Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Benjamin H. Haber (SBN 315664)
benjamin@wilshirelawfirm.com
Daniel J. Kramer (SBN 314625)
dkramer@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone: (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff GRACIE RODRIGUEZ

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

JONATHAN ELIAS, on behalf of himself and all other similarly situated aggrieved employees,

Plaintiffs,

v.

TMONE, LLC d/b/a "Mass Markets, Inc.," a Delaware limited liability company; MARLOWE COMPANIES INC. also known as "MCI" d/b/a "Mass Markets, Inc.," a California entity, form unknown; and DOES 1 to 10, inclusive,

Defendants.

Case No.: 37-2022-00032324-CU-OE-CTL

[*Assigned for all purposes to:* Hon. Blaine K. Bowman, Dept. C-74]

DECLARATION OF JUSTIN F. MARQUEZ IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT

Date: June 28, 2024
Time: 8:30 a.m.
Dept: C-74

Complaint filed: August 12, 2022
Trial Date: None Set

DECLARATION OF JUSTIN F. MARQUEZ

I, Justin F. Marquez , declare as follows:

1. I am admitted, in good standing, to practice as an attorney in the State of California, the Ninth Circuit Court of Appeals, and the United States District Courts for the Central, Southern, Eastern, and Northern Districts of California. I am a Senior Partner at Wilshire Law Firm, PLC, counsel of record for Plaintiff Gracie Rodriguez ("Plaintiff Rodriguez"). I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness. This Declaration is submitted in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

CASE BACKGROUND

2. This is a wage and hour class and Private Attorneys General Act ("PAGA") (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiffs and the putative class members worked in California as hourly-paid or non-exempt employees for Defendants TM One, LLC dba "Mass Markets, Inc." and Marlowe Companies Inc. also known as "MCI" dba "Mass Markets, Inc." (collectively, "Defendants") during the class period. Defendants provide telemarketing and customer service to various companies.

3. Plaintiffs allege that Defendants' payroll, timekeeping, and wage and hour practices resulted in numerous Labor Code violations. Specifically, Plaintiffs allege that Defendants failed to, *inter alia*, pay for all hours worked, provide employees with legally compliant meal and rest periods, indemnify employees for all necessary business expenses, and provide timely wages. Based on these allegations, Plaintiffs assert claims against Defendants for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, failure to maintain required payroll records, unfair business practices, and civil penalties under PAGA.

4. On February 18, 2022, Plaintiff Rodriguez filed a putative class action asserting wage and hour claims against Defendants in San Diego County Superior Court titled *Rodriguez v. TMone, LLC dba Mass Markets, et al.*, Case No. 37-2022-00006663-CU-OE-CTL ("*Rodriguez*

Class Action”).

5. On April 26, 2022, Plaintiff Rodriguez filed the PAGA-only action entitled, *Rodriguez v. TMONE, LLC dba Mass Markets, et al.*, Case No. 37-202200015435-CU-OE-CTL (“*Rodriguez* PAGA Action”).

6. On August 12, 2022, Plaintiff Jonathan Elias (“Plaintiff Elias”) filed PAGA-only representative action against Defendant in San Diego County Superior Court entitled *Elias v. TMone, LLC d/b/a “Mass Markets, Inc.” el al.*, Case No. 37-2022-00032324-CU-OE-CTL. .

7. On July 7, 2023, Plaintiff Elias filed a First Amended Complaint adding class claims and realleging all claims based on the substantive claims in the original complaint.

8. The *Rodriguez* Class and PAGA Actions allege: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (8) unfair business practices; and (9) civil penalties pursuant to PAGA.

<u>DISCOVERY AND INVESTIGATION</u>

9. The Parties exchanged documents and information before mediating this action. Defendants produced a sample of timekeeping and pay records for the class members. Defendants also provided documents of their wage and hour policies and practices during the class period and information regarding the total number of current and former employees in their informal discovery responses.

10. After reviewing documents regarding Defendants’ wage and hour policies and practices, analyzing Defendants’ timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants’ maximum monetary exposure for all claims. Class Counsel was also able to evaluate the extent to which Defendants paid premium wages for non-compliant meal and rest periods. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the Litigation. Class Counsel reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.

SETTLEMENT NEGOTIATIONS

11. On February 28, 2024, the Parties participated in private mediation with experienced class action litigator and mediator Gail A. Glick, Esq. The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached.

12. After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, the Parties reached a settlement following the issuance of a mediator's proposal, the material terms of which were subsequently incorporated in the Parties Settlement, which is attached to the Declaration of Kevin T. Barnes.

13. Plaintiffs do not have any interest, financial or otherwise, in the third-party administrator, Rust Consulting Inc.

14. No one at Wilshire Law Firm (meaning the law firm itself and anyone employed at the law firm) has any interest, financial or otherwise, in the third-party administrator, Rust Consulting Inc.

THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE

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

16. Based on an analysis of the facts and legal contentions in this case, documents and information from Defendants, Class Counsel evaluated Defendant's maximum exposure. Class Counsel took into account the risk of not having the claims certified and the risk of not prevailing at trial, even if the claims are certified. After using the data Defendants provided, including class member timekeeping and payroll records, as well as class member demographics (i.e., the number

of class members, workweeks, and average total compensation of the class), with the assistance of a statistics expert, Class Counsel created a damages model to evaluate the realistic range of potential recovery for the class. The damages model and analysis are provided in the Declaration of Kevin T. Barnes. The damages analysis does not take into account the risks, as outlined below, associated with further litigating this action. Therefore, I believe a class settlement of $280,000 is fair and reasonable.

EXPOSURE AND RISK ANALYSIS

17. While Plaintiffs are confident in the merits of their claims, a legitimate controversy exists as to each cause of action. Plaintiffs also recognizes that proving the amount of wages due to each Class Member would be an expensive, time-consuming, and uncertain proposition.

18. This Settlement avoids the risks and the accompanying expense of further litigation. Although the Parties had engaged in a significant amount of investigation, informal discovery and class-wide data analysis, the Parties had not yet completed formal written discovery. Plaintiffs intended to depose corporate officers and managers of Defendants. Moreover, preparation for class certification and a trial remained for the Parties, as well as the prospect of appeals in the wake of a disputed class certification ruling for Plaintiffs and/or adverse summary judgment ruling. Had the Court certified any claims, Defendants could move to decertify the claims. As a result, the Parties would incur considerably more attorneys' fees and costs through trial.

19. As outlined in the Declaration of Kevin T. Barnes, there are numerous risks associated with pursuing this case in litigation. My office has met and conferred with counsel for Plaintiff Elias on numerous occasions throughout the litigating these cases, and I agree with Plaintiff Elias' assessment of the risk as discussed in the Declaration of Kevin T. Barnes. As such, by further litigating this action to trial, Plaintiffs run the high risk of suffering defeat due to the reasonable defenses that can be (and have been) asserted by Defendants.

ENHANCEMENT AWARD FOR PLAINTIFF IS REASONABLE

20. Class Counsel represent that Plaintiffs devoted a great deal of time and work assisting counsel in the case, communicated with counsel very frequently for litigation and to prepare for mediation, and was frequently in contact with Class Counsel during the mediation.

Plaintiffs' requested service awards are reasonable particularly in light of the substantial benefits they generated for all class members.

21. Throughout this Litigation, Plaintiffs, who are former employees of Defendants, have cooperated immensely with my office and have taken many actions to protect the interests of the class. In particular, Plaintiff Rodriguez provided valuable information regarding the "off-the-clock," meal period, and rest period claims. Plaintiff Rodriguez also informed my office of developments and information relevant to this action, participated in decisions concerning this action, made himself available to answer questions during the mediation, and provided my office with the names and contact information of potential witnesses in this action. Before we filed this case, Plaintiff Rodriguez provided my office with documents regarding the claims alleged in this action. The information and documentation provided by Plaintiff Rodriguez was instrumental in establishing the alleged wage and hour violations alleged in this action, and the recovery provided for in this Settlement would have been impossible to obtain without Plaintiff Rodriguez's participation.

22. At the same time, Plaintiffs faced many risks in adding themselves as the class representatives in this matter. Plaintiff Rodriguez faced actual risks with her future employment, as putting herself on public record in an employment lawsuit could also very well affect her likelihood for future employment. Furthermore, as part of this Settlement, Plaintiff Rodriguez is executing a general release of all claims against Defendants.

23. In turn, class members will now have the opportunity to participate in a settlement, reimbursing them for alleged wage violations they may have never known about on their own or been willing to pursue on their own. If these class members would have each tried to pursue their legal remedies on their own, that would have resulted in each having to expend a significant amount of their own monetary resources and time, which were obviated by Plaintiffs putting themselves on the line on behalf of these other class members.

24. In the final analysis, this class action would not have been possible without the aid of Plaintiffs, who put their own time and effort into this Litigation, sacrificed the value of their own individual claims, and placed themselves at risk for the sake of the class members. The

requested service award for Plaintiffs for their service as the class representatives and for their general release of all individual claims is a relatively small amount of money when the time and effort put into the Litigation are considered and in comparison to enhancements granted in other class actions. The requested incentive awards are therefore reasonable to compensate Plaintiffs for their active participation in this lawsuit. Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation*, et al., No. 2:14-cv-02509-TLN-DB, a wage and hour class action alleging that class members were misclassified as exempt outside salespersons, I was co-lead Class Counsel and helped negotiate a $2.5 million class action settlement for 339 class members, and the court approved a $25,000.00 class representative incentive award for each named plaintiff.

<u>THE REQUEST FOR ATTORNEYS' FEES AND COSTS IS REASONABLE</u>

25. The Settlement provides for attorneys' fees payable to Class Counsel in an amount up to one-third (33 1/3%) of the Settlement Amount, for a maximum fees award of $93,333.33, plus actual costs and expenses. The proposed award of attorneys' fees to Class Counsel in this case can be justified under either method – lodestar or percentage recovery. Class Counsel, however, intend to base the proposed award of fees, costs and expenses on the percentage method as many of the entries in the time records will have to be redacted to preserve attorney-client and attorney work product privileges.

26. To date, my firm has incurred costs in litigating this case and the claims resolved by this settlement. My firm anticipates incurring additional costs related to this case in advance of the motion for final approval, and we will submit an updated costs breakdown at that time.

27. I am informed and believe that the fee and costs provision is reasonable. The fee percentage requested is less than that charged by my office for most employment cases. My office invested significant time and resources into the case, with payment deferred to the end of the case, and then, of course, contingent on the outcome.

28. It is further estimated that my office will need to expend at least another 15 to 20 hours to monitor the process leading up to the final approval and payments made to the class. My office also bears the risk of taking whatever actions are necessary if Defendants fail to pay.

29. The risk to my office has been very significant, particularly if we would not be

successful in pursuing this class action. In that case, we would have been left with no compensation for all the time taken in litigating this case. Indeed, I have taken on a number of class action cases that have resulted in thousands of attorney hours being expended and ultimately having certification denied or the defendant company going bankrupt. The contingent risk in these types of cases is very real and they do occur regularly. Furthermore, we were precluded from focusing on, or taking on, other cases which could have resulted in a larger, and less risky, monetary gain.

30. Because most individuals cannot afford to pay for representation in litigation on an hourly basis, Wilshire Law Firm, PLC represents virtually all of its employment law clients on a contingency fee basis. Pursuant to this arrangement, we are not compensated for our time unless we prevail at trial or successfully settle our clients' cases. Because Wilshire Law Firm, PLC is taking the risk that we will not be reimbursed for our time unless our client settles or wins his or her case, we cannot afford to represent an individual employee on a contingency basis if, at the end of our representation, all we are to receive is our regular hourly rate for services. It is essential that we recover more than our regular hourly rate when we win if we are to remain in practice so as to be able to continue representing other individuals in civil rights employment disputes.

EXPERIENCE AND QUALIFICATIONS

31. Wilshire Law Firm, PLC was selected by Best Lawyers and U.S. News & World Report as one of the nation's Best Law Firms for every year since 2020 and is comprised of over 70 attorneys and over 500 employees. Wilshire Law Firm, PLC is actively and continuously practicing in employment litigation, representing employees in both individual and class actions in both state and federal courts throughout California.

32. Wilshire Law Firm, PLC is qualified to handle this Litigation because its attorneys are experienced in litigating Labor Code violations in both individual, class action, and representative action cases. Wilshire Law Firm, PLC has handled, and is currently handling, numerous wage and hour class action lawsuits, as well as class actions involving consumer rights and data privacy litigation.

33. I graduated from the University of California, Los Angeles's College Honors Program in 2004 with Bachelor of Arts degrees in History and Japanese, magna cum laude and Phi

Beta Kappa. As an undergraduate, I also received a scholarship to study abroad for one year at Tokyo University in Tokyo, Japan. I received my Juris Doctor from Notre Dame Law School in 2008.

34. My practice is focused on advocating for the rights of consumers and employees in class action litigation and appellate litigation. I am currently the primary attorney in charge of litigating several class action cases in state and federal courts across the United States.

35. I have received numerous awards for my legal work. From 2017 to 2020, Super Lawyers selected me as a “Southern California Rising Star,” and from 2022 to 2024, I was selected as a “Southern California Super Lawyer.” I was selected as one of the “Best Lawyers in America” in 2023 and 2024. In 2016 and 2017, the National Trial Lawyers selected me as a “Top 40 Under 40” attorney. I am also rated 10.0 (“Superb”) by Avvo.com.

36. I am on the California Employment Lawyers Association (“CELA”)’s Wage and Hour Committee and Mentor Committee, and I was selected to speak at CELA’s 2019 Advanced Wage & Hour Seminar on the topic of manageability of class actions. Since 2013, I have actively mentored young attorneys through CELA’s mentorship program.

37. I am also a past member of the Consumer Attorneys of California (“CAOC”). In 2020, I was selected for a position on CAOC’s Board of Directors. I am also a past member of CAOC’s Diversity Committee, and I helped assist the CAOC in defeating bills that harm employees. Indeed, I recently helped assist Jacqueline Serna, Esq., Legislative Counsel for CAOC, in defeating AB 443, which proposed legislation that sought to limit the enforceability of California Labor Code § 226.

38. As the attorney responsible for day-to-day management of this matter at the Wilshire Law Firm, PLC, I have over thirteen years of experience with litigating wage and hour class actions. Over the last thirteen years, I have managed and assisted with the litigation and settlement of several wage and hour class actions. In those class actions, I performed similar tasks as those performed in the course of prosecuting this action. My litigation experience includes:

a. I served as lead or co-lead in negotiating class action settlements worth over $10 million in gross recovery to class members for each year since 2020, including over

$37.5 million in 2022 and over $75 million in 2023.

b. I lead a team of attorneys that successfully obtained class certification of meal period, rest period, and related derivative claims on April 5, 2024 in *Aguilar-Flores v. Javier's CC LLC*, Los Angeles Superior Court No. 19STCV36438 (Hon. Elihu M. Berle).

c. I was part of the team of attorneys that prevailed in *Moore v. Centrelake Medical Group, Inc*. (2022) 83 Cal.App.5th 515, the first California appellate decision in a data breach class action holding that consumer plaintiffs adequately alleged injury in fact under the benefit of the bargain theory and monitoring-costs theory.

d. In 2022, Top Verdict recognized Wilshire Law Firm and myself for having one case in the Top 20 Labor & Employment Settlements (including number 19 for the $4.1 million settlement in *The FPI Management Wage and Hour Cases*) and four additional cases in the Top 50 Labor & Employment Settlements (numbers 36, 39, 41, and 49).

e. In 2021, Top Verdict recognized Wilshire Law Firm and myself for having one case in the Top 20 Labor & Employment Settlements (including number 19 for the $1.6 million settlement in *Moreno v. Pretium Packaging, L.L.C*) and four additional cases in the Top 50 Labor & Employment Settlements (numbers 27, 30, 33, and 37).

f. To my knowledge, I am the only attorney to appear on each of the following Top Verdict lists for 2018 in California: Top 20 Civil Rights Violation Verdicts, Top 20 Labor & Employment Settlements, and Top 50 Class Action Settlements.

g. As lead counsel, on April 29, 2021, I prevailed against CVS Pharmacy, Inc. by winning class certification on behalf of hundreds of thousands of consumers for misleading advertising claims in *Joseph Mier v. CVS Pharmacy, Inc.*, U.S. Dist. Ct. C.D. Cal. no. SA CV 20-1979-DOC-(ADSx).

h. As lead counsel, I prevailed against Bank of America by: winning class certification on behalf of thousands of employees for California Labor Code violations; defeating appellate review of the court's order certifying the class; defeating summary judgment; and defeating a motion to dismiss. (*Frausto v. Bank of America, N.A.* (N.D. Cal. 2019) 334 F.R.D. 192, 2020 WL 1290302 (9th Cir. Feb. 27, 2020), 2019 WL 5626640 (N.D. Cal. Oct. 31, 2019), 2018 W.L. 3659251 (N.D. Cal. Aug. 2, 2018).). The decision certifying the class in *Frausto* is also discussed in Class Certification Under Fed. R. Civ. P. 23 in Action by Information Technology or Call Center Employees for Violation of State Law Wage and Hour Rules, 35 A.L.R. Fed. 3d Art. 8.

i. I was the primary author of the class certification and expert briefs in *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, a wage and hour class action for over 40,000 class members for off-the-clock, meal period, split shift, and reimbursement claims. *ABM Industries Overtime Cases* is the first published California appellate authority to hold that an employer's "auto-deduct policy for meal breaks in light of the recordkeeping requirements for California employers is also an issue amenable to classwide resolution." (*Id.* at p. 310.)[1] Notably, the Court of Appeal also held that expert analysis of timekeeping records can also support the predominance requirement for class certification. (*Id.* at p. 310-11.) In 2021, the case settled for $140 million, making it one of the largest ever wage and hour class action settlements for hourly-paid employees in California.

j. I briefed, argued, and won *Yocupicio v. PAE Group, LLC* (9th Cir. 2015) 795 F.3d 1057. The Ninth Circuit ruled in my client's favor and held that non-class claims under the PAGA cannot be used to calculate the amount in controversy under the Class Action Fairness Act ("CAFA"). This case is cited in several leading treatises such as Wright & Miller's Federal Practice & Procedure, and Newberg on Class Actions. In October 2016, the U.S. Supreme Court denied review of a case that primarily concerned Yocupicio. That effort was led by Theodore J. Boutrous, who

[1] As a California district court observed before the *ABM Industries Overtime* decision, "[t]he case law regarding certification of auto-deduct classes is mixed." (*Wilson v. TE Connectivity Networks, Inc.* (N.D. Cal. Feb. 9, 2017) No. 14-CV-04872-EDL, 2017 WL 1758048, *7.)

brought the cert petition, with amicus support from a brief authored by Andrew J. Pincus.[2] Considering that leading Supreme Court practitioners from the class action defense bar were very motivated in undermining *Yocupicio* case, but failed, this demonstrates the national importance of the *Yocupicio* decision.

k. On December 13, 2018, the United States District Court granted final approval of the $2,500,000 class action settlement in *Mark Brulee, et al. v. DAL Global Services, LLC* (C.D. Cal. Dec. 13, 2018) No. CV 17-6433 JVS(JCGx), 2018 WL 6616659 in which I served as lead counsel. In doing so, the Court found: "Class Counsel's declarations show that the attorneys are experienced and successful litigators." (*Id.* at p. *10.)

l. *Gasio v. Target Corp.* (C.D. Cal. Sep. 12, 2014) 2014 U.S. Dist. LEXIS 129852, a reported decision permitting class-wide discovery even though the employer has a lawful policy because "[t]he fact that a company has a policy of not violating the law does not mean that the employees follow it, which is the issue here." The court also ordered defendant to pay for the cost of *Belaire-West* notice.

m. In 2013, I represented a whistleblower that reported that his former employer was defrauding the State of California with the help of bribes to public employees. The case, a false claims (qui tam) action, resulted in the arrest and criminal prosecution of State of California employees by the California Attorney General's Office.

n. In 2013, I was part of a team of attorneys that obtained conditional certification for over 2,000,000 class members in a federal labor law case for misclassification of independent contractors that did crowdsourced work on the Internet, *Otey v. CrowdFlower, Inc.*, N.D. Cal. Case No. 12-cv-05524-JST (MEJ), resulting in the following pro-plaintiff reported decisions:

    i. 2013 U.S. Dist. LEXIS 151846 (N.D. Cal. Oct. 22, 2013) (holding that an unaccepted Rule 68 offer doesn't moot plaintiff's claims, and granting

[2] http://www.chamberlitigation.com/cases/abm-industries-inc-v-castro.

plaintiff's motion to strike defendant's affirmative defenses based on *Twombly/Iqbal*).

ii. 2013 U.S. Dist. LEXIS 122007 (N.D. Cal. Aug. 27, 2013) (order granting conditional collective certification).

iii. 2013 U.S. Dist. LEXIS 95687 (N.D. Cal. July 8, 2013) (affirming the magistrate judge's discovery ruling which held that "evidence of other sources of income is irrelevant to the question of whether a plaintiff is an employee within the meaning of the FLSA").

iv. 2013 U.S. Dist. LEXIS 91771 (N.D. Cal. June 20, 2013) (granting broad discovery because "an FLSA plaintiff is entitled to discovery from locations where he never worked if he can provide some evidence to indicate company-wide violations").

o. From 2012 to 2013, I was part of a team of attorneys that obtained class certification for over 60,000 class members for off-the-clock claims, *Linares v. Securitas Security Services USA, Inc.*, Los Angeles Superior Court. Case No. BC416555. We also successfully opposed subsequent appeals to the California Court of Appeal and California Supreme Court.

39. Benjamin H. Haber is a seventh-year Associate Attorney at Wilshire Law Firm. He graduated from the University of California, Los Angeles, with a Bachelor of Arts in Political Science, and received his Juris Doctor from the University of California, Hastings College of the Law in 2016. During law school, he was a member of the executive board for the *Hastings Law Journal* and student mediator at the San Francisco Superior Court, Small Claims Division. He was admitted to practice law in the State of California in 2017. Since graduating from law school, he has focused his legal work primarily on wage-and-hour litigation and has helped obtain dozens of settlements on behalf of tens of thousands of workers in California. He was also selected as a "Southern California Rising Star" in 2024.

40. Daniel J. Kramer is a seventh-year Associate Attorney at Wilshire Law Firm, PLC. He was admitted to practice law in the State of California and the Central, Eastern, Southern, and

Northern Districts of California. He graduated from Stanford University with a Bachelor of Arts in History and Political Science, and received his Juris Doctor from Loyola Law School, Los Angeles in 2016. During law school, he was a research editor for the *Loyola of Los Angeles International and Comparative Law Review*. Before joining Wilshire Law Firm, he practiced briefly at a firm that focused on municipal law and code enforcement and then moved to a respected plaintiff-side firm to practice wage and hour class action litigation. He has several years of work experience litigating wage and hour class actions.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on June 5, 2024, at Los Angeles, California.

Justin F. Marquez