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FILED/ENDORSED
JUL 21 2022
By: V. Aleman
Deputy Clerk

File By Fax

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

TONG XIONG, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

REX MOORE GROUP, INC., a California corporation, CONSTRUCTION INNOVATIONS GROUP, LLC, a California Limited Liability Company, REX MOORE ELECTRICAL CONTRACTORS & ENGINEERING, INC., a California corporation, REX SIGNATURE SERVICES, LLC, a California Limited Liability Company, and DOES 4 through 10, inclusive,

Defendants.

Case No. 34-2019-00270480-CU-OE-GDS

CLASS ACTION

[*Assigned for all purposes to Honorable Lauri A. Damrell, Dept. 28*]

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

[*Filed with Memorandum of Points and Authorities, the Declarations of Tong Xiong and Justin F. Marquez, and Proposed Order*]

PRELIMINARY APPROVAL HEARING
Date: August 12, 2022
Time: 9:00 a.m.
Dept: 28

RESERVATION NO. 2654387

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

PLEASE TAKE NOTICE that on August 12, 2022 at 9:00 a.m., in Department 28 of the Sacramento Superior Court, 813 6th Street, Sacramento, California 95814, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq*., Plaintiff Tong Xiong will move the Court for an Order granting preliminary approval of the proposed class action settlement between Plaintiff and Defendants Rex Moore Group, Inc., Construction Innovations Group, LLC, Rex Moore Electrical Contractors & Engineering, Inc., Rex Signature Services, LLC. Plaintiff further moves the Court for an Order:

1. Granting preliminary approval of the Stipulation for Class Action Settlement;
2. Certifying a Class for settlement purposes;
3. Approving the Notice and Settlement Information Form (collectively, "Notice Packet") and the plan for distribution of the Notice Packet to Settlement Class Members;
4. Appointing Plaintiff Tong Xiong as Class Representative for settlement purposes;
5. Appointing Plaintiff's Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes;
6. Appointing Phoenix Class Action Administration Solutions as the Settlement Administrator; and
7. Scheduling a final approval hearing.

The motion will be based upon this notice, the attached memorandum of points and authorities, the Declarations of Tong Xiong and Justin F. Marquez, filed concurrently herewith, the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

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Respectfully submitted,

Dated: June 21, 2022

WILSHIRE LAW FIRM

By: /s/ Christina M. Le

Justin F. Marquez, Esq.
Christina M. Le
Nicol E. Hajjar, Esq.
Arsiné Grigoryan, Esq.
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. <u>INTRODUCTION</u>

Plaintiff Tong Xiong ("Plaintiff") seeks preliminary approval of a proposed $300,000 non-reversionary, wage and hour class action settlement with Defendants Rex Moore Group, Inc., Construction Innovations Group, LLC, Rex Moore Electrical Contractors & Engineering, Inc., Rex Signature Services, LLC. ("Defendants"). The Settlement will provide substantial monetary payments to approximately 1,145 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Hon. Ronald M. Sabraw (Ret.), over the course of a full day of mediation that was conducted via Zoom. After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties were unable to reach an agreement during the October 21, 2020 mediation. The parties continued to engage in settlement discussions. On July 29, 2021, Defendants' counsel informed Plaintiff's counsel that a related case *Rudy Garcia v. Construction Innovations Group, LLC, et al*. Case No.:34-2020-00285239, settled on May 27, 2021. On September 14, 2021, Plaintiff sent a formal settlement demand to resolve the remaining UCL claim for the unreleased class period. On November 11, 2021, the Parties reached a settlement. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

II. <u>SUMMARY OF THE LITIGATION AND SETTLEMENT</u>

A. <u>Plaintiff's Claims</u>

This is a wage and hour class action and PAGA representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendants during the class period. Defendants specialize in electrical contracting, with a location in Sacramento, California. (Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Declaration of

Justin F. Marquez ["Marquez Decl."], ¶ 2.)

Plaintiff alleges that Defendants' payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendants failed to pay for all hours worked by not recording the actual start and end times of shifts and only paying for 8 hours of work for each workday, regardless of whether an employee worked overtime. Plaintiff further alleges that Defendants failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff asserts claims against Defendants for failure to pay overtime wages, failure to pay minimum and straight time wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to reimburse business expenses, inaccurate wage statements, failure to pay all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On December 4, 2019, Plaintiff filed a putative wage-and-hour class action complaint against Defendants Rex Moore Group, Inc. for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194, and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to provide accurate itemized wage statements (Labor Code § 226); (5) failure to timely pay final wages at termination (Labor Code §§ 201-203); and (6) unfair business practices (Business and Professions Code 17200 et seq.). On October 28, 2020, Plaintiff filed Amendments to the Complaint inserting the true name of DOES 1-3 as Construction Innovations Group, LLC, Rex Moore Electrical Contractors & Engineering, Inc., and Rex Signature Services, LLC. On February 24, 2022, Plaintiff filed a First Amended Complaint against Defendants adding claims for failure to authorize and permit rest periods (Labor Code §§ 226.7), failure to indemnify employees for expenditures (Labor Code § 2802), and civil penalties under Private Attorneys General Act "PAGA" (Labor Code § 2698 et seq.). (Marquez Decl., ¶ 4.)

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

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

After reviewing documents regarding Defendants' wage and hour policies and practices, analyzing Defendants' timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims. (*Id*. at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id*.) Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id*.)

C. <u>Settlement Negotiations</u>

On October 21, 2020, the parties participated in private mediation with experienced class action mediator Hon. Ronald M. Sabraw (Ret.). (*Id.* at ¶ 7.) The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id*.) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties were unable to reach an agreement during the October 21, 2020 mediation. (*Id.* at ¶ 8.) On July 29, 2021, Defendants' counsel informed Plaintiff's counsel that a related case *Rudy Garcia v. Construction Innovations Group, LLC, et al*. Case No.:34-2020-00285239, settled on May 27, 2021. On September 14, 2021, Plaintiff sent a formal settlement demand to resolve the remaining UCL claim for the unreleased class period. On November 11, 2021, the Parties reached a settlement the material terms of which are encompassed within the Settlement. (*Id.* at ¶ 9, Ex. 1 [Joint Stipulation for Class Action Settlement].)

Class Counsel has conducted a thorough investigation into the facts of this case. Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members in light of all known facts and circumstances, the risk of significant delay, the defenses that could be asserted by Defendants both to certification and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 16.)

Specifically, because Plaintiff was a member of the *Garcia* settlement, Defendants assert that Plaintiff has no remaining claims that are viable, and he cannot assert claims on behalf of a class or serve as a representative in a PAGA action. Plaintiff disputes Defendants' argument in this regard. See additional information in Section III.A.2 below.

Indeed, the $300,000.00 Settlement represents **44%** of **the realistic maximum recovery of $675,703.40**. (*Id.* at ¶ 23.) Although Class Counsel estimated that Defendants' maximum potential liability for all claims was approximately $3.3 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendants' realistic exposure was $675,703.40, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 16-27.) Considering the risk and uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class. (*Id.* at ¶ 25.) Indeed, because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

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

Under the Settlement, Defendants will pay $300,000.00 to resolve this litigation. This amount is all-inclusive. The Settlement's key terms include:

1. <u>Class Members or Settlement Class</u>: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "all current and former hourly-paid or non-exempt employees who worked for Defendants within the State of California at any time during the Settlement Period (collectively referred to as the "Class"). (Settlement, § I(D).)

2. <u>Settlement Period</u>: The Settlement Period means the period from December 4,

2015 through September 14, 2016, and from January 22, 2021 through the date of preliminary approval. (Settlement, § I(R).)

3. Settlement Amount: This amount is $300,000.00, which shall be paid by Defendants, and from which all Net Settlement Payments, Court-approved attorneys' fees and Litigation costs pursuant to Section XIII, Administrative Costs pursuant to Section VIII, enhancement to Named Plaintiff pursuant to Section XIV, statutory penalties, interest, and PAGA Settlement pursuant to Section XVI shall be paid, except as provided herein. (Settlement, § I(Q).)

4. No Reversion: This is a non-reversionary settlement. Settlement checks will be valid for 180 days. Pursuant to Code of Civil Procedure § 384(a), any unpaid cash residue or unclaimed or abandoned class member funds, plus any accrued interest thereon will be sent to the Center for Workers' Rights, 2741 Fruitridge Rd., Suite 5, Sacramento, CA 95820 pursuant to Code of Civil Procedure Section 384(a). (Settlement, § XI(C).)

5. Release: The class release is limited to "all claims, both potential and actual, that were or may have been raised in the First Amended Complaint or that are reasonably related to the allegations in the First Amended Complaint as to all Class Members, including claims under Labor Code section 201, 202, 203, 204, 210, 226, 226.3, 226.7, 246, 246.5, 248.5, 510, 512, 558, 1174, 1194, 1194.2, 1197, 1197.1, 1198, 2802, 2698, 2699, 2699.3, 2699.5, California Industrial Welfare Commission Wage Orders, Cal. Code Regs., tit. 8, section 11040, *et seq.*, California Business and Professions Code section 17200, *et seq*, and all class claims, representative claims, aggrieved employee claims, meal or rest periods, meal or rest period premiums, unpaid wages, overtime, minimum wages, and complete payments of wages at separation or termination, failure to provide accurate and itemized wage statements, unfair competition based on the foregoing, unfair business practices based on the foregoing, unlawful business practices based on the foregoing, fraudulent business practices based on the foregoing, PAGA penalties based on the foregoing, waiting time penalties, civil penalties based on the foregoing, interest, fees, costs, and any other claims that may have been raised in the First Amended Complaint or that reasonably relate to the allegations therein during the Class Period

as defined above (collectively the "Released Claims"). The Release Period shall be the Class Period. "Released Parties" as referenced herein and as released in the Settlement shall collectively mean: (i) Defendants Construction Innovations Group, LLC, Rex Moore Group, Inc., Rex Signature Services, LLC; Rex Moore Electrical Contractors & Engineering, Inc.; (ii) each of Defendants' past, present and future parents, subsidiaries and affiliates including, without limitation any corporation, limited liability company, partnership, trust, foundation and non-profit entity which controls, is controlled by, or is under common control with Defendants; (iii) the past, present, and future shareholders, directors, officers, agents, consultants, representatives, administrators, fiduciaries, benefit plans, transferees, predecessors, successors and assigns of any of the foregoing; and (iv) any individual or entity which could be jointly liable with any of the foregoing." (Settlement, § VII(A).)

6. PAGA Settlement: The settlement includes $25,000.00 allocated to Plaintiff's claims under PAGA, with 75% of which ($18,750.00) will be paid to the LWDA and 25% ($6,250.00) will be paid to eligible members of the PAGA Class. Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 10.)

7. Net Settlement Amount: The Net Settlement Fund is the Settlement Amount minus any award of attorneys' fees and Litigation costs, Administrative Costs, enhancement to the Named Plaintiff, and penalties recoverable pursuant to California's Private Attorney General Act ("PAGA") (the "PAGA Settlement"). (Settlement, § I(L).)

8. Distribution Formula: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims set forth in Section VII(A), above, in an amount determined by the Settlement Administrator in accordance with the provisions of this Agreement. The lump sum payment to each member of the Settlement Class not excluding him/ herself will be determined in accordance with the procedure set forth in Section X. (Settlement, § XI(A).)

9. Taxation and Allocation: Any settlement money paid to Settlement Class Members will be allocated as 15 % as wages, 85 % as penalties and interest. (Settlement, §

XV.)

10. Enhancement Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed $10,000.00. (Settlement, § XIV.) This amount is for Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § VII (B).) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount to be distributed between the participating Settlement Class Members on a pro-rata basis. (Settlement, § XIV.)

11. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% ($100,000.00) of the Settlement Amount, plus out-of-pocket costs not to exceed $15,000.00 (Settlement, § XIII.) At this time, Class Counsel's costs are approximately $10,366.41. (Marquez Decl., ¶ 11.)

12. Notice of Proposed Settlement: The Notice sets forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service awards being sought, and an explanation of how the settlement allocations are calculated. (Settlement, Ex. A.) The Notice also sets forth each class member's total workweeks, as well as the approximate amount of money they would receive in the event all class members participate in the settlement. The Notice also includes an opt-out form. (*Id.*) Class Members will be notified by first class mail of the settlement. (Settlement, § IX (A).) Phoenix Settlement Administrators, the proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. (Settlement, § X (B)-(D).) Notice will be provided in English and Spanish. (Marquez Decl., ¶ 12; Ex. 2.)

13. Dispute Procedure: Class Notice will include a procedure by which a Class Member may dispute the number of workweeks or opt-out of the settlement. (Settlement, Ex. B.)

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III. <u>DISCUSSION</u>

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached through arm's-length bargaining; (2) investigation is 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,* 48 Cal.App.4th at p. 1800.)

In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc*., (2008) 168 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness. (*Id*. at p. 133.) The record need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims", but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."].)

As discussed below, Class Counsel has provided information exceeding the threshold required to provide this Court with materials and information necessary to determine that the proposed settlement is fair, adequate, and reasonable.

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A. **<u>The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation</u>**

1. The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm's-Length Negotiations

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption here that the negotiations were conducted in good faith. (Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 11.51.) Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 ["The fact that a plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement."].)

The Settlement was reached following extensive negotiations following one day of mediation with experienced employment mediator, Hon. Ronald M. Sabraw. (Marquez Decl. ¶ 7.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties were unable to reach an agreement during the October 21, 2020 mediation. (Marquez Decl. ¶ 8.) The parties continued to engage in settlement discussions. On July 29, 2021, Defendants' counsel informed Plaintiff's counsel that a related case *Rudy Garcia v. Construction Innovations Group, LLC, et al*. Case No.:34-2020-00285239, settled on May 27, 2021. (Marquez Decl. ¶ 9.) On September 14, 2021, Plaintiff sent a formal settlement demand to resolve the remaining UCL claim for the unreleased class period. On November 11, 2021, the Parties reached a settlement. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll records, Defendants' policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*Id.*)

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 40-50.) Again, this supports the position that the terms of the Settlement are premised on objective evidence that has been considered and weighed in light of the risks, expenses, and time consumption to both sides of continued litigation of this action.

2. The Settlement Is Fair and Reasonable in Light of the Parties' Respective Legal Positions

A settlement is not judged against what might plaintiff recover had he prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 ["Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."].)

This settlement avoids the risks and the accompanying expense of further litigation. (Marquez Decl., ¶ 25.) Specifically, Defendants argue that because Plaintiff was a member of the settlement reached in *Rudy Garcia v. Construction Innovations Group, LLC, et al*. Case No.:34-2020-00285239, Plaintiff has no remaining claims that are viable, other than a short period covered under the Unfair Competition Law's limitations period, which is not included in the *Garcia* settlement, and cannot serve as a representative plaintiff in a class or PAGA action. (*See Cel-Tech Communications v. Los Angeles Cellular Telephone Co*. (1995) 20 Cal.4th 163, 168 [Plaintiff cannot circumvent an absolute bar for relief "simply by recasting the cause of action as one for unfair competition"]; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1203 [Defendants' immunity from suit by Plaintiff, "should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct" and UCL cannot be used to circumvent the limitations and procedures set forth in Revenue and Taxation Code]; *Krantz v. Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178 [UCL claim will "stand or fall depending on the fate of the antecedent substantive causes of action"]; *Smith v. Smith Farm Mut. Auto. Ins. Co*. (2001) 93 Cal.App.4th 700, 718-20 ["it is fairly said that section 17200 'borrows' violations of other laws,'" but the underlying laws must still be actionable for the UCL claim to be actionable]; *Robinson v. Southern Counties Oil Co*. (2020) 53 Cal.App.5th 476, 484 ["A change in facts or law can deprive a plaintiff of standing."].) Plaintiff disputes Defendants' argument in this regard and disputes that he lacks standing to assert class and representative PAGA claims.

While Plaintiff is confident in the merits of their claims, a legitimate controversy exists as to each cause of action, and as to Plaintiff's standing to bring class and representative PAGA claims, as detailed above. (*Id.* at ¶ 24.) Plaintiff also recognizes that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id*.)

The proposed settlement of $300,000.00 therefore represents a substantial recovery when compared to Plaintiff's reasonably forecasted recovery. (*Id.* at ¶¶ 116-27.) Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of $300,000.00 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average***

net benefit of approximately $123.36. (*Id.* at ¶ 27.)

3. Class Counsel Has Extensive Experience in Class Action Litigation

The settlement negotiations were conducted by highly capable and experienced counsel. Class Counsel have a strong record of vigorous and effective advocacy for their clients and are experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 39-50.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation, they support the proposed Settlement as being in the best interests of the class.

B. <u>The Proposed Class Notice of Settlement Should Be Approved</u>

The proposed Notice and Workweek Dispute Form, in the form attached to the Settlement Agreement as Exhibit A, should be approved for dissemination to the class and sub-class. The Notice and Workweek Dispute Form informs the class of the terms of the settlement and of their rights to be excluded from the settlement. And if there are class members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice and Workweek Dispute Form meet all the requirements of Rule 3.769(f) of the California Rules of Court.

C. <u>The Proposed Attorneys' Fees and Costs Are Reasonable</u>

Under the Settlement, subject to the Court's approval, Defendants agree to pay Class Counsel reasonable attorneys' fees in amount of $100,000.00, which is 33 1/3% of the gross Settlement Amount, and up to $15,000.00 in costs. These amounts are disclosed to all class members in the proposed Notice and are reasonable.

1. Class Counsel Request an Award of Fees Based on the "Common Fund" Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v.*

Priest (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

Class Counsel seek an award of attorneys' fees on the "percentage of recovery/ common fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*, *supra,* 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." (*Id.* at p. 110.)

The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc*. (2016) 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Id*. at p. 503.) The court explained: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts." (*Id*. [internal citations omitted].)

2. The Requested Fee Award Is in Line with Typical Cases

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." (*See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03.) Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively small. (*Id*; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million].)

Here, Plaintiff requests attorneys' fees equal to 33 1/3% of the Settlement Amount, which is in line with the prevailing guidelines established in California case law and academic literature, and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Accordingly, Plaintiff respectfully requests that the Court approve the attorneys' fees as negotiated by the parties and requested herein.

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

Labor Code § 1194(a) provides for the recovery of "minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." Under this section, Plaintiff would be permitted to recover his actual attorneys' fees, even if those fees were larger than the total class recovery at the conclusion of this case. This settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendants while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Marquez Decl., ¶¶ 36-37.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (*Id*.) Once counsel undertook this litigation on behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class ahead of all other concerns.

4. The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award

As demonstrated by their past experience in pursuing class actions on behalf of consumers and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez Decl., ¶¶ 39-50.) Class Counsel has been involved as lead counsel or co-counsel in several class actions that resulted in millions in recovery. (*Id*.) Because it is reasonable to compensate class counsel commensurate with their skill, reputation and experience, Class Counsel's requested fee award is supported here.

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendants and the reasonableness of the settlement. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of class action litigation. Based on these and other factors, Class Counsel has frequently received fee awards of this percentage from the gross recovery for the class. Therefore, the requested fee award is reasonable and fair.

D. <u>The Service Award to Named Plaintiff Is Reasonable</u>

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz, supra,* 86 Cal.App.4th at p. 412.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class, and are appropriate given the benefit the class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59.)

Service awards are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage and hour laws. This strong policy is codified in California Labor Code section 90.5, which provides, "it is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…."). Nonetheless, the California Supreme Court has noted that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

Under the settlement agreement, subject to the Court's approval, Defendants agreed to pay a Service Award in the amount of $10,000 to Plaintiff. This amount is also in exchange for Plaintiff's general release of all claims against Defendants. Class Counsel represent that Plaintiff devoted a great deal of time and work assisting counsel in the case, communicated with counsel very frequently for litigation and to prepare for mediation, and was frequently in contact with Class Counsel during the mediation. (Marquez Decl., ¶¶ 29-33.) This amount is reasonable particularly in light of the substantial benefits Plaintiff generated for all class members. (*Id*.) Indeed, in *Karl Adams, III, et al. v. MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez helped negotiate a $2.5 million class action settlement for 339 class members, and the court approved a $25,000 class representative incentive award for each named plaintiff. (Marquez Decl., ¶ 33.)

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

E. There is Good Cause for Selecting Center for Workers' Rights As the *Cy Pres* Recipient.

A *cy pres* award allows for "aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class." (*Six Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) "To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members." (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican Workers,* 904 F.2d at 1308.)

Moreover, in the class action context, California Code of Civil Procedure permits unpaid cash residues in a class action settlement to be distributed to a *cy pres* recipient "in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians." (Cal. Civ. Proc. Code § 384.)

Here, under the terms of the settlement agreement, in the event settlement checks remain uncashed after 180 days, those funds shall be donated to Center for Workers' Rights as a *cy pres* beneficiary. (Settlement, § XI(C).) Center for Workers' Rights furthers the purpose of this case and promotes justice for all Californians by striving "to improve working conditions, reduce barriers to securing employment, and remedy workplace injustice for low-wage workers and their families in the greater Sacramento area." (*See* https://www.rightscenter.org/about/)

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

A. Legal Standard

The proposed Settlement Class is well suited for class certification. All of the claims derive from a core set of alleged violations of California's wage and hour laws and regulations. For the reasons set forth more fully below, for purposes of settlement only, the Class satisfies the prerequisites for certification under Code of Civil Procedure § 382. 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." (Code Civ. Proc., § 382.) There are two requirements to section 382: "(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 [citations omitted].) To clarify these requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the community-of-interest requirement itself embodies three factors: "(1) predominant 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." (*Richmond v. Dart Indus., Inc*. (1981) 29 Cal. 3d 462, 470.)

California law and policy favor the fullest and most flexible use of the class action device. (*Id.* at pp. 469-73.) Indeed, "Courts long 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 consumers are at issue. (*Linder v. Thrifty Oil Co*. (2000) 23 Cal. 4th 429, 434.) Any doubt as to the appropriateness of class treatment should be resolved in favor of certification. (*Richmond*, *supra,* 29 Cal.3d at pp. 473-75.)

B. <u>Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for Settlement Purposes.</u>

1. The Classes Are Ascertainable and Numerous

The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes approximately 1,145 employees of Defendants.

Plaintiff maintains that there is an easily ascertainable class, defined by objective and precise criteria. Because class members are identified using specific criteria in the regular business records of Defendant, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life Ins. Co*. (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the subject of the lawsuit is sufficient to make the class ascertainable].)

"The requirement of Code of Civil Procedure section 382 that there be 'many' parties to a class action suit is indefinite and has been construed liberally." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.) "Where a question is of common interest to 'many' persons, an action may be maintained as a class action even where the parties are numerous and it is in fact practicable to join them all." (*Id.*) "No set number is required as a matter of law for the maintenance of a class action." (*Id.*) "Thus, our Supreme Court has upheld a class representing the 10 beneficiaries of a trust in an action for removal of the trustees." (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore, Plaintiff contends that numerosity is plainly satisfied.

2. There are Many Common Issues of Law and Fact Which Predominate

The Court should grant conditional class certification for settlement purposes here on the grounds that questions of law and fact common to all class and subclass predominate over any individual questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp*. (1987) 191 Cal.App.3d 605.)

Here, the employment practices at issue are: whether Defendants had legally compliant policies and practices to provide employees with meal periods; whether Defendants had legally compliant policies and practices authorizing and permitting its employees to take rest periods; whether Defendants had legally compliant policies and practices for all hours worked, including overtime wages; whether Defendants reimbursed employees for business expenses; whether Defendants paid terminated employees all vacation wages at the correct rate of pay; whether final payment of wages was untimely and excluded unpaid wages, including meal period premium wages, and rest period premium wages; and whether the wage statements were consequently non-compliant. Plaintiff contends that the factual and legal issues are the same for all of the identified class members, including Plaintiff. Further, all class members suffered from, and seek redress for, the same alleged injuries.

3. Plaintiff's Claims Are Typical of the Claims of the Class

The typicality requirement does not focus on the individual characteristics or circumstances of the representative plaintiff compared to those of the remainder of the class, but rather upon the typicality of the proposed representative's claims as they relate to the defendant's conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 ["[t]he only requirements are that common questions of law and fact predominate and that the class representative be similarly situated" vis-à-vis the class.].) A representative plaintiff's claims are typical of the class if they arise from the same event, practice or course of conduct, and if the claims rest on the same legal theories. (*Id.*) That is precisely the case here. Plaintiff is a former employee of Defendants; as such, he alleges that he was subject to the same policies and practices as other similarly situated employees.

4. Plaintiff and His Counsel Meet the Adequacy Requirement

The adequacy of representation requirements is met by fulfilling two conditions: first, a named plaintiff must be represented by counsel qualified to conduct the pending litigation; second, a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451.)

All of these requirements are met here for settlement purposes. Plaintiff retained counsel with extensive experience in prosecuting complex class actions, including similar class actions that previously settled. (Marquez Decl., ¶¶ 39-50.) Class Counsel unquestionably is "qualified, experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel, litigated this case and diligently reviewed the settlement terms, showing their dedication. Plaintiff's willingness to serve as a representative demonstrates his serious commitment to bringing about the best results possible for the class and subclass. (*McGhee*, *supra,* 60 Cal.App.3d at p. 451.)

5. A Class Action is Superior to a Multiplicity of Litigation

Finally, in making its class certification decision, the Court must determine that a class action would be superior to alternative means for the fair and efficient adjudication of the litigation. By consolidating many potential individual actions into a single proceeding, this Court's use of the class action device enables it to manage this litigation in a manner that serves the economics of time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-situated employees with small but nevertheless meritorious claims for damages would, as a practical matter, have no means of redress because of the time, effort and expense required to prosecute individual actions. (*Gentry v. Super. Ct*. (2007) 42 Cal. 4th 443, 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns are essentially non-existent.

V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND

A. The Proposed Notice Plan Satisfies Due Process

Notice requirements are set forth in the California Rules of Court. Cal. Rules of Court, Rule 3.766 (e) and (f). California law vests the Court with broad discretion in fashioning an appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the class members will receive direct mailed notice. As the Court of Appeals has explained, "[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members … ." (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by direct mailing, the best possible form of notice.

B. The Notice is Accurate and Informative

The proposed Notice should be approved. It will be disseminated through direct U.S. first class mail to the last known address for each Class Member. It informs the Class Members of the terms of the settlement and their right to be excluded from the Settlement. And if there are Class Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the terms and conditions of the settlement agreement, in an informative and coherent manner. It makes clear that the settlement agreement does not constitute an admission of liability by the Defendant, who deny all liability, and it recognizes that this Court has not ruled on the merits of the action. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a combined settlement-certification class notice.

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VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement and set a Final Approval Hearing for August 12, 2022.

Respectfully submitted,

Dated: July 21, 2022

WILSHIRE LAW FIRM

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PROOF OF SERVICE

Tong Xiong v. Rex Moore Group, Inc., et al.
34-2019-00270480-CU-OE-GDS

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is 3055 Wilshire Blvd., 12th Fl., Los Angeles, California 90010. My electronic service address is ssespene@wilshirelawfirm.com.

On July 21, 2022, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

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REX MOORE GROUP, INC., et al.

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

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

Executed this **July 21, 2022**, at Los Angeles, California.

Sandy S. Sespene