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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF STANISLAUS**

MANUEL GARDUNO, individually, and on  
behalf of all others similarly situated,

*Plaintiff,*

v.

NEW GENERATION FRAMING, INC., a  
California corporation; GOLDEN STATE  
CONSTRUCTION & FRAMING, INC., a  
California corporation; and DOES 1 through 10,  
inclusive,

*Defendants.*

Case No.: CV-21-000544

**CLASS ACTION**

[Assigned to: Hon. Sonny S. Sandhu, Dept.  
24]

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

[Filed concurrently with: Declaration of  
Justin F. Marquez; and [Proposed] Order]

**PRELIMINARY APPROVAL HEARING**

Date: February 7, 2023

Time: 8:30 a.m.

Dept: 24

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

2 PLEASE TAKE NOTICE that on February 7, 2023 at 8:30 a.m., in Department 24 of the  
3 Stanislaus County Superior Court, 801 10th Street, 4th Floor, Modesto, California 95354, pursuant  
4 to California Code of Civil Procedure § 382 and California Rules of Court, Rule 3.769, *et seq.*,  
5 Plaintiff Manuel Garduno (“Plaintiff”) will move the Court for an Order granting preliminary  
6 approval of the proposed class action settlement between Plaintiff and Defendants New Generation  
7 Farming, Inc. and Golden State Construction & Framing, Inc. Plaintiff further moves the Court  
8 for an Order:

- 9 1. Granting preliminary approval of the Class Action and PAGA Settlement Agreement  
10 and Class Notice;  
11 2. Certifying a Class for settlement purposes;  
12 3. Approving the Notice and the plan for distribution of the Notice;  
13 4. Appointing Plaintiff Manuel Garduno as Class Representative for settlement purposes;  
14 5. Appointing Plaintiff’s Counsel, Justin F. Marquez, Benjamin H. Haber, and Arrash T.  
15 Fattahi of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;  
16 6. Appointing Phoenix Settlement Administrators as the Settlement Administrator; and  
17 7. Scheduling a Final Approval Hearing.

18 The Motion will be based upon this Notice, the attached Memorandum of Points and  
19 Authorities, the Declaration of Justin F. Marquez, filed concurrently herewith, the records and files  
20 in this Action, and any other further evidence or argument that the Court may properly receive at  
21 or before the hearing.

22 Respectfully submitted,

23 Dated: January 13, 2023

WILSHIRE LAW FIRM

24  
25 By:

Justin F. Marquez  
Benjamin H. Haber  
Arrash T. Fattahi

*Attorneys for Plaintiff*

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff Manuel Garduno (“Plaintiff”) seeks preliminary approval of a proposed \$750,000.00 non-reversionary, wage and hour class action settlement with Defendants New Generation Framing, Inc. and Golden State Construction & Framing, Inc. (“Defendants,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 1,229 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Jeffrey A. Ross, Esq., over the course of a full day of mediation that was conducted via Zoom. After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff’s claims and Defendants’ defenses, the Parties reached a settlement. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

### II. SUMMARY OF THE LITIGATION AND SETTLEMENT

#### A. Plaintiff’s Claims

This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as hourly-paid or non-exempt employees for Defendants during the class period. Defendants operate in the general construction industry and specialize in rough carpentry, metal framing, and gypsum board installation. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (Declaration of Justin F. Marquez [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendants’ payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendants failed to pay for all hours worked. Plaintiff further alleges that Defendants failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff assert claims against Defendants for failure to pay minimum and straight time wages, failure to pay overtime wages,

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

4 On February 2, 2021, Plaintiff filed a putative wage and hour class action complaint  
5 against Defendants for: (1) failure to pay minimum and straight time wages (Labor Code §§  
6 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194 and  
7 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to  
8 authorize and permit rest periods (Labor Code §§ 226.7 and 512); (5) failure to timely pay final  
9 wages at termination (Labor Code §§ 201-203); (6) failure to provide accurate itemized wage  
10 statements (Labor Code § 226); and (7) unfair business practices (Business and Professions  
11 Code 17200, *et seq.*). (*Id.* at ¶ 4.) On February 3, 2021, Plaintiff sent a notice to Defendants  
12 and the California Labor & Workforce Development Agency (“LWDA”) alleging similar wage  
13 and hour violations pursuant to the PAGA. (*Id.*, Ex. 1 [Plaintiff’s Notice of Labor Code  
14 Violations and PAGA Penalties].) Plaintiff also paid the \$75.00 filing fee on February 3, 2021.  
15 (Marquez Decl., ¶ 4.) On January 13, 2023, the Parties filed a Joint Stipulation for Leave to  
16 File First Amended Class and Representative Action Complaint, which requests that the Court  
17 grant Plaintiff leave to file a First Amended Class and Representative Action Complaint  
18 (“FAC”) adding a claim for civil penalties pursuant to the PAGA. (*Id.*) Following the filing of  
19 the FAC, Plaintiff will provide a conformed copy of the FAC to the LWDA. (*Id.*)

## 20 **B. Discovery and Investigation**

21 Following the filing of the initial Complaint, the Parties exchanged documents and  
22 information before mediating this action. Defendants produced a sample of timekeeping and  
23 pay records for the class members. Defendants also provided documents of their wage and hour  
24 policies and practices during the class period and information regarding the total number of  
25 current and former employees in their informal discovery responses. (*Id.* at ¶ 5.)

26 After reviewing documents regarding Defendants’ wage and hour policies and practices,  
27 analyzing Defendants’ timekeeping and payroll records, and interviewing Class Members, Class  
28 Counsel was able to evaluate the probability of class certification, success on the merits, and



Defendants' maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id.*)

### C. Settlement Negotiations

On January 6, 2022, the Parties participated in private mediation with experienced class action mediator Jeffrey A. Ross, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties reached a settlement, the material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8, Ex. 2 [Class Action and PAGA Settlement Agreement and Class Notice].)

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

Indeed, the \$750,000.00 Settlement represents **76.8% of the realistic maximum recovery of \$976,520.80.** (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendants' maximum potential liability for all claims was approximately \$10 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendants' realistic exposure was \$976,520.80, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 15-27.) Considering the risk and uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class. (*Id.* at ¶ 23.) Indeed, because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid

the risk of an unfavorable judgment.

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

The Parties used the Los Angeles County Superior Court’s Form Class Action and PAGA Settlement Agreement and Class Notice. A document showing edits the Parties made to the template in redline is attached to the Declaration of Justin F. Marquez as Exhibit 3. (Marquez Decl., ¶ 9.) The Settlement’s key terms include:

1. Class Definition: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: all individuals employed by New Generation Framing, Inc. or Golden State Construction & Framing, Inc. in California and classified as an hourly-paid or non-exempt employee during the Class Period. (Settlement, § 1.5.)

2. Class Period: “means the period from February 2, 2017 to January 6, 2022.” (Settlement, § 1.12.)

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

4. Non-Participating Class Members: “means any Class Members who opts out of the Settlement by sending the Administrator a valid and timely Request for Exclusion.” (Settlement, § 1.29.)

5. Aggrieved Employees: means a person employed by Defendants in California and classified as an hourly-paid or non-exempt employee who worked for Defendants during the PAGA Period of February 2, 2020 to January 6, 2022. (Settlement, §§ 1.4, 1.30, and 1.31.) Every class member is not also an Aggrieved Employee.

6. Gross Settlement Amount: This amount is \$750,000.00 and will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Award, and the Administrator’s Expenses. (Settlement, § 1.22.) “Defendants shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendants’ share of payroll taxes by transmitting the funds to the Administrator no later than four months after the Court grants final approval of the Settlement, with the first \$500,000 to be paid within 10 business days of the Court

granting final approval of this Settlement and the remaining within four months after Defendants’ payment of the first installment as previously defined.” (*Id.* at § 4.3.)

7. Uncashed Checks: For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date (not less than 180 days after the date of mailing), the Administrator shall transmit the funds represented by such checks to the California State Controller’s Unclaimed Property Funds in the name of the Class Members thereby leaving no “unpaid residue” subject to the requirements of California Code of Civil Procedure § 384, subd. (b). (Settlement, §§ 4.4.1, 4.4.3.)

8. Release by Participating Class Members Who Are Not Aggrieved Employees: “All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties [New Generation Framing, Inc. and Golden State Construction & Framing, Inc. and each of their former and present directors, officers, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates] from all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action, including any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; and (7) violation of California’s Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq.* Except as set forth in Section 5.3 of [the Settlement] Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers’ compensation, or claims based on facts occurring outside the Class Period.” (Settlement, § 5.2.) This Release will be deemed effective on the date when Defendants fully fund the entire Gross Settlement Amount and fund all employer payroll taxes owed on the Wage Portion of the Individual Class Payments. (*Id.* at § 5.)

///

1           9.     Release by Non-Participating Class Members Who Are Aggrieved Employees: “All  
2 Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf  
3 of themselves and their respective former and present representatives, agents, attorneys, heirs,  
4 administrators, successors, and assigns, the Released Parties from all claims for PAGA Penalties  
5 that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated  
6 in the Operative Complaint, and the PAGA Notice, and ascertained in the course of the Action,  
7 including any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to  
8 pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest  
9 periods; (5) failure to timely pay final wages at termination; and (6) failure to provide accurate  
10 itemized wage statements.” (Settlement, § 5.3.)

11           10.   No Reversion: “None of the Gross Settlement Amount will revert to Defendants.”  
12 (Settlement, § 3.1.)

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

18           12.   Net Settlement Fund/Amount: “means the Gross Settlement Amount, less the  
19 following payments in the amounts approved by the Court: Individual PAGA Payments, the  
20 LWDA PAGA Payment, Class Representative Service [Award], Class Counsel Fees Payment,  
21 Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The  
22 remainder is to be paid to Participating Class Members as Individual Class Payments.”  
23 (Settlement, § 1.28.)

24           13.   Distribution Formula: “An Individual Class Payment [will be] calculated by (a)  
25 dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating  
26 Class Members during the Class Period and (b) multiplying the result by each Participating Class  
27 Member’s Workweeks.” (Settlement, § 3.2.4.) As to PAGA: “The Administrator will calculate  
28 each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees’ 25%

share of PAGA Penalties (\$5,000) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods." (Settlement, § 3.2.5.1.)

14. Tax Allocation: "33% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 67% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion")." (Settlement, § 3.2.4.1.)

15. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid a service award not to exceed \$10,000.00. (Settlement, § 3.2.1.) This amount is for Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to California Civil Code Section 1542. (*Id.* at § 5.1.) If the Court approves a lesser enhancement, then the unapproved portion shall revert into the Net Settlement Amount to be distributed between the Participating Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

16. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% (\$250,000.00) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed \$25,000.00. (Settlement, § 3.2.2.)

17. Court Approved Notice of Class Action Settlement and Hearing Date for Final Court Approval: The Notice sets forth, in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and an explanation of how the settlement allocations are calculated. (Settlement, Ex. A, Class Notice.) Class Members will be notified by first-class mail of the settlement. (Settlement, § 4.4.1.) Phoenix Settlement Administrators, the proposed Settlement Administrator, will undertake its best efforts to ensure that the Notice is provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. (*Id.*; Marquez Decl., ¶ 11, Ex. 4 [Settlement Administrator Bid].)

///

1     **III.     DISCUSSION**

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

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

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

25     ///

26     ///

27     ///

28     ///

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

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

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

12          The Settlement was reached following extensive negotiations following one day of  
13          mediation with experienced employment mediator, Jeffrey A. Ross, Esq. (Marquez Decl. ¶ 7.)  
14          The settlement negotiations were at arm’s length and, although conducted in a professional manner,  
15          were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a  
16          settlement of the dispute, but each side was also prepared to litigate their or its position through  
17          trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and  
18          discussions regarding the strengths and weaknesses of Plaintiff’s claims and Defendants’ defenses,  
19          the Parties reached an agreement. (Marquez Decl. ¶ 8.)

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

1 negotiating the proposed Settlement. (*Id.*)

2 Class Counsel also has considerable experience and has demonstrated competence with  
3 litigating wage and hour class actions. (*Id.* at ¶¶ 38-46.) Again, this supports the position that the  
4 terms of the Settlement are premised on objective evidence that has been considered and weighed  
5 in light of the risks, expenses, and time consumption to both sides of continued litigation of this  
6 action.

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

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

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

21 The proposed settlement of \$750,000.00 therefore represents a substantial recovery when  
22 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 15-27.) Because of the proposed  
23 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an  
24 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in  
25 achieving class certification, the burdens of proof necessary to establish liability, the probability  
26 of appeal of a favorable judgment, it is clear that the settlement amount of \$750,000.00 is within  
27 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***  
28 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***



1   **\$352.52.** (*Id.* at ¶ 26.)

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

3           The settlement negotiations were conducted by highly capable and experienced counsel.  
4   Class Counsel have a strong record of vigorous and effective advocacy for their clients and are  
5   experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 38-  
6   46.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,  
7   they support the proposed Settlement as being in the best interests of the class.

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

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

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

16           Under the Settlement, subject to the Court's approval, Defendants agree to pay Class  
17   Counsel reasonable attorneys' fees in amount of \$250,000.00, which is 33 1/3% of the Gross  
18   Settlement Amount, and up to \$25,000.00 in costs. These amounts are disclosed to all class  
19   members in the proposed Notice and are reasonable.

20                   **1.       Class Counsel Request an Award of Fees Based on the "Common Fund"**  
21                   **Method**

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

28   ///

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

11           The California Supreme Court affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th  
12 480 that, “when class action litigation establishes a monetary fund for the benefit of the class  
13 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the  
14 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the  
15 fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages of the percentage  
16 method—including relative ease of calculation, alignment of incentives between counsel and the  
17 class, a better approximation of market conditions in a contingency case, and the encouragement  
18 it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—  
19 convince us the percentage method is a valuable tool that should not be denied our trial courts.”  
20 (*Id.* [internal citations omitted].)

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

22           According to a leading treatise on class actions, “[n]o general rule can be articulated on  
23 what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on  
24 a reasonable fee award from a common fund in order to assure that the fees do not consume a  
25 disproportionate part of the recovery obtained for the class, although somewhat larger percentages  
26 are not unprecedented.” (*See Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.)  
27 Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty  
28 to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; *see also*

1 *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most  
2 cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10  
3 million].)

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

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

12 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime  
13 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this  
14 section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were  
15 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in  
16 that it limits the risk of continued expenses and consumption of time, energy, and resources facing  
17 Defendants while at the same time rewarding Class Counsel for their decision to assume risk by  
18 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class  
19 Counsel. (Marquez Decl., ¶¶ 36-37.) Class Counsel undertook this matter solely on a contingent  
20 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the  
21 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class  
22 ahead of all other concerns.

### 23 **4. The Experience, Reputation and Ability of Class Counsel Support the** 24 **Requested Fee Award**

25 As demonstrated by their past experience in pursuing class actions on behalf of consumers  
26 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez  
27 Decl., ¶¶ 38-46.) Class Counsel has been involved as lead counsel or co-counsel in several class  
28 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class

1 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee  
2 award is supported here.

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

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

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

18 Service awards are particularly important to plaintiffs in wage and hour cases because they  
19 promote the important public policies underlying the wage and hour laws. This strong policy is  
20 codified in California Labor Code Section 90.5, which provides, “it is the policy of this state to  
21 vigorously enforce minimum labor standards in order to ensure employees are not required or  
22 permitted to work under substandard unlawful conditions....”). Nonetheless, the California  
23 Supreme Court has noted that “retaliation against employees for asserting statutory rights under  
24 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.  
25 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should  
26 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*  
27 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

28 ///

1 Under the settlement agreement, subject to the Court’s approval, Defendants agreed to pay  
2 a service award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for  
3 Plaintiff’s general release of all claims against Defendants. Class Counsel represent that Plaintiff  
4 devoted a great deal of time and work assisting counsel in the case, communicated with counsel  
5 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class  
6 Counsel during the mediation. (Marquez Decl., ¶¶ 28-32.) This amount is reasonable particularly  
7 in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl*  
8 *Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel  
9 Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339 class members,  
10 and the court approved a \$25,000 class representative incentive award for each named plaintiff.  
11 (Marquez Decl., ¶ 32.)

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

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

##### 25 **A. Legal Standard**

26 The proposed Settlement Class is well suited for class certification. All of the claims derive  
27 from a core set of alleged violations of California’s wage and hour laws and regulations. For the  
28 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the

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

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

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

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

The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes approximately 1,229 employees of Defendants.

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

1           “The requirement of Code of Civil Procedure Section 382 that there be ‘many’ parties to a  
2 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)  
3 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action  
4 may be maintained as a class action even where the parties are numerous and it is in fact practicable  
5 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a  
6 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries  
7 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d  
8 574; *see also Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,  
9 Plaintiff contends that numerosity is plainly satisfied.

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

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

16           Here, the employment practices at issue are: whether Defendants had legally compliant  
17 policies and practices to provide employees with meal periods; whether Defendants had legally  
18 compliant policies and practices authorizing and permitting their employees to take rest periods;  
19 whether Defendants had legally compliant policies and practices for all hours worked, including  
20 overtime wages; whether final payment of wages was untimely and excluded unpaid wages,  
21 including meal and rest period premium wages; and whether the wage statements were  
22 consequently non-compliant. Plaintiff contends that the factual and legal issues are the same for  
23 all of the identified class members, including Plaintiff. Further, all class members suffered from,  
24 and seek redress for, the same alleged injuries.

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

26           The typicality requirement does not focus on the individual characteristics or circumstances  
27 of the representative plaintiff compared to those of the remainder of the class, but rather upon the  
28 typicality of the proposed representative’s claims as they relate to the defendant’s conduct and

activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 [“[t]he only requirements are that common questions of law and fact predominate and that the class representative be similarly situated” vis-à-vis the class.]) A representative plaintiff’s claims are typical of the class if they arise from the same event, practice or course of conduct, and if the claims rest on the same legal theories. (*Id.*) That is precisely the case here. Plaintiff is a former employee of Defendants; as such, he alleges that he was subject to the same policies and practices as other similarly situated employees.

#### 4. Plaintiff and His Counsel Meet the Adequacy Requirement

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

All of these requirements are met here for settlement purposes. Plaintiff retained counsel with extensive experience in prosecuting complex class actions, including similar class actions that previously settled. (Marquez Decl., ¶¶ 38-46.) Class Counsel unquestionably is “qualified, experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel, litigated this case and diligently reviewed the settlement terms, showing their dedication. Plaintiff’s willingness to serve as a representative demonstrates his serious commitment to bringing about the best results possible for the class and subclass. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

Finally, in making its class certification decision, the Court must determine that a class action would be superior to alternative means for the fair and efficient adjudication of the litigation. By consolidating many potential individual actions into a single proceeding, this Court’s use of the class action device enables it to manage this litigation in a manner that serves the economics of time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-situated employees with small but nevertheless meritorious claims for damages would, as a



practical matter, have no means of redress because of the time, effort and expense required to prosecute individual actions. (*Gentry, supra*, 42 Cal.4th at p. 443, 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns are essentially non-existent.

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

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

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

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

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

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

1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary  
3 approval of the proposed settlement and set a Final Approval Hearing for in June 2023.

4  
5  
6 Dated: January 13, 2023

Respectfully submitted,

WILSHIRE LAW FIRM

7  
8 By:

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*Manuel Garduno v. New Generation Framing, Inc., et al.*  
CV-21-000544

## PROOF OF SERVICE