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on behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

JAIME GONZALEZ, individually and on behalf of himself and all others similarly situated, Plaintiff, v. PROBUILD COMPANY, LLC, a Delaware limited liability company, doing business as DIXIELINE LUMBER & HOME CENTERS; BUILDERS FIRSTSOURCE, INC., entity type unknown; and DOES 1-50, inclusive, Defendants.	Case No.: CVRI2105278 Assigned for All Purposes To: Hon. Harold W. Hopp, Dept. 1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Date: December 13, 2024 Time: 8:30 a.m. Dept.: 1 Complaint filed: November 19, 2021 Trial Date: None set

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I. INTRODUCTION

Plaintiff Jaime Gonzalez ("Plaintiff") seeks preliminary approval of a Class Action and PAGA Settlement ("Settlement") on behalf of all current and former non-exempt employees of Defendants[1] who worked for Defendants in California from October 4, 2020 and March 24, 2024 (the "Class"). Following substantial investigation and mediation, the Parties agreed to a non-reversionary Maximum Settlement Amount ("MSA") of $2,500,000, exclusive of employer-side payroll taxes. Subject to Court approval, the MSA will be distributed to Class Members who do not opt-out of the Settlement based on their workweeks during the Class Period, after deductions of the PAGA Settlement Amount, Administration Expenses Payment, Class Representative Enhancement Payment, and Class Counsel's Fees Payment.

Plaintiff requests that the Court: (1) provisionally certify the Class; (2) preliminarily approve the Settlement; (3) approve the proposed Class Notice and distribution plan; (4) appoint Plaintiff as Class Representative, James Hawkins APLC as Class Counsel, and Apex Class Action LLC as the Administrator; and (5) schedule a final approval hearing.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Plaintiff's Claims And Relevant Background

Plaintiff was employed by Defendants as a non-exempt Material Handler and Assembler in Riverside, California from September 21, 2020 through November 18, 2020. (Declaration of James R. Hawkins ("Hawkins Decl."), ¶ 6.) Plaintiff contends that over the course of his employment, Defendants failed to include non-discretionary bonuses and incentives into regular rate of pay for purposes of overtime and meal period premiums; often required him to perform off-the-clock work and through meal and rest periods; failed to timely pay all wages owed at separation from employment; failed to reimburse for expenses incurred, including mileage; and failed to provide accurate, itemized wage statements. (*Id.*)

On November 18, 2021, Plaintiff filed a Class Complaint alleging causes of action for (1) violations of FCRA for failure to make required disclosures; (2) violations of FCRA for failure to obtain required authorization; (3) violations of ICRAA for failure to make required disclosures; (4) violations of

[1] Defendants means defendants ProBuild Company LLC (now known as BFS Group LLC, a Delaware Limited Liability Company (amended foreign name) and BFS Group of California LLC, a Delaware Limited Liability Company (amended California alternate name))and Builders FirstSource, Inc. (collectively, "Defendants").

ICRAA for failure to obtain required authorization; (5) failure to pay minimum wages; (6) failure to pay overtime; (7) failure to provide meal periods; (8) failure to authorize and permit rest periods; (9) failure to timely pay wages during employment; (10) failure to timely pay wages owed upon separation from employment; (11) failure to comply with itemized wage statement provisions; and (12) violation of the unfair competition law. Plaintiff also notified the California Labor and Workforce Development Agency ("LWDA") and Defendants of his intent to assert the rights granted to him under PAGA. (Hawkins Decl., ¶ 7.)

On January 24, 2022, after providing notice to the LWDA, Plaintiff filed a separate PAGA-only complaint asserting violations of the California Labor Code and applicable Industrial Welfare Commission ("IWC") Wage Order for the violations outlined in the (Hawkins Decl., ¶ 8.)

On February 17, 2022, Defendants removed Plaintiff's class action to the Central District of California (Case No. 5:22-CV-00315). On April 7, 2022, Plaintiff filed a First Amended Complaint removing claims for failure to authorize and permit rest periods and failure to timely pay wages during employment, and added claims for payment of wages earned with a gift card and for failure to reimburse necessary expenses. On May 31, 2022, Plaintiff dismissed the background check claims. On August 1, 2022, Plaintiff filed a Second Amended Complaint removing the background check claims and the claims for paying wages earned with a gift card. The Parties stipulated to remand the case to this Court for purposes of settlement, and the case was ordered remanded on July 15, 2024. (Hawkins Decl., ¶ 9.)

B. Investigation and Settlement Negotiations

Prior to filing the lawsuits, Class Counsel thoroughly investigated the facts and circumstances underlying each of Plaintiff's potential claims. (Hawkins Decl., ¶ 11.) This required, among other things, numerous phone calls with Plaintiff, analysis of documents provided by Plaintiff, investigation into the viability of class treatment of the potential claims, and research of the applicable law. (*Id.*) After conducting their initial investigation, Class Counsel determined that Plaintiff's claims were well suited for class adjudication based on what appeared to be a common course of conduct affecting a similarly-situated group of employees. (*Id.*)

After filing the lawsuit, Plaintiff propounded formal discovery and noticed a deposition of Defendants' Person Most Knowledgeable. In lieu of responding to formal discovery, the Parties agreed to mediation and engaged in an informal discovery process. In preparation for mediation Defendants provided substantial data including: (1) a 20% sampling of Class time and pay records; (2) total numbers of current and former employees in both the Class and PAGA groups; (3) total workweeks and pay periods at issue; (4) average pay rates; and (5) applicable handbooks and policies. (Hawkins Decl., ¶ 12.) Class Counsel analyzed this data with the assistance of experts. (Hawkins Decl., ¶¶ 13-14.)

On January 8, 2024, the parties participated in a full-day mediation with Brandon McKelvey, a highly experienced wage and hour class action mediator. (Hawkins Decl., ¶ 18.) Though the case did not settle at mediation, the parties continued to negotiate with the assistance of the mediator and ultimately agreed to settle the claims asserted for the MSA of $2,500,000. (Hawkins Decl., ¶ 19.)

Class Counsel believes the Settlement is fair and reasonable, taking into consideration the strengths and weaknesses of the claims asserted, the amounts received in other wage and hour class actions, the risks inherent in complex litigation, and the defenses asserted. (Hawkins Decl., ¶¶ 17–24.) At all times, the parties' negotiations were adversarial and conducted at arm's-length between experienced attorneys. (Hawkins Decl., ¶¶ 20, 24.)

III. THE TERMS OF THE PROPOSED SETTLEMENT

Subject to Court approval, and pursuant to Code of Civil Procedure section 382 and California Rules of Court, rule 3.769 et seq., the parties have agreed to settle the claims in the operative complaint upon the terms and conditions and for the consideration set forth in the Settlement, a copy of which is attached as Exhibit 1 to the Declaration of James R. Hawkins and is incorporated herein by reference in its entirety. The following is a summary of the principal terms of the Settlement:

A. Class Definition

The Class is defined as all current and former non-exempt employees of Defendants who worked for Defendants in California at any time during the Class Period. (Settlement, § 1.5.) The Class Period is defined as the period from October 4, 2020 to March 24, 2024. (*Id.*, § 1.12) Defendants' records indicate that there are approximately 5,348 Class Members. (*Id.*, § 4.1).

In addition, the Settlement defines Aggrieved Employees as all current or former non-exempt employees of Defendants who worked for Defendants in California between November 20, 2020 to March 24, 2024. (Id. § 1.4.) As set forth below, any Class Member who opts out of the Settlement will nonetheless remain eligible for an Individual PAGA Payment and will be bound by the Release of PAGA Claims. (*Id.*, §§ 5.4, 7.5)

B. The Maximum Settlement Amount And Allocation Of Settlement Funds

Defendants have agreed to pay a non-reversionary MSA of $2,500,000 to settle the claims asserted in the action. (Id. §1.22.) The MSA is an all-in settlement and includes: (1) Individual Class Payments to Participating Class members; (2) Class Counsel's Fees Payment of up to $875,000 and costs of up to $17,500; (3) Administration Expenses Payment of up to $31,000; (4) a Class Representative Enhancement Payment to Plaintiff of up to $10,000; and (5) a PAGA Settlement Amount of $125,000 allocated $93,750 (75%) to the LWDA and $31,250 (25%0 to the Aggrieved Employees. (*Id.*, § 3.2) In addition, Defendants will separately pay the applicable employer-side payroll taxes owed on the wage portions of the Individual Class Payments. (*Id.* § 3.1)

C. Net Funds Available To Class Members

After all Court-approved deductions from the MSA, the estimated amount to be distributed to Participating Class Members is $1,441,500 (the "Net Settlement Amount"). (Hawkins Decl. ¶ 27). The Net Settlement Amount will be distributed on a pro rata based on the number of workweeks a Class Member worked during the Class Period. (Settlement, §3.2.4) Class Members will be provided with notice of the Settlement and its terms, their estimated Individual Class Payment and Individual PAGA Payment, their right to opt-out or object to the settlement, and their right to appear at the fairness hearing. (*Id.* § 7.4)

D. Release

Effective on the date when Defendants fully fund the entire MSA and fund all employer payroll taxes owed on the Wage Portion of the Individual Class Payments, Class Members who do not seek to be excluded from the settlement will be bound by the following release:

> All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from all demands, rights, liabilities, causes of action and claims that were alleged or that could have been alleged based on the facts and theories asserted in the Action arising at any time during the Class Period, including, without limitation, all of the following claims for relief: (1) failure to pay minimum, straight time, overtime, or double time wages, sick pay, and any other wages alleged in the Action; (2) failure to authorize and permit rest periods and/or failure to pay rest premiums at the regular rate; (3) failure to provide meal periods and/or failure to pay meal premiums at the regular rate; (4)

> failure to provide timely accurate and itemized wage statements; (5) failure to timely pay all wages during employment; (6) failure to pay final wages due at separation; (7) failure to reimburse or indemnify all necessary business expenses and losses; (8) failure to maintain records in violation of Labor Code section 1174; (9) failure to pay sick pay; (10) payment of wages earned with a gift card in violation of Labor Code section 212 and 450; (11) claims brought under Business & Professions Code section 17200, et seq. predicated on the same or similar facts and/or claims alleged in the Action, including, but not limited to all claims for unfair, unlawful and harmful conduct to class members, the general public, and Defendants' competitors, and claims of unlawfully gaining an unfair advantage over other businesses; (12) penalties of any nature that were alleged or that could have been alleged based on the facts and theories asserted in the Action; (13) interest; and (14) attorneys' fees and costs.

(Settlement, §5.2).

Plaintiff and the LWDA will be bound by the following release:

> Plaintiff and the LWDA release Released Parties from all demands, rights, liabilities, causes of action and claims under PAGA due to any alleged violations by Released Parties that were alleged or that could have been alleged based on the facts and theories asserted in the Action, or any letter to the Labor and Workforce Development Agency by Plaintiff, or that could have been premised on the claims, causes of action or legal theories described above in Section 5.2, including, but not limited to, alleged violations of Labor Code sections 201, 202, 203, 204, 210, 212, 216, 218.5, 218.6, 221-224, 226, 226.3, 226.7, 245-249, 256, 450, 510, 512, 516, 558, 1024.5, 1174, 1182.12, 1185, 1194, 1194.2, 1195, 1197, 1197.1, 1198, 1198.5, 1199, 2802, and 2804 pertinent IWC California Wage Orders, California Code of Regulations, Title 8, section 11000 et seq., interest, and all attorneys' fees and costs. The release of the Released Class Claims and Release PAGA Claims shall be effective as to the entire Class Period and PAGA Period, respectively, as above; and expressly excludes all other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, and California class claims outside of the Class Period, and PAGA claims outside of the PAGA period.

(Id., §5.3).

In addition to the release given by each Class Member and Aggrieved Employee, and in exchange for the proposed Class Representative Enhancement Payment, Plaintiff will release any and all charges, complaints, claims, causes of action, demands, disputes, damages, business expenses, attorneys' fees, costs, losses, and liabilities of any kind or nature whatsoever, known or unknown, suspected or unsuspected, asserted or unasserted, which Plaintiff, at any time had, claimed to have, or may have against the Released Parties, including waiving their rights under Civil Code § 1542. (Id., § 5.1).

E. Class Notice And Settlement Administration

Subject to Court approval, the Parties agreed to retain Apex Class Action LLC as the Settlement Administrator ("Administrator"), who will be responsible for mailing the Class Notice to Class Members, posting notice of entry of final order and judgment certifying the Class Settlement and approving the Settlement, handling inquiries from Class Members concerning the Class Notice, determining Settlement Payments and PAGA Payments, maintaining the settlement funds in an appropriate account, distributing all Court-approved payments under the Settlement, issuing a final report on the disbursement of funds, and performing such other duties as the parties may direct. (*Id.,* §§ 7.1, 7.8.) Additionally, the Settlement Administrator will handle all tax document preparation and reporting. (*Id.*, § 7.2.)

The Class Notice will inform Class Members of their estimated Settlement Payment, their estimated PAGA Payment, and the number of pay periods they worked during the Class Period and PAGA Period. (*Id.* § 7.4.) Class Members may challenge the number of workweeks allocated to them in the Class Notice by contacting the Administrator before the response deadline. (*Id.* § 7.6.) Challenges will be resolved without hearing by the Administrator, who will make a decision based on Defendants' records and any documents or other information presented by the Class Member making the challenge, Class Counsel, or Defendants. (*Id.*) The Administrator's determination of each Class Member's allocation of workweeks shall be final and not appealable. (*Id.*)

F. Notice Process

Class Members who wish to exclude themselves from the Settlement must send the Administrator, by fax or mail, a signed written request for exclusion faxed of postmarked not later than 45 days after the Administrator mails the Class Notice (the "response deadline"). (*Id.* § 7.5.) Every Class Member who does not submit a timely and valid request for exclusion will be entitled to all benefits and bound by all terms and conditions of the Settlement. (*Id.*) Any Class Member who submits a valid and timely request for exclusion will not receive a Settlement Payment or have the right to object to the class action component of the Settlement but will still be entitled to a PAGA Payment and be bound by the Release of PAGA Claims. (*Id.*)

Class Members may send written objections to the Administrator by fax or mail. (*Id.* § 7.7.) Class Members may also appear in Court (or retain an attorney to appear on their behalf) to present verbal objections at the Final Approval Hearing. (*Id.*) A Class Member who elects to send a written objection to the Administrator must do so by the response deadline. (*Id.* § 7.4.4)

Upon completion of administration of the Settlement, the Administrator shall provide written certification of such completion to the Court, Class Counsel and Defendants' Counsel. (*Id.* § 7.8.) Any funds associated with checks that have not been cashed within 180 days, will become void and the payment associated with the uncashed check will be distributed to the California Controller's Office, Unclaimed Property Division in the name of each Class Member or Aggrieved Employee, pursuant to Code of Civil Procedure section 384. (*Id.* § 4.4.)

G. Tax Treatment Of Individual Payments

Under the terms of the Settlement, 20% of each Class Member's Settlement Payment will be allocated to the settlement of wage claims and will be subject to tax withholding and reported on an IRS Form W-2. (*Id.* § 3.3.1.) The remaining 80% of each Settlement Payment shall constitute interest and penalties, and each Class Member will be issued an IRS Form 1099 for such payment. (*Id.*) PAGA Payments will be treated as penalties for tax purposes, and if applicable, the Administrator will issue each recipient an IRS Form 1099. (*Id.*)

IV. PROVISIONAL CERTIFICATION IS APPROPRIATE

Courts generally find class action suits are appropriate "when the question is one of a common or general interest . . . or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc. § 382; see *Richmond v. Dart Indus., Inc*. (1981) 29 Cal.3d 462, 469-475.) In order to sustain a class action, two requirements must be met: (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.)

To ensure efficient use of judicial resources, California law and policy favor the fullest and most flexible use of the class action device. (*Richmond* at 469-475.) Indeed, courts have acknowledged "the importance of class actions as a means to prevent a failure of justice in our judicial system" particularly where the rights of numerous "small claimants" are at issue. (See *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 434-435, 445.) Any doubt as to the appropriateness of class treatment should be resolved in favor of certification. (*Richmond* at 473-475.)

A. There Is A Numerous And Ascertainable Class

The numerosity requirement is satisfied where a proposed class is so large that joinder of all members would be impracticable. (See Code Civ. Proc. § 382.) Whether a class is ascertainable is determined by examining the class definition, the size of the class, and the reasonable means available for identifying members of the class. (See *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263, 1271.)

Plaintiff contends, and Defendants do not dispute, that for settlement purposes only, there is a numerous and ascertainable class. (Hawkins Decl. ¶ 11). Documents and information exchanged between the parties reflect a class of approximately 5,348 Class Members. (Hawkins Decl., ¶ 11.) Moreover, Class Members have already been identified by reference to Defendants' payroll and personnel records. (*Id.* § 1.5.)

Because joinder of more than 5,000 employees would be impracticable, and Class Members can readily be determined by Defendants' personnel records, there is a numerous and ascertainable class that is suitable for provisional certification.

B. There Is A Well-Defined Community Of Interest

As a general rule, a community of interest is established where (1) there are predominant common questions of law or fact; (2) the named plaintiff has "claims or defenses typical of the class"; and (3) the named plaintiff is able to adequately represent the class. (See *Dunk v. Ford Motor. Co.* (1996) 48 Cal.App.4th 1794, 1806.)

1. Common Questions Of Law And Fact Exist

Whether a class action is the appropriate mechanism will depend largely upon "whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits." (*Richmond* at 477-478.) In determining whether common questions of law and fact exist, courts generally look at the allegations in the complaint, as well as the declarations of class counsel. (*Id.* at 478.) The primary purpose of this inquiry is to ascertain whether the proposed class is sufficiently cohesive to warrant adjudication by representation. (See, e.g., *Clothesrigger, Inc. v. GTE Corp*. (1987) 191 Cal.App.3d 605, 612; *Lazar v. Hertz Corp*. (1983) 143 Cal.App.3d 128, 138-139; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 142.) Simply because class members must prove their own damages does not mean that individual questions predominate. (*Clothesrigger, Inc.* at 617.)

Common questions of law and fact exist among Class Members in this case. The operative complaint alleges causes of action for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (2) failure to authorize and permit lawful rest periods; (3) failure to provide lawful meal periods; (4) failure to timely pay wages owed upon separation of employment; (5) failure to reimburse necessary expenses; (6) failure to comply with itemized wage statement provisions; (7) civil penalties pursuant to PAGA. (Hawkins Decl., ¶¶ 68–69.) Thus, at minimum, some of the common questions of law and fact that affect the Class are, without limitation, whether Defendants included non-discretionary bonuses when calculating Class Members' regular rate of pay for purposes of paying overtime wages and meal period premiums; whether Class Members were provided compliant meal and rest periods; whether Defendants were required to reimburse Class Members for expenses incurred including mileage; and whether the wage statements Defendants provided to Class Members complied with California law (*Id.*, ¶ 70.)

Here, the required commonality element is satisfied because there are questions of law and fact common to Plaintiff and the Class, and those questions predominate over any such questions affecting only Plaintiff or individual Class Members. As such, the underlying claims are sufficiently cohesive to warrant adjudication by representation. (See *Clothesrigger, Inc.* at 612.)

2. Plaintiff's Claims Are Typical Of Class Members' Claims

The typicality requirement for purposes of class certification focuses on the typicality of the named Plaintiff's claims as they relate to the Defendants' policies and practices. (See *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99 [typicality met where plaintiff alleged that defendant subjected him to the same unlawful conduct that other putative class members were subjected to].) Indeed, the mere fact that a defendant may raise defenses against some members of the class does not negate the typicality of the plaintiff's claims. (*Ibid.*)

Here, Plaintiff's claims are typical of the claims of the Class. As detailed in the operative complaint, Class Members were all subject to the same policies and practices while working for Defendants, including the company's payroll and timekeeping policies, meal and rest period policies, and failure to reimburse employees for expenses incurred (Hawkins Decl., ¶¶ 6, 33.) As such, all sustained the same or similar damages resulting from Defendants' alleged violations of California wage-and-hour laws, including unpaid regular, minimum and overtime wages, noncompliant meal and rest periods and/or unpaid premiums, inaccurate wage statements, and unreimbursed business expenses. (*Id.*) Because each Class Member would be required to demonstrate the same elements in order to recover on their claims against Defendants, Class Members' interests are sufficiently aligned with Plaintiff's so as to meet the typicality requirement. (See *Medrazo,* 166 Cal.App.4th at p. 99.)

3. Plaintiff And Class Counsel Have And Will Continue To Adequately Represent The Class

A class representative is an adequate representative of the class so long as his or her interests are not antagonistic or in conflict with the objectives that he or she purports to represent. (*Richmond* at 470.) Additionally, Class Counsel "must be qualified, experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 875.) Here, both Plaintiff and Plaintiff's Counsel, the proposed Class Counsel, meet the necessary requirements to adequately represent the Class.

First, Plaintiff's interests are not antagonistic to the interests of the Class. As previously explained, Plaintiff alleges that Class Members were all subject to the same unlawful policies and practices by Defendants, and thus suffered identical harm. Consequently, Plaintiff seeks the same relief sought by every other member of the Class. (See *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 625-26 ["[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."].) For more than three years, Plaintiff has vigorously prosecuted this case on behalf of the other Class Members. (Hawkins Decl., ¶ 52.) He spent numerous hours reviewing documents, meeting and corresponding with Class Counsel, answering questions regarding his experiences while working for Defendants, and evaluating settlement options. (*Ibid.*)

In addition, Plaintiff has retained counsel with extensive experience prosecuting complex wage and hour class actions, who have worked diligently to obtain the Settlement on behalf of the Class. (Hawkins Decl., ¶70.) Class Counsel thoroughly investigated the claims raised in this action, the underlying case law, the merits of Defendants' defenses, and meticulously reviewed the information and documents exchanged prior to attending mediation. (Hawkins Decl., ¶¶10–15, 22.) Class Counsel was sufficiently informed prior to engaging in settlement negotiations. (*Id.*) Furthermore, the negotiations which the Settlement before the Court were themselves informed, conducted at all times in an arms-length, non-collusive manner, and overseen by a highly experienced mediator, Brandon McKelvey. (Hawkins

Decl., ¶18.) Over the course of this litigation, Plaintiff and Class Counsel have adequately represented the interests of the Class and will continue to do so.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE

A. The Proposed Settlement Meets The Standards For Preliminary Approval

California Rules of Court, rule 3.769, requires court approval for class action settlements. "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (Cal. R. Ct. 3.769(g).) Courts act within their discretion in approving settlements that are fair, not collusive, and take into account "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.2d 167, 179, *cert. den. sub nom. Iowa Beef Processors. Inc. v. Meat Price Investigators Ass'n* (1981) 452 U.S. 905.)

The purpose of the preliminary evaluation of class action settlements is to determine only whether the proposed settlement is within the range of reasonableness, and, therefore, whether notice to the class and the scheduling of a formal fairness hearing are warranted. (*Wershba v. Apple Computer. Inc.* (2001) 91 Cal.App.4th 224, 234-235; *Newberg on Class Actions* (4th Ed.) § 11:25.) Courts have broad powers to determine whether a proposed settlement is fair under the circumstances of the case. (*Wershba* at 234-235; *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.) In determining whether a settlement meets the standards for preliminary approval, courts must consider several relevant factors, including "the strength of the Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel . . . ." (*Dunk* at 1801.) "The list of factors is not exclusive, and the court is free to engage in a balancing and weighing, of the factors depending on the circumstances of each case." (*Wershba* at 245.) Furthermore, courts must give "proper deference to the private consensual decision of the parties" because "the 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." (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027.)

At the preliminary approval stage, the Court need only determine that the settlement falls within the "range of possible judicial approval," so that notice to the class and the scheduling of the fairness hearing are worthwhile. (See *Newberg* § 11:25.) Indeed, the Court should grant preliminary approval if there are no "grounds to doubt its fairness or other obvious deficiencies . . . and [the settlement] appears to fall within the range of possible approval." (*Manual For Complex Litigation* (Third) § 30.41 (1995); see *Dunk,* at 1802.) A "presumption of fairness exists where: (1) 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." (*Dunk* at 1802 [citing *Newberg* § 11:41].)

As demonstrated below, the proposed Settlement in this case falls well within the range of possible approval and there are no grounds to doubt its fairness.

1. The Settlement Is The Result Of Serious, Informed, Non-Collusive Negotiations Overseen By A Highly Experienced Mediator

The proposed Settlement, which came only after significant investigation of the facts and law both during and in preparation for mediation, was reached as a result of arm's-length negotiations facilitated by an experienced mediator. (Hawkins Decl., ¶15–18.) The settlement negotiations have been, at all times, adversarial and non-collusive in nature. Indeed, continued good-faith but occasionally contentious negotiations were required to ultimately reach an agreement following a full-day mediation with respected class action mediator, Brandon McKelvey. While Plaintiff believes in the merits of his case, he also recognizes the inherent risks of litigation. He also understands the benefits to the Class of receiving settlement funds immediately as opposed to delaying payment or risking an unfavorable decision on summary adjudication, motion for class certification, at trial or on appeal, all of which have the potential to eliminate any relief for Class Members. (Hawkins Decl., ¶46.)

2. The Extent Of The Information Provided Through Discovery And The Stage Of The Proceedings Support The Settlement

There is a presumption that a proposed settlement is fair and reasonable when there has been sufficient investigation and discovery to permit counsel and the Court to act intelligently, and counsel are experienced in similar litigation. (*Dunk* at 1802.)

Here, the parties thoroughly investigated and evaluated the factual and legal strengths and weaknesses of this case before reaching the Settlement. (Hawkins Decl., ¶¶ 15–18.) The Settlement was reached in consideration of the parties' thorough calculations and risk evaluation, a thorough evaluation of timekeeping and payroll data for 20 percent of the Class, and an analysis of applicable policy documents. (Hawkins Decl., ¶ 13.) Plaintiff retained an expert to evaluate the data and to provide calculations regarding Defendants' potential exposure. (*Id.*) Counsel for the parties have investigated the law as applied to the facts and thus evaluated the claims asserted and potential defenses thereto. (Hawkins Decl., ¶ 22.)

The proposed Settlement came only after the case was fully investigated by experienced counsel. (Hawkins Decl., ¶¶ 22–24.) This litigation, therefore, had reached the stage where the parties had a clear view of the strengths and weaknesses of their cases, sufficient to support the Settlement. (See *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 617.)

3. Class Counsel Is Experienced In Similar Litigation

Experienced counsel, operating at arm's-length, have weighed the strengths of the case and examined the risks of litigation and endorse the proposed settlement. (Hawkins Decl., ¶ 36.) The view of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve a settlement. (*Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, affd. (9th Cir. 1981) 661 F.2d 939.)

Throughout this litigation, Class Members have been represented by well-qualified counsel who have years of experience in wage and hour class action litigation. (Hawkins Decl., ¶¶ 74–80.) In total, Class Counsel have litigated hundreds of complex class and representative actions, the vast majority as plaintiff's counsel. (*Id.*) Counsel on both sides share the view—endorsed by an experienced class action mediator—that this is a fair and reasonable settlement in light of the complexities of the case, state of the law, and uncertainties of litigation and trial. (Hawkins Decl., ¶ 20.)

4. The Settlement Is Fair And Reasonable Based On The Strengths Of Plaintiff's Case And The Risks And Costs Of Further Litigation

Defendants have contested and continues to contest liability for the claims asserted in this action. (*Id.* ¶ 22, Settlement, § 12.1.) Despite their belief that Plaintiff is unlikely to succeed on the merits, Defendants nonetheless agreed to resolve this action through settlement to avoid the expense, distraction, and uncertainty of protracted litigation. (*Id.*)

There are significant legal uncertainties associated with cases such as this, as they can be factually complex and require protracted litigation to resolve. (Hawkins Decl., ¶ 46.) A settlement is not judged solely against what might have been recovered had the Plaintiff prevailed at trial, nor does the settlement have to provide 100 percent of the damages sought to be fair and reasonable. (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242; *Wershba* at 246, 250; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139.) "Compromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated . . . the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." (*Wershba* at 250.) Based on information obtained through informal discovery, Class Counsel assessed the strengths and weaknesses of the claims. (Hawkins Decl., ¶¶ 11–12.) As a result, Class Counsel believes that the Settlement before the Court represents a very favorable resolution for the Class. (*Id.*, ¶ 22.)

5. The Proposed Settlement Is A Reasonable Compromise Of Claims

a. The Settlement Provides Relief to Class Members in Light of the Significant Risks and Expense of Further Litigation

To evaluate a settlement, the trial court must receive "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) The record need not contain an explicit statement of the maximum theoretical recovery, but rather evidence sufficient to allow "an understanding of the amount that is in controversy and the realistic ranges of outcomes of the litigation." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409 [citing *Kullar,* at 120].)

Here, the Settlement results in a significant benefit to Class Members and the MSA of $2,500,000 is a good result by any measure. (Hawkins Decl., ¶ 22.) Although Plaintiff maintains all claims are meritorious and believes he would have prevailed had he taken his case to trial, he also acknowledges that Defendants have legitimate defenses to liability, class certification, and manageability. (*Id.*, ¶46.) Defendants have consistently denied all material allegations in the complaint, that they violated any applicable laws, that they are liable for damages, penalties, interest, restitution, attorneys' fees, or for any other remedy on account of the claims asserted, and that class certification or representative treatment is appropriate as to any claim. (*Id.*, ¶23) Such considerations pose a substantial obstacle for Plaintiff to maintain his claims, as well as establishing the full amount of Plaintiff's estimated damages and civil penalties for such claims at trial. (*Id.*, ¶ 36.)

Under the terms of the Settlement, each Class Member will be entitled to receive a pro rata portion of the Net Settlement Amount available for distribution based upon his or her respective number of workweeks worked during the Class Period. (Settlement, § 3.2.4) This means that Class Members who worked a greater number of workweeks during the Class Period will receive a larger portion of the Settlement. All Class Members are therefore treated equitably and fairly, and no Class Member is granted improper preferential treatment, as distribution of the Net Settlement Amount takes into consideration the length of employment for each Class Member and the respective number of violations he or she would have suffered during the Class Period. (*Id.*)

b. The Amount Offered in Settlement Given the Estimated Value of the Claims Favors Preliminary Approval of the Settlement

Class Counsel estimated Defendants' maximum-possible exposure to be approximately $62,297,366.58. (Hawkins Decl., ¶ 25.) This estimate assumed that class certification would be granted, and that Plaintiff would prevail on all claims at trial, as well as recover the full amount of the estimated damages and assumed $100 per PAGA pay period in civil penalties under PAGA. (*Id.*)

With more than 5,000 Class Members holding dozens of different nonexempt positions in numerous store locations throughout the state, class certification is by no means a certainty. (*Id.*, ¶ 26.) As such, for purposes of settlement, Class Counsel assumes a 75 percent discount on the merits to account for the possibility that Plaintiff will not prevail on all claims and the potential for a reduction in any PAGA penalties awarded. (*Id.*) Accordingly, Class Counsel believes a more realistic valuation of the claims in this case after incorporating discounts is $15,574,341.65. (*Id.*)

While the $2,500,000 MSA represents a significant discount on Plaintiff's estimate of Defendants' potential exposure in this matter, the reduction represents an extremely reasonable compromise considering the substantial risks that Plaintiff and Class Members faced in this litigation. (*Id.,* ¶ 35.) As explained above, Defendants have legitimate defenses to class certification, manageability, and the merits of the underlying claims. (*Id.*, ¶¶ 23, 27) In negotiating the Settlement before the Court, Class Counsel considered the likelihood of obtaining and maintaining class certification of Plaintiff's claims through trial, and obtaining 100 percent of the damages sought. (*Id*., ¶ 36.) Moreover, Plaintiff considered the significant risk that the Court may deny class certification or reverse a favorable ruling on the merits on appeal – risks that are obviated by the Settlement. (*Id*.) In addition, continued litigation would likely be extremely expensive, reducing and substantially delaying any recovery by Class Members. (*Id*., ¶ 37.) In contrast, the proposed Settlement will guarantee that Class Members receive timely relief and avoid the risk of an unfavorable judgment. (*Id*.)

Finally, as it relates to the imposition of any penalties under PAGA, there was a very real risk that the Court would exercise its discretion and reduce the award because it was unjust, arbitrary, or confiscatory. (*Id*., ¶ 35.) This is particularly true because throughout the Class and PAGA Periods, Defendants argue that it maintained facially lawful written policies regarding many of the claims asserted. (*Id*., ¶ 23.)

B. The PAGA Settlement Should Be Approved

Where a settlement includes a good faith amount for PAGA penalties and "there is no indication that this amount was the result of self-interest at the expense of other" class members, such amounts are generally considered reasonable. (*Hopson v. Hanesbrands, Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133 at *1, *9.) Courts routinely approve settlements where only a small portion of the Maximum Settlement Amount is allocated to PAGA penalties. (See *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576 [approving a settlement where no portion was allocated to PAGA penalties; *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. Oct. 13, 2011) 2011 WL 4899942 at *6 [approving a PAGA payment of 0.25%]; *McKenzie v. Fed. Express Corp.* (C.D. Cal. Jan. 23, 2012) 2012 WL 12882124 at *5 [acknowledging that courts approve PAGA claim settlements in the range of zero to two percent of the total settlement].) Here, the parties negotiated a good faith settlement amount of $125,000, 75% percent of which ($75,000) will be paid to the LWDA, with the remaining 25% ($25,000) to be distributed to Aggrieved Employees. (Settlement at § 3.2.5.3.) The $125,000 allocated to PAGA penalties equates to 5% of the MSA, which is in line with amounts that are routinely approved by courts in this state. Therefore, the settlement of the claim for penalties under PAGA is reasonable because it was negotiated in good faith and was not the result of self-interest at the expense of any Class Member. (Hawkins Decl., ¶ 35)

Had a higher amount been allocated to the PAGA claim, the burden to pay civil penalties would have effectively shifted to the Aggrieved Employees as it would reduce the amount that they ultimately receive under the Settlement. Although this burden shifting may achieve the enforcement objective of the PAGA statute, it would do so at the expense of the same employees that the statute was designed to protect. The Settlement has been submitted to the LWDA as required by statute. (Hawkins Decl., ¶ 35, Ex. 2.) Accordingly, the proposed $125,000 allocation to PAGA penalties strikes a balance between the interests of all parties, including the LWDA and the general public, by penalizing the employer and providing relief to the Aggrieved Employees. As such, Plaintiff respectfully request that the Court approve the allocation of $125,000 to PAGA penalties.

C. The Requested Class Representative Enhancement Payment Is Fair And Reasonable

Courts routinely approve class representative payments to compensate named Plaintiff for the services they provide and the risks they incur during the course of class litigation. (See *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726 [upholding service payments to Plaintiff for their efforts in bringing a class case]; *Manual for Complex Litigation* (Fourth) (2004) § 21.62 n. 971 [noting that service awards are warranted].) In approving such payments, California courts frequently approve awards of $10,000 or more. (*In re Cellphone Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-1395 [upholding $10,000 service award to each of four class representatives]; *West v. Circle K Stores, Inc.* (E.D. Cal. Oct. 19, 2006) 2006 U.S. Dist. LEXIS 76558, *28 ["the court finds Plaintiff's enhancement payments of $ 15,000 each to be reasonable"]; *Glass v. UBS Fin. Servs.* (N.D. Cal. Jan. 26, 2007) 2007 U.S. Dist. LEXIS 8476, *52 [finding "requested payment of $ 25,000 to each of the named Plaintiff is appropriate" in wage and hour settlement].) The factors courts use in determining the amount of an award include: (1) a comparison between the service awards and the range of monetary recovery available to the class; (2) time and effort put into the litigation; (3) whether the litigation will further the public policy underlying the statutory scheme; and (4) the risk of retaliation. (*Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 608, 804.)

By being the named class representative in this action, Plaintiff put their name forward on the public record at the risk of potential employers choosing not to hire them. (Hawkins Decl., ¶ 54.) Plaintiff also ran the risk of being liable for Defendants' attorneys' fees and costs as a result of the fee shifting provisions of the Labor Code. (See, e.g., Labor Code § 218.5.) Over the course of this litigation, Plaintiff spent a significant amount of time reviewing documents, communicating with counsel, assisting with the preparation of the complaint and witness questionnaire, identifying potential witnesses, and helping Class Counsel prepare for mediation. (Hawkins Decl., ¶ 53.) As part of the proposed Settlement, Plaintiff has also agreed to a general release of any and all claims to the furthest extent permitted by law. (Hawkins Decl., ¶ 55; Settlement, §5.1.) The proposed Class Representative Enhancement Payment of $10,000 to Plaintiff is fair and reasonable given the risk he took and the work e bore for the benefit of the Class. (Hawkins Decl., ¶ 56.)

D. The Requested Attorneys' Fees And Costs Are Fair And Reasonable

The California Supreme Court has held that when a monetary fund is created for the benefit of class members, and the trial court 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. (*Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503.) The Court further held that although trial courts have discretion to use a lodestar multiplier cross-check or to forego a lodestar multiplier cross-check if some other means to evaluate the reasonableness of a requested fee percentage exists, "the percentage method is a valuable tool that should not be denied our trial court." (*Id.* at pp. 503-506.) California courts have awarded common fund fees calculated using a percentage-of-fund method that is not dependent on counsel's lodestar amount. (Pearl, *California Attorney Fee Awards* (CEB 3d Ed. 2010) § 5.19 [citing *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512]; *Bell* at 726; *Apple Computer, Inc. v. Superior Ct.* (2005) 126 Cal.App.4th 1253, 1270.)

Here, the Settlement provides that Class Counsel may seek Attorneys' Fees of up to $875,000 (35% of the MSA), in addition to reimbursement for actual litigation expenses in an amount not to exceed $17,500. (Settlement, § 3.2.) As demonstrated in the Declaration of James R. Hawkins, Class Counsel performed a significant amount of work litigating this action, including performing extensive legal and factual research, which counsel used to measure the relative strengths and weaknesses of Plaintiff's claims to better identify an appropriate range of settlement figures. (Hawkins Decl., ¶¶ 58.) Class Counsel committed, and continue to commit, significant financial and staffing resources to this case, diverted many of their resources in order to contend with Defendants' vigorous defense, and undertook this action on a contingency basis, thereby bearing all the costs of this complex, risky, expensive, and time-consuming litigation. (*Ibid.*) The requested Attorneys' Fees and Litigation Costs payments are fair and reasonable and should be preliminarily approved.

VI. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The final step in the settlement approval process is a final approval hearing, at which time the Court may hear all evidence and arguments necessary to conclusively evaluate the proposed Settlement. Should the Court grant Plaintiff's motion for preliminary approval, Plaintiff requests that a hearing on the issues of final approval of the Settlement, approval of the Class Representative Enhancement Payment to Plaintiff, approval of the Class Counsel's Attorneys' Fees and Litigation Costs, and approval of the Administration Expenses be scheduled approximately 120 days after preliminary approval.

VII. CONCLUSION

Plaintiff respectfully requests this Court: (1) grant preliminary approval of the Settlement; (2) provisionally certify the proposed Class; (3) approve the proposed Notice and distribution plan; (4) appoint Plaintiff Gonzalez as Class Representative, James Hawkins APLC as Class Counsel, and Apex Class Action LLC as Settlement Administrator; and (5) schedule a final approval hearing approximately 120 days from the date of preliminary approval.

Dated: November 21, 2024

JAMES HAWKINS APLC

By: ______________________________

James R. Hawkins
Christina M. Lucio
Mitchell J. Murray

Attorneys for Plaintiff