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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TEHAMA

NATALI ASCENCIO, an individual, on
behalf of herself and others similarly situated,

PLAINTIFF,

v.

KUMAR HOTELS, INC.; and DOES 1 thru
50, inclusive,

DEFENDANTS.

CASE NO. 23CI-000020

[Case Assigned for All Purposes to Dept. 5]

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with Declarations of Liane
Katzenstein Ly, Natali Ascencio, and Jonathan
Paul of Xpand Legal Consulting; and
Proposed Order]*

Date: June 4, 2024

Time: 8:30 A.M.

Dept.: 5

Complaint Filed: January 24, 2023

FAC Filed: April 3, 2023

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on June 4, 2024 at 8:30 A.M. in Department 5 of the
3 above-entitled court, Plaintiff NATALI ASCENCIO will move the Court for an Order
4 of Preliminary Approval of the Class Action and PAGA Settlement Agreement
5 (“Agreement” or “Settlement”), a copy of which is filed concurrently herewith.

6 The Motion will be made on the grounds that the proposed Agreement is fair, adequate,
7 reasonable, and in the best interest of the Class and the Parties.

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Liane Katzenstein Ly, the Agreement and Release, all other
10 papers and records on file in this action, and on such oral and documentary evidence as may be
11 presented at the hearing on this Motion.

12 DATED: May 7, 2024

KINGSLEY & SZAMET & LY

13
14 By: 

Eric B. Kingsley
Liane Katzenstein Ly
Jessica Bulaon
Attorneys for Plaintiff NATALI ASCENCIO and the
Proposed Class

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Federal Cases

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Augustus v. ABM Security Services, Inc.,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff NATALI ASCENCIO (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Plaintiff’s Motion for Preliminary Approval of the Class Action and
5 PAGA Settlement Agreement reached between Plaintiff and Defendant Kumar Hotels, Inc.
6 (“Defendant”) (Plaintiff and Defendant together, the “Parties”).

7 By this Motion, Plaintiff requests that the Court:

8 (1) Grant preliminary approval of the fully-executed Class Action and PAGA
9 Settlement Agreement (“Agreement”). A true and correct copy of the Agreement is attached hereto
10 as Exhibit “1”;

11 (2) Approve the proposed Notice to Class Members, a copy of which is attached to the
12 Agreement as Exhibit “A,” and direct that the Notice be sent to Class Members in the manner set
13 forth in the Agreement; and

14 (3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff’s
15 counsel’s application for an award of attorney’s fees and litigation costs at which Class Members
16 may be heard (“Final Approval Hearing”).

17 **II. FACTUAL BACKGROUND**

18 A. Litigation Overview and Procedural History

19 On January 24, 2023, Plaintiff NATALI ASCENCIO filed a Class Action Complaint
20 seeking recovery for (1) failure to pay wages and/or overtime under Labor Code sections 510,
21 1194, and 1199; (2) failure to provide meal breaks pursuant to Labor Code sections 226.7 and 512;
22 (3) failure to provide rest breaks pursuant to Labor Code section 226.7; (4) failure to issue accurate
23 itemized wage statements pursuant to Labor Code section 226(a); (5) penalties under Labor Code
24 section 203; and (6) violation of Business & Professions Code section 17200. (Declaration of Liane
25 Katzenstein Ly (Ly Decl.) ¶4.) Also on January 24, 2023, Plaintiff sent a notice letter, pursuant
26 to Labor Code section 2699 (“PAGA”), to the Labor Workforce Development Agency (“LWDA”)
27 regarding her intent to seek civil penalties for the same Labor Code violations above, under Labor
28 Code section 2699, et seq. (Ly Decl. ¶5.)

1 On April 3, 2023, Plaintiff filed a First Amended Class and Representative Action
2 Complaint adding an additional cause of action for penalties pursuant to Labor Code § 2699, et
3 eq., the Private Attorneys General Act (“PAGA”) based on the underlying Labor Code violations
4 already pled. (Hereafter, the “Action”.) (Ly Decl. ¶6.)

5 Plaintiff brings the Class Action on behalf of a Proposed Class defined as:

6 “All non-exempt employees who are employed or have been employed by Kumar Hotels,
7 Inc., in the State of California who worked one or more pay periods since four (4) years prior to
8 the filing of this action to the present plus any additional time during which the statutes of
9 limitation for the causes of action herein were tolled pursuant to Emergency Rule 9 of the
10 California Rules of Court, the ‘Emergency Rules Related to COVID-19’. (“Proposed Class”)
11 Plaintiff brings the representative action on behalf of herself and a group of aggrieved employees
12 defined as: All non-exempt employees who are employed or have been employed by Kumar
13 Hotels, Inc., in the State of California who worked one or may pay periods since one (1) year prior
14 to the date of this letter and continuing to the present.

15 B. The Discovery Process

16 The Parties have started to engage in formal discovery but have focused their efforts on
17 resolving this case through early mediation. Plaintiff served her first set of Special Interrogatories
18 and Requests for Production of Documents on July 12, 2023, and Defendant responded to this
19 discovery on September 7, 2023. Defendant produced time and pay data as well as employee files
20 in responding to discovery. (Ly Decl. ¶7.)

21 Defendant denies any liability or wrongdoing of any kind associated with the claims
22 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
23 that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
24 representative action treatment. (Ly Decl. ¶8.)

25 Based on their own independent investigation and evaluation, Class Counsel is of the
26 opinion that the Agreement with Defendant is fair, reasonable and adequate, and in the best interest
27 of the settlement classes in light of all known facts and circumstances, including the risk of
28 significant delay, defenses asserted by Defendant, uncertainties regarding a class and

representative action trial on the merits, and numerous potential appellate issues. (Ly Decl. ¶9.) Accordingly, the Parties desire to fully, finally, and forever settle, compromise and discharge all disputes and claims arising from or relating to the Action on the terms set forth here. (*Id.*)

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever “the question [in a case] 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” (Code Civ. Proc. § 382; *see, e.g., Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an important function by “establishing a technique whereby the claims of many individuals can be resolved at the same time” thereby “eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress.” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (*See Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

The certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

The California Supreme Court has identified three certification requirements: (1) “the existence of an ascertainable and sufficiently numerous class”; (2) “a well-defined community of interest”; and, (3) “substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) The “community of interest” requirement includes three additional requirements: (1) common questions of law or fact predominant over individual questions; (2) the class representatives have claims or defenses typical of the class; and (3) the class representatives can adequately represent

1 the class. (*Ibid*, citing *Fireside Bank*, *supra*, 40 Cal.4th at 1089.)

2 Class certification for settlement purposes is proper in this case as the proposed Settlement
3 Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this
4 Court should certify the putative settlement class.

5 A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

6 1. Ascertainability

7 Putative class members are deemed “ascertainable” when they may be “readily identified
8 without unreasonable expense or time by reference to official records.” (*Rose v. City of Hayward*
9 (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court
10 scrutinizes the class definition, the size of the class and the means of identifying class members.
11 (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

12 Here, Plaintiff maintains that the proposed Class is ascertainable for several reasons: First,
13 Defendant has agreed in the Agreement to provide a class list to the Administrator containing the
14 Class Member’s name, last-known mailing address, Social Security number, and number of Class
15 Period Workweeks and PAGA Pay Periods for all putative class members after issuance of the
16 preliminary approval order. (Ly Decl. ¶10; Ex. 1 at § 1, ¶1.8.) Second, Settlement Class Member
17 consist of Defendant’s hourly employees, and Defendant is required to keep records of its hourly
18 employees’ names, home addresses, and social security numbers. (*See* Wage Order 5-2001,
19 subsection 7(c); Ly Decl. ¶11.)

20 2. Numerosity

21 There is no set number that is required as a matter of law to maintain a class action. (*See*,
22 *e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed settlement
23 Class contains, based upon information and belief, approximately 70 hourly non-exempt
24 employees in the State of California. (Ex. 1 at § 9.) Therefore, Plaintiff is confident she will be
25 able to establish that the proposed settlement Class is sufficiently numerous. (Ly Decl. ¶12.)

26 ///

27 ///

28 ///

1 B. There Is a Well-Defined Community of Interest

2 1. There Are Predominant Questions of Law and Fact

3 In deciding whether questions of common or general interest predominate, a court must
4 determine whether “the issues which may be jointly tried, when compared with those requiring
5 separate adjudication, are so numerous or substantial that the maintenance of a class action would
6 be advantageous to the judicial process and to the litigants.” (*Collins v. Rocha* (1972) 7 Cal.3d
7 232, 238; *accord, Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a
8 general matter, if the defendant’s liability can be determined by facts common to all members of
9 the class, a class will be certified even if the members must individually prove their damages.”
10 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord, Knapp v.*
11 *AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

12 Here, Plaintiff argues that there are questions of law and fact common to the proposed
13 settlement Class that predominate over any questions affecting only individual Class Members.
14 (Ly Decl. ¶13.) These common questions include:

- 15 1) Whether Defendant failed to pay all wages and/or overtime compensation;
- 16 2) Whether Defendant failed to provide lawfully required meal periods and/or failed
17 to compensate employees one (1) hour’s wages in lieu thereof;
- 18 3) Whether Defendant failed to provide lawfully required rest periods and/or failed to
19 compensate employees one (1) hour’s wages in lieu thereof;
- 20 4) Whether Defendant failed to provide accurate itemized wage statements;
- 21 5) Whether Defendant failed to pay compensation due and owing upon termination
22 of employment;
- 23 6) Whether Defendant engaged in unfair competition; and,
- 24 7) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the
25 acts previously alleged.

26 (Ly Decl. ¶14.)

27 Plaintiff’s challenge to Defendant’s policies and practices involves common factual and
28 legal issues that are amenable to class treatment. (Ly Decl. ¶15.) As the California Supreme Court

1 has emphasized, “[c]aims alleging that a uniform policy consistently applied to a group of
2 employees is in violation of the wage and hour laws are of the sort routinely, and properly, found
3 suitable for class treatment.” (*Brinker, supra*, 53 Cal.4th at 1033; *see also Bradley v. Networkers*
4 *International, LLC* (2012) 211 Cal.App.4th 1129, 1141-1146.) Moreover, a class of similarly
5 situated employees may be certified based on common questions of fact or law, even if each
6 employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.* (2004)
7 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at 340.)

8 Here, Plaintiff maintains that the proposed Settlement Class Members suffered the same
9 injuries, in the same manner: (1) Settlement Class Members did not receive their meal and rest
10 periods as required; (2) Settlement Class Members were not provided accurate itemized wage
11 statements; (3) Settlement Class Members did not receive timely wages; and (5) Settlement Class
12 Members were not paid all wages owed upon termination/resignation. (Ly Decl. ¶16.) Plaintiff
13 alleges that Settlement Class Members worked in the same capacity for the same employer and
14 were subject to the same employment policies and practices, the questions of fact and claims
15 regarding the status of these employees are the same for each member of the Class. Accordingly,
16 for purposes of settlement, certification for settlement purposes is appropriate. (Ly Decl. ¶17.)

17 2. The Class Representative Has Claims Typical of the Proposed Class

18 A putative class representative’s claim must be “typical,” but not necessarily identical, to
19 the claims of other class members. The test of typicality “is whether other members have the same
20 or similar injury, whether the action is based on conduct which is not unique to the Class
21 Representatives, and whether other class members have been injured by the same course of
22 conduct.” (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient
23 that the representative is similarly situated so that he or she will have the motive to litigate on
24 behalf of all class members. (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus,
25 it is sufficient that the representative is similarly situated so that he or she will have the motive to
26 litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27,
27 45.) It is not necessary that the class representative have personally incurred all of the damages
28 suffered by each of the other class members. (*Wershba v. Apple Computer, Inc.* (2001) 91

1 Cal.App.4th 224, 238.)

2 Plaintiff worked as an “hourly non-exempt employee” in different positions, including
3 reception, housekeeper, and host, at different locations for Defendant. (Ly Decl. ¶18.) Plaintiff
4 alleges that she: (1) worked without being paid all wages and/or overtime; (2) worked without
5 being provided meal/rest periods as required by law; (3) worked without being provided accurate
6 itemized wage statements; and (4) worked without being paid all wages due upon separation. She
7 also alleges that she experienced derivative claims for unfair business competition (B&P Code
8 §17200) and Labor Code §2699, et seq. (Ly Decl. ¶19.) Plaintiff also contends that her claims are
9 typical of those of the settlement Class. (Ly Decl. ¶20.)

10 3. Plaintiff Contends She Has and Will Fairly Represent the Class Members

11 A putative class representative must show that she can adequately represent the class.
12 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative,
13 through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests
14 of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

15 Plaintiff believes that she is capable of fairly representing and adequately protecting the
16 interests of the proposed Settlement Class Members. (Ly Decl. ¶21.) Plaintiff’s interests in this
17 litigation are coextensive with the interests of the proposed Settlement Class Members. The
18 members of the proposed settlement Class all worked for Defendant during the relevant time
19 period and incurred the same type of alleged damages with regard to Defendant’s alleged violations
20 of the law. (Ly Decl. ¶22.) Moreover, Plaintiff has agreed to serve as Class Representative and
21 has retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Ly
22 Decl. ¶23.) This demonstrates her commitment to bringing about the best possible results for the
23 benefit of the proposed settlement Class. (Ly Decl. ¶24.) Plaintiff has provided her Counsel with
24 all necessary and pertinent information. (Ly Decl. ¶25.) She has been a very active participant in
25 the litigation including having frequent contact with Settlement Class Members and working
26 closely with Class Counsel to develop the theories of liability. (Ly Decl. ¶26.) Plaintiff has
27 provided her Counsel with all necessary and pertinent information. (Ly Decl. ¶27.) She also
28 attended the full-day mediation in this matter and was informed of and involved in all of the

1 Settlement negotiations. (Ly Decl. ¶28.) Therefore, Plaintiff believes that she has and will
2 continue to adequately represent the proposed Settlement Class Members. (Ly Decl. ¶29.) Plaintiff
3 has provided her Counsel with all necessary and pertinent information. (Ly Decl. ¶30.)

4 C. The Class Action Vehicle Is Superior to the Alternatives

5 “The ultimate question in every case of this type is whether . . . the issues which may be
6 jointly tried, when compared with those requiring separate adjudication, are so numerous or
7 substantial that the maintenance of a class action would be advantageous to the judicial process
8 and to the litigants.” (*Lockheed Martin, supra*, 29 Cal.App.4th at 1104–1105.) The California
9 Supreme Court has directed the courts to utilize the class action device to fashion “an effective
10 and inclusive group remedy.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.)
11 Normally, in making its class certification decision, the Court must determine that a class action
12 would be superior to alternate means for a fair and efficient adjudication. If the causes of action
13 may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting
14 duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v.*
15 *Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal,
16 Plaintiff submits that there is not as much need as there would be in an ordinary motion for class
17 certification for the Court to determine that the case can be manageably tried.

18 Plaintiff maintains that class treatment would be the superior method of managing this case.
19 A class action is superior to individual litigation “when numerous parties suffer injury of
20 insufficient size to warrant individual action and when denial of class relief would result in unjust
21 advantage to the wrongdoer.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In
22 cases such as this, where individual damages may be small, the class action device is the most
23 feasible method of recovery. (*See, e.g. Lockheed Martin, supra*, 29 Cal.4th at 1131.) In this regard,
24 the superiority of class treatment is evident here because individual pursuit of class members’
25 claims may not be economically viable. (Ly Decl. ¶31.) The only alternative to certification would
26 be to force over 70 employees to join this action, file individual, uniform actions, or abandon their
27 legal rights altogether. (Ly Decl. ¶32.) Plaintiff maintains that this economic reality would result
28 in a windfall for Defendant if this case were not certified. (Ly Decl. ¶33.)

1 **IV. THE PROPOSED SETTLEMENT**

2 A. The Settlement Class

3 For purposes of Agreement, the settlement class is defined as: “all non-exempt employees
4 who are employed or have been employed by Kumar Hotels, Inc., in the State of California from
5 January 24, 2019 to March 7, 2024.” (“Settlement Class Members” or “Class”.) (Ly Decl. ¶34;
6 Agreement, Ex. 1 at §1, ¶1.5.)

7 The Class Period is January 24, 2019 to March 7, 2024. (Ly Decl. ¶35; Ex. 1 at § 1, ¶1.24.)
8 As of March 7, 2024 (the date of mediation),and based on documents and other information
9 produced by Defendant, there are approximately 70 Settlement Class Members. (Ly Decl. ¶36; Ex.
10 1 at § 4, ¶4.1.)

11 B. Aggrieved Employees

12 For purposes of Agreement, the Aggrieved Employees are defined as: “All non-exempt
13 employees who are employed or have been employed by Kumar Hotels, Inc., in the State of
14 California who worked one or more pay periods since January 24, 2022 and March 7, 2024.”
15 (“Aggrieved Employee”.) (Ly Decl. ¶37; Agreement, Ex. 1 at §1, ¶1.4.)

16 The PAGA Period is January 24, 2023 to March 7, 2024. (Ly Decl. ¶38; Ex. 1 at § 1, ¶1.31.)
17 As of March 7, 2024 and based on documents and other information produced by Defendant, there
18 are approximately 34 Aggrieved Employees. (Ly Decl. ¶39; Ex. 1 at § 4, ¶4.1.)

19 C. Gross Settlement Amount

20 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
21 Settlement Amount of \$125,000.00, which includes the sum of the Individual Class Payments, the
22 Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement
23 Administration Costs. (Ly Decl. ¶40; Ex. 1 at § 3, ¶3.1.)

24 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
25 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs. (Ly
26 Decl. ¶41; Ex. 1 at § 1, ¶1.28.)

27 The Parties estimate the amount of the Net Settlement Amount as follows:

Gross Settlement Amount:	\$	125,000.00
Less Class Representative Enhancement:	\$	10,000.00

Less Class Counsel's Fees: \$ 41,666.67
Less Class Counsel's Costs: \$ 15,000.00
Less PAGA Payment: \$ 5,000.00
(\$3,750.00 to the LWDA and
\$1,250.00 to remain in the Net
Settlement Amount)

Less Administrator Costs: \$ 10,000.00

Anticipated Net Settlement Amount \$ 39,583.33

(Ex. 1 at § 4.)

D. Individual Settlement Payments

The Individual Class Payment amount of each Participating Class Member is an individualized amount that is based on the Participating Class Member's pro rata share of the Net Settlement Amount calculated according to the number of Workweeks worked during the Class Period. (Ex. 1 at § 1, ¶1.23; *see also* Ex. A to the Agreement [Class Notice].) Specifically, Individual Class Payments will be paid from the Net Settlement Amount and shall be paid pursuant to the settlement formula as follows: (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. (Ex. 1 at § 3, ¶3.2.4.)

One Third (1/3) of the Gross Settlement Amount to each Participating Class Member shall be deemed payment for settlement of claims for wages and will be subject to appropriate deductions and withholdings calculated and made by the Administrator. (Ex. 1 at § 3, ¶3.2.4.1.) Two Thirds (2/3) of the Gross Settlement Amount to each Participating Class Member shall be deemed payment for settlement of claims for penalties and interest and other non-wage payments not subject to withholdings. (*Id.*)

The Individual PAGA Payment will be an equal payment to all Aggrieved Employees based on the Aggrieved Employee's pro rata share of 25% of the PAGA Penalties calculated according to the number of Workweeks worked during the PAGA Period. (*See* Ex. 1 at § 1, ¶1.24.)

E. Process for Administering Settlement after Preliminary Approval

The detailed Notice Procedure established by the Agreement will efficiently and accurately ensure that Notice is provided to the Settlement Class Members. (Ex. 1 at § 8, ¶8.4.) The Parties have agreed to use a reputable third-party claims administrator, Xpand Legal Consulting, to

administer the Agreement. (Ex. 1 at § 1, ¶1.2.)

F. Process for Settlement Class Members to Respond to Class Notice

Settlement Class Members will have an opportunity to request exclusion from the Settlement Class (i.e. opt out) and to object to the Settlement at the Final Approval Hearing. (Ex. 1 at § 8, ¶8.5; 8.7.)

Settlement Class Members who do not opt out may object to the Agreement by mailing written objections to the Administrator no later than sixty (60) calendar days after the mailing of the Notice Packet. (Ex. 1 at § 8, ¶8.6.) This deadline applies notwithstanding any argument regarding alleged late receipt or non-receipt of the Notice Packet. (*Ibid.*) Any Settlement Class Member who fails to timely mail written objections in this manner shall be deemed to have waived any objections and shall be foreclosed from making any objection to the Agreement and from filing any appeal from any order granting final approval issued by the Court. (*Ibid.*)

Settlement Class Member who timely and validly return a Request for Exclusion from the Agreement shall have no right to object and shall be foreclosed from making any objection to the Agreement. (*Ibid.*) The Administrator shall promptly provide any such objections to Counsel, who in turn shall file them with the Court in connection with the final approval motion. (*Ibid.*)

Any Settlement Class Member wishing to appear at the final approval hearing to object to the Agreement shall expressly indicate this in his or her written objections. (*Ibid.*) The making of an objection to this Agreement does not affect the Settlement Class Members' ability to return a valid Claim Form and become a Qualified Claimant if the Agreement is finally approved. (*Ibid.*)

G. Funding of Gross Settlement

Funding of Gross Settlement Amount. This Settlement shall be paid over time. The first payment shall be paid to the Administrator within two weeks of the execution of this Agreement in the amount of \$50,000.00. Beginning thirty (30) days after the initial payments, payments shall be made by Defendant to the Administrator in the amount of \$6,818.18 every month. If a payment is more than seven (7) days late, the remaining balance is due in its entirety. (Ex. 1 at § 4, ¶4.3.)

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1 H. The Release

2 The Release by Participating Class Members is defined as: “all claims that were alleged,
3 or reasonably could have been alleged, based on the Class Period facts stated in the Operative
4 Complaint, including failure to pay wages and overtime, failure to provide meal breaks, failure to
5 provide rest breaks, failure to provide accurate itemized wage statements, and waiting time
6 penalties. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do
7 not release any other claims, including claims for vested benefits, wrongful termination, violation
8 of the Fair Employment and Housing Act, unemployment insurance, disability, social security,
9 workers’ compensation, or claims based on facts occurring outside the Class Period.” (Ex. 1 at §
10 6, ¶6.2.)

11 The Release by Non-Participating Class Members Who Are Aggrieved Employees is
12 defined as: “All Non-Participating Class Members and Participating Class Members who are
13 Aggrieved Employees are deemed to release, on behalf of themselves and their respective former
14 and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the
15 Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have
16 been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA
17 Notice for the following Labor Code sections: 201, 202, 203, 226(a), 226.7, 510, 512, 1194. (Ex.
18 1 at § 6, ¶6.3.)

19 V. **ARGUMENT**

20 A. Plaintiff Requests Approval of This Class Action Settlement

21 The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, set forth
22 several factors that the Court should analyze in determining whether to approve a class action
23 settlement. These factors include: (1) the strength of plaintiff’s case; (2) the risk, expense,
24 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
25 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
26 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
27 participant; and (8) the reaction of the class members to the proposed settlement.

28 In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399,

409, the court clarified that a Kullar showing does not require the parties to submit the outer reaches of maximum possible recovery without taking into account the actual risks of certification, decertification, dispositive motions, and trial, so long as there is a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409.

The proposed settlement satisfies each of these factors. (Ly Decl. ¶42.) Class Counsel conducted extensive discovery before entering into meaningful settlement negotiations in this matter. (*Id* at Ly Decl. ¶¶7-9.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶43.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Ly Decl. ¶44.)

1. The Strength of Plaintiff’s Case

a. The Risks Associated with the Wage Claims

Plaintiff, proposed class members, and aggrieved employees were forced to work without receiving compensation for all hours worked at proper overtime rates. Labor Code section 510(a) requires “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.” Further, “[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee” and “any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” (Lab. Code, § 510(a).) “Under state and federal law, overtime compensation is based on an employee’s ‘regular rate’” of pay. (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902.) In any pay period where a non-exempt employee earns other includable compensation in addition to wages—such as a non-discretionary bonus or a commission based on production or a formula—it must be included into Plaintiff’s regular rate of pay.

Plaintiff and other employees often worked two shifts in one day (a double shift), but

1 Defendant did not pay overtime and double time for all hours worked in one day (i.e. those hours
2 in the second shift that were worked in the same day as the first shift). (Ly Decl. ¶45.) This resulted
3 in Plaintiff and employees regularly working in excess of eight hours in one workday and in excess
4 of 40 hours in one workweek and not being compensated at the appropriate overtime or double-
5 time rate for all hours worked. Additionally, Defendant failed to pay Plaintiff and employees for
6 overtime or double time for work on the seventh day. (Ly Decl. ¶46.)

7 Defendant argued that the employees did not work double shifts and the records reflect the
8 accurate hours worked. (Ly Decl. ¶47.)

9 b. The Risks Associated with the Meal Break Claim

10 Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall
11 employ any person for a work period of more than five hours without providing a meal period of
12 not less than thirty minutes. The first meal period must be permitted to commence no later than
13 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
14 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
15 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
16 work (10.0 hours on the clock). (Ibid.) The California Supreme Court succinctly described Section
17 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they
18 are relieved of any duty or employer control and are free to come and go as they please." (*Brinker*
19 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

20 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
21 permits the meal periods or rest breaks called for under the law (as specified in the applicable
22 Wage Order), "it has violated the wage order and is liable." (See *Brinker*, 53 Cal.4th at p. 1033.)
23 Following *Brinker*, California courts have confirmed that liability for meal and rest period
24 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
25 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, ["In
26 *Faulkinbury I*, we concluded that even if [defendant]'s on-duty meal break policy was unlawful,
27 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.
28 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that

[defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)); accord *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726 [finding that the employer would become liable upon a showing that it failed to maintain a policy authorizing required breaks, which does not require an individual technician to provide he or she actually missed breaks as a result of the employer’s policies. Rather, “the Wage Order . . . imposes an affirmative obligation on every employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has violated the law and is liable.”].)

Moreover, employers have an obligation to both to provide meal breaks and to record having done so. (IWC Wage Order 5-2001(7)(a)(3) [requiring employer to keep time records showing when the employee begins and ends each work period and meal period.].) If the employer fails to properly record a valid meal period, it is presumed that no meal period was provided. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 76 [There is a rebuttable presumption of liability when the records “show noncompliant meal periods.”].)

Here, Plaintiff alleges that Defendant failed to maintain a policy informing Plaintiff, the Proposed Class, and aggrieved employees of these rights. Plaintiff and the employees consistently worked shifts over five (5) hours. (Ly Decl. ¶48.) As described above, Plaintiff alleges that Defendant required Plaintiff and employees to stay at their position, offered no coverage to take their breaks, and often interrupted any meal breaks employees were able to take. (Ly Decl. ¶49.) Accordingly, Defendant failed to provide Plaintiff and the employees with proper uninterrupted meal periods of not less than thirty (30) minutes before the fifth hour of work and before the tenth hour of work during the relevant time period all in violation of California labor laws, regulations, and Industrial Welfare Commission Wage Orders. (Ly Decl. ¶50.)

Defendant raised a defense that Plaintiff signed an on-duty meal period waiver. Wage Order 5, § (11)(A) states:

Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the

1 agreement at any time.

2 However, this Plaintiff alleges that these waivers are invalid, because they are not
3 signed by the employer, the language does not comply with the Wage Order, the “nature
4 of the work” did not prevent Plaintiff from being relieved of all duty every shift.

5 c. The Risks Associated with the Rest Break Claim

6 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
7 of compensation for each workday the employer fails to provide a rest period according to law.
8 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
9 major fraction thereof. (Cal. Code Regs., tit. 8, § 11050, subd. 12(A).)

10 The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for
11 shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours
12 up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on.” (Brinker
13 Rest. Corp v. Superior Court, supra, 53 Cal.4th at 1029.) The Court has also clarified what steps
14 an employer must take to make rest breaks available to its employees:

15 An employer is required to authorize and permit the amount of rest break time
16 called for under the wage order for its industry. If it does not—if, for example, it
17 adopts a uniform policy authorizing and permitting only one rest break for
18 employees working a seven-hour shift when two are required—it has violated the
19 wage order and is liable. No issue of waiver ever arises for a rest break that was
20 required by law but never authorized; if a break is not authorized, an employee has
21 no opportunity to decline to take it.

22 (*Brinker Rest. Corp. v. Superior Court, supra, 53 Cal.4th at 1033 (emphasis added.).*)

23 Moreover, Plaintiff alleges that Defendant’s Meal Time Waiver also improperly waives
24 rest periods. (Ly Decl. ¶51.) A rest break is un-waivable. There is no “on-duty” rest break because
25 unlike on-duty meal breaks “when forced to take on-duty rest periods, “an employee essentially
26 performs ... ‘free’ work, i.e., the employee receives the same amount of compensation for working
27 through the rest periods that the employee would have received had he or she been permitted to
28 take [off-duty] rest periods.” (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266,
as modified on denial of reh'g (Mar. 15, 2017); *Murphy v. Kenneth Cole Productions, Inc.* (2007)
40 Cal.4th 1094, 1104 [In an eight-hour work day, being denied the two paid rest breaks in a day

1 is “essentially perform[ing] 20 minutes of ‘free’ work.”). The waiver is invalid and all rest breaks
2 were noncompliant.

3 Defendant alleged that employees took their rest periods. (Ly Decl. ¶52.)

4 d. The Risks Associated with the Failure to Provide Accurate Itemized
5 Wage Statements Claim

6 California Labor Code §226(a) requires that every employer shall, semimonthly or at the
7 time of each payment of wages, furnish each of his or her employees, an accurate itemized
8 statement in writing showing, in relevant part, the total hours worked by the employee and all
9 applicable hourly rates in effect during the pay period and the corresponding number of hours
10 worked at each hourly rate by the employee. (Labor Code § 226(a)(2) and (9).) Such itemized
11 wage statements must list premium pay earned for unlawful breaks. (See *Naranjo v. Spectrum*
12 *Security Services, Inc.* (2022) 13 Cal.5th 93, 121 [holding “that an employer’s obligation under
13 Labor Code section 226 to report wages earned includes an obligation to report premium pay for
14 missed breaks.”].)

15 As a result of the wages and overtime and meal and rest break claims alleged above,
16 Defendant engaged in a practice of failing to provide Plaintiff, proposed class members, and all
17 aggrieved employees accurate itemized wage statements listing accurate total hours worked, all
18 applicable hourly rates in effect during the pay period and the corresponding number of hours
19 worked at each hourly rate, and premium pay, in violation of Labor Code section 226(a). (Ly Decl.
20 ¶53.) Defendant is liable for fifty dollars for the initial violation and one hundred dollars for each
21 violation in a subsequent pay period per proposed class member, not exceeding an aggregate
22 penalty of four thousand dollars.

23 This is a derivative claim, and as such, if Plaintiff did not succeed on the underlying claims,
24 this claim would fail as well.

25 e. The Risks Associated with the Failure to Provide All Wages as the
26 Time of Termination

27 Under Labor Code section 203, if an employer fails to provide wages at the time of an
28 employee’s termination or within seventy-two (72) hours of resignation, then the employee’s

1 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
2 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
3 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
4 Cal.App.4th 487, 492.)

5 Here, Plaintiff and numerous Proposed Class Members and aggrieved employees are no
6 longer employed by Defendant. (Ly Decl. ¶54.) Plaintiff alleges that Defendant failed to pay all
7 wages owed and due upon their termination and/or resignation. Defendant's actions were willful,
8 as they have intentionally failed or refused to perform an act which was required to be done. (See
9 *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.; Ly Decl. ¶55.) "The failure to
10 pay is willful if the employer 'knows what [it] is doing [and] intends to do what [it] is doing', and
11 does not also require proof that the employer acted with "a deliberate evil purpose to defraud
12 work[ers] of wages which the employer knows to be due.'" (*Diaz v. Grill Concepts Services, Inc.*
13 (2018) 23 Cal.App.5th 859, 868.) Defendant was fully aware of its payment policies and practices
14 and intended to carry out said policies and practices. Therefore, Defendant is liable for damages.

15 Defendant contests the underlying claims giving rise to these penalties and argued that any
16 alleged violation was not willful. (Ly Decl. ¶56.)

17 f. The Risks Associated with the PAGA Claim

18 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, permits
19 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
20 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
21 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
22 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

23 The Parties discounted the PAGA claim for multiple reasons. First, the aggrieved
24 employees' PAGA claims are derivative of all the foregoing class claims. Second, a court has
25 discretion to award less than the maximum penalty. Labor Code § 2699(e)(2) ("a court may award
26 a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts
27 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
28 arbitrary and oppressive, or confiscatory"). See e.g., *Carrington v. Starbucks Corporation* (2018)

30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). Finally, the settlement Class is compensated for these violations in the proposed Agreement, and thus any PAGA recovery for these same violations would be duplicative. As such, the Agreement's contemplated PAGA payment of \$5,000.00 is appropriate. (Ly Decl. ¶57.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

There is significant expense associated with class certification. (Ly Decl. ¶58.) If the Court did certify a class, trial of a case involving 70 Class Members would require expensive expert witnesses, the accrual of litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶59.) Moreover, given the complexity of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Ly Decl. ¶60.)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified. (Ly Decl. ¶61.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need to conduct multiple depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Id.*)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement of \$125,000.00. (Ly Decl. ¶62.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Ly Decl. ¶63.) The Parties arrived at it after extensive investigation and discovery, careful evaluation of the law, risks, and all information substantiating the amount of penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance of an experienced mediator, Russ J. Wunderli. (*Id.*)

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a. Plaintiff's Assessment of Defendant's Maximum Exposure

Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount, at approximately \$9,000.00. (Ly Decl. ¶65.) This calculation took into account the fact that half time and double time was not paid for shifts where employees worked at two locations. (Ly Decl. ¶66.) Plaintiff used an hourly average rate of \$14.19. (Ly Decl. ¶67.)

The full value of the Meal Period claim, without any discount, was approximately \$148,000.00. (Ly Decl. ¶68.) This amount is based on a meal period penalty for 10,474 shifts over five hours in length, and Plaintiff assumed that all meals taken were on duty meal periods. (Ly Decl. ¶69.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Ly Decl. ¶70.)

The full value of the Rest Period claim, without any discount, was approximately \$157,000.00. (Ly Decl. ¶71.) This amount is based on a 100% violation rate for rest periods on 11,052 shifts that were over 3.5 hours in length. (Ly Decl. ¶72.) For the reasons above, Plaintiff determined that accepting a discount of the full amount was appropriate. (Ly Decl. ¶73.)

Plaintiff valued the Wage Statement Claim, without discount, at \$55,800.00. (Ly Decl. ¶74.) Plaintiff used \$50.00/\$100.00 for each wage statement issued (pay period) for 575 pay periods with a \$4,000 cap. (Ly Decl. ¶75.) Due to the risk discussed above that 226(a) liability wouldn't attach under *Naranjo* and *Maldonado*, Plaintiff determined that a steep discount of this claim was fair for settlement purposes. (Ly Decl. ¶76.)

Plaintiff valued the Waiting Time Claim at \$147,774.00, and this number is based on the penalty for all former employees. (Ly Decl. ¶77.) Considering the derivate nature of Labor Code §203 and the dispute over whether class members were owed any wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Ly Decl. ¶78.)

Finally, Plaintiff calculated the value of the PAGA claim at \$111,200.00 for the aggrieved employees (using \$100 per pay period for 573 pay periods). (Ly Decl. ¶79.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Ly Decl. ¶80.) A judge can award the statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage statement. (Ly Decl. ¶81.) While there is a dearth of available authority, in

1 Plaintiff's view, were she to succeed on any of the underlying Labor Code violations, it is not
2 likely that a Judge would also award a large amount of penalties of top of any damages recovered.
3 (Ly Decl. ¶82.)

4 Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the
5 Settlement Class Members' claims was approximately \$517,00.00 and PAGA penalties of
6 \$111,200.00. (Ly Decl. ¶83.) The value of the underlying claims, without penalties, is \$314,000.00
7 and that includes a 100% violation rate for meal and rest periods. However, as a result of the
8 forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$125,000.00
9 is fair and reasonable. (Ly Decl. ¶84.)

10 5. The Experience and Views of Counsel

11 Finally, counsel's experience and success in similar class actions also weigh in favor of
12 preliminary approval. *See Wershba, supra*, 91 Cal.App.4th at 245. Kingsley Szamet & Ly
13 ("Kingsley") is very experienced in prosecuting complex employment litigation, and the firm has
14 focused its practice since the year 2000 on complex wage, hour, and working condition violations.
15 (Ly Decl. ¶¶85-87.) The firm is well versed in class action litigation and has diligently and
16 aggressively pursued this action. (*Id.*) Kingsley currently serves as Class Counsel for dozens of
17 pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of
18 representative cases that Kingsley has handled is included in the accompanying declaration of
19 Liane Katzenstein Ly (*Id.*) After factoring in the risks explained above, Class Counsel believes
20 that the proposed settlement is fair and reasonable. (Ly Decl. ¶88.)

21 6. The Proposed Plan of Allocation Is Fair and Reasonable

22 Plans of allocation are subject to the same standard of review as class action settlements;
23 they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service*
24 *Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
25 compensates Settlement Class Members pro rata based on the number of workweeks worked by
26 the Settlement Class Member during the Class Period. The lump sum payment to each member of
27 the Settlement Class not excluding him/ herself will be determined by dividing the Net Settlement
28 Amount by the total number of Workweeks worked by all Participating Class Members, and (b)

1 multiplying the result by the number of Workweeks worked by each individual Participating Class
2 Member. This allocation distributes Settlement funds proportionally to each class member's
3 damages, and should therefore be approved as fair, adequate, and reasonable. (Ly Decl. ¶88; Ex.
4 1 at § 4, ¶1.)

5 7. The Proposed Notice Fairly Apprises the Class Members of the Terms of
6 the Settlement and of the Class Members' Rights under the Settlement

7 Plaintiff requests that the Court approve the proposed plan and form of Class Notice. The
8 standard for determining the adequacy of notice is whether the notice has “a reasonable chance of
9 reaching a substantial percentage of the class members.” (*Cartt v. Superior Court* (1975) 50
10 Cal.App.3d 960, 974.) Pursuant to the Agreement, the Notice will be sent to the last known address
11 of all Settlement Class Members, or to an updated address if one is located in the National Change
12 of Address Database. (Ex. 1 at § 8, ¶8.4.2). If any Notices are returned as undeliverable, the
13 Administrator will undertake another reasonable address verification measure to locate a valid
14 mailing address and will promptly send the Notice to the new address. (Ex. 1 at § 8, ¶8.4.3.) As
15 such, the Notice is likely to reach most, if not all, Settlement Class Members.

16 With respect 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.” (*Trotsky v. L.A. Fed. Sav. & Loan Ass'n* (1975) 48 Cal.App.3d 134, 151–52.)
19 The purpose of a class notice is to give class members sufficient information to decide whether
20 they should accept the benefits offered, opt out and pursue their own remedies, or object to the
21 settlement. (*Ibid.*)

22 Here, the Notice clearly explains the proposed Agreement and the options to opt out of the
23 Settlement or object to it at the Final Approval Hearing. (Ex. 1 at ¶8.5; 8.7; *see also* Ex. A to the
24 Agreement at pp. 2, 5, and 8 [Class Notice].) In short, the Court should approve the proposed
25 Class Notice because it describes the proposed settlement with enough specificity to allow
26 Settlement Class Members to make an informed choice regarding whether to participate.

27 ///

28 ///

1 **VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF**

2 The Class Representative is entitled to an enhancement for her valiant effort and time
3 expended in this matter. (Ly Decl. ¶90.) The time spent by Natali Ascencio is significant and
4 includes researching and retaining competent counsel; providing information to Class Counsel
5 regarding the nature of the work at Defendant; compiling relevant documents; working closely
6 with Class Counsel to develop the theories of liability and martial relevant evidence; regularly
7 discussing the status of the case with Class Counsel; discussing the case via telephone with many
8 Settlement Class Members; attending a full-day of mediation; and responding promptly to Class
9 Counsel’s communications regarding settlement. (*Id.*) Thus, in addition to the sums paid to
10 Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of
11 \$10,000.00, to be paid from the Gross Settlement Amount. (Ex. 1 at § 3, ¶3.2.1.) As set forth in
12 the Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil
13 Code Section 1542. (Ly Decl. ¶91; Ex. 1 at § 6, ¶6.1.1.)

14 Additionally, Plaintiff refused to put her claims ahead of the class and enter into an
15 individual settlement. She declined to negotiate without the class. (Ly Decl. ¶92.)

16 Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶93.) The
17 enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming
18 forward to litigate this matter on behalf of all Settlement Class Members. (*Id.*) Plaintiff will
19 provide a detailed declaration with the Final Approval Motion detailing her participation and
20 further justification for the enhancement. (*Id.*)

21 **VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

22 As indicated on the Proof of Service, Plaintiff’s Motion for Approval of Class Action
23 Settlement (“Motion”) will be concurrently uploaded to the LWDA website. Proof of submission
24 and copy of the email from the LWDA confirming receipt is attached to the Declaration of Liane
25 Katzenstein Ly as Exhibit “2.” (Ly Decl. ¶94.)

26 **VIII. CONCLUSION**

27 Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable,
28 and in the best interest of the Settlement Class Members. Therefore, the Parties respectfully

1 request that the Court (1) grant preliminary approval of the Class Action and PAGA Settlement
2 Agreement, and all of its terms; (2) approve the proposed form of notice, and direct that the Notice
3 be sent to Settlement Class Members in the manner set forth in the Class Action and PAGA
4 Settlement Agreement; and (3) schedule a hearing on final approval of the Agreement and Class
5 Counsel's application for an award of attorney's fees and litigation costs.

6 DATED: May 7, 2024

KINGSLEY SZAMET & LY

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8 By: 

9 Liane Katzenstein Ly
10 Attorneys for Plaintiff NATALI ASCENCIO and the
11 Proposed Class
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On May 7, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

GRIFFITH & HORN, LLP
David R. Griffith
David@davidgriffithlaw.com
15360 Humboldt Road, Suite 3
Chico, CA 95928

☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

☒ **BY ELECTRONIC MAIL TRANSMISSION:** I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 7, 2024, at Woodland Hills, California.



Michelle Tanzer