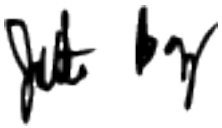


08/16/2022

By: J. Berg, Deputy Clerk



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

TIMOTHY ISAAC, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

CENTRAL PAYMENT CO., LLC, a Delaware
limited liability company; TSYS MERCHANT
SOLUTIONS, LLC, a Delaware limited liability
company; and DOES 1 through 100,

Defendants.

Case No.: CIV2002734

CLASS ACTION

*[Assigned for all purposes to the Hon.
Stephen P. Freccero, Courtroom A]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: 10/11/2022

Time: 1:30 PM

Courtroom: A

Action Filed: September 18, 2020

Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on a date and time to be determined by the Court, in Courtroom A of the above-entitled Court, located at 3501 Civic Center Drive, San Rafael, CA 94903, Plaintiff Timothy Isaac ("Plaintiff") will, and hereby does, move this Court for:

1. Preliminary approval of the proposed class action Settlement Agreement between Plaintiff and Defendants Central Payment Co., LLC and TSYS Merchant Solutions, LLC ("Defendants");

2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:

All current and former Sales Representatives that, during the period of September 18, 2016 to the date the Court grants preliminary approval ("Class Period"), either: (i) performed services for Defendants and lived in California; (ii) performed services for Defendants and had an active account in California, and lived elsewhere; and/or (iii) performed services for Defendants and traveled to California for training; and California law applied to the services relationship between the Sales Representatives and Defendants per their written agreement.

3. Preliminary appointment of Plaintiff as Class Representative;

4. Preliminary appointment of Haines Law Group, APC as Class Counsel;

5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;

6. Approval of the proposed Class Notice and Notice of Estimated Settlement Award (together, the "Notice Packet"), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement Agreement; and

7. The scheduling of a hearing to consider whether the class settlement should be finally approved and to award an amount for a Class Representative Incentive Award to Plaintiff, and attorneys' fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declaration of Paul K. Haines and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declaration of Plaintiff; the pleadings and other papers filed in this action; and on any further oral or documentary evidence or argument presented at the time of hearing.

1
2 Dated: August 15, 2022

Respectfully Submitted,
HAINES LAW GROUP, APC

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Paul K. Haines
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Timothy Isaac (“Plaintiff”) seeks preliminary approval of a class action
4 settlement agreement (“Settlement”) with Defendants Central Payment Co., LLC and TSYS
5 Merchant Solutions, LLC (together, “Defendants” or “CPAY”). The Settlement resolves a class
6 and representative action pending before this Court (the “Action”), in which Plaintiff alleges that
7 CPAY misclassified him and other Sales Representatives as independent contractors and, as a
8 result, failed to pay all wages due, failed to reimburse expenses, and failed to provide meal and
9 rest periods. Plaintiff further alleges that as a result of these violations, CPAY failed to provide
10 accurate itemized wage statements, failed to pay all final wages, and is liable for Private Attorneys
11 General Act (“PAGA”) civil penalties.

12 Plaintiff now respectfully requests that this Court preliminarily approve this non-
13 reversionary, common-fund class action Settlement,¹ in which Defendants have agreed to pay
14 \$1,475,000.00 to the following Settlement Class, estimated to consist of 1,205 individuals:

15 All current and former Sales Representatives that, during the period of September
16 18, 2016 to the date the Court grants preliminary approval (“Class Period”), either:
17 (i) performed services for Defendants and lived in California; (ii) performed
18 services for Defendants and had an active account in California, and lived
19 elsewhere; and/or (iii) performed services for Defendants and traveled to California
20 for training; and California law applied to the services relationship between the
21 Sales Representatives and Defendants per their written agreement.

22 The Settlement was reached after the parties engaged in mediation with Francis “Tripper”
23 Ortman, Esq., an experienced wage and hour class action mediator. In connection with mediation,
24 Defendants provided Plaintiff with extensive informal discovery, including pay records for
25 Settlement Class members; information regarding the number of months worked by Settlement
26 Class members and the number of merchants serviced each month; relevant wage and hour
27 policies; and other data and documents. After extensive research and investigation, including a
28 detailed analysis of Defendants’ potential exposure, the parties attended a full-day mediation with
Mr. Ortman on September 13, 2021. The parties did not reach a resolution at mediation; however,

¹ The Settlement is attached as Exhibit 1 to the Haines Declaration. The Class Notice and Notice
of Estimated Settlement Award are attached as Exhibits A and B, respectively, to the Settlement.

over the following months and with Mr. Ortman' assistance, the parties eventually reached a settlement in principle. The parties continued their negotiations to resolve the finer terms of the settlement, ultimately resulting in the Settlement now before the Court.

Notably, Settlement Class members are not required to submit a claim form to receive a payment ("Settlement Award") from the Settlement. After deductions for proposed settlement administration costs, attorneys' fees and costs, Plaintiff's incentive award, and the LWDA's share of PAGA civil penalties, the average Settlement Award is estimated to be at least **\$732.43**. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

CPAY provides credit processing services to small- to medium-sized businesses across the country. *See* Declaration of Paul K. Haines ("Haines Decl."), ¶ 10. *Id.* Plaintiff and Settlement Class members are Sales Representatives who performed services for CPAY during the Class Period and either worked in California, serviced merchants in California, and/or attended training in CPAY's former San Rafael, California, location, and whose agreement with CPAY provided that California law applied to the agreement. *Id.*

On September 18, 2020, Plaintiff filed the instant action, alleging claims for failure to pay overtime and minimum wages, rest period violations, failure to reimburse expenses, unlawful deductions, wage statement penalties, waiting time penalties, and unfair competition. Haines Decl., ¶ 11. On November 30, 2020, Plaintiff filed a First Amended Complaint adding a claim for PAGA civil penalties. *Id.*, ¶ 12. On August 11, 2022, pursuant to the Settlement and the parties' stipulation, Plaintiff filed a Second Amended Complaint adding a meal period claim. *Id.*

B. PLAINTIFF'S CLAIMS AND CPAY'S DEFENSES

1. Misclassification as Independent Contractors

Plaintiff's primary allegation in this case is that CPAY misclassified Plaintiff and other Sales Representatives as independent contractors. Haines Decl., ¶ 17. Plaintiff contends that because CPAY's core function is providing credit processing services to merchants, and Sales

Representatives sell these services to merchants, they do not “perform work that is outside the usual course” of CPAY’s business. Thus, Plaintiff alleges they do not meet the “ABC test” for independent contractor status adopted by the California Supreme Court and codified by AB 5, and should have been classified as employees. *Id.*; see *Dynamex Operations W. v. Sup. Ct.*, 4 Cal.5th 903 (2018) (adopting “ABC test” and holding workers are presumed employees unless employer proves all elements of test are met).

CPAY counters that it would be able to meet the *Dynamex* factors since, among other things, Sales Representatives set their own hours; they do not report to a CPAY office and instead work “in the field” directly selling to merchants and/or maintain their own business locations; they decide which merchants to solicit and service; they are not directly supervised by CPAY; they understand they are independent contractors per their agreement with CPAY; and because CPAY provides credit card processing services and is *not* in the business of direct-selling to merchants. Haines Decl., ¶ 17. CPAY also argues that some of Plaintiff’s claims stem from the Labor Code and not the Wage Orders and therefore *Dynamex* does not apply to those claims. *Id.*; see also *Garcia v. Border Transp. Grp., LLC*, 239 Cal.Rptr.3d 360, 370-71 (2018) (interpreting *Dynamex* as applying only to Wage Order claims); *Becerra v. McClatchy Co.*, 69 Cal.App.5th 913, 934 (2021) (finding that claims for unreimbursed expenses arise under Labor Code and not Wage Orders, and therefore *Dynamex* does not apply).

CPAY further argues that even assuming it could not meet the ABC test as laid out in *Dynamex*/AB 5, Sales Representatives fall under one or more of the exceptions codified in AB 5, and which apply retroactively.² Haines Decl., ¶ 17. Specifically, CPAY asserts that Sales Representatives, who sell directly to merchants, qualify as “direct sales salespersons” under Labor Code § 2783(e), and/or qualify for the “professional services” exemption under Labor Code § 2778, since, among other things, Sales Representatives maintain their own business locations, set their own hours, use their own discretion in performing their duties, and are able to do sales work for other entities. *Id.*

² Cal. Labor Code § 2785(b) provides, “Insofar as the application of Sections 2776 to Section 2784 would relieve an employer from liability, those sections shall apply retroactively to existing claims and actions to the maximum extent permitted by law.”

1 Finally, CPAY contends this claim would require an individualized inquiry as to whether
2 each Sales Representative was properly classified, as well as individualized damages questions,
3 precluding class certification. Haines Decl., ¶ 17.

4 **2. Outside Sales Exemption**

5 CPAY further argues that even if Sales Representatives should have been classified as
6 employees, many of Plaintiff's claims, including claims for unpaid overtime and minimum wages,
7 meal and rest periods, and claims derivative of those claims, would fail because Plaintiff and other
8 Sales Representatives would have qualified as outside sales representatives. Haines Decl., ¶ 18.
9 Specifically, CPAY argues, Sales Representatives are expected to, and indeed do, spend a
10 majority of their time selling to and/or obtaining orders from merchants away from CPAY's place
11 of business, and therefore qualify for the outside sales exemption. *Id.*; see also Wage Order 4, §
12 2(M) (defining "outside salesperson" as an employee "who customarily and regularly works more
13 than half the working time away from the employer's place of business selling tangible or
14 intangible items or obtaining orders or contracts for products, services or use of facilities");
15 *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 793 (1999) ("As noted, IWC provides that
16 an employee be considered an outside salesperson if he or she works more than half the working
17 time away from the employer's place of business selling items or obtaining orders.")

18 **3. Claims Based on Commission Pay Plan**

19 Sales Representatives are paid on a commission basis, and Plaintiff alleges that CPAY
20 failed to separately compensate Sales Representatives for rest periods. Haines Decl., ¶ 20; see
21 *Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98, 114 (2017) (holding that commission
22 pay plan, like piece-rate pay plan, is unlawful if it does not separately compensate for rest periods,
23 stating "[w]e agree with *Bluford* that Wage Order 7 requires employers to separately compensate
24 employees for rest periods if an employer's compensation plan does not already include minimum
25 hourly wage for such time"). Plaintiff further alleges that CPAY failed to separately compensate
26 Sales Representatives for "non-productive" time, such as time attending telephonic trainings and
27 picking up and delivering equipment for merchants. Haines Decl., ¶ 19; see also *Gonzalez v.*
28 *Downtown LA Motors*, 215 Cal.App.4th 36, 40-41 (2013) ("*DTLA*") ("...we conclude that class

1 members [paid on a piece-rate basis] were entitled to separate hourly compensation for time spent
2 waiting for repair work or performing other non-repair tasks directed by the employer....”).

3 CPAY argues, first, that Sales Representatives were properly classified as independent
4 contractors, or in the alternative were outside salespersons exempt from minimum wage or
5 overtime requirements and from rest period requirements, as described in detail above. Haines
6 Decl., ¶¶ 17-18. CPAY next argues that its commission pay plans resulted in Sales
7 Representatives being paid at least the minimum wage for all hours worked, and was lawful under
8 the California Supreme Court’s ruling in *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762 (2020).
9 Pursuant to *Oman*, CPAY argues, a commission-based pay plan is only unlawful if it “borrow[s]
10 wages contractually owed for one set of hours or tasks to rectify compensation below the
11 minimum wage for a second set of hours or tasks.” *Id.* at 781. CPAY asserts that its pay plans did
12 not violate the rule set forth in *Oman* because CPAY did not contractually promise employees
13 certain compensation for certain hours or tasks and “borrow” from that compensation to pay for
14 other hours or tasks. Rather, all compensation paid was meant to pay Sales Representatives for
15 *all* hours and tasks performed in any given month. Haines Decl., ¶ 19.

16 Moreover, CPAY argues that even if its pay plan is found to be an unlawful commission-
17 based pay plan, its failure to separately compensate employees for rest periods during shifts would
18 be limited to back-pay for the rest periods themselves (i.e., pay for the 10 minutes per rest period)
19 as opposed to the rest period penalties under Labor Code § 226.7, measured as an hour of pay per
20 workday, sought by Plaintiff. Haines Decl., ¶ 20. CPAY also points out that many Sales
21 Representatives perform services for CPAY on a very part-time basis, only servicing up to a
22 handful of merchants at any given time, and therefore do not consistently work 3.5 hours per day
23 (or even work every day) for CPAY and thus would not even be entitled to rest periods. *Id.* CPAY
24 further contends that Sales Representatives work minimal (if any) uncompensated “non-
25 productive” time, since, as noted above, *all* of Sales Representatives’ tasks were part and parcel
26 of their commission-based work. *Id.*, ¶ 19. CPAY further argues that any questions of non-
27 productive time would be highly individualized, as Sales Representatives worked without
28 supervision and there are no separate records or other common evidence of time spent on

1 potentially non-productive tasks necessary to prove class-wide liability and damages, thereby
2 precluding class certification. *Id.*

3 **4. Unlawful Deductions Claim**

4 Plaintiff alleges that CPAY took deductions from his and other Sales Representatives’
5 commissions for the cost of business cards and other expenses, and that these constitute unlawful
6 deductions from wages under Labor Code §§ 221-223. Haines Decl., ¶ 21. CPAY argues, first,
7 that Sales Representatives are properly classified as independent contractors (as explained above)
8 and thus Sections 221-223 do not apply. *Id.* CPAY also argues any deductions were specifically
9 agreed to by Sales Representatives in their written agreements, and offset actual expenses incurred
10 by CPAY at the request of Sales Representatives, such as printing business cards, which are not
11 required by CPAY and are done for the convenience of the Sales Representative. *Id.* CPAY
12 further argues that any deductions were simply one step in calculating Sales Representatives’
13 commissions and therefore were not deductions from “earned” wages under Section 221. *Id.*; see
14 also *Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1337 (2006) (finding that Lab. Code § 221
15 “prohibits an employer only from collecting or receiving wages that have already been earned by
16 performance of agreed-upon requirements.”) CPAY also argues that not all Sales Representatives
17 experienced deductions, and that differences in the amount (if any) and types of deductions
18 experienced by different Sales Representatives would necessitate an unmanageable series of mini-
19 trials, thus precluding class certification of this claim. Haines Decl., ¶ 21.

20 **5. Claim for Unreimbursed Expenses**

21 Plaintiff alleges that he and other Sales Representatives incurred expenses, including
22 using their personal computers, cell phones, and vehicles in the course of their work for CPAY,
23 but that CPAY failed to reimburse those expenses in violation of Labor Code § 2802. Haines
24 Decl., ¶ 22. CPAY counters, first, that Sales Representatives were properly classified as
25 independent contractors as discussed above, and therefore no reimbursement was required. *Id.*
26 Indeed, CPAY points out, even if the *Dynamex* test otherwise applies to Sales Representatives,
27 the *Dynamex* test does not apply to reimbursement claims since the obligation to reimburse
28 employees is found in the Labor Code and not in the Wage Orders. *Id.*; see also *Becerra, supra*,

69 Cal.App.5th at 934. CPAY also argues this claim is not suitable for class treatment, as it would require individualized inquiries as to whether each Sales Representative incurred work-related expenses that were not reimbursed, how much those expenses were, and whether each Sales Representative's expenses were reasonable in his or her individual circumstances. Haines Dec., ¶ 22; *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) ("In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices").

6. Claims for Unpaid Wages and Meal and Rest Periods During Trainings at CPAY's San Rafael Location in 2017

Plaintiff alleges that, for himself and other Sales Representatives who attended training in San Rafael, California, which took place in 2017, CPAY failed to pay any wages and failed to provide meal and rest periods at the trainings. Haines Decl., ¶ 23. CPAY argues, first, that Sales Representatives are independent contractors who need not be paid hourly or provided meal or rest periods, as explained above. *Id.* CPAY further argues that trainings did not need to be compensated, because trainings are outside Sales Representatives' working hours, attendance is voluntary, and Sales Representatives did not perform productive work for CPAY while completing the training. *Id.*; see also *Wilson v. County of Santa Clara*, 68 Cal.App.3d 78, 87 (1977) (citing 29 C.F.R. § 785.27); DLSE Manual, § 46.6.3 (setting forth criteria for when training is not compensable). CPAY also asserts that Sales Representatives were free to take off-duty meal and rest periods while visiting CPAY's San Rafael, California location, and that there were ample breaks during the training sessions for them to do so. Lastly, CPAY argues individualized inquiries would be required to determine whether and why individual Sales Representatives received or did not receive meal or rest periods on each day of training, thereby precluding certification of this claim. Haines Decl., ¶ 23.

7. Claims Under Labor Code §§ 203, 226, and the PAGA

As a result of its alleged failure to pay all wages, Plaintiff asserts that CPAY failed to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code

§§ 203 and 226, respectively. Haines Decl., ¶¶ 24-25. Finally, Plaintiff seeks civil penalties under the PAGA based on the aforementioned claims. *Id.*, ¶ 26.

CPAY argues that Plaintiff’s derivative claims fail for the same reasons his underlying claims fail. CPAY further asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, precluding imposition of waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding “good faith dispute” precluded imposition of waiting time penalties). CPAY further contends any alleged wage statement violations could not be shown to be “knowing and intentional,” particularly given its good-faith defenses; that Plaintiff cannot show he or other employees “suffer[ed] injury” due to alleged wage statement violations, as required by Lab. Code § 226(e); and that Sales Representatives’ wage statements always accurately reflected amounts *paid* to them. Haines Decl., ¶ 24; *see also* *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (“The purpose of section 226 is to ‘document the paid wages to ensure the employee is fully informed regarding the calculation of those wages.’”) (citing *Soto v. Motel 6 Operating, L.P.*, 4 Cal.App.5th 385, 392 (2016)).

Finally, CPAY contends Plaintiff’s PAGA claim fails because the underlying claims fail. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”). CPAY further maintains that given its good-faith defenses, the Court would substantially reduce PAGA civil penalties even if it were to find in favor of Plaintiff on his underlying claims. Haines Decl., ¶ 26; *see also* Labor Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court’s discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because “the evidence showed...defendants took their obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer was “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

1 **C. DISCOVERY AND MEDIATION**

2 In preparation for mediation, the parties engaged in extensive informal discovery. CPAY
3 produced relevant records for a vast majority of putative class members for the putative class
4 period, including records indicating the number of merchants services each month for each class
5 member and the amounts paid to each class member; CPAY’s relevant written documents
6 applicable to Sales Representatives; and other relevant data and information. Haines Decl., ¶ 13.
7 Plaintiff analyzed and extrapolated the data produced by CPAY, which allowed Plaintiff to create
8 potential damages models in advance of mediation. *Id.* This discovery allowed the parties to
9 assess the merits and value of Plaintiff’s claims and CPAY’s defenses, as well as the chances for
10 class certification. *Id.*

11 The parties attended a full-day mediation on September 13, 2021 with Mr. Ortman.
12 Haines Decl., ¶ 14. The parties vigorously debated their legal positions, the likelihood of
13 certification of Plaintiff’s claims, and the legal bases for the claims and defenses. *Id.* The parties
14 did not reach a resolution at mediation. *Id.* Over the following months, however, the parties
15 continued their negotiations with Mr. Ortman’s assistance, and eventually reached a settlement
16 in principle. *Id.* Over the next several months, the parties negotiated the finer terms of the
17 settlement, ultimately resulting in the Settlement. *Id.*

18 **III. THE PROPOSED SETTLEMENT**

19 **A. ESSENTIAL TERMS OF THE SETTLEMENT**

20 Under the Settlement, CPAY will pay a non-reversionary Maximum Settlement Amount
21 (“MSA”) of \$1,475,000.00, with no claims process required for Settlement Class members to
22 receive payment. The monetary terms of the Settlement are summarized below:

23	• Maximum Settlement Amount (“MSA”):	\$1,475,000.00
24	• Minus Court-approved attorneys’ fees (up to one-third):	\$491,666.67
25	• Minus Court-approved verified costs (up to):	\$25,000.00
26	• Minus Court-approved Incentive Award (up to):	\$7,500.00
27	• Minus Amount Paid Set Aside as PAGA penalties:	\$75,000.00
28	• <u>Minus estimated settlement administration costs:</u>	<u>\$12,000.00</u>
	Net Settlement Amount (“NSA”):	\$863,833.33
	• PLUS 25% “PAGA Amount” to Settlement Class:	\$18,750.00
	Total Amount Paid to Settlement Class members:	\$882,583.33

1 **1. The Settlement Provides for Reasonable Monetary Payments**

2 After deducting amounts for a court-approved incentive award, administration costs,
3 attorneys' fees and costs, and PAGA payment to the LWDA, CPAY will pay at least \$882,583.33
4 to Settlement Class members. *See* Settlement, § 3(C). CPAY represents there are approximately
5 1,205 Settlement Class members. *Id.*, §§ 1, 3(E). Thus, the average Settlement Award is estimated
6 to be \$732.43. Haines Decl., ¶ 16. Payments will be distributed as follows. First, each Participating
7 Class Member (i.e., those Settlement Class members who do not opt out) will receive a
8 "Guaranteed Minimum Payment" of \$300.00 from the NSA. *See* Settlement, § 4(B). The
9 remainder of the NSA will be distributed to Participating Class Members based on their
10 proportionate number of "merchant-months" during the Class Period. Each Participating Class
11 Member's "merchant-months" will be calculated by multiplying the number of months they
12 performed services for CPAY during the Class Period by the average number of merchants they
13 serviced during those months. *Id.* Finally, in addition to the NSA, \$18,750.00 of the GSA is
14 designated the "PAGA Amount," and will be distributed to all Covered Class Members
15 (regardless of whether they opt out) who performed services for CPAY during the PAGA Period
16 (September 23, 2020 to the end of the Class Period), based on the proportionate number of months
17 they performed services for CPAY during the PAGA Period. *See* Settlement, § 4(C).

18 Payments from the NSA will be treated as 35% wages reported on a Form W-2, and as
19 65% interest and penalties reported on a Form 1099. *See* Settlement, § 4(E). Payments from the
20 PAGA Amount will be treated as 100% penalties. *Id.* CPAY will pay the employer's share of
21 payroll taxes on the amount designated as "wages" separate from, and in addition to, the MSA.
22 *Id.*, §§ 3(D), 4(E). Settlement Class members will have 60 days from the Notice mailing to object
23 or request to opt-out, or submit disputes, thereby providing ample time to review the Notice
24 without unduly delaying the Settlement. *See id.*, § 9(C)-(E).

25 Participating Class Members will be bound by the Settlement, and shall release all wage
26 and hour claims pled in the Action, or that could have been pled based on the facts alleged in the
27 Action, during the Class Period ("Class Released Claims"). *See* Settlement, § 2(A). All Covered
28 Class Members (regardless of whether they opt out) who performed services for CPAY during

the PAGA Period will release all claims for PAGA civil penalties based on the allegations underlying the Class Released Claims, arising during the PAGA Period. *See* Settlement, § 2(A).

2. Attorneys' Fees and Costs, Incentive Award, and PAGA Payment

At final approval, Plaintiff will separately apply for a Class Representative Incentive Award in the amount of \$7,500. *See* Settlement, § 3(C)(3). “[I]ncentive awards are fairly typical in class action cases...and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at final approval, Plaintiff’s requested payment is in recognition of the time and effort he expended on behalf of the Settlement Class, including providing factual information and documents to counsel, identifying potential witnesses, attending meetings with counsel to discuss the claims and theories at issue in the litigation, and otherwise actively participating in the prosecution of this case. Haines Decl., ¶ 30. Plaintiff respectfully submits that this requested payment is well within the range of permissible approval. *See, e.g., Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 1883188 at *10 (E.D. Cal. May 17, 2011) (approving \$7,500 award to each of five named plaintiffs from \$505,058.60 settlement).

The parties have also designated \$75,000 of the MSA as PAGA penalties, of which \$56,250 (75%) will be paid to the LWDA, with the remaining \$18,750 (25%) distributed to Covered Class Members (*see* Settlement, § 3(C)(5)), consistent with the PAGA’s requirement that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to aggrieved employees (Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of \$7,500 to LWDA from \$6.9 million settlement).

At final approval, Plaintiff’s counsel will request attorneys’ fees of one-third of the MSA (currently estimated at \$491,666.67), and up to \$25,000 in litigation costs. Settlement, § 3(C)(4). Plaintiff submits the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Plaintiff’s counsel have incurred

substantial attorneys' fees conducting pre-filing investigation; analyzing Plaintiff's claims; conducting legal research; analyzing payroll and other data to create a comprehensive damages model; preparing for and attending mediation; continuing settlement negotiations post-mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. Haines Decl., ¶ 29. Further, Plaintiff's counsel will incur significant future attorneys' fees in overseeing the Notice process, fielding phone calls from Covered Class Members, preparing the Final Approval Motion, and appearing at the Final Approval Hearing. *Id.*

It is appropriate to award attorneys' fees as a percentage of the "common fund" created by the settlement. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480 (2016) (holding "the percentage of fund method survives in California class action cases"). Counsel's request for fees of one-third of the MSA is well within the range of reasonableness and is typical for common fund settlements. *See Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have awarded percentage fees in the range of 20% to 50%). As will be fully briefed at final approval, counsel submit their request for fees is reasonable in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions class action settlements on court approval, which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role is to ensure the settlement agreement taken as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a presumption of fairness when a settlement is negotiated at arm's length by counsel. *See, e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

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1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the Settlement is fair, reasonable, and adequate in light of the balance of factors in this case.

a. The Strength of Plaintiff’s Case

Although he maintains his claims are meritorious, Plaintiff acknowledges there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described in section II.B., *supra*, CPAY presented multiple defenses to Plaintiff’s claims, both on the merits and to class certification. While Plaintiff was prepared to litigate his claims through class certification and ultimately trial, success was far from certain.

b. Risk, Expense, Complexity, and Duration of Further Litigation

Although the parties engaged in significant informal discovery, they had not completed formal written and deposition discovery, which would have required expenditure of substantial time and resources. Haines Decl., ¶ 28. Plaintiff also still had to file for class certification. *Id.* Even if Plaintiff obtained certification, the parties would incur considerable attorneys’ fees and costs through a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id.* This settlement avoids those risks and the accompanying expense. *Id.*

c. Risk of Maintaining Class Action Status

Plaintiff has not yet filed his class certification motion, and as such, the extent to which Plaintiff’s proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk there would not be a certified class at trial, or if there were, that it would consist of a significantly smaller group than the proposed Settlement Class, and the expected recovery would be significantly reduced. Thus, this factor supports preliminary approval.

1 **d. Amount Offered in Settlement Given Realistic Value of Claims**

2 The Settlement provides a fair and reasonable monetary recovery for the Settlement Class
3 for hotly disputed claims. Based on data provided by CPAY in advance of mediation, Plaintiff
4 analyzed potential damages due to CPAY's allegedly unlawful policies and practices. Plaintiff's
5 analyses of realistic expected recoveries for each theory of liability are set forth below:

6 **Unpaid Wages – Non-Productive Time: \$592,200**

7 Plaintiff alleges that CPAY failed to separately compensate Sales Representatives for
8 “non-productive time” such as time attending telephonic trainings or picking up and dropping off
9 equipment for merchants. Based on data provided by CPAY, Plaintiff estimates that Sales
10 Representatives performed services for approximately 140,000 weeks during the Class Period,
11 and Plaintiff further estimates that Sales Representatives spent an average of about one hour
12 performing non-productive tasks per week. Haines Decl., ¶ 19. The average minimum wage in
13 California during the Class Period is about \$11.75 per hour, and Plaintiff therefore estimated
14 CPAY's potential exposure for unpaid “non-productive” time as: 140,000 hrs * \$11.75 min. wage
15 * 2 (liquidated damages under Labor Code § 1194.2) = \$3,290,000. *Id.* But as noted above, CPAY
16 presented several defenses to this claim, including but not limited to: that Sales Representatives
17 were properly classified as independent contractors, that even if they were employees they were
18 bona fide outside salespersons not entitled to a guaranteed minimum wage, that all activities
19 performed by Sales Representatives are “directly related” to their sales activities and therefore
20 they perform little to no “non-productive time,” that most Sales Representatives only worked a
21 handful of hours each week and did not attend regular trainings or otherwise perform any potential
22 non-productive work, and that individual inquiries as to whether each Sales Representative was
23 properly classified (as well as individualized damages questions) would preclude class
24 certification. *Id.* Based on these defenses, Plaintiff discounted the maximal value of this claim by
25 40% for risk of non-certification, and by an additional 70% for risk of losing on the merits or
26 failing to recover the full amount sought, to arrive at a realistic exposure of \$592,200. *Id.*

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1 Failure to Separately Compensate for Rest Periods: \$265,740

2 Plaintiff alleges CPAY failed to separately compensate Sales Representatives for rest
3 periods, and therefore failed to authorize and permit paid rest periods, entitling Plaintiff and other
4 Sales Representatives to rest period premium pay. Haines Decl., ¶ 20. Based on Plaintiff's
5 experience and conversations with other Sales Representatives, Plaintiff estimated that Sales
6 Representatives who serviced at least 20 merchants in any given month generally worked over
7 3.5 hours per day and would therefore be entitled to rest periods on each day worked. *Id.* Based
8 on data provided by CPAY, there were approximately 4,429 months worked by Sales
9 Representatives during the Class Period where they serviced at least 20 merchants, and Plaintiff
10 therefore estimated 88,580 workdays (approximately 20 workdays per month) in which Sales
11 Representatives worked over 3.5 hours per day and were therefore entitled to a rest period. *Id.*
12 Plaintiff further calculated, based on data provided by CPAY, that Sales Representatives' average
13 rate of pay was approximately \$20 per hour. *Id.* Plaintiff therefore calculated CPAY's potential
14 exposure for failure to separately compensate for rest periods as: $88,580 * \$20 = \$1,771,600$. *Id.*
15 But as noted above, CPAY maintains that Sales Representatives were properly classified as
16 independent contractors or, alternatively, outside salespersons, and therefore would not be
17 entitled to rest periods. *Id.* CPAY further argues that even if separate compensation were required
18 for rest periods, its liability would be limited to back-pay for the rest periods themselves (i.e. pay
19 for the 10 minutes per rest period) as opposed to the rest period penalties under Labor Code §
20 226.7 (measured as an hour of pay per workday) sought by Plaintiff, and thus its potential liability
21 would be drastically lower. CPAY also argues this claim would not be amenable to class
22 certification, as individual inquiries would be required to determine whether each Sales
23 Representative was properly classified, and as to whether and how often they would have been
24 entitled to rest periods on each workday. In light of these defenses, Plaintiff discounted CPAY's
25 maximum exposure by 40% to account for the risk of non-certification, and an additional 75%
26 for risk of losing on the merits or failure to recover the full amount sought, to arrive at an estimated
27 exposure of approximately \$265,740. *Id.*

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1 Unlawful Deductions: \$182,946

2 Plaintiff alleges CPAY took unlawful deductions from Sales Representatives’
3 commissions, including deductions for the cost of business cards, shipping costs, and other
4 expenses. Haines Decl., ¶ 21. Based on data provided by CPAY and on Plaintiff’s experience and
5 conversations with other Sales Representatives, Plaintiff estimated CPAY took about \$20 per
6 month in allegedly unlawful deductions, and that Sales Representatives collectively worked
7 approximately 35,182 months during the Class Period, for a total potential exposure of \$703,640.
8 *Id.* As noted above, CPAY presented several defenses to this claim, including that Sales
9 Representatives were properly classified as independent contractors, that any deductions taken
10 were authorized in advance by Sales Representatives and were simply one step in the process of
11 calculating commissions rather than deductions from already-earned wages, and that differences
12 in the amount, type, and frequency of deductions would preclude class certification. *Id.* Plaintiff
13 thus discounted the maximal exposure by 35% for risk of non-certification, and by an additional
14 60% for risk of losing on the merits, for an estimated realistic exposure of \$182,946. *Id.*

15 Unreimbursed Expenses: \$279,697

16 Plaintiff alleges that CPAY failed to reimburse Sales Representatives for use of their
17 personal vehicles, computers, and cell phones in performing their duties. Haines Decl., ¶ 22.
18 Based data provided by CPAY and on his own experience as a Sales Representative, Plaintiff
19 estimated an average of about \$25 per month for reasonable business-related cell phone and
20 computer use, and about 50 miles per month of business-related vehicle use. *Id.* Based on an
21 average IRS mileage rate during the Class Period of about \$.56, and 35,182 months worked by
22 Sales Representatives, Plaintiff estimated a total potential exposure as: [(50 miles * \$.56/mile) +
23 \$25/mo.] * 35,182 months = \$1,864,646. *Id.* As noted above, CPAY contends that Sales
24 Representatives were properly classified as independent contractors and therefore not entitled to
25 reimbursement; that even if under *Dynamex*, Sales Representatives should be classified as
26 employees, *Dynamex* doesn’t apply to expense reimbursement since such claim is based on the
27 Labor Code and not the Wage Order; and that this claim is not suitable for class treatment, as it
28 would require individual inquiries as to whether each Sales Representative incurred work-related

1 expenses that were not reimbursed, how much those expenses were, and whether they were
2 reasonable. *Id.* Based on these defenses, Plaintiff discounted this claim by 50% for risk of non-
3 certification, and an additional 70% for risk of losing on the merits or failing to recover the full
4 amount sought, to arrive at an estimated realistic exposure of \$279,697. *Id.*

5 Unpaid Wages and Meal & Rest Period Premiums – In-Person Trainings: \$3,120

6 Plaintiff alleges CPAY failed to pay Plaintiff and other Sales Representatives any wages
7 for time spent attending in-person trainings at CPAY's San Rafael, California location in 2017,
8 and failed to provide them with meal and rest periods during those trainings. Haines Decl., ¶ 23.
9 Based on data provided by CPAY, Sales Representatives attended an aggregate total of
10 approximately 15 training days, so Plaintiff estimated 120 hours of unpaid time (15 days * 8
11 hrs/day). *Id.* The minimum wage in California in 2017 was \$10.50, and therefore Plaintiff
12 estimated CPAY's potential exposure for unpaid wages for these trainings as: 120 hrs * \$10.50 *
13 2 = \$2,520. *Id.* Further, as noted above, Plaintiff estimated Sales Representatives' average rate of
14 pay as about \$20 per hour, and Plaintiff assumed a meal period violation and rest period violation
15 on each day of training. *Id.* Thus, Plaintiff assumed meal and rest period damages for these
16 trainings as: 15 days * \$20 * 2 violations/day = \$600, for a total of \$3,120 in potential damages
17 for CPAY's failure to pay any wages or provide meal and rest periods for in-person trainings. *Id.*
18 As noted *supra*, however, CPAY maintains that Sales Representatives are independent
19 contractors who need not be paid hourly or provided meal or rest periods, as explained above;
20 that trainings did not need to be compensated, because trainings are outside of working hours,
21 attendance is voluntary, and Sales Representatives did not perform productive work for CPAY
22 while completing the training; that Sales Representatives were free to take off-duty meal and rest
23 periods while visiting CPAY's San Rafael, California location, and that there were ample breaks
24 during the training sessions for them to do so; and that individual inquiries would be required to
25 determine whether and why individual Sales Representatives received or did not receive meal or
26 rest periods on each day of training, thereby precluding certification of this claim. Although these
27 defenses warranted discounting the maximum exposure, in light of the relatively small amount of
28 underpayment, Plaintiff did not discount this claim for purposes of his damages analysis. *Id.*

1 Wage Statement Penalties: \$164,357

2 Based on information provided by CPAY, there were approximately 14,449 pay periods
3 worked by Covered Class Members within the one-year liability window under Labor Code §
4 226. Haines Decl., ¶ 24. In calculating CPAY's exposure, Plaintiff assumed he could recover the
5 "initial" wage statement penalty of \$50 for each violation, for a total of \$722,450 (14,449 pay
6 periods * \$50) in potential penalties. *Id.*; see also Lab. Code § 226(e) (providing \$50 penalty for
7 "initial" violations); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding
8 "initial" violation rate applies until employer notified it violated Labor Code); *Patel v. Nike Retail*
9 *Svcs., Inc.*, 58 F.Supp.3d 1032, 1042-43 (N.D. Cal. 2014) (citing *Amaral* and applying "initial"
10 \$50 penalty to all pay periods in calculating amount-in-controversy for wage statement claim).
11 However, given CPAY's arguments that no violations occurred, that class members suffered no
12 "injury," and that any alleged violations were not "knowing and intentional," as well as risks
13 associated with Plaintiff's underlying claims discussed above, Plaintiff discounted the maximum
14 exposure by 35% for risk of non-certification, and by an additional 65% for risk of being
15 unsuccessful on the merits, for an estimated realistic exposure of \$164,357. Haines Decl., ¶ 24.

16 Waiting Time Penalties: \$299,808

17 Based on Plaintiff's analysis of the data provided by CPAY in connection with mediation,
18 there were approximately 347 Sales Representatives who stopped performing services for CPAY
19 since April 2017. Haines Decl., ¶ 25. Plaintiff further estimated an average waiting time penalty
20 of about \$4,800 (\$20 * 8 hours * 30 days), and thus calculated CPAY's maximum waiting time
21 penalty exposure as approximately \$1,665,600 (347 * \$4,800). *Id.* As noted above, however,
22 CPAY asserts it has strong, good-faith defenses to Plaintiff's underlying claims, and that any
23 failure to pay wages was therefore not "willful" as a matter of law. *Id.* CPAY further contends
24 that because the waiting time claim is derivative of Plaintiff's underlying wage claims, Plaintiff
25 would need to overcome CPAY's defenses, both as to class certification and as to the merits, to
26 his underlying claims. Based on these defenses, Plaintiff discounted CPAY's maximum exposure
27 by 40% for risk of non-certification and by an additional 70% for risk of being unsuccessful on
28 the merits, to arrive at an estimated total of \$299,808. *Id.*

1 PAGA Civil Penalties: \$144,490

2 Plaintiff estimated a maximum PAGA exposure of \$1,444,900, based on 14,449 pay
3 periods at the \$100 “initial” violation rate under Lab. Code § 2699(f). Haines Decl., ¶ 26; *Amaral*,
4 163 Cal.App.4th at 1209. However, these penalties derive from Plaintiff’s underlying claims, each
5 of which CPAY vigorously disputes. *Green v. Lawrence Service Co.*, No. LA-CV-12-6155-JAK
6 (VBKx), 2013 WL 3907506 at *5, fn. 5 (C.D. Cal. July 23, 2013) (PAGA claim’s success is
7 determined by merits of underlying claims). In addition, CPAY argued that even if Plaintiff were
8 to prevail on some of his underlying claims, he could not show a violation in each pay period.
9 CPAY further argues that the PAGA grants trial courts discretion to reduce PAGA civil penalties
10 (Lab. Code § 2699(e)(2)), and that the Court would reduce penalties significantly given CPAY’s
11 good-faith defenses. *Id.* Thus, Plaintiff discounted the maximum figure by 60% for risk of losing
12 on the merits and/or not recovering a PAGA penalty for each pay period, and by an additional
13 75% for risk of the Court reducing penalties, to arrive at an estimated exposure of \$144,490. *Id.*;
14 *see also, e.g., Fleming*, 2011 WL 7563047 at *4 (reducing PAGA penalties by more than 82%);
15 *Carrington*, 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just \$5 per pay period).

16 Using these figures, Plaintiff predicted the realistic total recovery for the Settlement Class
17 would be approximately \$1,932,358. Haines Decl., ¶ 27. The proposed settlement of \$1,475,000
18 thus represents over 76.3% of Plaintiff’s reasonably forecasted recovery. *Id.* Preliminary approval
19 is therefore appropriate, as the Settlement will provide significant monetary relief to the
20 Settlement Class.

21 **e. The Experience and Views of Counsel**

22 “Parties represented by competent counsel are better positioned than courts to produce a
23 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter.*
24 *Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience
25 litigating wage and hour class actions from both the plaintiff and defense side, and have been
26 appointed class counsel in numerous cases alleging similar claims. Haines Decl., ¶¶ 3-7. Counsel
27 conducted an in-depth review of CPAY’s policies, payroll and other records, and other relevant
28 data, and drew on their extensive experience to assess Plaintiff’s claims. *Id.*, ¶¶ 13, 17-26. The

Settlement was also reached with the assistance of Mr. Ortman, a respected wage and hour class action mediator. *Id.*, ¶ 14. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

2. The Preliminary Approval Standard Is Met

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

As noted, the Settlement reflects over 76.3% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is within the range of possible approval.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations, and a full-day mediation with an experienced mediator. Thus, the Settlement is entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiff carefully vetted the claims at issue, and conducted a detailed analysis of the relevant data and information. Haines Decl., ¶¶ 17-26. Thus, this factor strongly supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

Preliminary approval of the Settlement is warranted because there are no obvious deficiencies. The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees, costs, Plaintiff's incentive award, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification of a settlement class under California law because: 1) the individuals in the Settlement Class are ascertainable and numerous; 2) common questions of law and fact predominate; 3) Plaintiff's claims are typical of

the claims of the Settlement Class; and 4) Plaintiff and his counsel will fairly and adequately represent the interests of the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is “ascertainable” where members “may be readily identified without unreasonable expense or time by reference to official [or business] records.” *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes Sales Representatives who performed services for CPAY during the Class Period. Thus, they can be readily identified from CPAY’s records. CPAY represents there are about 1,205 Covered Class Members, rendering it impracticable to bring them all before the Court. *See* Settlement, § 1. Thus, numerosity is satisfied.

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, “common or individual,” are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff’s claims are predicated primarily on CPAY’s alleged misclassification as independent contractors under *Dynamex*, and alleged failures to pay wages, provide meal and rest periods, and reimburse business expenses. Such claims are commonly held proper for class certification. *See, e.g., Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (2013) (certifying meal & rest period claims); *Cochran v. Schwan’s Home Service, Inc.*, 228 Cal.App.4th 1137 (2014) (reversing denial of certification of reimbursement claim); *Moreno v. JCT Logistics, Inc.*, No. EDCV 17-2489 JGB (KKx), 2019 WL 3858999 (C.D. Cal. May 29, 2019) (certifying various wage claims based on allegation that workers were misclassified under *Dynamex*).

3. The Named Plaintiff’s Claims Are Typical

The typicality requirement is satisfied where class representatives have claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff’s claims are typical of those held by Covered Class Members. Plaintiff performed services for CPAY as a Sales Representative during the Class Period, and he was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. Plaintiff asserts he was misclassified as an independent contractor, was not paid

1 separately for rest periods or non-productive time, was not reimbursed for expenses, had unlawful
2 deductions from his wages, and received inaccurate wage statements and was not paid all final
3 wages as a result. *See* Declaration of Timothy Isaac, ¶¶ 2-6. Thus, typicality is satisfied.

4 **4. Plaintiff and Class Counsel Will Adequately Represent the Class**

5 The adequacy requirement examines conflicts of interest between named parties and the
6 class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155
7 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement
8 Class, as there are no known conflicts between Plaintiff or his counsel and the Settlement Class.
9 *See McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where
10 there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no
11 interests antagonistic to those of the proposed class). Class Counsel also have extensive
12 experience in wage and hour class action litigation, as noted above.

13 **C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE**

14 The Court should order distribution of the proposed Notice by U.S. Mail, using last known
15 mailing addresses provided by CPAY. *See* Settlement, § 9. This is the “best notice practicable”
16 under the circumstances as it provides “individual notice to all members who can be identified
17 through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff
18 proposes the Settlement be administered by Phoenix Settlement Administrators, an experienced
19 class action settlement administrator. *See* Jodey Lawrence Declaration and exhibits. CPAY will
20 provide Covered Class Member addresses to Phoenix, who will also run all addresses through the
21 U.S. Postal Service National Change of Address database and/or perform “skip traces” to obtain
22 current addresses. *See* Settlement, § 9(B) & (F).

23 The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises
24 Covered Class Members of the nature of the claims; the basic contentions and denials of the
25 parties and the key terms of the Settlement; the 60-day deadline to opt out, object, or submit a
26 dispute and the procedures by which to do so; explains the recovery formula and expected
27 recovery amount for each Covered Class Member; and explains the releases of claims included in
28 the Settlement. *See* Haines Decl., Exh. A to Exh. 1. The proposed Notice also includes the final

1 approval hearing date and time, and provides contact information for Class Counsel and the
2 administrator in the event Covered Class Members have any questions about the Settlement. *Id.*
3 This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method
4 of reaching Covered Class Members.

5 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

6 Finally, the Court should set a hearing for final approval of the settlement on a date
7 appropriately scheduled to follow Covered Class Members' response deadline. *See* Cal. Rule of
8 Court 3.769.

9 **V. CONCLUSION**

10 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
11 approve the proposed Settlement, provisionally certify the Settlement Class, and enter the
12 Proposed Order submitted concurrently herewith.

13
14 Dated: August 15, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

15
16 By:



Paul K. Haines
Attorneys for Plaintiff