
7 in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl*  
8 *Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel  
9 Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339 class members,  
10 and the court approved a \$25,000.00 class representative incentive award for each named plaintiff.  
11 (Marquez Decl., ¶ 33.)

12 When compared with the amounts awarded in typical class action cases, the amount  
13 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive  
14 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class  
15 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore  
16 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,  
17 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment  
18 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,  
19 while named plaintiffs in other employment class actions received an average award of \$12,121  
20 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards  
21 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by  
22 compensating them for the high costs of their service to the class, including risks of stigmatization  
23 or retaliation on the job.” (*Id.* at p. 1308.)

24 **E. There is Good Cause for Selecting Legal Aid at Work As the *Cy Pres***  
25 **Recipient**

26 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim  
27 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six Mexican*  
28 *Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure that the

1 settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy*  
2 *pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class  
3 members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican*  
4 *Workers*, 904 F.2d at 1308.)

5 Moreover, in the class action context, California Code of Civil Procedure permits unpaid  
6 cash residues in a class action settlement to be distributed to a *cy pres* recipient “in a manner  
7 designed either to further the purposes of the underlying class action or causes of action, or to  
8 promote justice for all Californians.” (Cal. Civ. Proc. Code § 384.)

9 Here, under the terms of the Settlement Agreement, in the event settlement checks remained  
10 uncashed for 180 days, those funds shall be donated to Legal Aid at Work (located at 180  
11 Montgomery Street, Suite 600, San Francisco, CA 94104) as a *cy pres* beneficiary. (Settlement, §  
12 VI, subd. 2.8.) Legal Aid at Work is a 501(c)(3) non-profit organization located in San Francisco,  
13 California. Legal Aid at Work provides essential public services which directly relate to the  
14 objective and purposes of this matter. “Legal Aid at Work is a non-profit legal services  
15 organization that has been assisting low-income, working families for more than 100 year.”<sup>1</sup> Legal  
16 Aid at work provides free clinics and helplines, free legal information, assists in litigation which  
17 “enforces and strengthens the civil and employment rights of low wage workers in California,” and  
18 works on policy advocacy to “strengthen civil and workplace rights at the local, state and federal  
19 level.”<sup>2</sup>

#### 20 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED**

##### 21 **A. Legal Standard**

22 The proposed Settlement Class is well suited for class certification. All of the claims derive  
23 from a core set of alleged violations of California’s wage and hour laws and regulations. For the  
24 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the  
25 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when  
26 \_\_\_\_\_

27 <sup>1</sup> See “Our Mission and How We Work,” accessed June 24, 2022, located at  
<https://legalaidatwork.org/our-mission-and-how-we-work/>

28 <sup>2</sup> *Id.*

1 the question is one of a common or general interest, of many persons, or when the parties are  
2 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend  
3 for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1)  
4 There must be an ascertainable class; and (2) there must be a well-defined community of interest  
5 in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow*  
6 *Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the  
7 California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the  
8 community-of-interest requirement itself embodies three factors: “(1) predominant questions of  
9 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class  
10 representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29  
11 Cal. 3d 462, 470.)

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

18 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**  
19 **Settlement Purposes**

20 **1. The Class is Ascertainable and Numerous**

21 Plaintiff contends that the proposed class that Plaintiff seeks to represent is easily  
22 ascertainable, and includes approximately 772 employees of Defendants.

23 Plaintiff maintains that there is an easily ascertainable class, defined by objective and  
24 precise criteria. Because class members are identified using specific criteria in the regular business  
25 records of Defendants (i.e., job position), the class is ascertainable. (*Wilner v. Sunset Life Ins. Co.*  
26 (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the  
27 subject of the lawsuit is sufficient to make the class ascertainable].)

28 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a

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

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

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

15 Here, the alleged employment practices at issue are: whether Defendants had legally  
16 compliant policies and practices for all hours worked, including overtime wages; whether  
17 Defendants had legally compliant policies and practices to provide employees with meal periods;  
18 whether Defendants had legally compliant policies and practices authorizing and permitting its  
19 employees to take rest periods; whether final payment of wages was untimely and excluded unpaid  
20 wages, including meal period premium and rest period premium wages; whether the wage  
21 statements were consequently non-compliant; and whether Defendants adequately reimbursed  
22 employees for business expenditures. Plaintiff contends that the factual and legal issues are the  
23 same for all of the identified class members, including Plaintiff. Further, all class members are  
24 alleged to have suffered from, and seek redress for, the same alleged injuries. Defendants deny all  
25 allegations.

## 26 **3. Plaintiff’s Claims Are Typical of the Claims of the Class**

27 The typicality requirement does not focus on the individual characteristics or circumstances  
28 of the representative plaintiff compared to those of the remainder of the class, but rather upon the

1 typicality of the proposed representative’s claims as they relate to the defendant’s conduct and  
2 activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 [“[t]he only requirements are that  
3 common questions of law and fact predominate and that the class representative be similarly  
4 situated” vis-à-vis the class.].) A representative plaintiff’s claims are typical of the class if they  
5 arise from the same event, practice or course of conduct, and if the claims rest on the same legal  
6 theories. (*Id.*) That is precisely the case here. Plaintiff is a former employee of Defendants; as  
7 such, she alleges that she was subject to the same policies and practices as other similarly situated  
8 employees.

#### 9                   **4. Plaintiff and Her Counsel Meet the Adequacy Requirement**

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

14           All of these requirements are met here for settlement purposes. Plaintiff retained counsel  
15 with extensive experience in prosecuting complex class actions, including similar class actions that  
16 previously settled. (Marquez Decl., ¶¶ 40-50.) Class Counsel unquestionably is “qualified,  
17 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148  
18 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,  
19 litigated this case and diligently reviewed the settlement terms, showing their dedication.  
20 Plaintiff’s willingness to serve as a representative demonstrates her serious commitment to  
21 bringing about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

23           Finally, in making its class certification decision, the Court must determine that a class  
24 action would be superior to alternative means for the fair and efficient adjudication of the litigation.  
25 By consolidating many potential individual actions into a single proceeding, this Court’s use of the  
26 class action device enables it to manage this Litigation in a manner that serves the economics of  
27 time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-  
28 situated employees with small but nevertheless meritorious claims for damages would, as a

practical matter, have no means of redress because of the time, effort and expense required to prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443, 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns are essentially non-existent.

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

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

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

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

The Notice of Proposed Class Action Settlement should be approved. It will be disseminated through direct U.S. first-class mail to the last known address for each Class Member. It informs the Class Members of the terms of the Settlement and their right to be excluded from the Settlement. And if there are Class Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

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

1 required of a combined settlement-certification class notice.

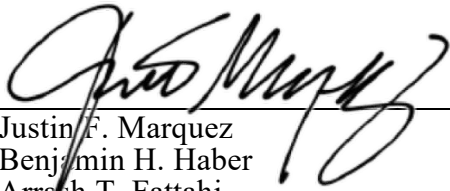
2 **VI. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary  
4 approval of the proposed Settlement and set a Final Approval Hearing on January 26, 2023 (with  
5 the deadline to file the Motion on January 3, 2023), or the first available date thereafter.

6  
7  
8 Dated: August 23, 2022

Respectfully submitted,

**WILSHIRE LAW FIRM**

9  
10 By:  \_\_\_\_\_

Justin F. Marquez  
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*Reyes v. Everytable, PBC, et al.*  
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