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 for all purposes to:* Hon. Eddie Sturgeon, Dept. C-67] **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY 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 Preliminary Approval of Class Action Settlement; and [Proposed] Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement] PRELIMINARY APPROVAL HEARING Date: January 30, 2023 Time: 8:30 a.m. Dept: C-67

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

PLEASE TAKE NOTICE that on January 30, 2023, at 8:30 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 preliminary approval of the proposed class action settlement between Plaintiff and Defendant Tara Materials, Inc. Plaintiff further moves the Court for an Order:

1. Granting preliminary approval of the Stipulation for Class Action Settlement;
2. Certifying a Class for settlement purposes only;
3. Affording Plaintiff leave to file a First Amended Class and Representative Action Complaint;
4. Approving the Notice of Proposed Class Action Settlement and the plan for distribution of the Notice to Settlement Class Members;
5. Appointing Plaintiff Martin Ortiz as Class Representative for settlement purposes only;
6. Appointing Plaintiff's Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes only;
7. Appointing Phoenix Settlement Administrators as the Settlement Administrator; and
8. Scheduling a Final Approval Hearing.

The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Justin F. Marquez, 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: January 6, 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 preliminary 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 Settlement will provide substantial monetary payments to approximately 59 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Gig Kyriacou, Esq., over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class for settlement purposes only, afford Plaintiff leave to file a First Amended Class and Representative Action Complaint, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims

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 Preliminary 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.*). (*Id.* at ¶ 4.) 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. (*Id.*) The case was subsequently remanded back to state court because federal subject matter jurisdiction did not exist. (*Id.*) The Parties have stipulated to Plaintiff being afforded leave to file a First Amended Class and Representative Action Complaint, which will add causes of action for Defendant's failure to indemnify employees for expenditures (Cal. Lab. Code § 2802) and civil penalties under PAGA. (*Id.*; Ex. 1 [Plaintiff's First Amended Class and Representative Action Complaint].)

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 ¶ 5.)

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. (*Id*. at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id*.) Class Counsel reviewed these records and utilized an expert to prepare a damages analysis prior to mediation. (*Id*.)

C. <u>Settlement Negotiations</u>

On January 31, 2022, the Parties participated in private mediation with experienced class action mediator, Gig Kyriacou, Esq. (*Id.* at ¶ 7.) 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*.)

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 ¶ 8; Ex. 2 [Joint Stipulation and Settlement Agreement of Class Action and PAGA Representative Claims ("Settlement" or "Settlement Agreement")].)

Class Counsel has conducted a thorough investigation into the facts of this case. Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members in light of all known facts and circumstances, the risk of significant delay, the defenses that could be asserted by Defendant both to certification and on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 15.)

Indeed, the $140,000.00 Settlement represents **92.2%** of **the realistic maximum recovery of $151,786.52**. (*Id.* at ¶ 24.) Although Class Counsel estimated that Defendant's maximum potential liability for all claims was approximately $1.1 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendant's realistic exposure was $151,786.52, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 18-24.) Considering the risk and uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class. Indeed, because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

D. <u>Key Terms of the Proposed Settlement</u>

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. <u>Settlement Class</u>: 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. <u>Settlement Period</u>: The Settlement Period means the period from January 13, 2017 through March 15, 2022. (Settlement, Section 1.9.)

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

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

5. <u>PAGA Group Members</u>: 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. <u>Total Settlement Amount</u>: 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.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

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. Distribution Formula: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims as set forth in Section D (8), above, in an amount determined by the Settlement Administrator in accordance with Section 3.3.2 of the Settlement Agreement.

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

13. 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.*)

14. 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.) At this time, Class Counsel's costs are less than $10,000.00. (Marquez Decl., ¶ 39.)

15. Notice of Proposed Class Action Settlement: The Notice sets 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. (Settlement, Ex. A.) Class Members will be notified by first-class mail of the settlement. (Settlement, Section 6.1.2.) Phoenix Settlement Administrators, the proposed

Settlement Administrator, will undertake its best efforts to ensure that the notice is 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 Section 6.1.3.) Notice will be provided in English and Spanish. (Marquez Decl., ¶ 11; Ex. 3 [Settlement Administrator Bid].)

III. DISCUSSION

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

In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include 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, the experience and views of counsel, the presence of a governmental 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.) In order to approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness. (*Id*. at p. 133.) The record need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims", but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."].)

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

A. <u>The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation</u>

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

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

The Settlement was reached following extensive negotiations following a full day of mediation with experienced employment mediator, Gig Kyriacou, Esq. (Marquez Decl., ¶¶ 7-8.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) 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 or its position through trial and appeal if a settlement had not been reached. (*Id.*)

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

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

2. The Settlement Is Fair and Reasonable in Light of the Parties' Respective Legal Positions

A settlement is not judged against what might Plaintiff recover had he prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 ["Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."].)

This settlement avoids the risks and the accompanying expense of further litigation. (Marquez Decl., ¶ 26.) While Plaintiff is confident in the merits of his claims, a legitimate controversy exists as to each cause of action. (*Id.* at ¶ 25.) Plaintiff also recognizes that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*)

The proposed settlement of $140,000.00 therefore represents a substantial recovery when compared to Plaintiff's reasonably forecasted recovery. (*Id.* at ¶¶ 17-28.) Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of $140,000.00 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each class member is eligible to receive an average net benefit of approximately $1,090.40.*** (*Id.* at ¶ 27.)

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3. Class Counsel Has Extensive Experience in Class Action Litigation

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

B. The Proposed Class Notice of Settlement Should Be Approved

The Notice of Proposed Class Action Settlement, in the form attached to the Settlement Agreement as Exhibit A, should be approved for dissemination to the class. The Notice informs the class of the terms of the settlement and of their rights to be excluded from the settlement. And if there are class members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice meet all the requirements of Rule 3.769(f) of the California Rules of Court.

C. The Proposed Attorneys' Fees and Costs Are Reasonable

Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class Counsel reasonable attorneys' fees in amount of $46,666.67, which is 33 1/3% of the Total Settlement Amount, and up to $15,000.00 in costs. These amounts are disclosed to all class members in the Notice of Proposed Class Action Settlement and are reasonable.

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

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. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

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Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common fund" theory. The purpose of this 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.* (1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, 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." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 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." (*Id.* at p. 110.)

The California Supreme Court recently 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].)

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

According to a leading treatise on class actions, "[n]o 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. (*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].)

Here, Plaintiff requests attorneys' fees equal to 33 1/3% of the Settlement Amount, which is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. (*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."].) Accordingly, Plaintiff respectfully requests that the Court approve the attorneys' fees as negotiated by the Parties and requested herein.

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

Labor Code § 1194(a) provides for the recovery of "minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." Under this section, Plaintiff would be permitted to recover his actual attorneys' fees, even if those fees were larger than the total class recovery at the conclusion of this case. This settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Marquez Decl., ¶¶ 35-38.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class ahead of all other concerns.

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

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

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendant and 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 of this percentage from the gross recovery for the class. Therefore, the requested fee award is reasonable and fair.

D. <u>The Service Award to Named 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, supra,* 86 Cal.App.4th at p. 412.) 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.)

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Under the Settlement Agreement, subject to the Court's approval, Defendant agreed to pay a Service Award in the amount of $2,500.00 to Plaintiff. This amount is also in exchange for Plaintiff's general release of all claims against Defendant. Class Counsel represent that Plaintiff devoted a great deal of time and work assisting counsel in the case, communicated with counsel very frequently for litigation and to prepare for mediation, and was frequently in contact with Class Counsel during the mediation. (Marquez Decl., ¶¶ 29-33.) This amount is reasonable particularly in light of the substantial benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez helped negotiate a $2.5 million class action settlement for 339 class members, and the court approved a $25,000.00 class representative incentive award for each named plaintiff. (Marquez Decl., ¶ 33)

When compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive award given to class action plaintiffs from **1993 to 2002** 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.)

IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED

A. Legal Standard

The proposed Settlement Class is well suited for class certification. All of the claims derive from a core set of alleged violations of California's wage and hour laws and regulations. For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) There are two requirements to section 382: "(1) There must be an ascertainable class; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." (*Daar v. Yellow Cab Co*. (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the community-of-interest requirement itself embodies three factors: "(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Indus., Inc*. (1981) 29 Cal. 3d 462, 470.)

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

B. <u>Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for Settlement Purposes</u>

1. The Class is Ascertainable and Numerous

The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes approximately 59 employees of Defendant.

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

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

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

The Court should grant conditional class certification for settlement purposes here on the grounds that questions of law and fact common to all class predominate over any individual questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp*. (1987) 191 Cal.App.3d 605.)

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

3. Plaintiff's Claims Are Typical of the Claims of the Class

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

4. Plaintiff and His Counsel Meet the Adequacy Requirement

The adequacy of representation requirements is met by fulfilling two conditions: first, a named plaintiff must be represented by counsel qualified to conduct the pending litigation; second, a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451.)

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

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

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

V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND

A. The Proposed Notice Plan Satisfies Due Process

Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court, Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the class members will receive direct mailed notice. As the Court of Appeals has explained, "[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members …" (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by direct mailing, the best possible form of notice.

B. The Notice is Accurate and Informative

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

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

VI. CONCLUSION

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

Dated: January 6, 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 **January 6, 2023**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY 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 **January 6, 2023** at Los Angeles, California.

Ashley Narinyans — Ashley
Type or Print Name — Signature