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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION
AUG 16 2023
BY VERONICA GONZALEZ, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

JONHATAN BARAJAS, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

FINAL PHASE CONSTRUCTION, INC., a California corporation; and DOES 1 to 10, inclusive,

Defendants.

Case No. CIVSB2118622

CLASS ACTION

[*Assigned to:* Hon. Joseph T. Ortiz, Dept. S-17]

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[*Filed concurrently with:* Declaration of Justin F. Marquez, Declaration of Jennifer Forst and Proposed Order]

FINAL APPROVAL HEARING
Date: September 8, 2023
Time: 1:30 p.m.
Dept: S-17

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

PLEASE TAKE NOTICE that on September 8, 2023 at 1:30 p.m., in Department S-17 of the San Bernardino County Superior Court, San Bernardino District – Civil Division, 247 West Third Street, San Bernardino, California 92415-0210, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq*., Plaintiff Jonathan Barajas ("Plaintiff") will and hereby does move the Court for an Order granting final approval of the proposed class action settlement between Plaintiff and Defendant Final Phase Construction, Inc. ("Defendant"). Plaintiff further move the Court for an Order:

1. Certifying a Class for settlement purposes;
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 as Class Representatives for settlement purposes;
4. Appointing Plaintiff's Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
5. Approving payment of administrative expenses to CPT Group, Inc. as the Settlement Administrator in the amount of $8,500.00;
6. Approving payment of $83,333.33 in attorney's fees, which is 33 1/3% of the Maximum Settlement Amount, and costs in the amount of $16,065.00 for litigating this action to Class Counsel;
7. Approving the payment to the California Labor Workforce Development Agency in the amount of $37,500.00;
8. Directing that the clerk of the Court enter the Court's order as a final judgment; and,
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 Declarations of Justin F. Marquez and Jennifer Forst 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.

Respectfully submitted,

Dated: August 16, 2023

WILSHIRE LAW FIRM

By: ______________________________
Justin F. Marquez
Benjamin H. Haber

Attorneys for Plaintiff

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I. INTRODUCTION

Plaintiff Jonathan Barajas ("Plaintiff") seeks preliminary approval of a proposed $250,000.00 non-reversionary, wage and hour class action settlement with Defendant Final Phase Construction, Inc. ("Defendant"). The Settlement will provide substantial monetary payments to approximately 61[1] class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law.

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. Upon the Court's approval of the settlement, participating class members will receive an ***average individual net settlement payment of approximately $1,978.14***, with the ***highest individual net settlement payment to be paid of approximately $4,576.62***. (Declaration of Jennifer Forst Regarding Notice Administration ["Forst Decl."], ¶ 16.) ***The deadline to opt-out or object to the settlement was July 27, 2023; as of filing this Motion, there were <u>zero</u> requests for exclusion and <u>zero</u> written objections to the settlement.*** (*Id.* at ¶¶ 11, 12.) 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 $83,333.33, reimbursement of attorney costs and expenses in the amount of $16,0665.00, an incentive award for Plaintiff in the amount of $10,000.00, Settlement Administration Costs of 20,000.00; and payment to the California Labor Workforce Development Agency "LWDA") in the amount of $7,500.00 are also reasonable and thus should be approved by the Court.

Accordingly, Plaintiff respectfully requests that the Court grant final approval of the

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[1] In Plaintiff's Motion for Preliminary Approval of the Settlement, Plaintiff indicated that there were approximately 55 class members at that time based on the initial information provided by Defendant for the class period. In the final class mailing list provided to the Settlement Administrator by Defendant, the list states that there are 61 participating class members in the class period. (Forst Decl., ¶ 5.)

Settlement.

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 or non-exempt employees for Defendant during the class period. Defendant operates a full-service commercial finish carpentry and mill work installation company in Rancho Cucamonga, California. (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. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods and failed to reimburse 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, failure to produce requested employment records, failure to provide paid sick leave, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.) Defendant denies all allegations.

On June 25, 2021, Plaintiff filed a putative wage and hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194 and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code §§ 226.7); (5) failure to timely pay final wages at termination (Labor Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Labor Code § 226); (7) failure to indemnify employees for expenditures (Labor Code § 2802); and (8) unfair business practices (Business and Professions Code 17200, *et seq.*). (*Id.* at ¶ 4.) On June 25, 2021, Plaintiff sent a notice to Defendant and the California Labor & Workforce Development Agency

("LWDA") alleging similar wage and hour violations pursuant to the PAGA. (*Id.*) On February 7, 2022, Plaintiff filed a First Amended Class & Representative Action Complaint, which added a claim for civil penalties under the PAGA. (*Id.*)

B. Discovery and Investigation

Following the filing of the initial Complaint, the Parties engaged in an exchange of informal discovery. In advance of mediation, Defendant produced a sample of timekeeping and pay records for the 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. (*Id.* at ¶ 5.)

After reviewing documents regarding Defendant's wage and hour policies and practices, 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 prepared a damage analysis prior to mediation. (*Id.*)

C. Settlement Negotiations, Preliminary Approval, and Class Size.

On October 25, 2022, the Parties participated in private mediation with experienced class action mediator Honorable Jackson Lucky (Ret.) (*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 reached a settlement, the material terms of which are encompassed within the Settlement. (*Id.* at ¶ 8; Ex. 1 [Class Action and PAGA Settlement Agreement and Class Notice ("Settlement" or "Settlement Agreement")].) The Court ultimately granted preliminary approval on April 27, 2023. (*Id.* at ¶ 8.)

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., ¶ 12.) Indeed, because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

D. Key Terms of the Proposed Settlement

Under the Settlement, Defendants will pay $250,000.00 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 individuals employed by Final Phase Construction in California and classified as an hourly-paid or non-exempt employee during the Class Period. (Settlement, § 1.5.)

2. Class Period: "June 25, 2017 and shall end on November 3, 2022 or on a date when the Court grants preliminary approval of the settlement, whichever date is earlier." (Settlement, § 1.12.)

3. Participating Class Members: "means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement." (Settlement, § 1.35.)

4. Non-Participating Class Members: "means any Class Members who opts out of the Settlement by sending the Administrator a valid and timely Request for Exclusion." (Settlement, § 1.29.)

5. Aggrieved Employees: means a person employed by Final Phase Construction in California and classified as an hourly-paid or non-exempt employee who worked for Final Phase Construction during the PAGA Period of April 15, 2020 to November 3, 2022. (Settlement, §§ 1.4, 1.30, and 1.31.) Every class member is not also an Aggrieved Employee. (Settlement, §§ 1.4, 1.30, and 1.31.)

6. Gross Settlement Amount: This amount is $250,000.00 and will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Award, and the

Administrator's Expenses. (Settlement, § 1.22.) Defendant "shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Final Phase Construction share of payroll taxes by transmitting the funds to the Administrator in two installments: $75,000 upon final approval of the settlement, and the remaining balance of $175,000, plus applicable employer-side payroll taxes and any additional settlement funds owed, if applicable […] will be due 60 days thereafter. (*Id.* at § 4.3.)

7. Uncashed Checks: For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date (not less than 180 days after the date of mailing), the Administrator shall transmit the funds represented by such checks to the California State Controller's Unclaimed Property Funds in the name of the Class Members thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil Procedure § 384, subd. (b). (Settlement, § 4.4.3.)

8. Release by Class Members: "All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action including any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify expenditures; and (8) violation of California's Unfair Competition Law, California Business Professions Code §§ 17200, *et seq*. […] Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period." (Settlement, § 6.2.) This Release will be deemed effective on the date when Defendant fully funds the entire Gross Settlement Amount and fund all employer payroll taxes owed on the Wage Portion of the Individual Class Payments.

9. Release by Aggrieved Employees: All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice and ascertained in the course of the Action, including any and all claims for (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; and (7) failure to indemnify expenditures." (Settlement, § 6.3.)

10. No Reversion: "None of the Gross Settlement Amount will revert to Final Phase Construction." (Settlement, § 3.1.)

11. PAGA Allocation: The settlement includes $10,000.00 allocated to Plaintiff's claims under PAGA, with 75% of which ($7,500.00) being paid to the LWDA and 25% ($2,500.00) being paid to the Aggrieved Employees. (Settlement, § 1.34.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 10.)

12. Net Settlement Fund/Amount: "means the Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments." (Settlement, § 1.28.)

13. Distribution Formula: "An Individual Class Payment [will be] calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks." (Settlement, § 3.2.4.) As to PAGA: "The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties ($2,500) by the total number of PAGA Period Workweeks worked by all

Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods." (Settlement, § 3.2.5.1.)

14. Tax Allocation: "33% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 67% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion")." (Settlement, § 3.2.4.1.)

15. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid a service award not to exceed $10,000.00. (Settlement, § 3.2.1.) 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 Section 1542. (*Id.* at § 6.1.) If the Court approves a lesser enhancement, then the unapproved portion shall revert into the Net Settlement Amount to be distributed between the Participating Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

16. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33.33% ($83,333.33) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed $20,000.00. (Settlement, § 3.2.2.) At the time of preparing this motion, Class Counsel's costs are approximately $15,765.00. (Marquez Decl., ¶ 27.)

17. Court Approved Notice of Class Action Settlement and Hearing Date for Final Court Approval: 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 Notice.) Class Members will be notified by first-class mail of the settlement. (Settlement, § 4.3.1.) CPT, the Settlement Administrator, undertook its best efforts to ensure that the notice was provided to the current addresses of class members, including conducting a skip trace when needed and re-mailing the notice to updated addresses. (Forst Decl., ¶¶ 6-9.)

E. Class Notice and Settlement Administration.

This Court granted preliminary approval on April 27, 2023. (Marquez Decl., ¶ 11.) Notices explaining class member rights were mailed out to all 61 class members in the mailing list provided by Defendant. (Forst Decl., ¶¶ 5, 7.) To date, only one notice packet remains undeliverable after remailing attempts were made. (*Id.* at ¶ 9.) ***There were zero requests for exclusion and zero objections to the settlement.*** (*Id.* at ¶¶ 11, 12.)

III. THE SETTLEMENT MERITS FINAL APPROVAL

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 Computers, 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].)

A. The Settlement Reflects a Reasonable Compromise.

A settlement is not judged against what the plaintiff might recover had she prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba, supra,* 91 Cal.App.4th at pp. 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."].)

The settlement obviates the significant risk that this Court may deny certification of all or some of Plaintiff's claims. (Marquez Decl., ¶ 12.) While Plaintiff is confident in the merits of their claims, a legitimate controversy exists as to each cause of action. (*Id.*) Plaintiff also recognizes that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery by the class. (*Id.*)

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 $250,000.00 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average benefit of approximately $1,978.14, and the highest estimated net payout is expected to be approximately $4,576.62.*** (Forst Decl., ¶ 16.)

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

The Settlement was reached over the course of a full-day mediation with experienced employment mediator, Honorable Jackson Lucky (Ret.). (Marquez Decl. ¶ 7.) 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, Defendants' 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, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*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 her counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*Id.*)

C. Plaintiff's Counsel Has Substantial Class Action Experience.

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 28-40.) 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 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 member has objected to the Settlement, and no class members have requested exclusion from the Settlement. (Forst Decl., ¶¶ 11, 12.) 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 FEES, COSTS AND AN ENHANCEMENT PAYMENT.

Under the Settlement, subject to the Court's approval, Defendant has agreed to pay Class Counsel reasonable attorneys' fees in the amount of $83,333.33, which is 33 1/3% of the Maximum Settlement Amount, and costs up to $20,000.00 for litigating this Action. In addition, Defendant will not oppose an application for the payment of Settlement Administration Costs and a Class Representative Service Payment. Settlement Administration Costs are $8,500.00, and Plaintiff will apply for a Service Payment in the amount of $10,000.00. The proposed attorneys' fees and expenses, as well as the requested Enhancement Award, were disclosed to the Class Members in the proposed 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. Counsel Requests 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. 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].)

The settled-for 33 1/3% 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 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.

(Cal. 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.)

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 Defendants' 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 Wage Commission to adopt mandatory meal and rest periods].)

This action also conferred a significant benefit on a large class of persons. Notice was sent to 61 Settlement Class Members, and no Settlement Class Members requested exclusion. The

Settlement provides a significant monetary benefit, in that it permits all persons who worked for Defendants during the applicable class period to obtain compensation for unpaid wages and missed meal and rest periods.

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 33 1/3% of the Maximum Settlement Amount, a percentage considered within the norm in class action practice, is certainly justified here.

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendants 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 amounting to 33 1/3% of the recovery for the class. Therefore, the requested fee award is reasonable and fair.

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

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 at least $108,300 based on at least 197 hours of work performed by Class Counsel thus far. (Marquez Decl., ¶¶ 19-20.) Accordingly, the requested fee of $83,333.33 is reasonable and fair as it is based on a negative multiplier of 0.8. To be sure, trial courts have substantial discretion in adjusting the lodestar to account for various factors. (*See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, 39-45; *see also Serrano*, *supra,* 20 Cal.3d at p. 49.) In addition, it has been held that "[m]ultipliers can range from 2 to 4 or even higher." (*See Wershba*, 91 Cal.App.4th at p. 255; *see also Van Vranken*, *supra,* 901 F. Supp. At p. 298 ["[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation"].)

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 830 California employees. 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.

3. Applying a Positive Multiplier Is Appropriate.

Once this lodestar figure has been determined, the Court may take into account other "enhancement" factors to adjust the lodestar award. While Plaintiff seeks a negative multiplier of 0.8 here, the overall reasonableness of Plaintiff's request is underscored by the fact that a significantly higher multiplier would be justified under applicable law.

Contingency fees should be higher than fees for the same legal services paid concurrently with the provision of the services. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (*Id.* at p. 1133.) Application of that rule is particularly appropriate where the case is brought to redress important rights of vulnerable persons. (*Id.*) A risk enhancement is "earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather it is intended to approximate market-level compensation for such services which typically pay a premium for the risk of nonpayment or delay in payment of attorney's fees." (*Id*. at p. 1138.)

"Multipliers can range from 2 to 4 or even higher." (*Wershba*, *supra,* 91 Cal.App.4th at p. 255; *see also Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 [applying a 2.52 multiplier on a cross-check in an antitrust class action]; *Chavez, supra,* 162 Cal. App. 4th at p. 60 [applying a 2.5 multiplier on a lodestar cross-check]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6 ["most" common fund cases apply a multiplier of 1.0-4.0]; *Been v. O.K. Industries Inc.* (E.D. Okla. 2011) 2011 WL 4478766, *11 [citing a study "reporting [an] average multiplier of 3.89 in survey of 1,120 class action cases" and finding that a multiplier of 2.43 would be "per se reasonable"].) The intermediate court in *Laffitte*, after finding that "2 to 4" is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. (*Laffitte v. Robert Half Int'l* (2014) 231 Cal. App. 4th 860, 881-82.) The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

Factors considered in determining whether a lodestar multiplier is appropriate generally include: (1) the risks presented by the contingent nature of the case; (2) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (3) the nature of the opposition; (4) the preclusion of other employment by the attorney due to acceptance of the case; and (5) the result obtained and the importance of the lawsuit to the public. (*Serrano, supra,* 20 Cal. 3d at pp. 48-49.) All of these factors favor approval of a multiplier along the lines of those approved in the cases above.

The major consideration in determining the necessity of a multiplier is the contingent nature of the award. (*Ketchum, supra,* 24 Cal.4th at pp. 1132-33.) Further, the possibility of no recovery is only one of the uncertainties involved in taking on such a case. Other uncertainties are the amount that will be recovered, uncertainty as to the cost, both in effort and expenses, and uncertainty about how much time will pass before the recovery is obtained. (*Id.* at pp. 1132-1133, 1138.) Here, Class Counsel have been the only counsel to represent Class Members in this matter and have borne the entire risk and costs of litigation purely on a contingency basis. Class Counsel's outlay of time and money in this case has been significant.

The other factors are also present here. Class Counsel are skilled attorneys who have had success in wage-and-hour class actions. This case required experienced and competent lawyers and expertise in the issues presented herein. Defendant's contentions underscore the risk of prevailing at class certification and trial, and any of these obstacles could have prevented recovery completely. Further, proceeding to trial would have added years to the resolution of this case because of the difficult legal and factual issues raised and the likelihood of appeals. Despite these risks, Class Counsel took this case on a contingency basis. Yet, there are only so many cases that Class Counsel can take at any one time. Consequently, there were other meritorious cases presented to Class Counsel that would have generated substantial fees, but were declined, during the pendency of this action in order to devote the attention necessary to achieve favorable results. (Marquez Decl., ¶ 25.) Considered against the risks of continued litigation, and the importance of the employment rights and a speedy recovery, the relief provided under the Settlement represents a very strong result for the Class.

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

As of the date of filing this Motion, Class Counsel has incurred around $15,765.00 in costs, and they anticipate incurring at least $300.00 in additional costs up to the time the Court enters a judgment in this action and schedules a hearing on distribution. (*Id. at* ¶¶ 10, 27, Ex. 2.) Accordingly, Class Counsel respectfully requests reimbursement of up to $16,065.00 in costs. Notably, Defendant has agreed that it will not oppose any cost award request up to $20,000.00. The categories of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are easily seen to be both reasonable and necessary.

D. <u>The Enhancement Payment to the 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, 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.) The California Supreme Court has also 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.) Plaintiffs should therefore 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 a Service Award in the amount of $10,000.00 to Plaintiff. (Settlement, § 3.2.1.) This amount is also in exchange for Plaintiff's general release of all claims against Defendant. Plaintiff has submitted a declaration demonstrating that Plaintiff devoted at least **40 hours** of time and work assisting counsel in the case, communicated with counsel very frequently for litigation and to prepare for mediation. (*See, generally,* Declaration of Plaintiff Jonathan Barajas filed in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement; *see also* Marquez Decl., ¶¶ 13-17.)

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).)

E. Administration Expenses Should be Approved.

CPT Group, Inc., the Settlement Administrator, estimates that it will incur a total of $8,500.00 in costs associated with the administration of this Settlement. (Forst Decl., ¶ 17.) These expenses are reasonable, based upon the size of the class, claim and exclusion tracking, and Class Member payment processing.

V. CONCLUSION

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

Respectfully submitted,

Dated: August 16, 2023

WILSHIRE LAW FIRM

By: ______________________

Justin F. Marquez
Benjamin H. Haber
Attorneys for Plaintiff

PROOF OF SERVICE

Barajas v. Final Phase Construction, Inc., et al.

CIVSB2118622

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Min Jee Kim, 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 minjee@wilshirelawfirm.com.

On August 16, 2023, I served the **PLAINTIFF'S 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:

Fred J. Knez (SBN 94038)
Andrew J. Knez (SBN 296894)
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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.

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

Executed on August 16, 2023, at Los Angeles, California.

Min Jee Kim