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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

JOSE ERNESTO LUCAS, individually, and on behalf of all others similarly situated, Plaintiff, vs. SW INGREDIENTS HOLDINGS, LLC, a Delaware limited liability company; SPICE WORLD INC., a Florida corporation; SPICE WORLD, LLC, a Florida limited liability company; and DOES 1 through 10, inclusive, Defendants	Lead Case No. 21CECG01943 (Consolidated with cases 21CECG03840, 22CECG00586) [Assigned to Hon. Jonathan Skiles, Dept. 403] **CONSOLIDATED CLASS AND REPRESENTATIVE ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RENEWED MOTION FOR AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: February 14, 2024 Time: 3:30 p.m. Dept. 403 Judge: Jonathan Skiles

JOSE MAGALLAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

SW INGREDIENTS HOLDINGS, LLC d/b/a SPICE WORLD, INC., a Delaware Limited Liability Company; and DOES 1 Through 10, inclusive,

Defendants.

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I. INTRODUCTION

This motion seeks preliminary approval of a pre-certification consolidated wage and hour class and PAGA[1] representative action settlement of $425,000 by Plaintiffs Jose Ernesto Lucas and Jose Magallan ("Plaintiffs"), individually and on behalf of a putative Class of California non-exempt employees against Defendants SW INGREDIENTS HOLDINGS, LLC ("Defendant SW"), SPICE WORLD, INC., and SPICE WORLD, LLC (collectively, "Defendants") employed any time during the Class Period (July 20, 2017 through the date the Court preliminarily approves of the Settlement or the on the day on which the number of workweeks reaches 24,461 at Defendants' option). Declaration of Isam C. Khoury ("Khoury Decl."), ¶ 10, Ex. 1 – Class Action and PAGA Settlement Agreement ("Agreement" or "SA"), ¶ 1.12.

Plaintiffs allege Defendants maintained a practice of failing to: pay for time spent undergoing security and temperature checks and working off the clock; pay overtime wages at the correct rate incorporating all applicable pay; provide timely, compliant, off-duty meal and rest breaks or pay premiums for non-compliant breaks; provide one day's rest in seven; and reimburse reasonable and necessary work-related expenses. Derivatively, Plaintiffs allege Defendants failed to provide accurate wage statements and timely final wages. Khoury Decl., ¶ 11; Declaration of Jose Ernesto Lucas ("Lucas Decl."), ¶¶ 4-5; Declaration of Jose Magallan ("Magallan Decl."), ¶¶ 4-5.

II. THE PARTIES

A. Defendants

Defendants manufacture, package, and sell a variety of prepared ingredients, such as pre-minced garlic and seasoning blends. Khoury Decl., ¶ 12.

B. Plaintiffs

Plaintiff Lucas worked for Defendants as a non-exempt forklift operator from approximately June 2020 to May 2021 and was classified as non-exempt during the entirety of

[1] Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*

his employment. Khoury Decl., ¶ 13; Lucas Decl., ¶ 3. Plaintiff Magallan worked for Defendants as a non-exempt employee from approximately April 2020 to April 21, 2021. From April 2020 to August 2020, Mr. Magallan worked as a Sanitation Cleaner, from August 2020 to February 2021 as a Quality Assurance employee, and from February 2021 to April 21, 2021 as a Maintenance Clerk. Khoury Decl., ¶ 14; Magallan Decl., ¶ 3.

C. The Class and Aggrieved Employees

The Class is defined as all current and former non-exempt employees of Defendants employed in California during the Class Period. Khoury Decl., ¶ 15; SA, ¶ 1.5. At the time of mediation, there were an estimated 300 class members based on the payroll records for the putative class members as defined by Plaintiffs in the Consolidated Complaint. The Class Period is from July 20, 2017 through the date the Court preliminarily approves of the Settlement or on the day on which the number of workweeks reaches 24,461 at Defendants' option. Class members were identified by running a payroll report for all non-exempt employees that worked in California during the proposed class period in advance of mediation and up to July 1, 2022. Because the Class Period may run through the date of the preliminary approval order, the exact number may change slightly. However, from July 20, 2017 through July 1, 2022, 297 non-exempt employees had been employed by Defendant SW, and these employees worked approximately 21,270 workweeks during this time. Declaration of Matthew McDonald, Vice President of Human Resources for Defendant SW Ingredient Holdings, LLC ("McDonald Decl."), ¶ 2.

III. PROCEDURAL HISTORY

Plaintiff Lucas filed a class action complaint on July 2, 2021 alleging that Defendants systematically: (1) failed to pay minimum and straight time wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest periods, (5) failed to reimburse necessary business expenses, (6) failed to timely pay wages at termination, (7) failed to provide accurate itemized wage statements and (8) engaged in unfair business practices. Khoury Decl., ¶ 18. On September 23, 2021, Lucas amended his complaint to add a ninth (9) cause of action under the PAGA, after giving requisite notice to the LWDA and Defendants with no response. Khoury Decl., ¶ 19.

On June 28, 2021, Defendants responded to Plaintiff Magallan's record request and produced Plaintiff Magallan's personnel file containing, in pertinent part, employment policies and procedures, new employee documents, time cards, and wage statements. Khoury Decl., ¶ 20.

On August 30, 2021, Plaintiff Magallan filed a PAGA action relating to the same employees sought to be represented by Plaintiff Lucas, after giving requisite notice to the LWDA and Defendants with no response. Khoury Decl., ¶ 21. On September 13, 2021, Plaintiff Magallan filed a class action largely overlapping with the Lucas action, with many of the same claims and an entirely overlapping Class definition. Khoury Decl., ¶ 22.

On February 25, 2022, Plaintiff Magallan served Defendants with employment and form interrogatories, special interrogatories, requests for admission, and requests for production of documents in the PAGA action. That same day, Plaintiff Magallan also noticed the deposition of Defendants for March 29, 2022. Khoury Decl., ¶ 23.

Plaintiffs Magallan and Lucas agreed to consolidate their actions, and an Order consolidating the actions was entered on March 25, 2022. Khoury Decl., ¶ 24. A consolidated complaint was filed on March 28, 2022, which Defendants answered on April 11, 2022. *Id.,* ¶ 25.

In early March 2022, the Parties agreed to stay formal discovery and to attend mediation. Plaintiffs requested, and Defendants produced[2] sufficient data and documents to allow Plaintiffs to assess liability and to calculate Class-wide damages for purposes of mediation. Khoury Decl., ¶ 26. Plaintiffs' consultant, Bennett S. Berger ("Berger" or "Plaintiffs' consultant"), reviewed and analyzed the data and documents to devise class damages and PAGA penalties calculations which Plaintiffs relied on at mediation. *Id.*; Declaration of Bennet S. Berger of Berger Consulting Group

[2] That information included: (a) excel spreadsheets with timekeeping records and corresponding spreadsheets with payroll records for all purported Class Members (with identities redacted); (b) the estimated Class size: 296 (c) the estimated number of former employees in the three-year statute of limitations for waiting time penalties: 161; (d) the estimated number employees during the one-year statute of limitations for PAGA Penalties: 268 (e) the estimated number of Class Period workweeks: 21,270 workweeks during the Class Period, from July 20, 2017 to July 1, 2022 (f) the estimated number of PAGA Period pay periods: 7,128 PAGA Pay Periods Worked from July 2, 2020 to July 1, 2022 (PAGA Period); and (g) Defendants' employee handbook provided to the Class, containing all pertinent policies including those relating to compensation, timekeeping, work expenses, and meal and rest periods. Khoury Decl., ¶ 26, Ex. 2 thereto— Timecard Detail Example, Ex. 3 thereto—Payroll Records Example.

("Berger Decl."), ¶¶ 6-17.

IV. MEDIATION

Plaintiffs provided Berger with the data and documents Defendants produced for mediation, including the excel timekeeping and payroll records, which Berger used to assess actual short, late, or missed meal periods where no premium was paid and underpaid overtime wages due to regular rate miscalculations. Using reasonable assumptions provided by Plaintiffs, Berger also assessed unreimbursed business expenses, wages not paid for off-the-clock time, unpaid rest period premiums, wage statement penalties, waiting time penalties, and PAGA Penalties. Khoury Decl., ¶ 27; Berger Decl., ¶¶ 6-17.

With Class-wide damages and PAGA penalties models prepared, on October 12, 2022, the Parties attended mediation with Tripper Ortman, Esq., an experienced wage and hour class action mediator facilitating the day-long arms'-length negotiations. By the end of the day, the Parties were able to reach a settlement in principle. Khoury Decl., ¶ 28.

V. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

The Parties agreed to settle the Action for the Gross Settlement Amount ("GSA") of $425,000 which includes, subject to Court approval: (a) attorneys' fees of $141,666.67[3] (not to exceed one-third of the GSA); (b) litigation costs of up to $30,000; (c) Service Payment of $7,500 to each named Plaintiff for their efforts in initiating and prosecuting the Action, work performed, risks undertaken for costs, substantial benefits conferred on absent Class Members, and a general release; (d) PAGA Payment of $5,000 for civil penalties, of which $3,750 (75%) will be paid to the LWDA and $1,250 (25%) will be distributed to Aggrieved Employees; and (e) administration expenses to ILYM Group, Inc. ("ILYM"), up to $10,000; costs are currently estimated at $8,600, and Plaintiffs seek only this amount. Khoury Decl., ¶ 29; SA, ¶¶ 3.1-3.2; Declaration of Sean

[3] Plaintiffs consented in writing to the equal distribution of attorneys' fees recovered in this case, i.e., 50% to Moon Law Group, PC, and 50% to Cohelan Khoury and Singer (to be divided with co-counsel D. Law, Inc. subject to separate agreement). Khoury Decl., ¶ 29; Magallan Dec., ¶ 17; Lucas Decl., ¶ 17. Per the Court's May 5, 2023 Order, at final approval, Plaintiffs will provide their counsel's billing rates and hours expended, the aforementioned fee splitting agreements, and more detailed declarations describing Plaintiffs' time spent and services provided in support of the class claims. Khoury Decl., ¶ 29.

Hartranft on Behalf of ILYM Group, Inc. ("ILYM Decl."), ¶ 10. In addition to the GSA, Defendants will pay the employer's share of payroll taxes on Class Members' payment allocated as wages. Khoury Decl., ¶ 30; SA, ¶ 4.3.

The remaining Net Settlement Amount estimated at $224,733.33[4] will be distributed to Participating Class Members based on the number of weeks each worked during the Class Period. No claim form will be necessary. Khoury Decl., ¶ 31; SA, ¶¶ 1.23, 1.28, 7.4.2. With an estimated 21,270 weeks worked during the Class Period, a Participating Class Member will receive an estimated $10.57 for each week worked during the Class Period, or an average payment of $756.68 ($224,733.33/297 Class Members). Khoury Decl., ¶ 32; SA, ¶ 4.1. Aggrieved Employees will receive a proportionate share of the $1,250 PAGA Payment based on the number of pay periods worked during the PAGA Period. With 7,128 pay periods during the PAGA Period, each Aggrieved Employee will receive an estimated $0.18 for each pay period. Khoury Decl., ¶ 33; SA, ¶¶ 1.24, 4.1. After 180 days of issuance of the Settlement Payments, uncashed checks will be voided and funds sent to the State of California Controller, Unclaimed Property Division for further handling on behalf of the Class Member whose check was voided. Khoury Decl., ¶ 34; SA, ¶¶ 4.4.1, 4.4.3. No part of the GSA will revert to Defendants. Khoury Decl., ¶ 35; SA, ¶ 3.1. The information needed to distribute the funds is available from Defendants' records and the Administrator can apply the formula fairly. Khoury Decl., ¶ 36; ILYM Decl., ¶¶ 5-10.

B. Administrator, Notice of Settlement to the Class, and Release of Claims

The administrator will search the National Change of Address database to update Class Member mailing addresses produced by Defendants before mailing the Court-approved Notice of Proposed Class Action Settlement ("Class Notice"). Khoury Decl., ¶ 37; ILYM Decl., ¶¶ 6-7; SA, ¶¶ 1.10, 4.4.1, Ex. A. If a Class Notice is returned undeliverable, the Administrator will skip-trace using the Class Member's social security number and re-mail if a better address is found. Khoury Decl., ¶ 38; ILYM Decl., ¶ 7; SA, ¶¶ 1.10, 7.4.3. Class Members with re-mailed Class Notices will have an additional 14 days beyond the Response Deadline to act. Khoury Decl., ¶ 39; SA, ¶¶ 1.43,

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[4] $425,000 GSA- $141,666.67 attorneys' fees- $30,000 litigation costs - $15,000 for two service payments - $5,000 PAGA Payment - $8,600 administration costs = $224,733.33.

7.4.4.

The proposed Class Notice advises the Class of: (1) the right to participate in the Settlement/that a claim form is not needed; (2) the manner and timing to submit objections or request exclusion; (3) how to challenge the payment calculation information; (4) the released claims; and (5) the date, place, and time to appear for the Final Approval hearing. Khoury Decl., ¶ 40; SA - Ex. A. Class Members who remain in the Class will release only those claims alleged in the Action, i.e.:

> all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint, including, e.g., any and all claims arising under California Labor Code sections 201, 202, 203, 204, 218.5, 218.6, 226, 226.7, 510, 512, 1174(d), 1194, 1194.2, 1197, 1198, 2802 and the applicable Industrial Welfare Commission Wage Orders based on any alleged failure to pay minimum wage; failure to pay overtime compensation; failure to pay paid time off wages; failure to provide meal periods; failure to authorize and permit rest periods; failure to indemnify necessary business expenses; failure to timely pay final wages; failure to timely pay wages during employment; failure to provide accurate wage statements; failure to keep adequate records; and unfair business practices arising under California Business and Professions Code section 17200 *et seq*.

Khoury Decl., ¶ 41; SA, ¶ 5.2. If a Class Member requests exclusion, and is an eligible Aggrieved Employee, they will receive a proportionate share of the $1,250 PAGA Payment and release only those claims brought under the PAGA. Khoury Decl., ¶ 42; SA, ¶¶ 1.9, 4.4.1, 5.3.

VI. ARGUMENT

A. Class Action Settlements Are Subject to Court Review and Approval

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." California Rules of Court, Rule 3.769(g). Where a settlement is reached on terms agreeable to all Parties, a court should disapprove of the settlement "only with considerable circumspection." *Jamison v. Butcher & Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. California courts may look to federal authority analyzing class issues for guidance. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40. At preliminary approval, a court "limits its inquiry 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." *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723.

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B. The Settlement is Fair, Reasonable, and Adequate

To approve a proposed class action settlement under Code of Civil Procedure section 382, the Court must find the settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801. The trial court considers "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." *Id*. A proposed class action settlement is presumed fair where there are: (1) extensive arms'-length negotiations; (2) investigation and discovery sufficient to allow counsel and the Court to act intelligently; (3) experienced counsel; and, (4) few objectors. *Id*. at p. 1802.

1. Serious, Informed, Non-Collusive Negotiations Led to Settlement

The Settlement was reached through arm's-length negotiations facilitated by an experienced wage and hour class action mediator. Though cordial and professional, the negotiations were at all times, adversarial and non-collusive in nature. Khoury Decl., ¶ 43.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiffs' Counsel investigated claims and Defendants' potential defenses before serving the PAGA letters and filing the complaints. For mediation, Defendants produced time and payroll data and pertinent policies for all putative Class Members which Plaintiffs used to analyze their claims and assess potential damages and penalties with the assistance of a well-qualified and experienced data consultant. Khoury Decl., ¶ 44; footnote 2 *supra*; McDonald Decl., ¶¶ 3-9; Berger Decl., ¶¶ 1-17. This gave the Parties an understanding of the strengths and weaknesses of their positions before negotiations. Khoury Decl., ¶ 45. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 410 (approving settlement where "considerable information [exists]…to assess the strength of the class claims" and risks of litigation).

3. Counsel are Experienced in Similar Litigation

Counsel for Plaintiffs and the Class have significant experience in litigating employment wage and hour class actions. Khoury Decl., ¶¶ 2-9, 46; Declaration of Allen Feghali ("Feghali

Decl."), ¶¶ 6-23; Declaration of Emil Davytan ("Davtyan Decl."), ¶¶ 2-8. Defense counsel Ronald H. Barsamian, Patrick S. Moody, and Catherine Houlihan of Barsamian & Moody are also skilled and experienced wage and hour litigators who defended their clients vigorously to settle this action. Khoury Decl., ¶ 47. Class Counsel believes the Settlement is fair, reasonable, and in the Class' best interest in light of the recovery and risks of continued litigation. Khoury Decl., ¶ 48. The view of attorneys actively conducting the litigation "is entitled to significant weight" in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc*. (E.D. Pa. 1985) 630 F.Supp. 482, 488. As the Settlement satisfies three of the four *Dunk* requirements, preliminary approval should be granted.

C. The Settlement is a Reasonable Compromise of Claims

"[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation," information is presented to the Court, as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. *Kullar* requires only "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at p. 409 (finding trial court's review of the number of class members, payroll data, and declarations on hours worked, duties, and meal and rest period experiences were an adequate basis to understand the amount in controversy under *Kullar*). As in *Munoz*, Class Counsel relied on time and pay records and policy documents for the Class during the Class Period. On these bases, Class counsel's damages consultant calculated Class-wide damages and penalties through the date of mediation. Khoury Decl., ¶ 49.

1. Labor Code §§ 510, 1194 –Minimum and Overtime Wages

(a) Off-the-clock ("OTC") Work. Plaintiffs contend Defendants failed to pay for off-the-clock time Class Members spent subject to its control. Specifically, Plaintiffs contend each morning Class Members had to go through a security screening, that next, they would have to wait in line to clock in, and that finally, once the pandemic began, Defendants initiated a COVID screening prior to clocking in. Plaintiffs asked their consultant to calculate exposure assuming 3 minutes per shift of unpaid OTC work at the average hourly rate of $17.72. Applying 3 minutes per shift (0.05 hours) multiplied by the 108,487 shifts[5] worked during the Class Period multiplied by the average hourly rate of $17.72 results in a total unpaid amount of $96,119. Berger Decl., ¶ 8. Plaintiffs discounted this maximum value based on the following considerations. First, according to Defendants, the COVID screening portion of this OTC time was only in effect from July 30, 2020 through November 30, 2020. McDonald Decl., ¶ 8. Second, courts often deny certification of off-the-clock claims due to the need for individual inquiries as in *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July 29, 2015) 2015 U.S. Dist. LEXIS 118756, at *46; here, Plaintiffs would need to prove as to each Class Member that screenings were performed before clocking in, rather than after. Plaintiffs thus reduced Defendants' exposure by 50% to **$48,060**. Khoury Decl., ¶ 50.

(b) Overtime Wages Owed for Shifts Over Eight Hours in a Day. Plaintiffs contend Defendants failed to pay all overtime wages owed for hours worked over eight per day or forty per week, instead paying overtime according to the time table in Labor Code section 860 for agricultural workers or to an alternative workweek schedule. Plaintiffs contend Class Members were not employed in an agricultural occupation and that a search of the state's database returns zero reported alternative workweek election results. Plaintiffs requested their consultant compare the time punch records with the pay records to determine the amount of unpaid overtime that resulted by Defendants not paying overtime in excess of 8 hours/day or 40 hours/week. The consultant successfully compared time record hours with pay record hours within a close margin for 90.1% of the pay periods. Out of these pay periods with hours matching, the consultant found 3.1% had underpaid overtime for not paying hours in excess of 8 per day or 40 per week resulting in an extrapolated 2,589.1 underpaid overtime premium hours. Applying the average rate of pay in each year results in $22,940 in underpaid overtime premiums (0.5x portion). Berger Decl., ¶ 9.Plaintiffs reduced this maximum value in consideration of the following. First, there is a dearth of case law explaining when Labor Code section 860 should apply—that is, what employees are employed in an "agricultural occupation;" thus, Defendants might successfully argue section 860 should apply because their business was manufacturing and packaging agriculatural products. Second, there was

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[5] In his declaration, Berger explains how this number of shifts was calculated from the data. Berger Decl., ¶ 7.

a substantial risk this claim would not be certified given that only 3.1% of the Class was underpaid overtime. Plaintiffs thus reduced this value by 50% to **$11,470**. Khoury Decl., ¶ 51.

(c) Overtime Wages Owed at the Regular Rate of Pay. Plaintiffs contend Defendants failed to factor into the regular rate of pay all non-discretionary bonuses when calculating overtime wages. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, 554. Specifically, payroll records show an apparently yearly bonus labeled "Bonus" which was not factored into Class Members' regular rate of pay in pay periods in which they earned overtime wages. Khoury Decl., ¶ 52. Plaintiffs requested their consultant analyze the payroll records to determine the amount of underpaid overtime which occurred by not including the bonus payments into the regular rate of pay for purposes of paying overtime. The analysis assumes the bonuses were earned over the entire year and therefore the consultant calculated the underpaid overtime by applying these bonus payments to the entire year in which they were earned. The consultant calculated the regular rate of pay on a pay period by pay period basis and compared the overtime paid amounts with what Defendants should have been paying assuming the bonuses needed to be included in the regular rate of pay. 66.8% of employees analyzed resulted in an underpayment across 70.2% of pay periods totaling $14,406 in underpaid overtime. Berger Decl., ¶ 10. Plaintiffs each received at least one such "Bonus" while working for Defendants in the same pay period in which they earned overtime wages; despite this, their overtime wages were paid at exactly one and one-half times their based hourly rate, indicating the Bonus was not included in their regular rate of pay. Khoury Decl., ¶ 53, Ex. 4 thereto— Lucas and Magallan Pay Records Showing Bonus and Overtime. Given the risk that the "Bonus" identified in the records would not be deemed non-discretionary, and that this claim could fail at certification, Plaintiffs reduced Defendants' exposure by 50%, to **$7,203**. Khoury Decl., ¶ 54.

2. Labor Code §§ 226.7, 512 Meal Periods

Employers must provide "an uninterrupted 30-minute period during which the employee is relieved of all duty." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1042. "An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee." Labor Code § 512(a). Otherwise, the employer owes one hour of pay to the employee at their regular rate of pay. Labor Code §§ 226.7, 512. If records show a missed, late, short, or interrupted meal period there is a presumption of liability, which the employer may rebut. *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58, 77.

Plaintiffs asked their consulant to assess the meal break exposure for shifts worked over 5 hours with one of the following occurrences: a meal break starting after the end of the 5th hour of work (late), a shift without a recorded meal break (missed 1st), a meal break lasting for less than 30 minutes (short), a shift lasting between 10 – 12 hours without a recorded 2nd meal break (missed 2nd), or a shift lasting longer than 12 hours without a recorded 2nd meal break (missed 2nd). The extrapolated results from the meal break analysis are as follows: a) 13,818 instances had a late meal break out of the 103,392 extrapolated meal breaks, representing 13.4% of all shifts with a recorded meal break. b) 809 shifts had a missing 1st meal break representing 0.8% of the 104,201 extrapolated shifts over 5 hours. c) 133 instances of a short meal break representing 0.1% of the 103,392 extrapolated 1 st meal breaks. d) 17,321 shifts had a missing 2nd meal break for shifts between 10-12 hours. e) 729 shifts had a missing 2nd meal break for shifts over 12 hours. f) In total, there were 28,264 instances of one or more of the above meal break violations representing a 26.1% meal break violation rate of all shifts extrapolated assuming no meal break waivers. g) In total, there were 14,396 instances of one or more of the above meal break violations representing a 13.3% meal break violation rate of all shifts extrapolated assuming meal break waivers. h) Applying a one-hour penalty of $17.72 per each of the 14,396 extrapolated meal break violations assuming meal break waivers results in an exposure of $255,104. Berger Decl., ¶ 11. Plaintiffs contend that for valulation purposes, an assumption that meal period waivers were signed is rational given that Plaintiffs Lucas and Magallan signed meal period waivers. Khoury Decl., ¶ 55, Ex. 5 thereto—Lucas and Magallan Signed Meal Break Waivers.[6]

Plaintiffs were among those who suffered meal period violations. For instance, Plaintiff

[6] An exemplar wage statement is included before the late first meal period examples solely to show each Plaintiffs' Employee ID number. Khoury Decl., ¶ 56.

Lucas experienced late or missed meal or rest periods, especially when he had to unload trucks and could not go on break until the truck was fully unloaded. He believes this occurred at least one to two times per week. Lucas Decl., ¶ 5. Plaintiff Magallan was also not provided all meal and rest periods to which he was entitled. Magallan Decl., ¶ 4. Plaintiffs' timekeeping records reveal examples of late meal periods suffered by them. Khoury Decl., ¶ 56, Ex. 6 thereto—Lucas and Magallan Late First Meal Period Examples.

Plaintiffs reduced this maximum value in consideration of the following. First, Defendant SW produced a facially compliant meal period policy which applied to all Class Members, which it could use to rebut the presumption of liability by arguing that Class Members chose to miss meal breaks or take them late. McDonald Decl., ¶ 6, Exhibit A thereto. Second, given that Class Members worked in various positions with various duties (with even the two Plaintiffs working in a combined four separate non-exempt positions), Plaintiffs might have difficulty certifying the Class given that Defendants' individualized defenses to liability. *See, e.g. Galvan v. First Student Mgmt., LLC* (N.D.Cal. Aug. 23, 2022, No. 18-cv-07378-JST) 2022 U.S.Dist.LEXIS 242869, at *19 (finding no commonality where Plaintiffs could not show a consistent unofficial policy to deny meal breaks existed as to each Class Member, despite the *Donohue* presumption being invoked by the plaintiff who showed a percentage of meal breaks were facially non-compliant)("Because individualized issues predominate, the Court denies certification of a meal period class."); see also *Shiferaw v. Sunrise Senior Living Mgmt.*, No. 13-cv-02171-JAK, (C.D. Cal. June 11, 2014) 2014 U.S. Dist. LEXIS 195245, 2014 WL 12585796 at *14 (denying class certification where evidence showed "wide variation in meal breaks taken depending on job classifications, departments, and . . . locations"). Given this, Plaintiffs reduced this figure by 50%, to **$127, 552**. Khoury Decl., ¶ 57.

3. Labor Code § 226.7 Rest Periods

California employers must authorize a first 10-minute rest period after 3.5 hours and a second after 6 hours. *Brinker Restaurant Corp.,* 53 Cal. 4th at 1029. Otherwise, the employer owes one hour of pay at the employee's regular rate of pay. Labor Code § 226.7. Class Members' heavy workloads resulted in non-compliant late, short, or missed rest periods. As discussed in the "Labor Code §§ 226.7, 512 Meal Periods" section above, Plaintiffs were among those who did not receive all rest periods to which they were entitled. Lucas Decl., ¶ 5; Magallan Decl., ¶ 4. Plaintiffs' consultant was asked to assume a rest break violation rate of 20%. Assigning a 20% violation rate to the 107,366 shifts greater than or equal to 3.5 hours equates to 21,473 rest break violations. Applying a one-hour penalty of $17.72 per each of the 21,473 extrapolated rest break violations results in an exposure of $380,501. Berger Decl., ¶ 12. Given that Defendant SW produced a facially compliant rest period policy, that rest period claims are inherently difficult to certify where no timekeeping records of them exist, and that Class Members likely could not remember which, if any, shifts had non-compliant rest periods, Defendants' potential exposure was reduced by 75% to **$95,126**. Khoury Decl., ¶ 58; McDonald Decl., ¶ 6, Ex. A thereto; *see, e.g. Mireles v. Paragon Sys., Inc.*, No. 13cv122 L(BGS), (S.D. Cal. 2014) 2014 U.S. Dist. LEXIS 125311, 2014 WL 4409822, at *6 (denying certification based on lack of commonality where "defendant has an official uniform policy concerning rest periods which is facially consistent with California law").

4. Labor Code § 2802 – Reimbursement of Business Expenses

An employer must indemnify its employees for all their necessary expenditures or losses incurred in the discharge of their duties. Labor Code § 2802. A reasonable percentage of an employee's cell phone charges, which vary in each case, must be reimbursed. *Cochran v. Schwan's Home Services, Inc*. (2014) 228 Cal. App. 4th 1137, 1145. Plaintiffs alleged Defendants failed to reimburse them: for the use of personal cell phones to communicate with coworkers and managers during their shifts when issues arose; for gloves, masks, boots, and earplugs; and for mileage when Plaintiff Magallan was required to use his personal vehicle to drive during work hours when machines broke down and he was required to buy parts to repair them. Defendant SW contends it maintained bulk quantities of supplies of gloves, masks, and earplugs, evidence of which was provided to Plaintiffs in advance of mediation. Furthermore, Defendant SW contends non-exempt employees were covered by Defendant SW's reimbursement policies, including its Shoes for Crews for boots, cell phone reimbursement policy, and travel and expense reimbursement policies. McDonald Decl., ¶¶ 6-7, Ex. B thereto (employee handbook excerpts and onboarding training), Ex. C thereto (cell phone stipend policy executed by Plaintiff Magallan as exemplar of policy provided to non-exempt employees during the Class Period). Given these defenses, Plaintiffs' consultant was asked to conservatively assume $10 per month in unreimbursed business expenses. Assigning a $10 per month multiplied by the estimated 5,555 months over the class period results in an exposure of $55,550. Berger Decl., ¶ 13. Plaintiffs further considered that individualized issues might prevent certification and issues of proof might prevent victory at trial. *See, e.g. Pyara v. Sysco Corp.* (E.D.Cal. Mar. 8, 2017, No. 2:15-cv-01208-JAM-KJN) 2017 U.S.Dist.LEXIS 34164, at *4 (denying certification of cell phone reimbursement claim where written policy existed) ("The 'necessity' of utilizing one's own phone for work purposes will vary by individual."). Defendants' exposure was thus reduced by 90% to **<u>$5,555</u>**. Khoury Decl., ¶ 59.

5. Labor Code § 226 - Wage Statement Penalties (Derivative)

Wage statements must show gross and net wages earned, "total hours worked by the employee" and the "corresponding number of hours worked at each hourly rate." Labor Code §§ 226(a)(1),(2),(5), (9). Plaintiffs contend wage statements did not show all hours worked due to off-the-clock work and all wages earned due to regular rate miscalculation and failure to pay meal and rest break premiums. To recover penalties, Plaintiffs need to prevail on the underlying claims and show any violation was knowing, intentional, or willful. *Pedroza v. PetSmart, Inc*. (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530 *20.

At the time of settlement, unpaid meal and rest period premiums did not give rise to wage statement penalties. *Naranjo v. Spectrum Security Services*, Inc. (2019) 40 Cal. App. 5th 444, 474 review granted, 2020 Cal. LEXIS 167 (January 2, 2020) ("*Naranjo*"). Further, the good faith defense to willfulness is clearly established under California law. *Nordstrom Comm'n Cases* (2010) 186 Cal. App. 4th 576, 584 ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due.").

Wage Statement Penalties, calculated by Plaintiffs' consultant, assume each of the 268 employees and 7,128 pay periods in the 1-year statute of limitations have a violation and therefore are entitled to penalties. Wage Statement Penalties are calculated at $50 for the initial penalty and $100 for each subsequent penalty with a maximum of $4,000 per employee. 268 employees multiplied by $50 = $13,400 for initial penalties. The subsequent penalties are 6,860 (7,128 – 268) and multiplied by $100 per pay period = $686,000. The sum of the initial plus subsequent penalties equals to $699,400. Berger Decl., ¶ 15. Applying only the $50 initial violation rate to all pay periods per *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209, this figure is reduced to $356,400 ($50 x 7,128 pay periods). Khoury Decl., ¶ 60. Plaintiffs estimated probability of certification at 50% and victory at trial at 50%--based on the probability that the underlying claims would be certified and would prevail as discussed above--resulting in a 75% discount to realistic exposure of **<u>$89,100</u>**. Khoury Decl., ¶ 61.

6. Labor Code § 203 - Waiting Time Penalties (Derivative)

If Plaintiffs prove the underlying claims for failure to pay all wages due then derivative claims arise under Labor Code section 203 for failure to pay all wages due on separation of employment. An employer must pay all wages due to an involuntarily terminated employee at the time of termination, or within 72 hours to an employee voluntarily terminating. Labor Code § 203. If failure to pay final wages is willful, daily wages are owed at the same rate for up to 30 days.

Defendant SW stated there are 183 former employees in the 4-year class period. Plaintiffs' consultant determined that reducing this figure to the 3-year statute of limitations results in approximately 161 terminated employees. Waiting Time Penalties assume each of these 161 employees are entitled to penalties and are calculated at 30 days per employee multiplied by $17.72 hourly rate multiplied by 8 hours per day. This results in $684,701 in Waiting Time Penalties. Berger Decl., ¶ 14.

At the time of settlement, the only claim which clearly supported waiting time penalties was for unpaid wages. *Naranjo*, 40 Cal. App. at p. 474 (holding rest and meal period premiums did not). To recover waiting time penalties, Plaintiffs must prove wages owed were willfully not paid. Plaintiffs' counsel believed there was only a 25% probability of prevailing at certification and on the merits, given that "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." *Hill v. Walmart Inc*. (N.D. Cal. January 14, 2021) 2021 U.S. Dist. LEXIS 20950, *17. Realistic exposure was thus estimated at 25% of the maximum, or **<u>$171,175</u>**. Khoury Decl., ¶ 62.

7. Labor Code § 2699 PAGA Penalties

"PAGA penalties are paid 75% to the California Labor and Workforce Development Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle, [ ] very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members." *Magadia v. Wal-Mart Assocs*. (2019) 384 F. Supp. 3d 1058, 1101, disapproved on other grounds, *Magadia v. Wal-Mart Assocs*. (9th Cir., November 19, 2020) 999 F.3d 668.

PAGA civil penalties were calculated using the initial violation rate for all 7,128 PAGA pay periods. *See Vieyara-Flores v. Sika Corp.* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 98081, *13 ("[C]ourts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code."). Khoury Decl., ¶ 63.

Plaintiffs' consultant assessed the potential PAGA penalties assuming a maximum of one violation per pay period for each predicate violation. Unpaid wages assume a $100 penalty amount per each of the 7,128 pay periods results in a maximum PAGA exposure of approximately $712,800. Unpaid overtime assumes a $100 penalty amount per each of the 5,006 pay periods with a regular rate of pay violation and results in a PAGA exposure of approximately $500,600. Meal breaks assume a $50 penalty amount per each of the 3,531 pay periods with a meal break violation and results in a PAGA exposure of approximately $176,550. Rest breaks assume a $50 penalty amount per each of the 7,119 pay periods with a rest break violation and results in a PAGA exposure of approximately $355,950. Wage Statements assume a $250 penalty amount per each of the 7,128 pay periods with a violation and results in a PAGA exposure of approximately $1,782,000. Reimbursements assume a $100 penalty amount per each of the 7,128 pay periods with a violation and results in a PAGA exposure of approximately $712,800. The total PAGA exposure results in $4,240,700. Berger Decl., ¶ 16.

Maximum exposure was greatly discounted given the risk of not proving underlying violations and the Court's authority to reduce penalties, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135. Further, Plaintiffs anticipated the court might deem a PAGA trial unmanageable given the need to interview Class Members as to rest and meal period violations, cell phone and personal vehicle usage, and safety equipment purchases. Based on this, Plaintiffs believed reasonable exposure was no more than two percent of the maximum exposure, or roughly $80,000. Plaintiffs believed this was reasonable given the extent to which courts have reduced PAGA awards from potential maximum exposure. *See, e.g. Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517 (4th DCA). (Plaintiff requested "nearly $70 million in penalties," trial court's $150,000 (or 0.2% of the maximum) award upheld on appeal). Khoury Decl., ¶ 64.

Further, the $5,000 amount allocated to PAGA, representing 1.1% of the settlement value, is in line with other approved settlements. *See*, *e.g.*, *In Re Nordstrom Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (no abuse of discretion approving settlement attributing $0 to PAGA.); *Alcala v. Meyer Logistics, Inc*. (C.D. Cal. June 17, 2019) 2019 LEXIS 166879, *26 (PAGA penalties 1.25% of settlement, "falls within the zero to two percent range for PAGA claims approved by courts."); *In re M.L. Stern Overtime Litig*. (S.D. Cal. Apr. 13, 2009) 2009 LEXIS 31650, *1 (PAGA settlement of 2%). Khoury Decl., ¶ 65.

Finally, on the same date this motion and its supporting documents and exhibits are filed with the Court, they will be served upon Defendants and provided to the LWDA via the LWDA's website, using the appropriate intake form. Khoury Decl., ¶ 66, Ex. 7 thereto—LWDA Confirmation.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiffs and their Counsel seriously considered all facts and arguments and concluded the non-reversionary Settlement is fair and reasonable. After reasonable reductions to maximum exposure calculations, Defendants' reasonable exposure was calculated at $563,465[7] in damages and $80,000 in PAGA penalties, for a total value of $643,465. The GSA of $425,000 represents over 75 % of the realistic value of Class claims, and over 66 % of the maximum exposure including PAGA penalties after reasonable reductions. A settlement is not judged solely against what might have been recovered at trial nor must it provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242. Adequacy must be judged as

[7] $48,060 (off-the-clock unpaid wages) + $11,470 (unpaid overtime wages) + $7,203 (underpaid overtime wages due to regular rate miscalculations) + $135,776 (meal period premiums) + $95,126 (rest period premiums) + $5,555 (expense reimbursements) + $89,100 (wage statement penalties) + $171,175 (waiting time penalties) = $563,465.

"a yielding of absolutes... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation ..." *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 624 (citation omitted). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair." *Id*. at p. 628. The proposed Settlement reflects a good recovery for the Class and should be granted preliminary approval. Khoury Decl., ¶ 67.

VII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

Numerosity and Ascertainability: When an ascertainable and sufficiently numerous class exists, with a well-defined community of interest, and class litigation would be superior to alternate means, certification is appropriate. See *Brinker Restaurant Corp.*, 53 Cal. 4th at p. 1021. Ascertainability is determined by examining class definition, size, and means for identifying members. *Reyes v. Bd. of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271. The 297-member class has been ascertained from Defendants' records and joinder is impracticable, satisfying numerosity. Khoury Decl., ¶ 68.

Community of Interest—Predominance, Typicality, and Adequacy: There is a community of interest if common legal or factual questions predominate, Plaintiffs' claims are typical of the class, and Plaintiffs can adequately represent the class. *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

Predominance: Many of the allegations raised in Plaintiffs' Consolidated Complaint were addressed by Defendant's policies including those contained in its employee handbook. For example, non-exempt employees are covered by Defendsnat's Non-Exempt employee classification, Paydays, Overtime, Time Records, Meal Periods, Break Periods, Travel Expenses, Cell Phone Use, and Final Paycheck policies. McDonald Decl., ¶ 6, Ex. A thereto. Further, Defendant SW attests that the Class was subject to the same realities and policies regarding expense reimbursement, meal breaks, and pre-shift screenings. McDonald Decl., ¶¶ 6-9, Exs. B-D thereto. Further, Plaintiffs' consultant identified by examining Defendant SW's records that 66.8% of the Class was undercompensated due to a regular rate overtime issue and that the Class suffered substantial presumptive meal period violations (14,396 recorded violations for a Class of 297). Berger Decl., ¶¶ 10-11. Given these realities, common questions predominate for the Class. Khoury Decl., ¶ 69.

Typicality: Plaintiffs are typical of the Class. As to the off-the-clock pre-shift screening claim, each Plaintiff was subjected to these screenings as non-exempt employees. McDonald Decl., ¶ 9. As to the overtime-regular rate claim, payroll records reveal both Plaintiffs received a "Bonus" but that this bonus was not factored into the regular rate when paying overtime wages. Khoury Decl., ¶ 70; Ex. 4 thereto. As to the meal period claim, timekeeping records reveal each Plaintiff suffered presumptive late first meal periods. Khoury Decl., ¶ 71; Ex. 6 thereto. As to the derivative claims, if Plaintiffs succeed on the underlying claims, then their waiting time and wage statement penalty claims will be typical of the Class. Khoury Decl., ¶ 72. Finally, because they were non-exempt employees, Plaintiffs were subject to the uniform policies of Defendant SW regarding Paydays, Overtime, Time Records, Meal Periods, Break Periods, Travel Expenses, Cell Phone Use, and Final Paychecks. McDonald Decl., ¶ 6, Ex. A thereto.

Adequacy: Each Plaintiff is an adequate representative of the Class because he has no interests averse to the Class. Lucas Decl., ¶ 2; Magallan Decl., ¶ 2. Further, each Plaintiff accepted the risks of serving as a class representative, spent significant time assisting in the prosecution of the action, conferred a significant benefit on the Class through this Settlement, and remains committed to prosecuting this action. Lucas Decl., ¶¶ 2-13, 15; Magallan Decl., ¶¶ 2-13, 15. *Clark v. American Residential Services* (2009) *LLC*, 175 Cal.App.4th 785, 804-807. For these reasons, each Plaintiff requests a representative service award of $7,500. Lucas Decl., ¶ 14; Magallan Decl., ¶ 14.

Finally, Plaintiff's attorneys are qualified to conduct the litigation and their interests are not antagonistic to the interest of the Class. *McGhee v. Bank of Am*. (1976) 60 Cal.App.3d 442, 450; Khoury Decl., ¶¶ 2-9, 73; Feghali Decl., ¶¶ 6-24; Davtyan Decl., ¶¶ 2-8.

Superiority: The large number of Class Members (297) and the relatively small amount of each Class Member's individual claims makes individual suits impractical. The class action mechanism is thus superior. Khoury Decl., ¶ 74.

VIII. CONCLUSION

Plaintiffs request the Settlement be preliminarily approved, Notice of Class Action

Settlement approved and ordered to be disseminated to the Class, ILYM be appointed the Administrator, Moon Law Group, PC, Cohelan Khoury & Singer, and D.Law. Inc. be appointed as Class Counsel, Plaintiffs Jose Lucas and Jose Magallan be appointed Class Representative, and Final Approval Hearing date be set.

MOON LAW GROUP, PC

Dated: October 17, 2023

By: Rosemary Khoury with permission from
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Allen Feghali
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Attorneys for Plaintiff Jose Ernesto Lucas

COHELAN KHOURY & SINGER
D.LAW, INC.

Dated: October 17, 2023

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