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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

RAYMOND FLORES, on behalf of the State of California and other aggrieved persons,

Plaintiff,

v.

FENCE FACTORY, a California Corporation; FENCE FACTORY dba ELECTRONIC ENTRY DISTRIBUTORS, a California corporation; ELECTRONIC ENTRY DISTRIBUTORS, a California Corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 56-2021-00559015-CU-OE-VTA

CLASS AND REPRESENTATIVE ACTION COMPLAINT

[*Assigned for all purposes to Hon. Benjamin F. Coats, Dept. 43*]

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

[*Filed concurrently with*: Declarations of Justin F. Marquez, and Nick Castro (Settlement Administrator in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and [Proposed] Order Granting Motion.]

FINAL APPROVAL HEARING
Date: February 2, 2024
Time: 8:20 a.m.
Dept: 43

Complaint Filed: October 14, 2021
FAC Filed: July 29, 2022
SAC Filed: June 28, 2023
Trial Date: None Set

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

PLEASE TAKE NOTICE that on February 2, 2024, at 8:20 a.m. in Department 43 of the Ventura County Superior Court, The Hall of Justice, 800 South Victoria Ave., Ventura, CA 93009, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq*., Plaintiff Raymond Flores ("Plaintiff") will move the Court for an Order granting Final Approval of the proposed class action and PAGA settlement between Plaintiff and Defendants Arbee, Inc. and Fence Factory dba Electronic Entry Distributors Technologies, Inc. ("Defendants"). Plaintiff further moves the Court for an Order:

1. Certifying a Class for settlement purposes;
2. Approving the settlement of $ 250,000 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 Raymond Flores as Class Representative for settlement purposes, and approving payment of $10,000.00 to Plaintiff for his services as the Class Representative;
4. Appointing Plaintiff's Counsel, Justin F. Marquez, Christina M. Le, and Arsiné Grigoryan of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes only;
5. Approving payment of settlement administrative expenses to ILYM Group, Inc. in the amount of $9,890;
6. Approving payment of $ 83,333.33 in attorney's fees, which is 33 1/3% of the settlement amount, and costs of $20,000 for litigating this action to Class Counsel;
7. Approving the PAGA Pay in the amount of $10,000.
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, Raymond Flores in Support of Preliminary Approval, and Nick Castro of ILYM Group, Inc. (Settlement Administrator), 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: January 12, 2024

WILSHIRE LAW FIRM

By: Christina M. Le

Justin F. Marquez
Christina M. Le
Arsiné Grigoryan

Attorneys for Plaintiff

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I. INTRODUCTION

Plaintiff Raymond Flores ("Plaintiff") seeks Final Approval of a proposed $250,000 non-reversionary, wage and hour class action and PAGA settlement with Defendants Arbee, Inc. and Fence Factory dba Electronic Entry Distributors Technologies, Inc. ("Defendants," and together with Plaintiff, the "Parties").

The Stipulation of Class and PAGA Action Settlement and Release ("Settlement" or "Settlement Agreement"), which this Court preliminarily approved on September 25, 2023, and is attached as Exhibit 1 to the Declaration of Justin F. Marquez, satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the settlement was reached through extensive, mediated arm's-length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently, and Class Counsel is experienced in similar wage-and-hour litigation. The Settlement will provide substantial monetary payments to 179 Class Members[1]. Upon the Court's final approval of the Settlement, Participating Class Members will receive an **estimated average <u>gross</u> payment of $652.38.** (Castro Decl., ¶ 14.) Among the Participating Class Members, the **<u>estimated highest net payment will be $ 1,031.61.</u>** (*Id.*) To, there are no objections to the Settlement and no requests for exclusion. (*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 requests attorney's fees in the amount of $ 83,333.33, reimbursement of costs and expenses in the amount of $20,000, an enhancement in the amount of $10,000.00 for Plaintiff, Administrative Costs of $ 9,890, and a PAGA Payment of $10,000.00, with a 75% allocation to the California Labor Workforce Development Agency "LWDA") in the amount of $7,500.00 and a 25% allocation to PAGA Group Members in the amount of $2,500.00, requests which are reasonable and thus should be approved by the Court.

Accordingly, Plaintiff respectfully requests the Court grant final approval of the Settlement.

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[1] The Class Data reflected 179 Class Members, and to date, all Class Members are participating in the 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 putative class members worked in California as hourly-paid or non-exempt employees for Defendants during the class period. Defendants specialize in the manufacture, sale, and installation of a wide variety of fencing and related products, including residential, commercial, and industrial fencing, horse corrals, guard rails, bridge railing, gate operators, security systems, wild animal enclosures, portable toilets and much more. (Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ["Marquez Decl."], ¶ 2.)

Plaintiff alleges that Defendants' payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendants failed to pay for all hours worked, including but not limited to off-the-clock work. Plaintiff further alleges that Defendants failed to provide employees with legally compliant meal and rest periods, and Defendants failed to pay overtime and sick pay at the appropriate regular rate of pay. Based on these allegations, Plaintiff asserts related claims for failure to provide accurate wage statements, failure to pay all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On October 14, 2021, Plaintiff filed his Complaint alleging PAGA penalties for the violations against Defendants. Plaintiff sent a notice to Defendants and the California Labor & Workforce Development Agency ("LWDA") alleging similar wage and hour violations pursuant to the PAGA on August 10, 2021. On July 29, 2022, pursuant to a stipulation submitted by the Parties and granted by the Court, Plaintiff filed his First Amended Complaint to correct Defendant entities and submitted an amended PAGA notice to the LWDA on July 15, 2023. On June 28, 2023, pursuant to a stipulation and granted by the Court, Plaintiff filed his Second Amended Class and Representative Action Complaint ("SAC") to include Class causes of action for (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of California Labor Code §§ 201 and 202 (Final Wages Not Timely Paid); (6) Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment); (7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements); (8) Violation of California Labor Code § 1174(d) (Failure To Keep Requisite Payroll Records); and (9) Violation of California Business & Professions Code §§ 17200, et seq. On July 21, 2023, Defendants filed an answer to the SAC. (*Id*. at ¶ 4.)

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

Following the filing of the Complaint, the parties exchanged documents and information before mediating this action. Defendants produced a sample of time and pay records for class members. Defendants also provided documents of its wage and hour policies and practices during the class period, and information regarding the total number of current and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

After reviewing documents regarding Defendants' wage and hour policies and practices, analyzing Defendants' timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants' estimated 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. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id*. at ¶ 6.)

Defendants deny the allegations in the Operative Complaint, denies any failure to comply with the laws identified in in the Operative Complaint, and denies any and all liability for the causes of action that are or reasonably could have been alleged based on the facts in the Operative Complaint

C. <u>Settlement Negotiations</u>

On October 6, 2022, the Parties participated in private mediation with experienced class action mediator, Steven J. Rottman, Esq. The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id.* at ¶ 7.)

After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties reached a settlement, the material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8, **Ex. 1** [Class Action and PAGA Settlement Agreement and Class Notice (**Ex. 1, Ex. B**].)

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 Defendants both to certification and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 29.)

Indeed, the $250,000 Settlement represents **40.0**% of **the realistic maximum recovery of $624,446.91.** (*Id.* at ¶ 25.) Although Class Counsel estimated that Defendants' maximum potential liability for all claims was approximately $4.6 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendants' realistic exposure was $624,446.91 meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 15-29.) Considering the risk and uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class. (*Id.* at ¶ 29.) Indeed, because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

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

The Settlement's key terms include:

1. <u>Settlement Class Definition</u>: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "all current and former hourly-paid or non-exempt employees who worked for Defendants within the

State of California at any time during the period from February 14, 2020 through the date of granting of preliminary approval, or 90 days from the date of the settlement on October 6, 2022, whichever occurs first." (Settlement, § II.1.x.)

2. Settlement Class Period: "means the time period from February 14, 2020 through the date of granting of preliminary approval, or 90 days from the date of the settlement on October 6, 2022, whichever occurs first." (Settlement, § II.1.z.)

3. Participating Settlement Class Members: "means all Settlement Class Members who do not submit a valid and timely Request for Exclusion." (Settlement, § II.1.n.)

4. Gross Settlement Amount: This amount is $250,000, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the Labor and Workforce Development Agency ("LWDA") for the alleged PAGA penalties, all other penalties, and the Class Representative Service Award. (Settlement, § 1.21.)

5. Uncashed Checks: "Each Settlement Payment check will remain valid and negotiable for one hundred eighty (180) calendar days from the date the checks are issued and shall be cancelled thereafter. Funds associated with such cancelled checks will be transmitted to Legal Aid at Work as the cy pres recipient. If the Court does not approve the cy pres designee, the Parties shall select a new cy pres designee, with approval by the Court. Any Class Member who does not opt-out will be nevertheless bound by the terms of the agreement regardless of whether he or she cashes the check." (Settlement, § IV.19.)

6. Release: "Subject to final approval by the Court of this Settlement Agreement and without waiving such rights or claims as may be created by this Settlement Agreement, upon the Effective Date, Plaintiff and Participating Settlement Class Members, for themselves and their respective heirs, executors, administrators, affiliates, successors, and assigns, shall be deemed to have, and by operation of the judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Parties, as defined herein**."** (Settlement, § VI.)

7. No Reversion: "None of the Gross Settlement Amount will revert to Fence Factory." (Settlement, § IV.4.)

8. PAGA Allocation: The settlement includes $10,000 allocated to Plaintiff's claims under PAGA, with 75% of which ($7,500) being paid to the LWDA and 25% ($2,500.00) being paid to the Aggrieved Employees. (Settlement, § IV.6.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 9.)

9. Net Settlement Fund: The "Net Settlement Fund" is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) attorneys' fees and litigation costs, (2) Administrative Costs, (3) enhancement to the Named Plaintiff, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § IV.4 and 5.)

10. Distribution Formula: "Class Members will be eligible to receive a pro rata share of the NSF (i.e., Settlement Share) based on Qualifying Workweeks. Settlement Shares will be calculated by the Settlement Administrator based on the following formula: After Preliminary Approval of the Settlement, the Net Settlement Fund will be divided by the total number of Qualifying Workweeks worked by all Settlement Class Members during the Settlement Class Period to determine the base dollar amount per Qualifying Workweek. Then, the resulting base dollar amount per Qualifying Workweek will be multiplied by each Settlement Class Member's Qualifying Workweeks. After Final Approval of the Settlement, the Net Settlement Fund will be divided by the total number of Qualifying Workweeks worked by all Participating Settlement Class Members during the Settlement Class Period to determine the base dollar amount per Qualifying Workweek. Then, the resulting base dollar amount per Qualifying Workweek will be multiplied by each Participating Settlement Class Member's Qualifying Workweeks. Each Settlement Share will be subject to reduction for applicable taxes as set forth in Paragraph IV.17. To the extent the total payment under this calculation varies from the NSF, each share shall be adjusted on a pro rata basis to equal the Settlement Fund." (Settlement, §IV.11.)

11. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 10% wages, 90% to penalties and interest. (Settlement, § IV.17.)

12. Class Representative Service Award: "Plaintiff will apply to the Court for, and Defendants will not oppose the application for, an award not to exceed ten thousand dollars

($10,000) for his role in serving as the Settlement Class Representative (i.e., Enhancement Award). The Enhancement Award is in addition to the Settlement Share to which Plaintiff is entitled along with other Participating Settlement Class Members. An award by the Court of a lesser amount than that sought by Plaintiff for the Enhancement Award will not constitute a material change to the Settlement." (Settlement, § 3.2.1.)

13. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% ($83,333.33) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed $20,000.00. (Settlement, § IV.8.)

14. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and an explanation of how the settlement allocations are calculated. (Exh. 1, Settlement, Exh. B, Class Notice; Settlement, § V.)

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

This Court granted Plaintiff's Motion for Preliminary Approval of Class Action Settlement on September 25, 2023.

Altogether, notices explaining class member rights were mailed out to all 179 Class Members. (Castro Decl., ¶ 7.) To date, six (6) notice packets remain undeliverable. (*Id.* at ¶ 9.) To date, ***there are no objections to the settlement and no requests for exclusion***[2]**.** (*Id.* at ¶¶ 11-12.) If the Court approves the settlement, the 179 Participating Class Members will receive an **estimated average net payment of $ 652.38** with the **estimated highest net payment will be $1,031.61**. (*Id.* at ¶ 14.)

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

[2] The Response Deadline was January 11, 2024. Plaintiff's counsel will submit a supplemental declaration to address any potential requests for exclusions or objections that were sent as a result of a class member having the Class Notice remailed to them.

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

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

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

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

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

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

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

The Settlement was reached following extensive negotiations following a full day of mediation with experienced employment mediator, Steven J. Rottman, Esq. (Marquez Decl., ¶¶ 7-8.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id*.) The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as class member timekeeping and payroll records, 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 his 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 has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 44 -56.) 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 Defendants' defenses against certification, the strength of Defendants' 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.

To date, no Class Member has objected to the Settlement and no Class Member submitted a request for exclusion from the Settlement. (Castro 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 ATTORNEYS' FEES, COSTS AND AN ENHANCEMENT PAYMENT.

Under the Settlement, subject to the Court's approval, Defendants have agreed not to oppose Class Counsel's request for reasonable attorneys' fees in the amount of $83,333.33, which is 33 1/3% of the Total Maximum Settlement Amount, and Litigation costs in an amount not to exceed $20,000.00 for litigating this Action, which shall be paid from the Total Maximum Settlement Amount. In addition, Defendants will not oppose an application for the payment of Administrative Costs in the amount of $9,890.00 and a Class Representative Enhancement payment in the amount of $10,000.00, to be paid from the Settlement Amount. The proposed attorneys' fees and expenses were disclosed to the Class Members in the Notice of Proposed Class Action Settlement.

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

A. 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 as negotiated by the Parties and requested herein.

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

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

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

(Lab. Code § 1194.)

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

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

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

This action also conferred a significant benefit on a large class of persons. Notice was sent to 178 individuals, and to date, no Class Member objected to the Settlement or 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 significant 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. (Marquez Decl., ¶¶ 44 - 57; *see also Moreno v. Pretium Packaging, Inc.* (C.D. Cal. Aug. 6, 2021) No. 8:19-cv-02500-SB-DFM, 2021 WL 3673845 [approving Plaintiff's counsel's request for attorney's fees after finding it was "reasonable, given the qualifications of the attorneys who worked on this matter."]; *Mark Brulee, et al. v. DAL Global Services, LLC* (C.D. Cal. Dec. 13, 2018) No. CV 17-6433 JVS(JCGx), 2018 WL 6616659 ["Class Counsel's declarations show that the attorneys are experienced and successful litigators."].) 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.

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

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

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation."(*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

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

Wilshire Law Firm's current lodestar is $98,300.00 based on at least 135.8 hours of reported work performed by Class Counsel. (Marquez Decl., ¶¶ 35-43.) Accordingly, the requested fee of $ 83,333.33 is reasonable and fair as it is very close to the lodestar and is it is based on a negative multiplier of about 0.84. Additionally, there are additional hours devoted by Class Counsel to this litigation that are not reflected in Class Counsel's request for attorney's fees, such as future time that will need to be devoted to ensuring the settlement checks are administered. (Marquez Decl., ¶ 40.)

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 531 California employees. Indeed, California Labor Code section 90.5(a) states:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

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

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

Class Counsel requests reimbursement of $20,000 in expenses[3]. (Marquez Decl., ¶ 43.) Defendants have agreed that it will not oppose any cost award request up to $20,000. (Settlement, § 3.2.2.) 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 Class Representative Payment to Plaintiff is Reasonable.</u>

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

Service awards are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage and hour laws. This strong policy is codified in California Labor Code section 90.5, which provides, "it is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions….").

Under the Settlement Agreement, subject to the Court's approval, Defendants agreed not to oppose an enhancement to Plaintiff in the amount of $10,000.00. (Settlement, § 3.2.1.) This amount is also in exchange for Plaintiff's general release of all claims against Defendants. Plaintiff has submitted a declaration demonstrating that he devoted a great deal of time and work assisting

[3] Class Counsel's costs are $21,180.22 but are only seeking the maximum amount recoverable under the Settlement. (Marquez Decl., Exh. 3.)

counsel in the case, including numerous phone calls to discuss the case, case strategy, mediation, and settlement. (*See generally,* Declaration of Plaintiff Raymond Flores In Support Of Motion for Preliminary Approval ["Flores Decl."] (showing at least 40 hours of estimated time devoted to this case).)

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

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

Here, Plaintiff has lent his name to this case and thus subjected himself to public attention. He has also risked his reputation in the community and with regard to future employment opportunities as a result of stepping forward publicly in a class action. When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, an incentive award is especially important. (*See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977; *Weeks v. Kellogg Co.* (C.D. Cal. 2013) 2013 WL 6531177, *36.) Plaintiff has been subject to the rigors of litigation and has had to devote his own time and expenses in participating in the case. (*See, generally,* Young Decl.; *see also* Marquez Decl., ¶ 30-34.)

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

ILYM Group, Inc., the Settlement Administrator, estimates that it will incur a total of $9,890.00 in costs associated with the administration of this Settlement. (Castro Decl., ¶ 15.) These expenses are reasonable, based upon the size of the class and the additional tasks associated with claim and exclusion tracking and Class Member payment processing.

V. <u>CONCLUSION</u>

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

Respectfully submitted,

Dated: January 12, 2024

WILSHIRE LAW FIRM

By: ______________________________

Justin F. Marquez
Christina M. Le
Arsiné Grigoryan

Attorneys for Plaintiff

PROOF OF SERVICE

Flores v. Fence Factory, et al.
56-2021-00559015-CU-OE-VTA

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Sandy S. Sespene, 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 ssespene@wilshirelawfirm.com.

On **January 12, 2024**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA 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:

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Attorneys for Defendants

(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 January 12, 2024, at Los Angeles, California.

____
Sandy S. Sespene