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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

VANESSA MURILLO, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

SAN BERNARDINO MEDICAL
ORTHOPAEDIC GROUP, INC. DBA
ARROWHEAD ORTHOPAEDICS, a California
corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. CIVSB2128071

CLASS ACTION

*[Assigned for all purposes to Judge David
Cohn, Dept. S-26]*

**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; Declaration of Vanessa
Murillo 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: July 20, 2022

Time: 10:00 a.m.

Dept: S-26

Complaint filed: September 30, 2021

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

2 PLEASE TAKE NOTICE that on July 20, 2022, at 10:00 a.m., in Department S-26 of the
3 San Bernardino County Superior Court, 247 West 3rd Street, San Bernardino, California 92415,
4 pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff
5 Vanessa Murillo (“Plaintiff”) will move the Court for an Order granting preliminary approval of
6 the proposed class action settlement between Plaintiff and Defendant San Bernardino Medical
7 Orthopaedic Group, Inc. dba Arrowhead Orthopaedics. Plaintiff further moves the Court for an
8 Order:

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

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

5
6 Respectfully submitted,

7 Dated: June 27, 2022

WILSHIRE LAW FIRM

8
9 By: _____

Justin F. Marquez

Christina M. Le

Arsiné Grigoryan

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11 Attorneys for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Vanessa Murillo (“Plaintiff”) seeks preliminary approval of a proposed \$1,500,000.00 non-reversionary, wage and hour class action settlement with Defendant San Bernardino Medical Orthopaedic Group, Inc. dba Arrowhead Orthopaedics (“Defendant,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 867 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, Mr. Carl West, 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, afford Plaintiff leave to file a First Amended Class and Representative Action Complaint, 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 and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*)¹ representative action. Plaintiff and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant specializes in full service orthopaedic sub-specialty care in the Inland Empire area of California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours

¹ Prior to the mediation and settlement, the Parties had filed a stipulation on March 24, 2022 to allow Plaintiff to file her First Amended Class and Representative Action to add her PAGA claim, but this stipulation was recently rejected by the Court as it was discovered that not all parties have paid their First Appearance fee. Thus, to address this issue, the Parties stipulate now for settlement purposes that Plaintiff be afforded leave to file a First Amended Class and Representative Action Complaint to add her PAGA claim.

1 worked off the clock by the putative class members. In addition, Plaintiff alleges that Defendant
2 failed to include all remuneration in the employees' overtime rate and meal period premiums.
3 Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal
4 and rest periods. Based on these allegations, Plaintiff asserts claims against Defendant for
5 failure to pay minimum and straight time wages, failure to pay overtime wages, failure to
6 provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final
7 wages at termination, failure to provide accurate itemized wage statements, and unfair business
8 practices, and civil penalties under PAGA. (*Id.* at ¶ 3.) Defendant denies all allegations and
9 contends that its employment practices were at all relevant times compliant with applicable
10 California law.

11 On September 30, 2021, Plaintiff filed a putative wage-and-hour class action complaint
12 against Defendant for: (1) failure to pay minimum and straight time wages; (2) failure to pay
13 overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest
14 periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate
15 itemized wage statements; and (7) violation of California's Unfair Competition Law, California
16 Business and Professions Code §§ 17200, *et seq.* (*Id.* at ¶ 4.) In addition, the Parties stipulate
17 that Plaintiff be afforded leave to file a First Amended Class and Representative Action
18 Complaint, which will add a cause of action for civil penalties under PAGA. (*Id.*)

19 **B. Discovery and Investigation**

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

25 After reviewing the documents regarding Defendant's wage and hour policies and
26 practices and analyzing Defendant's timekeeping and payroll records, Class Counsel was able
27 to evaluate the probability of class certification, success on the merits, and Defendant's
28 maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the

1 applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Class Counsel
2 reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.
3 (*Id.*)

4 C. Settlement Negotiations

5 On April 19, 2021, the Parties participated in private mediation with experienced class
6 action mediator, Hon. Carl J. West (Ret.). (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
7 The settlement negotiations were at arm's length and, although conducted in a professional
8 manner, were adversarial. The Parties went into the mediation willing to explore the potential
9 for a settlement of the dispute, but each side was also prepared to litigate their position through
10 trial and appeal if a settlement had not been reached. (*Id.*)

11 After extensive negotiations and discussions regarding the strengths and weaknesses of
12 Plaintiff's claims and Defendant's defenses, the Parties were able to reach a resolution, the
13 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. 1
14 [Joint Stipulation of Class Action and PAGA Settlement and Release ("Settlement" or
15 "Settlement Agreement")].)

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

22 Indeed, the \$1,500,000.00 Settlement represents **62% of the realistic maximum**
23 **recovery of \$2,436,530.00.** (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendant's
24 maximum potential liability for all claims was approximately \$14.2 million, when the risk of
25 prevailing at certification and trial are factored into the equation, Class Counsel believes that
26 Defendant's realistic exposure was \$2,436,530.00, meaning the Settlement achieves a
27 significant recovery. (*Id.* at ¶¶ 16-23.) Considering the risk and uncertainty of prevailing at
28 class certification and at trial, this is an excellent result for the Class. Indeed, because of the

proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

D. Key Terms of the Proposed Settlement

Under the Settlement, Defendant will pay \$1,500,000.00 to resolve this Litigation. This amount is all-inclusive. The Settlement's key terms include:

1. Settlement Class: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period (together, collectively referred to as the "Class Members")." (Settlement, § I (R).)

2. Settlement Period: The Settlement Period means the period from April 5, 2017 through June 18, 2022. (Settlement, § I (S).)

3. Participating Class Members: Participating Class Members means all Class Members who do not submit a valid and timely request to exclude themselves from the Settlement. (Settlement, § I (L).)

4. Participating PAGA Members: Participating PAGA Members means all Class Members, as that term is defined in Section I.R of the Settlement Agreement, who worked for Defendant from April 5, 2020 through June 18, 2022. (Settlement, § I (M).)

5. Gross Settlement Amount: This amount is \$1,500,000.00, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the Labor and Workforce Development Agency ("LWDA") for the alleged PAGA penalties, all other penalties, and the Class Representative Service Award. (Settlement, § I (Q).)

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

1 at Work. (Settlement, § 2.8.)

2 7. Release as to All Settlement Class Members: The class release is limited to “any
3 and claims that were alleged in the Litigation or which could have been alleged in the Litigation
4 based on the facts asserted in the Litigation arising during the Settlement Period against Defendant,
5 and its divisions, affiliates, predecessors, successors, shareholders, members, managers, officers,
6 directors, employees, agents, trustees, representatives, administrators, fiduciaries, assigns,
7 subrogees, executors, partners, parents, subsidiaries, joint employers, insurers, and related
8 corporations, including but not limited to the following claims: (1) all claims alleged in the
9 operative complaint, under any legal theory of liability, for the failure to pay all wages of any kind,
10 including any minimum or straight time wages, owed pursuant to California Labor Code §§ 204,
11 510, 1194, 1194.2, and 1197, the California Industrial Welfare Commission (“IWC”) Wage Orders,
12 or any comparable federal statute under any theory of liability; (2) all claims alleged in the
13 operative complaint, under any legal theory of liability, for the failure to pay overtime or double
14 time wages owed pursuant to California Labor Code §§ 204, 510, 1194, and 1198, the IWC Wage
15 Orders, or any comparable federal statute under any theory of liability; (3) all claims alleged in the
16 operative complaint, under any legal theory of liability, for the failure to provide meal periods
17 pursuant to California Labor Code §§ 226.7 and 512, and the IWC Wage Orders; (4) all claims
18 alleged in the operative complaint, under any legal theory of liability, for the failure to provide rest
19 periods pursuant to California Labor Code § 226.7, and the IWC Wage Orders; (5) all claims
20 alleged in the operative complaint, under any legal theory of liability, for the failure to properly
21 calculate any premiums owed and/or paid pursuant to California Labor Code § 226.7(b); (6) all
22 claims alleged in the operative complaint, under any legal theory of liability, for any penalties of
23 any kind arising from an alleged failure to pay final wages or other amounts allegedly owed to Class
24 Members pursuant to California Labor Code §§ 201-203; (7) all claims alleged in the operative
25 complaint, under any legal theory of liability, for any penalties of any kind arising from an alleged
26 wage statement violation pursuant to California Labor Code §§ 226 and 1174.5; (8) all claims
27 alleged in the operative complaint, under any legal theory of liability, for failure to indemnify
28 employees for expenditures pursuant to California Labor Code § 2802; (9) all claims alleged in the

operative complaint, under any legal theory of liability, for violation of Business & Professions Code §§ 17200, *et seq.*; (10) all claims alleged in the operative complaint and Plaintiff's PAGA letter, under any legal theory of liability, for penalties pursuant to the PAGA (Labor Code §§ 2698, *et seq.*); and (11) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties or any other amounts that could be potentially owed to Class Members during the Settlement Period, including penalties owed pursuant to California Labor Code §§ 210, 226.3, 558, and 1197.1." (Settlement, § VIII (A).) This Release will be deemed effective upon the date the Court's Final Approval Order becomes "Final" (as that term is defined in the Settlement Agreement, § I (E)). (Settlement, § VIII (A).)

8. PAGA Allocation: The settlement includes \$30,000.00 allocated to Plaintiff's claims under PAGA, with 75% of which (\$22,500.00) being paid to the LWDA and 25% (\$7,500.00) being paid to the Participating PAGA Members. (Settlement, § XVII.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

9. 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, § I (K).)

10. 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 Section D (7), above, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section XII of the Settlement Agreement.

11. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 20% wages, 40% penalties, and 40% interest. (Settlement, § XVI.) The tax allocation breakdown comports with Plaintiff's *Kullar* analysis, as detailed in Justin F. Marquez's Declaration. (Marquez Decl., ¶¶ 18-24; *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 128.)

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

8 13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
9 a fee application of up to 33 1/3% (\$500,000.00) of the Gross Settlement Amount, plus out-of-
10 pocket costs not to exceed \$25,000.00. (Settlement, § XIV.) At this time, Class Counsel's costs
11 are approximately \$12,213.36. (Marquez Decl., ¶ 38.)

12 14. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
13 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
14 fees, costs, and service award being sought, and an explanation of how the settlement allocations
15 are calculated. (Settlement, Ex. A.) The Notice also includes an opt-out form that class members
16 can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members
17 will be notified by first-class mail of the settlement. (Settlement, § X (C).) Simpluris, the proposed
18 Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the
19 current addresses of class members, including conducting a national change of address search and
20 re-mailing the notice to updated addresses. (*Id.*) (Marquez Decl., ¶ 11; Ex. 2 [Settlement
21 Administrator Bid].)

22 **III. DISCUSSION**

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

1 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

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

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

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

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

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

1 The Settlement was reached following extensive negotiations following a full day of
2 mediation with experienced employment mediator, Hon. Carl J. West (Ret.). (Marquez Decl., ¶¶
3 7-8.) The settlement negotiations were at arm's length and, although conducted in a professional
4 manner, were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential
5 for a settlement of the dispute, but each side was also prepared to litigate their or its position
6 through trial and appeal if a settlement had not been reached. (*Id.*)

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

17 Class Counsel also has considerable experience and has demonstrated competence with
18 litigating wage and hour class actions. (*Id.* at ¶¶ 39-49.) Again, this supports the position that the
19 terms of the Settlement are premised on objective evidence that has been considered and weighed
20 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
21 action.

22 **2. The Settlement Is Fair and Reasonable in Light of the Parties'** 23 **Respective Legal Positions**

24 A settlement is not judged against what might Plaintiff recover had he prevailed at trial, nor
25 does the settlement have to provide 100% of the damages sought to be fair and reasonable.
26 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 ["Compromise is inherent
27 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
28 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar

1 to a class settlement because the public interest may indeed be served by a voluntary settlement in
2 which each side gives ground in the interest of avoiding litigation.”].)

3 This settlement avoids the risks and the accompanying expense of further litigation.
4 (Marquez Decl., ¶ 25.) While Plaintiff is confident in the merits of his claims, a legitimate
5 controversy exists as to each cause of action. (*Id.* at ¶ 24.) Plaintiff also recognizes that proving
6 the amount of wages due to each class member would be an expensive, time-consuming, and
7 uncertain proposition. (*Id.*)

8 The proposed settlement of \$1,500,000.00 therefore represents a substantial recovery when
9 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 15-27.) Because of the proposed
10 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
11 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
12 achieving class certification, the burdens of proof necessary to establish liability, the probability
13 of appeal of a favorable judgment, it is clear that the settlement amount of \$1,500,000.00 is within
14 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
15 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
16 ***\$1,066.90.*** (*Id.* at ¶ 26.)

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

18 The settlement negotiations were conducted by highly capable and experienced counsel.
19 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
20 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 39-
21 49.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,
22 they support the proposed Settlement as being in the best interests of the class.

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

24 The Notice of Proposed Class Action Settlement, in the form attached to the Settlement
25 Agreement as Exhibit A, should be approved for dissemination to the class. The Notice informs
26 the class of the terms of the settlement and of their rights to be excluded from the settlement. And
27 if there are class members who wish to object to this proposed class action settlement, they will
28 have the opportunity to file their objections and be heard at the Final Approval Hearing.

1 Accordingly, the proposed Notice meets all the requirements of Rule 3.769(f) of the California
2 Rules of Court.

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

4 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
5 Counsel reasonable attorneys' fees in amount of \$500,000.00, which is 33 1/3% of the gross
6 Settlement Amount, and up to \$25,000.00 in costs. These amounts are disclosed to all class
7 members in the Notice of Proposed Class Action Settlement and are reasonable.

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

10 California courts have long awarded attorneys' fees as a percentage of the benefit created
11 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when
12 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
13 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
14 or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d
15 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

16 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common
17 fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all
18 the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*,
19 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
20 Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund
21 from which others derive benefits may require those passive beneficiaries to bear a fair share of
22 the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
23 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
24 has been applied "consistently in California when an action brought by one party creates a fund in
25 which other persons are entitled to share." (*Id.* at p. 110.)

26 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc.* (2016)
27 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the
28 class members, and the trial court in its equitable powers awards class counsel a fee out of that

1 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
2 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages
3 of the percentage method—including relative ease of calculation, alignment of incentives between
4 counsel and the class, a better approximation of market conditions in a contingency case, and the
5 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
6 the litigation—convince us the percentage method is a valuable tool that should not be denied our
7 trial courts.” (*Id.* [internal citations omitted].)

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

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

19 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
20 is in line with the prevailing guidelines established in California case law and academic literature
21 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
22 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
23 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)
24 Accordingly, Plaintiff respectfully requests that the Court approve the attorneys’ fees as negotiated
25 by the Parties and requested herein.

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

27 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
28 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this

1 section, Plaintiff would be permitted to recover his actual attorneys' fees, even if those fees were
2 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
3 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
4 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
5 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
6 Counsel. (Marquez Decl., ¶¶ 33-38.) Class Counsel undertook this matter solely on a contingent
7 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the
8 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
9 ahead of all other concerns.

10 **4. The Experience, Reputation and Ability of Class Counsel Support the** 11 **Requested Fee Award**

12 As demonstrated by their past experience in pursuing class actions on behalf of consumers
13 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
14 Decl., ¶¶ 39-49.) Class Counsel has been involved as lead counsel or co-counsel in several class
15 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
16 counsel commensurate with their skill, reputation and experience, Class Counsel's requested fee
17 award is supported here.

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

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

26 Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to
27 compensate them for the expense or risk they have incurred in conferring a benefit on other
28 members of the class." (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval

1 of class action settlement agreements containing enhancements for the class representatives, which
2 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
3 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir.
4 2009) 563 F.3d 948, 958-59.)

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

15 Under the Settlement Agreement, subject to the Court’s approval, Defendant agreed to pay
16 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for
17 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
18 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
19 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class
20 Counsel during the mediation. (Marquez Decl., ¶¶ 28-32; Declaration of Vanessa Murillo in
21 Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Murillo
22 Decl.”], ¶¶ 4-9.) This amount is reasonable particularly in light of the substantial benefits Plaintiff
23 generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation,*
24 *et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez helped negotiate a \$2.5
25 million class action settlement for 339 class members, and the court approved a \$25,000.00 class
26 representative incentive award for each named plaintiff. (Marquez Decl., ¶ 32)

27 When compared with the amounts awarded in typical class action cases, the amount
28 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive

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

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

A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican Workers*, 904 F.2d at 1308.)

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

Here, under the terms of the Settlement Agreement, in the event settlement checks remained uncashed for 180 days, those funds shall be donated to Legal Aid at Work (located at 180 Montgomery Street, Suite 600, San Francisco, CA 94104) as a *cy pres* beneficiary. (Settlement, § XII (C)(2).) Legal Aid at Work is a 501(c)(3) non-profit organization located in San Francisco, California. Legal Aid at Work provides essential public services which directly relate to the

1 objective and purposes of this matter. “Legal Aid at Work is a non-profit legal services
2 organization that has been assisting low-income, working families for more than 100 year.”² Legal
3 Aid at work provides free clinics and helplines, free legal information, assists in litigation which
4 “enforces and strengthens the civil and employment rights of low wage workers in California,” and
5 works on policy advocacy to “strengthen civil and workplace rights at the local, state and federal
6 level.”³

7 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED**

8 **A. Legal Standard**

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

24 California law and policy favor the fullest and most flexible use of the class action device.
25 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
26

27 ² See “Our Mission and How We Work,” accessed June 24, 2022, located at
<https://legalaidatwork.org/our-mission-and-how-we-work/>

28 ³ *Id.*

means to prevent a failure of justice in our judicial system” particularly where the rights of consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434.) Any doubt as to the appropriateness of class treatment should be resolved in favor of certification. (*Richmond, supra*, 29 Cal.3d at pp. 473-75.)

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

1. The Class is Ascertainable and Numerous

Plaintiff contends that the proposed class that Plaintiff seeks to represent is easily ascertainable, and includes approximately 867 employees of Defendant.

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

“The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 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.*) “No set number is required as a matter of law for the maintenance of a class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore, Plaintiff contends that numerosity is plainly satisfied.

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

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

1 Cal.App.3d 605.)

2 Here, the alleged employment practices at issue are: whether Defendant had legally
3 compliant policies and practices for all hours worked, including overtime wages; whether
4 Defendant had legally compliant policies and practices to provide employees with meal periods;
5 whether Defendant had legally compliant policies and practices authorizing and permitting its
6 employees to take rest periods; whether final payment of wages was untimely and excluded unpaid
7 wages, including meal period premium and rest period premium wages; whether the wage
8 statements were consequently non-compliant; and whether Defendant adequately reimbursed
9 employees for business expenditures. Plaintiff contends that the factual and legal issues are the
10 same for all of the identified class members, including Plaintiff. Further, all class members are
11 alleged to have suffered from, and seek redress for, the same alleged injuries. Defendant denies
12 all allegations.

13 **3. Plaintiff's Claims Are Typical of the Claims of the Class**

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

24 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

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

1 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
2 with extensive experience in prosecuting complex class actions, including similar class actions that
3 previously settled. (Marquez Decl., ¶¶ 39-49.) Class Counsel unquestionably is “qualified,
4 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148
5 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
6 litigated this case and diligently reviewed the settlement terms, showing their dedication.
7 Plaintiff’s willingness to serve as a representative demonstrates his serious commitment to bringing
8 about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

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

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

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

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

1 direct mailing, the best possible form of notice.

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

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

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

17 **VI. CONCLUSION**

18 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
19 approval of the proposed Settlement and set a Final Approval Hearing on November 18, 2022
20 (with the deadline to file the Motion on October 26, 2022), or the first available date thereafter.

21
22 Respectfully submitted,

23 Dated: June 27, 2022

WILSHIRE LAW FIRM

24 By: 
25 Justin F. Marquez
26 Christina M. Le
27 Arsiné Grigoryan
28 Attorneys for Plaintiff

Murillo v. San Bernardino Medical Orthopedic Group, Inc., et al.
CIVSB2128071

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

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(X) **BY MAIL:** I enclosed the above documents in a sealed envelope with postage thereon fully prepaid and placed for collection and mailing on the above date in accordance with ordinary business practices. I am readily familiar with this firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service the same day in the ordinary course of business pursuant to Cal. Code Civ. Proc. § 1013(a).

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

Executed on **June 27, 2022**, at Los Angeles, California.


Sandy S. Sespene