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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 30 2021

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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF SAN BERNARDINO

17 VICTOR PEREZ, individually, and on behalf of
18 all others similarly situated,

19 *Plaintiff,*

20 v.

21 THE BIG COMPANY, INC. DBA CAPO
22 FIRESIDE, a California corporation; and DOES
23 1 through 10, inclusive,

24 *Defendants.*

Case No. CIVDS 2009691

CLASS ACTION

[Assigned for all purposes to Hon. David Cohn, Dept. S26]

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

*[Filed with Memorandum of Points and
Authorities the Declaration of Justin F.
Marquez, and Proposed Order]*

PRELIMINARY APPROVAL HEARING

Date: September 22, 2021
Time: 9:00 a.m.
Dept: S-26

**FILE BY FAX
PER CAC
2.303**

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

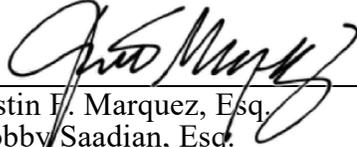
2 PLEASE TAKE NOTICE that on September 22, 2021 at 9:00 a.m., in Department S-26 of
3 the San Bernardino Justin Center located at 247 West Third Street, San Bernardino, CA 92415-
4 0210, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*,
5 Plaintiff Victor Perez will move the Court for an Order granting preliminary approval of the
6 proposed class action settlement between Plaintiff and Defendant The BIG Company, Inc. dba
7 CAPO Fireside. Plaintiff further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Stipulation for Class Action Settlement;
- 9 2. Certifying a Class for settlement purposes;
- 10 3. Approving the Notice and Settlement Information Form (collectively, “Notice
11 Packet”) and the plan for distribution of the Notice Packet to Settlement Class
12 Members;
- 13 4. Appointing Plaintiff Victor Perez as Class Representative for settlement purposes;
- 14 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
15 settlement purposes;
- 16 6. Appointing Phoenix Class Action Administration Solutions as the Settlement
17 Administrator; and
- 18 7. Scheduling a final approval hearing.

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

23 Dated: August 30, 2021

WILSHIRE LAW FIRM

24
25 By: 

Justin F. Marquez, Esq.
Bobby Saadian, Esq.
Nicol E. Hajjar, Esq.
Rachel J. Vinson, Esq.

Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Victor Perez (“Plaintiff”) seeks preliminary approval of a proposed \$575,000.00
4 non-reversionary, wage and hour class action settlement with Defendant The BIG Company, Inc.
5 dba CAPO Fireside. (“Defendant”). The Settlement will provide substantial monetary payments to
6 approximately 199 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, Steven J. Serratore, over the course of a full
10 day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court
11 preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the
12 proposed notice, and set a final approval hearing.

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

14 **A. Plaintiff’s Claims**

15 This is a wage and hour class action and PAGA representative action. Plaintiff and
16 putative class members worked in California as hourly-paid, non-exempt employees for
17 Defendant during the class period. Defendant provides modern fireplace installation and
18 serves customers in Van Nuys, San Diego, Palm Desert, Concord, San Juan Capistrano, Santa
19 Cruz, and Sacramento. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for
20 Preliminary Approval of Class Action Settlement (Declaration of Justin F. Marquez
21 [“Marquez Decl.”], ¶ 2.)

22 Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices
23 resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours
24 worked by not recording the actual start and end times of shifts and only paying for 8 hours of
25 work for each workday, regardless of whether an employee worked overtime. Plaintiff further
26 alleges that Defendant failed to provide employees with legally compliant meal and rest
27 periods. Based on these allegations, Plaintiff asserts claims against Defendant for failure to
28 pay overtime wages, failure to pay minimum and straight time wages, failure to provide meal

1 periods, failure to authorize and permit rest periods, inaccurate wage statements, failure to pay
2 all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.*
3 at ¶ 3.)

4 On May 29, 2020, Plaintiff filed a putative wage-and-hour class action complaint
5 against Defendant The BIG Company, Inc. dba CAPO Fireside for: (1) failure to pay
6 minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to
7 pay overtime wages (Labor Code §§ 1194, and 1198); (3) failure to provide meal periods
8 (Labor Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code
9 §§ 226.7); (5) failure to timely pay final wages at termination (Labor Code §§ 201-203); (6)
10 failure to provide accurate itemized wage statements (Labor Code § 226); and (7) unfair
11 business practices (Business and Professions Code 17200 et seq.). On June 29, 2020, Plaintiff
12 filed a First Amended Complaint adding a claim for civil penalties under Private Attorneys
13 General Act “PAGA” (Labor Code § 2698 et seq.). (Marquez Decl., ¶ 4.)

14 **B. Discovery and Investigation**

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

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

27 **C. Settlement Negotiations**

28 On May 20, 2021, the parties participated in private mediation with experienced class

1 action mediator Steven J. Serratore. (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
2 After extensive negotiations and discussions regarding the strengths and weaknesses of
3 Plaintiff’s claims and Defendant’s defenses, Mr. Serratore issued a mediator’s proposal that
4 was accepted by all parties, the material terms of which are encompassed within the
5 Settlement. (*Id.* at ¶ 8, Ex. 1 [Joint Stipulation for Class Action Settlement].)

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

12 Indeed, the \$575,000.00 Settlement represents **49.5% of the realistic maximum**
13 **recovery of \$1,162,393.** (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendant’s
14 maximum potential liability for all claims was approximately \$5.4 million, when the risk of
15 prevailing at certification and trial are factored into the equation, Class Counsel believes that
16 Defendant’s realistic exposure was \$1,162,393, meaning the Settlement achieves a significant
17 recovery. (*Id.* at ¶¶ 17-27.) Considering the risk and uncertainty of prevailing at class
18 certification and at trial, particularly in light of many class members being subject to
19 arbitration agreements and class action waivers, this is an excellent result for the Class. (*Id.* at
20 ¶ 23.) Indeed, because of the proposed Settlement, class members will receive timely,
21 guaranteed relief and will avoid the risk of an unfavorable judgment.

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

23 Under the Settlement, Defendant will pay \$575,000.00 to resolve this litigation. This
24 amount is all-inclusive. The Settlement’s key terms include:

25 1. Class or Class Members: For settlement purposes only, the Parties agree to the
26 certification of a class pursuant to California Code of Civil Procedure § 382 defined as: “All
27 current and former employees who worked in a non-exempt or hourly-paid position for The BIG
28

1 Company, Inc. dba CAPO Fireside within the state of California during the Class Period
2 (together, collectively referred to as the “Class Members”). (Settlement, ¶ 6.)

3 2. Class Period: The Settlement Period means the period from May 29, 2016 to the
4 earlier of: (i) the date the Court enters the Order preliminarily approving the Settlement; or (ii)
5 July 19, 2021. (Settlement, ¶ 8.)

6 3. Total Settlement Amount: This amount is \$575,000.00, which shall be paid by
7 Defendant and from which all Net Settlement Payments, Court-approved attorneys’ fees and
8 Litigation costs pursuant to ¶43(a), Administrative Costs pursuant to ¶ 28, enhancement to
9 Named Plaintiff pursuant to ¶ 12, statutory penalties, interest, and PAGA Settlement pursuant to
10 ¶ 21 shall be paid, except as provided herein. (Settlement, ¶¶ 15, 41.)

11 4. No Reversion: This is a non-reversionary settlement. Settlement checks will be
12 valid for 180 days. Pursuant to Code of Civil Procedure § 384(a), any unpaid cash residue or
13 unclaimed or abandoned class member funds, plus any accrued interest thereon will be sent to the
14 State of California’s Unclaimed Property Fund in the name of the Participating Class
15 Member/Aggrieved Employee pursuant to Code of Civil Procedure Section 384(a). (Settlement, ¶
16 50 (e).)

17 5. Release: The class release is limited to “all Settled Claims, whether known or
18 unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or
19 hidden, which now exist, or have existed upon any theory of law or equity now existing or
20 coming into existence in the future.” (Settlement, ¶ 37.)

21 6. PAGA Amount: The settlement includes \$30,000 allocated to Plaintiff’s claims
22 under PAGA, with 75% of which (\$22,500) will be paid to the LWDA and 25% (\$7,500) will be
23 paid to eligible members of the PAGA Class. (Settlement, ¶ 21.) Class Counsel submitted the
24 proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez
25 Decl., ¶ 9.)

26 7. Net Class Settlement Amount: The Net Settlement Fund is the settlement amount
27 to be distributed to Participating Class Members, which is the Gross Settlement Amount less
28

1 Attorneys' Fees and Costs, the Enhancement Award, the PAGA Amount, and Settlement
2 Administration Costs. (Settlement, ¶ 19.)

3 8. Distribution Formula: Individual Settlement Payments shall be distributed only to
4 Participating Class Members, with the exception that PAGA Payments will be distributed to all
5 Aggrieved Employees. The portion of the Net Class Settlement Amount allocated to Class
6 Members who opt out of the Settlement will be distributed to Participating Class Members on a
7 *pro rata* basis based on the formula set forth in ¶ 43.e . (Settlement, ¶ 43 (g).)

8 9. Taxation of Settlement Proceeds: Any settlement money paid to Settlement Class
9 Members will be allocated as 10% as wages, 45% as interest on unpaid wages, and 45% as
10 penalties. (Settlement, ¶ 45 (a).)

11 10. Enhancement Award: Subject to Court approval, Plaintiff shall be paid an
12 enhancement award not to exceed \$7,500. (Settlement, ¶¶ 12, 43 (c).) This amount is for
13 Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general
14 release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, ¶
15 12, 43 (c).) If the Court awards less than the amount requested, any amount not awarded will be
16 part of the distribution to the Participating Class Members as set forth in this Agreement and
17 shall not be a reason to invalidate/terminate this Agreement. (Settlement, ¶ 43 (c).)

18 11. Attorneys' Fees and Costs: The Settlement provides that Defendant will not
19 oppose a fee application of up to 33 1/3% (\$191,666.66) of the Settlement Amount, plus out-of-
20 pocket costs not to exceed \$25,000.00 (Settlement, ¶ 4.) (Marquez Decl., ¶ 10.) At this time,
21 Class Counsel's costs are approximately \$19,211.85. (Marquez Decl., ¶ 38.)

22 12. Notice of Proposed Settlement: The Notice sets forth in plain terms, a statement of
23 the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees,
24 costs, and service awards being sought, and an explanation of how the settlement allocations are
25 calculated. (Settlement, Ex. A.) The Notice also sets forth each class member's total
26 workweeks, as well as the approximate amount of money they would receive in the event all
27 class members participate in the settlement. The Notice also includes an opt-out form. (*Id.*)
28 Class Members will be notified by first class mail of the settlement. (Settlement, ¶ 46 (a).)

1 Phoenix Class Action Administration Solutions, the proposed Settlement Administrator, will
2 undertake its best efforts to ensure that the notice is provided to the current addresses of class
3 members, including conducting a national change of address search and re-mailing the notice to
4 updated addresses. (Settlement, ¶ 46 (a)-(c).) Notice will be provided in English and Spanish.
5 (Marquez Decl., ¶ 11; Ex. 2.)

6 13. Dispute Procedure: Class Notice will include a procedure by which a Class
7 Member may dispute the number of workweeks or opt-out of the settlement. (Settlement, Ex. A.)

8 **III. DISCUSSION**

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

16 In considering whether a settlement is reasonable, the trial court should consider relevant
17 factors, which may include the strength of plaintiff’s case, the risk, expense, complexity and
18 likely duration of further litigation, the risk of maintaining class action status through trial, the
19 amount offered in settlement, the extent of discovery completed and the stage of the proceedings,
20 the experience and views of counsel, the presence of a governmental participant, and the reaction
21 of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
22 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
23 that the class settlement is within the “ballpark” of reasonableness. (*Id.* at p. 133.) The record
24 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI*
25 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar*
26 does not require “an explicit statement of the maximum amount the plaintiff class could recover
27 if it prevailed on all its claims”, but instead, only an “understanding of the amount that is in
28 controversy and the realistic range of outcomes of the litigation.”].)

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

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

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

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

15 The Settlement was reached following extensive negotiations following a full day of
16 mediation with experienced employment mediator Steven J. Serratore. (Marquez Decl. ¶¶ 7.)
17 The settlement negotiations were at arm’s length and, although conducted in a professional
18 manner, were adversarial. (*Id.*) The parties went into the mediation willing to explore the
19 potential for a settlement of the dispute, but each side was also prepared to litigate their or its
20 position through trial and appeal if a settlement had not been reached. (*Id.*)

21 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
22 the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll
23 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
24 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
25 as information regarding the number of putative class members and the mix of current versus
26 former employees, the wage rates in effect, and the amount of meal and rest period premium
27 wages paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual
28 investigation, Class Counsel investigated the applicable law regarding the claims and defenses

1 asserted in the litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and
2 effectively in negotiating the proposed Settlement. (*Id.*)

3 Class Counsel also has considerable experience and has demonstrated competence with
4 litigating wage and hour class actions. (*Id.* at ¶¶ 41-52.) Again, this supports the position that
5 the terms of the Settlement are premised on objective evidence that has been considered and
6 weighed in light of the risks, expenses, and time consumption to both sides of continued
7 litigation of this action.

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

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

17 This settlement avoids the risks and the accompanying expense of further litigation.
18 (*Marquez Decl.*, ¶ 25.) While Plaintiff is confident in the merits of their claims, a legitimate
19 controversy exists as to each cause of action. (*Id.* at ¶ 24.) Plaintiff also recognizes that proving
20 the amount of wages due to each class member would be an expensive, time-consuming, and
21 uncertain proposition. (*Id.*) Additionally, approximately 50% of all class members are subject to
22 arbitration agreements and class action waivers. (*Id.* at ¶17.)

23 The proposed settlement of \$575,000.00 therefore represents a substantial recovery when
24 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-27.) Because of the
25 proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk
26 of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved
27 in achieving class certification, the burdens of proof necessary to establish liability, the
28 probability of appeal of a favorable judgment, it is clear that the settlement amount of

1 \$575,000.00 is within the “ballpark” of reasonableness, and preliminary settlement approval is
2 appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average net***
3 ***benefit of approximately \$1,574.54.*** (*Id.* at ¶ 26.)

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

5 The settlement negotiations were conducted by highly capable and experienced counsel.
6 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
7 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 39-
8 50.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the
9 litigation, they support the proposed Settlement as being in the best interests of the class.

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

11 The proposed Notice and Workweek Dispute Form, in the form attached to the Settlement
12 Agreement as Exhibit A, should be approved for dissemination to the class and sub-class. The
13 Notice and Workweek Dispute Form informs the class of the terms of the settlement and of their
14 rights to be excluded from the settlement. And if there are class members who wish to object to
15 this proposed class action settlement, they will have the opportunity to file their objections and
16 be heard at the Final Approval Hearing. Accordingly, the proposed Notice and Workweek
17 Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of Court.

18 **C. The Proposed Attorneys’ Fees and Costs Are Reasonable**

19 Under the Settlement, subject to the Court’s approval, Defendant agrees to pay Class
20 Counsel reasonable attorneys’ fees in amount of \$191,666.66, which is 33 1/3% of the gross
21 Settlement Amount, and up to \$25,000.00 in costs. These amounts are disclosed to all class
22 members in the proposed Notice and are reasonable.

23 **1. Class Counsel Request an Award of Fees Based on the “Common** 24 **Fund” Method**

25 California courts have long awarded attorneys’ fees as a percentage of the benefit created
26 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that
27 “when a number of persons is entitled in common to a specific fund, and an action brought by a
28 plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such

1 plaintiff or plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977)
2 20 Cal.3d 25, 34, quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

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

13 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016)
14 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the
15 class members, and the trial court in its equitable powers awards class counsel a fee out of that
16 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
17 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized
18 advantages of the percentage method—including relative ease of calculation, alignment of
19 incentives between counsel and the class, a better approximation of market conditions in a
20 contingency case, and the encouragement it provides counsel to seek an early settlement and
21 avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable
22 tool that should not be denied our trial courts.” (*Id.* [internal citations omitted].)

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

24 According to a leading treatise on class actions, “No general rule can be articulated on
25 what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit
26 on a reasonable fee award from a common fund in order to assure that the fees do not consume a
27 disproportionate part of the recovery obtained for the class, although somewhat larger
28 percentages are not unprecedented.” (*See* Conte & Newberg, *Newberg on Class Actions* (3rd

1 Ed.) § 14.03.) Attorneys’ fees that are fifty percent of the fund are typically considered the upper
2 limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively
3 small. (*Id.*; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp.
4 294 [stating that most cases where 30-50 percent was awarded involved “smaller” settlement
5 funds of under \$10 million].)

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

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

14 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
15 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
16 section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were
17 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
18 that it limits the risk of continued expenses and consumption of time, energy, and resources
19 facing Defendant while at the same time rewarding Class Counsel for their decision to assume
20 risk by taking on this matter. In fact, prosecution of this action involved significant financial risk
21 for Class Counsel. (Marquez Decl., ¶¶ 35-37.) Class Counsel undertook this matter solely on a
22 contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on
23 behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary
24 duty to the Class ahead of all other concerns.

25 4. The Experience, Reputation and Ability of Class Counsel Support the 26 Requested Fee Award

27 As demonstrated by their past experience in pursuing class actions on behalf of
28 consumers and employees, Class Counsel possess considerable expertise in litigating class

1 actions. (Marquez Decl., ¶¶ 39-50.) Class Counsel has been involved as lead counsel or co-
2 counsel in several class actions that resulted in millions in recovery. (*Id.*) Because it is
3 reasonable to compensate class counsel commensurate with their skill, reputation and experience,
4 Class Counsel’s requested fee award is supported here.

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

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

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

20 Service awards are particularly important to plaintiffs in wage and hour cases because they
21 promote the important public policies underlying the wage and hour laws. This strong policy is
22 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to
23 vigorously enforce minimum labor standards in order to ensure employees are not required or
24 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
25 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
26 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
27 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
28

1 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
2 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

3 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
4 a Service Award in the amount of \$7,500 to Plaintiff. This amount is also in exchange for
5 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
6 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
7 very frequently for litigation and to prepare for mediation, and was frequently in contact with
8 Class Counsel during the mediation. (Marquez Decl., ¶¶ 28-32.) This amount is reasonable
9 particularly in light of the substantial benefits Plaintiff generated for all class members. (*Id.*)
10 Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB,
11 Class Counsel Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339
12 class members, and the court approved a \$25,000 class representative incentive award for each
13 named plaintiff. (Marquez Decl., ¶ 32.)

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

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1 **E. There is Good Cause for Selecting the State of California’s Unclaimed**
2 **Property Fund As the *Cy Pres* Recipient.**

3 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
4 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six*
5 *Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure
6 that the settlement retains some connection to the plaintiff class and the underlying claims,
7 however, a *cy pres* award must qualify as ‘the next best distribution’ to giving the funds directly
8 to class members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six*
9 *Mexican Workers*, 904 F.2d at 1308.)

10 Moreover, in the class action context, California Code of Civil Procedure permits unpaid
11 cash residues in a class action settlement to be distributed to a *cy pres* recipient “in a manner
12 designed either to further the purposes of the underlying class action or causes of action, or to
13 promote justice for all Californians.” (Cal. Civ. Proc. Code § 384.)

14 Here, under the terms of the settlement agreement, in the event settlement checks remain
15 uncashed after 180 days, those funds shall be donated to the State of California’s Unclaimed
16 Property Fund in the name of the Participating Class Member/Aggrieved Employee. (Settlement,
17 ¶ 50 (e).)

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

19 **A. Legal Standard**

20 The proposed Settlement Class is well suited for class certification. All of the claims
21 derive from a core set of alleged violations of California’s wage and hour laws and regulations.
22 For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
23 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
24 the question is one of a common or general interest, of many persons, or when the parties are
25 numerous, and it is impracticable to bring them all before the court, one or more may sue or
26 defend for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section
27 382: “(1) There must be an ascertainable class; and (2) there must be a well-defined community
28 of interest in the questions of law and fact involved affecting the parties to be represented.”

1 (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these
2 requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to
3 explain that the community-of-interest requirement itself embodies three factors: “(1)
4 predominant questions of law or fact; (2) class representatives with claims or defenses typical of
5 the class; and (3) class representatives who can adequately represent the class.” (*Richmond v.*
6 *Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470.)

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

13 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
14 **Settlement Purposes.**

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

16 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
17 approximately 199 employees of Defendant.

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

23 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
24 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
25 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an
26 action may be maintained as a class action even where the parties are numerous and it is in fact
27 practicable to join them all.” (*Id.*) “No set number is required as a matter of law for the
28 maintenance of a class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing

1 the 10 beneficiaries of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v.*
2 *Super. Ct.* (1955) 44 Cal.2d 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35
3 member class.]) Therefore, Plaintiff contends that numerosity is plainly satisfied.

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

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

10 Here, the employment practices at issue are: whether Defendant had legally compliant
11 policies and practices to provide employees with meal periods; whether Defendant had legally
12 compliant policies and practices authorizing and permitting its employees to take rest periods;
13 whether Defendant had legally compliant policies and practices for all hours worked, including
14 overtime wages; whether Defendant paid terminated employees all vacation wages at the correct
15 rate of pay; whether final payment of wages was untimely and excluded unpaid wages, including
16 meal period premium wages, and rest period premium wages; and whether the wage statements
17 were consequently non-compliant. Plaintiff contends that the factual and legal issues are the
18 same for all of the identified class members, including Plaintiff. Further, all class members
19 suffered from, and seek redress for, the same alleged injuries.

20 **3. Plaintiff’s Claims Are Typical of the Claims of the Class**

21 The typicality requirement does not focus on the individual characteristics or
22 circumstances of the representative plaintiff compared to those of the remainder of the class, but
23 rather upon the typicality of the proposed representative’s claims as they relate to the defendant’s
24 conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 [“[t]he only
25 requirements are that common questions of law and fact predominate and that the class
26 representative be similarly situated” vis-à-vis the class.].) A representative plaintiff’s claims are
27 typical of the class if they arise from the same event, practice or course of conduct, and if the
28 claims rest on the same legal theories. (*Id.*) That is precisely the case here. Plaintiff is a former

1 employee of Defendant; as such, he alleges that he was subject to the same policies and practices
2 as other similarly situated employees.

3 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

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

8 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
9 with extensive experience in prosecuting complex class actions, including similar class actions
10 that previously settled. (Marquez Decl., ¶¶ 39-50.) Class Counsel unquestionably is "qualified,
11 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
12 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
13 litigated this case and diligently reviewed the settlement terms, showing their dedication.
14 Plaintiff's willingness to serve as a representative demonstrates his serious commitment to
15 bringing about the best results possible for the class and subclass. (*McGhee, supra*, 60
16 Cal.App.3d at p. 451.)

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

18 Finally, in making its class certification decision, the Court must determine that a class
19 action would be superior to alternative means for the fair and efficient adjudication of the
20 litigation. By consolidating many potential individual actions into a single proceeding, this
21 Court's use of the class action device enables it to manage this litigation in a manner that serves
22 the economics of time, effort and expense for the litigants and the judicial system. Absent class
23 treatment, similarly-situated employees with small but nevertheless meritorious claims for
24 damages would, as a practical matter, have no means of redress because of the time, effort and
25 expense required to prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443,
26 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of
27 settlement, the superiority concerns are essentially non-existent.

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

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

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

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

12 The proposed Notice should be approved. It will be disseminated through direct U.S. first
13 class mail to the last known address for each Class Member. It informs the Class Members of the
14 terms of the settlement and their right to be excluded from the Settlement. And if there are Class
15 Members who wish to object to this proposed class action settlement, they will have the
16 opportunity to file their objections and be heard at the Final Approval Hearing.

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

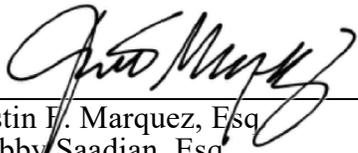
25 **VI. CONCLUSION**

26 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
27 approval of the proposed settlement and set a Final Approval Hearing for February 15, 2022.

28 ///

1 Dated: August 30, 2021

WILSHIRE LAW FIRM

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3 By: 
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