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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

EMMA PETROSSIAN, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

THE TESTING COMPANY LLC, a limited
liability company; and DOES 1 through 10,
inclusive,

Defendant.

Case No.: 22STCV34526

CLASS ACTION

*[Assigned for all purposes to: Hon. Yvette M.
Palazuelos, Dept. 9]*

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

*[Filed with the Declaration of Justin F.
Marquez, Declaration of Emma Petrossian,
and Proposed Order]*

PRELIMINARY APPROVAL HEARING

Date: February 27, 2024

Time: 10:00 a.m.

Dept: 9

Complaint filed: October 27, 2022

FAC filed: March 2, 2023

Trial date: Not set

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

2 PLEASE TAKE NOTICE that on February 27, 2024 at 10:00 a.m., in Department 9 of the
3 Los Angeles Superior Court, located at 312 N. Spring Street, Los Angeles, CA 90012, pursuant to
4 Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*, Plaintiff Emma
5 Petrossian (“Plaintiff”) will move the Court for an Order granting preliminary approval of the
6 proposed class action settlement between Plaintiff and Defendant The Testing Company, LLC
7 (“Defendant”). Plaintiff further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Class Action and PAGA Settlement Agreement
9 and Class Notice;
10 2. Certifying a Class for settlement purposes;
11 3. Approving the Notice and the plan for distribution of the Notice;
12 4. Appointing Plaintiff Emma Petrossian as Class Representative for settlement purposes;
13 5. Appointing Plaintiff’s Counsel, Justin F. Marquez, Benjamin H. Haber, and Daniel J.
14 Kramer of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
15 6. Appointing CPT Group as the Settlement Administrator; and
16 7. Scheduling a final approval hearing.

17 The motion will be based upon this notice, the attached memorandum of points and
18 authorities, the Declarations of Justin F. Marquez and Emma Petrossian, filed concurrently
19 herewith, the records and files in this action, and any other further evidence or argument that the
20 Court may properly receive at or before the hearing.

21 Respectfully submitted,

22 Dated: January 3, 2024

WILSHIRE LAW FIRM

23
24 By: _____

Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

25
26 *Attorneys for Plaintiff*
27
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Emma Petrossian (“Plaintiff”) seeks preliminary approval of a proposed
4 \$350,000.00 non-reversionary, wage and hour class action settlement with Defendant The Testing
5 Company, LLC (“Defendant”). The Settlement will provide substantial monetary payments to
6 approximately 393 class members. And, as set forth more fully below, the proposed Settlement
7 satisfies all the criteria for settlement approval under California law. The Settlement was reached
8 after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and
9 were facilitated by an experienced class action mediator, David Phillips, Esq., over the course of a
10 full day of mediation that was conducted via Zoom. After extensive negotiations and discussions
11 regarding the strengths and weaknesses of Plaintiff’s claims and Defendant’s defenses, the Parties
12 finalized and executed the long-form settlement agreement in October 2023. Accordingly, Plaintiff
13 requests that the Court preliminarily approve the proposed Settlement, certify the proposed
14 settlement class, approve the proposed notice, and set a final approval hearing.

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

16 **A. Plaintiff’s Claims**

17 This is a wage and hour class action and PAGA representative action. Plaintiff and
18 putative class members worked in California as hourly-paid or non-exempt employees for
19 Defendant during the class period. Defendant is a California limited liability corporation that
20 provides COVID-19 testing centers for businesses, schools and universities, municipalities,
21 governments, events, and other organizations. (Declaration of Justin F. Marquez in Support of
22 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶
23 2.) Defendant shut down its operations in California. (*Id.*)

24 Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices
25 resulted in Labor Code violations. (Marquez Decl., ¶ 3.) Plaintiff alleges that Defendant failed
26 to pay for all hours worked. (*Id.*) Plaintiff further alleges that Defendant failed to provide
27 employees with legally compliant meal and rest periods, and Defendant failed to reimburse
28 business expenses. (*Id.*) Based on these allegations, Plaintiff asserts related claims for failure

1 to provide accurate wage statements, failure to pay all final wages at termination, unfair business
2 practices, and civil penalties under PAGA. (*Id.*)

3 On October 27, 2022, Plaintiff filed a putative wage-and-hour class action complaint
4 against Defendant for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204,
5 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194, and 1198);
6 (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and
7 permit rest periods (Labor Code §§ 226.7 and 512); (5) failure to provide accurate itemized
8 wage statements (Labor Code § 226); (6) failure to timely pay final wages at termination (Labor
9 Code §§ 201-203); (7) failure to indemnify employees for expenditures (Labor Code § 2802);
10 and (8) unfair business practices (Business and Professions Code 17200 et seq.). (Marquez
11 Decl., ¶ 4.) On March 2, 2023, Plaintiff filed the First Amended Complaint against Defendant
12 adding claims for civil penalties under Private Attorneys General Act “PAGA” (Labor Code §
13 2698 et seq.). (*Id.*) Plaintiff sent a notice to Defendant and the California Labor & Workforce
14 Development Agency (“LWDA”) alleging similar wage and hour violations pursuant to the
15 PAGA (Cal. Lab. Code §§ 2699, *et seq.*) on October 31, 2022. (*Id.*)

16 **B. Discovery and Investigation**

17 Following the filing of the Complaint, the parties exchanged documents and information
18 before mediating this action. (Marquez Decl., ¶ 5.) Defendant produced a sample of time and
19 pay records for class members. (*Id.*) Defendant also provided documents of its wage and hour
20 policies and practices during the class period, and information regarding the total number of
21 current and former employees in its informal discovery responses. (*Id.*)

22 After reviewing documents regarding Defendant’s wage and hour policies and practices,
23 analyzing Defendants’ timekeeping and payroll records, and interviewing Class Members, Class
24 Counsel was able to evaluate the probability of class certification, success on the merits, and
25 Defendant’s maximum monetary exposure for all claims. (Marquez Decl., ¶ 6.) Class Counsel
26 also investigated the applicable law regarding the claims and defenses asserted in the litigation.
27 (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior to mediation.
28 (*Id.*)

1 **C. Settlement Negotiations**

2 On June 9, 2023, the parties participated in private mediation with experienced class
3 action mediator David Phillips, Esq. (Marquez Decl., ¶ 7.) The mediation was conducted via
4 Zoom. (*Id.*) The settlement negotiations were at arm's length and, although conducted in a
5 professional manner, were adversarial. (*Id.*) The parties went into the mediation willing to
6 explore the potential for a settlement of the dispute, but each side was also prepared to litigate
7 their position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive
8 negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and
9 Defendant's defenses, the Parties reached a settlement the material terms of which are
10 encompassed within the Settlement. (*Id.* at ¶ 8, Ex. 1 [Class Action and PAGA Settlement
11 Agreement and Class Notice].)

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

18 Indeed, the \$350,000.00 Settlement represents **38.4% of the realistic maximum**
19 **recovery of \$912,056.35.** (Marquez Decl., ¶ 25.) Although Class Counsel estimated that
20 Defendant's maximum potential liability for all claims was approximately \$7 million, when the
21 risk of prevailing at certification and trial are factored into the equation and the fact that
22 Defendant is no longer operating in California, Class Counsel believes that Defendant's realistic
23 exposure was \$912,056.35, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶
24 16-29.) Considering the risk and uncertainty of prevailing at class certification and at trial, this
25 is an excellent result for the Class. (*Id.* at ¶ 25.) Indeed, because of the proposed Settlement,
26 class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable
27 judgment.

28 ///

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

2 The Parties used the Los Angeles Superior Court’s Form Class Action and PAGA
3 Settlement Agreement and Class Notice. A document showing edits the parties made to the
4 template in redline is attached to the Declaration of Justin F. Marquez as Exhibit 2. The
5 Settlement’s key terms include:

6 1. Class Definition: For settlement purposes only, the Parties agree to the certification
7 of a class pursuant to California Code of Civil Procedure § 382 defined as: “all persons who were
8 employed by Testing Company in California as hourly-paid or non-exempt employees during the
9 Class Period.” (Settlement, § 1.5.)

10 2. Class Period: “means the period from May 2, 2018 to August 9, 2023.” (Settlement,
11 § 1.12.)

12 3. Participating Class Members: “means a Class Member who does not submit a valid
13 and timely Request for Exclusion from the Settlement.” (Settlement, § 1.35.)

14 4. Aggrieved Employees: means a person employed by Defendant in California as an
15 hourly-paid or nonexempt employee who worked for Defendant during the PAGA Period from
16 May 6, 2021 to August 9, 2023. (Settlement, §§ 1.4, 1.31.)

17 5. Gross Settlement Amount: This amount is \$350,000.00, for all claims, including
18 wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs,
19 payment to the Labor and Workforce Development Agency (“LWDA”) for the alleged PAGA
20 penalties, all other penalties, and the Class Representative Service Award. (Settlement, § 1.22.)

21 6. Uncashed Checks: If a settlement check is returned to the Settlement Administrator
22 as undelivered, the Settlement Administrator shall, within 7 days of receiving the returned check,
23 re-mail checks to the USPS forwarding address provided or to an addressed ascertained through
24 the Class Member Address Search. Any settlement checks remaining uncashed after one hundred
25 and eighty (180) days shall be transmitted to the Cy Pres Recipient, Bet Tzedek Legal Services,
26 3250 Wilshire Boulevard, #1300, Los Angeles, California 90010. (Settlement, §§ 4.4.1, 4.4.2,
27 4.4.3.)

28 7. Release: “All Participating Class Members, on behalf of themselves and their

1 respective former and present representatives, agents, attorneys, heirs, administrators, successors,
2 and assigns, release Released Parties from all causes of action and factual or legal
3 theories/allegations that were alleged in the Operative Complaints in the Action and/or Plaintiff's
4 PAGA Notice to the LWDA, or that could have been brought in the Action and/or Plaintiff's PAGA
5 notice to the LWDA based on those same factual or legal theories/allegations, against the Released
6 Parties. This Release includes, but is not limited to, claims for violation of, or recovery under,
7 Labor Code sections 201, 202, 203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 1174,
8 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2802; the applicable IWC Wage Order; and Business
9 & Professions Code section 17200-17208. This Release also includes, but is not limited to, the
10 following claims for relief: (a) failure to pay minimum and straight time wages; (b) failure to pay
11 overtime wages; (c) failure to provide meal breaks; (d) failure to authorize and permit rest periods;
12 (e) failure to timely pay final wages at termination; (f) failure to provide accurate itemized wage
13 statements; (g) failure to indemnify employees for expenditures; (h) unfair business practices; and
14 (i) all damages, penalties, restitution, attorneys' fees, interest, and other amounts recoverable in
15 connection with the above legal authorities and/or claims for relief under local, California, and
16 federal law. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do
17 not release any other claims, including claims for vested benefits, wrongful termination, violation
18 of the Fair Employment and Housing Act, unemployment insurance, disability, social security,
19 workers' compensation, or claims based on facts occurring outside the Class Period." (Settlement,
20 § 5.2.)

21 8. No Reversion: "None of the Gross Settlement Amount will revert to Defendant."
22 (Settlement, § 3.1.)

23 9. PAGA Allocation: The settlement includes \$20,000.00 allocated to Plaintiff's
24 claims under PAGA, with 75% of which (\$15,000.00) being paid to the LWDA and 25%
25 (\$5,000.00) being paid to the Aggrieved Employees. (Settlement, §§ 1.34, 3.2.5.) Class Counsel
26 submitted the proposed settlement to the LWDA before filing this Motion for Preliminary
27 Approval. (Marquez Decl., ¶ 10.)

28 10. Net Settlement Amount: The "Net Settlement Amount" is the amount that remains

and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) Individual PAGA Payments, the LWDA PAGA Payment, the Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expense Payment, and the Administration Expenses Payment. (Settlement, § 1.28.)

11. Distribution Formula: “An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks.” (Settlement, § 3.2.4.) As to PAGA: “The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$5,000) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods.” (Settlement, § 3.2.5.1.)

12. Tax Allocation: “33% of each Participating Class Member’s Individual Class Payment will be allocated to settlement of wage claims (the “Wage Portion”). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. 33% of each Participating Class Member’s Individual Class Payment will be allocated to settlement of claims for penalties, and 34% of each Participating Class Member’s Individual Class Payment will be allocated to settlement of claims for interest (together, the “Non-Wage Portion”). The Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment.” (Settlement, § 3.2.4.1.)

13. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid a Service Payment not to exceed \$5,000.00. (Settlement, § 3.2.1.) This amount is for Plaintiff’s time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § 5.1.) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount to be distributed between the participating Settlement Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

1 14. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
2 a fee application of up to 33 1/3% (\$116,666.67) of the Gross Settlement Amount, plus out-of-
3 pocket costs not to exceed \$20,000.00. (Settlement, § 3.2.2.)

4 15. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
5 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys'
6 fees, costs, and service award being sought, and an explanation of how the settlement allocations
7 are calculated. (Settlement, Ex. A, Class Notice.) Class Members will be notified by first-class
8 mail of the settlement. (Settlement, § 7.4.) CPT Group, the proposed Settlement Administrator,
9 will undertake its best efforts to ensure that the notice is provided to the current addresses of class
10 members, including conducting a national change of address search and re-mailing the notice to
11 updated addresses. (*Id.*; Marquez Decl., ¶ 11, Ex. 3 [Settlement Administrator Bid].)

12 **III. DISCUSSION**

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

20 In considering whether a settlement is reasonable, the trial court should consider relevant
21 factors, which may include the strength of plaintiff's case, the risk, expense, complexity and likely
22 duration of further litigation, the risk of maintaining class action status through trial, the amount
23 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
24 experience and views of counsel, the presence of a governmental participant, and the reaction of
25 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
26 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
27 that the class settlement is within the "ballpark" of reasonableness. (*Id.* at p. 133.) The record
28 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*

1 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not
2 require “an explicit statement of the maximum amount the plaintiff class could recover if it
3 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy
4 and the realistic range of outcomes of the litigation.”].)

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

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

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

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

19 The Settlement was reached following extensive negotiations following one day of
20 mediation with experienced employment mediator, David Phillips, Esq. (Marquez Decl. ¶ 7.) The
21 settlement negotiations were at arm’s length and, although conducted in a professional manner,
22 were adversarial. (*Id.*) The parties went into the mediation willing to explore the potential for a
23 settlement of the dispute, but each side was also prepared to litigate their or its position through
24 trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and
25 discussions regarding the strengths and weaknesses of Plaintiff’s claims and Defendant’s defenses,
26 the Parties reached an agreement. (Marquez Decl. ¶ 8.)

27 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
28 the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll

1 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
2 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
3 as information regarding the number of putative class members and the mix of current versus
4 former employees, the wage rates in effect, and the amount of meal and rest period premium wages
5 paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation,
6 Class Counsel investigated the applicable law regarding the claims and defenses asserted in the
7 litigation. (*Id.*) Thus, Plaintiff and her counsel were able to act intelligently and effectively in
8 negotiating the proposed Settlement. (*Id.*)

9 Class Counsel also has considerable experience and has demonstrated competence with
10 litigating wage and hour class actions. (*Id.* at ¶¶ 40-51.) Again, this supports the position that the
11 terms of the Settlement are premised on objective evidence that has been considered and weighed
12 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
13 action.

14 **2. The Settlement Is Fair and Reasonable in Light of the Parties’** 15 **Respective Legal Positions**

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

23 This settlement avoids the risks and the accompanying expense of further litigation.
24 (*Marquez Decl.*, ¶ 27.) While Plaintiff is confident in the merits of her claims, a legitimate
25 controversy exists as to each cause of action. (*Id.* at ¶ 26.) Plaintiff also recognizes that proving
26 the amount of wages due to each class member would be an expensive, time-consuming, and
27 uncertain proposition. (*Id.*)

28 The proposed settlement of \$350,000.00 therefore represents a substantial recovery when

1 compared to Plaintiff's reasonably forecasted recovery. (*Id.* at ¶¶ 16-29.) Because of the proposed
2 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
3 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
4 achieving class certification, the burdens of proof necessary to establish liability, the probability
5 of appeal of a favorable judgment, it is clear that the settlement amount of \$350,000.00 is within
6 the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
7 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
8 ***\$453.77.*** (*Id.* at ¶ 28.)

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

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

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

16 The proposed Notice, in the form attached to the Settlement Agreement, should be approved
17 for dissemination to the class. The Notice informs the class of the terms of the settlement and of
18 their rights to be excluded from the settlement. And if there are class members who wish to object
19 to this proposed class action settlement, they will have the opportunity to file their objections and
20 be heard at the Final Approval Hearing. Accordingly, the proposed Notice meets all the
21 requirements of Rule 3.769(f) of the California Rules of Court.

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

23 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
24 Counsel reasonable attorneys' fees in amount of \$116,666.67, which is 33 1/3% of the gross
25 Settlement Amount, and up to \$20,000.00 in costs. These amounts are disclosed to all class
26 members in the proposed Notice and are reasonable.

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1 **1. Class Counsel Request an Award of Fees Based on the “Common Fund”**
2 **Method**

3 California courts have long awarded attorneys’ fees as a percentage of the benefit created
4 by counsel in creating a common fund. The California Supreme Court held that “when a number
5 of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs
6 for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs
7 may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34,
8 quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

9 Class Counsel seeks an award of attorneys’ fees on the “percentage of recovery/ common
10 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
11 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent v.*
12 *Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995)
13 15 Cal.3d 162, the California Supreme Court stated: “[O]ne who expends attorneys’ fees in
14 winning a suit which creates a fund from which others derive benefits may require those passive
15 beneficiaries to bear a fair share of the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and*
16 *County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized
17 that the common fund doctrine has been applied “consistently in California when an action brought
18 by one party creates a fund in which other persons are entitled to share.” (*Id.* at p. 110.)

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

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

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

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

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

Labor Code § 1194 (a) provides for the recovery of “minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this section, Plaintiff would be permitted to recover her actual attorneys’ fees, even if those fees were larger than the total class recovery at the conclusion of this case. This settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Marquez Decl., ¶¶ 38-39.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (Marquez Decl., ¶¶ 36, 38-39.) Once counsel undertook this

1 litigation on behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing
2 its fiduciary duty to the Class ahead of all other concerns.

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

5 As demonstrated by their past experience in pursuing class actions on behalf of consumers
6 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
7 Decl., ¶¶ 40-51.) Class Counsel has been involved as lead counsel or co-counsel in several class
8 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
9 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee
10 award is supported here.

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

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

19 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
20 compensate them for the expense or risk they have incurred in conferring a benefit on other
21 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
22 of class action settlement agreements containing enhancements for the class representatives, which
23 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
24 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
25 2009) 563 F.3d 948, 958-59.)

26 Service awards are particularly important to plaintiffs in wage and hour cases because they
27 promote the important public policies underlying the wage and hour laws. This strong policy is
28 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to

1 vigorously enforce minimum labor standards in order to ensure employees are not required or
2 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
3 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
4 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
5 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
6 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
7 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

8 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
9 a Service Award in the amount of \$5,000 to Plaintiff. As part of the settlement, Plaintiff is
10 executing a general release of all claims against Defendant. Class Counsel represent that Plaintiff
11 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
12 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class
13 Counsel during the mediation. (Marquez Decl., ¶¶ 30-34.) This amount is reasonable particularly
14 in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl*
15 *Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel
16 Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339 class members,
17 and the court approved a \$25,000 class representative incentive award for each named plaintiff.
18 (Marquez Decl., ¶ 34.)

19 When compared with the amounts awarded in typical class action cases, the amount
20 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
21 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
22 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
23 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
24 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
25 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
26 while named plaintiffs in other employment class actions received an average award of \$12,121
27 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
28 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by

compensating them for the high costs of their service to the class, including risks of stigmatization or retaliation on the job.” (*Id.* at p. 1308.)

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

A. **Legal Standard**

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

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

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

3 **1. The Classes Are Ascertainable and Numerous**

4 The proposed class that Plaintiff seeks to represent is easily ascertainable and includes
5 approximately 393 employees of Defendant.

6 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
7 precise criteria. Because class members are identified using specific criteria in the regular business
8 records of Defendant, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life Ins. Co.*
9 (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the
10 subject of the lawsuit is sufficient to make the class ascertainable].)

11 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
12 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
13 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
14 may be maintained as a class action even where the parties are numerous and it is in fact practicable
15 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
16 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
17 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
18 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
19 Plaintiff contends that numerosity is plainly satisfied.

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

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

26 Here, the employment practices at issue are: whether Defendant had legally compliant
27 policies and practices to provide employees with meal periods; whether Defendant had legally
28 compliant policies and practices authorizing and permitting its employees to take rest periods;

whether Defendant had legally compliant policies and practices for all hours worked, including overtime wages; whether Defendant reimbursed employees for business expenses; whether final payment of wages was untimely and excluded unpaid wages, including meal period premium wages, and rest period premium wages; and whether the wage statements were consequently non-compliant. Plaintiff contends that the factual and legal issues are the same for all of the identified class members, including Plaintiff. Further, all class members suffered from, and seek redress for, the same alleged injuries.

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

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

4. Plaintiff and Her Counsel Meet the Adequacy Requirement

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

All of these requirements are met here for settlement purposes. Plaintiff retained counsel with extensive experience in prosecuting complex class actions, including similar class actions that previously settled. (Marquez Decl., ¶¶ 40-51.) Class Counsel unquestionably is "qualified, experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,

1 litigated this case and diligently reviewed the settlement terms, showing her dedication. Plaintiff's
2 willingness to serve as a representative demonstrates her serious commitment to bringing about
3 the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

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

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

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

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

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

26 The proposed Notice should be approved. It will be disseminated through direct U.S. first
27 class mail to the last known address for each Class Member. It informs the Class Members of the
28 terms of the settlement and their right to be excluded from the Settlement. And if there are Class

Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

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

VI. CONCLUSION

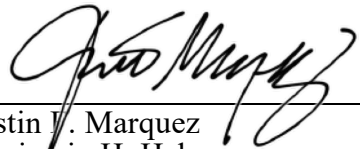
For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement and set a Final Approval Hearing in June 2024.

Respectfully submitted,

Dated: January 3, 2024

WILSHIRE LAW FIRM

By: _____


Justin I. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiff

Petrossian v. The Testing Company LLC, et al.
22STCV34526

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

On January 3, 2024, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Amy R. Patton (SBN 203877)
arp@paynefears.com
 Tyler B. Runge (SBN 310697)
tbr@paynefears.com
 Chris Van Steenbergen
cvansteenbergen@paynefears.com
 Donna A. McNally
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PAYNE & FEARS LLP
 4 Park Plaza, Suite 1100
 Irvine, California 92614
 Telephone: (949) 851-1100
 Facsimile: (949) 851-1212

Attorneys for Defendant

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

(X) **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service **CASEANYWHERE**.

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

Executed on January 3, 2024, at Los Angeles, California.


Min Jee Kim