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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MERCED

DILLON GELTZ, on behalf of himself and other current and former employees, Plaintiff, v. DONAGHY SALES, LLC, an entity unknown, and DOES 1 through 50, inclusive, Defendants.	Case No.: 23CV-04394 [Assigned for all purposes to Hon. Brian McCabe, Courtroom 8] **PLAINTIFF DILLON GELTZ'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Filed concurrently with Declaration of Kenneth H. Yoon; Declaration of Stephanie E. Yasuda; [Proposed] Order] Date: January 9, 2024 Time: 8:30 a.m. Place: Courtroom 8

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 9, 2024, at 8:30 a.m. or as soon thereafter as the matter may be heard in Courtroom 8 of the above-referenced Court, located at 627 W. 21st Street, Merced, CA 95340, Plaintiff Dillon Geltz ("Plaintiff") will, and hereby does, move the Court for an Order granting preliminary approval of the class action settlement reached between Plaintiff and Defendant Donaghy Sales, LLC ("Defendant," collectively the "Parties"), as memorialized in the Class Action Settlement Agreement ("Agreement").

This motion is made pursuant to California Rules of Court, rule 3.769 on the grounds that the proposed settlement is within the range of possible final approval, and notice should therefore be provided to the Class. This motion is based upon this notice, the Memorandum of Points and Authorities in Support Thereof, Declaration of Kenneth H. Yoon and Declaration of Stephanie E. Yasuda filed concurrently herewith, such argument of counsel as may be presented at the hearing on this matter, and all papers and records on file herein.

DATED: December 13, 2023 YOON LAW, APC

/s/ Stephanie E. Yasuda
Stephanie E. Yasuda
Attorneys for Plaintiff Dillon Geltz

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Dillon Geltz ("Plaintiff") seeks preliminary approval of the Class Action Settlement Agreement ("Agreement") entered into by Plaintiff and Defendant Donaghy Sales, LLC ("Defendant," and collectively the "Parties").[1] The Parties have reached the settlement, subject to Court approval, on a class-wide basis. The Parties reached the settlement after extensive arms-length negotiations. The Class consists of approximately 800 Class Members and the Gross Settlement Amount is $1,500,000.00 without any reversionary interest. The estimated cost to administer this settlement is $30,000.00.

For the reasons set forth below, Plaintiff and Plaintiff's counsel believe the settlement reached by the Parties is fair, reasonable and adequate and request the Court to preliminarily approve the settlement so that the Class may receive the benefits it provides.

II. SUMMARY OF THE LITIGATION

A. Plaintiff's Allegations and Procedural History

Plaintiff was formerly employed by Defendant, a beverage distributor headquartered in Fresno. Plaintiff worked as a non-exempt merchandiser and pursues his claims on behalf of himself and other similarly-situated employees, including merchandisers, warehouse workers, and drivers.

Plaintiff filed a related action on June 5, 2020 in the Fresno County Superior Court, entitled *Dillon Geltz v. Donaghy Sales, LLC*, Case No. 20CECG01633 ("*Geltz I*"). *Geltz I* asserts a single claim for violation of the California Private Attorneys General Act of 2004 ("PAGA"), premised upon the following violations of California law: (1) failure to pay meal period and rest break wages; (2) failure to pay all overtime and minimum wages; (3) failure to reimburse necessary work-related expenses; (4) failure to pay all wages upon termination; and (5) failure to maintain accurate pay stubs. Plaintiff filed a First Amended Complaint on September 16, 2020 re-alleging the same claims as set forth in the original complaint, but removing the prayer for unpaid wages.

Through formal discovery, Defendant produced voluminous documents and data, including class-wide time cards, payroll data, and policy documents for the class. After production of this

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[1] All defined terms used herein shall have the same meaning as defined in the Settlement.

information, the Parties participated in a full-day mediation before the Honorable Howard R. Broadman (Ret.) on August 10, 2023, which culminated in a Memorandum of Understanding as to the basic terms of a settlement the same day. The released claims consist of all claims alleged in *Geltz I*, and claims that could have been pled arising out of the same operative facts, as well as claims for meal and rest breaks, wage statement violations, and off the clock work.

Consistent with the terms of the settlement, Plaintiff commenced the instant putative class action on November 28, 2023, asserting the legal violations underlying the PAGA claim in *Geltz I*, but on a class-wide basis. Specifically, Plaintiff asserts Defendant failed to pay minimum and overtime wages in violation of Labor Code sections 510 and 1194, failed to provide meal and rest periods in violation of Labor Code sections 226.7 and 512, failed to reimburse necessary work-related expenses in violation of Labor Code section 2802, failed to timely pay wages upon termination in violation of Labor Code section 203, and failed to provide complete and accurate wage statements in violation of Labor Code section 226.

B. <u>Investigation and Discovery</u>

Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in extensive arms-length negotiations taking place among the Parties. Defendant produced numerous written policy documents, corporate organizational charts, job descriptions, and time and payroll documents for the class, which Plaintiff's counsel analyzed for purposes of estimating the wages owed and the damages exposure for the Class. In sum, Plaintiff has obtained sufficient discovery on both liability and damages to apprise the Court of the fairness of the settlement. (Declaration of Stephanie E. Yasuda filed concurrently herewith ("Yasuda Decl.") ⁋ 2.)

Despite the asserted fairness of the settlement, should any Class Member, upon reviewing the Class Notice, object to the terms of the settlement as set forth therein, each has the right to file an objection or seek exclusion from the settlement. (Settlement at ¶ III(E)(3).) By such procedure, Class Members may also attend the Final Approval Hearing for the purposes of objecting to one or more of the settlement's terms.

Based on the above, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent risk of litigation, the risks and time of appeal, and the costs of pursuing such litigation.

III. SUMMARY OF SETTLEMENT TERMS

A. Summary of the Terms of the Settlement

The Settlement provides for $1,500,000.00 as the Gross Settlement Amount. (Settlement at ¶ I(P).) Defendant's payment of the Gross Settlement Amount represents the full and maximum amount payable in this settlement by Defendant, excluding the employer's share of payroll taxes. (*Id.*) Following deduction of Court-approved attorneys' fees and litigation costs, Class Representative Service Payment, Administration Expenses Payment, and the LWDA Payment, the Net Settlement Amount will be available to be distributed to Participating Class Members. (Settlement at ¶ I(S).)

Each Class Member's Individual Class Payment shall be determined by dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and multiplying the result by each Participating Class Member's Workweeks. There will be no reversion of any of the Gross Settlement Amount or Net Settlement Amount to Defendant. For purposes of this calculation, work weeks are defined as two work weeks per payroll period that occurred during the Class Period, based on the payroll periods included in Defendant's records. If a Participating Class Member worked any time during a payroll period, then he or she will be credited for two weeks for the payroll period. Both payroll periods and workweeks must be integers. The calculation of a Class Member's Workweeks shall be construed from Defendant's records. (Settlement at ¶¶ III(C)(2).)

The Notice of Settlement explains to the Class Members all the procedures for settlement and will provide the Class Members information as to how they may dispute their estimated settlement share, and object to or request exclusion from the Settlement. (Settlement Ex. A.)

The settlement provides for an award of attorneys' fees to Class Counsel in an amount not to exceed 35% of the Gross Settlement Amount, or $525,000.00, and an award of actual litigation expenses advanced by Class Counsel (presently estimated not to exceed $30,000.00, and which figure will be inserted into the Notice), subject to Court approval. (Settlement at ¶ III(B)(2).) Costs for the Settlement Administrator up to $30,000, subject to Court approval, are also paid from the Gross Settlement Amount. (Settlement at ¶ III(B)(4).) The settlement also allows Plaintiff to request a Class

Representative Service Payment, subject to Court approval, in the amount of $15,000.00. (Settlement at ¶ III(B)(1).) The settlement also designates $100,000.00 of the Gross Settlement Amount as the PAGA Payment, which shall be allocated $75,000.00 to the LWDA (the "LWDA Payment") as the LWDA's share of the settlement of civil penalties paid under the settlement pursuant to the PAGA, and $25,000.00 to the Net Settlement Amount for distribution to the Participating Class Members. (Settlement at ¶ III(B)(3).)

With respect to the foregoing, the settlement requires Plaintiff and his counsel to apply for an award of attorneys' fees, costs, Settlement Administrator costs and Class Representative Service Payment by application to the Court. The purpose of the application is to provide the Court with sufficient information justifying the requested attorneys' fees, costs, and Class Representative Service Payment. (Settlement at ¶¶ III(E)(6).) Plaintiff's counsel will include in a summary of the time spent during the settlement process, answering questions of Class Members received in response to the Class Notice or otherwise addressing issues that arise during the notice process. Plaintiff will provide in advance of the final approval hearing his supporting declaration of the work each performed and risks incurred by this litigation.

Class Members may request exclusion from the settlement if they so choose. The release is narrowly tailored to the causes of action alleged in the operative complaint, and those that could have been alleged based upon the asserted facts. Class Members who do not request exclusion from the settlement will release only "all alleged claims in the [instant action] and all other wage and hour claims that could have been pled arising out of the same operative facts" that occurred during the Class Period from February 7, 2019 through the preliminary approval of the settlement. (Settlement at ¶ III(F)(1).)

B. <u>Notice to the Class</u>

The Settlement provides that the agreed-upon Settlement Administrator will perform a national change of address ("NCOA") search, update the addresses per the results of the NCOA search, and then send, by U.S. Mail, a copy of the Court-approved Notice Packet to all Class Members. In the event that a Class Notice sent by mail is returned as undeliverable, the Settlement Administrator will make reasonable efforts to obtain a valid mailing address by using the social security number of the

Class Member and standard skip tracing devices to conduct a search for a correct mailing address and by contacting Class Members. The Settlement Administrator shall make one (1) attempt to re-mail the Notice Packet within ten (10) days from the date of the return of the Class Notice. Following each search that results in a corrected address, the Settlement Administrator shall promptly resend the original Class Notice to the Class Member by first-class mail, postage prepaid. (Settlement at ¶ III(E)(2)(c).)

The Class Notice provides Class Members with everything they need to know in order to make an informed decision, including (a) information regarding the nature of the Action; (b) a summary of the Agreement's principal terms; (c) the Class definition; (d) the Class Member's estimated share of the Net Settlement Amount and the formula for calculating it, including the Claim Amount; (e) the dates which comprise the Class Period; (f) instructions on how to submit a timely and valid request for exclusion in order to opt-out of the Class; (g) instructions on how to challenge the employment information used to calculate their estimated share of the Net Settlement Amount; (h) instructions on how to submit an objection to the settlement; (i) the deadlines by which the Class Members must postmark their request for exclusion or Participating Class Members must postmark any challenge to their estimated share of the Net Settlement Amount, or postmark an objection to the Settlement; and (j) the release language. Cal. Rules of Court, rule 3.766(d).

C. <u>Settlement Administration Process</u>

Class Members are not required to submit claims to receive compensation. The response deadline is forty-five (45) calendar days from mailing of the Notice of Settlement. (Settlement at ¶ III(E)(3)(a)-(c).) The response deadline is reasonable because most Class Members likely reside in the State of California, and thus should receive their Class Notice shortly after mailing.

IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. <u>Legal Standard</u>

Any settlement of class litigation must be reviewed and approved by the court. Cal. Rules of Court, rule 3.769(a); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800 (1996). This is done in two steps: (1) a preliminary review by the court, and (2) a final review and approval by the court after notice has been distributed to the class members for their comment or objections. Cal. Rules of Court, rule 3.769(c)-(f). If the court has not yet certified the action as a class action when settlement is reached, the court must certify the class according to the standards set out in California Code of Civil Procedure § 382, in addition to distributing the settlement notice. Cal. Rules of Court, rule 3.769(d).

At the preliminary approval stage, "the judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004). A court should grant preliminary approval of a class action settlement where it is within the "range of reasonableness." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th Ed. 2009); *see also Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1446 (2009) (finding the proposed settlement was "within the range of reasonableness").

B. <u>The Settlement May be Presumed Fair and Reasonable</u>

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). While the recommendations of counsel proposing a settlement are not conclusive, the court can properly take them into account in recognition of counsel's duty to the entire class; this is particularly true where, as in the instant case, counsel has been involved in informal and formal discovery and negotiations for some period of time. *Id.* Absent evidence of fraud or collusion, courts typically defer to the opinion of counsel. *Id.*

1. Arms-Length Bargaining

This settlement was achieved only after a full-day mediation with the Honorable Howard R. Broadman (Ret.), which culminated in a Memorandum of Understanding, followed by continued negotiations between the Parties to finalize a long-form settlement agreement. The Parties have agreed that the settlement reached is a compromise for the damages of absent Class Members for the alleged violations. The settlement also compensates the Class Representative for his claims and provides an additional Class Representative Service Payment, thus taking into consideration the risks, time, effort and expenses incurred by the class representative in coming forward, finding putative class counsel, providing invaluable information, and assisting in the litigation of this matter on behalf of all Class

Members.

Plaintiff and Defendant hold strong opinions regarding liability and damages in the instant matter. However, based on their own independent investigations and evaluations, the Parties and their respective counsel are of the opinion that the settlement, for the consideration and on the terms set forth in the settlement, is fair, reasonable, adequate and in the best interest of the Class Representative, Class Members and Defendant in light of all known facts, circumstances and risks inherent in litigation, including the risk of proceeding through class certification and the risk of potential appeals. (Yasuda Decl. ¶ 3.)

2. Investigation and Discovery Prior to Settlement

Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in extensive arms-length negotiations taking place among the Parties. Plaintiff has received hundreds of pages of time and payroll documents for the Class, and thousands of lines of data, which were then used to estimate the damages exposure. (Yasuda Decl. ¶ 2.) In sum, Plaintiff has obtained sufficient discovery on both liability and damages to apprise the Court of the fairness of the settlement.

Despite the asserted fairness of the settlement, should any potential Class Member, upon reviewing the Class Notice, object to the terms of the settlement as set forth therein, each has the right to file an objection or seek exclusion from the settlement. (Settlement at ¶¶ III(E)(3).) By such procedure, Class Members may also attend the Final Approval Hearing for the purposes of objecting to one or more of the Settlement's terms.

Based on the above, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent risk of litigation, the risks and time of appeal, and the costs of pursuing such litigation.

3. Experience of Class Counsel

Class Counsel have a great deal of experience in wage-and-hour class action litigation. (Yasuda Decl. ¶ 11.) Class Counsel has been approved as class counsel in a number of other wage/hour class actions. (*Id*.) Moreover, as noted above and detailed below, Class Counsel conducted an investigation of the factual allegations involved in this case. Thus, based upon such experience and knowledge of the current case, Class Counsel believe that the current Settlement is fair, reasonable and adequate. (Yasuda Decl. ⁋ 3.) In sum, there should be a presumption of fairness because the factors establishing such a presumption are satisfied.

C. The Settlement Meets the Standard of Fair, Reasonable, and Adequate

Courts will consider the following non-exhaustive list of factors when making a determination regarding final settlement approval: (1) the strength of the plaintiffs' claims, (2) the expense, complexity and likely duration of continued litigation, (3) the risk of maintaining class action status through trial, (4) the settlement amount, (5) the stage of the proceedings and extent of any completed discovery, (6) experience and views of respective counsel, and (7) the reaction of the class members to the proposed settlement. *Dunk,* 48 Cal. App. 4th at 1800.

As discussed above, Plaintiff believes he has strong meritorious claims; however, he recognizes the risks associated with continued litigation. Further, continued litigation is likely to result in significant expenditure of additional time and resources. Plaintiff has not yet proceeded through the class certification process. Thus, the expense and complexity of continued litigation would impose a significant burden on the Parties and the Court. This case, if not settled, would almost certainly endure for a significant period of time. This Settlement avoids that for actual significant money in hand for the Class now.

Counsel for both Parties are of the opinion the settlement is fair, reasonable, and adequate. The Parties have negotiated a guaranteed, non-reversionary settlement that provides the Class with significant benefit when compared with the risks of continued litigation. After the Administrator calculates the actual estimated amounts on a per capita basis, Plaintiff can provide additional detail in advance of the Final Approval and Fairness Hearing.

Plaintiff therefore respectfully submits the Court should preliminarily approve the settlement as fair, reasonable, and adequate.

D. The Settlement is Within the Range of Reasonableness in Light of the Estimate of Actual Loss

Plaintiff estimates the value of actual loss to be approximately **$12.7 million**. This is based on the following calculations:

Unpaid Rounding

Plaintiff asserts that Defendant rounded employee hours worked to the nearest quarter-hour, and compensated employees only for this rounded time. Plaintiff claims this resulted in a failure to compensate employees for all hours worked, including overtime as applicable. Cal. Lab. Code §§ 510(a), 1194(a). Defendant ended this practice in September 2019.

Rounding resulted in a nominal amount of pay shortage; the primary risk from this policy is the penalty exposure it creates. The rounding affects approximately 8,000 workweeks, or 4,000 pay periods. The actual lost wages due to rounding is estimated on the high end to be $100,000. The rounding was to the quarter hour, so the loss is on average a high end of 1/8th an hour a day. Given 4.6 shifts a week and $15.81 an hour average pay, this would total **less than $100,000.**

Meal Periods

Defendant's records indicate that, for at least a portion of the class period, Defendant automatically deducted 30 minutes of time from workers' hours worked for meal periods. However, California law requires employers to not only provide employees with at least 30-minute meal periods, but moreover, to accurately record them. Cal. Labor Code § 512(a); *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 78 (2021). In addition to meal violations due to automatic deduction, Plaintiff asserts a generalized failure by Defendant to provide meal periods, because the data also reflected missed, short, and delayed meals. This creates the rebuttable presumption that Defendant failed to provide adequate meal periods. *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 77 (2021).

Analysis of the records resulted in a high-end estimate for meal premiums at $**2.65 million**. This figure was arrived at looking at the sample records and extrapolating to the larger class. It accounts for meal premiums paid.

Rest Breaks

Plaintiff asserts Defendant did not take any steps to relieve employees of duty for rest breaks. California law requires employers to authorize and permit employees to take a 10-minute rest break for every four hours of work or major fraction thereof. Cal. Lab. Code § 512(a); Cal. Code Regs., tit. 8, § 11090(12)(A). The burden is on the employer to "relieve[] its employees of all duty" and "relinquish[] control over their activities." *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1040 (2012). This is unequivocally an affirmative obligation; Defendant is required to *take action* to relieve employees of duty. *Bargas v. Rite Aid Corp.*, 245 F. Supp. 3d 1191, 1213-14 (C.D. Cal. 2017). Plaintiff claims Defendant failed to take any steps to relieve employees of duty.

Plaintiff calculates damages at a 100% violation rate, and thus estimates damages for this claim in the amount of **$6 million**.

<u>Off-The-Clock Unpaid Time</u>

Plaintiff asserts Defendant did not pay for all time work, including off-the-clock work as well as paying for only eight hours in a day. All time worked must be paid, regardless of whether it is recorded on a time clock. Plaintiff estimates this at one hour per week at **$1.7 million**. In addition to off-the-clock work, Plaintiff alleges off the-clock-work resulting from the automatically deducted meals. Plaintiff estimates on the high-end this damage exposure at **$750,000.00**.

Plaintiff also alleges that Defendant compensated some of its workers with a flat daily rate of pay. Plaintiff asserts this resulted in a failure to pay minimum wages and overtime wages, as applicable, for any hours worked over eight hours in a day. *See* Cal. Lab. Code § 515(d)(2).

Based on the analysis, Plaintiff estimates the wage claim related to flat pay to total no more than **$1 million**.

Defendant noted that drivers were settled earlier in *Zaval, et al. v. Donaghy Sales, LLC*, Kern County Superior Court Case No. BCV-20-102005 DRL, which case was settled in 2021.

<u>Reimbursements – Drivers and Merchandisers</u>

Drivers and merchandisers were required to use mobile telephones and vehicles in order to perform their jobs. As a regular part of work, these employees were required to use their personal mobile phones when their company-provided devices and vehicles were unavailable. Nevertheless, there is no evidence Defendant compensated employees for these company-related expenses. Plaintiff asserts a violation of Labor Code section 2802, which requires employers to reimburse employees for necessary work-related expenses.

Because cell phones costs are incurred on a monthly basis, Plaintiff factored the use of the phone as the value of the claim. 40 hours a week is about 25% of the time, and given that cell phones are about $100 a month, this factors to $5.77 a week. Plaintiff thus calculated damages for this claim in the amount of **$500,000.00** ($5.77 x 80,000 workweeks).

In sum, the settlement is well within the range of reasonableness in light of the fact the Gross Settlement Amount accounts for about 12% of the high estimate of actual loss. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 325 (3rd Cir. 2011) (there appears to be "no authority that requires a district court to assess the fairness of a settlement in light of the potential for trebled damages."); *Behrens v. Wometco Enters., Inc.,* 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery."); *Balderas v. Massage Envy Franchising, LLC*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net settlement amount representing 5% of the projected maximum recovery at trial). This is a good result for the settlement class of 800 persons.

E. <u>The Revised Code of Civil Procedure Section 384 Does Not Apply</u>

California Code of Civil Procedure section 384 ("Section 384") was revised effective June 27, 2018. It now mandates that after distribution of a fund in a class action, the parties shall report to the court the total amount that was actually paid to the class members. The court will then amend the judgment to direct the defendant to pay the sum of the unpaid residue plus interest on that sum to nonprofit organizations. Cal. Code Civ. Proc. § 384(b).

The Parties respectfully submit that this section does not apply to the instant action. Pursuant to the settlement reached in this case, any uncashed settlement checks will be sent to the California State Controller to be held pursuant to California's Unclaimed Property Law ("UPL") (Cal Code Civ. Proc. §§ 1500 *et seq*.). The UPL is not a true escheat statue; rather it has dual objectives: (1) to reunite owners[2] with unclaimed funds or property, and (2) to give the state, rather than the holder[3], the benefit of the use of unclaimed funds or property. *See Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 74. "The state, through the Controller, acts as the protector of the rights of the true owner. [citation] When

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[2] "'Owner' means … claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this chapter, or his or her legal representative." Cal. Code Civ. Proc. § 1501(g).

[3] "'Holder' means any person in possession of property subject to this chapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this chapter." Cal. Code Civ. Proc. § 1501(e).

considered in total context, the statutory scheme of the UPL compels the Controller to affirmatively take all steps necessary to carry out the purposes of the UPL." *Id*. "It is the intent of the Legislature that property owners be reunited with their property. In making changes to the unclaimed property program, the Legislature intends to adopt a more expansive notification program that will provide all of the following: (1) Notification by the state to all owners of unclaimed property prior to escheatment. (2) A more expansive post escheatment policy that takes action to identify those owners of unclaimed property." Cal. Code Civ. Proc. § 1501.5(c).

In other words, under the UPL, there would be no "unpaid residue" to trigger the requirements under Section 384(b) because any uncashed check belonging to a Class Member remains the property of the Class Member. The funds will be held by the State until claimed by the employee; the uncashed check never ceases to be the employee's property. The unpaid cash is held by the State until claimed by the employee, and in the meantime, all Californians benefit from the funds because the state will use the funds until claimed by the employee. Accordingly, the Settlement Agreement also satisfies the purpose of Section 384: to distribute the funds in a manner designed either to further the purposes of the underlying class action or to promote justice for all Californians.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE REQUESTED ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE PAYMENT

A. The Requested Attorneys' Fees and Costs Are Justified

Plaintiff's counsel will seek an award of attorneys' fees in the amount of $525,000.00 of the Gross Settlement Amount and an additional amount for reimbursement of actual advanced litigation costs (presently estimated not to exceed $30,000.00, which figure will be inserted in the Notice). Plaintiff's counsel will file a timely summary of attorney tasks and fees, in addition to an itemization of the costs incurred.

The requested award is commensurate with (1) the risk Plaintiff's counsel took in commencing this action; (2) the time, effort and expense dedicated to the case; (3) the skill and special knowledge of Plaintiff's counsel; and (4) the value of this guaranteed settlement achieved for Class Members. Counsel spent numerous hours analyzing hundreds of pages of data and documents produced by Defendant. Plaintiff's counsel is well-versed in wage-and-hour class actions, which they practice almost exclusively. Plaintiff's counsel have been deemed class counsel in numerous class actions in both California state and federal courts, both after class certification and for purposes of settlement. (Yasuda Decl. ⁋ 11.)

B. <u>Plaintiff's Class Representative Service Payment is Warranted</u>

In evaluating the propriety of enhancement awards, courts consider relevant factors including the following: (1) the time and effort put into the litigation and the degree to which the class has benefited from those actions; (2) the duration of the litigation; (3) a comparison between the service awards and the range of monetary recovery available to the class; (4) whether the litigation will further the public policy underlying the statutory scheme; and (5) risks to the class representatives in participating in the lawsuit, including financial exposure, retaliation, and negative notoriety related to the lawsuit. *See Staton v. Boeing Co.*, 327 F. 3d 938, 977 (9th Cir. 2003); *Cook v. Niedert*, 142 F.3d 1004, 1015-16 (7th Cir. 1998); *Van Vranken v. Atlantic Richfield Co.*,, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 202 (S.D.N.Y. 1997).

"Incentive awards are fairly typical in class actions." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (internal quotation marks and citations omitted). "The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Id.* at 1394. Particularly in employment class actions, named plaintiffs should be entitled to an enhancement award as an incentive to take the risks associated with pursuing employment claims on behalf of other employees. An award is justified where the plaintiff is a "present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril." *Roberts*, 979 F. Supp. at 201.

Plaintiff requests that the Court appoint him as Class Representative and preliminarily approve an Class Representative Service Payment in the amount of $15,000.00. Plaintiff will apply to the Court for approval of his enhancement with a detailed explanation of the tasks performed and the hardships endured in this action. However, in order to provide the Court with an understanding why the requested Class Representative Service Payment should be preliminarily approved, Plaintiff provides as follows: Plaintiff commenced this litigation 3.5 years ago and has been active from the outset. He has been consistently available to assist his lawyers at their request, including reviewing documents, answering questions, and otherwise insisting the action as needed. Plaintiff attended the mediation. Plaintiff spent substantial time explaining documents, policies, and records, and their meaning to the case to his counsel. Further, as part of the settlement, Plaintiff has provided a full and general release of any and all claims, in addition to his release as a Class Member. (Settlement at ¶ III(F)(2).) This includes claims that Plaintiff believes are meritorious but that he could not bring on behalf of the class. Finally, the settlement achieved is an excellent result for the class, and the amount requested is proportionate to the amounts putative class members will receive as part of the settlement. For these reasons, Plaintiff asks that his requested Class Representative Service Payment be preliminarily approved. He will provide a detailed declaration in support of this request prior to final approval, which will also provide additional details and facts about his efforts and sacrifices for this litigation.

The amount of $15,000 is reasonable given the efforts and risks that Plaintiff took and bore for the Class and the benefits each conveyed on the other Class Members. The Class Members should have the opportunity to comment on whether the amount is reasonable. Based on the foregoing, Plaintiff requests the Court preliminarily approve the requested Class Representative Service Payment.

VI. THE COURT SHOULD APPROVE THE PAGA PORTION OF THE SETTLEMENT

The Parties have agreed to allocate $100,000.00 to be paid from the Gross Settlement Amount, with 75% ($75,000.00) allocated to the LWDA Payment and 25% ($25,000.00) allocated to the Net Settlement Amount.

Plaintiff submits this is a reasonable allocation that should be approved. The PAGA statute permits a court to "exercise discretion to award lesser penalties based upon the enumerated considerations." *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). These considerations include whether the maximum award would be unjust, arbitrary and oppressive, or confiscatory. Cal. Lab. Code § 2699(e)(2). Here, the interests of justice would be served the proposed allocation. While the Settlement allocates a greater proportion of the common fund to actual damages rather than penalties, each Class Member's settlement payment must provide fair value compared to the actual estimated loss. However, a Court has the broad discretion to reduce penalties as it deems appropriate.

Further, where PAGA penalties are negotiated in good faith and "there is no indication that [the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.,* 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Comm 'n Cases,* 186 Cal. App. 4th. 576, 579 (2010) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims."). Here, the Settlement of $304,000.00 was reached between the Parties after extended negotiations and further private mediation, and the Settlement is based in large part on Defendant's financial condition. The Parties negotiated the Settlement in good faith.

Additionally, Plaintiff has electronically submitted the Settlement to California's Labor and Workforce Development Agency ("LWDA") pursuant to California Labor Code section 2699(l)(2). Should the LWDA deem the Settlement insufficient, it will have the opportunity to voice its objections at final approval.

In sum, the purpose of PAGA is to vindicate the LWDA's interest in enforcing the Labor Code. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 388-89 (2014). The purpose of PAGA, according to the California Labor Commissioner is not to displace money that would go to workers by instead sending that money to the State. Pursuant to the Settlement here, Defendant will be required to pay a raw average of over $1,000.00 per class member. The purpose of PAGA, and the allocation here, serves the State's interest in protecting the rights of its workers.

Plaintiff respectfully submits that the Settlement serves PAGA's purpose of augmenting LWDA's enforcement mechanisms.

VII. CLASS CERTIFICATION

The Class consists of all individuals who were California residents who formerly worked or currently work in non-exempt hourly positions at Defendant Donaghy Sales, LLC in California at any time between February 7, 2019 through the preliminary approval of the settlement (the "**Class Period**"), excluding Rodolfo Galarza. (Settlement at ¶ (I)(B).)

A. The Class is Sufficiently Numerous

While "[n]o set number is required as a matter of law for the maintenance of a class action," case law indicates that 30-40 class members satisfies the numerosity requirement because at that point, joinder is not practical. *Rose v. City of Hayward, 126* Cal. App. 3d 926, 934 (1981). In fact, numerous courts have certified smaller classes. *See, e.g., Hebbard v. Colgrove,* 28 Cal. App. 3d 1017, 1030 (1972) (28 class members); *Bowles v. Superior Court*, 44 Cal. 2d 574 (1955) (10 class members). Here, the Court should find the putative class is sufficiently numerous, where there are 800 settlement Class Members.

B. The Class is Ascertainable

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." *Sevidal v. Target Corp.,* 189 Cal. App. 4th 905, 919 (2010) (internal quotation marks and citations omitted). "Thus, class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official or business records." *Id.*

The Class is readily identified without unreasonable expense official for the following primary reasons: (1) the class definition is stated in terms that are objectively easy to understand and do not require any specific knowledge of Defendant's business, (2) Defendant maintains records showing dates of employment and the non-exempt status of its employees. The Class is therefore ascertainable. *See Sevidal*, 189 Cal. App. 4th at 919 (proposed class definition must provide "an objective means of identifying those persons who will be bound by the results of the litigation").

C. There Exists a Community of Interests Amongst Class Members

The community interest requirement has three essential elements: (1) predominant questions of law and fact, (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Linder v. Thrifty Oil Co.,* 23 Cal. 4th 429, 435 (2000). For settlement purposes only, Defendant has stipulated and agreed that the requisites for establishing class certification are met.

1. Common Questions of Law and Fact Predominate

For common questions of law or fact to predominate, "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the action advantageous to the judicial process and to the litigants." *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913-14 (2001)*; see also Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 99-100 (2008) ("Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.")."The existence of even one significant issue common to the class" has been found sufficient to warrant certification. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008).

This action concerns Defendant's statewide policies and practices which affected all Class Members equally. *See Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 421 (1987) (finding that company-wide policies and practices which affected all within the proposed class satisfied the commonality requirement). Plaintiff contends Defendant, as a policy and practice, maintained policies that did not comply with California law on payment of wages. For example, the records produced by Defendant demonstrate that Defendant routinely rounded employee hours worked, did not pay for all hours worked and did not comply with California meal period requirements (e.g., late, missed, short or automatically deducted). Plaintiff also contends that Defendant did not take action to affirmatively relieve employees of duty for rest breaks at all. Thus, Plaintiff contends the only question that needs to be resolved is whether or not Defendant's policies complied with California law.

2. The Claims of the Named Plaintiff Are Typical of the Claims of the Class

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007) (internal quotation marks and citations omitted).

The requirement is satisfied here, where the claims alleged by Plaintiff arise from the same course of conduct that gave rise to the claims of other Class Members. Specifically, Plaintiff asserts he personally was not compensated for all time worked, was not provided meal periods as required, and was not relieved of duty for rest breaks, because he – like everyone else – was subject to the same policies and procedures as every other Class Member. Plaintiff also asserts he was not reimbursed for the use of his personal cell phone for work-related purposes, along with others. Plaintiff's claims are typical of the Class as a whole because they arise from the same factual basis and are based on the same legal theories as that applicable to the Class.

3. Class Counsel and the Class Representatives are Adequate

"It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981). "But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Id.*

Here, no conflict exists between Plaintiff and the Class where Plaintiff contends he has been damaged by the same alleged conduct and has the incentive to fairly represent all Class Members to achieve the maximum possible recovery. Plaintiff is fully informed of his duties as a class representative and is further aware that he surrendered any right to compromise the group action for his own individual gain. Plaintiff was and remains willing to vigorously prosecute this action to the benefit of the Class.

Furthermore, Plaintiff is represented by counsel who have extensive experience in complex wage-and-hour litigation and have protected the interests of the Class Members. Accordingly, Plaintiff and Plaintiff's counsel are adequate and will continue to fairly and adequately represent the Class.

D. <u>The Class Action Method is the Superior Means of Adjudication</u>

Class actions are the superior method of adjudication when they unify claims that would otherwise require adjudication of numerous separate actions arising out of the same basic facts. *See Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1308 (2010) ("[i]n light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication"); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004) ("As alleged, each class member's claim to unpaid overtime depends on whether he or she worked for defendant during the relevant period in a position that was misclassified . . . ."). Further, there is recognition by the courts that class actions are encouraged where "absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime." *Gentry v. Superior Court*, 42 Cal. 4th 443, 462 (2007).

Here, the numerous common issues of law and fact that predominate in this case make class treatment the superior method of adjudication. Plaintiff's claims are based on the same system-wide policies, procedures, and practices that apply to all Class Members. This class action will serve to deter further unlawful employment practices on the part of Defendant. The wage-and-hour claims of the class members are difficult to prosecute as individual employees because (1) many of the individual claims are likely to be relatively low-value and may need to be litigated in small claims court, and (2) these employees are likely to be unaware of their right to rest breaks, or the impropriety of rounding employees hours worked and automatically deducting meal periods, particularly because it is common in the beverage distribution industry for companies to engage in these practices.

For all these reasons, a class action is the superior means of resolving Plaintiff's and Class Members' claims and this action should be certified accordingly.

VIII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court enter an order granting preliminary approval of the class action settlement in this action.

DATED: December 13, 2023

YOON LAW, APC

__/s/ Stephanie E. Yasuda__
Stephanie E. Yasuda
Attorneys for Plaintiff Dillon Geltz

PROOF OF SERVICE

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 751 N. Fair Oaks Avenue, Pasadena, California 91103.

On December 13, 2023, I served the following documents described as:

PLAINTIFF DILLON GELTZ'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; POINTS AND AUTHORITIES IN SUPPORT THEREOF

on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as shown on the attached mailing list.

[ ] (BY FACSIMILE)
I am readily familiar with the business practices of this office. The telephone number of the facsimile machine I used was (213) 489-9961. This facsimile machine complies with Rules 2003(3) of the California Rules of Court. Upon transmission, no error was reported by the facsimile machine and a printed copy of the machine's transmission record indicating that the transmission was successfully completed is attached to this declaration.

[X] (BY E-MAIL)
The documents were sent as an attachment to an email, with two types of delivery confirmation: Delivery Receipt and Read Receipt. Upon sending, no error was reported and I received a Delivery Receipt, confirming that the message and documents reached the above email address

[ ] (BY MAIL)
I am familiar with my employer's mail collection and processing practices; know that mail is collected and deposited with the United States Postal Services on the same day it is deposited in the interoffice mail; and know that postage thereon is fully prepaid.

[ ] (BY FEDERAL EXPRESS COURIER AND COURTESY EMAIL)
I am "readily familiar" with the firm's practice of collection and processing correspondence for Federal Express delivery. Under that practice it would be deposited with the Federal Express Courier on that same day at Los Angeles, California in the ordinary course of business.

[X] (State) I declare under penalty of perjury that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member the Bar of this Court at whose direction the service was made.

Executed on December 13, 2023, at Pasadena, California.

NICHOLAS ORTIZ

Dillon Geltz v. Donaghy Sales, LLC
Superior Court of California, County of Merced, Case No.: 23CV-04394

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