Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Benjamin H. Haber (SBN 315664)
benjamin@wilshirelawfirm.com
Arrash T. Fattahi (SBN 333676)
afattahi@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

MARTIN ORTIZ, individually, and on behalf of all others similarly situated, *Plaintiff*, v. TARA MATERIALS, INC., a Georgia corporation, and DOES 1 through 10, inclusive, *Defendants*.	Case No. 37-2021-0001473-CU-OE-CTL **CLASS ACTION** [*Assigned to:* Hon. Eddie Sturgeon, Dept. C-67] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** [*Filed concurrently with*: Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Final Approval of Class Action Settlement; Declaration of Martin Ortiz; Declaration of Jarrod Salinas; [Proposed] Order and Judgment Granting Plaintiff's Motion for Final Approval of Class Action Settlement] FINAL APPROVAL HEARING Date: May 26, 2023 Time: 9:00 a.m. Dept: C-67

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

PLEASE TAKE NOTICE that on May 26, 2023, at 9:00 a.m., in Department C-67 of the San Diego County Superior Court, 330 West Broadway, San Diego, California 92101, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq*., Plaintiff Martin Ortiz ("Plaintiff") will move the Court for an Order granting final approval of the proposed class action settlement between Plaintiff and Defendant Tara Materials, Inc. Plaintiff further moves the Court for an Order:

1. Certifying a Class for settlement purposes only;
2. Approving the settlement as fair and reasonable and finding that class members were given notice of the settlement, and advised of their right to participate in the settlement, object to the settlement, or exclude themselves from the settlement, in a reasonable manner;
3. Appointing Plaintiff Martin Ortiz as Class Representative for settlement purposes only, and approving payment of $2,500.00 to Plaintiff for his services as the Class Representative;
4. Appointing Plaintiff's Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes only;
5. Approving payment of settlement administrative expenses to Phoenix Settlement Administrators in the amount of $6,500.00;
6. Approving payment of up to $46,666.67 in attorney's fees, which is 33 1/3% of the Settlement Amount of $140,000.00, and costs of $8,473.35 for litigating this action to Class Counsel;
7. Approving the PAGA Settlement in the amount of $5,000.00, with $3,750.00 to be paid to the California Labor Workforce Development Agency;
8. Directing that the clerk of the Court enter the Court's order as a final judgment;
9. Without affecting the finality of the final judgment, reserving continuing jurisdiction over the parties for the purposes of implementing, enforcing and/or administering the Settlement or enforcing the terms of the judgment.

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

Dated: May 4, 2023

WILSHIRE LAW FIRM

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

Attorneys for Plaintiff

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I. INTRODUCTION

Plaintiff Martin Ortiz ("Plaintiff") seeks final approval of a proposed $140,000.00 non-reversionary, wage and hour class action settlement with Defendant Tara Materials, Inc. ("Defendant," and together with Plaintiff, the "Parties").

The proposed Settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the Settlement was reached through extensive, mediated arm's-length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently, and Class Counsel is experienced in similar wage-and-hour litigation. The Settlement will provide substantial monetary payments to approximately 55 class members.[1] Upon the Court's approval of the settlement, participating class members will receive an **estimated average payment of $1,169.70**. (Declaration of Jarrod Salinas ["Salinas Decl."], ¶ 12.) Among the class members, the **estimated highest payment will be $2,953.08** and the estimated lowest payment will be $32.81. (*Id.*) As of filing this Motion, there are no objections to the settlement, no disputes to the number of workweeks, and no requests for exclusion. (*Id.* at ¶¶ 7-9.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Plaintiff's request for attorneys' fees in the amount of up to $46,666.67 (which is one-third of the Settlement Amount), reimbursement of costs and expenses in the amount of $8,473.35, an enhancement in the amount of $2,500.00 to Plaintiff, Administration Expenses Payment of $6,500.00, and a PAGA Settlement of $5,000.00, with a 75% allocation to the California Labor Workforce Development Agency ("LWDA") in the amount of $3,750.00, are also reasonable and thus should be approved by the Court. Accordingly, Plaintiff respectfully requests the Court grant final approval of the Settlement.

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[1] In Plaintiff's preliminary approval motion, Plaintiff indicated that there were approximately 59 class members at that time based on the initial information provided by Defendant. In the final class mailing list provided by Defendant to the Settlement Administrator, the list states that there are 55 class members in the class period. (Salinas Decl., ¶ 3.)

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims and Relevant Background

This is a wage and hour class and Private Attorneys General Act ("PAGA") (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant specializes in the manufacturing of printable canvas materials on which artists paint. (Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ["Marquez Decl."], ¶ 2.)

Plaintiff alleges that Defendant's payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts for each workday. Plaintiff further alleges that Defendant engaged in an unlawful rounding scheme which led to the underpayment of wages. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Plaintiff further alleges that Defendant failed to reimburse employees for all necessary business-related expenditures. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, failure to indemnify employees for expenditures, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.) Defendant denies all allegations.

On January 13, 2021, Plaintiff filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); and (7) unfair business practices (Cal. Bus. & Prof. Code §§

17200, *et seq.*). On March 3, 2021, Defendant removed this action to the United States District Court, Southern District of California based on the assumption that the District Court maintained federal diversity jurisdiction over this matter. The case was subsequently remanded back to state court because federal subject matter jurisdiction did not exist. (*Id.* at ¶ 4.)

On March 20, 2023, following the Court granting Plaintiff leave to file an amended complaint, Plaintiff filed a First Amended Complaint, which added causes of action for Defendant's failure to indemnify employees for expenditures (Cal. Lab. Code § 2802) and civil penalties under PAGA. (*Id.* at ¶ 5.)

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

Following the remand back to state court, the Parties exchanged documents and information before mediating this action. Defendant produced timekeeping and payroll records for a sampling of the putative class members. Defendant also provided documents of their wage and hour policies and practices during the class period, and information regarding the total number of current and former employees in its informal discovery responses. (*Id.* at ¶ 6.)

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

C. <u>Settlement Negotiations</u>

On January 31, 2022, the Parties participated in private mediation with experienced class action mediator, Gig Kyriacou, Esq. The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id.* at ¶ 8.)

After extensive negotiations and discussions regarding the strengths and weaknesses of

Plaintiff's claims and Defendant's defenses, the Parties were able to reach a resolution, the material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 9; **Ex. 1** [Joint Stipulation and Settlement Agreement of Class Action and PAGA Representative Claims ("Settlement" or "Settlement Agreement")].)

Class Counsel submitted the proposed Settlement and Amendment to Settlement to the LWDA before filing this Motion for Final Approval. (*Id.* at ¶ 13.)

D. Key Terms of the Proposed Settlement

Under the Settlement, Defendant will pay $140,000.00 to resolve this Litigation. This amount is all-inclusive. The Settlement's key terms include:

1. Settlement Class: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: All current and former non-exempt employees who worked for Defendant within the State of California during the Settlement Period. (Settlement, Section 1.5.)

2. Settlement Period: The Settlement Period means the period from January 13, 2017 through March 15, 2022. (Settlement, Section 1.9.)

3. PAGA Period: The PAGA Period means the period from January 19, 2020 through March 15, 2022. (Settlement, Section 1.10.)

4. Participating Settlement Class Member(s): Participating Settlement Class Member means any Class Member who does not submit a timely and valid Request for Exclusion. (Settlement, Section 1.29.)

5. PAGA Group Members: PAGA Group Members means all current and/or former non-exempt employees who worked for Defendant during the PAGA Period. A PAGA Group Member may not request exclusion from the PAGA Payment. (Settlement, Section 1.7.)

6. Total Settlement Amount: This amount is $140,000.00, which is the total amount that Defendant will pay to: Participating Settlement Class Members (which includes the employee payroll taxes withheld from the Wage Component of each Participating Settlement Class Member's Settlement Award); the Class Representative; Class Counsel; the Settlement Administrator; and the LWDA (i.e., the PAGA Payment). (Settlement, Section 1.43.)

7. Uncashed Checks: Each Participating Settlement Class Member will have one hundred eighty (180) calendar days from the date of the mailing of the individual Settlement Award check to cash the check sent to the Participating Settlement Class Member. Upon the 180-day deadline, the checks will automatically be cancelled by the Settlement Administrator if not deposited, cashed, or otherwise negotiated beforehand. Funds associated with such cancelled checks will be remitted to the Controller of the State of California pursuant to the Unclaimed Property Law, California Civil Code § 1500, *et seq.*, to be held in trust for those who did not timely cash their checks, until such time as they claim their property. (Settlement, Section 3.3.4.)

8. Release as to All Participating Settlement Class Members: As of the Effective Date (as that term is defined in Section 1.19 of the Settlement Agreement), all Participating Settlement Class Members, including each of their respective attorneys, agents, spouses, executors, representatives, guardians ad litem, heirs, successors, and assigns, release Tara Materials and each of its former or present parents, subsidiaries, affiliates, investors, partners, owners, related organizations, predecessors or successors, and all agents, employees, officers, directors, shareholders, partners, members, managers, holding companies, insurers, and attorneys thereof (the "Released Parties") from all claims asserted under any applicable laws and/or regulations relating to any and all facts and claims asserted in the Action or any other claims, with the exception of all claims under the PAGA, that could have been asserted in the Action based on the facts alleged, including without limitation claims related to minimum wages, overtime and double time wages (including, but not limited to, any claims for additional wages owed due to "rounding" or "off the clock" work); meal and rest breaks; failure to maintain accurate employment records; wage statement violations; separation pay violations; failure to reimburse business expenses; and unfair business practices arising during the Settlement Period. (Settlement, Sections 1.34, 1.37, and 4.1.)

9. PAGA Payment: The settlement includes $5,000.00 allocated to Plaintiff's claims under PAGA, with 75% of which ($3,750.00) being paid to the LWDA and 25% ($1,250.00) being paid to the PAGA Group Members. (Settlement, Section 1.27.)

10. Net Settlement Fund: The "Net Settlement Fund" means the funds available to pay the Settlement Awards to all Participating Settlement Class Members. The Net Settlement Fund

shall constitute the Total Settlement Amount minus the sum of the: (1) Attorneys' Fees and Costs; (2) Service Award; (3) Settlement Administration Costs; and (4) PAGA Payment made to the LWDA. (Settlement, Section 1.24.)

11. Tax Allocation: Any settlement money paid to Participating Settlement Class Members will be allocated as 20% wages and 80% penalties/interest. (Settlement, Section 3.3.6.)

12. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed $2,500.00. (Settlement, Sections 1.40 & 3.4.) This amount is for Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to California Civil Code, § 1542. (*Id.*) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Fund to be distributed between the Participating Settlement Class Members on a pro-rata basis. (*Id.*)

13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% ($46,666.67) of the Total Settlement Amount, plus out-of-pocket costs not to exceed $15,000.00. (Settlement, Section 3.5.)

14. Notice of Proposed Class Action Settlement: The Notice set forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and an explanation of how the settlement allocations are calculated. (Salinas Decl., Ex. A.) Class Members were notified by first-class mail of the settlement. (*Id*. at ¶¶ 5-6.) Phoenix Settlement Administrators, the approved Settlement Administrator, undertook its best efforts to ensure that the notice was provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. (*Id*. at ¶ 6.) Notice was also provided in English and Spanish. (*Id*. at ¶ 5.)

E. Preliminary Settlement Approval, Class Notice, and Settlement Administration.

On January 30, 2023, this Court issued its Order granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

Notices were subsequently mailed out to 55 class members in English and Spanish. (Salinas Decl., ¶¶ 5-6, Ex. A.) Two notice packets were returned without a forwarding address, but Phoenix promptly performed a skip trace for those individuals and re-mailed their notice packets to updated addresses. (*Id.* at ¶ 6.) **There were <u>zero</u> objections to the settlement and <u>zero</u> requests for exclusion**. (*Id.* at ¶¶ 7-8.) If the Court approves the settlement, the participating class members will receive an **estimated average net payment of $1,169.70**, with the **<u>estimated highest net payment being $2,953.08</u>** and the estimated lowest net payment being $32.81. (*Id.* at ¶ 12.)

III. <u>THE SETTLEMENT MERITS FINAL APPROVAL</u>

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See e.g., Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors to be considered in evaluating a class action settlement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through proceedings, the experience and views of counsel, the presence of a government participant, and the reaction of the class members to the proposed settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is fair and reasonable exists where, as here, the following four factors are present: "(l) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.)

Whether a class action settlement should be approved is a question committed to the trial court's broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give "[d]ue regard ...to what is otherwise a private consensual agreement between the parties." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) "The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*. [internal citations omitted].)

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A. **<u>The Settlement Reflects a Reasonable Compromise.</u>**

The Settlement represents a significant percentage of the maximum damages that may have been awarded to the class in this case if they had prevailed at trial. The Settlement, of course, reflects a compromise. The amount of settlement benefits takes into account all the litigation risks related to obtaining class certification, proving Defendant's liability, and proving Class Members' damages. In light of all the defenses asserted by Defendant which posed substantial litigation risks, a compromise effectively awarding Class Members a significant percentage of the maximum value of their claims is eminently fair and reasonable.

Because of the Settlement, and through the efforts of Plaintiff and Class Counsel, Class Members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

To be sure, Defendant ultimately has to pay less under the settlement than it likely would have had to pay if Plaintiff had achieved complete success resulting in a favorable judgment on all claims at trial. But an ideal settlement requiring a defendant to pay the full amount of its potential damages is rarely achieved. As the Ninth Circuit has observed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" (*Officers for Justice v. Civil Service Commission of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 624.) Thus, a proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (*Id*. at p. 625.) A court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*.)

B. **<u>The Settlement was Reached After Arms-Length Negotiations Following Informal Discovery.</u>**

The Settlement was reached following extensive negotiations between Class Counsel and Defendant's counsel. (Marquez Decl., ¶¶ 6-9.) Prior to the mediation, Defendant provided Class Counsel with class-wide information and documents, including its wage and hour policies and practices during the class period and an extensive sampling of time and pay records for class members. (*Id.*) At the mediation that was conducted by experienced class action mediator Gig Kyriacou, Esq, the Parties were able to reach a resolution, the material terms of which are encompassed within the Settlement and Amendment to Settlement. (*Id.* at ¶ 9, **Ex. 1**.)

Counsel participated in lengthy arms-length settlement negotiations that involved numerous discussions, exchanges of information and candid evaluation of the respective Parties' strengths and weaknesses. (*Id.* at ¶ 8.) There is no evidence to suggest that the Parties did not have sufficient information to make informed decisions about the value of this case or that the Settlement is a product of fraud, overreaching or collusion.

C. Class Counsel Has Extensive Experience in Class Action Litigation

Class Counsel has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 30-42.) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id.*)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of Defendant's defenses against certification, the strength of Defendant's defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement and Addendum to Settlement Agreement would be in the best interests of class members in light of the significant risks of litigation is entitled to great weight. (*See Kullar, supra,* 168 Cal.App.4th at 129 ["The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arms-length transaction entered without self-dealing or other potential misconduct"].)

D. There Are No Objections To The Settlement.

No class members objected to the Settlement and **no class members requested exclusion from the Settlement**. (Salinas Decl., ¶¶ 7-8.) The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc.*

Marketing and Sales Practices Litigation (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few objections and requests for exclusion support approval].)

Factors to be considered in evaluating a class action settlement include "the reaction of the class members to the proposed settlement." (*Kullar, supra,* 168 Cal.App.4th at p. 128.) The reaction here has been overwhelmingly positive. Courts have approved class action settlements in lesser circumstances. (*See, e.g., Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S. Dist. LEXIS 5976, 2001 WL 34089697, *8 [court found that the "class members overwhelmingly support[ed] the settlement" where there were over 37,000 notices sent out, 2,745 class members participated in the settlement, "only nine objections were submitted", and there were 86 timely opt-outs and over 20 additional defective or untimely opt-outs, "these indicia of the approval of the class of the terms of the settlement support a finding of fairness under Rule 23"], *citing Hanlon v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous objections and appeal by objectors, "fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness", court did not abuse its discretion in approving settlement].)

IV. THE COURT SHOULD AWARD PLAINTIFF THE REQUESTED AMOUNTS OF ATTORNEYS' FEES, COSTS AND AN ENHANCEMENT PAYMENT.

Under the Settlement, subject to the Court's approval, Defendant has agreed not to oppose Class Counsel's request for reasonable attorneys' fees in the amount of up to $46,666.67, which is 33 1/3% of the Settlement Amount, and Litigation costs in an amount not to exceed $8,473.35 for litigating this Action, which shall be paid from the Settlement Amount. In addition, Defendant will not oppose an application for the Administrative Expenses Payment in the amount of $6,500.00 and a Class Representative Enhancement payment in the amount of $2,500.00, to be paid from the Settlement Amount. The proposed attorneys' fees and expenses were disclosed to the Class Members in the Notice of Proposed Class Action Settlement.

"In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba, supra,* 91 Cal.App.4th at pp. 234-235.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Id.* at p. 254; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.)

A. <u>Counsel Requests an Award of Fees Based on the "Common Fund" Method.</u>

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

Class Counsel intends to seek an award of attorneys' fees on the "percentage of recovery/ common fund" theory. The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995) 15 Cal. 3d 162, 167, the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share."

The California Supreme Court affirmed in *Laffitte v. Robert Half Int'l Inc*. (2016) 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Id*. at p. 503.) The court explained: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts." (*Id.* [internal citations omitted].)

Several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote: "This court is compelled to ask, 'Is this process necessary?' Under a cost-benefit analysis, the answer would be a resounding, 'No!'" (*In re Activision Securities Litigation* (N.D. Cal 1989) 723 F. Supp. 1373, 1375.) The percentage approach is preferable to the lodestar because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on judicial resources. (*Id*. at pp. 1378-79.) The Ninth Circuit now routinely uses the percentage of the common fund approach to determine the award of attorney's fees. (*See*, *e.g., In re Pacific Enterprises Securities City and County of San Francisco Litigation* (9th Cir. 1994) 47 F.3d 373, 378-79 [approving attorney's fee of 33 1/3%].)

1. The Standard Fee Award in Class Actions Has Resolved Itself As One-Third Of The Recovery In Common Fund Cases.

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

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The settled-for one-third fee award is consistent with the average fee award in class actions. Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, Plaintiff's fee request is in line with the prevailing guidelines established in California case law and academic literature, and is consistent with awards in California. Accordingly, Plaintiff requests that the Court approve the attorneys' fees as negotiated by the Parties and requested herein.

2. This Matter Involves A "Fee-Shifting" Provision of the Labor Code.

Class Counsel is entitled to recover fees under Labor Code § 1194, which provides, in part:

> [A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(Lab. Code § 1194.)

As this litigation culminated in a settlement that provided for a recovery of unpaid wages, including unpaid minimum wages and overtime compensation, Plaintiff is entitled to recover reasonable attorneys' fees and costs under the California Labor Code.

Class Counsel is also entitled to a fee award under California's private attorney general statute, Code of Civil Procedure § 1021.5. "The award of attorneys fees is proper under Section 1021.5 if '(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" (*Press v. Lucky Stores* (1983) 34 Cal.3d 311, 317-318.) The fundamental objective of the statute is "to encourage suits enforcing public policies by providing substantial attorneys' fees to successful litigants in such cases." (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 565.) Additionally, Class Counsel would be entitled to attorney's fees and costs for "any employee who prevails in any [PAGA] action." (*See* Lab. Code § 2699(g)(1).)

This action resulted in the enforcement of an important right affecting the public interest, as Plaintiff sought to enforce Settlement Class Members' rights to recover statutory wages arising from Defendant's alleged failure to pay all wages and failure to provide meal and rest breaks. (*See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1113 [noting that "health and safety concerns" are what motivated the Industrial Welfare Commission to adopt mandatory meal and rest periods].)

This action also conferred a significant benefit on a large class of persons. After Notice was sent to 55 individuals, no class member objected to the Settlement and no class member requested exclusion. The Settlement provides a significant monetary benefit, in that it permits all persons who worked for Defendant during the applicable class period to obtain significant compensation for unpaid wages and missed meal and rest periods, which they likely would not have recovered if not for this action.

Finally, the necessity and financial burden of private enforcement render an award appropriate. Without the incentive of an attorneys' fee award, Plaintiff could not have afforded to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiff's potential recovery. (*See Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044 ["As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimants' personal interest; in other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter."].)

3. The Experience, Reputation and Ability of Class Counsel Support the Fee Award.

As demonstrated by their past experience in pursuing class actions on behalf of consumers and employees, Class Counsel possesses considerable expertise in litigating class action matters. Class Counsel has been involved as lead counsel or co-counsel in dozens of class actions resulting in a multitude of beneficial results to class members in California. Because it is reasonable to compensate class counsel commensurate with their skill, reputation and experience, a fee award of one-third of the Settlement Amount is justifiable and considered within the norm in class action practice.

Indeed, Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendant, negotiating with Defendant's counsel, and evaluating the reasonableness of the settlement. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of class action litigation. Based on these and other factors, Class Counsel has frequently received fee awards amounting to 33 1/3% of the recovery for the class. Therefore, the requested fee award is reasonable and fair.

B. <u>While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees.</u>

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the lodestar method as a drain on the judicial system and a disincentive on attorneys to take on high-risk, challenging cases. (*Id.* at p. 29.) Indeed, the lodestar approach: "(1) 'increases the workload of an already overtaxed judicial system,' (2) is 'insufficiently objective and produce[s] results that are far from homogenous,' (3) 'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,' (4) 'is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount,' (5) 'encourages lawyers to expend excessive hours, and . . . engage in duplicative and unjustified work,' (6) 'creates a disincentive for the early settlement of cases,' (7) deprives trial courts of 'flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered,' (8) 'works to the particular disadvantage of the public interest bar,' and (9) results in 'confusion and lack of predictability.'" (*Id.*)

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation."(*In re*

Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 557.)

Applying the lodestar method requires a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a multiplier to the lodestar to take into account various factors. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.* at pp. 556-57.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id.* at p. 557.)

Wilshire Law Firm's current lodestar is $99,000 based on at least 161 hours of reported work performed by Class Counsel. (Marquez Decl., ¶¶ 16-17.) Accordingly, the requested fee of $46,666.67 is reasonable and fair as it is based on a negative multiplier of 0.47. There are also additional hours devoted by Class Counsel to this litigation that are not reflected in Class Counsel's request for attorney's fees, such as future time that will need to be devoted to ensuring the settlement checks are administered. (Marquez Decl., ¶¶ 18-20.)

1. Class Counsel's Rates Have Been Approved by Several Courts.

Class Counsel provides a declaration to support their lodestar hourly rates. "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.) Class Counsel has received final approval of their hourly rates in other wage and hour class action settlements. These rates are not opposed or challenged.

2. The Lawsuit Provided a Public Benefit.

Class Counsel's choice to litigate this matter provided a public benefit to 55 California employees. Indeed, California Labor Code section 90.5(a) states:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…and to protect employers who comply with the law from those who

> attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Moreover, the California Supreme Court stated that "Labor Code section 1194 confirms "a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." [citation omitted]." (*Sav-on Drug Stores, Inc. v. Super. Ct*. (2004) 34 Cal.4th 319, 340.) Given the financial risks and numerous attorney hours attendant to the litigation of Plaintiff's claims, this factor supports Class Counsel's fee request and encourages the private enforcement of legal rights for the general good.

C. <u>Costs Are Reasonable.</u>

Class Counsel requests reimbursement of $8,473.35 in expenses. (Marquez Decl., ¶ 24.) Meanwhile, Defendant has previously agreed that it will not oppose any cost award request up to $15,000. The categories of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are clearly seen to be both reasonable and necessary.

D. <u>The Enhancement Payment to Plaintiff is Reasonable.</u>

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class, and are appropriate given the benefit the class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59.)

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

Under the Settlement Agreement, subject to the Court's approval, Defendant agreed to pay Plaintiff a Service Award in the amount of $2,500.00. Plaintiff has submitted a declaration demonstrating that he devoted a great deal of time and work assisting counsel in the case, including numerous meetings with Class Counsel and extensive phone calls to discuss the case, case strategy, mediation, and settlement. (*See generally,* Declaration of Plaintiff Martin Ortiz ["Ortiz Decl."] [showing **at least 30 hours of estimated time devoted to this case** through the date of filing this motion]; *see also* Marquez Decl., ¶¶ 27-31 [highlighting the time and efforts Plaintiff devoted to this case].)

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

Another factor that supports the awarding of service awards is whether the class representative's service resulted in notoriety or other personal difficulties. (*See, e.g., Schaffer v. Litton Loan Servicing, LP* (C.D. Cal. 2012) 2012 WL 10274679, at *18.) The California Supreme Court has recognized that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

Here, Plaintiff has lent his name to this case and thus subjected himself to public attention. He has also risked his reputation in the community and with regard to future employment opportunities as a result of stepping forward publicly in a class action. When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, an incentive award is especially important. (*See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977; *Weeks v. Kellogg Co.* (C.D. Cal. 2013) 2013 WL 6531177, *36.) Plaintiff has been subject to the rigors of litigation and has had to devote his own time in participating in this case. (*See generally,* Ortiz Decl.; *see also* Marquez Decl., ¶¶ 25-29.)

E. <u>Administrative Costs Should be Approved.</u>

Phoenix Settlement Administrators, the approved Settlement Administrator, is charging a total of $6,500.00 in costs associated with the administration of this Settlement, including future estimated costs involved in completing the administration. (Salinas Decl., ¶ 15.) These expenses are reasonable, based upon the size of the class and the additional tasks associated with claim and exclusion tracking and Class Member payment processing.

V. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the proposed settlement.

Dated: May 4, 2023

WILSHIRE LAW FIRM

By: ______________________

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

Attorneys for Plaintiff

PROOF OF SERVICE
Ortiz v. Tara Materials, Inc., et al.
37-2021-00001473-CU-OE-CTL

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

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

On **May 4, 2023**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES,** on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Danielle Hultenius Moore (SBN 232480)
dmoore@fisherphillips.com
Bret Martin (SBN 304658)
bmartin@fisherphillips.com
Benjamin P. Carney (SBN 317206)
bcarney@fisherphillips.com
FISHER & PHILLIPS LLP
4747 Executive Drive, Suite 1000
San Diego, California 92121
Telephone: (858) 597-9600
Facsimile: (858) 597-9601

Attorneys for Defendant

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

(X) **BY MAIL:** I enclosed the above documents in a sealed envelope with postage thereon fully prepaid and placed for collection and mailing on the above date in accordance with ordinary business practices. I am readily familiar with this firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service the same day in the ordinary course of business pursuant to Cal. Code Civ. Proc. § 1013(a).

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

Executed on **May 4, 2023**, at Los Angeles, California.

Ashley Narinyans
Type or Print Name

Ashley
Signature