

Matthew S. Da Vega (SBN 195443)
Matthew H. Fisher (SBN 229532)
DAVEGA | FISHER | MECHTENBERG LLP
232 E. Anapamu St.
Santa Barbara, CA 93101
Telephone: (805) 232-4471
Facsimile: (877) 535-9358
mdavega@mdmflaw.com

Attorneys for Plaintiff and Proposed Plaintiffs Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

KRISTINA REYES, on behalf of herself and
all others similarly situated,

Plaintiff,

vs.

BACKPACK BOYZ LOS ANGELES,
LLC; LOS ANGELES INDUSTRY, INC.,
and DOES 1-100, inclusive,
Defendants.

Case No.: 22STCV05435

CLASS and REPRESENTATIVE ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT and
CONDITIONAL CERTIFICATION FOR
SETTLEMENT PURPOSES ONLY;**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION;**

**DECLARATION OF MATTHEW S.
DA VEGA IN SUPPORT OF MOTION;**

[PROPOSED] ORDER with COVER SHEET

Assigned For All Purposes to the Honorable
William Highberger (Dept. 10)

Date: December 20, 2022

Time: 10 a.m.

Location: Dept. 10 (Hon. William Highberger)

1 **TO THIS HONORABLE COURT, ALL INTERESTED PARTIES, and THEIR**
2 **ATTORNEYS OF RECORD PLEASE TAKE NOTICE** that on December 20, 2022 at 10
3 a.m., or as soon as the matter may be heard, in Department 10 (Hon. William Highberger) of the
4 above entitled Court at Los Angeles County Superior Court - Spring Street Courthouse located at
5 312 N Spring St, Los Angeles, CA 90012, Plaintiff Kristina Reyes (“Plaintiff”) pursuant to
6 California Code of Civil Procedure §382 and California Rules of Court, rule 3.769, *et seq.*, will
7 and does move this Court for an Order granting preliminary approval of the proposed class action
8 and PAGA settlement on the terms and conditions set forth in the Joint Stipulation of Class
9 Action Settlement Agreement and Release (“Settlement Agreement”), a copy of which is
10 attached as **Exhibit 1: Settlement Agreement** to the Declaration of Matthew S. Da Vega in
11 Support of Motion (“Da Vega Decl.”). Plaintiff further moves the Court for an Order:

- 12 1. Approving the Stipulation and Order Granting Plaintiff Leave to File a Second
13 Amended Complaint (simultaneously filed and served with this Motion), and
14 also attached to the Settlement Agreement as **Exhibit A: Second Amended**
15 **Complaint**, for settlement purposes only;
- 16 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
17 Order attached to the Settlement Agreement as **Exhibit B: Preliminary**
18 **Approval Order**;
- 19 3. Certifying the proposed Class, for settlement purposes only;
- 20 4. Appointing Plaintiff as “Class Representative”, for settlement purposes;
- 21 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class
22 Counsel, for settlement purposes;
- 23 6. Approving the proposed Class Notice which is attached to the Settlement
24 Agreement as **Exhibit C: Notice of Class Action Settlement**;
- 25 7. Approving the method and manner for providing notice to the Class, as
26 well as procedure for opting out, and making objections, as set forth in the
27 Settlement Agreement;
- 28

8. Approving the schedule for sending of notices to the Class per the Settlement Agreement;
9. Setting a date and time for Final Approval Hearing / Fairness Hearing as soon as possible to consider Final Approval of the Settlement;

Plaintiff seeks class certification of the following class, for settlement purposes only:

The “Class” is defined as:

“All current and former non-exempt employees who worked for Defendants in the State of California from February 14, 2018, through the date the Court grants preliminary approval of the Settlement, including but not limited to individuals holding the job titles of Budtenders, Cashiers, Inventory Managers, Joint Rollers, Managers, Floor Lead, Floater, and Receptionist.”

“Class Period” refers to the period of time from February 14, 2018 through the date the Court grants preliminary approval of the Settlement.”

As a practical matter, there were no shifts worked by any Class Member prior to March 10, 2021.

This Motion will be made on the grounds that the Parties have reached a settlement, subject to approval by this Court, which the Parties believe provides fair, just, and reasonable compensation to the class of non-exempt employees who Plaintiff alleges were misclassified as independent contractors, were not paid the correct overtime rates for all overtime hours worked, were not paid minimum wage, were not provided meal/rest breaks, were not furnished timely/accurate wage statements, were not reimbursed necessary business expenses, and were not paid full wages upon separation/termination, in violation of California Labor Codes, California Unfair Business Act and the Private Attorney General Act (“PAGA”). Plaintiff desires to give notice of the proposed settlement to the Class Members and hold a hearing as to whether the settlement should be finally approved. The Parties have met and conferred regarding this Motion for the Preliminary Approval of Class Settlement and request the Court to approve it.

This Motion is based on the following Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of the Class Settlement, the Declaration of Matthew S. Da Vega in Support of Motion, and all other records and papers on file in this action. Pursuant to Labor Code § 2699(1)(2), and the instructions provided by the Department of Industrial Relations

1 on its web site, a PDF copy of this motion and the supporting papers will be sent/uploaded
2 electronically to LWDA's website at the time it is filed and served.

3
4 Dated: October 27, 2022

DAVEGA | FISHER | MECHTENBERG LLP

5
6
7 By: _____

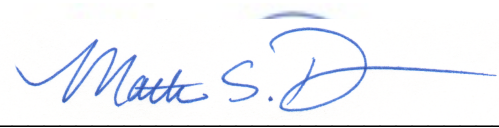

Matthew S. Da Vega
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On behalf of herself and similarly situated individuals, Plaintiff Kristina Reyes (“Plaintiff”
4 or “Class Representative”) respectfully moves for preliminary approval of a **\$350,000 (Three**
5 **Hundred and Fifty Thousand Dollars)** settlement of the class and PAGA claims asserted in this
6 lawsuit against Defendants Backpack Boyz Los Angeles, LLC and Los Angeles Industry, Inc.
7 (“Defendants” or “Backpack Boyz”) or together with the Plaintiff, the “Parties”.

8 The Parties to the Lawsuit vigorously disagree on the merits of the case. Class
9 certification, liability and damages are all sharply disputed. Nevertheless, after litigation,
10 investigation, numerous interviews, exchange of extensive information, data, documents, and a
11 mediation before a neutral, professional mediator skilled in California employment laws, the
12 Parties reached an informed agreement to settle the class and PAGA claims pursuant to the Joint
13 Stipulation of Class Action Settlement and Release (“Settlement Agreement”) (See Da Vega
14 Decl., **Exhibit 1 - “Settlement Agreement”**).

15 The Parties’ investigations and interchange of information enabled them to conduct
16 meaningful and prolonged negotiations, with a keen eye towards the strengths and weaknesses of
17 their positions and the value of the claims. In particular, the Parties exchanged data (i.e.
18 documents and spreadsheets of all alleged Class Members employment data during the damages
19 period) and Plaintiff completed expert analyses of the data (i.e. estimates of potential damages
20 for various claims if proven), which informed their views of the case, and ultimately helped set
21 the parameters for settlement talks. All negotiations were conducted at arm’s-length and were
22 facilitated by a highly experienced class action and employment mediator, Hon. Robert Dondero
23 (Ret.) (<https://www.jamsadr.com/dondero/>) on July 25, 2022.

24 At mediation the Parties agreed to basic terms of a potential resolution of claims codified
25 in a Confidential Memorandum of Understanding (“MOU”) and eventually the Settlement
26 Agreement. The Settlement represents a good value for the Class and provides an estimated
27 average gross of approximately **\$1,755.37 (pre-tax) to each of the approximate 93 Class**
28 **Member**. The fact that the Parties were able to reach a favorable settlement without additional

1 years of risky and costly litigation presents substantial benefits to the Class Members and
2 promotes judicial economy. As detailed in these papers, the Parties believe the Settlement is the
3 best possible outcome of this matter, especially given the substantial risks and delays associated
4 with litigation.

5 Therefore, Pursuant to California Rules of Court, Rule § 3.769, Plaintiff now seeks, and
6 Defendants do not oppose, preliminary approval of the settlement. See Manual for Complex
7 Litigation (“MCL”) § 21.63 (4th ed. 2004). In order to effectuate the settlement and the
8 resolution of this action, Plaintiff respectfully moves the Court for an Order:

- 9 1. Approving the Stipulation and Order Granting Plaintiff Leave to File a Second
10 Amended Complaint simultaneously filed and served with this Motion, and also
11 attached to the Settlement Agreement (Exhibit 1 to Da Vega Decl.) as **Exhibit A:**
12 **Second Amended Complaint**, for settlement purposes only;
- 13 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
14 Order attached to the Settlement Agreement as **Exhibit B: Preliminary Approval**
15 **Order**;
- 16 3. Certifying the proposed Class for settlement purposes only;
- 17 4. Appointing Plaintiff as “Class Representative” for settlement purposes;
- 18 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class Counsel
19 for settlement purposes;
- 20 6. Approving the proposed Class notice attached to the Settlement Agreement as
21 **Exhibit C: Notice of Class Action Settlement**;
- 22 7. Approve the method and manner for providing notice to the Class, as well as
23 procedure for opting out, and making objections, as set forth in the Settlement
24 Agreement;
- 25 8. Approve the schedule for sending of notices to the Class per the Settlement
26 Agreement;
- 27 9. Setting a date and time for the Final Approval Hearing/Fairness Hearing as soon as
28 possible to consider Final Approval of the Settlement.

II. BACKGROUND

Plaintiff and Class Members are current and former non-exempt Cannabis Dispensary Employees for the Defendants in Los Angeles, Long Beach, and La Mesa, California. Plaintiff was employed as a Budtender (a derivative of the term “bartender”), along with Cashiers, Inventory Managers, Joint Rollers, Managers, Floor Leads, Floaters, Receptionists and other non-exempt employees who work/worked for Defendants at its various locations in California. Plaintiff alleges Defendants intentionally misclassified these non-exempt employees as “Independent Contractors”, when in fact Plaintiff and Class Members are/were Defendants’ employees. Plaintiff further alleges that Defendants failed to pay Plaintiff and Class Members for all wages earned including for overtime hours worked at the appropriate overtime rate (Defendants paid Class Members in cash and paid them only a flat regular hourly rate for overtime hours worked and not the correct overtime rates of 1.5x or 2x), failed to pay minimum wages, failed to pay for “on-duty” meal periods or “on-duty” rest breaks, failed to keep and provide accurate and timely records of wages earned and other legally mandated records (Defendants paid in cash and did not provide wage statements), failed to reimburse Plaintiff and Class Members for necessary business expenses (i.e. use of personal cell phones for Defendants’ business), and failed to pay Plaintiff and Class Members whose employment has terminated (voluntarily resigned and/or were terminated) a final payment of his or her wages in a prompt and timely manner in conformity with California Labor Codes.

III. PROCEDURAL HISTORY

February 14, 2022 (Original Complaint Filed and PAGA Notice Sent): Plaintiff sent and submitted her PAGA notice (LWDA-CM-868131-22) and also filed her class action suit under CCP §382 to address Defendants' violations of California wage and hour laws. Plaintiff’s complaint alleged 8 causes of action, including:

1. Failure to Pay Overtime Wages,
2. Failure to Pay Minimum Wage,
3. Failure to Provide Meal Breaks,
4. Failure to Provide Rest Breaks,
5. Failure to Furnish Timely/Accurate Wage Statements,
6. Failure to Pay All Wages Due at Discharge in Timely Manner,
7. Failure to Reimburse Necessary Business Expenses,
8. Unlawful Business Practices.

1 **The Putative Class Definition:** Plaintiff originally defined the class as:

2 “All current and former California-based Cannabis Dispensary Employees who were
3 classified as “Independent Contractors” and worked for Defendants from February 14,
4 2018 until the entry of judgment.”

5 Plaintiff is a member of the proposed class and representative of other non-exempt
6 Cannabis Dispensary employees. Plaintiff believes this includes, but is not limited to,
7 Defendants’ non-exempt employees classified as “independent contractors” and working as
8 Budtenders, Cashiers, Inventory Managers, Joint Rollers, Managers, Floor Lead, Floater,
9 Receptionist, and other non-exempt employees.

10 **March 24, 2022 (Parties Discuss Potential Class Mediation):** Plaintiff’s counsel was
11 contacted by Defense counsel (Tal Yeyni of Lewitt Hackman in Encino, California). The parties
12 discussed potential resolution of the class wide claims and started discussing potential mediators.
13 The parties eventually agreed upon using mediator Hon. Robert L. Dondero (Ret.) and scheduled
14 the mediation for July 25, 2022.

15 **May 24, 2022 (First Amended Complaint Filed):** Plaintiff filed and served her First
16 Amended Complaint (“FAC”) with the addition of the 9th cause of action for violations of the
17 PAGA. This includes a claim for penalties under PAGA for misclassification of employees.

18 **July 25, 2022 (Date of Mediation Proceedings):** The Parties participated in an all day
19 mediation with JAMS Mediator Hon. Robert L. Dondero. At the mediation the Parties reached a
20 tentative settlement of the class and PAGA claims pending this Court’s approval. The Parties
21 executed a confidential MOU regarding settlement. The Parties then executed the long form
22 settlement in the form of a Joint Stipulation of Class Action Settlement and Release (see Da Vega
23 Decl., Exhibit 1: Settlement Agreement).

24 **IV. CASE INVESTIGATION, DISCOVERY, NEGOTIATIONS and MEDIATION**

25 The Parties vigorously investigated and debated the claims asserted against Defendants.
26 Plaintiff’s Counsel began their investigation into the claims long before the case was filed.
27 Plaintiff’s Counsel interviewed and obtained discovery/documents from various current and
28 former non-exempt employees regarding their experiences working for Defendants. (Da Vega

Decl. ¶13.) After the Lawsuit was initiated, Parties' Counsel engaged in serving written discovery, informal discovery, discussions and negotiations before reaching this Settlement. (*Id.* at ¶13.) Early in the litigation process the Parties' Counsel began having regular discussions regarding the claims, discovery, production of data, and the possibility of mediation/settlement. (*Id.*)

A. The Parties' Dispute of the Merits of the Case.

Throughout the litigation, Defendants have denied Plaintiff's allegations, and further have denied the case is appropriate for class certification. (Da Vega Decl. ¶14.) Further, in addition to generally denying the allegations, Defendants have contended that the non-exempt employees were not misclassified, that Defendants paid non-exempt employees correctly for all hours worked, non-exempt employees regularly received compliant meal and rest breaks and did not work through/during meal/rest breaks, and did not incur business expenses. Defendants also have contended that to the extent any work hours were not paid correctly, which Defendants deny, all such hours were worked in violation of Defendants' policies, and without Defendants' knowledge. Defendants also contend Plaintiff and other Class Members were precluded from seeking claims on a class basis due to compliant arbitration agreements they signed on hire. On the other hand, Plaintiff alleges that all non-exempt employees, throughout the Class Period, were subject to the same policy and practice promulgated by Defendants. Plaintiff alleges they were misclassified as independent contractors, were paid only their flat regular rate for overtime hours as opposed to the correct rate for overtime hours (i.e. 1.5 x - 2x regular rate), that non-exempt employees worked through meal/rest periods and were not paid the one hour premium/regular rate for said violations, and not reimbursed for necessary business related expenses (i.e. use of cell phones for work). As part of the investigation into the claims, Class Counsel interviewed current and former non-exempt employees and reviewed various documents and handbooks related to non-exempt employees work for Defendants. (*Id.*) This investigation was crucial to the Parties' dispute over both the merits of the case, as well as with respect to the appropriate scope of the Class. (*Id.*)

B. Document and Data Discovery and Expert Analysis

Plaintiff and Defendants informally exchanged extensive documents and multiple data points on the class (i.e. data for all class members of class period including job titles, wages rates,

shifts worked, length of shifts, shift dates, start/end dates, shift pay, etc.) which at the time of filing includes approximately **93 Class Members** (Da Vega Decl. ¶15.) Plaintiff retained experts Desmond, Marcello & Amster - Valuation and Litigation Consultants (www.dmavalue.com) (“Plaintiff’s Expert”), to examine the data for mediation. (*Id.*) Based on analysis of the data, Plaintiff made various assessments of the data, overtime hours/incorrect pay rates, meal/rest breaks violations, misclassification penalties, unpaid business expense reimbursements, and calculated the potential damages. (*Id.*). Further, Plaintiff’s Counsel provided Defendants with Plaintiff’s position as to a calculation of damages at mediation. (*Id.*) Those expert calculations estimate Defendants’ potential liability for alleged:

- (1) Under-paid overtime wages at approximately \$2,506;
- (2) Meal Break damages at \$69,325 (and \$157,200 in PAGA penalties/premiums);
- (3) Rest Break damages at \$70,073 (and \$160,800 in PAGA penalties/premiums);
- (4) Misclassification Penalties at \$2.32 million;
- (5) Waiting time Penalties at \$278,362;
- (6) Wage Statement Violations at \$83,250;
- (7) Minimum Wage Violations at \$25,100,
- (8) Unreimbursed expenses at \$23,050 (and \$82,900 in PAGA penalties);
- (9) Total Liability = \$3.27 million (of which \$3.11 million is penalties)**

The putative Class Members worked approximately 7,281 shifts. If you take the Estimated Net Settlement Amount of approximately \$163,250 divided by 7,281 shifts it equals approximately \$22.42 per shift (the average hourly rate of all class members is \$15.77/hour). Further, the minimum work days per Class Members was 1 shift, while the maximum was 259 shifts. The overall average was approximately 78 shifts per Class Member, and the overall median was 64 shifts per Class Member. (Da Vega Decl. ¶15.)

C. Mediation and Settlement

On July 25, 2022 the Parties engaged in a full day of mediation with the experienced employment and class action mediator Hon. Robert Dondero (Ret.). (Da Vega Decl. ¶16.) After exchanging data, documents, and evidence the Parties met for a full-day mediation via Zoom

1 video conference with Plaintiff's counsel in-person with Plaintiff. The mediation was attended by
2 Plaintiff's Counsel and the class representative, Kristina Reyes, Defense counsel, and Defendants'
3 representatives. The Parties ultimately executed a confidential memorandum of understanding
4 ("MOU") at the mediation, which included a term to settle the class claims for the Gross
5 Settlement Amount of **\$350,000 (Three Hundred and Fifty Thousand Dollars)**, subject to Court
6 approval. (*Id.*) The Parties then later finalized the terms of the settlement in a long form Joint
7 Stipulation of Class Action Settlement and Release. (*Id.*)

8 **V. CLASS REPRESENTATIVE'S SERVICE TO THE CLASS**

9 Plaintiff Kristina Reyes was the driving force behind this class action. (Da Vega Decl., ¶
10 17.) Plaintiff played a critical role in retaining Matthew Da Vega and Matthew Fisher of
11 Da Vega Fisher Mechtenberg LLP and providing information regarding her legal claims to make
12 them successful. (*Id.*) Plaintiff has experience as a non-exempt Cannabis Dispensary employee
13 and knew other putative class members that in turn provided additional information in support of
14 the legal claims. With their help Plaintiff's counsel was able to gather additional evidence, and
15 contact additional putative class members. (*Id.*) Together, the Plaintiff worked dozens of hours to
16 help Plaintiff's counsel, sacrificing her personal time and reputation to make the case successful.

17 In fact Plaintiff's counsel spoke to other witnesses who were afraid to participate in
18 litigation for fear that it might result in damage to their careers. (Da Vega Decl., ¶ 18.) Plaintiff
19 and witnesses feared that by initiating or participating a class action lawsuit might risk their future
20 job opportunities. Despite this Plaintiff stepped up and worked diligently in support of the case.
21 (*Id.*) Plaintiff have had numerous meetings and telephone conversations with Class Counsel to aid
22 in the initial investigation, factual development, mediation, and resolution of this case. (*Id.*) She
23 also reached out to and communicated with other non-exempt employees about their work for
24 Defendants, and encouraged by Plaintiff, other non-exempt employees contacted Class Counsel to
25 provide information about their time at Defendants. (*Id.*) In sum, the Settlement could never have
26 been achieved without Plaintiff's service on behalf of the Class. (*Id.*)

27 **VI. KEY TERMS OF THE SETTLEMENT**

28

1 The Settlement provides for a significant settlement payment to each Class Member. In
2 exchange, Class Members will release claims, which were asserted or could have been asserted in
3 the Lawsuit based on the facts alleged in support of the class and PAGA claims.

4 **A. Definition of the Class**

5 Under the Settlement Agreement, the “Class” is defined as follows:

6 The “Class”:

7 “All current and former non-exempt employees who have worked at for Defendants in the
8 State of California from February 14, 2018, through the date the Court grants preliminary
9 approval of the Settlement including but not limited to individuals holding the job titles of
Budtenders, Cashiers, Inventory Managers, Joint Rollers, Managers, Floor Lead, Floater,
and Receptionist.” (Settlement Agreement §1.1)

10 “Class Period” refers to the period of time from February 14, 2018, through the date the
11 Court grants preliminary approval of the Settlement. As a practical matter, there were no
12 shifts worked by any Class Member prior to March 10, 2021.” (Settlement Agreement
§1.7)

13 “Settlement Class Members” is defined to mean those Class Members who have not
14 “opted out” of the Class Settlement by submitting a timely and valid Request for
Exclusion. (Settlement Agreement §1.35)

15 **B. \$350,000 Gross Settlement Amount**

16 The Settlement provides for Defendants to make a maximum payment of **\$350,000 (Three**
17 **Hundred and Fifty Thousand Dollars)** in settlement of all class and PAGA claims in the case,
18 including the Class Counsel Award, all Settlement Administration Costs, the PAGA Penalty
19 Amount, all settlement payments to Settlement Class Members, and the Class Representative
20 Enhancement Payment. (the “Gross Settlement Amount”) (Settlement Agreement §§1.16.; 2.1).

21 The “Individual Settlement Amount Calculations” payment to the Class Members will be
22 based on the approximate number of Shifts each Settlement Class Member worked during the
23 Class Period. The Settlement Administrator will determine the total number of Shifts worked by
24 all Class Members during the Class Period and then divide that Net Settlement Fund by the
25 number of Total Shifts to derive the “Shift Point Value”. Then for each Settlement Class Member
26 the Settlement Administrator shall multiply the number of their Shifts worked during the Class
27 Period by the Shift Point Value to determine each Settlement Class Members Individual
28

1 Settlement Amount and that amount shall be reported on an IRS Form 1099. (Settlement
2 Agreement § 7.1).

3 The portion of the Net Settlement Amount allocated to the Class shall be all-in and
4 settlement checks will be sent to all Settlement Class Members. Any settlement checks not cashed
5 after 180 days from the date of the class-wide distribution shall be void, and the Settlement
6 Administrator shall, as soon as practicable, forward the sums correlating to those checks and any
7 residual amounts returned to the Settlement Administrator to be paid out per guidelines in CCP
8 §384 to Cy Pres recipient the Legal Aid Society of Los Angeles County (<https://lafla.org/>), Ron
9 Olson Justice Center, 1550 W. 8th Street, Los Angeles, CA 90017. (Settlement Agreement §7.4).

10 **C. Released Claims**

11 *Released Claims:* Under the terms of the Settlement Agreement, upon Final Approval by
12 the Court, and subject to Defendants' deposit of the Gross Settlement with the Settlement
13 Administrator, Plaintiff and each Settlement Class Member shall be bound by the Settlement, and,
14 at the same time, will have released the Released Parties from the Released Claims. The
15 “Released Claims” with respect to the “Released Parties” (defined below) are, “any manner of
16 action, cause of action, claim, demand, right, suit, obligation, debt, contract, agreement, promise,
17 liability, or remedy of any nature whatsoever (including without limitation any damages, charges,
18 penalties, interest, losses, costs, expenses, and attorneys’ fees), whether in law or in equity, under
19 contract, tort or any other subject area, or under any statute, rule, regulation, order, or law,
20 whether federal, state, or local, on any grounds whatsoever, including without limitation any and
21 all alleged violations of the California Labor Code, the California Code of Regulations, the
22 Industrial Welfare Commission Wage Orders, the California Business & Professions Code, and
23 the Fair Labor Standards Act, that were pled or that could have been pled, and claims sought or
24 that could have been sought, based on or arising out of the factual allegations in the Complaint,
25 whether foreseen or unforeseen, fixed or contingent.” (Settlement Agreement §1.30)

26 The term “Released Parties” means, “Backpack Boyz and any of their current and former
27 directors, officers, members, administrators, agents, insurers, beneficiaries, trustees, employee
28 benefit plans, representatives, partners, accountants, servants, employees, attorneys, parents,

1 subsidiaries, affiliates, divisions, branches, units, shareholders, investors, contractors, successors,
2 joint venturers, predecessors, related entities, and assigns, and all other individuals and entities
3 acting by, through, under and/or on behalf of Backpack Boyz. (Settlement Agreement §1.31) The
4 Settlement Agreement also provides Defendants with a general release from named Plaintiff,
5 including a Civil Code § 1542 waiver. (Settlement Agreement §2.6).

6 **D. Attorneys' Fees and Incurred Expenses**

7 Under the terms of the Settlement Agreement, Class Counsel will move for reasonable
8 attorney's fees, not exceeding one-third (33%), **\$115,500 (One Hundred and Fifteen Thousand**
9 **and Five Hundred Dollars)**, of the Gross Settlement Amount (\$350,000). (Settlement Agreement
10 § 2.2). Class Counsel will also seek reimbursement of reasonable expenses incurred by Class
11 Counsel in connection with the Lawsuit, not exceeding **\$25,000 (Twenty-Five Thousand**
12 **Dollars)**. (*Id.*) The Court need not rule on Class Counsel's fees and expenses now; a formal
13 application will be filed prior to and to be heard at the same date and time as the Final Approval
14 Hearing. As will be explained in detail in the application, the requested fees and costs are
15 eminently reasonable considering the amount of time and expenses incurred by Class Counsel in
16 this case. In that application for fees and costs Class Counsel will provide a lodestar cross check
17 and itemization of costs so that the court can see the requests are reasonable. (Da Vega Decl., ¶
18 26.)

19 **E. PAGA Penalty Amount, LWDA Payment, and Settlement Administrator.**

20 **\$35,000 (Thirty-Five Thousand Dollars)** of the Gross Settlement Fund is allocated to be
21 paid for the resolution of potential PAGA claims (the "PAGA Penalty Amount"). (Settlement
22 Agreement §1.27). Pursuant to PAGA, 75% of that amount, **\$26,250 (Twenty-Six Thousand**
23 **Two Hundred and Fifty Dollars)**, is to be paid to the California Labor and Workforce
24 Development Agency (the "LWDA Payment") and 25% to the PAGA Group, **\$8,750 (Eight**
25 **Thousand Seven Hundred and Fifty Dollars)**, (the "PAGA Group Amount"). (Settlement
26 Agreement §§1.20, 1.25, 1.26, 1.27). Prior to the Final Approval/Fairness Hearing, Class Counsel
27 will apply to the Court for payment from the Gross Settlement Fund to compensate the Settlement
28 Administrator, CPT Group, Inc., for fees and costs associated with the administration of the

1 settlement (not exceeding **\$10,000 [Ten Thousand Dollars]**)(the “Settlement Administration
2 Costs”). (Settlement Agreement §§ 1.2, 1.3). (Da Vega Decl., ¶ 27)

3 **F. Class Representative Enhancement Payment**

4 Pursuant to the terms of the Settlement, Class Counsel will seek an Enhancement Payment
5 of **\$10,000 (Ten Thousand Dollars)** for the Class Representative. (Settlement Agreement §§1.8,
6 2.3). The Court need not rule on the Class Representative Enhancement Payment now; a formal
7 application will be filed prior to the Final Approval/Fairness Hearing. As will be explained in
8 detail in the application, the requested Enhancement Payment is reasonable and justified based on
9 the significant time, effort and risks the Class Representative incurred in bringing this case on
10 behalf of the Class, as well as the substantial benefits the resulting Settlement provides the Class.
11 The proposed Class Representative Enhancement Payment represents only .02% of the total Gross
12 Settlement Amount and will not significantly reduce the awards of the Class Members. Public
13 policy strongly supports service awards to plaintiffs in employment class actions, and they are
14 routinely granted by courts in this state and around the country. Such awards compensate
15 plaintiffs for the efforts and risks they have undertaken on behalf of the Class, without which no
16 settlement would be possible. And, they provide an incentive for other employees to bring cases
17 that vindicate the public interest in the lawful payment of wages. (Da Vega Decl., ¶28.)

18 **VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD**
19 **BE PRELIMINARILY APPROVED**

20 The law favors settlements, especially of class actions. See *Potter v. Pacific Coast*
21 *Lumber Co.* (1951) 37 Cal. 2d 592, 602; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d
22 943, 950. To ensure there is no “fraud, collusion or unfairness to the class,” class claims can only
23 be settled through Court review and approval. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
24 1794, 1801. The trial court is required to determine whether the “settlement is fair, adequate and
25 reasonable,” and has “broad discretion” in making this assessment. *Id.* Nevertheless, “[d]ue regard
26 should be given to what is otherwise a private consensual agreement between the parties.” *Id.*

27 At this stage, the Court is making a preliminary assessment of whether the Settlement
28 appears to be fair, adequate, and reasonable and, thus, whether notice to the class of the settlement

1 terms and conditions and the scheduling of a final approval hearing is worthwhile. See Cal. Rules
2 of Court, rule 3.769; 4 NEWBERG ON CLASS ACTIONS § 13:13 (5th ed. 2014). (“The goal of
3 preliminary approval [of a class settlement] is for a court to determine whether notice of the
4 proposed settlement should be sent to the class, not to make a final determination of the
5 settlement’s fairness.”) “The general rule is that a court will grant preliminary approval where the
6 proposed settlement is neither illegal nor collusive and is within the range of possible of
7 approval.” 4 NEWBERG ON CLASS ACTIONS § 13:10 (5th ed. 2014). *See also Harris v. Vector*
8 *Mktg. Corp.* (N.D. Cal. Apr. 29, 2011) No. C-08-5198 EMC, 2011 WL 1627973, at *7 (“the Court
9 may grant preliminary approval of a settlement and direct notice to the class if the settlement (1)
10 appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious
11 deficiencies; (3) does not improperly grant preferential treatment to class representatives or
12 segments of the class; and (4) falls within the range of possible approval.”)

13 Following notice to the Class, the Court will make a final determination regarding the
14 fairness of Settlement. In making this evaluation, courts consider and balance a number of
15 factors, including:

16 [T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration
17 of further litigation, the risk of maintaining class action status through trial, the
18 amount offered in settlement, the extent of discovery completed and the stage of
19 the proceedings, the experience and views of counsel, the presence of a
governmental participant, and the reaction of the class members to the proposed
settlement.

20 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–45 (quoting *Dunk v. Ford*
21 *Motor Co., supra*, 48 Cal.App.4th at 1801). Nevertheless, a presumption of fairness exists when:
22 (1) the parties reached a settlement through arm’s-length bargaining; (2) the parties conducted
23 sufficient investigation and discovery to allow counsel and the Court to act intelligently; (3)
24 counsel are experienced in similar litigation; and, (4) the percentage of objectors is small. *Dunk,*
25 *supra*, 48 Cal.App.4th at 1802.

26 **A. The Settlement Is the Product of Non-Collusive, Arm’s-length, and Well-**
27 **Informed Negotiations**
28

1 In reaching the Settlement Agreement, counsel on both sides relied on their respective
2 substantial litigation experience in similar employment class actions, and thorough analysis of the
3 legal and factual issues presented in this case. Information obtained through Class Member
4 interviews and informal discovery informed Plaintiff's assessment of the strengths and
5 weaknesses of the case and the benefits of the Settlement Agreement. The document and data
6 exchanges have allowed the Parties to closely evaluate the claims in this case, and the benefits of
7 the proposed Settlement Agreement. *See 7-Eleven Owners for Fair Franchising v. Southland*
8 *Corp.* (2000) 85 Cal.App.4th 1135, 1150 (“[I]n the context of class action settlements, formal
9 discovery is not a necessary ticket to the bargaining table where the parties had sufficient
10 information to make an informed decision about settlement.”) (quoting *Linney v. Cellular Alaska*
11 *P'ship* (9th Cir. 1998) 151 F.3d 1234, 1239).

12 The Parties initially engaged in a full day of mediation, which resulted in an agreement to
13 certain terms of resolution. Further, even after a deal was reached in the form of a confidential
14 MOU, the Parties continued to engage with each other in regards to the terms of the long form
15 Settlement Agreement. The fact that the Settlement “was the product of extensive and hard-
16 fought adversarial negotiations between the parties” and only reached with the assistance of an
17 experience mediator is a strong indication that the settlement process was fair and non-collusive.
18 *See Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.

19 **B. The Settlement Agreement Provides Reasonable Compensation for Class**
20 **Members' Damages in Light of Significant Litigation Risks**

21 Class Members will share in an “Estimated Net Settlement Amount” of approximately
22 **\$163,250 (One Hundred and Sixty Three Thousand Two Hundred and Fifty Dollars)**
23 (\$350,000 Gross Settlement Amount minus attorney fees [-\$115,500], estimated attorney costs
24 [-\$25,000], estimated class administration costs [-\$10,000], service award [- \$10,000] and PAGA
25 payments to the State of California/LWDA Payment [-\$26,250]), to be distributed to the
26 Settlement Class Members as 1099 payments. This is a good recovery for the class of
27 approximately 93 non-exempt employees making approximately \$15.77/hr., and who have been
28 estimated to be under-paid \$2,506 in total overtime wages, \$69,325 in meal periods and \$70,073

1 in rest breaks and whose claims' damages are driven largely by misclassification penalties. **The**
2 **average Class Member will receive a pre-tax award of approximately \$1,755.37** (\$163,250
3 [Est. Net Settlement Amount] divided by 93 Class Members = \$1,755.37/per class member).

4 The amount of the Settlement is reasonable given: (1) the difficulty of the claims, (2) the
5 degree of risk and uncertainty involved in further litigation, (3) the amount of time that would
6 pass before Plaintiff and the Class Members would see the fruits of any class verdict in their favor,
7 (4) ability of Defendants to pay, and (5) the relative short period (since March 10, 2021) of the
8 alleged practices and amount of alleged under-paid overtime wages. Defendants assert numerous
9 legal and factual grounds for defending this action and, protracted litigation can lead to potential
10 insolvency, and thus no recovery for any Class Member. Further, absent this Settlement,
11 Defendants would have vehemently contested the propriety of class treatment both through
12 motion practice regarding compelling arbitration and class certification and through any trial.

13 While Plaintiff remains confident that were this case to proceed in litigation, she would
14 successfully move for class certification, defeat decertification, and prove her claims at trial,
15 Plaintiff recognizes there are considerable risks, and that independent contractor and "off-the-
16 clock" class actions are particularly challenging, and that a Court may have required her to
17 individually arbitrate her claim. See *Deaver v. Compass Bank* (N.D. Cal. Dec. 11, 2015) 2015 WL
18 8526982, at *7 (approving class settlement in part because of the "difficulties [in] certifying the
19 class and establish liability on the merits of Plaintiff's [off-the-clock] claims"); Cf. *Chu v. Wells*
20 *Fargo Investments, LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, at *4 (ruling that class
21 certification risk weighed in favor of settlement approval, recognizing that "the outcome of
22 plaintiffs' case was far from certain, particularly in light of several recent decertification orders
23 and denials of certification in similar wage and hour class actions.")

24 Further, even if Plaintiff succeeded in proving at trial that Defendants should be liable for
25 non-exempt employees being misclassified and working "off the clock"/under-paid their flat rate
26 for overtime hours, Plaintiff would still have the challenge of prevailing on a motion to compel
27 arbitration and proving misclassification and the extent of hours worked/under-paid. Given the
28 nature of a misclassification case not all the information sought to be analyzed by Class Counsel

1 could be found in documented records. Instead, Plaintiff's Expert analyzed potentially under-paid
2 overtime and penalties based on the estimates of the testimony/declarations of Plaintiff and Class
3 Members and assumptions from evidence provided by Class Members and Defendants. Based on
4 Class Counsel's investigation and Plaintiff's Expert's experience from other cases, Plaintiff
5 believes her assumptions are reasonable. Nevertheless, Plaintiff is very cognizant that Defendants
6 would challenge the assumptions as aggressive. Indeed, Defendants disputes that the evidence
7 establishes a pattern and practice of wage and hour violations (e.g., failure to pay minimum wage,
8 failure to pay overtime, failure to provide meal and rest breaks, etc.). The Court could ultimately
9 reject, either in whole or in part, Plaintiff's model for analyzing the existence of "off-the-
10 clock"/under-paid overtime work thus mooted her and class claims and damages potentially
11 leading to no recovery. *See Wren v. RGIS Inventory Specialists* (N.D. Cal. Apr. 1, 2011) 2011 WL
12 1230826, at *7 (risk associated with "challenges to their expert witnesses and damages
13 calculations" supported approval of settlement in off-the-clock class action); *In re Wells Fargo*
14 *Loan Processor Overtime Pay Litig.* (N.D. Cal. Aug. 2, 2011) 2011 WL 3352460, at *6
15 (recognizing that the potential difficulty in proving "off-the-clock" hours is a significant risk
16 which supports approval of class settlement).

17 Based on her current analysis, Plaintiff believes – and Defendants deny - that in the best-
18 case scenario, they would prove that the Class Members were misclassified and owed on average
19 a few hours of under-paid overtime wages each week (see Damage Analysis above). However,
20 "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of
21 what might have been achieved had plaintiffs prevailed at trial." *Wershba v. Apple Computer,*
22 *Inc., supra*, 91 Cal.App.4th at p. 246.

23 A settlement need not obtain 100 percent of the damages sought in order to be fair
24 and reasonable. (See *Rebney v. Wells Fargo Bank, supra*, 220 Cal.App.3d at p.
25 1139 [settlements found to be fair and reasonable even though monetary relief
26 provided was "relatively paltry"]; *City of Detroit v. Grinnell Corp., supra*, 495
F.2d at p. 455 [settlement amounted to only "a fraction of the potential
recovery"].)

27 *Id.* at 250. *See also Officers for Justice v. Civil Serv., Commission* (9th Cir. 1982) 688 F.2d 615,
28 624, 628 (recognizing that "the very essence of a settlement is compromise, a yielding of

1 absolutes and an abandoning of highest hopes” and that “[i]t is well-settled law that a cash
2 settlement amounting to only a fraction of the potential recovery will not per se render the
3 settlement inadequate or unfair.”) (internal quotation omitted).

4 Considering the significant challenges faced by Plaintiff including Defendants' legal and
5 factual defenses, there is a great risk the Class would do substantially worse in litigation than
6 under the Settlement or receive nothing at all. Further, absent a settlement, Class Members might
7 not receive any recovery at all or may not see any recovery until after years of litigation, including
8 appeals. See *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221
9 F.R.D. 523, 526 (“In most situations, unless the settlement is clearly inadequate, its acceptance
10 and approval are preferable to lengthy and expensive litigation with uncertain results.”) (internal
11 quotation omitted).

12 On the other hand, the average Class Member non-exempt employee will receive
13 approximately **\$1,755.37** under the Settlement. This is a good recovery similar to many other
14 wage and hour actions brought on behalf of hourly paid workers. See e.g. *Ogbuehi v. Comcast of*
15 *California/Colorado/Florida/Oregon, Inc.* (E.D. Cal. June 9, 2015) 2015 WL 3622999, at *7, 10
16 (approval of wage settlement where the average non-exempt/hourly class member was receiving
17 \$531.67); *Gardner v. GC Servs., LP* (S.D. Cal. Apr. 2, 2012) 2012 WL 1119534, at *4 (average
18 settlement award for the non-exempt/hourly employee class was “around several hundred dollars”
19 – “a good result for the class”); *Collins v. Cargill Meat Solutions Corp.* (E.D. Cal. 2011) 274
20 F.R.D. 294, 302 (preliminary approval of wage settlement where the average non-exempt/hourly
21 class member was receiving \$685). In sum, the Settlement provides meaningful, prompt relief for
22 the disputed wage and hour violations and is well within the range of reasonableness.

23 **C. The Class Settlement Payment Process is Fair and Reasonable**

24 All Settlement Class Members will be eligible to receive a share of the Estimated Net
25 Settlement Fund based upon the number of Shifts s/he worked as a non-exempt employee during
26 the Class Period. (See Settlement Agreement §§1.18, 1.21, 1.23, 1.35, 7.1). This method of
27 distribution is reasonably designed so that Settlement Class Members who worked more shifts and
28 thus, Plaintiff alleges, would have larger overtime and/or meal/rest break claims will receive a

1 larger share of the Settlement. Significantly, the proposed payment process ensures that the
2 maximum possible Estimated Net Settlement Fund will actually be received by Settlement Class
3 Members. As stated in the Class Notices, the Settlement Class Members need not take any further
4 action to receive a Settlement payment other than cash the settlement checks they receive in the
5 mail. Class Members who may be hesitant to take affirmative action to claim monies from
6 Defendants will not face the barrier of taking affirmative action to recover their portion of the
7 Settlement. If they do not opt-out of the settlement they will simply receive a check in the mail
8 that they can deposit/cash. Any settlement checks not cashed after 180 days from the date of the
9 class-wide distribution shall be void and the sums correlating to those checks not cashed and any
10 residual amounts shall be returned to the Settlement Administrator and will be paid out per
11 guidelines in CCP § 384. (Settlement Agreement §7.4).

12 **D. The Settlement of Penalties Under the Labor Code Private Attorney General**
13 **Act of 2004 (PAGA) is Reasonable**

14 The settlement of the PAGA claim for **\$35,000** (10% of \$350,000 Gross Settlement
15 Amount) is within the range of reasonable PAGA settlement amounts. *See, e.g. Nelson v. Avon*
16 *Prod., Inc.* (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *2 (approving class settlement of \$1.8
17 Million with \$10,000 attributed to PAGA claim); *Taylor v. Shippers Transp. Express, Inc.* (C.D.
18 Cal. May 14, 2015) 2015 WL 12658458, at *19 (approving payment of \$50,000 for PAGA
19 penalties from a \$11 Million class settlement, finding that “[t]he proposed PAGA payment is
20 greater than awards deemed reasonable and approved in other cases,” and citing cases); *Franco v.*
21 *Ruiz Food Prod., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, at *14 (approving PAGA
22 payment of \$10,000 from a \$2.5 Million class settlement, finding the “amount comports with
23 settlement approval of PAGA awards in other cases,” and citing cases); *Cotter v. Lyft, Inc.* (N.D.
24 Cal. 2016) 193 F.Supp.3d 1030, 1037 [preliminarily approving class action settlement allocating a
25 PAGA set-aside worth a fraction of the PAGA claim’s potential value, where the defendant’s
26 obligations were “genuinely unclear” and there was no evidence the defendant acted deliberately
27 or negligently failed to learn about its obligations.] Pursuant to Labor Code § 2699(i), the
28

1 LWDA will receive 75% of this amount (\$26,250), and the remaining 25% (\$8,750) will be
2 shared by the PAGA Group. (Settlement Agreement §§ 1.19, 1.20, 1.25, 1.26, 1.27).

3 **E. The Settlement’s Provision for Attorneys’ Fees, Expenses, and Costs is**
4 **Reasonable, Fair, and Appropriate Under the Circumstances**

5 In connection with final settlement approval/Fairness Hearing, Class Counsel will apply to
6 the Court for reasonable attorney’s fees and costs. The Settlement Agreement allows Counsel to
7 seek one-third (33%) of total Settlement fund (\$115,500) in attorney fees. Fee awards of 33%
8 are commonly awarded by courts. See, e.g. *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal. 5th 480,
9 503 (affirming fee award of one-third of the common fund in a wage and hour class action and
10 recognizing the following advantages in using the percentage method: “relative ease of
11 calculation, alignment of incentives between counsel and the class, a better approximation of
12 market conditions in a contingency case, and the encouragement it provides counsel to seek an
13 early settlement and avoid unnecessarily prolonging the litigation”) (internal quotation omitted);
14 *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 (“Empirical studies show that,
15 regardless whether the percentage method or the lodestar method is used, fee awards in class
16 actions average around one-third of the recovery.”) (internal quotation omitted); *Smith v. CRST*
17 *Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 2013 WL 163293, at *5 (recognizing the California
18 benchmark for fee awards in class actions as 33%).

19 The Court need not rule on Class Counsel’s fees and costs now; a formal application will
20 be filed prior to the Final Approval Hearing. As will be explained in detail in the application,
21 including a lodestar cross-check, a fee award of one-third (33%) of the Settlement fund is
22 reasonable and well-justified in consideration of the risks Class Counsel has undertaken in
23 pursuing this case on a contingency basis and the good result achieved on behalf of the Class.
24 Class Counsel expended significant time and resources on this matter and will continue to do so
25 over the next approximate six months as they oversee the administration of the Settlement. Class
26 Counsel will further request reimbursement of their incurred, reasonable costs, not exceeding
27 \$25,000. See *Thieriot v. Celtic Inc. Co.* (N.D. Cal. Apr. 21, 2011) 2011 WL 1522385, *7 (“Class
28 counsel are entitled to reimbursement of reasonable out-of-pocket expenses.”)

1 **F. Class Representative Enhancement Payments Are Reasonable and**
2 **Routinely Awarded**

3 Prior to the Final Approval Hearing/Fairness Hearing, Class Counsel will file a motion
4 seeking a reasonable Class Representative Enhancement Payment for the Class Representative.
5 The Court need not rule on this request now. At present, it is sufficient for the Court to determine
6 that the award provided for in the Settlement Agreement does not render the overall Settlement
7 inherently unfair and is not an obstacle to preliminary approval.

8 Courts routinely approve service (“incentive” or “enhancement”) awards to compensate
9 class representatives for the services they provide and the risks they incur during class litigation.
10 See *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393 (“incentive
11 awards are fairly typical in class action cases . . . and are intended to compensate class
12 representatives for work done on behalf of the class, to make up for financial or reputational risk
13 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a
14 private attorney general.”)

15 At the Final Approval Hearing/Fairness Hearing, Class Counsel will ask the Court to
16 approve an Enhancement Payment of **\$10,000 for the Class Representative**. Based on Class
17 Representative’s significant time, effort and risks incurred in bringing this case on behalf of the
18 Class, as well as the substantial benefits the resulting Settlement provides the Class, the requested
19 service awards should ultimately be found to be reasonable. See, *e.g. Hasty v. Elec. Arts, Inc.* (San
20 Mateo Cty. Super. Ct., Sept. 22, 2006) No. CIV 444821 (approving an award of \$30,000 to the
21 class representative in a wage and hour class action); *Meewes v. ICI Dulux Paints* (Los Angeles
22 Cty. Super. Ct. Sept. 19, 2003) No. BC265880 (approving service awards of \$50,000, \$25,000 and
23 \$10,000 to the named plaintiffs); *In re High-Tech Employee Antitrust Litig.* (N.D. Cal. Sept. 2,
24 2015) No. 11-CV-02509-LHK, 2015 WL 5158730, at *17 (awarding service awards of \$80,000
25 and \$120,000).

26 The requested Class Representative Enhancement Payment is also reasonable in proportion
27 to the overall Settlement. The award represents only a small fraction of the total Settlement fund
28 and thus barely impacts the recovery of the Class Members. See *Singer v. Becton Dickinson & Co.*

1 (S.D. Cal. June 1, 2010) 2010 WL 2196104, at *9 (awarding \$25,000 to class representative from
2 \$1 Million wage and hour case settlement (2.5% of fund)); *Thieriot v. Celtic Inc. Co, supra* 2011
3 WL 1522385 at *8 (awarding \$25,000 service award to class representative from class settlement
4 of \$1.375 Million (1.8% of fund)).

5 In sum, the proposed Attorneys' fees, costs and Class Representative Enhancement
6 Payment are within the typical range of approval, and are justified given the facts of this case.
7 Regardless, both the attorneys' fees, costs and Enhancement Payment are subject to the Court's
8 approval and should be assessed at the final approval stage/Fairness Hearing after Class Counsel
9 formally applies for fees, costs and Class Representative Enhancement Payment and the Class
10 Members have an opportunity to respond.

11 **G. CPT Group Should Be Appointed as the Settlement Administrator**

12 Pursuant to the Settlement Agreement, the Parties seek to have CPT Group, Inc. appointed
13 as the Settlement Administrator. Amongst other things, the Settlement Administrator will be
14 responsible for: processing class data from Defendants; mailing Notices to Class Members;
15 handling returned Class Notices, using skip-tracing and last-known telephone numbers to obtain
16 current addresses for Class Members; creating and overseeing a Qualified Settlement Fund (QSF);
17 calculating the Class Settlement Payments (with the assistance and input of the Parties);
18 distributing the Individual Settlement Amount and PAGA Group Payments to Class/PAGA
19 Members; and tax reporting of Class Settlement Payments. CPT Group is a competent and
20 experienced settlement administration company. Plaintiff will apply to the Court for payment for
21 CPT's fees and costs, which it estimates at **\$10,000**. Based on the amount of work demanded of
22 the Settlement Administration, this sum is reasonable. See, e.g. *McNeal v. RCM Techs. USA Inc.*
23 (C.D. Cal. Mar. 16, 2017) 2017 WL 1807595, at *3 (preliminarily approving \$327,000 class
24 settlement where the Claims Administrator would receive fees not exceeding \$20,000).

25 **VIII. THE COURT SHOULD CONDITIONALLY CERTIFY A PROVISIONAL**
26 **SETTLEMENT CLASS**

27 When a negotiated class action settlement has been reached prior to certification—as
28 here—the Parties may agree that a defined class be conditionally (or provisionally) certified

1 for settlement purposes only. Cal. Rules of Court, Rule 3.769(d). In such circumstances, the
2 decision to certify a class is purely a procedural one and should be based on the allegations in the
3 Complaint and not on the perceived factual or legal merit of the class claims. *Linder v. Thrifty*
4 *Oil Co.*, 23 Cal.4th 429, 439-41 (2000). Therefore in a class action settlement context the
5 Parties are not required to stipulate to certification as contemplated by Cal. Rules of Court, Rule
6 3.764(e).

7 In support of conditional class certification, a party must show that (1) the class is
8 “ascertainable and sufficiently numerous;” (2) there are “predominant common questions of law
9 or fact;” (3) the class representatives have “claims or defenses typical of the class;” (4) the class
10 representatives can “adequately represent the class;” and (5) the benefits of a class action make it
11 “superior to the alternatives.” *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,
12 1021.

13 *Ascertainability and Numerosity:* For settlement purposes the Class Members are
14 identifiable from Defendants' records, and they total approximately 93 individuals. For purposes
15 of administering this Settlement, the Class is ascertainable and sufficiently numerous as to make
16 joinder impracticable. *Citizens of Humanity, LLC v. Ramirez* (2021) 63 Cal.App.5th 117, 130–
17 131.

18 *Common Legal and Factual Questions Predominate:* For settlement purposes, the
19 common questions include, without limitation: (i) whether Class Members were misclassified as
20 independent contractors; (ii) whether Class Members were paid for all hours worked and wages
21 to which they were entitled; (iii) whether Class Members were paid for all overtime hours
22 worked and wages to which they were entitled at the appropriate rate; (iv) whether Class
23 Members were denied duty-free meal/rest periods; (v) whether Class Members are entitled to
24 recover waiting time penalties under California law; (vi) whether Class Members received
25 reimbursement for necessary business expenses; and (vii) whether Class Members received
26 compliant wage statements. *See, e.g. Williams v. Superior Court* (2013) 221 Cal.App.4th 1353,
27 1369-1371 (overturning decertification of off-the-clock class and ruling the plaintiffs had
28

adequately shown that defendants had a company wide practice of having class members work off-the-clock).

Typicality of Claims: “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509. Like all Class Members, Plaintiff was engaged as a non-exempt Cannabis employee and alleges that she and all other non-exempt employees were subject to the same or similar policies and practices of Defendants whereby they were allegedly misclassified as independent contractors, not paid the correct rate for all overtime hours worked, not reimbursed for business related expenses, and denied duty-free meal/rest breaks. Further, Plaintiff alleges that as a result of these policies and practices she – like all Class Members – she was: Misclassified, denied overtime pay at the correct rate, required to work through/during meal/rest periods and not provided premium pay, not reimbursed for necessary business expenses, and not provided accurate and timely wage statements. See *Wershba v. Apple Computer, Inc.*, supra, 91 Cal.App.4th at p. 239 (class representative typical as “all of the class members [including the class representative] here suffered a common alleged wrong.”)

Adequate Representation: Plaintiff will adequately represent the Class. She has the same interest in maintaining this action as any Class Member would have. Further, she has hired counsel experienced in class actions and wage and hour law. See *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450 (“Adequacy of representation depends on whether the plaintiff’s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the class.”)

Superiority of Class Action: Further, the maintenance of the Class results in “substantial benefits” to the Parties, including the Class Members, and the Court. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. It would be inefficient and a waste of the Court’s and Parties’ resources to require 93 Class Members to separately litigate the same issues in different lawsuits. *Capitol People First v. Dep’t of Developmental Servs.* (2007) 155 Cal.App.4th 676, 702 (“without class treatment there could be multiple actions that would burden the litigants and the courts with

1 cumulative and excessive expenses, discovery efforts and evidence.”) The class action procedure
2 is an ideal method for resolving the relatively modest individual claims of 93 current and former
3 non-exempt employees, many of whom would be deterred from bringing individual claims due to
4 the costs of litigation and concerns that bringing a lawsuit could adversely affect current or future
5 employment. *See Bibo v. Fed. Exp., Inc.* (N.D. Cal. Apr. 21, 2009) 2009 WL 1068880, at *9
6 (“Class treatment will increase class members’ access to redress because it unifies what may be a
7 series of small claims . . . Additionally, class treatment may relax any concerns that current
8 employees may have about retaliation if they were to bring a suit against FedEx, as unity of the
9 employee class would prevent retaliation.”)

10 Accordingly, the Class should be conditionally certified as a provisional settlement class.

11 **IX. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

12 A court is afforded broad discretion in determining appropriate notice to class members.
13 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973-74. The Class Notice should be provided
14 in a manner that “has a reasonable chance of reaching a substantial percentage of the class
15 members.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 251 (internal quotation
16 omitted). “In regard to the contents of the notice, the notice given to the class must fairly apprise
17 the class members of the terms of the proposed compromise and of the options open to dissenting
18 class members.” *Id.* (internal quotation omitted).

19 The proposed Class Notices is attached to the Settlement Agreement as **Exhibit C: Notice**
20 **of Class Action Settlement.** The Settlement Agreement is attached as Exhibit 1 to the Da Vega
21 Decl., which is filed in support of this motion.

22 A notice will be sent to Class Members. **The Notice Period / “Response Deadline” will**
23 **be 45 calendar days.** The Class Notice clearly and accurately describes (a) the case information
24 and the nature of the action; (b) the terms of Settlement Agreement; (c) the definition of the class;
25 (d) the formula for calculating the Net Settlement Fund (including the amounts sought for the
26 Class Counsel Award, Class Representative Enhancement Payment, Settlement Administration
27 Costs and the LWDA Payment) and Individual Settlement Amounts; (e) the individual Class
28 Member’s estimated number of Shifts worked during the Class Period and Gross Allocated

1 Amount; (f) the dates which comprise the Class Period, (g) instructions on how to submit a Shift
2 Dispute, Request for Exclusion, or Objection, and (h) the deadlines by which Shift Disputes,
3 Requests for Exclusion, or Objections to the Agreement must be submitted to the Settlement
4 Administrator. It also describes that Class Members who do not opt-out, will be bound by the
5 Settlement Agreement, including the release of claims and PAGA, if the Agreement is approved
6 by the Court; the process to appear at the Final Approval Hearing/Fairness Hearing to state
7 objections; and that a Class Member may retain separate counsel to appear on the Class Member's
8 behalf. *See* Cal. Rules of Court, rule 3.766(d) & 3.769(f).

9 The proposed plan for distributing the Class Notice is also reasonable and satisfies the
10 notice requirements of California Rules of Court, Rules 3.766 & 3.769(f) and all other legal and
11 due process requirements. Individual notice will be mailed to Class Members, which is a
12 reasonable and practicable way of reaching all of the Class Members. 4 NEWBERG ON CLASS
13 ACTIONS § 8:15 (5th ed. 2014). The notices will have contact information for Class Counsel.
14 Defendants will provide the Settlement Administrator with a Class List containing each Class
15 Members: (1) full name; (2) last known mailing address; (3) last known telephone number; (4)
16 Social Security number; and (5) estimated number of Shifts worked during the Class Period to the
17 extent any or all such information is reasonably available to Defendants. (Settlement Agreement
18 §1.6).

19 Prior to the mailing of the Class Notice, the Settlement Administrator will run the list of all
20 Class Members through the United States Postal Service's National Change of Address database
21 ("NCOA"). (Settlement Agreement §4.3). However, if Class Notices are returned because the
22 address of the recipient is no longer valid, the Settlement Administrator will perform skip traces to
23 locate Class Members. (Settlement Agreement §4.4). Further, as necessary, the Settlement
24 Administrator will use Class Members' last-known telephone numbers (and telephone numbers
25 updated through public and proprietary databases) to obtain Class Members' current addresses.
26 The proposed mailing and distribution of the Class Notice constitutes the best notice practicable.

27 **X. A FINAL APPROVAL / FAIRNESS HEARING SHOULD BE SCHEDULED**
28

1 The last step in the settlement approval process is a final approval hearing, at which the
2 Court may hear all evidence and argument necessary to evaluate the proposed Settlement. *See*
3 California Rules of Court, Rules 3.769(g). Plaintiff respectfully requests that the Court schedule
4 the Final Approval / Fairness Hearing and set deadlines for the submission of motion and
5 supporting papers.

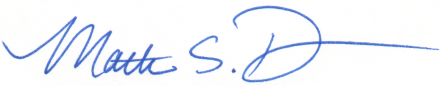
6 **XI. CONCLUSION**

7 For the reasons set forth above and in the accompanying papers, Plaintiff respectfully
8 requests that the Court grant Plaintiff's Motion for Preliminary Approval of the Class Settlement.
9

10 **DATED:** October 27, 2022

DA VEGA | FISHER | MECHTENBERG LLP

11
12 By: _____



13 Matthew S. Da Vega
14 Attorneys for Plaintiff and Class
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