

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

GUIFU LI, MENG WANG, FANG DAI, LIN  
CUI, and ZHONG YU, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

A PERFECT DAY FRANCHISE, INC, a  
California Corporation, et al.,

Defendants.

Case No.: 5:10-CV-01189-LHK

ORDER GRANTING PLAINTIFFS'  
MOTION FOR DEFAULT JUDGMENT;  
GRANTING PERMANENT  
INJUNCTION

Plaintiffs in this certified wage and hour class action are current and former massage therapists that have been classified as independent contractors by Defendant A Perfect Day Franchise, Inc. and/or A Perfect Day, Inc. ("Perfect Day"). Before the Court is Plaintiffs' motion for default judgment against corporate Defendants Perfect Day and Minjian Hand Healing Institute ("Minjian"), and individual Defendants Huan Zou, Tailiang Li, Jin Qiu and Jun Ma (collectively the "Defaulting Defendants"). ECF No. 506. A hearing on this motion was held on June 14, 2012. For the reasons set forth below, Plaintiffs motion for default judgment is GRANTED.

### I. BACKGROUND

This case was filed on March 22, 2010, and was reassigned to the undersigned judge on August 2, 2010. On February 25, 2011, the Court set a trial date of April 16, 2012. ECF No. 155. On September 29, 2011, in order to accommodate a request from Plaintiffs' counsel, the trial date

1 was moved up to April 2, 2012. ECF No. 267. Since resetting the trial date, the Court has certified  
2 a class of Plaintiffs under the FLSA and for California state wage and hour claims. *See* ECF Nos.  
3 269.

4 The history of litigation in this case since the matter was reassigned is extensively  
5 chronicled in the Court's Order of March 19, 2012, denying Huan Zou's motion to dismiss, and  
6 granting in part and denying in part Plaintiffs' motion for sanctions and Defendants' motion for  
7 summary adjudication and will not be repeated in detail here. *See* ECF No. 389. In the March 19  
8 Order, the Court detailed the two year litigation history in this case, and the repeated discovery  
9 abuses perpetrated by the Defendants in this action. Although the Court declined to grant default  
10 judgment against Defendants at the time, the Court did impose issue sanctions against all  
11 Defendants, except Jade Li,<sup>1</sup> based upon the Defendants' abusive litigation tactics, and based upon  
12 evidence of collusion amongst the Defendants. All Defendants, until March 2012, participated in  
13 the litigation through their counsel, the Law Offices of Richard C.J. Wahng.

14 The events surrounding and post-dating the Court's March 19 Order are relevant to the  
15 motion for default judgment and are further detailed below. A hearing on Plaintiffs' motion for  
16 sanctions and Defendants' motion for summary adjudication was held on February 16, 2012.  
17 Additionally, the parties were scheduled to have a Magistrate Judge Settlement Conference  
18 ("MJSC") with Judge Spero on March 7, 2012. At the February 16, 2012 hearing, the Court  
19 indicated it intended to issue a ruling on the pending motions before the parties' MJSC. On March  
20 5, before the Court was able to issue an order on the pending motions, 2 days before the MJSC, and  
21 less than one month before the trial date, Defendant Perfect Day filed a petition for Chapter 7  
22 bankruptcy, which automatically stayed the proceedings as to Perfect Day in this Court. On  
23 March 6, 2012, Defendants Tailiang Li and Jin Qiu filed a bankruptcy petition, which effectively  
24 stayed proceedings as to Tailiang Li and Jin Qiu in this Court. Plaintiffs obtained relief from the  
25 bankruptcy stays on March 9, 2012, and March 19, 2012, respectively. This Court issued its Order  
26 on the pending motions on March 19, 2012, imposing the sanctions outlined above, and granting in

27 <sup>1</sup> Defendant Jade Li was dismissed from this action pursuant to Defendants' motion for summary  
28 adjudication. Defendant Tom Schriener has settled with the class and is not subject to this default  
judgment order.

1 part and denying in part Defendants' motion for summary adjudication. Notably, Perfect Day's  
2 bankruptcy petition was dismissed on March 28, 2012 for failure to file necessary financial asset  
3 information with the Bankruptcy Court. *See* U.S. Bankruptcy Court, Northern District of  
4 California, Case No. 12-51703.

5 At a case management conference on March 15, 2012, defense counsel indicated that all  
6 Defendants, in addition to Perfect Day, Tailiang Li, and Jin Qiu, were considering filing for  
7 bankruptcy, and that defense counsel intended to seek to withdraw from representing the  
8 Defendants. The Court indicated it was not inclined to allow defense counsel to withdraw, given  
9 the impending April 2, 2010 trial date and defense counsel's intent to argue on behalf of Perfect  
10 Day before the Ninth Circuit on May 18, 2012, but invited defense counsel to file a motion. On  
11 March 16, 2012, less than three weeks before trial, the Law Offices of Richard Wahng filed a  
12 motion to withdraw as counsel as to all Defendants except Tom Schriener. On March 19, 2011,  
13 Defense Attorney Lee Sheldon filed a declaration regarding a request for a status conference  
14 indicating that Defendants Perfect Day, Minjian, Huan Zou, Tailiang Li, Jin Qiu, and Jun Ma, had  
15 terminated the Law Offices of Richard Wahng. ECF No. 374.

16 On March 20, 2012, the Court allowed defense counsel to withdraw as to all Defendants  
17 except Tom Schriener, but issued the following finding:

18 The parties are two weeks from trial in a matter that has been set for trial since  
19 February 2011. Given the pattern of obstruction that Defendants have displayed  
20 throughout this case, the Court considers the recent actions by several Defendants  
21 to file for bankruptcy on the eve of a court-ordered settlement conference and trial  
and subsequent attempts of defense counsel to withdraw from representation to be  
further evidence of Defendants' pattern and practice of evasion, obfuscation, and  
delay.

22 Order Regarding Defendants, Defense Counsel, and Upcoming Trial Deadlines at 3, ECF No. 394.  
23 The Court also gave the Defaulting Defendants a choice. The Defaulting Defendants were allowed  
24 to either: (1) proceed pro se, (2) litigate with their current defense counsel, or (3) obtain new  
25 counsel. *Id.* at 4. The corporate Defendants Perfect Day and Minjian were informed that the local  
26 rules prohibited them from proceeding pro se. *Id.* at 4 n.1. The Court reiterated that regardless of  
27 the Defendants' choices, the trial schedule remained as set. *Id.* at 4. The Defaulting Defendants  
28 that still wished to terminate counsel, were required to submit signed written declarations

1 acknowledging consent to allow defense counsel to withdraw in light of the requirements contained  
2 in the order. *Id.* at 5. Finally, the Defaulting Defendants were warned that failure to comply with  
3 the pretrial deadlines or appear for trial might lead to default judgment being entered against the  
4 non-complying Defendants. *Id.* at 4.

5 Defendants, Huan Zou, on behalf of himself and Perfect Day; Tailiang Li, on behalf of  
6 himself and Minjian; Jin Qiu; and Jun Ma all signed declarations acknowledging that they elected  
7 to terminate the Law Offices of Richard Wahng and acknowledged the requirements imposed in  
8 the Court's March 20 Order, including the threat of default judgment for failure to comply with the  
9 rules or appear at trial. *See* Sheldon Decl. Exs. A-D, ECF No. 402.

10 A pretrial conference was held on March 27, 2012, and the Defaulting Defendants failed to  
11 appear. ECF No. 436. The Court granted defense counsel's motion to withdraw, and ordered  
12 defense counsel to inform Defendants to file, by March 28, 2012, declarations under penalty of  
13 perjury stating: (1) whether each Defendant will or will not attend trial; (2) if a Defendant does  
14 intend to appear, whether the Defendant would appear pro se or with new counsel (except for the  
15 corporate Defendants Perfect Day and Minjian who are precluded from appearing pro se); and (3)  
16 if the Defendant is to appear with new counsel, that new counsel must file a notice of appearance  
17 by the same deadline. *Id.* No declarations were filed. The Court also set a settlement conference  
18 before the Honorable Ronald M. Whyte for April 2, 2012 at 10:00 a.m. and a final pretrial  
19 conference for April 2, 2012 at 2:00 p.m. *Id.*

20 At the April 2, 2012 Settlement Conference, the only appearances were by Plaintiffs, Tom  
21 Schriener, and Jun Ma. All other Defendants failed to appear. At the settlement conference, when  
22 Judge Whyte inquired as to whether Defendant Jun Ma intended to appear for trial the next day,  
23 Ma refused to answer. On the same day, the Court held a final pretrial conference at 2:00 p.m.  
24 The Defaulting Defendants, including Jun Ma, failed to appear at the final pretrial conference.

25 At the April 3, 2012 trial, Defendants Perfect Day, Minjian, Tailiang Li, Jin Qiu, Huan Zou,  
26 and Jun Ma failed to appear. After waiting an hour to see if the Defaulting Defendants would  
27 appear for trial, the Court dismissed the jury. Based on the Defaulting Defendants' failure to  
28 appear, despite repeated opportunities to participate and warnings that failure to do so would result

1 in default judgment, the Court struck the amended answers of Perfect Day, Minjian, Jin Qiu, and  
2 Tailiang Li, and the answer of Jun Ma. ECF No. 461. The Court then ordered the Clerk of the  
3 Court to enter default against the Defaulting Defendants. *Id.*; *see also* ECF No. 462.

4 After the default was entered against the Defaulting Defendants, Tailiang Li and Huan Zou  
5 belatedly filed for permission to sign up for the electronic case filing system. *See* ECF Nos. 470;  
6 498. The Court granted Li and Zou's requests on April 17, 2012, and May 8, 2012, respectively.  
7 *See* ECF Nos. 476; 502. Additionally, Tailiang Li sent a letter dated April 1, 2012, and filed on  
8 May 2, 2012. In the letter, Tailiang Li argued that Minjian and Perfect Day are separate entities.  
9 Tailiang Li did not indicate an intent to contest the default judgment or to otherwise engage in  
10 litigation.

11 Plaintiffs filed a motion for default judgment on May 9, 2012. Mot. for Default J. ("MDJ"),  
12 ECF No. 506. The previously certified class of Plaintiffs seek default judgment against all of the  
13 Defaulting Defendants for failure to comply with state and federal wage and hour laws. Plaintiffs  
14 filed and served an updated motion for default judgment on June 7, 2012. ECF No. 520.

15 Judgment is sought for restitution, damages, penalties and interest in the amount of  
16 \$11,711,499.83 as set forth in the concurrently filed declaration of Jeffrey S. Petersen, Ph.D.  
17 Updated Petersen Decl. ¶ 26. In addition to monetary damages, Plaintiffs request that this Court  
18 enter a permanent injunction against Defendants restraining them from engaging in future  
19 violations of California and federal wage and hour laws. MDJ at 1. Finally, Plaintiffs' counsel  
20 seek reasonable attorneys' fees plus costs in the amount of \$1,422,937.72. *Id.*

21 The Defaulting Defendants have all failed to object to Plaintiffs' motion for default  
22 judgment, or to contest the amount of damages or fees sought. Additionally, the Defaulting  
23 Defendants failed to appear at the June 14, 2012 hearing on the default judgment.

## 24 II. LEGAL STANDARD

25 A corporation or other artificial entity must be represented by licensed counsel. *See, e.g.,*  
26 *Rowland v. California Men's Colony*, 506 U.S. 194, 201–202 (1993) (noting that 28 U.S.C. § 1654  
27 does not allow corporations, partnerships, or associations to appear in federal court other than  
28 through a licensed attorney); Civil L.R. 3-9(b) ("A corporation, unincorporated association,

partnership or other such entity may appear only through a member of the bar of this Court.”). Therefore, while pro se litigants can represent themselves, they cannot represent corporations, companies or other artificial entities. Further, although pro se litigants are held to a lesser pleading standard than are other parties, *see Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (pro se pleadings are to be “liberally construed”), the Local Rules provide that “[a] person representing him or herself without an attorney is bound by the Federal Rules, as well as by all applicable local rules. Sanctions (including default or dismissal) may be imposed for failure to comply with local rules.” Civil L.R. 3-9(a).

Pursuant to Rule 55(b)(2), the court may enter a default judgment when the clerk, under Rule 55(a), has previously entered the party’s default. Fed. R. Civ. P. 55(b). Under Federal Rule of Civil Procedure 55(b)(2), a party may apply to the court for entry of judgment by default. When a party against whom a default judgment is sought has appeared personally or by a representative, “[t]hat party or its representative must be served with written notice of the application at least 7 days before the hearing.” *Id.*

“The district court’s decision whether to enter a default judgment is a discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk of Court enters default, all well-pleaded allegations regarding liability are taken as true, except with respect to damages. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002); *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir.1987); *Philip Morris USA v. Castworld Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003) (“[B]y defaulting, Defendant is deemed to have admitted the truth of [plaintiff’s] averments.”). In exercising its discretion to enter default judgment, the Court may consider the following *Eitel* factors: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

### III. DISCUSSION

#### A. Whether Default Judgment is Proper

1                                   **1. Notice**

2           As a procedural prerequisite to granting default judgment against the Defaulting  
3 Defendants, Plaintiffs must first establish that the Defaulting Defendants were served with written  
4 notice of the application at least 7 days before the hearing on the default judgment. *See* Fed. R.  
5 Civ. P. 55(b)(2) (“If the party against whom a default judgment is sought has appeared personally  
6 or by a representative, that party or its representative must be served with written notice of the  
7 application at least 7 days before the hearing.”). Failure to satisfy Rule 55(b)(2)’s notice  
8 requirement is a serious procedural error usually justifying reversal on appeal or the setting aside of  
9 a default. *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993); *Ringgold Corp. v. Worrall*,  
10 880 F.2d 1138, 1141 (9th Cir. 1989); *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir.  
11 1977).

12           Although notice was originally defective as to Defendants Huan Zou, Perfect Day, Jun Ma,  
13 and Jin Qiu, Plaintiffs cured the defect and served Ma, and Qiu on May 24, 2012, and served  
14 Perfect Day and Zou on May 25, 2012. *See* ECF Nos. 514, 517. On June 7, 2012, Plaintiffs filed  
15 and served on all Defendants an amended motion for default judgment, which amended the  
16 damages calculations of the motion for default judgment. Defendant Tailiang Li became an ECF  
17 filer before the motion for default judgment was filed by Plaintiffs on May 9, 2012. Therefore,  
18 Tailiang Li received notice of the default judgment motion, as well as the amended default  
19 judgment motion. All Individual Defendants have had notice of the default judgment more than  
20 seven days in advance of the hearing, thus meeting the requirements of Rule 55(b)(2).  
21 Additionally, it is reasonable to conclude that Perfect Day and Minjian also received notice of  
22 Plaintiffs’ application for default judgment because the sole owners of both Perfect Day and  
23 Minjian – Huan Zou and Tailiang Li, respectively – received notice of the motion. Accordingly,  
24 the Court finds that Plaintiffs’ have satisfied the notice requirement of Rule 55(b)(2).

25                                   **2. First Eitel Factor: Possibility of Prejudice**

26           Under the first *Eitel* factor, the Court considers the possibility of prejudice to a plaintiff if  
27 default judgment is not entered against a defendant. This factor weighs heavily in favor of granting  
28 default judgment in this case. Plaintiffs have diligently pursued this class action for two years,

1 despite the Defaulting Defendants’ failure to comply with their discovery obligations. Moreover,  
2 as is apparent from the procedural history of this case, the Defaulting Defendants’ conduct as the  
3 parties neared the MJSC and trial suggests that absent a default judgment, Plaintiffs will never be  
4 able to have their case heard on the merits.

5 The timing of Perfect Day, Tailiang Li, and Jin Qiu’s bankruptcy filings, and corresponding  
6 stays of litigation just days before the MJSC and less than a month before trial create the strong  
7 inference that these Defendants used the bankruptcy filing to avoid the pending litigation. *Cf.*  
8 *Roberts v. Heim*, 184 B.R. 814, 819 (N.D. Cal. 1995). Moreover, the fact that Perfect Day’s  
9 bankruptcy petition was dismissed shortly after it was filed provides further evidence that Perfect  
10 Day’s bankruptcy filing was solely intended to avoid and delay a decision on the merits in this  
11 action. *See id.* (“[A]n absence of reorganization activity by the debtor during the pendency of its  
12 bankruptcy action implies that the filing of that action was not motivated by a good-faith intent to  
13 reorganize.”).

14 Additionally, the fact that the Defaulting Defendants, as a group, terminated their  
15 representation less than three weeks before the trial date, and then failed to appear for all  
16 subsequent pretrial conferences, as well as the trial date, provides further evidence that absent a  
17 default judgment, resolution of this matter is simply not possible. Given the evidence of  
18 Defendants’ pattern and practice of evasion, obfuscation, and delay, this Court finds that Plaintiffs  
19 would be unduly prejudiced absent an entry of default judgment against Perfect Day, Minjian,  
20 Huan Zou, Tailiang Li, Jin Qiu, and Jun Ma. *Cf. Craigslist, Inc. v. Naturemarket, Inc.*, 694 F.  
21 Supp. 2d 1039, 1061 (N.D. Cal. 2010) (“[W]here a defendant's failure to appear makes a decision  
22 on the merits impracticable, if not impossible, entry of default judgment is warranted.”) (internal  
23 quotations omitted). Thus, the first factor weighs in favor of granting of default judgment.

24 **3. Second and Third *Eitel* Factors: Merits of Plaintiff’s Substantive Claims**  
25 **and the Sufficiency of the Complaint**

26 The second and third *Eitel* factors address the merits and sufficiency of Plaintiff’s claims  
27 pled in the complaint. These two factors are often analyzed together. *See Dr. JKL Ltd. V. HPC IT*  
28 *Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010). In its analysis of the second and third



1 *Eitel* factors, the Court will accept as true all well-pleaded allegations regarding liability. *See Fair*  
2 *Hous. of Marin*, 285 F.3d at 906. The Court will therefore consider the merits of Plaintiffs' claims,  
3 and the sufficiency of its pleadings together. Notably, Plaintiffs' claims pursuant to PAGA are  
4 predicated on violations of the wage and hour laws identified below. Because Plaintiffs' PAGA  
5 claim is an additional avenue for damages, the Court will address the relief sought under PAGA in  
6 the damages section of this Order.

7 **a. Misclassification of Workers**

8 Under California law, the defining feature of the employer-employee relationship is the  
9 employer's "right to control the manner and means of accomplishing the result desired." *S.G.*  
10 *Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350 (1989) (internal quotation  
11 marks omitted). California courts also look to secondary indicia to determine whether an  
12 individual is an employee, including: (1) the right to discharge at will; "[2] whether the one  
13 performing services is engaged in a distinct occupation or business; [3] the kind of occupation,  
14 with reference to whether, in the locality, the work is usually done under the direction of the  
15 principal or by a specialist without supervision; [4] the skill required in the particular occupation;  
16 [5] whether the principal or the worker supplies the instrumentalities, tools, and the place of work  
17 for the person doing the work; [6] the length of time for which the services are to be performed; [7]  
18 the method of payment, whether by the time or by the job; [8] whether or not the work is a part of  
19 the regular business of the principal; and [9] whether or not the parties believe they are creating the  
20 relationship of employer-employee." *Id.* at 350-351; *Narayan v. EGL, Inc.*, 616 F. 3d 895, 900-03  
21 (9th Cir. 2010) (employer's operational control over workers' performance, appearance,  
22 interactions with customers and equipment and supplies used demonstrated employment  
23 relationship). "[T]he individual factors cannot be applied mechanically as separate tests; they are  
24 intertwined and their weight depends on particular combinations." *Borello*, 48 Cal. 3d at 351  
25 (internal citation and quotations omitted). The Court must "assess and weigh all of the incidents of  
26 the relationship with the understanding that no one factor is decisive, and that it is the rare case  
27 where the various factors will point with unanimity in one direction or the other." *NLRB v.*  
28 *Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2007) (internal citation and quotations omitted).

1 Plaintiffs have sufficiently alleged that Defendants misclassified Plaintiffs and Class  
2 members as independent contractors when, they are, in fact, employees who perform services that  
3 are controlled by Defendants. SAC ¶¶ 42, 44, 48, 54, 60, 111(e). According to the SAC,  
4 Plaintiffs' perform services within Defendants' usual course of business and do not work in an  
5 independently established trade, occupation, profession, or business. SAC ¶ 44. Defendants  
6 instruct Plaintiffs how to do their work, regulate their hours, determine and control the terms,  
7 conditions, and amounts paid for Plaintiffs' services. Defendants disciplined Plaintiffs and dictated  
8 the performance and details of their jobs. *Id.* at ¶ 45. Defendants also provide the necessary  
9 instrumentalities for work, but charge Plaintiffs for the tools. *Id.* at ¶ 51. Defendants exercise  
10 control over the hours, wages and all working conditions of class members, set the price, schedule  
11 and terms of the services class members provide to clients, and hold class members out as  
12 employees to the public. *Id.* at ¶¶ 45-46, 54, 58-60. Thus, Plaintiffs have sufficiently established,  
13 for the purposes of default judgment, that the Defaulting Defendants retain the "right to control the  
14 manner and means of accomplishing the result desired," and have been unlawfully classified by  
15 Defaulting Defendants as independent contractors when they are, in fact, employees. *Borello*, 48  
16 Cal. 3d at 350.

17 **b. Failure to Pay Overtime Under California and Federal Law**

18 California Labor Code Section 1194(a) states that "any employee receiving less than . . . the  
19 legal overtime compensation applicable to the employee is entitled to recover in a civil action the  
20 unpaid balance of the full amount of this . . . overtime compensation, including interest thereon,  
21 reasonable attorney's fees, and costs of suit." *See* Cal. Lab. Code § 1194. "Any work in excess of  
22 eight hours in one workday and any work in excess of 40 hours in any one workweek must be  
23 compensated at the rate of no less than one and one-half times the regular rate of pay for an  
24 employee." *See* Cal. Lab. Code § 510(a). Under federal law, the legal overtime pay rate for  
25 employees is one and one-half times an employee's regular hourly rate of pay for work performed  
26 in excess of 40 hours in a workweek. 29 U.S.C. § 207. The SAC alleges that class members  
27 routinely worked in excess of eight hours in a day and 40 hours in a week and that Defendants  
28 willfully failed to pay them time and a half for that time. SAC ¶¶ 49, 62-65, 70. Plaintiffs have

1 therefore adequately pled a violation of Federal and California laws requiring payment of overtime  
2 compensation.

3 **c. Failure to Pay Minimum Wage Under California Law**

4 California Labor Code Section 1194 provides that “any employee receiving less than the  
5 legal minimum wage . . . is entitled to recover in a civil action the unpaid balance of the full  
6 amount of this minimum wage.” *See* Cal. Labor Code § 1194. Section 1194.2 entitles such  
7 employees to recover liquated damages “in the amount equal to the wages unlawfully unpaid and  
8 interest thereon.” *See* Cal. Labor Code § 1194.2. According to the applicable wage order for  
9 service industry employees, “[e]very employer shall pay to each employee wages not less than  
10 seven dollars and fifty cents (\$7.50) per hour for all hours worked, effective January 1, 2007, and  
11 not less than eight dollars (\$8.00) per hour for all hours worked, effective January 1, 2008 . . .”  
12 IWC Wage Order 2-2001 ¶ 4. The allegations in the SAC establish that class members worked  
13 shifts of 8 or more hours but were only paid for the hours they actually performed massage, which  
14 in some instances was as little as one hour a day. SAC ¶¶ 55-56. Throughout the class period,  
15 class members were not paid minimum wages for all hours worked. SAC ¶¶ 48-50, 78, 111(a),  
16 120. Plaintiffs have therefore adequately pled a violation of California’s minimum wage law.

17 **d. Failure to Provide Itemized Wage Statements**

18 California Labor Code § 226(a) mandates that an employer “furnish each of his or her  
19 employees . . . an accurate itemized statement in writing showing [among other things] (1) gross  
20 wages earned, [and] (2) total hours worked by the employee, [and (3)] net wages earned.” Cal.  
21 Lab. Code § 226(a). Under subsection (e) of the same provision: “[a]n employee suffering injury  
22 as a result of a knowing and intentional failure by an employer to comply with [section 226(a) ] is  
23 entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period  
24 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a  
25 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000) . . .”  
26 Cal. Lab. Code § 226(e). The allegations in the SAC adequately establish that Defendants failed to  
27 provide accurate itemized wage statements. SAC ¶¶ 88 (“Defendants ...fail[ed] to provide  
28 accurate itemized wage statements in writing showing all applicable rates in effect during the pay

1 period and the corresponding number of hours worked at each hourly rate by Plaintiffs and  
2 members of the Class,” “fail[ed] to show the dates of labor for which payments are or were being  
3 made,” and “fail[ed] to provide complete and/or accurate information concerning deductions that  
4 are or have been taken from these employees’ wages”). Moreover, the allegations in the SAC  
5 establish that Defendants’ conduct was knowing and willful. *Id.* at ¶¶88-90. Plaintiffs have  
6 therefore adequately pled a violation of California Labor Code § 226.

7 **e. Waiting Time Penalties**

8 California Labor Code Section 203 provides that “[i]f an employer willfully fails to pay,  
9 without abatement or reduction, . . . any wages of an employee who is discharged or who quits, the  
10 wages of the employee shall continue as a penalty from the due date thereof at the same rate until  
11 paid or until an action therefor is commenced; but the wages shall not continue for more than 30  
12 days.” Cal. Lab. Code § 203(a). Upon discharge, the employees’ earned and unpaid wages are due  
13 within 72 hours. Cal. Lab. Code § 201(a).

14 An employer effectuates a “discharge” not only when it fires an employee from ongoing  
15 employment, but also when it releases the employee upon completion of a particular job  
16 assignment or time duration for which he or she was hired. *See Smith v. Superior Court*, 39 Cal.  
17 4th 77, 92 (2006). Additionally, the meaning of “willful” under Section 203 “is that an employer  
18 has intentionally failed or refused to perform an act which was required to be done.” *See Amaral v.*  
19 *Cintas Corp., No. 2*, 163 Cal. App. 4th 1157, 1201 (2008). “The employer’s refusal to pay need  
20 not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows  
21 to be due.” *Id.* (internal quotation marks omitted). Pursuant to 8 Cal. Code. Reg. § 13520: “A  
22 willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an  
23 employer intentionally fails to pay wages to an employee when those wages are due. However, a  
24 good faith dispute that any wages are due will preclude imposition of waiting time penalties under  
25 Section 203. A ‘good faith dispute’ that any wages are due occurs when an employer presents a  
26 defense, based in law or fact which, if successful, would preclude any recovery on the part of the  
27 employee.” In this case, Plaintiffs have sufficiently alleged that “Defendants have willfully failed  
28 and refused to timely pay compensation and wages, including unpaid overtime pay, unpaid

1 minimum wage pay and unpaid meal period compensation, to Plaintiffs and members of the Class  
2 whose employment terminated. As a result, Defendants are liable to Plaintiffs and members of the  
3 Class for waiting time penalties.” SAC § 102. Thus, Plaintiffs have sufficiently established that  
4 Defendants have violated California Labor Code Sections 201-203.

5 **f. Conversion of Tips**

6 California Labor Code Section 351 forbids employers from collecting gratuities left for  
7 employees by a patron. The statute specifically requires an employer “that permits patrons to pay  
8 gratuities by credit card shall pay the employees the full amount of the gratuity that the patron  
9 indicated on the credit card slip, without any deductions for any credit card payment processing  
10 fees or costs that may be charged to the employer by the credit card company.”

11 There is no private right of action for the violation of California Labor Code Section 351.  
12 *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592 (2010). However, violations of section 351  
13 “are actionable as unlawful business practices.” *Anderson v. American Airlines, Inc.*, No. 08-  
14 4195, 2011 WL 855820, at \*9 (N.D. Cal. Mar. 9, 2011) (citing *Etheridge v. Reins Int’l Cal., Inc.*,  
15 172 Cal. App. 4th 908 n.6 (2009)). Plaintiffs have alleged in the SAC that Defendants took a  
16 portion of class members’ tips that were paid by clients by credit card and thus Defendants are  
17 “liable for . . . Plaintiffs and Class members for the loss of gratuities paid by the customers.” SAC  
18 ¶¶ 105-08, 111.

19 **g. Unfair Competition Law**

20 The UCL creates a cause of action for business practices that are: (1) unlawful, (2) unfair,  
21 or (3) fraudulent. Cal. Bus. & Profs. Code § 17200. Its coverage has been described as  
22 “sweeping,” and its standard for wrongful business conduct is “intentionally broad.” *In re First*  
23 *Alliance Mortg. Co.*, 471 F.3d 977, 995 (9th Cir. 2006). Each “prong” of the UCL provides a  
24 separate and distinct theory of liability, *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731  
25 (9th Cir. 2007). Plaintiffs make two UCL claims in their SAC. First, Plaintiffs claim that  
26 Defendants’ violations of the other wage and hour laws create liability under the UCL. MDJ at 10;  
27 SAC ¶ 111(a). Second, the named Plaintiffs also have additional UCL claims (which were not  
28 certified as class claims) under the unfair and fraudulent prong for the “tuition” payments that

Defendants fraudulently induced Plaintiffs to pay to attend Minjian before they would be employed by Perfect Day. *Id.* at 112-114.

The unlawful prong of the UCL prohibits “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (quotation marks and citations omitted). By proscribing “any unlawful” business practice, Cal. Bus. & Profs. Code § 17200, the UCL permits injured consumers to “borrow” violations of other laws and treat them as unfair competition that is independently actionable. *Cel-Tech*, 20 Cal. 4th at 180. Because Plaintiffs have established Defendants’ violations of predicate statutes, as explained above, Plaintiffs have established liability under the UCL. SAC ¶ 111(a).

The UCL also creates a cause of action for a business practice that is “fraudulent” even if not specifically proscribed by some other law. In order to state a cause of action under the fraud prong of the UCL a plaintiff must show that members of the public are likely to be deceived. *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000). “[T]his prong of the UCL is governed by the reasonable consumer test: a plaintiff may demonstrate a violation by showing that reasonable members of the public are likely to be deceived.” *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010) (internal quotation marks omitted).

The SAC alleges that Defendants fraudulently induced Plaintiffs to pay sums of money to Defendants for “tuition” by promising future employment and guaranteed high monthly income. SAC ¶¶ 36-41, 48, 112. Relying on these promises, each of the Plaintiffs paid sums for “tuition.” *Id.* ¶ 112. Rather than receiving such guaranteed income, however, Plaintiffs found themselves locked into low wage jobs. *Id.* Based on these allegations in the SAC, Plaintiffs have sufficiently alleged that they were deceived into paying these tuition payments in violation of the UCL.

#### **h. Failure to Provide Meal Periods**

Plaintiffs claim for failure to provide meal periods was not certified. Nonetheless, the five named Plaintiffs seek default judgment as to their individual claims based on Defendants’ failure to provide meal periods. California Labor Code Section 226.7 provides that “[n]o employer shall require any employee to work during any meal or rest period. . .” Cal. Lab. Code § 226.7(a). An

1 employer is required to provide employees with a meal period of not less than 30 minutes if the  
2 employee is employed for more than five hours per day. Cal. Lab. Code § 512. “If an employer  
3 fails to provide an employee a meal period or rest period . . . the employer shall pay the employee  
4 one additional hour of pay at the employee's regular rate of compensation for each work day that  
5 the meal or rest period is not provided.” Cal. Lab. Code § 226.7(b). The SAC adequately alleges  
6 that Plaintiffs routinely were deprived of off-duty meal periods. SAC ¶¶ 83 (“Plaintiffs and Class  
7 members worked at least 5 hours a day, and were not provided meal periods as required by law”).  
8 Thus, the named Plaintiffs have sufficiently established a claim for failure to provide meal periods.

9 **i. Failure to Indemnify Employees for Expenses**

10 Plaintiffs’ claim for failure to indemnify employees for expenses was also not certified.  
11 Nonetheless, the five named Plaintiffs seek default judgment as to their individual claims based on  
12 Defendants’ violation of California Labor Code Section 2802, which requires an employer to  
13 “indemnify his or her employee for all necessary expenditures or losses incurred by the employee  
14 in direct consequence of the discharge of his or her duties.” Plaintiffs have sufficiently alleged that  
15 “Defendants have required Plaintiffs and members of the Class to make purchases and incur work-  
16 related expenses without reimbursement.” SAC ¶ 96. Plaintiffs have further specified that the  
17 necessary expenditures include deductions for “massage lotions, tissues, advertising flyers, [and]  
18 uniforms. *Id.* at ¶ 51. The named Plaintiffs have thus sufficiently established a claim for violation  
19 of Labor Code Section 2802.

20 **j. Liability of Defendants**

21 The allegations in the complaint further attach liability to each of the remaining Defendants.  
22 Plaintiffs’ well-pleaded complaint contains allegations that Defendants Ma, Tailiang Li, Qiu, Zou  
23 and Minjian are the joint employers and alter egos of Perfect Day. SAC ¶¶ 19-20, 43. Those well-  
24 pleaded allegations are taken as true now that default has been entered. *Fair Hous.*, 285 F.3d at  
25 906. Minjian, Zou, T. Li and Ma are employers under FLSA. SAC ¶ 68; 29 U.S.C. § 203(d)  
26 (FLSA applies to “any person acting directly or indirectly in the interest of an employer in relation  
27 to an employee”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (FLSA defines  
28 employer “expansively” and with a “striking breadth”).

1 All Defendants – Minjian, Zou, T. Li, Qiu, and Ma are the alter egos of Perfect Day. SAC  
2 19-20, 43. They are thus jointly and severally liable for the full amount of the judgment entered in  
3 this case. ECF No. 389 at 41:3-43:1; *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010);  
4 *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1544  
5 (9th Cir. 1988); *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 538 (2000) (citing  
6 *Roman Catholic Archbishop v. Super. Ct.*, 15 Cal. App. 3d 405, 411 (1971)).

#### 7 **4. Fourth *Eitel* Factor: The Sum of Money at Stake**

8 Under the fourth factor, “the court must consider the amount of money at stake in relation  
9 to the seriousness of Defendant’s conduct.” *PepsiCo Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172,  
10 1176 (C.D. Cal. 2002); *see also Eitel*, 782 F.2d at 1471-72. “The Court considers Plaintiff’s  
11 declarations, calculations, and other documentation of damages in determining if the amount at  
12 stake is reasonable.” *Truong Giang Corp. v. Twinstar Tea Corp.*, No. 06-CV-03594, 2007 WL  
13 1545173, at \*12 (N.D. Cal. May 29, 2007). Default judgment is disfavored when a large amount  
14 of money is involved or unreasonable in light of the potential loss caused by the defendant’s  
15 actions. *See id.*

16 In this case, Plaintiff seeks \$11,711,499.83, plus attorneys’ fees and costs in the amount of  
17 \$1,422,937.72. While the amount Plaintiff seeks is significant, Plaintiffs have conducted  
18 significant discovery into the amount of damages owed, and have enlisted the assistance of a  
19 damages expert that was prepared to testify at the trial on April 3. Furthermore, the amount of  
20 money at stake, in light of the the size of the class (127 class members), the class period (beginning  
21 March 2006), and the number of claims brought, is not unreasonable. Finally, the SAC alleges that  
22 much of Defendants’ conduct was willful and aimed at exploiting non-English speaking, low wage  
23 workers. *See, e.g.*, SAC ¶¶ 36-38. Given these facts, the Court finds that the amount of money at  
24 stake is reasonable under the circumstances, so the fourth *Eitel* factor weighs in favor of a default  
25 judgment.

#### 26 **5. Fifth, Sixth, *Eitel* Factors: Potential Disputes of Material Fact and Excusable Neglect**

27 The fifth *Eitel* factor considers the possibility of dispute as to any material facts in the case.  
28 Admittedly, in this case, there is the possibility of a material dispute of fact as is evidenced by the



fact that litigation has consumed the better part of two years. However, in light of the procedural history of this case, the Court is satisfied that the possibility of a material dispute of fact is outweighed by the need to enter default judgment. There are several reasons for this conclusion. First, as the Court has detailed in several prior orders, the Defendants' main witnesses regarding liability, particularly Jun Ma and Jade Li, are simply not credible. *See, e.g.*, March 19 Order at 23-24, n.18, n.19. Second, Defendants Perfect Day and Minjian have failed to produce significant discovery related to Plaintiffs' alter ego theory of liability. The Court found in its March 19 Order that "[t]he inevitable inference is that Defendants Perfect Day [and] Minjian . . . not only possess documents that were never produced, but that the information contained in those documents is unfavorable to Defendants' interests." Finally, the Defaulting Defendants' evasive behavior in collectively terminating defense counsel on the eve of trial further supports an inference that any defense presented at trial would likely not have been meritorious.

The sixth *Eitel* factor considers whether failure to appear was the result of excusable neglect. There is no evidence that Defendant's failure to participate in the litigation is due to excusable neglect. Indeed, the Defaulting Defendants' conduct establishes the opposite. The Defaulting Defendants were warned that failure to appear at trial would lead to default judgment, and the Defendants submitted signed declarations acknowledging that they understood the Court's admonition. Nonetheless, the Defaulting Defendants failed to appear at either the March 27 or April 2 pretrial conferences, and failed to appear for the April 3 trial. There is absolutely no evidence in the record that the Defaulting Defendants' failure to appear was the result of excusable neglect.

#### **6. Seventh *Eitel* Factor: Policy Favoring Decision on the Merits**

While the policy favoring decision on the merits generally weighs strongly against awarding default judgment, district courts have regularly held that this policy, standing alone, is not dispositive, especially where a defendant fails to appear or defend itself. *See, e.g.*, *Naturemarket, Inc.*, 694 F. Supp. 2d at 1061; *United States v. Lyon*, No. 10-2549, 2011 WL 2226308, at \*3 (E.D. Cal. June 7, 2011) (citing *Cal. Sec. Cans*, 238 F.Supp.2d at 1177). It is clear to the Court that a decision on the merits will not occur in this case. The Defaulting Defendants

were given every opportunity to defend themselves, yet failed to appear at trial. In light of the extraordinary circumstances presented here, the Court finds that the seventh *Eitel* factor is outweighed by the other six factors that weigh in favor of default judgment. See *United States v. Ordonez*, No. 10-01921, 2011 WL 1807112, at \*3 (E.D. Cal. May 11, 2011). The Court therefore finds that default judgment is appropriate in this case.

## **B. Requested Relief**

### **1. Damages**

A plaintiff seeking default judgment “must also prove all damages sought in the complaint.” *Dr. JKL Ltd.*, 749 F. Supp. 2d at 1046 (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003)). Rule 55 does not require the court to conduct a hearing on damages, as long as it ensures that there is an evidentiary basis for the damages awarded in the default judgment. *Action S.A. v. Marc Rich & Co. Inc.*, 951 F.2d 504, 508 (2nd Cir. 1991). In support of their request for class damages, Plaintiffs have provided the report, and supplemental materials, of their damages expert Dr. Jeffrey Petersen.

Where an employer fails to maintain accurate payroll records, an employee carries his burden under the FLSA if he shows he performed work for which he was improperly compensated and produces some evidence to show the amount and extent of that work “as a matter of just and reasonable inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), superseded by statute on other ground, Portal-to-Portal Act, 61 Stat. 86–87; see also *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986); *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988). The Ninth Circuit has approved “approximated awards where plaintiffs can establish, to an imperfect degree of certainty, that they ‘have performed work and have not been paid in accordance with the FLSA.’” *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914-15 (9th Cir. 2003) citing *Brock*, 790 F.2d at 1448 (internal quotation marks and alterations omitted). “In such instances, the only uncertainty is the amount of damage, not the fact that damages are due. Where an approximate award based on reasonable inferences forms a satisfactory surrogate for unquantified and unrecorded actual times, an approximated award is permissible.” *Id.* (internal quotation marks, citations, and alterations omitted).

1 Under this burden shifting approach, both the Ninth Circuit and California courts have  
2 permitted district courts to award back wages based upon evidence of damages from a  
3 representative sampling of class members. *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988);  
4 *Amaral*, 163 Cal. App. 4th at 1189 (“*Anderson*’s reasoning has also been applied to permit class  
5 action plaintiffs to prove their damages for unpaid overtime by the use of statistical sampling.”).  
6 Thus, where, as here, Plaintiffs have established liability for unpaid wages (see discussion above),  
7 and that Defendants have failed to maintain accurate payroll records, the court can rely on evidence  
8 of a representative sampling of class members regarding the damages owed to establish liability as  
9 to the class. SAC ¶¶ 50, 88.

10 Plaintiffs engaged the firm of Allman & Petersen Economics, LLC to conduct a survey of  
11 the class and prepare an expert report as to the monetary compensation due to the class. That  
12 survey and report are described in detail in the Declaration of Jeffrey S. Petersen. *See* Petersen  
13 Decl. ¶¶ 3-26 & Ex. C. Plaintiffs’ experts, relying on data collected from surveyed class members,  
14 and using generally acceptable statistical methods, calculated the average payments due to the class  
15 for each of the class claims as well as PAGA penalties. Petersen Decl. ¶¶ 17-20 & Ex. C ¶¶ 10, 14,  
16 17A, 17B. The Court is satisfied that Plaintiffs have met their burden of establishing an  
17 approximate award based on reasonable inferences provided by a representative sample of the  
18 class.

19 **a. Failure to Pay Minimum Wage Under California Law**

20 California wage law establishes that “any employee receiving less than the legal minimum  
21 wage . . . is entitled to recover in a civil action the unpaid balance of the full amount of this  
22 minimum wage.” *See* Cal. Lab. Code § 1194 (emphasis added). According to the applicable wage  
23 order for service industry employees, “[e]very employer shall pay to each employee wages not less  
24 than seven dollars and fifty cents (\$7.50) per hour for all hours worked, effective January 1, 2007,  
25 and not less than eight dollars (\$8.00) per hour for all hours worked, effective January 1, 2008 . . .”  
26 IWC Wage Order 2-2001 ¶ 4.

27 In light of Defendants’ failure to provide accurate records of hours worked and wages  
28 earned by class members, the Court must rely upon the evidence provided by Plaintiffs. Plaintiffs

1 conducted a survey by which a randomly selected subset of class members were surveyed. The  
2 surveyed employees estimated the number of hours worked per day, the approximate amount of  
3 wages earned per day, and the number of hours for which each surveyed employee was not paid.  
4 From the survey results, the expert was able to estimate the unpaid minimum wage owed to the  
5 surveyed employees for hours worked under 40 hours a week (unpaid hours over 40 hours per  
6 week are compensated in the unpaid overtime section below). *See Armenta v. Osmose, Inc.*, 135  
7 Cal. App. 4th 314, 317–18 (2d Dist. 2005); Updated Petersen Decl. ¶ 17. The average unpaid  
8 overtime wages for each class member is \$3,269. *Id.* The total unpaid overtime owed to the class  
9 of 127 is therefore \$415,190. *Id.* The Court has reviewed the expert report and finds that the  
10 approximated award is based on reasonable inferences and awards \$415,190 in unpaid minimum  
11 wages to the class.

12 Additionally, section 1194.2 entitles such employees to recover liquated damages “in the  
13 amount equal to the wages unlawfully unpaid.” *See* Cal. Lab. Code § 1194.2(a). The Labor Code  
14 allows the Court to refuse to award liquidated damages if the employer establishes “that the act or  
15 omission giving rise to the action was in good faith and that the employer had reasonable grounds  
16 for believing that the act or omission was not a violation of any provision of the Labor Code  
17 relating to minimum wage.” *Id.* § 1194.2(b). The employer has made no such showing, and  
18 therefore the class is entitled to liquidated damages in the amount of \$415,190.

19 **b. Failure to Pay Overtime Under California Law**

20 California Labor Code Section 1194(a) states that “any employee receiving less than . . . the  
21 legal overtime compensation applicable to the employee is entitled to recover in a civil action the  
22 unpaid balance of the full amount of this . . . overtime compensation, including interest thereon,  
23 reasonable attorney’s fees, and costs of suit.” *See* Cal. Lab. Code § 1194. “Any work in excess of  
24 eight hours in one workday and any work in excess of 40 hours in any one workweek must be  
25 compensated at the rate of no less than one and one-half times the regular rate of pay for an  
26 employee.” *See* Cal. Lab. Code § 510(a).

27 California looks to federal law in defining and interpreting “regular rate” of pay. *See*  
28 *Alonzo v. Maximus, Inc.*, \_\_ F. Supp. 2d \_\_, 2011 WL 6396444, \*6 (C.D. Cal. 2011); *Zator v.*

1 *Sprint/United Mgmt. Co.*, No. 09cv0935–LAB (MDD), 2011 WL 1157527, at \*3 (S.D. Cal. Mar.  
2 29, 2011) (“California looks to the Fair Labor Standards Act to determine what ... constitutes the  
3 regular rate of pay for overtime purposes”); *Advanced–Tech Sec. Servs., Inc. v. Superior Court*,  
4 163 Cal. App. 4th 700, 707 (2008) (California courts look to Department of Labor regulations  
5 interpreting the “regular rate” of pay under the FLSA to interpret that term as used in California  
6 Labor Code § 510); DLSE Manual § 49.1.2 (“In not defining the term ‘regular rate of pay,’ the  
7 Industrial Welfare Commission has manifested its intent to adopt the definition of ‘regular rate of  
8 pay’ set out in the [FLSA].”) Under federal law, when an employee is employed “solely on the  
9 basis of a single hourly rate, the hourly rate is his ‘regular rate.’ For his overtime work he must be  
10 paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the  
11 hourly rate by the number of hours worked in excess of 40 in the week.” 29 C.F.R. § 778.110(a).

12 Plaintiffs calculated, based on the surveyed employees, the average amount of overtime  
13 owed to each survey respondent. To calculate overtime wages due, the expert looked to the  
14 overtime compensation rate of each respondent (1.5 times the regular rate of pay) and multiplied  
15 that rate by the number of unpaid overtime hours (number of hours per week over 40 hours  
16 worked). *See Rivera v. Rivera*, No. 10-01345, 2011 WL 1878015 at \*5 (N.D. Cal. May 17, 2011);  
17 Updated Petersen Decl. ¶ 18. From the survey results, the expert was able to conclude that the  
18 average amount of unpaid overtime per class member is \$30,468. *Id.* In total, the amount of  
19 unpaid overtime to all 127 members of the California class is \$3,869,405. *Id.* The Court has  
20 reviewed the expert report and finds that the approximated award is based on reasonable inferences  
21 and awards \$3,869,405 in unpaid minimum wages to the class.

22 **c. Failure to Pay Overtime Under the FLSA**

23 Plaintiffs also seek an award of liquidated damages under the FLSA for Defendants’ willful  
24 failure to pay overtime. Under the FLSA, “[a]ny employer who violates the provisions of section  
25 206 or section 207 of this title shall be liable to the employee or employees affected in the amount  
26 of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in  
27 an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Section 207 prohibits any  
28 employer from employing any of his employees for a workweek longer than forty hours unless

1 such employee receives compensation for those hours at a rate not less than one and one-half times  
2 the regular rate at which he is employed. 29 U.S.C. § 207(a)(1).

3 Section 216(b) mandates that when overtime is not properly provided to employees,  
4 liquidated damages must be additionally awarded to such employees in the amount equal to the  
5 amount already owed. 29 U.S.C. § 216(b). Section 260, however, makes liquidated damages  
6 discretionary where the employer proves that the failure to pay overtime was both in good faith and  
7 based upon such reasonable grounds that it would be unfair to impose liquidated damages upon the  
8 employer. 29 U.S.C. § 260. “Under 29 U.S.C. § 260, the employer has the burden of establishing  
9 subjective and objective good faith in its violation of the FLSA.” *Local 246 Utility Workers Union*  
10 *of America v. Southern California Edison Co.*, 83 F.3d 292, 297–298 (9th Cir. 1996).

11 Here, Defendants have not established good faith or reasonable grounds for not paying  
12 overtime to its workers. As indicated above, the Court has already awarded unpaid overtime  
13 wages, Plaintiffs are also entitled to liquidated damages in the same amount. *See Rivera*, 2011 WL  
14 1878015 at \*6; *Seminiano v. Xyris Enter.*, 2011 U.S. Dist. LEXIS 4298, \*10, 2011 WL 165377  
15 (C.D. Cal. Jan. 18, 2011) (finding that plaintiffs were owed liquidated damages under FLSA in the  
16 amount equal to plaintiffs’ unpaid overtime wages). Because only 59 employees have opted in to  
17 the FLSA class, the amount of liquidated damages owed to the FLSA class is \$1,797,612 (59 x  
18 \$30,468).

19 **d. Conversion of Tips**

20 As explained above, California Labor Code Section 351 provides the predicate statute for  
21 Plaintiffs to collect restitution under the UCL. Based on the survey data collected by the expert,  
22 and using accepted principles and methods, the experts concluded that the average amount of  
23 converted tips owed to each class member is \$1,400. *See Updated Petersen Decl.* ¶ 20. The total  
24 amount of unpaid tips due to the class of 127 members is \$177,757. The Court has reviewed the  
25 expert report and finds that the approximated award is based on reasonable inferences and awards  
26 \$177,757 in unpaid tips unlawfully withheld from the class.

27 **e. Failure to Provide Itemized Wage Statements**

1 California Labor Code § 226(a) mandates that an employer “furnish each of his or her  
2 employees . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total  
3 hours worked by the employee . . . .” Cal. Lab. Code § 226(a). Under subsection (e) of the same  
4 provision: “[a]n employee suffering injury as a result of a knowing and intentional failure by an  
5 employer to comply with [section 226(a) ] is entitled to recover the greater of all actual damages or  
6 fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars  
7 (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate  
8 penalty of four thousand dollars (\$4,000) . . . .” Cal. Lab. Code § 226(e).

9 Based on the survey data, and using accepted economic principles and methods, the expert  
10 determined the average penalty to each class member. *See* Updated Petersen Decl. ¶ 22. The  
11 expert applied the provisions of the California Labor Code and determined the average amount of  
12 penalties awarded to each class member for violations of this provision of the labor code. The  
13 average statutory award for failure to provide itemized wage statements is \$2,560. The total  
14 penalty for failure to provide itemized wage statements due to the class of 127 members is  
15 \$325,173. The Court has reviewed the expert report and finds that the approximated amount is  
16 based on reasonable inferences and awards \$325,173 to the class in statutory damages for failure to  
17 provide itemized wage statements.

18 **f. Failure to Pay Waiting Time Penalties**

19 California Labor Code Section 203 provides that “[i]f an employer willfully fails to pay,  
20 without abatement or reduction, . . . any wages of an employee who is discharged or who quits, the  
21 wages of the employee shall continue as a penalty from the due date thereof at the same rate until  
22 paid or until an action therefor is commenced; but the wages shall not continue for more than 30  
23 days.” Cal. Lab. Code § 203(a). Upon discharge, the employees’ earned and unpaid wages are due  
24 within 72 hours. Cal. Lab. Code § 201(a). Pursuant to 8 Cal. Code. Reg. Section 13520: “A  
25 willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an  
26 employer intentionally fails to pay wages to an employee when those wages are due. However, a  
27 good faith dispute that any wages are due will preclude imposition of waiting time penalties under  
28 Section 203. A ‘good faith dispute’ that any wages are due occurs when an employer presents a

1 defense, based in law or fact which, if successful, would preclude any recovery on the part of the  
2 employee.”

3 Here, according to the evidence provided, some class members were not paid certain earned  
4 wages at all, let alone within 72 hours of discharge as required by California statute. Defendants  
5 have not provided any justification for noncompliance or raised a “good faith dispute” that wages  
6 are due to Plaintiffs. Based on the survey data, and using accepted economic principles and  
7 methods, Plaintiffs’ expert determined the waiting time penalties due to the portion of the class that  
8 is no longer working for Defendants. *See* Updated Petersen Decl. ¶ 23. Plaintiffs’ expert  
9 determined that 46% of class members are currently employed by Defendants, while 54% are no  
10 longer working for Defendants. *Id.* Using the pay rate most often cited by the survey respondents  
11 -- \$11 per hour – the expert determined that the total amount of waiting time penalties due to the  
12 percentage of the class no longer working for Defendants is \$181,051. “This amount was derived  
13 by taking 54% (the percentage of class members no longer working for Defendants) of the total of  
14 \$11 per hour x 8 hours per day x 30 days (statutory maximum) x 127 (the size of the class). *See*  
15 *Id.*; *see also* *Rivera*, 2011 WL 1878015 at \*7; *Seminiano*, 2011 U.S. Dist. LEXIS 4298 at \*10,  
16 2011 WL 165377 (awarding damages for continuing wages pursuant to Section 203). The Court  
17 has reviewed the expert report and finds that the approximated award is based on reasonable  
18 inferences and awards \$181,051 to the class in statutory damages for waiting time penalties. This  
19 award is only available to members of the class no longer employed by Defendants.

20 **g. PAGA Penalties**

21 Plaintiffs assert a claim under the California Private Attorneys General Act of 2004,  
22 California Labor Code § 2699 et seq. (“PAGA”). That section provides that “any provision of this  
23 code that provides for a civil penalty to be assessed and collected by the Labor and Workforce  
24 Development Agency or any of its departments, divisions, commissions, boards, agencies, or  
25 employees, for a violation of this code, may, as an alternative, be recovered through a civil action  
26 brought by an aggrieved employee on behalf of himself or herself and other current or former  
27 employees[.]” Cal. Lab. Code § 2699(a).



1 The Labor Code specifically provides for such civil penalties for violation of its provisions  
2 asserted as claims in this action. Cal. Lab. Code § 558; Wage Order 2-2001 ¶ 20. PAGA therefore  
3 provides additional civil penalties for Defendants' violations of unpaid overtime wages, unpaid  
4 minimum wages, failure to provide meal breaks, failure to indemnify class members for business  
5 expenses, and failure to provide accurate wage statements. These PAGA penalties are separate and  
6 apart from the actual damages that a Plaintiff may recover under other labor code sections. *See*  
7 *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1144-48 (2012).

8 The representative action authorized by the PAGA is an enforcement action, with one  
9 aggrieved employee acting as a private attorney general to collect penalties from employers who  
10 violate the Labor Code. Class action requirements do not apply to representative actions brought  
11 under the PAGA. *Arias v. Super. Ct.*, 46 Cal. 4th 969, 984 (2009). The Court has reviewed the  
12 expert report and finds that the approximated award is based on reasonable inferences for  
13 establishing the penalties that are owed to Plaintiffs under PAGA. The failure to pay minimum  
14 wage, overtime, and meal periods penalties were governed by the penalties in California Labor  
15 Code Section 558. The Labor Code provides civil penalties of \$50 for each aggrieved employee  
16 per pay period for the initial violation, and \$100 per employee for each subsequent violation for  
17 minimum wage, overtime, meal break and wage statement violations. The PAGA penalty remedies  
18 Defendants' failure to indemnify class members for business expenses and tip conversion. Cal.  
19 Lab. Code § 2699(f).

20 After reviewing the Expert Report and the Tables filed in support, the Court awards the  
21 PAGA penalties identified below. Of this amount 75% should be allocated to the California Labor  
22 and Workforce Development Agency and 25% should be allocated to the class.

- 23 • For failure to pay overtime, \$411,956.
- 24 • For failure to pay minimum wage, \$312,738.
- 25 • For failure to provide meal periods, \$329,406.
- 26 • For the failure to reimburse expenses, \$969,963.
- 27 • For the conversion of tips, \$740,833.

Although Plaintiffs are entitled to the above PAGA penalties, they are not entitled to PAGA penalties for failure to provide accurate wage statements under California Labor Code § 226. Plaintiffs elected to receive penalties for Defendants' failure to provide accurate wage statements in violation of California Labor Code § 226. As explained above, the Court awarded such penalties. Therefore, granting PAGA penalties for failure to provide accurate wage statements would be duplicative recovery. Plaintiffs have provided no authority, and the Court is aware of no authority, that would permit double recovery of essentially the same penalties. Therefore, the Court declines to award PAGA penalties for the failure to provide accurate wage statements as this penalty has already been awarded.

**h. Individual Damages: Failure to Provide Meal Periods, Failure to Indemnify Employees for Expenses, and Tuition Reimbursement**

As explained above, the individual named Plaintiffs have sufficiently established liability for their claims that Defendants failed to provide meal periods, failed to indemnify their expenses, and for the UCL claim related to the tuition reimbursement. Plaintiffs have supported their request for damages with sworn declarations detailing the amounts owed by Defendants. The named Plaintiffs are entitled to the following damages:

*Missed Meal Periods*

- Guifu Li's damages are \$10,941. ECF No. 506-4 ¶¶ 3, 6-7.
- Meng Yang's damages are \$2,398.50 ECF No. 506-6 ¶¶ 3, 6-7.
- Fang Dai's damages are \$216. ECF No. 506-3 ¶¶ 3, 6-7.
- Lin Cui's damages are \$2,025. ECF No. 506-5 ¶¶ 3, 6-7.
- Zhong Yu's damages are \$1,185. ECF No. 506-7 ¶¶ 3, 6-7.

*Failure to Indemnify Business Expenses*

- Guifu Li's damages are \$8,680.60. ECF No. 506-4 ¶ 11.
- Meng Yang's damages are \$1,080.60. ECF No. 506-6 ¶ 11.
- Fang Dai's damages are \$1,239.25. ECF No. 506-3 ¶ 11.
- Lin Cui's damages are \$1,230. ECF No. 506-5 ¶ 11.
- Zhong Yu's damages are \$573.88. ECF No. 506-7 ¶ 11.

*UCL Restitution for Tuition Payments*

- Guifu Li paid a total amount of \$3,850 in tuition. ECF No. 506-4 ¶ 4.
- Meng Yang paid a total amount of \$4,000 in tuition. ECF No. 506-6 ¶ 4.
- Fang Dai paid a total amount of \$1,315 in tuition. ECF No. 506-3 ¶ 4.
- Lin Cui paid a total amount of \$2,300 in tuition. ECF No. 506-5 ¶ 4.
- Zhong Yu paid a total amount of \$2,330 in tuition. ECF No. 506-7 ¶ 4.

**2. Interest**

Plaintiffs also seek post-judgment interest. Mot. for Default Judgment at 23. Pursuant to 28 U.S.C. § 1961(a), interest “shall be allowed on any money judgment in a civil case recovered in a district court.” Accordingly, Plaintiffs shall be awarded post-judgment interest, which will be calculated “at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.” *Id.*

Additionally, it appears as though Plaintiffs also seek pre-judgment interest on unpaid minimum wages, overtime wages, and tips due. *See* Updated Petersen Decl. ¶ 21. California Labor Code Section 1194(a) permits recovery of interest on unpaid wages due to an employee. However, Plaintiffs have cited no authority, and the Court is aware of no authority, which authorizes the collection of prejudgment interest on restitution under the UCL in which the predicate violation is for unpaid gratuities under California Labor Code Section 351. *See M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.*, 202 Cal. App. 4th 1509, 1538 (2012) (“Initially, we note that the UCL does not authorize an award of prejudgment interest.”). Accordingly, the Court declines to award prejudgment interest for the unpaid gratuities.

As to the unpaid minimum wage and overtime, Plaintiffs’ expert has computed the interest accrued on the unpaid wages owed to the class. Updated Petersen Decl. ¶ 21. The Expert used the “midpoint formula” for computing simple interest, and assumed an interest rate of 10 percent. *See also* Cal. Lab. Code § 218.6; Cal. Civ. Code § 3289; *Bell v. Farmers Ins. Exchange*, 135 Cal. App. 4th 1138, 1145 (2006). The Court has reviewed the expert report, and the Tables provided in support thereof, and finds that the approximated award for interest on unpaid wages is based on

1 reasonable inferences. Accordingly, the Court awards \$1,151,814 to the class in interest on unpaid  
2 wages.

### 3 **3. Permanent Injunction**

4 Plaintiffs seek the issuance of a permanent injunction. Plaintiffs may seek to enjoin future  
5 non-compliance with state and federal wage and hour violations. *See, e.g. Brock v. Big Bear*  
6 *Market No. 3*, 825 F.2d 1381, 1383 (9th Cir. 1987); *Solis v. Best Miracle, Corp.*, 709 F. Supp. 2d  
7 843, 859 (C.D. Cal. 2010). A plaintiff seeking a permanent injunction must demonstrate: “(1) that  
8 it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages,  
9 are inadequate to compensate for that injury; (3) that, considering the balance of hardships between  
10 the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would  
11 not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388,  
12 391 (2006).

13 Because Plaintiffs are low-wage workers, and lost wages or delays in compensation  
14 “threaten or impair their ability to meet basic needs,” such harms are irreparable. *Carrillo v.*  
15 *Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1045 (C.D. Cal. 2011). “[W]ages are not  
16 ordinary debts,” and “because of the economic position of the average worker . . . it is essential to  
17 the public welfare that he receive his pay when it is due.” *Id.* (citing *Smith v. Ceva Logistics U.S.*,  
18 *Inc.*, 2011 U.S. Dist. LEXIS 111941, \*8–9 (C.D. Cal. Sept. 28, 2011) (quoting *Smith v. Superior*  
19 *Court*, 39 Cal. 4th 77, 82 (2006)). In the absence of immediate compliance with the overtime,  
20 minimum wage, and other wage and hour requirements, Defendants will continue to keep from  
21 these low wage workers what is due to them.

22 Additionally, with respect to the third and fourth factors, the balance of the equities favor  
23 Plaintiffs. A permanent injunction will not harm Defendants – it will merely require them to  
24 comply with the law. Finally, the public interest favors a permanent injunction here. “California  
25 courts have long recognized wage and hour laws concern not only the health and welfare of the  
26 workers themselves, but also the public health and general welfare.” *Gould v. Maryland Sound*  
27 *Industries, Inc.*, 31 Cal. App. 4th 1137, 1148 (1995) (citation and quotation marks omitted).  
28

1           The Ninth Circuit has explained in determining whether to grant injunctive relief in a FLSA  
2 case, that a district court must “weigh the finding of violations against factors that indicate a  
3 reasonable likelihood that the violations will not recur.” *Brock*, 825 F.2d at 1383. “A dependable,  
4 bona fide intent to comply, or good faith coupled with extraordinary efforts to prevent recurrence,  
5 are such appropriate factors. An employer’s pattern of repetitive violations or a finding of bad  
6 faith are factors weighing heavily in favor of granting a prospective injunction.” *Id.* (citing  
7 *Dunlop v. Davis*, 524 F.2d 1278, 1281 (5th Cir. 1975)). It appears that Perfect Day and Minjian are  
8 still ongoing concerns, and the Defendants in this action all remain, in some way, involved in the  
9 management or ownership of the businesses. There is no indication that the wage and hour  
10 violations have in any way abated despite this litigation. In light of this record, the Court cannot  
11 say that Defendants are likely to comply with their legal obligations under either the FLSA or the  
12 California Labor Code. Accordingly, the Court permanently enjoins the continuing wage and hour  
13 violations identified above in Section III.A.3.a. – III.A.3.i.

#### 14                           **4. Attorneys’ Fees and Costs**

15           Plaintiffs are entitled to attorney’s fees under the FLSA and California law. 29 U.S.C §  
16 216(b) (2006); Cal. Lab. Code §§ 218.5, 1194; *see also Newhouse v. Robert’s Ilimare Tours, Inc.*,  
17 708 F.2d 436, 441 (9th Cir. 1983) (“The FLSA grants prevailing plaintiffs a reasonable attorney’s  
18 fee.”); *Drumm v. Morningstar, Inc.*, 695 F. Supp. 2d 1014, 1018 (N.D. Cal. 2010) (noting that  
19 under California law, awarding attorney’s fees is “mandatory” in unpaid wage claims).

20           Courts in the Ninth Circuit calculate an award of attorney’s fees using the lodestar method,  
21 whereby a court multiplies “the number of hours the prevailing party reasonably expended on the  
22 litigation by a reasonable hourly rate.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th  
23 Cir. 2008) (citation omitted). A party seeking attorney’s fees bears the burden of demonstrating  
24 that the rates requested are “in line with the prevailing market rate of the relevant community.”  
25 *Carson v. Billings Police Dep’t*, 470 F.3d 889, 891 (9th Cir. 2006). Generally, “the relevant  
26 community is the forum in which the district court sits.” *Camacho*, 523 F.3d at 979 (citing *Barjon*  
27 *v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). Typically, “affidavits of the plaintiffs’ attorney and  
28 other attorneys regarding prevailing fees in the community and rate determinations in other cases . .

1 . are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps*  
2 *Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

3 The Court has reviewed the records provided by Plaintiffs and finds the rates charged by  
4 the attorneys and the paralegals that have been involved in this case to be reasonable. Moreover,  
5 as the Court detailed on the record at the May 24, 2012 hearing on the final approval of the  
6 Schriener settlement, Plaintiffs’ attorneys’ fee request is based on the fact that this was a hard fought  
7 case, involving heavily litigated law and motion and discovery disputes and preparations all the  
8 way up through the first day of trial before Mr. Schriener settled and the remaining Defendants  
9 defaulted. Defendants’ evasiveness, discovery abuses, and document destruction policy caused  
10 unnecessary litigation which increased Plaintiffs’ attorneys’ fees. In light of the record in this case,  
11 the requested fee award is reasonable. *See* Olivier Decl. ¶¶ 27-35, ECF No. 506-1. Therefore, the  
12 Court awards Plaintiffs’ attorneys’ fee request of \$1,320,593.50. Similarly, Plaintiffs’ costs and  
13 expenses of \$102,344.22 are reasonable, and the Court will award the requested amount of costs as  
14 well. The total in costs and fees awarded is \$1,422,937.72.

15 Additionally, in the March 19 Order, the Court awarded Plaintiffs’ counsel attorneys’ fees  
16 for successfully bringing several motions to compel. Because Plaintiffs failed to provide an  
17 accounting of hours that were expended on the successful motions to compel, the March 19 Order  
18 ordered Plaintiffs’ counsel to file a supplemental declaration detailing the costs and fees associated  
19 with bringing the following motions: (1) Plaintiffs’ Motion to Compel Responses Regarding  
20 Financial Information (ECF No. 277), (2) Plaintiffs’ Motion to Compel the Deposition of Anna  
21 Tong (ECF No. 284), and (3) Plaintiffs’ Motion to Compel Production of Documents and  
22 Responses to Interrogatories (ECF No. 282); as well as an accounting of the costs associated with  
23 attempting to serve a deposition subpoena on Anna Tong. Plaintiffs filed a declaration setting forth  
24 the attorneys’ fees sought arising out of the motions to compel and the costs in attempting to serve  
25 Anna Tong. ECF No. 442. Based on this declaration, the Court finds the requested award  
26 reasonable and awards \$23,336.35 to Plaintiffs’ counsel.

27 **IV. DEFAULT JUDGMENT ORDER**

For the reasons detailed above, Plaintiff's motion for default judgment is GRANTED. Judgment shall be entered in favor of Plaintiffs and against Defendants Perfect Day, Minjian Hand Healing Institute, Huan Zou, Tailiang Li, Jin Qiu, and Jun Ma, in the amount of \$11,141,452.83<sup>2</sup> in total damages, penalties, and interest on unpaid wages. Attorneys' fees and costs shall be awarded to Plaintiffs' counsel in the amount of \$1,446,274.07. Defaulting Defendants are jointly and severally liable for the amounts owed to Plaintiffs and Plaintiffs' counsel. Any amount collected from the class settlement with Tom Schriener, up to \$620,000, will be deducted from the amount owed by the Defaulting Defendants to the class.


The distribution of amounts recovered through collection of judgment shall be determined at a later time, with this Court's approval. The Court shall retain jurisdiction over this case until distribution of class funds is complete. Plaintiffs shall submit a status report as to the collection and class distribution of the judgment no later than six months from the date of this judgment.

#### V. PERMANENT INJUNCTION ORDER

Defendants are hereby permanently enjoined from treating class members as independent contractors and not W-2 employees. Defendants are hereby permanently enjoined from failing to pay class member minimum wages, overtime and tips, failing to provide accurate wage statements, failing to pay all amounts due upon separation of an employee, failing to provide meal periods, and failing to reimburse expenses as required under California and federal law.

**IT IS SO ORDERED.** The Clerk shall close the file.

Dated: June 14, 2012

  
LUCY H. KOH  
United States District Judge

<sup>2</sup> Defendants Schriener, Perfect Day, Minjian, Tailiang Li, Jin Qiu, Huan Zou, and Jun Ma were sanctioned \$4,000 for failure to publish a class notice in Chinese language newspapers as repeatedly ordered by the Court. *See* ECF No. 436. Defendants were jointly and severally liable for this sanction, but only Defendant Schriener paid the sanction. Plaintiffs' counsel used the sanction award to publish the class notice as ordered by the Court. Plaintiffs' counsel has indicated that the costs associated with the translation and publication of the class notice totaled \$2,708. ECF No. 525. The remaining amount of the sanction award – \$1,292 – shall be deposited in the Duckworth, Peters, Lebowitz, Olivier LLP Client Trust Account until distribution of the funds to the class. Because this money was a sanction against Defendants for violation of Court orders, this money will not be credited against the money owed by Schriener or the Defaulting Defendants to the class. Instead, the \$1,292 shall be distributed to the class along with the amounts collected from Schriener and the Defaulting Defendants.