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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ANDRII BLYZENKO, AUBRIELA
GARCIA, and RANDY ST. PIERRE
individually, and on behalf of all
others similarly situated,

Plaintiffs,

v.

AVA Inc., a California Corporation, dba
Reliable Roofing; and DOES 1 through 50,
inclusive,
Defendants.

Case No.: CGC-21-594279 (lead) and CGC-
21-595923

**MEMORANDUM IN SUPPORT OF
MOTION FOR CONDITIONAL
CERTIFICATION OF SETTLEMENT
CLASS AND PRELIMINARY
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT**

Date: March 25, 2024

Time: 10:00 a.m.

Dept: 304

Complaint Filed: August 3, 2021

FAC Filed: November 12, 2021

SAC Filed: October 7, 2022

Trial Date: None

Judge: Hon. Ethan P. Schulman

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I. INTRODUCTION

Plaintiffs Andrii Blyzenko and Aubriela Garcia (“Plaintiffs”), on behalf of themselves and all others similarly situated (“Class Members”), by and through counsel, and pursuant to Civil Code § 1781(f), Code of Civil Procedure § 382, and Rules of Court, Rule 3.769, respectfully submit this Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Approval of Class Action and PAGA Settlement and Certification of Settlement Class (the “Motion”) to settle Plaintiffs’ case against defendant AVA Inc. dba Reliable Roofing (“Defendant”). The settlement for which Plaintiffs now seek preliminary approval (the “Settlement”) obtains for the class and alleged aggrieved employees a \$550,000.00 settlement fund (exclusive of employer-side payroll taxes), a “checks mailed” payment to class members, and zero reversion to the Defendant of any portion of the fund. Plaintiffs assert that the settlement is fair, adequate, and reasonable, and present the Court with a form and plan for notice to the class.

Counsel for Plaintiffs and Defendant (collectively, the “Parties”) have met and conferred, and Defendant has reviewed and represented to Plaintiffs’ counsel that they have no objection to this Motion. Declaration of Ilya Filmus (“Filmus Decl.”) at ¶ 25. For the reasons set forth below, Plaintiffs respectfully request that the Court enter an order: (1) provisionally certifying the Classes under Code of Civil Procedure section 382 and California Rule of Court 3.769(c) for settlement purposes; (2) preliminarily approving the Settlement; (3) approving as to form the Notice of Settlement and ordering that the Notice of Settlement be distributed to all Class Members; (4) appointing Named Plaintiffs Andrii Blyzenko and Aubriela Garcia as the Class Representatives; (5) appointing CPT Group, Inc. as the Settlement Administrator; (6) appointing Infinity Law Group LLP as Class Counsel; and (7) setting this matter for a hearing on the issues of final approval of the proposed Settlement, approval of the Named Plaintiff enhancement awards, approval of Class Counsel’s attorneys’ fees and costs, and approval of the administration fees and costs.

II. PROCEDURAL HISTORY

A. Class Action (CGC-21-594279)

On August 3, 2021, Plaintiff Andrii Blyzenko filed his initial class action complaint (“Class Action”). A First Amended Class Action Complaint was filed on November 12, 2021 (adding

1 Plaintiff Aubriela Garcia), and a Second Amended Class Action Complaint was filed on October
2 7, 2022 (adding Plaintiff Randy St. Pierre). Filmus Decl., at ¶ 6. On March 20, 2023, Plaintiffs’
3 counsel informed counsel for Defendant that Plaintiff Randy St. Pierre (“St. Pierre”) had passed
4 away and, as a result, Plaintiffs will seek to amend the operative Class Action Complaint and
5 PAGA Action Complaint to remove Plaintiff Randy St. Pierre (and the individuals he sought to
6 represent).

7 **B. PAGA Action (CGC-21-595923)**

8 On October 12, 2021, Plaintiff Andrii Blyzenko filed his initial PAGA Complaint, after providing
9 notice to the LWDA on August 2, 2021 (“PAGA Action”). An amended PAGA Complaint was
10 filed on December 17, 2021, which added Plaintiff Aubriela Garcia, who provided notice to the
11 LWDA on October 13, 2021. Filmus Decl., at ¶ 6. On May 6, 2023, Plaintiff Andrii Blyzenko sent
12 an amended Notice to the LWDA and properly served Defendant. On January 28, 2022, Defendant
13 filed a Notice of Related Case in the Class Action identifying the PAGA Action. On April 27,
14 2022, the Court consolidated the Class Action and the PAGA Action.

15 Immediately prior to filing this Motion, Plaintiffs’ counsel submitted this Motion and all
16 supporting documents filed herewith in relation to the PAGA Blyzenko (i.e., the October 12, 2021
17 LWDA Notice) and PAGA Garcia (i.e., the December 17, 2021 LWDA Notice) matters to the
18 LWDA via online upload. Service of the LWDA is reflected in paragraph 26 of the Declaration of
19 Ilya Filmus submitted herewith.

20 **III. STATEMENT OF FACTS**

21 **A. Plaintiffs’ Claims and Allegations**

22 Plaintiff Blyzenko was hired by Defendant as an “Estimator” from October 2019 through
23 May 2020, and then as a “Quality Assurance” technician from May 2020 through January 2021.
24 Plaintiff Blyzenko was at all times classified by Defendant as an independent contractor. Plaintiff
25 Garcia was employed by Defendant in the accounting department from September 2020 through
26 January 28, 2021. Plaintiff Garcia was at all times classified by Defendant as a non-exempt
27 employee paid hourly.

28 Plaintiffs allege that during the Class and PAGA Periods, Defendant maintained a policy

1 and practice of hiring individuals like Plaintiff Blyzenko and other persons to conduct sales-related
2 or customer service-related tasks including, but not limited to, individuals who held the following
3 positions: sales, quality assurance, and estimator, and classifying them as independent contractors,
4 when in fact they were employees, in order to avoid many of the requirements under the Labor
5 Code. Plaintiffs also allege that Plaintiff Blyzenko's and other workers' pay was withheld until a
6 positive customer review was secured. In addition to withholding pay, Plaintiffs allege Defendant
7 had a policy and practice of scheduling individuals in these sales of customer-service related roles
8 for back-to-back appointments such that there was inadequate time to have compliant meal and
9 rest breaks.

10 Plaintiffs also allege that Defendant violated various wage and hour laws applicable to its
11 workers who were classified as W-2 employees. For example, Plaintiffs allege that Defendant
12 frequently told Plaintiff Garcia and others similarly situated that they had to clock out for lunch,
13 but Defendant would pressure her and others to continue working and answer phone calls
14 throughout rest and meal break periods; pressured its nonexempt employees to clock out at the
15 scheduled time but to continue working once clocked out; and/or expected its non-exempt/hourly
16 employees to work as soon as they arrived at the office but would not allow them to clock in until
17 the designated start time. As a result, Plaintiff Garcia and other similarly situated persons were not
18 compensated for all hours worked.

19 Through the operative complaint, Plaintiffs, former independent contractors (i.e.,
20 individuals who conducted sales-related or customer service-related tasks including, but not
21 limited to, individuals who held the following positions: sales, quality assurance, and estimator)
22 and employees of Defendant (on behalf of themselves and all others similarly situated)—sought
23 damages, restitution, penalties, pre- and post-judgment interest, costs, attorneys' fees, and any
24 other relief deemed appropriate by the Court on the basis of the following allegations:

- 25 1. Failure to Pay Minimum Wages (L.C. §§ 1194, 1197, 1197.1, Wage Order 4-2001, and
26 Wage Order 16-2001);
- 27 2. Liquidated Damages for Failure to Pay Minimum Wages (L.C. § 1194.2);

3. Failure to Pay Overtime and Double-time Wages (L.C. §§ 204, 510, 1194, and Wage Order 4-2001 and Wage Order 16-2001);
4. Failure to Provide Meal Breaks (L.C. §§ 226.7, 512, and Wage Order 4-2001 and Wage Order 16-2001);
5. Failure to Provide Rest Breaks (L.C. § 226.7, and Wage Order 4-2001 and Wage Order 16-2001);
6. Failure to Reimburse Required Business Expenses (L.C. § 2802, and Wage Order 4-2001 and Wage Order 16-2001);
7. Failure to Provide Accurate and Itemized Wage Statements (L.C. § 226);
8. Failure to Timely Pay Wages Upon Termination (L.C. §§ 201, 203); and
9. Unfair Business Practices (Bus. & Prof. Code §§ 17200, *et seq.*).

Plaintiffs have also asserted a claim for penalties pursuant to the Private Attorneys General Act (Labor Code §§ 2698, *et seq.*) (“PAGA”) based on the violations alleged above. Filmus Decl., at ¶ 20.

B. Defendant’s Defenses and Denial of Allegations

On December 23, 2022, Defendant filed an Answer to Plaintiffs’ Second Amended Complaint, denying Plaintiffs’ allegations and asserting 42 affirmative defenses. Defendant vehemently denies Plaintiffs’ allegations in their entirety, denies any and all liability for Plaintiffs’ claims, the putative classes they purport to represent, or any allegedly aggrieved employees. Defendant further denies that Plaintiffs, the putative class, and/or the aggrieved employees are entitled to any relief. Defendant also contends the claims are improper for class treatment and are unmanageable on a representative basis in that they cannot be effectively tried and violate Defendant’s due process rights. Defendant also maintains that it had valid meal period, rest period, and timekeeping and pay policies for its non-exempt staff at all relevant times. Therefore, Defendant contends that any allegedly short, late, or missed meal periods were voluntary, were done without Defendant’s knowledge, and were in direct violation of Company policy. Defendant further maintains that it properly classified individuals who conducted sales and customer service-related tasks as independent contractors. Additionally, Defendant contends it has limited financial

means. Defendant provided Plaintiffs’ counsel a multitude of financial documentation, including, but not limited to personal and corporate tax returns, balance statements, income statements and other documents to support Defendant’s inability to pay more than the Gross Settlement Amount. Filmus Decl., at ¶ 11. As set forth in the Declaration of Vahe Kalashyan, Defendant has not been profitable since 2021, and has limited assets from which to fund any settlement. (Declaration of Vahe Kalashyan [“Kalashyan Decl.”], ¶ 3.)

C. Mediation

Plaintiffs’ counsel diligently pursued an investigation into the putative class and PAGA claims, including analyzing personnel records, payment records, internal data maintained by Defendant, evaluating Defendant’s legal positions, calculating potential class-wide damages and working with an expert in this regard, researching applicable law and defenses thereto, and communicating with Defendant’s counsel. After undertaking this discovery and research, on June 1, 2023, the Parties participated in a private, all-day mediation session with Marc Feder, a well-respected, experienced mediator in the field of wage and hour class actions. Filmus Decl., at ¶ 8. The mediation lasted until about 2 am, but the case did not settle at mediation. After mediation, there were multiple conversations directly with Mr. Feder, with Mr. Feder and Defendant’s counsel, and directly with Defendant’s counsel. After mediation, Plaintiffs’ counsel retained two private investigators to research Defendant and its owner’s financial condition, as well as a forensic accounting expert to evaluate Defendant’s financial records. Filmus Decl., at ¶ 9. Due to Plaintiffs’ counsels’ preparation and effort before, during, and after mediation, these arms-length discussions were fruitful – all parties accepted Mr. Feder’s mediator’s proposal on September 1, 2023. Filmus Decl., at ¶ 10. The Parties signed a Memorandum of Understanding, and then negotiated the Joint Stipulation of Class Action and PAGA Settlement and Release (the “Settlement”) that Plaintiffs present to the Court for preliminary approval. A true and correct copy of the Settlement with exhibits is attached as Exhibit 1 to the “Filmus Decl.”

I. TERMS OF THE PROPOSED SETTLEMENT

Plaintiffs contend that the Settlement is fair, reasonable and adequate, and consequently, Plaintiffs respectfully request that the Court preliminarily approve it and allow for the

1 dissemination of Notice of the Settlement to the conditionally certified class. The central terms of
2 the Settlement are as follows:

3 The Settlement seeks to provide compensation to a Class which is divided into two
4 subclasses named as Hourly Class Members and Class Contractors (collectively “Class
5 Members”). Filmus Decl., Ex. 1, at 1 ¶ 2.

6 “Hourly Class Member” are defined as “All current and former non-exempt employees of
7 Defendant who worked in the state of California at any time between August 3, 2017, and July 5,
8 2023.” The period from August 3, 2017, to July 5, 2023, will be referred to herein as the “Class
9 Hourly Period.” Filmus Decl., Ex. 1, at 1 ¶ 2(a).

10 “Class Contractor” are defined as “All current and former individuals or entities who
11 worked in the state of California at any time between August 3, 2017, and August 31, 2021, and
12 who were contracted by Defendant as independent contractors to conduct sales-related or customer
13 service-related tasks including, but not limited to, individuals who held the following positions:
14 sales, quality assurance, and estimator” The period from August 3, 2017, to August 31, 2021, will
15 be referred to herein as the “Class Contractor Period.” Filmus Decl., Ex. 1, at 1 ¶ 2(b).

16 Also, the Settlement seeks to provide compensation to two sub-groups of allegedly
17 aggrieved individuals, which are named as “PAGA Hourly Employees” and “PAGA Contractor.”
18 (collectively “PAGA Members”). Filmus Decl., Ex. 1, at 1 ¶ 3.

19 “PAGA Hourly Employees” are defined as “All current and former non-exempt employees
20 of Defendant who worked in the state of California at any time between December 17, 2020 and
21 July 5, 2023.” The period from December 17, 2020 to July 5, 2023 will be referred to herein as the
22 “PAGA Hourly Period.” Filmus Decl., Ex. 1, at 1 ¶ 3(a).

23 “PAGA Contractor” are defined as “all current and former individuals or entities who
24 worked in the state of California at any time between December 17, 2020 and August 31, 2021,
25 and who were contracted by Defendant as independent contractors to conduct sales-related or
26 customer service-related tasks including, but not limited to, individuals who held the following
27 positions: sales, quality assurance, and estimator.” The period from December 17, 2020 to August
28

31, 2021 will be referred to herein as the “PAGA Contractor Period.” Filmus Decl., Ex. 1, at 1 ¶ 3(b).

Defendant will pay \$550,000.00 (the “Gross Settlement Amount”), excluding employer-side payroll taxes in full settlement of the Class and PAGA claims alleged. Filmus Decl., Ex. 1, at 2 ¶ 6. The Gross Settlement Amount is intended to cover all monetary components for the resolution of this matter, including (1) Payments to the Class Members for their share of the Net Settlement Amount (defined below); (2) Payments to the PAGA Members of their share of the Net Settlement Amount; (3) Plaintiffs’ counsel’s attorneys’ fees of \$183,333 (one-third of the Gross Settlement Amount) *Id.*, at 3 ¶ 10; (4) Plaintiffs’ counsel’s litigation costs and expenses which may not exceed \$25,000. *Id.*, at 3 ¶ 10; (5) settlement administration costs not to exceed \$14,500; (6) the payment to the LWDA of its share of Net Settlement Amount; (7) payment of service awards to Plaintiffs of \$10,000 each; and (8) all employment taxes for employee side wages. *Id.*, at 2 ¶ 6. After the deduction of Court approved expenditures from the Gross Settlement Amount, the remaining Net Settlement Amount will be distributed to Class and PAGA Members based upon a formula described below. In exchange for the consideration provided in the Settlement, Plaintiffs, and the Class and PAGA Members will release Defendant from liability for all claims alleged in *Blyzenko, et al. v. Ava Inc.*, San Francisco Superior Court Case No. CGC-23-607386 and *Blyzenko, et al. v. Ava Inc.*, San Francisco Superior Court Case No. CGC-23-418787. *Id.*, at 4 ¶ 16.

Defendant will pay the Gross Settlement Amount pursuant to a payment plan. Within 15 days after Defendant funds the first half of the Gross Settlement Amount, the Administrator will mail checks for half of the following amounts: all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payments. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payments shall not precede disbursement of Individual Class Payments and Individual PAGA Payments. Within 15 days after Defendant funds 75% of the Gross Settlement Amount, the Administrator will mail checks for 25% of the following amounts: all Individual Class Payments, all Individual PAGA Payments, the LWDA

PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payments. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payments shall not precede disbursement of Individual Class Payments and Individual PAGA Payments. Within 15 days after Defendant fully funds the Gross Settlement Amount, the Administrator will mail checks for remaining 25% of the following amounts: all Individual Class Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Class Representative Service Payments. Disbursement of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payments shall not precede disbursement of Individual Class Payments and Individual PAGA Payments.

The Parties have obtained a not-to-exceed quote from CPT Group, Inc. ("Settlement Administrator") for Settlement Administration Costs of \$14,500. The Settlement Administration Costs shall be paid out of the Gross Settlement Amount if the Court awards payments of Settlement Administration Costs in an amount that is less than the amount stated herein. If the costs incurred by the Settlement Administrator are less than those awarded by the Court, the remainder shall become part of the Gross Settlement Amount.

Defendant will provide the Settlement Administrator with a list containing each Class and PAGA Member's full name and the necessary details about each member, such as mailing address, social security number, and the like, for the Settlement Administrator to effectively administer the settlement. Filmus Decl., at Ex. 1, 3 ¶ 11. Notice of the settlement will be sent to the Class Members by U.S. mail to their last known addresses as reflected in Defendant's records. However, the Settlement Administrator will conduct a National Change of Address search to confirm the most recent address and will mail the notice and claim form to the most recent address available by first class mail, in the event that the current address differs from Defendant's records. The Settlement Administrator shall keep this information strictly confidential. *Id.* Defendant also will provide the Settlement Administrator with the total number of weeks worked by each Class

Member and the total number of PAGA Periods worked by each PAGA Member during the applicable Class/PAGA Periods. One day of work within a week qualifies a Class Member as having worked the entire week for purposes of distributing settlement benefits. *Id.*, at 6 ¶ 20.

The Settlement Administrator will multiply the PAGA Pay Period Value by the number of pay periods worked by each PAGA Member during the PAGA Hourly Period and/or the PAGA Contractor Period, as applicable, to arrive at each PAGA Members pro rata share of the 25% allocation of the PAGA Payment. All payments are for penalties and will be reported on IRS 1099 forms. Filmus Decl., at Ex. 1, at 4 ¶ 13(a).

The remaining Net Settlement Amount will be allocated to Class Members (“Class Member Fund”). The Settlement Administrator will multiply the Class Workweek Value by the number of workweeks worked by each Class Member during the Class Hourly Period and/or Class Contractor Period to arrive at each Class Member’s pro rata share of the Class Member Fund. *Id.*, at 4 ¶ 13(b); Filmus Decl., at ¶ 14. Settlement checks issued by the Settlement Administrator to Class and PAGA Members will remain valid for a period of 180 calendar days after they issue, and shall be cancelled thereafter. Uncashed checks will be transmitted to the National Stuttering Association (“Cy Pres Recipient”) consistent with Code of Civil Procedure Section 384, subd. (b). *Id.*, at 7 ¶ 25.

Because the Settlement resolves and releases claims relating to wages as well as claims relating to expenses, interest, and penalties, the Parties stipulated that 20% of each Class Member’s individual settlement payment would be deemed related to wage claims, and 80% would be deemed reimbursement business expenses, other damages, and for interest and penalties. Filmus Decl., at Ex. 1, at 4 ¶ 13(b). This is important because the tax treatment of the amounts differs. For that portion of an individual settlement payment allocated to wages, the Settlement Administrator will deduct the employee’s share of payroll taxes from the payment and report it using an IRS Form W-2. *Id.* For the portion allocated to business expenses, interest and penalties, the Claims Administrator will report the payment on an IRS Form 1099. *Id.* Defendant must separately pay the employer contributions of any and all employer payroll taxes owed on any amounts allocated

as wages, as, those additional amounts are not included in the Gross Settlement Amount. *Id.*, at 15 ¶ 47.

A Class Member need not file a claim to reap the Settlement benefits. Filmus Decl., at ¶ 16. Rather, Class Members will be provided a Notice of Settlement. The Settlement Administrator will use a variety of tools to ensure that the mailing address used for each Class Member is current. Filmus Decl., at ¶ 17. PAGA Payments, if applicable, will be mailed to PAGA Members regardless of whether the individual opts out of the Class Settlement.

Plaintiffs' counsel will submit to counsel for Defendant a draft proposed Consolidated Complaint which removes Plaintiff Randy St. Pierre ("Amended Complaint") as well as a proposed stipulation and order regarding the filing of the same. Once finalized, Plaintiffs' Counsel will file it with the Court. Defendant is not required to file a response to the Amended Complaint. Filmus Decl., at Ex. 1, at 3 ¶ 9; Filmus Decl., at ¶ 15.

The effective date of the Settlement will be when the final approval of the settlement is no longer appealable (the "Effective Date"). Defendant shall fund half the Gross Settlement Amount, or Two Hundred and Seventy-Five Thousand Dollars (\$275,000) and all employer-side payroll taxes, within sixty (60) days after the Effective Date. The remaining portion of the Gross Settlement Amount, or Two Hundred and Seventy-Five Thousand Dollars (\$275,000), shall be paid in twelve (12) equal monthly installments to begin one month after the first payment. Vahe Kalashyan has signed a personal guarantee of the settlement funds. Filmus Decl., at Ex. 1, at 7 ¶ 24.

The Parties stipulated to procedures for permitting putative Class Members to object to the Settlement or to opt-out of the Settlement should any individual Class member elect to do so. In either instance, the putative Class member must provide to the Settlement Administrator a written notice of his or her exclusion or objection within 60 calendar days of the first date Notice of the Settlement was mailed. Filmus Decl., at ¶ 19. If an individual opts out, then they will have no right to object. Filmus Decl., at Ex. 1, at 4 ¶ 15. Detailed instructions as to the contents of an exclusion or opt-out request will be provided in the Notice of Settlement. *E.g., id.*, at Ex. A to the Settlement (Proposed Notice of Settlement).

The Parties also stipulated to procedures for Class Members who want to share in the Settlement benefits but who dispute the data upon which his or her payment is based to dispute the proposed award. Filmus Decl., at ¶ 18. The instructions for disputing the data upon which the payment is based are included in the Notice of Settlement. *Id.*, at Ex. A. As with requests for exclusion or objections, disputes as to the amount of a payment must be raised within 60 calendar days of the mailing of the Notice of Settlement. Filmus Decl., at ¶ 19.

Finally, the Parties stipulated that the Settlement shall be fully enforceable and binding upon the parties, and that it shall be admissible under California Code of Civil Procedure Section 664.6 and subject to disclosure in any proceeding to enforce its terms, notwithstanding the mediation confidentiality provisions that otherwise might apply under federal or state law.

II. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

The Court's evaluation of the propriety of certifying a class turns not on the merits of the claims asserted, but upon whether those claims are based on common issues of law and fact. *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal. 4th 319, 326. The central goal of the class action device is to avoid "a multiplicity of trial conducted at great expense to both the judicial system and the litigants." *Id.* at 340. To achieve this goal, California law and public policy favor the fullest and most flexible use of the class action device. *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470. Hence, California Code of Civil Procedure Section 382 provides, "When the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Cal. Civ. Proc. § 382.

Section 382 requires Plaintiffs to demonstrate that: "(1) there must be an ascertainable class; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704 (internal citations omitted). "The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On*

1 *Drug Stores*, 34 Cal. 4th at 326. The proposed settlement classes here meets the twin requirements
2 of Section 382.

3 **A. Ascertainable Classes Exists That are so Numerous that Joiner is**
4 **Impracticable**

5 The proposed classes are readily ascertainable in that all Class Members and their dates of
6 employment can be identified in Defendant’s hiring and personnel records. Filmus Decl., at ¶ 12.
7 Based on Defendant’s records, the putative class consists of 444 persons. Filmus Decl., at ¶ 13.
8 Accordingly, the putative class is considerably larger than the 28 member class certified in
9 *Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017, 1030, and the 42 member class certified in
10 *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 934 (disapproved on other grounds in *Noel*
11 *v. Thrifty Payless, Inc.* (2019) 7 Cal. 5th 955, 984). As in Hebbard and Rose, joinder of all 444
12 putative Class Members would be impracticable and unmanageable. A class-wide proceeding is
13 preferable.

14 **B. There is a Well-Defined Community of Interest in Questions of Law and Fact**

15 The putative settlement classes embody all three factors of the “community of interest” test of
16 Section 382: (1) Commonality; (2) Typicality; and (3) Adequacy. *Sav-On Drug Stores*, 34 Cal. 4th
17 at 326].

18 **1. Questions of Law and Fact Predominate**

19 Class Contractors’ claims center on Defendant’s alleged pattern and practice of
20 misclassifying employees as independent contractors. Defendant’s alleged misclassification
21 cascades into a series of Labor Code violations all premised on the same underlying conduct. The
22 default presumption in California is that a worker is an employee. The burden is on Defendant to
23 establish that its workers are not employees. Labor Code § 2775(b)(1). Thus, one question common
24 to all putative Class Contractors is whether Defendant can establish that they are not employees.
25 Notably, the kind of evidence relevant to this question similarly is common to all putative Class
26 Contractors, including the amount of control and direction Defendant exerted over Class
27 Contractors’ performance of their work, and whether the nature of Class Contractors’ work was
28 outside the usual course of Defendant’s business. Additional common questions flow from the

1 presumption that putative Class Contractors are employees. These same common questions of
2 whether Defendant committed Labor Code violations apply to Class Hourly Employees in a similar
3 fashion. For example, whether all Class Members were afforded rest and meal breaks, whether all
4 Class Members were paid overtime, whether all Class Members were paid for all hours worked,
5 whether all Class Members were reimbursed for necessary business expenses, and whether all
6 Class Members were provided compliant wage statements. This Action presents numerous,
7 substantial common questions favoring class treatment.

8 **2. Plaintiffs' Claims are Typical**

9 Typicality does not focus on individual characteristics or circumstances of the Plaintiffs
10 relative the rest of the putative class, but rather on the Plaintiffs' claims as they relate to the
11 Defendant's alleged conduct. *Classen v. Weller* (1983) 145 Ca. App. 3d 27, 47. The class
12 representative's claims are typical if they arise from the same event, practice or course of conduct
13 that gives rise to the claims of other class members, and if their claims rest on the same legal
14 theories. *Id.* Here, Plaintiffs' claims are typical of the proposed Settlement Class. The Class
15 Contractors worked pursuant to the same written contracts, were paid in the same manner as other
16 Class Contractors, were performing the same work as other Class Contractors, and were subject to
17 Defendant's allegedly noncompliant policies and practices as were the other Class Members.
18 Similarly, the Class Hourly Employees were all subject to Defendant's allegedly noncompliant
19 policies and practices, were paid in a similar manner, and were provided similar wage statements.

20 **3. Plaintiffs and their Counsel will Adequately Protect the Interests of the** 21 **Settlement Classes**

22 The adequacy requirement is met by fulfilling two conditions: (1) that Plaintiffs' counsel
23 is qualified to conduct the pending litigation; and (2) the class representative's interests are not
24 antagonistic to those of the putative class. *McGhee v. Crocker-Citizens Nat. Bank* (1976) 60 Cal.
25 App. 3d 442, 451. First, Plaintiffs' counsel is qualified and able to conduct the litigation. Plaintiffs'
26 counsels have extensive expertise in handling all aspects of wage and hour litigation, both on an
27 individual and class basis. Filmus Decl., at ¶ 3-4; Pfeilschifter Decl., at ¶ 3-4 Second Plaintiffs
28 do not pursue any interests that are antagonistic to the putative class. As a result of Defendant's

1 alleged wage and hour violations, Plaintiffs were injured in the same manner as putative Class
2 Members and seek the same redress for themselves as they do for the class for those injuries.
3 Plaintiffs assisted in the litigation efforts by gathering their own records, communicating with their
4 counsel to illuminate Defendant's alleged bad practices, gathered contact information of
5 Defendants' employees, contributed to informal records requests and discovery requests,
6 facilitated interviews between Defendant's former employees and Class Counsel, participated in a
7 17-hour mediation of this Action, and continue to stay involve in settlement discussions that lasted
8 over a few months after mediation. Declarations of A. Blyzenko, ¶¶ 4-5 & A. Garcia, ¶¶ 4-5. As a
9 direct result of their efforts, their attorneys gathered sufficient documentary and testimonial
10 evidence to engage in meaningful class-wide mediation that resulted in the proposed \$550,000
11 class settlement for 444 California workers.

12 **4. A Class Action is Superior to a Multiplicity of Litigation**

13 Finally, the Court must determine that a class action would be superior to alternative means
14 for the fair and efficient adjudication of the claims. By consolidating 444 potential individual
15 actions into a single class-wide proceeding, the Court can manage this litigation in a manner that
16 serves the economics of time, effort and expense for the litigants and the judicial system. Absent
17 class treatment, similarly situated employees with relatively small but meritorious claims for
18 damages would, as a practical matter, have no means of redress because of the time, effort and
19 expense required to prosecute individual actions. *Daar*, 67 Cal.2d at 713.

20 **V. THE SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL**

21 Review of a proposed class action settlement involves a two-step process: preliminary
22 approval and a subsequent final approval hearing. "[T]he purpose of the preliminary evaluation is
23 to determine only whether the proposed settlement and plan of distribution are within the range of
24 possible approval and whether notice to the settlement class of its terms and conditions, and the
25 scheduling of a . . . final approval hearing, will be worthwhile." Newberg on Class Actions, Class
26 Actions in State Courts, Preliminary Approval (4th ed. 2002) § 13:64. Determining whether the
27 proposed settlement is within the range of possible approval necessarily requires the Court to
28 consider whether the settlement is fair, as that is the overarching consideration at the final approval

1 hearing. Cal. R. Ct. 3.769(g) (“Before final approval, the court must conduct an inquiry into the
2 fairness of the proposed settlement.”); *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794,
3 1801.

4 The Court has broad discretion in evaluating the fairness of a class settlement. And
5 although California courts, including California federal district courts, have adopted a mix of
6 considerations, “[t]he list of factors is not exhaustive and should be tailored to each case.” *Dunk*,
7 48 Cal. App. 4th at 1801. The factors are: (1) the strength of Plaintiffs’ case; (2) the risk, expense,
8 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
9 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the
10 stage of the proceedings; and (6) the experience and views of counsel. *7-Eleven Owners v.*
11 *Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1146.¹

12 The Settlement satisfies these factors.

13 **A. The Strength of Plaintiffs’ Case**

14 Plaintiffs are fairly confident that all Class Contractors were misclassified as independent
15 contractors. In most contexts, the default presumption in California is that a worker is an
16 “employee” if they provide labor or services for someone else in exchange for pay. The burden is
17 on the hiring entity to establish that the worker is not an employee. Cal. Labor Code § 2775(b)(1);
18 *Dynamix Oper. West, Inc. v. Super. Ct.* (2018) 4 Cal. 5th 903, 913. Defendant would have to prove
19 each of three prongs, known as the “ABC test,” to defend classifying Class/PAGA Members as
20 independent contractors. Plaintiffs allege Defendant would not be able to satisfy the ABC test
21 because, among other reasons, the Class Contractors’ labor and services did not fall outside the
22 usual course of Defendant’s business (in contradiction to prong B of the ABC test). Defendant is
23 a sales and marketing company which sells roofing services which, according to Plaintiffs, is
24 precisely the work that Plaintiff Blyzenko and the Class Contractors conducted.

25 Because Plaintiffs allege that Class Contractors were misclassified as independent
26 contractors, Plaintiffs allege Defendant necessarily violated California’s statutory and regulatory

27 ¹ The reaction of the class members is another factor to consider at final approval (*7-Eleven*
28 *Owners*, 85 Cal. App. 4th at 1146), but it has no bearing at this stage because the class has not
yet been notified of the proposed settlement.

1 schemes governing minimum and overtime wages, meal and rest periods, accurate wages
2 statements, and reimbursement of business-related expenses. Plaintiffs are also confident that
3 Defendant violated the same statutory and regulatory scheme with respect to the Class Hourly
4 Employees. Based on Plaintiff Garcia's recollection and former employee interviews, Plaintiffs
5 assert that Defendant did not pay all Class Members for all hours worked, Class members used
6 their own property to conduct Defendant's business in violation of Labor Code Section 2802, and
7 Defendant failed to provide compliant meal and rest breaks to Class Hourly Employees, among
8 other things.

9 **B. The Risk, Expense, Complexity and Duration of Litigation**

10 Defendant vigorously disputes the validity of Plaintiffs' claims. Defendant raises several
11 factual and legal defenses that, if successful, would defeat or substantially impair the value of
12 Plaintiffs' claims. For example, Defendant claims that Defendant had reasonable grounds for
13 believing that payment, overtime, meal and rest period practices complied with applicable laws
14 and that such act of omission was not a violation of the California Labor Code or any applicable
15 Wage Order, such that Plaintiffs and/or any alleged putative Class Members are not entitled to any
16 damages or penalties. Moreover, Defendant argues that proof as to meal and rest breaks necessarily
17 will require individual proof, making class treatment improper. Defendant contends that
18 calculating the reimbursement value for all Class Members would require timely and costly
19 individual proof, creating manageability problems with obtaining and presenting individual proof.
20 Further, Defendant argues that the Class Contractors met the outside sales exemption, which would
21 exempt Defendant from certain wage and hour obligations. Finally, Defendant asserts that its time
22 records establish compliance with wage and hour laws.

23 While Defendant's arguments may or may not be well-taken, it is clear that continued
24 litigation of Plaintiffs' claims would involve extensive and expensive discovery that would not
25 likely increase the value of the claims. That is, although the attorneys' fees and costs would
26 increase substantially with the continuation of litigation, the damages recovered for the Class
27 Members would not substantially increase.

Moreover, there are significant legal uncertainties associated with cases such as this as they can be factually complex and require protracted litigation to resolve. A settlement is not judged solely against what might have been recovered had plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F. 3d 1234, 1242; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th at 246 & 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1139. Instead, "[c]ompromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba*, supra, 91 Cal.App.4th at page 250.

Plaintiffs also are cognizant that the final resolution of their claims could be delayed by one or more appeals, the risk of which can arise at multiple points in the litigation, including during class certification proceedings, during class and merits discovery, and during and after trial.

Finally, Defendant contends that its business has declined and is no longer as profitable as it had previously been. To corroborate this contention, Defendant provided financial statements and tax returns, which reflected a smaller and volatile business than in previous years. Two experts and two private investigators were retained to evaluate the records that Defendant provided and do additional research on Defendant and its owner. Filmus Decl., at ¶ 7. While Defendant did not have 2022 tax returns completed at the time of the mediator's proposal and there is a possibility that the financial returns for 2022 and 2023 may not have been accurate, there is nevertheless a risk that continued litigation could result in little or no recovery for Class Members because Defendant is a midsize business that appears to have a smaller workforce, reduced revenue, and heavily leveraged real estate, as well as other potential debt. Filmus Decl., at ¶ 11.

C. The Risk of Maintaining Class Action Status

Plaintiffs believe this action is appropriate for class treatment and could be properly maintained throughout trial. However, they understand that in the absence of settlement, Defendant would fight class certification and could seek decertification at several points in the litigation.

D. The Amount Offered to Compromise

Mediation efforts were protracted. It took Plaintiffs and their counsel tremendous effort to obtain Defendant's commitment to pay \$550,000, following extensive negotiation and evaluation of purported financial status. The average Class Member payout is expected to be about \$500. Filmus Decl., at ¶ 22. While Defendant has agreed to pay the Settlement amount, as set forth above, there were doubts as to Defendant's solvency should the parties continue with litigation. *See, e.g., Ross v. Bar None Enterprises, Inc.* (E.D. Cal., Mar. 10, 2015, No. 2:13-cv-00234) 2015 WL 1046117, at *5 (granting final approval of misclassification settlement, noting defendant could absorb settlement, but not likely increased litigation costs and possible judgment). To maximize the likelihood of payment by Defendant, a payment plan was negotiated and Plaintiffs have obtained a personal guaranty from Defendant's owner.

E. The Sufficiency of Discovery and the Stage of the Proceedings

Plaintiffs gathered sufficient evidence through Plaintiffs' own records, Class Counsel interviewed a number of former workers, discovery, investigations with the use of two private investigators and two experts, and the informal exchange of information before, during, and after mediation to negotiate a settlement in good faith. Filmus Decl., at ¶¶ 7, 9. The information provided a sufficient "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal. App. 4th 399, 409. Plaintiffs and their counsel evaluated the chances of success on a claim-by-claim basis and considered whether additional discovery and litigation would increase or decrease the likelihood of prevailing on the claims. The Settlement is higher than the lowest judgment that could be entered and lower than the most Plaintiffs could recover for themselves and the Class if they prevailed on every claim. Plaintiffs and their counsel are confident that this Settlement is grounded on information sufficient to evaluate the merits of the applicable claims, the strength of Defendant's defenses, and the sufficiency of settlement value.

F. Counsel's Views and Experience

Plaintiffs' counsel frequently advises employers and employees regarding wage and hour laws, and has prosecuted and defended wage and hour cases, including class action cases. Filmus

Decl., at ¶¶ 3-4. Plaintiffs’ counsel understands the burden Plaintiffs face to obtain class certification and to prosecute these claims. Class Counsel is familiar with the difficulties associated with pursuing claims on a class basis and experienced in the evaluation of the kinds of claims asserted in this action. Class Counsel understands the problems small and midsize employers encounter when faced with significant judgments or awards. Based on Counsel’s experience, the proposed Settlement is a good result for the Class Members. Filmus Decl., at ¶ 23.

VI. THE PROPOSED NATURE AND METHOD OF CLASS NOTICE ARE CONSTITUTIONALLY SOUND AND APPROPRIATE

A. The Proposed Notice Plan Satisfies Due Process

California law vests courts with broad discretion in fashioning an appropriate notice program. *Cartt v. Super. Ct.* (1975) 50 Cal. App. 3d 960, 973-74. “The notice given should have a reasonable chance of reaching a substantial percentage of the Class/PAGA Members” *Id.*, at 974. Here, CPT Group will be provided with the last known contact information for past and present employees, including each Class Member’s most recent mailing address, telephone number, and email address. Filmus Decl., Ex. 1 at 6 ¶ 20. CPT Group also will utilize the National Change of Address Database to identify updated addresses. After CPT Group conducts an address update search on the National Change of Address Database, will mail notice of the proposed Settlement to each Class Member. *Id.*, Ex. 1 at 6 ¶ 20.

After CPT Group conducts an address update search on the National Change of Address Database, CPT Group will mail notice of the proposed Settlement to each Class Member. Should a notice be returned to CPT Group as non-deliverable but bearing a forwarding address, CPT Group will re-mail the notice to the forwarding address. *Id.*, Ex. 1 at 17 ¶ 51. Mailed notices will be effective and constitutes the best notice practicable.

In addition to the sufficient mailed notice procedures described above, CPT Group also will email the notice of proposed Settlement to each Class Member (*id.* Ex. 1 at 16 ¶ 50) with information regarding the Settlement, key deadlines, and information regarding the Final Approval Hearing may be found (*id.*, Ex. 1 at 17 ¶ 50).

B. The Proposed Notice is Accurate and Informative

The content of the proposed Notice satisfies Cal. R. Ct. 3.766(d) by providing Class Members straight-forward information about the litigation, the meaning, nature and terms of the proposed Settlement, the relief the Settlement will provide, payment of attorneys' fees and costs, the date, time and place of the Final Approval Hearing, and the procedure and deadlines for opting out of the proposed settlement and for submitting comments and objections.

The Notice also fulfills the requirement of neutrality by summarizing the proceedings and the terms of the proposed Settlement in an informative and coherent manner. It states that the Settlement constitutes no admission of liability by the Defendant, and that the Court has not ruled on the merits of the claims. It also states that the final settlement approval decision has yet to be made. The Notice complies with the standards of fairness, completeness and neutrality and should be approved.

VII. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE

The last step in the settlement approval process is the formal hearing at which the Court may hear all evidence and argument to evaluate conclusively the proposed Settlement. At that hearing, proponents of the proposed Settlement may explain and describe its terms, and offer argument to support its final approval, and Class Members (or their counsel) may be heard to support or oppose the Settlement.

VIII. CONCLUSION

Plaintiffs respectfully requests that the Court conditionally certify the proposed Class for settlement, approve Infinity Law Group as Class Counsel, approve Plaintiffs Andrii Blyzenko & Aubriela Garcia as the Class Representative, approve the CPT Group as the third-party Settlement Administrator, approve the form and method of notice, approve the proposed mechanism for receiving and handling opt outs and objections, and the Final Approval Hearing be set.

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Dated: March 1, 2024

INFINITY LAW GROUP LLP


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