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Individually and on behalf of all similarly
situated individuals

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

DESTINEE NICOLE ROBINSON-MOORE,
individually and on behalf of all similarly
situated individuals,

Plaintiff,

vs.

MEDIA ALL STARS, INC., a California
Corporation, and DOES 1 to 100,

Defendants.

Case No. 37-2021-00050573-CU-OE-CTL

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

Date: February 3, 2023
Time: 9:00 a.m.
Dept.: C-60

Complaint Filed: December 2, 2021
Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on February 3, 2023, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Matthew C. Braner, judge
4 presiding, in Department C-60 of the above referenced Court, located at 1100 Union Street,
5 San Diego, California 92101, Plaintiff DESTINEE NICOLE ROBINSON-MOORE
6 (“Plaintiff”) will and hereby does move this Court for the following relief with respect to the
7 Class Action and PAGA Settlement Agreement (“Settlement” or “Settlement Agreement”)
8 entered into by Plaintiff and Defendants MEDIA ALL STARS, INC., (together, “Defendants”)
9 (collectively with Plaintiff, the “Parties”):

10 1. That the Court Preliminarily approve the Settlement Agreement referenced
11 above;

12 2. That the Court conditionally certify the following class for settlement purposes
13 only: all individuals who worked for Defendants as non-exempt, hourly-paid employees from
14 December 16, 2017 to the date of preliminary approval (the “Class”);

15 3. That Plaintiff be appointed as the Class Representative and Manny Starr,
16 Theodore Tang, and Dan Ginzburg of Frontier Law Center, APC, be appointed as Class
17 Counsel;

18 4. That the Court preliminarily approve the Settlement Agreement and the total
19 Gross Settlement Amount of One Hundred Eighty-Five Thousand Dollars (\$185,000.00);

20 5. That the Court finds on a preliminary basis that the Settlement Agreement
21 appears to be within the range of reasonableness of a settlement, including the amount of the
22 PAGA penalties, the enhancement payment to the Class Representative, Class Counsel award
23 of attorneys’ fees and litigation costs, settlement administration costs, and the allocation of
24 individual settlement payments to Class Members, that could ultimately be given final
25 approval by this Court;

26 6. That the Court approve the mailing of the proposed Notice of Class Action
27 Settlement to be sent to Class Members;

28 7. That the Court appoint Phoenix Settlement Administrators as the Settlement

1 Administrator; and

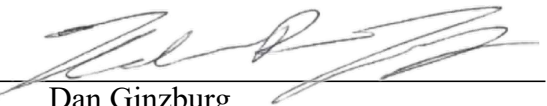
2 8. That the Court schedule the matter for a Final Fairness and Final Approval
3 hearing.

4 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
5 provides for court approval of the settlement of a purported class action and allows the Court
6 to preliminarily certify a class for settlement purposes.

7 The basis for this unopposed Motion is that the proposed settlement is fair, adequate,
8 and reasonable, and the procedures proposed by the Parties are adequate to ensure the
9 opportunity of Class Members to participate in, opt-out of, or object to the settlement. This
10 Motion is based on the attached Memorandum of Points and Authorities, the Settlement
11 Agreement and the proposed Class Notice, and the supporting Declarations of Theodore Tang,
12 Manny Starr, Dan Ginzburg, and Plaintiff Destinee Nicole Robinson-Moore, upon the oral
13 arguments of counsel (should there be any), and on the complete records and file herein.

14
15 DATED: January 9, 2023

FRONTIER LAW CENTER, APC

16
17 By: 

Dan Ginzburg
Theodore Tang
Manny Starr

Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code.
4 Plaintiff Destinee Nicole Robinson-Moore (“Plaintiff”) alleges that Defendants Media All
5 Stars, Inc. (“Defendants”) failed to provide compliant rest breaks, failed to pay minimum
6 wages for all hours worked, failed to pay overtime, failed to pay sick time wages, failed to pay
7 all wages due on time, failed to provide accurate itemized wage statements, and breached
8 contracts. Based on these violations, Plaintiff asserts class and PAGA claims under Labor
9 Code §§ 201, 202, 203, 204, 226, 226.7, 233, 246, 510, 512, 558, 1194, 1194.2, 1197.1, and
10 2699. The Parties have reached a class action settlement, the terms of which are reflected in
11 the Parties’ Class Action and PAGA Settlement Agreement (“Settlement” or “Settlement
12 Agreement”).

13 Prior to the settlement of this action, the Parties thoroughly investigated the facts
14 relating to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study
15 of the legal principles applicable to the claims asserted against Defendants. Through the
16 exchange of formal and informal discovery, Defendants provided necessary data pertaining to
17 the number of putative class members, the number of pay periods at issue, the hourly rates of
18 pay for the putative class, as well as documents and information pertaining to Defendants’
19 policies and practices at issue. The information provided by Defendants allowed Plaintiff to
20 review and analyze the liability and potential exposure. Thereafter, the Parties engaged in
21 arm’s-length settlement discussions which resulted in the current settlement.

22 The terms of the Settlement Agreement provide that Defendants pay a Gross
23 Settlement Amount of One Hundred Eighty-Five Thousand Dollars (\$185,000.00) to resolve
24 the class and PAGA claims in this case. Significantly, this is a **non-reversionary settlement**,
25 meaning that the entirety of the Gross Settlement Amount will be distributed to the class, such
26 that **no remaining monies will revert to Defendants**. Further, no claim forms are required.
27 The following represents the key terms of the Settlement:

- 28
 - Gross Settlement Amount of \$185,000.00;

- Estimated class size of 107 individuals in the Class;
- Enhancement Payment to the Class Representative of up to \$7,500.00;
- Class Counsel’s attorneys’ fees of one-third of the Gross Settlement Amount, up to \$61,050.00;
- Class Counsel’s costs associated with prosecution and resolution of this action of up to \$10,000.00;
- Settlement administration costs of up to \$6,500.00;
- Payment to the Labor and Workforce Development Agency of \$13,500.00, representing 75% of the total PAGA allocation of \$18,000.00;
- Net Settlement Amount of approximately \$86,450.00, which will be equally apportioned among the Class Members; and
- Raw average of approximately **\$807.94** to each Participating Class Member.

The Parties and their respective counsel believe that the Settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that the classes might not be certified and/or that Plaintiff could fail to establish liability.

Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On December 2, 2021, Plaintiff filed her written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201, 202, 203, 204, 226, and 246 and pursuant to the PAGA, Labor Code § 2699. Declaration of Manny Starr (“Starr Decl.”) ¶ 4. That same day, Plaintiff filed her complaint against Defendants in the Superior Court of California, County of San Diego. Starr Decl. ¶ 5. The complaint alleged causes of action for Breach of Contract, Rest Period Violations, Waiting Time Penalties, Wage Statement Penalties, Failure to Pay Sick Pay at the Regular Rate, and Violation of the Unfair

1 Competition Law. *Id.* On January 28, 2022 Plaintiff filed a First Amended Complaint for
2 Failure to Provide Compliant Rest Periods, Failure to Pay Minimum Wage for All Hours
3 Worked, Failure to Pay Overtime, Unpaid Sick Time Wages, Waiting Time Penalties, Wage
4 Statement Penalties, Violation of Unfair Competition Law, Private Attorneys General Act, and
5 Breach of Contract. On February 17, 2022, Plaintiff filed a Second Amended Complaint,
6 which is the operative complaint in this action (the “Complaint”). *Id.*

7 Plaintiff’s class and PAGA claims as pled in the Complaint are predicated upon the
8 following allegations. Plaintiff contends that Defendants encouraged employees to give up
9 their rest breaks to meet company goals, used a rounding policy in conjunction with a strict
10 attendance policy, and failed to correctly include bonuses and other non-discretionary pay into
11 employee’s “regular rate” for purposes of sick pay, overtime pay, and any meal or rest break
12 premiums paid. As a result of the alleged violations above, Plaintiff seeks unpaid wages,
13 break premium pay, waiting time penalties, wage statement penalties, restitution, statutory and
14 civil penalties under the California Labor Code and the PAGA, as well as attorneys’ fees and
15 costs. Starr Decl. ¶ 6.

16 After the filing of the Complaint, the Parties began the exchange of formal written
17 discovery. Starr Decl. ¶ 7. During the course of discovery, the Parties discussed the
18 possibility of informal resolution of the litigation. *Id.* In connection with the settlement
19 discussions, the Parties engaged in informal discovery to allow Plaintiff to assess the claims
20 and liability, as well as analyze the maximum exposure of damages and penalties. *Id.*
21 Defendants provided Plaintiff’s counsel with informal data and information pertaining to the
22 number of putative class members, the number of pay periods at issue, the hourly rates of pay
23 for the putative class, as well as documents and information pertaining to Defendant’s policies
24 and practices. *Id.* Based on the data provided by Defendants, Plaintiff’s counsel conducted an
25 analysis of liability and potential maximum exposure for the class and PAGA penalties. *Id.*
26 ¶¶8-9.

27 After thorough investigation and evaluation of the facts and claims, and as a result of
28 the arm’s-length negotiations, the Parties and their counsel ultimately reached the current

1 settlement. Starr Decl. ¶ 10. In resolution of Plaintiff's class and PAGA claims in this
2 lawsuit, the Parties entered into the Settlement Agreement, a true and correct copy of which is
3 attached as **Exhibit A** to the Declaration of Manny Starr. *Id.*

4 The Parties recognize the risk, expense, and delay in continuing litigation with the
5 class and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. Starr
6 Decl. ¶ 15. Accordingly, the Parties desire to settle, compromise, and discharge all disputes
7 and claims arising from or relating to the class and PAGA claims as set forth in the Settlement
8 Agreement.

9 **III. DISCUSSION**

10 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
11 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
12 review after notice has been distributed to the class members for their comment or objections.
13 The *Manual for Complex Litigation, Third* § 30.41 states:

14 Approval of class action settlements involves a two-step process.
15 First, counsel submits the proposed terms of settlement and the court
16 makes a preliminary fairness evaluation. If the preliminary
17 evaluation of the proposed settlement does not disclose grounds to
18 doubt its fairness or other obvious deficiencies, such as unduly
19 preferential treatment of class representatives or of segments of the
20 class, or excessive compensation for attorneys, and appears to fall
21 within the range of possible approval, the court should direct that
22 notice...be given to the class members of a formal fairness hearing,
23 at which arguments and evidence may be presented in support of
24 and in opposition to the settlement.

25 (Fed. Jud. Ctr., 3rd ed. 1995).

26 Thus, the preliminary approval by the trial court is simply a conditional finding that the
27 settlement appears to be within the range of acceptable settlements. As Professor Newberg
28 comments, "[t]he strength of the findings made by a judge at a preliminary hearing or
conference concerning a tentative settlement proposal may vary. The court may find that the
settlement proposal contains some merit, is within the range of reasonableness required for a
settlement offer, or is presumptively valid subject only to any objections that may be raised at
a final hearing." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th

1 ed. 2002).

2 The procedures for the parties' submission of a proposed settlement for preliminary
3 approval by the court also are discussed in 4 *Newberg on Class Actions*:

4 When the parties to an action reach a monetary settlement, they will
5 usually prepare and execute a joint Settlement Agreement of
6 settlement, which is submitted to the court for preliminary approval.
7 The Settlement Agreement should set forth the central terms of the
8 agreement, including but not limited to, the amount of settlement,
9 form of payment, manner of determining the effective date of
10 settlement and any recapture clause.

11 *Id.* § 11.24.

12 Here, the Parties have reached such an agreement and have submitted to this Court in
13 connection with this Motion a copy of the Settlement Agreement fully setting forth the
14 agreement reached by the Parties. The Settlement Agreement sets forth all terms of the
15 agreement reached by the Parties as to settlement of the class and PAGA claims. Said terms in
16 the Settlement Agreement include, among other things, the method for calculating the Class
17 Members' individual portions of the settlement payment.

18 The parties also may, at the preliminary approval stage, request that the court
19 provisionally approve certification of the class for settlement purposes—conditional upon final
20 approval of the settlement. “[P]re-certification settlements are routinely approved if found to
21 be fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001);
22 *accord Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement
23 was reached before any “adversary certification,” the court was satisfied that it was “fair,
24 adequate and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984)
25 (“many courts have employed this practice in the name of judicial efficiency in order to
26 facilitate apparently beneficial settlement proposals”). As further explained by Professor
27 Newberg:

28 The strength of the findings made by a judge at a preliminary
hearing or conference concerning a tentative settlement
proposal...may be set out in conditional orders granting tentative
approval to the various items submitted to the court. Three basic
rulings are often conditionally entered at this preliminary hearing.
These conditional rulings may approve a temporary settlement class,
the proposed settlement, and the class counsel's application for fees

1 and expenses.

2 4 *Newberg on Class Actions* § 11.26.

3 In addition to such terms as class identification, settlement amount, and payment
4 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
5 which the Parties stipulate to the Court's provisional certification of the Class for the purposes
6 of this settlement only. *See* Settlement Agreement ¶13.1.

7 **A. Proposed Class Definition**

8 The current settlement is being settled on behalf of the following class: all individuals
9 who worked as non-exempt, hourly-paid employees employed by Defendant during the Class
10 Period. The Class Period is defined as the period from December 16, 2017 to the date of
11 preliminary approval of the settlement. Pursuant to the Settlement Agreement, Defendants
12 have represented that there are 107 individuals that comprise the Class. *Id.*

13 **B. Settlement Terms and Evaluation**

14 Courts presume the absence of fraud or collusion in the negotiation of settlement
15 unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir.
16 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th
17 Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do
18 not substitute their judgment for that of the proponents, particularly where, as here, settlement
19 has been reached with the participation of experienced counsel familiar with the litigation.
20 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004);
21 *Hammon v. Barry*, 752 F.Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471
22 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979);
23 *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

24 While the recommendations of counsel proposing the settlement are not conclusive, the
25 Court can properly take them into account, particularly where, as here, they have been
26 involved in informal discovery and negotiations for some period of time, appear to be
27 competent, have experience with this type of litigation, and have exchanged substantial
28 evidence from the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural*

1 *Telecomms. Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length
2 negotiation process is preserved, however, a strong initial presumption of fairness attaches to
3 the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of
4 counsel, who are most closely acquainted with the facts of the underlying litigation”).

5 Here, both Plaintiff’s and Defendants’ counsel have a great deal of experience in wage
6 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
7 number of wage and hour class actions and have extensive litigation experience. Declaration
8 of Theodore Tang (“Tang Decl.”) ¶¶ 6-8 ; Declaration of Dan Ginzburg (“Ginzburg Decl.”) ¶
9 ____; Starr Decl. ¶ 14. Each side has apprised the other of their respective factual contentions,
10 legal theories, and defenses, resulting in negotiations taking place between the Parties. Starr
11 Decl. ¶¶ 7-9,15 .

12 Based on the class data provided by Defendants, Plaintiff estimated that Defendants
13 would face potential liability of up to approximately \$703,543 for Plaintiff’s class claims if
14 Plaintiff succeeded at trial. Starr Decl. ¶ 9. Plaintiff was able to estimate the potential class
15 penalties based on data provided by Defendants, including the number of employees in the
16 putative class and the average hourly rates of pay applicable to the putative class members. *Id.*
17 ¶ 8. Specifically, Plaintiff calculated waiting time penalties under Labor Code § 203 based on
18 107 putative class members and their average hourly rates of pay. *Id.*

19 With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that
20 Defendants could face civil penalties of up to a maximum of \$288,965 if Plaintiff were to
21 succeed at trial. Starr Decl. ¶ 9. However, even assuming that Plaintiff ultimately prevails on
22 her PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to
23 Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on
24 the facts and circumstances of the particular case, to do otherwise, would result in an award
25 that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of
26 Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the
27 plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA
28 penalty amount by 90%, citing the employer’s good faith attempt at complying with the law.

1 *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.

2 Although Plaintiff believes in the merits of the alleged claims and maintains that there
3 is no reason for reducing PAGA penalties, Plaintiff is aware that Defendants may raise
4 defenses to the claims and further with respect to the reduction of PAGA penalties and that
5 they could be persuasive to the Court. Starr Decl. ¶ 15. Thus, even if Plaintiff were to
6 successfully prove her claims at trial, there is a possibility that the Court may only award a
7 small percentage of PAGA penalties, as the Court has discretion to do so. The Gross
8 Settlement Amount was premised with this risk in mind, associated with the possibility of the
9 Court significantly reducing Plaintiff's PAGA penalties, along with other attendant risks, even
10 if Plaintiff was to prevail at trial. *Id.*

11 Further, Defendants raised several defenses that presented risk. First, Defendant
12 contends that the dialing systems that its employees use, which is the primary role of their job,
13 automatically shut off outside working hours, including breaks, and making pre-and post-shift
14 work impossible. Defendants also contend that they have an employee handbook which they
15 distribute to their employees which contains printed meal and rest break policies that are
16 facially compliant with California law. Defendants claim therefore that, even if off the clock
17 work was possible, it could not have been due to a policy or practice giving rise to a class
18 action. Thus, while Plaintiff believes that a class can be certified, there is a possibility that the
19 Court will not grant class certification here.

20 Thus, the Settlement for each Class Member is fair, reasonable, and adequate, given
21 the inherent risks of litigation, including the substantial risks relative to class certification and
22 the merits of the claims, the costs of pursuing such litigation, and the risks associated with the
23 Court's discretion to reduce PAGA penalties. The Settlement is the result of extensive arm's-
24 length negotiations between the Parties and their counsel.

25 Although Plaintiff believes that the class can be certified, Plaintiff also believes in the
26 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
27 involved in not prevailing on one or more of the causes of action or theories alleged in the
28 operative Complaint, the possibility of non-certification, and the potential for appeals. Starr

Decl. ¶ 15. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded back to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

Indeed, numerous courts have held that **gross** settlements approximating between only 8 and 25 percent of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16 percent of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the settlement is fair and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between **8.5 percent and 25 percent** of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1 percent** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15 percent of the potential recovery was fair and reasonable).

Here, the total amount of class and PAGA penalties amount to approximately \$992,508, without discounting for a potential loss on any of the causes of action. Starr Decl. ¶ 9. The Gross Settlement Amount is \$185,000.00, which is approximately **18.64%** of the maximum class and PAGA penalties. *Id.* Thus, the settlement was negotiated at arm's-length and the high settlement percentage-to-recovery further supports that the settlement is fair and reasonable.

1 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
2 Action Settlement (“Class Notice”), should any Class Member wish to pursue his or her own
3 case for the claims being released herein, each Class Member has the right to submit a request
4 for exclusion (*i.e.*, opt-out) from the settlement. *See* Class Notice, attached as **Exhibit A** to
5 the Settlement Agreement. Moreover, as set forth in the Class Notice, Class Members are
6 advised of their right to object to any of the terms contained in the Settlement Agreement and
7 attend the final approval hearing. *Id.*

8 **1. Amount and Manner of Distribution of the Compensation to be**
9 **Provided to Class Members Including the Amount, or an Estimate,**
10 **of What Each Class Member Will Receive**

11 The Settlement Agreement provides for One Hundred Eighty-Five Thousand Dollars
12 (\$185,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ 3.1. The Net
13 Settlement Amount, calculated after deduction of attorneys’ fees (up to \$61,050.00), litigation
14 costs (up to \$10,000.00), the enhancement payment to the Class Representative (up to
15 \$7,500.00), payment to the LWDA for PAGA penalties (\$13,500.00), and settlement
16 administration costs (up to \$6,500.00), is estimated to be approximately **\$86,450.00**. *Id.* § 3.

17 Pursuant to the Settlement Agreement, the Net Settlement Amount will be apportioned
18 among the Class Members according to the number of workweeks worked. Settlement
19 Agreement ¶ 3.2.4. Based thereon, on a raw average, each Class Member may potentially
20 recover approximately **\$807.94**. Starr Decl. ¶ 15. The amount actually paid to each Class
21 Member may increase depending on the number of opt-outs received. *Id.*

22 Finally, the terms of the Settlement provide that uncashed settlement payment checks
23 (upon the expiration date) shall be donated to the *cy pres* organization Legal Aid at Work.
24 Settlement Agreement ¶ 4.4.3.

25 **2. Whether, and Under What Circumstances, Amounts Available for**
26 **Payment in Settlement Might Not Be Paid to Class Members or**
27 **Might Revert to the Defendants**

28 This Settlement is **non-reversionary**, meaning that none of the settlement funds will
revert back to Defendants. Settlement Agreement ¶ 4.4.3.

///

1 **3. Scope of the Release of Class Members' Claims**

2 As a condition of participating in this Settlement, Class Members who are Not
3 Aggrieved Employees who do not opt out of the Settlement will provide a limited release of (i)
4 all claims that were alleged, or reasonably could have been alleged, based on the Class Period
5 facts stated in the Operative Complaint. Settlement Agreement ¶ 6.2. In addition, the
6 Aggrieved Employees who are not participating Class Members will release all claims for
7 PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA
8 Period facts stated in the Operative Complaint, and the PAGA Notice.

9 Given that the release is tailored to only claims pled in the operative Complaint and/or
10 PAGA notice, the release is appropriately limited.

11 **4. Tax Treatment of Settlement Amounts**

12 As this lawsuit seeks both wages and statutory and civil penalties as recovery, the
13 Parties have agreed that 33 1/3% of each individual settlement payment to Participating Class
14 Members shall be treated as wages reported by IRS Forms W-2 and 66 2/3% shall be treated
15 as a payment in settlement of claims for penalties and interest and shall be reported by IRS
16 Forms 1099. Settlement Agreement ¶ 3.2.4.1.

17 **5. Affirmative Obligations to be Undertaken by Class Members or Class**
18 **Counsel and the Reasons for Any Such Obligations**

19 As stated above, Class Members do **not** need to do anything should they wish to
20 receive their share of the settlement funds. In other words, because this is not a claims-made
21 settlement, Class Members will not be required to make a submission to participate in the
22 settlement. No claim forms are required. Thus, this substantially decreases the amount of
23 burden each Class Member must bear in order to receive their share of the settlement funds.

24 However, if a Class Member does not wish to take part in this Settlement or be bound
25 by the Class Release, he or she must submit a request for exclusion. Settlement Agreement ¶
26 8.5.1. Class Members who are Aggrieved Employees may not opt out of the PAGA release,
27 and will receive a PAGA payment even if they Opt-Out. Settlement ¶ 8.5.4

28 ///

1 **C. Notice to Class Members**

2 Should the Court grant the instant motion, Defendants will provide the Settlement
3 Administrator with a list containing each Class Member's full name, most recent mailing
4 address, SSN, and number of Class Period Workweeks and PAGA Periods ("Class List").
5 Settlement Agreement ¶ 1.8.

6 Pursuant to the Settlement Agreement, Defendants will provide said Class List within
7 thirty (30) days of preliminary approval. *Id.* Within three (3) days of receipt of the Class List
8 from Defendants, the Settlement Administrator will provide to Class Counsel a confirmation
9 of receipt of the class data and state the number of Class Members, PAGA Members,
10 Workweeks, and Pay Periods in the Data. Settlement ¶ 8.4.1. Within fourteen (14) days
11 following receipt of the Class Data, the Settlement Administrator will mail the Class Notice to
12 Class Members via regular First-Class U.S. mail. *Id.* ¶ 8.4.2. Class Notices that are returned
13 as undeliverable shall be re-mailed to the forwarding address indicated. *Id.* ¶ 8.4.3. For any
14 Class Notices returned to the Settlement Administrator as undeliverable, the Settlement
15 Administrator shall conduct a skip to locate the correct address. *Id.* If an updated/corrected
16 address can be obtained through skip tracing, the Settlement Administrator will re-mail said
17 Class Notice. *Id.*

18 The Class Notice will advise Class Members of what the lawsuit is about, their rights
19 and/or options under the settlement, the total settlement amount and other terms of the
20 settlement, their expected individual settlement payment share, their opportunity to opt out or
21 object to the settlement and procedures to do so, information pertaining to the final approval
22 hearing, and the release of claims. *See* Class Notice; Settlement Agreement ¶ 8.4.2. As set
23 forth in the Class Notice, Class Members will be allowed to opt out of or object to the
24 Settlement by a certain deadline, which is sixty (60) calendar days after the initial mailing of
25 the Class Notice. Settlement Agreement ¶ 8.5.1. With respect to objections, Class Members
26 are also informed in the Class Notice that they may appear at the final approval hearing to
27 present their objections to the Court if they have filed an objection in writing and. Settlement
28 Agreement ¶ 8.7.2; *see* Class Notice.

1 If Class Members need further information about the settlement and/or the lawsuit, the
2 Settlement Administrator will maintain and provide to Class Members an Email Address,
3 Website, and Toll-Free phone number for contact. In addition, Class Members are provided
4 with Class Counsel's contact information and the Settlement Administrator's contact
5 information in the Class Notice. *See* Class Notice.

6 **D. Typicality and Adequacy of Representation**

7 **1. Class Representative's Claims are Typical of the Class**

8 The commonality requirement is met when there are questions of law and fact common
9 to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of
10 shared legal issues with divergent legal factual predicates is sufficient, as is a common core of
11 salient facts couple with disparate legal remedies within the class"). Commonality requires
12 only that some common legal or factual questions exist; the plaintiffs need not show that all
13 issues in the litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462,
14 473 (1981). Defendants' conduct is central to the commonality inquiry. *See City of San Jose*
15 *v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-
16 13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as
17 Plaintiff alleges here, the class-wide impact of the Defendants' policies satisfies the
18 commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411,
19 421 (1987).

20 In the present case, Plaintiff alleges that Defendants are liable to the Class for failure
21 provide compliant rest breaks, to pay minimum wages for all hours worked, to pay overtime,
22 to pay sick time wages, to pay all wages due on time, and to provide accurate itemized wage
23 statements. Plaintiff alleged that these violations all occurred as a consequence of Defendant's
24 rounding policy, its uniform practice of encouraging its employees to forgo breaks in favor of
25 closing additional sales, and its uniform practice of failing to include bonuses and other non-
26 discretionary pay into sick pay and overtime. Like all Class Members, Plaintiff was subjected
27 to these same policies and practices. Declaration of Destinee Nicole Robinson-Moore
28 ("Moore Decl.") ¶3. In particular, Plaintiff regularly earned non-discretionary bonuses, and

1 did so in at least one pay period in which she worked more than 8 hours in a shift and during a
2 period in which she used sick time. During pay periods when Plaintiff was paid shift bonuses
3 as well as sick pay, Defendants underpaid sick pay to Plaintiff by failing to include the shift
4 bonuses into the regular rate of pay for purposes of paying sick pay. *Id.* ¶ 3. Additionally,
5 she was subjected to the same pressure to close deals as the rest of her coworkers. *Id.* In other
6 words, Plaintiff contends that she was subjected to the same policies and practices as other
7 Class Members and thus, the typicality requirement is met.

8 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
9 issues been raised or presented. *Id.* ¶ 4. Plaintiff has taken all necessary steps to represent the
10 interests of the Class, including by providing information and documents to Plaintiff's counsel.
11 *Id.* ¶¶ 6-8. For such reasons, Plaintiff has adequately represented the Class and will continue
12 to do so.

13 **2. Class Counsel Has Adequately Represented the Class and Has**
14 **Experience with Wage and Hour Class Action**

15 From the inception of the case, Class Counsel has zealously represented the interests of
16 the Class. Class Counsel has engaged in significant meet and confer discussions with
17 opposing counsel to obtain informal data and documents on behalf of the Class. Starr Decl. ¶¶
18 2-3, 7-9. The Settlement was obtained for the benefit of the Class, as opposed to the
19 individual Class Representative. *Id.* ¶ 2. Further, Class Counsel has been approved as class
20 counsel on a number of prior cases, have litigated numerous other class action cases, and are
21 competent to represent the class. Tang Decl. ¶ 8; Starr Decl. ¶ 14; Ginzburg Decl. ¶ ____.

22 **E. Costs and Fees**

23 **1. Attorneys' Fees and Costs**

24 California state and federal courts have recognized that an appropriate method for
25 determining award of attorneys' fees is based on a percentage of the total value of benefits to
26 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
27 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
28 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose

1 of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
2 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
3 entire burden alone.” *Vincent*, 557 F.2d at 769.

4 The common fund doctrine is predicated on the principle of preventing unjust
5 enrichment. When a litigant’s efforts create or preserve a fund from which others derive
6 benefits, she may require the passive beneficiaries to compensate those who created the fund.
7 Both California state and federal courts have embraced this doctrine. *Serrano*, 20 Cal. 3d at
8 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.
9 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine
10 has been applied “consistently in California when an action brought by one party creates a
11 fund in which other persons are entitled to share.” The reasons for applying the common fund
12 doctrine include:

13 fairness to the successful litigant, who might otherwise receive no
14 benefit because his recovery might be consumed by the expenses;
15 correlative prevention of an unfair advantage to the others who are
16 entitled to share in the fund and who should bear their share of the
17 burden of its recovery; encouragement of the attorney for the
18 successful litigant who will be more willing to undertake and
19 diligently prosecute proper litigation for the protection or recovery
20 of the fund if he is assured that he will be properly and directly
21 compensated should his efforts be successful.

22 *Id.* (citing *Estate of Stauffer*, 53 Cal. 2d 124, 132 (1959)).

23 Indeed, in 2016, the California Supreme Court has also now held that the award of
24 attorneys’ fees in common fund wage and hour class action settlements should start with the
25 percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“We join the
26 overwhelming majority of federal and state courts in holding that when class action litigation
27 establishes a monetary fund for the benefit of the class members, and the trial court in its
28 equitable powers awards class counsel a fee out of that fund, the court may determine the
amount of a reasonable fee by choosing an appropriate percentage of the fund created”).

The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is

1 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
2 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

3 The Parties have agreed to a payment of a maximum of one-third of the Gross
4 Settlement Amount, or \$61,050.00, for payment to Class Counsel as attorneys’ fees.
5 Settlement Agreement ¶ 3.2.2. The Parties have agreed to a payment of the foregoing
6 attorneys’ fees and, thus, this payment should be presumed to be fair. Further, the Parties have
7 agreed to reimbursement of Class Counsel’s litigation costs of up to \$10,000.00. *Id.* Class
8 Counsel has, at their own risk, expended costs, for example, to file this instant action and other
9 pleadings in the case, effect service of process, participate in mediation, and advance other
10 litigation-related costs. If Class Counsel’s actual costs are less than \$10,000.00, the remainder
11 will become part of the Net Settlement Amount to be distributed to Class Members. *Id.*

12 Based on the foregoing, the Court should preliminarily approve the attorney’s fees and
13 costs as requested by the Parties.

14 **2. Proposed Payment to the Class Representative.**

15 Class Representative Moore requests a modest enhancement of \$7,500.00. Settlement
16 Agreement ¶ 3.2.1. The Class Representative met and conferred with her counsel on a number
17 of occasions to discuss the case, provided documents and information to her counsel, and
18 reviewed pleadings and documents, including the Settlement Agreement. Moore Decl. ¶¶ 7-8.
19 As part of her duties as the Class Representative, Plaintiff provided invaluable information,
20 evidence, and documents that resulted in this Settlement. Furthermore, in consideration for
21 her service payment, Plaintiff also executed an individual general release of all claims under
22 California Civil Code § 1542, which other members of the Class did not have to do. This
23 payment also includes resolution of Plaintiff’s individual cause of action for breach of
24 contract. Settlement Agreement ¶ 6.1.

25 In addition to the invaluable services that she provided, Plaintiff also took a significant
26 risk, both professionally and monetarily, in acting as the Class Representative and seeking
27 benefits on behalf of the Class. Because the claims alleged by the Class Representative
28 involved the payment of costs to the prevailing party, Plaintiff could have possibly faced

1 paying the costs of Defendants, had she not prevailed in this action.

2 Furthermore, given that future employers are much less likely to hire individuals who
3 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
4 prejudice in the future from other potential employers. Plaintiff took this risk upon herself and
5 the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to
6 file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did
7 they have to face the potential for retaliation and not getting future employment had they filed
8 a public lawsuit.

9 **3. Settlement Administration Fees**

10 The Parties have agreed to an estimated payment of no more than \$6,500.00 to the
11 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to
12 administer this settlement. Settlement Agreement ¶ 3.2.3. Phoenix Settlement Administrators
13 is a well-recognized class action settlement administrator. The Parties believe that the
14 administration fee is reasonable and should be approved.

15 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
16 **PRELIMINARY APPROVAL**

17 The Settlement presented here is fair, adequate, and reasonable. The Settlement will
18 result in both substantial monetary benefits to Class Members; it is non-collusive; and it was
19 achieved as the result of informed, extensive, and arm's-length negotiations conducted by
20 counsel for the respective Parties who are experienced in wage and hour class action litigation.

21 For the foregoing reasons, Plaintiff respectfully requests that the Court grant
22 preliminary approval of the proposed Settlement, sign the proposed Order, approve and
23 authorize mailing of the proposed Class Notice, and set a date for a final approval hearing.

24
25 DATED: January 9, 2023

FRONTIER LAW CENTER, APC

26 By: 

27 Dan Ginzburg
Theodore Tang
Manny Starr

28 Attorneys for Plaintiff and the Class