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Superior Court of California
County of Fresno
By: Louana Peterson, Deputy

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

12 Attorneys for Plaintiffs

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF FRESNO**

15 LUCIANO HERNANDEZ and MIGUEL
16 ANGEL RAMIREZ-MAYA, individually, on
17 behalf of all others similarly situated, and on
18 behalf of the State of California and other
19 aggrieved persons; and SILVIANO
20 RODRIGUEZ, individually, and on behalf of all
21 other similarly situated,

22 *Plaintiffs,*

23 v.

24 BURFORD FARMING COMPANY, INC., a
25 California corporation; and DOES 1 through 10,
26 inclusive,

27 *Defendants.*

Case No. 21CECG03817

CLASS & REPRESENTATIVE ACTION

[Assigned to: Hon. D. Tyler Tharpe, Dept. 501]

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

[Filed concurrently with: Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Preliminary Approval of Class Action and PAGA Settlement; and [Proposed] Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action and PAGA Settlement]

PRELIMINARY APPROVAL HEARING

Date: December 22, 2022

Time: 3:27 p.m.

Dept: 501

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

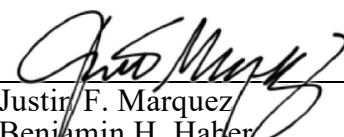
2 PLEASE TAKE NOTICE that on December 22, 2022, at 3:27 p.m. in Department 501 of
3 the Fresno County Superior Court, 1130 O. Street, Fresno California 92721, pursuant to Code of
4 Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiffs Luciano Hernandez,
5 Miguel Angel Ramirez-Maya, and Silvano Rodriguez (“Plaintiffs”) will move the Court for an
6 Order granting preliminary approval of the proposed class action and PAGA settlement between
7 Plaintiffs and Defendant Burford Farming Company, Inc. Plaintiffs further move the Court for an
8 Order:

- 9 1. Granting preliminary approval of the Class Action and PAGA Settlement;
- 10 2. Certifying a Class for settlement purposes only;
- 11 3. Approving the Court Approved Notice of Class Action Settlement and Hearing Date for
12 Final Court Approval (the “Class Notice”) and the plan for distribution of the Class
13 Notice to Settlement Class Members;
- 14 4. Appointing Plaintiffs Luciano Hernandez, Miguel Angel Ramirez-Maya, and Silvano
15 Rodriguez as Class Representatives for settlement purposes only;
- 16 5. Appointing Plaintiffs’ Counsel, Wilshire Law Firm, PLC, as Class Counsel for
17 settlement purposes only;
- 18 6. Appointing CPT Group, Inc. as the Settlement Administrator; and
- 19 7. Scheduling a Final Approval Hearing.

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

24 Dated: November 30, 2022

WILSHIRE LAW FIRM

25
26 By: 
Justin F. Marquez
Benjamin H. Haber
Arrash T. Fattahi

27
28 Attorneys for Plaintiffs

TABLE OF CONTENTS

1

2 I. INTRODUCTION..... 1

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

4 A. Plaintiffs’ Claims 1

5 B. Discovery and Investigation..... 2

6 C. Settlement Negotiations 3

7 D. Key Terms of the Proposed Settlement..... 4

8 III. DISCUSSION 7

9 A. The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation,

10 Litigation, and Negotiation 8

11 1. The Settlement Is the Product of Discovery, Investigation, and Informed and

12 Non-Collusive Arm’s-Length Negotiations..... 8

13 2. The Settlement Is Fair and Reasonable in Light of the Parties’ Respective

14 Legal Positions..... 9

15 3. Class Counsel Has Extensive Experience in Class Action Litigation..... 10

16 B. The Proposed Class Notice Should Be Approved..... 10

17 C. The Proposed Attorneys’ Fees and Costs Are Reasonable 11

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

19 Method 11

20 2. The Requested Fee Award Is in Line with Typical Cases 12

21 3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code 12

22 4. The Experience, Reputation and Ability of Class Counsel Support the

23 Requested Fee Award 13

24 D. The Service Payments to the Named Plaintiffs Are Reasonable 13

25 IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED..... 15

26 A. Legal Standard 15

27 B. Plaintiffs Maintain That the Criteria for Class Certification Are Satisfied for

28 Settlement Purposes..... 16

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

1. The Class is Ascertainable and Numerous..... 16

2. There are Many Common Issues of Law and Fact Which Predominate..... 16

3. Plaintiffs’ Claims Are Typical of the Claims of the Class..... 17

4. Plaintiffs and Their Counsel Meet the Adequacy Requirement..... 17

5. A Class Action is Superior to a Multiplicity of Litigation..... 18

V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND..... 18

A. The Proposed Notice Plan Satisfies Due Process 18

B. The Notice is Accurate and Informative 19

VI. CONCLUSION..... 19

TABLE OF AUTHORITIES

STATE CASES

1

2

3 *Bowles v. Super. Ct.* (1955) 44 Cal.2d 57416

4 *Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960.....19

5 *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43.....12

6 *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105.....11

7 *Classen v. Weller* (1983) 145 Cal.App.3d 2717

8 *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605.....17

9 *Collins v. Rocha* (1972) 7 Cal.3d 23216

10 *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 111

11 *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695.....15

12 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 17947, 8

13 *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443.....14

14 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.....8

15 *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480..... 11, 12

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

17 *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 4347

18 *McGhee v. Bank of America* (1976) 60 Cal.App.3d 44218

19 *Miller v. Woods* (1983) 148 Cal. App. 3d 86218

20 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 3998, 14

21 *Quinn v. State of California* (1995) 15 Cal.3d 162.....11

22 *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462.....16

23 *Rodriguez v. W. Publ’g Corp.* (9th Cir. 2009) 563 F.3d 94814

24 *Rose v. City of Hayward* (1981) 126 Cal.App.3d 92616

25 *Serrano v. Priest* (1977) 20 Cal.3d 25.....11

26 *Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 2318

27 *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224.....9

28 *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 95216

1	STATUTES	
2	<i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174	14
3	<i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510	18
4	<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438	8
5	<i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....	12
6	OTHER AUTHORITIES	
7	Code of Civil Procedure § 382.....	15, 16
8	Labor Code § 1194	13
9	Labor Code § 90.5	14
10	REGULATIONS	
11	California Rules of Court, Rule 3.766.....	18
12	California Rules of Court, Rule 3.769(f).....	11
13	CONSTITUTIONAL PROVISIONS	
14	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51	8
15	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03	12
16	Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39	19
17	Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An	
18	Empirical Study”, 53 <i>UCLA L. Rev.</i> 1303 (2006)	15
19		
20		
21		
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23		
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Luciano Hernandez, Miguel Angel Ramirez-Maya, and Silviano Rodriguez
4 (“Plaintiffs”) seek preliminary approval of a proposed \$600,000.00 non-reversionary, wage and hour
5 class action and PAGA settlement with Defendant Burford Farming Company, Inc. (“Defendant,”
6 and together with Plaintiffs, the “Parties”). The Settlement will provide substantial monetary
7 payments to approximately 97 class members. And, as set forth more fully below, the proposed
8 Settlement satisfies all the criteria for settlement approval under California law. The Settlement was
9 reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-
10 length and were facilitated by an experienced class action mediator, Honorable Howard R. Broadman
11 (Ret.), over the course of a full day of mediation that was conducted via Zoom. Accordingly,
12 Plaintiffs request that the Court preliminarily approve the proposed Settlement, certify the proposed
13 settlement class for settlement purposes only, approve the proposed notice, and set a Final Approval
14 Hearing.

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

16 **A. Plaintiffs’ Claims**

17 This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab.
18 Code §§ 2699, *et seq.*) representative action. Plaintiffs and the putative class members worked
19 in California as hourly-paid or non-exempt employees for Defendant during the class period.
20 Defendant specializes in the farming and agricultural industry and runs its operation out of
21 Fresno, California. (Declaration of Justin F. Marquez in Support of Plaintiffs’ Motion for
22 Preliminary Approval of Class Action and PAGA Settlement [“Marquez Decl.”], ¶ 2.)

23 Plaintiffs allege that Defendant’s payroll, timekeeping, and wage and hour policies and
24 practices resulted in Labor Code violations. Plaintiffs allege that Defendant failed to pay for
25 all hours worked, by not recording the actual start and end times of shifts for each workday.
26 Plaintiffs further allege that Defendant failed to provide employees with legally compliant meal
27 and rest periods. Plaintiffs further allege that Defendant failed to reimburse employees for all
28 necessary business-related expenditures. Based on these allegations, Plaintiffs assert claims

1 against Defendant for failure to pay minimum and straight time wages, failure to pay overtime
2 wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to
3 timely pay all final wages at termination, failure to provide accurate itemized wage statements,
4 failure to indemnify employees for expenditures, unfair business practices, and civil penalties
5 under PAGA. (*Id.* at ¶ 3.) Defendant denies all allegations and contends that its employment
6 practices were at all relevant times compliant with applicable California law.

7 On December 28, 2021, Plaintiffs Luciano Hernandez and Miguel Angel Ramirez-Maya
8 filed a putative wage and hour class action complaint against Defendant for: (1) failure to pay
9 minimum wages, straight time wages, rest and recover periods, and other nonproductive time
10 (Cal. Lab. Code §§ 204, 226.2, 1194, 1194.2, and 1197; IWC Wage Orders 13 and 14); (2)
11 failure to pay overtime wages (Cal. Lab. Code §§ 226.2, 1194 and 1198; IWC Wage Orders 13
12 and 14); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.2, 226.7 and 512; IWC
13 Wage Orders 13 and 14); (4) failure to authorize and permit rest periods (Cal. Lab. Code §§
14 226.2 and 226.7; IWC Wage Orders 13 and 14); (5) failure to timely pay final wages at
15 termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage
16 statements (Cal. Lab. Code §§ 226 and 226.2); (7) failure to indemnify for necessary business
17 expenses (Cal. Lab. Code § 2802); and (8) unfair business practices (Cal. Bus. & Prof. Code §§
18 17200, *et seq.*). (*Id.* at ¶ 4.) On March 3, 2022, Plaintiffs Luciano Hernandez and Miguel Angel
19 Ramirez-Maya separately filed a PAGA-only action against Defendant in the Fresno County
20 Superior Court (Case No. 22CECG00669). (*Id.*) The PAGA-only action was dismissed after
21 Plaintiffs Luciano Hernandez and Miguel Angel Ramirez-Maya filed a First Amended Class &
22 Representative Action Complaint on August 22, 2022 adding an additional class representative
23 (Plaintiff Silviano Rodriguez) and the cause of action alleged in the separately-filed PAGA
24 matter (the “Operative Complaint”). (*Id.*)

25 **B. Discovery and Investigation**

26 Following the filing of the initial Complaint, the Parties exchanged documents and
27 information before mediating this action. (*Id.* at ¶ 5.) Defendant produced timekeeping and
28 payroll records for the putative class members. (*Id.*) Defendant also provided documents of its

1 wage and hour policies and practices during the class period, and information regarding the total
2 number of current and former employees in its informal discovery responses. (*Id.*)

3 After reviewing the documents regarding Defendant’s wage and hour policies and
4 practices and analyzing Defendant’s timekeeping and payroll records, Class Counsel was able
5 to evaluate the probability of class certification, success on the merits, and Defendant’s
6 maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the
7 applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Class Counsel
8 reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.
9 (*Id.*)

10 **C. Settlement Negotiations**

11 On June 20, 2022, the Parties participated in private mediation with experienced class
12 action mediator, Honorable Howard R. Broadman (Ret.). (*Id.* at ¶ 7.) The mediation was
13 conducted via Zoom. The settlement negotiations were at arm’s length and, although conducted
14 in a professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing
15 to explore the potential for a settlement of the dispute, but each side was also prepared to litigate
16 their position through trial and appeal if a settlement had not been reached. (*Id.*)

17 After extensive negotiations and discussions regarding the strengths and weaknesses of
18 Plaintiffs’ claims and Defendant’s defenses, the Parties were able to reach a resolution, the
19 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. 1
20 [Class Action and PAGA Settlement Agreement and Class Notice (“Settlement” or “Settlement
21 Agreement”)].)

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

28 Indeed, the \$600,000.00 Settlement represents **68.5%** of **the realistic maximum**

1 **recovery of \$875,304.57.** (*Id.* at ¶ 22.) Although Class Counsel estimated that Defendant’s
2 maximum potential liability for all claims was approximately \$3.3 million, when the risk of
3 prevailing at certification and trial are factored into the equation, Class Counsel believes that
4 Defendant’s realistic exposure was \$875,304.57, meaning the Settlement achieves a significant
5 recovery. (*Id.* at ¶¶ 16-22.) Considering the risk and uncertainty of prevailing at class
6 certification and at trial, this is an excellent result for the Class. Indeed, because of the proposed
7 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
8 unfavorable judgment.

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

10 Under the Settlement, Defendant will pay \$600,000.00 to resolve this Litigation. This
11 amount is all-inclusive. The Settlement’s key terms include:

12 1. Settlement Class: For settlement purposes only, the Parties agree to the certification
13 of a class pursuant to California Code of Civil Procedure § 382 defined as: all current and former
14 hourly-paid or non-exempt employees who worked for Defendant Burford Farming Company, Inc.
15 in the State of California during the Class Period.

16 2. Class Period: The Class Period means the period from December 28, 2017 through
17 August 20, 2022. (Settlement, Section 1.12.)

18 3. PAGA Period: The PAGA Period means the period from December 28, 2020
19 through August 20, 2022. (Settlement, Section 1.30.)

20 4. Participating Class Member(s): Participating Class Members means a Class
21 Member who does not submit a valid and timely Request for Exclusion from the Settlement.
22 (Settlement, Section 1.34.)

23 5. Non-Participating Class Member(s): Non-Participating Class Members means any
24 Class Member who opts out of the Settlement by sending the Administrator a valid and timely
25 Request for Exclusion. (Settlement, Section 1.28.)

26 6. Aggrieved Employee(s): Aggrieved Employees means a person employed by
27 Defendant in California and classified as an hourly-paid or non-exempt employee who worked for
28 Defendant during the PAGA Period. (Settlement, Section 1.4.)

1 7. PAGA Notice: PAGA Notice means Plaintiffs Luciano Hernandez and Miguel
2 Angel Ramirez-Maya’s December 28, 2021 letter to Defendant and the State of California, Labor
3 & Workforce Development Agency (“LWDA”) providing notice pursuant to Labor Code section
4 2699.3, subd. (a). (Settlement, Section 1.32.)

5 8. Gross Settlement Amount: Gross Settlement Amount means \$600,000.00 which is
6 the total amount Defendant agrees to pay under the Settlement except as provided in Paragraph 8
7 of the Settlement Agreement. (Settlement, Sections 1.22, 8.)

8 9. Net Settlement Amount: This amount is \$600,000.00, for all claims, less the
9 following payments in the amounts approved by the Court: Individual PAGA Payments, the
10 LWDA PAGA Payment, the Class Representatives’ Service Payments, Class Counsel Fees
11 Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment.
12 (Settlement, Section 1.27.)

13 10. Uncashed Checks: Uncashed checks not negotiated within 180 days of their
14 issuance are void. For any Class Member whose Individual Class Payment check or Individual
15 PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall
16 transmit the funds represented by such checks to a Court-approved non-profit organization or
17 foundation consistent with Code of Civil Procedure Section 384, subd. (b) (“Cy Pres Recipient”),
18 the California Farmworker Foundation, located at 1120 Kensington St., Delano, California 93215.
19 (Settlement, Section 4.4.3.)

20 11. Release by Participating Class Members Who Are Not Aggrieved Employees: All
21 Participating Class Members, on behalf of themselves and their respective former and present
22 representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released
23 Parties from all claims that were alleged, or reasonably could have been alleged, based on the Class
24 Period facts stated in the Operative Complaint and ascertained in the course of the Action including
25 any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay
26 overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods;
27 (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage
28 statements; (7) failure to indemnify necessary business expenses; and (8) violation of California’s

1 Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq.* Except as
2 set forth in Section 5.3 of the Settlement Agreement, Participating Class Members do not release
3 any other claims, including claims for vested benefits, wrongful termination, violation of the Fair
4 Employment and Housing Act, unemployment insurance, disability, social security, workers'
5 compensation, or claims based on facts occurring outside the Class Period. (Settlement, Section
6 5.2.)

7 12. Release by Non-Participating Class Members Who Are Aggrieved Employees: All
8 Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf
9 of themselves and their respective former and present representatives, agents, attorneys, heirs,
10 administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties
11 that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated
12 in the Operative Complaint, and the PAGA Notice and ascertained in the course of the Action,
13 including any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to
14 pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest
15 periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized
16 wage statements; and (7) failure to indemnify necessary business expenses. (Settlement, Section
17 5.3.)

18 13. PAGA Penalties: The settlement includes \$20,000.00 allocated to Plaintiffs' claims
19 under PAGA, with 75% (\$15,000.00) being paid to the LWDA and 25% (\$5,000.00) being
20 distributed to the Aggrieved Employees. (Settlement, Section 1.33.) Class Counsel submitted the
21 proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez
22 Decl., ¶ 9.)

23 14. Tax Allocation: 25% of each Participating Class Member's Individual Class
24 Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions
25 are subject to tax withholding and will be reported on an IRS W-2 Form. The 75% of each
26 Participating Class Member's Individual Class Payment will be allocated to settlement of non-
27 wage claims [e.g., interest and penalties] (the "Non-Wage Portion"). The Non-Wage Portions are
28 not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class

1 Members assume full responsibility and liability for any employee taxes owed on their Individual
2 Class Payment. (Settlement, Section 3.2.4.1.)

3 15. Class Representatives' Service Payments: Subject to Court approval, Plaintiffs shall
4 be paid service payments of not more than \$10,000.00 each to Plaintiffs Luciano Hernandez and
5 Miguel Angel Ramirez-Maya and \$5,000.00 to Plaintiff Silvano Rodriguez. (Settlement, Section
6 3.2.1.) This amount is for Plaintiffs' time and effort in bringing and presenting the action, and in
7 exchange for a general release of all claims (including Plaintiff Luciano Hernandez with the
8 express exceptions agreed upon in Section 12.18 of the Settlement Agreement) pursuant to Civil
9 Code Section 1542. (Settlement, Section 5.1.1.)

10 16. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose
11 a fee application of up to 33 1/3% (\$200,000.00) of the Gross Settlement Amount, plus out-of-
12 pocket verifiable costs not to exceed \$20,000.00. (Settlement, Section 3.2.2.) At this time, Class
13 Counsel's costs are approximately \$11,979.55. (Marquez Decl., ¶ 39.)

14 17. Court Approved Notice of Class Action Settlement and Hearing Date for Final Court
15 Approval: The Class Notice sets forth, in plain terms, a statement of the case, the terms of the
16 Settlement Agreement, the approximate amount of attorneys' fees, costs, and service awards being
17 sought, and an explanation of how the settlement allocations are calculated. (Settlement, Ex. A.)
18 Class Members will be notified by first-class mail of the settlement. (Settlement, Section 7.4.2.)
19 CPT Group, Inc., the proposed Settlement Administrator, will undertake its best efforts to ensure
20 that the Class Notice is provided to the current addresses of class members. (*Id.*) Notice will be
21 provided in English and Spanish. (Settlement, Section 1.11; Marquez Decl., ¶ 11; Ex. 2 [Settlement
22 Administrator Bid].)

23 **III. DISCUSSION**

24 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
25 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
26 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super.*
27 *Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached
28 through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to

1 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
2 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

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

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

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

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

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

1 to approve the settlement.”].)

2 The Settlement was reached following extensive negotiations following a full day of
3 mediation with experienced employment mediator, Honorable Howard R. Broadman (Ret.).
4 (Marquez Decl., ¶ 7.) The settlement negotiations were at arm’s length and, although conducted
5 in a professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing to
6 explore the potential for a settlement of the dispute, but each side was also prepared to litigate their
7 or its position through trial and appeal if a settlement had not been reached. (*Id.*)

8 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
9 the claims set forth in the Litigation, such as a sampling of class member timekeeping and payroll
10 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
11 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
12 as information regarding the number of putative class members and the mix of current versus
13 former employees, and the wage rates in effect. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive
14 factual investigation, Class Counsel investigated the applicable law regarding the claims and
15 defenses asserted in the Litigation. (*Id.*) Thus, Plaintiffs and their counsel were able to act
16 intelligently and effectively in negotiating the proposed Settlement. (*Id.*)

17 Class Counsel also has considerable experience and has demonstrated competence with
18 litigating wage and hour class actions. (*Id.* at ¶¶ 40-50.) Again, this supports the position that the
19 terms of the Settlement are premised on objective evidence that has been considered and weighed
20 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
21 action.

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

24 A settlement is not judged against what might Plaintiffs recover had they prevailed at trial,
25 nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.
26 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is inherent
27 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
28 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar

1 to a class settlement because the public interest may indeed be served by a voluntary settlement in
2 which each side gives ground in the interest of avoiding litigation.”].)

3 This settlement avoids the risks and the accompanying expense of further litigation.
4 (Marquez Decl., ¶ 24.) While Plaintiffs are confident in the merits of their claims, a legitimate
5 controversy exists as to each cause of action. (*Id.* at ¶ 23.) Plaintiffs also recognize that proving
6 the amount of wages due to each class member would be an expensive, time-consuming, and
7 uncertain proposition. (*Id.*)

8 The proposed settlement of \$600,000.00 therefore represents a substantial recovery when
9 compared to Plaintiffs’ reasonably forecasted recovery. (*Id.* at ¶¶ 15-26.) Because of the proposed
10 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
11 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
12 achieving class certification, the burdens of proof necessary to establish liability, the probability
13 of appeal of a favorable judgment, it is clear that the settlement amount of \$600,000.00 is within
14 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
15 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
16 ***\$3,378.87.*** (*Id.* at ¶ 25.)

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

18 The settlement negotiations were conducted by highly capable and experienced counsel.
19 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
20 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 40-
21 50.) Although Plaintiffs and their counsel were prepared to litigate the claims alleged in the
22 litigation, they support the proposed Settlement as being in the best interests of the class.

23 **B. The Proposed Class Notice Should Be Approved**

24 The Court Approved Notice of Class Action Settlement and Hearing Date for Final Court
25 Approval (the “Class Notice”), in the form attached to the Settlement Agreement as Exhibit A,
26 should be approved for dissemination to the class. The Class Notice informs the class of the terms
27 of the settlement and of their rights to be excluded from the settlement. If there are class members
28 who wish to object to this proposed class action settlement, they will have the opportunity to file

1 their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Class
2 Notice meet all the requirements of Rule 3.769(f) of the California Rules of Court.

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

4 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
5 Counsel reasonable attorneys' fees in amount of \$200,000.00, which is 33 1/3% of the gross
6 Settlement Amount, and up to \$20,000.00 in verifiable litigation expenses. These amounts are
7 disclosed to all class members in the Class Notice and are reasonable.

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

10 California courts have long awarded attorneys' fees as a percentage of the benefit created
11 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when
12 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
13 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
14 or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d
15 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

16 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common
17 fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all
18 the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*,
19 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
20 Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund
21 from which others derive benefits may require those passive beneficiaries to bear a fair share of
22 the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
23 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
24 has been applied "consistently in California when an action brought by one party creates a fund in
25 which other persons are entitled to share." (*Id.* at p. 110.)

26 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc.* (2016)
27 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the
28 class members, and the trial court in its equitable powers awards class counsel a fee out of that

1 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
2 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages
3 of the percentage method—including relative ease of calculation, alignment of incentives between
4 counsel and the class, a better approximation of market conditions in a contingency case, and the
5 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
6 the litigation—convince us the percentage method is a valuable tool that should not be denied our
7 trial courts.” (*Id.* [internal citations omitted].)

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

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

19 Here, Plaintiffs request attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
20 is in line with the prevailing guidelines established in California case law and academic literature
21 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
22 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
23 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)
24 Accordingly, Plaintiffs respectfully request that the Court approve the attorneys’ fees as negotiated
25 by the Parties and requested herein.

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

27 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
28 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this

1 section, Plaintiffs would be permitted to recover their actual attorneys’ fees, even if those fees were
2 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
3 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
4 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
5 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
6 Counsel. (Marquez Decl., ¶¶ 35-38.) Class Counsel undertook this matter solely on a contingent
7 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the
8 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
9 ahead of all other concerns.

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

12 As demonstrated by their past experience in pursuing class actions on behalf of consumers
13 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
14 Decl., ¶¶ 40-50.) Class Counsel has been involved as lead counsel or co-counsel in several class
15 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
16 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee
17 award is supported here.

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

25 **D. The Service Payments to the Named Plaintiffs Are Reasonable**

26 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
27 compensate them for the expense or risk they have incurred in conferring a benefit on other
28 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval

1 of class action settlement agreements containing enhancements for the class representatives, which
2 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
3 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir.
4 2009) 563 F.3d 948, 958-59.)

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

15 Under the Settlement Agreement, subject to the Court’s approval, Defendant agreed to pay
16 Service Payments of not more than \$10,000.00 each to Plaintiffs Luciano Hernandez and Miguel
17 Angel Ramirez-Maya and \$5,000.00 to Plaintiff Silvano Rodriguez. These amounts are also in
18 exchange for Plaintiffs’ general release of all claims against Defendant (including Plaintiff Luciano
19 Hernandez with the express exceptions agreed upon in Section 12.18 of the Settlement Agreement).
20 Class Counsel represent that Plaintiffs devoted a great deal of time and work assisting counsel in
21 the case and communicated with counsel very frequently for litigation and to prepare for mediation.
22 (Marquez Decl., ¶¶ 27-31.) These amounts are reasonable particularly in light of the substantial
23 benefits Plaintiffs generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v.*
24 *Markets tar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez
25 helped negotiate a \$2.5 million class action settlement for 339 class members, and the court
26 approved a \$25,000.00 class representative incentive award for each named plaintiff. (Marquez
27 Decl., ¶ 31.)

28 ///

1 When compared with the amounts awarded in typical class action cases, the amount
2 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
3 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
4 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
5 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
6 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
7 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
8 while named plaintiffs in other employment class actions received an average award of \$12,121
9 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards
10 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
11 compensating them for the high costs of their service to the class, including risks of stigmatization
12 or retaliation on the job.” (*Id.* at p. 1308.)

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

14 **A. Legal Standard**

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

1 Cal. 3d 462, 470.)

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

8 **B. Plaintiffs Maintain That the Criteria for Class Certification Are Satisfied for**
9 **Settlement Purposes**

10 **1. The Class is Ascertainable and Numerous**

11 Plaintiffs contend that the proposed class that Plaintiffs seek to represent is easily
12 ascertainable and includes approximately 97 employees of Defendant.

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

18 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
19 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
20 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
21 may be maintained as a class action even where the parties are numerous and it is in fact practicable
22 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
23 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
24 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
25 574; see also *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
26 Plaintiffs contend that numerosity is plainly satisfied.

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

28 The Court should grant conditional class certification for settlement purposes here on the

1 grounds that questions of law and fact common to all class predominate over any individual
2 questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant
3 adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
4 Cal.App.3d 605.)

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

15 **3. Plaintiffs' Claims Are Typical of the Claims of the Class**

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

26 **4. Plaintiffs and Their Counsel Meet the Adequacy Requirement**

27 The adequacy of representation requirements is met by fulfilling two conditions: first, a
28 named plaintiff must be represented by counsel qualified to conduct the pending litigation; second,

1 a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of*
2 *America* (1976) 60 Cal.App.3d 442, 451.)

3 All of these requirements are met here for settlement purposes. Plaintiffs retained counsel
4 with extensive experience in prosecuting complex class actions, including similar class actions that
5 previously settled. (Marquez Decl., ¶¶ 40-50.) Class Counsel unquestionably is "qualified,
6 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
7 Cal.App.3d 862, 875.) In addition, Plaintiffs have no conflicts, and Plaintiffs have, with counsel,
8 litigated this case and diligently reviewed the settlement terms, showing their dedication.
9 Plaintiffs' willingness to serve as representatives demonstrates their serious commitment to
10 bringing about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

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

12 Finally, in making its class certification decision, the Court must determine that a class
13 action would be superior to alternative means for the fair and efficient adjudication of the litigation.
14 By consolidating many potential individual actions into a single proceeding, this Court's use of the
15 class action device enables it to manage this Litigation in a manner that serves the economics of
16 time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-
17 situated employees with small but nevertheless meritorious claims for damages would, as a
18 practical matter, have no means of redress because of the time, effort and expense required to
19 prosecute individual actions. (*Gentry, supra*, 42 Cal.4th at p. 462; *Leyva v. Medline Ind.* (9th Cir.
20 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns are
21 essentially non-existent.

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

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

24 Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court,
25 Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an
26 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
27 statutory or due process requirement that all class members receive actual notice, but in this matter,
28 the class members will receive direct mailed notice. As the Court of Appeals has explained, "[t]he

1 notice given should have a reasonable chance of reaching a substantial percentage of the Class
2 Members" (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
3 direct mailing, the best possible form of notice.

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

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

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

18 **VI. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary
20 approval of the proposed Settlement and set a Final Approval Hearing in May 2023, or the first
21 available date thereafter.

22
23 Dated: November 30, 2022

WILSHIRE LAW FIRM

24
25 By: 

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

26
27 Attorneys for Plaintiffs

PROOF OF SERVICE

Hernandez, et al. v. Burford Farming Company, Inc., et al.
21CECG03817

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ashley Narinyans, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is anarinyans@wilshirelawfirm.com.

On **November 30, 2022**, I served the foregoing **PLAINTIFFS’ NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Ronald H. Barsamian (SBN 81531)
ronbarsamian@aol.com
Patrick S. Moody (SBN 156928)
pmoody@theemployerslawfirm.com
Catherine M. Houlihan (SBN 312113)
choulihan@theemployerslawfirm.com
BARSAMIAN & MOODY
1141 W. Shaw Avenue, #104
Fresno, California 93711
Telephone: (559) 248-2360
Facsimile: (559) 248-2370
laborlaw@theemployerslawfirm.com

Attorneys for Defendant

- (X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.
- (X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

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

Executed on **November 30, 2022**, at Los Angeles, California.

Ashley Narinyans
Type or Print Name

Signature