

1 Justin F. Marquez (SBN 262417)
2 justin@wilshirelawfirm.com
3 Benjamin H. Haber (SBN 315664)
4 benjamin@wilshirelawfirm.com
5 Arrash T. Fattahi (SBN 333676)
6 afattahi@wilshirelawfirm.com
7 **WILSHIRE LAW FIRM**
8 3055 Wilshire Blvd., 12th Floor
9 Los Angeles, California 90010
10 Telephone: (213) 381-9988
11 Facsimile: (213) 381-9989

Attorneys for Plaintiff

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF RIVERSIDE**

12 FELIX REY GUTIERREZ, individually, and on
13 behalf of all others similarly situated,

Plaintiff,

v.

16 NEXT LEVEL DOOR & MILLWORK, INC., a
17 California corporation, and DOES 1 through 10,
18 inclusive,

Defendants.

Case No.: CVRI2105455

CLASS ACTION

[Assigned for all purposes to: Hon. Harold Hopp, Dept. 1]

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

[Filed with the Declaration of Justin F. Marquez, Declaration of Felix Rey Gutierrez, Declaration of April L. Szabo, Declaration of Sean Hartranft, and Proposed Order]

PRELIMINARY APPROVAL HEARING

Date: August 8, 2023

Time: 8:30 a.m.

Dept: 1

Complaint filed: November 30, 2021

Trial date: Not set

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

2 PLEASE TAKE NOTICE that on August 8, 2023 at 8:30 a.m., in Department 1 of the
3 Riverside County Superior Court, located at 4050 Main Street, Riverside, CA 92501, pursuant to
4 Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*, Plaintiff Felix Rey
5 Gutierrez will move the Court for an Order granting preliminary approval of the proposed class
6 action settlement between Plaintiff and Defendant Next Level Door & Millwork, Inc. Plaintiff
7 further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Class Action Settlement Agreement and Class
9 Notice;
- 10 2. Certifying a Class for settlement purposes;
- 11 3. Approving the Notice and the plan for distribution of the Notice;
- 12 4. Appointing Plaintiff Felix Rey Gutierrez as Class Representative for settlement
13 purposes;
- 14 5. Appointing Plaintiff’s Counsel, Justin F. Marquez, Benjamin H. Haber, Arrash T.
15 Fattahi of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
- 16 6. Appointing Apex Class Action 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 Declarations of Justin F. Marquez, Felix Rey Gutierrez, April L. Szabo, and Sean
20 Hartranft, filed concurrently herewith, the records and files in this action, and any other further
21 evidence or argument that the Court may properly receive at or before the hearing.

22 Respectfully submitted,

23 Dated: July 17, 2023

WILSHIRE LAW FIRM

24
25 By: 

Justin F. Marquez, Esq.
Benjamin H. Haber, Esq.
Arrash T. Fattahi, Esq.
Attorneys for Plaintiff

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27
28

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. SUMMARY OF THE LITIGATION AND SETTLEMENT..... 1

 A. Plaintiff’s Claims 1

 B. Discovery and Investigation..... 2

 C. Settlement Negotiations 2

 D. Key Terms of the Proposed Settlement..... 3

III. DISCUSSION 6

 A. The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation,
 Litigation, and Negotiation 7

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

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

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

 B. The Proposed Class Notice of Settlement Should Be Approved 9

 C. The Proposed Attorneys’ Fees and Costs Are Reasonable 9

 1. Class Counsel Request an Award of Fees Based on the “Common Fund”
 Method 9

 2. The Requested Fee Award Is in Line with Typical Cases 10

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

 4. The Experience, Reputation and Ability of Class Counsel Support the
 Requested Fee Award 11

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

 E. There is Good Cause for Selecting Legal Aid at Work As the *Cy Pres* Recipient. 13

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED 14

 A. Legal Standard 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for Settlement Purposes..... 15
 - 1. The Classes Are Ascertainable and Numerous 15
 - 2. There are Many Common Issues of Law and Fact Which Predominate..... 16
 - 3. Plaintiff’s Claims Are Typical of the Claims of the Class..... 16
 - 4. Plaintiff and His Counsel Meet the Adequacy Requirement 17
 - 5. A Class Action is Superior to a Multiplicity of Litigation..... 17
- V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND..... 18
 - A. The Proposed Notice Plan Satisfies Due Process 18
 - B. The Notice is Accurate and Informative 18
- VI. CONCLUSION..... 19

TABLE OF AUTHORITIES

1

2 **STATE CASES**

3 *Bowles v. Super. Ct.* (1955) 44 Cal.2d 57415

4 *Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960.....18

5 *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43.....11

6 *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105.....10

7 *Classen v. Weller* (1983) 145 Cal.App.3d 2716

8 *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605.....16

9 *Collins v. Rocha* (1972) 7 Cal.3d 23215

10 *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 19

11 *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695.....14

12 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 17946

13 *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443..... 12, 17

14 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.....6

15 *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480.....10

16 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429.....15

17 *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 4346

18 *McGhee v. Bank of America* (1976) 60 Cal.App.3d 44217

19 *Miller v. Woods* (1983) 148 Cal. App. 3d 86217

20 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 3996

21 *Quinn v. State of California* (1995) 15 Cal.3d 162.....10

22 *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462.....15

23 *Rodriguez v. W. Publ’g Corp.* (9th Cir. 2009) 563 F.3d 94812

24 *Rose v. City of Hayward* (1981) 126 Cal.App.3d 92615

25 *Serrano v. Priest* (1977) 20 Cal.3d 25.....9

26 *Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 2317

27 *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224.....8

28 *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 95215

1	FEDERAL CASES	
2	<i>Dennis v. Kellogg Co.</i> (9th Cir. 2012) 697 F.3d 858.....	14
3	<i>Eddings v. Health Net, Inc.</i> (C.D. Cal. 2013) 2013 WL3013867	14
4	<i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174	12
5	<i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510	17
6	<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438	7
7	<i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301.....	13
8	<i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....	11
9	STATE STATUTES	
10	Cal. Civ. Proc. Code § 384.....	14
11	Code of Civil Procedure § 382.....	3, 14, 15
12	Labor Code § 1194	2, 4, 11
13	Labor Code § 90.5	12
14	RULES	
15	California Rules of Court, Rule 3.766.....	18
16	California Rules of Court, Rule 3.769(f).....	9
17	TREATISES	
18	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51	7
19	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03	10
20	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39	18
21	OTHER AUTHORITIES	
22	Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An	
23	Empirical Study”, 53 <i>UCLA L. Rev.</i> 1303 (2006)	13
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Felix Rey Gutierrez (“Plaintiff”) seeks preliminary approval of a proposed
4 \$1,069,350 non-reversionary, wage and hour class action settlement with Defendant Next Level
5 Door & Millwork, Inc. The Settlement will provide substantial monetary payments to approximately
6 480 class members. And, as set forth more fully below, the proposed Settlement satisfies all the
7 criteria for settlement approval under California law. The Settlement was reached after extensive
8 investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated
9 by an experienced class action mediator, David Phillips, Esq., over the course of a full day of
10 mediation that was conducted via Zoom. After extensive negotiations and discussions regarding the
11 strengths and weaknesses of Plaintiff’s claims and Defendant’s defenses, the Parties reached a
12 settlement on March 6, 2023. Accordingly, Plaintiff requests that the Court preliminarily approve
13 the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set
14 a final approval hearing.

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

16 **A. Plaintiff’s Claims**

17 This is a wage and hour class action. Plaintiff and putative class members worked in
18 California as hourly-paid or non-exempt employees for Defendant during the class period.
19 Defendant is based in Indio, California and it supplies and installs residential, custom, and
20 commercial builder products in the Southwestern United States. (Declaration of Justin F.
21 Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement
22 [“Marquez Decl.”], ¶ 2.)

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

1 On November 30, 2021, Plaintiff filed a putative wage-and-hour class action complaint
2 against Defendant for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204,
3 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194, and 1198);
4 (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and
5 permit rest periods (Labor Code §§ 226.7 and 512); (5) failure to timely pay final wages at
6 termination (Labor Code §§ 201-203); (6) failure to provide accurate itemized wage statements
7 (Labor Code § 226); and (7) unfair business practices (Business and Professions Code §§ 17200
8 *et seq.*).

9 **B. Discovery and Investigation**

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

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

21 **C. Settlement Negotiations**

22 On March 6, 2023, the parties participated in private mediation with experienced class
23 action mediator David Phillips, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The
24 settlement negotiations were at arm’s length and, although conducted in a professional manner,
25 were adversarial. The parties went into the mediation willing to explore the potential for a
26 settlement of the dispute, but each side was also prepared to litigate their position through trial
27 and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and
28 discussions regarding the strengths and weaknesses of Plaintiff’s claims and Defendant’s

1 defenses, the Parties reached a settlement the material terms of which are encompassed within
2 the Settlement. (*Id.* at ¶ 8, Ex. 1 [Class Action Settlement Agreement and Class Notice].)

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

9 Indeed, the \$1,069,350.00 Settlement represents **90% of the realistic maximum**
10 **recovery of \$1,187,827.83.** (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendant’s
11 maximum potential liability for all claims was approximately \$7.2 million, when the risk of
12 prevailing at certification and trial are factored into the equation, Class Counsel believes that
13 Defendant’s realistic exposure was \$1,187,827.83, meaning the Settlement achieves a
14 significant recovery. (*Id.* at ¶¶ 15-27.) Considering the risk and uncertainty of prevailing at
15 class certification and at trial, this is an excellent result for the Class. (*Id.* at ¶ 22.) Indeed,
16 because of the proposed Settlement, class members will receive timely, guaranteed relief and
17 will avoid the risk of an unfavorable judgment.

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

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

23 1. Class Definition: For settlement purposes only, the Parties agree to the certification
24 of a class pursuant to California Code of Civil Procedure § 382 defined as: “all persons employed
25 by Defendant in California and classified as non-exempt or hourly-paid employee who worked for
26 Defendant during the Class Period.” (Settlement, § 1.4.)

27 2. Class Period: “means the period from June 5, 2017 and shall end on May 15, 2023.”
28 (Settlement, § 1.11.)

1 3. Participating Class Members: “means a Class Member who does not submit a valid
2 and timely Request for Exclusion from the Settlement.” (Settlement, § 1.26.)

3 4. Gross Settlement Amount: This amount is \$1,069,350.00, for all claims, including
4 wages, interest, Class Counsel Fees, Class Counsel Expenses, Class Representative Service
5 Payment and the Administrator’s Expenses. (Settlement, § 1.21.)

6 5. Uncashed Checks: If a settlement check is returned to the Settlement Administrator
7 as undeliverable, the Settlement Administrator shall promptly attempt to obtain a valid mailing
8 address by performing a skip trace search and, if another address is identified, shall mail the check
9 to the newly identified address. Any settlement checks remaining uncashed after one hundred and
10 eighty (180) days shall be transmitted to Legal Aid at Work, the proposed *cy pres* beneficiary.
11 (Settlement, § 4.4.3.) The Parties, Class Counsel and Defense Counsel represent that they have no
12 interest or relationship, financial or otherwise, with the intended Cy Pres Recipient.

13 6. Release: “All Participating Class Members, on behalf of themselves and their
14 respective former and present representatives, agents, attorneys, heirs, administrators, successors,
15 and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have
16 been alleged, based on the Class Period facts stated in the Operative Complaint, including any and
17 all claims involving any recovery of unpaid minimum wages and unpaid overtime (Cal. Lab. Code
18 §§ 204, 1194, 1194.2, 1197, 1198), failure to provide meal and rest periods (Cal. Lab. Code §§
19 226.7, 512), failure to provide accurate wage statements (Cal. Lab. Code § 226), failure to pay all
20 wages due at separation (Cal. Lab. Code §§ 201-203), and violation of Unfair Business Practices
21 (Cal. Bus. & Prof. Code §§ 17200, et seq.)” (Settlement, § 6.2.) This Release will be deemed
22 effective on the date when Defendant fully funds the entire Gross Settlement Amount and funds
23 all employer payroll taxes owed on the Wage Portion of the Individual Class Payments.
24 (Settlement, § 6.)

25 7. No Reversion: “None of the Gross Settlement Amount will revert to Defendant.”
26 (Settlement, § 3.1.)

27 8. Net Settlement Amount: “means the Gross Settlement Amount, less the following
28 payments in the amounts approved by the Court: Class Representative Service Payment, Class

1 Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration
2 Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class
3 Payments.” (Settlement, § 1.24.)

4 9. Distribution Formula: “An Individual Class Payment calculated by (a) dividing the
5 Net Settlement Amount by the total number of Workweeks worked by all Participating Class
6 Members during the Class Period and (b) multiplying the result by each Participating Class
7 Member’s Workweeks.” (Settlement, § 3.2.4.)

8 10. Tax Allocation: Any settlement money paid to Settlement Class Members will be
9 allocated as 33% wages, 67% to penalties and interest. (Settlement, § 3.2.4.1.)

10 11. Class Representative Service Award: Subject to Court approval, Plaintiff shall be
11 paid an enhancement award not to exceed \$10,000.00. (Settlement, § 3.2.1.) This amount is for
12 Plaintiff’s time and effort in bringing and presenting the action, and in exchange for a general
13 release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § 6.1.)
14 If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert
15 into the Net Settlement Amount to be distributed between the participating Settlement Class
16 Members on a pro-rata basis. (Settlement, § 3.2.1.)

17 12. Attorneys’ Fees and Costs: The Settlement provides that Defendant will not oppose
18 a fee application of up to 33 1/3% (\$356,450.00) of the Gross Settlement Amount, plus out-of-
19 pocket costs not to exceed \$20,000.00. (Settlement, § 3.2.2.)

20 13. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
21 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys’
22 fees, costs, and service award being sought, and an explanation of how the settlement allocations
23 are calculated. (Settlement, Ex. A, Class Notice.) Class Members will be notified by first-class
24 mail of the settlement. (Settlement, § 7.4.) Apex Class Action, the proposed Settlement
25 Administrator, will undertake its best efforts to ensure that the notice is provided to the current
26 addresses of class members, including conducting a national change of address search and re-
27 mailing the notice to updated addresses. (*Id.*; Marquez Decl., ¶ 10, Ex. 3 [Settlement Administrator
28 Bid].) Class counsel obtained bids from Apex, Phoenix, and ILYM Group; Apex had the lowest

1 bid. (Marquez Decl., ¶ 10.)

2 **III. DISCUSSION**

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

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

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

26 ///

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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, David Phillips, Esq. (Marquez Decl. ¶ 7.) The
14 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 Defendant’s 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, Defendant’s policies and procedures concerning the payment of wages, the provision of
23 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
24 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 ¶¶ 38-48.) 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 \$1,069,350.00 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 \$1,069,350.00 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 **\$1,360.21.** (*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 48.) 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 and sub-class. The Notice informs the class of the terms of the
11 settlement and of their rights to be excluded from the settlement. And if there are class members
12 who wish to object to this proposed class action settlement, they will have the opportunity to file
13 their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice
14 meets all the 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, Defendant agrees to pay Class
17 Counsel reasonable attorneys' fees in amount of \$356,450.00, which is 33 1/3% of the gross
18 Settlement Amount, and up to \$20,000.00 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, “No general rule can be articulated on what
23 is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a
24 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 Defendant 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., ¶¶ 38-48.) 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 Defendant 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 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay

1 a Service Award in the amount of \$10,000 to Plaintiff. This amount is also in exchange for
2 Plaintiff’s general release of all claims against Defendant. Class Counsel represent that Plaintiff
3 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
4 very frequently for litigation and to prepare for mediation, and was frequently in contact with Class
5 Counsel during the mediation. (Marquez Decl., ¶¶ 28-32.) This amount is reasonable particularly
6 in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl*
7 *Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel
8 Justin F. Marquez helped negotiate a \$2.5 million class action settlement for 339 class members,
9 and the court approved a \$25,000 class representative incentive award for each named plaintiff.
10 (Marquez Decl., ¶ 34.)

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

23 **E. There is Good Cause for Selecting Legal Aid at Work As the *Cy Pres***
24 **Recipient.**

25 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
26 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six Mexican*
27 *Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure that the
28 settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy*

1 *pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class
2 members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican*
3 *Workers*, 904 F.2d at 1308.)

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

8 Here, under the terms of the settlement agreement, in the event settlement checks remain
9 uncashed after 180 days, those funds shall be donated to Legal Aid at Work as a *cy pres* beneficiary.
10 (Settlement, § XI (C).) Legal Aid at Work furthers the purpose of this case and promotes justice
11 for all Californians by bringing “class and individual actions, limited representations, and impact
12 litigation,” which “enforces and strengthens the civil and employment rights of low-wage workers
13 in California and across the country.” (See [https://legalaidatwork.org/our-mission-and-how-we-
14 work/](https://legalaidatwork.org/our-mission-and-how-we-work/); *Eddings v. Health Net, Inc.* (C.D. Cal. 2013) 2013 WL3013867, *4
15 [approving Legal Aid at Work as a *cy pres* beneficiary in a wage and hour class action].)

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

17 **A. Legal Standard**

18 The proposed Settlement Class is well suited for class certification. All of the claims derive
19 from a core set of alleged violations of California’s wage and hour laws and regulations. For the
20 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
21 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
22 the question is one of a common or general interest, of many persons, or when the parties are
23 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend
24 for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1)
25 There must be an ascertainable class; and (2) there must be a well-defined community of interest
26 in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow*
27 *Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the
28 California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the

1 community-of-interest requirement itself embodies three factors: “(1) predominant questions of
2 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
3 representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29
4 Cal. 3d 462, 470.)

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

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

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

14 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
15 approximately 480 employees of Defendant.

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

21 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
22 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
23 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
24 may be maintained as a class action even where the parties are numerous and it is in fact practicable
25 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
26 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
27 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
28 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,

1 Plaintiff contends that numerosity is plainly satisfied.

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

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

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

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

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

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

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

6 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
7 with extensive experience in prosecuting complex class actions, including similar class actions that
8 previously settled. (Marquez Decl., ¶¶ 38-48.) Class Counsel unquestionably is “qualified,
9 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148
10 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
11 litigated this case and diligently reviewed the settlement terms, showing his dedication. Plaintiff’s
12 willingness to serve as a representative demonstrates his serious commitment to bringing about the
13 best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

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

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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 matter,
7 the class members will receive direct mailed notice. As the Court of Appeals has explained, “[t]he
8 notice given should have a reasonable chance of reaching a substantial percentage of the Class
9 Members” (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
10 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 & Newberg,
18 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
19 terms and conditions of the settlement agreement, in an informative and coherent manner. It
20 makes clear that the settlement agreement does not constitute an admission of liability by the
21 Defendant, who denies all liability, and it recognizes that this Court has not ruled on the merits
22 of the action. It also states that the final settlement approval decision has yet to be made. The
23 Notice thus complies with the standards of fairness, completeness, and neutrality required of a
24 combined settlement-certification class notice.

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1 **VI. CONCLUSION**

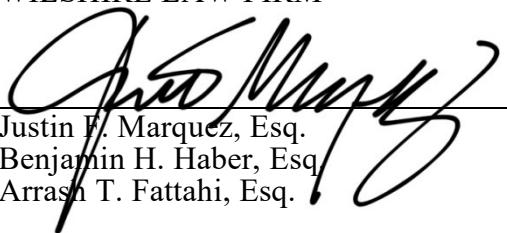
2 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
3 approval of the proposed settlement and set a Final Approval Hearing for sometime in January
4 2024.

5
6 Dated: July 17, 2023

Respectfully submitted,

WILSHIRE LAW FIRM

7
8 By:


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

Attorneys for Plaintiff