B. James Fitzpatrick (SBN: 129056)
Laura L. Franklin (SBN: 282642)
FITZPATRICK & SWANSTON
555 S. Main Street
Salinas, CA 93901
Telephone: (831) 755-1311
Facsimile: (831) 755-1319

Larry W. Lee (SBN 228175)
Max W. Gavron (SBN 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, California 90071
Telephone: (213) 488-6555
Facsimile (213) 488-6554
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff,
JUAN RAMON TORRES REYES on behalf of himself
and all similarly aggrieved employees

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

JUAN RAMON TORRES REYES, on behalf of himself and all similarly aggrieved employees, Plaintiff, v. BROTHERS HARVESTING INC.; D'ARRIGO BROS. CO., OF CALIFORNIA; and DOES 1 through 50, inclusive, Defendants.	Case No. 22CV000658 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: September 20, 2024 Time: 8:30 A.M. Dept.: 14 Complaint Filed: March 9, 2022 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Carrie M. Panetta, judge presiding, in Department 14 of the above referenced Court, located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Juan Ramon Torres Reyes ("Plaintiff") will and hereby move this Court for the following relief with respect to the Joint Stipulation of Class Action and PAGA Settlement ("Agreement" or "Settlement Agreement") entered into by Plaintiff and Defendants Brothers Harvesting Inc. and D'Arrigo Bros. Co. of California (together, "Defendants") (Plaintiff and Defendants shall collectively be referred to as the "Parties"):

1. That the Court approve the Agreement referenced above;

2. That the Court certify the following Class for settlement purposes: all current and former non-exempt employees of Defendant Brothers Harvesting Inc. that were assigned to work for Defendant D'Arrigo Bros. Co., of California in California, at any time from March 9, 2018, to August 4, 2022 (the "Class");

3. That Plaintiff Juan Ramon Torres Reyes be appointed as the Class Representative and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;

4. That the Court preliminarily approve the Agreement and the Gross Settlement Amount in the amount of One Hundred Seventy-Four Thousand Six Hundred and Two Dollars and Sixteen Cents ($174,602.16),

5. That the Court finds on a preliminary basis that the Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative enhancement payment, attorneys' fees and costs, settlement administration costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court;

6. That the Court approve the mailing of the proposed "Notice of Proposed Class Action Settlement" ("Notice Packet") to be sent to Class Members;

7. That the Court appoint CPT Group as the Settlement Administrator; and

8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to preliminarily certify a class for settlement purposes.

The basis for this Motion, filed without any opposition from Defendants, is that the proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of Class Members to participate in, opt-out of, or object to the settlement.

This Motion will be based on the attached Memorandum of Points and Authorities, the Settlement Agreement and the proposed Notice, and the supporting Declarations of B. James Fitzpatrick, Laura L. Franklin, Larry W. Lee, Max W. Gavron, and Plaintiff Juan Ramon Torres Reyes, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

Date: June 5, 2024

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

By: *__/s/ Max W. Gavron__*
Max W. Gavron
Attorneys for Plaintiff,
JUAN RAMON TORRES REYES on behalf of herself and all other similarly situated employees

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour class and representative PAGA action arising from Defendants Brothers Harvesting Inc. ("Brothers") and D'Arrigo Bros. Co., of California's ("D'Arrigo") (together, "Defendants") alleged Labor Code violations. Specifically, Plaintiff Juan Ramon Torres Reyes ("Plaintiff") asserted that Defendants failed to pay for all hours worked, including minimum and overtime wages, failed to provide timely, off-duty meal and rest breaks and/or pay premiums for missed or late meal and rest breaks, failed to pay sick pay at the correct regular rate, failed to pay all earned wages when due and upon separation of employment, and failed to provide accurate wage statements and keep accurate records. Based on these claims, Plaintiff asserts violations of the Labor Code and the Wage Order. Defendants deny each, every, and all allegations of the complaint and contend that their wage and hour practices comply with the Labor Code.

Prior to the settlement of this action, Plaintiff and Defendants (jointly referred to as the "Parties") thoroughly investigated the facts relating to the claims alleged in the operative Complaint against Defendants, including, but not limited to, review of payroll data/information for members of the Class and deposing Brothers' principal, Ruben Ortiz. The Parties commenced settlement negotiations through a private mediator, but the matter did not resolve. Following additional litigation, the Parties were ultimately able to reach the current settlement. Significantly, this entire amount is non-reversionary, such that no monies will revert to Defendants. The Parties believe that this amount is fair, adequate, and reasonable, especially given the risks and uncertainty of class certification and the merits of this case.

While Plaintiff and his counsel are confident that they could prevail on class certification and on the merits of the claims at trial, they recognize the inherent risks in drawn-out litigation and the specific risk that Plaintiff could fail to establish liability or that certification is appropriate. Based on their own independent investigation and evaluation, the Parties and their respective counsel are of the opinion that the settlement for the consideration and on the terms set forth in the Joint Stipulation of Class Action and PAGA Settlement (the

"Agreement" or "Settlement Agreement") is fair, reasonable, and adequate and is in the best interests of the Class and Defendants in light of all known circumstances and the expenses and risks inherent in litigation. Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On March 9, 2022, Plaintiff filed a class and representative action complaint in the Superior Court of California, County of Monterey, on behalf of herself and all similarly aggrieved employees against Brothers and D'Arrigo. Declaration of Max W. Gavron ("Gavron Decl.") ¶ 2. The complaint asserts claims for: (1) violation of Labor Code §§ 226.7 and 1198 (meal periods); (2) violation of Labor Code §§ 226.7 and 1198 (rest periods); (3) violation of Labor Code §§ 1194, 1197, and 1199; (4) violation of Labor Code §§ 1194 and 1198; (5) violation of Labor Code §§ 226, 1174, and 1175; (6) violation of Labor Code §§ 201, 202, and 203; (7) violation of Labor Code § 2698, *et seq.*, the Private Attorneys General Act ("PAGA"); and (8) violation of Business & Professions Code § 17200, *et seq.* ("UCL"). *Id*. ¶ 2. Specifically, Plaintiff alleges that Defendant failed to pay for all hours worked, including minimum and overtime wages, as a result of rounding time entries and off-the-clock work, including time spent traveling between fields; failed to provide timely, off-duty meal and rest breaks and/or pay premiums for missed or late meal and rest breaks; failed to pay sick pay at the correct regular rate; failed to pay all earned wages when due and upon separation of employment; and failed to provide accurate wage statements and keep accurate records. *Id*. ¶ 2. Plaintiff's PAGA claim is predicated on the foregoing violations of the Labor Code. *Id*.

Since the initiation of the lawsuit, the Parties have engaged in formal and informal discovery. Plaintiff has reviewed Brothers' production of relevant policies and practices, payroll data, and punch data records. *Id*. ¶ 3. Defendant Brothers produced the complete time and pay records for the Class Members. *Id.* ¶ 3. This permitted Plaintiff's counsel to evaluate the potential exposure. *Id.* ¶ 3. This investigation enabled Plaintiff to perform an analysis of the putative class and Defendants' liability. *Id*.

On October 24, 2023, the Parties engaged in private mediation with the Honorable

David A. Garcia (Ret.). *Id*. ¶ 4. However, the case did not resolve at mediation. Following the failed mediation attempt and continued litigation, including the filing of a motion to compel and the deposition of Ruben Ortiz, to the Parties reached an agreement in principle and entered into this proposed agreement. *Id*. ¶ 4.

The Parties recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl. ¶ 4. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims arising from or relating to the afore-referenced claims.

III. DISCUSSION

Any settlement of a class action lawsuit must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections. The *Manual for Complex Litigation, Third* § 30.41 states:

> Approval of class action settlements involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice…be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

(Fed. Jud. Ctr., 3rd ed. 1995).

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, "[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed. 2002).

The procedures for the parties' submission of a proposed settlement for preliminary approval by the court also are discussed in *4 Newberg on Class Actions*:

> When the parties to an action reach a monetary settlement, they will usually prepare and execute a joint stipulation of settlement, which is submitted to the court for preliminary approval. The stipulation should set forth the central terms of the agreement, including but not limited to, the amount of settlement, form of payment, manner of determining the effective date of settlement and any recapture clause.

Id. § 11.24.

Here, the Parties have reached such an agreement and have submitted to this Court in connection with this Motion a copy of the Agreement fully setting forth the agreement reached by the Parties. The Agreement sets forth all terms of the agreement reached by the Parties, which include, among other things, the method for calculating the Class Members' Individual Settlement Payments from the Gross Settlement Amount.

A. Proposed Class Definition

The current settlement is being settled on behalf of "all current and former non-exempt employees of Defendant Brothers Harvesting Inc. that were assigned to work for Defendant D'Arrigo Bros. Co., of California in California, at any time from March 9, 2018, to August 4, 2022" (the "Class"). *See* Agreement ¶ 4. The Class Period is defined as "the period from March 9, 2018, through August 4, 2022." *See* Agreement ¶ 8.

Pursuant to the Agreement, Brothers has represented that approximately 1,512 Class Members worked approximately 10,112 workweeks during the Class Period. *See* Agreement ¶¶ 4, 17.

B. Settlement Terms and Evaluation

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co*., 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig*., 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig*., 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions*, *supra* § 11.47; *Nat'l Rural Telecomms. Coop*., 221 F.R.D. at 528 ("[s]o long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement…[citations] and 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation").

Here, both Plaintiff's and Defendants' counsel have a great deal of experience in wage and hour class action litigation. Plaintiff's counsel have been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. Gavron Decl. ¶¶ 29-35; Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.") ¶ 4; Declaration of Laura L. Franklin ("Franklin Decl.") ¶¶ 3-4; Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 7-9. Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 25.

As noted above, Brothers produced the time and pay records that permitted Plaintiff to evaluate the potential exposure. Brothers also produced its written policies applicable to the class period, including, but not limited to, sick leave policies, Injury and Illness Prevention, Final Pay, Employee Handbooks, meal and rest periods, and commuting/travel between fields. *Id.* ¶ 10. Based on the time and pay records provided by Brothers, D'Arrigo's liability was entirely derivative of the liability evaluated against its farm labor contractor, Brothers. *Id.* ¶ 10; *see also* Lab. Code § 2810.3

Based on the class data provided by Brothers, Plaintiff estimated that Defendants Brothers and D'Arrigo could face potential maximum liability of up to approximately $6 million for Plaintiff's class claims, if Plaintiff was successful on all of his claims and obtained certification. Gavron Decl. ¶ 11. This amount likely overstates the realistic range of recovery, however, for the reasons below. Plaintiff calculated the maximum penalties as follows:

- ~$37,000 for unpaid minimum and overtime wages, assuming 6 minutes of off-the-clock work per week ((10,112 workweeks x 0.1) x $14.75 average rate of pay) and approximately ((10,112 workweeks x 0.1) x $22.13 average overtime rate of pay);
- $74,576.00 for meal and $74,576.00 for rest period violations, assuming a 50% violation rate (10,112 workweeks x $14.75 average rate of pay);
- $941,900 for Labor Code § 226(e) penalties ((10,112 workweeks x $100 penalty) – (1,386 class members x $50));
- $4.9 million in waiting time penalties [1,386 former employees x (30 days x 8 hours x $14.75)], which subsumes the potential exposure on Plaintiff's sick pay theory of liability.

See Gavron Decl. ¶ 11. Plaintiff's estimates above assume certification of the class. However, these types of claims can be difficult to certify for class treatment where the defendant maintains facially compliant policies. Accordingly, this exposure is entitled to a significant discount at the settlement stage given the difficulties in proving this claim on a class basis if moving forward with litigation. Gavron Decl. ¶ 12. Another significant issue in this case was Brothers' ability to satisfy any judgment, if Plaintiff were to succeed in establishing liability. Gavron Decl. ¶ 12. While Plaintiff contended that D'Arrigo was a joint employer and/or liable pursuant to Section 2810.3, this theory was not guaranteed, so Plaintiff still took into consideration Brothers' financial condition in evaluating the reasonableness of the settlement. Gavron Decl. ¶ 12.

Each of Plaintiff's putative class claims faced unique challenges from Defendants. For one, Defendants would have argued that the waiting time penalties, which comprise a significant portion of the estimated damages, are subject to a complete defense. Defendants would have argued that a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiff and the Class Members considering what Defendants argued were compliant policies and procedures. If Defendants were successful in their good faith defense, the Court may not have awarded waiting time penalties at all, reducing the exposure of each defendant by several million. *Hill v. Walmart, Inc.*, 32 F.4th 811 (9th Cir. 2022) (upholding good faith defense because defendant reasonably believed wages were not due and owing at time of separation of employment); *Chavez v. Converse, Inc.,* 2020 WL 1233919, at *l (N.D. Cal. 2020) (holding that an employer's failure to pay is not willful where there is uncertainty in the law or a "good faith mistaken belief that wages are not owed"). Even if Plaintiff were successful in establishing these penalties but Brothers defaulted, Plaintiff would have faced hurdles in obtaining these penalties from D'Arrigo because it likely would have argued that Section 2810.3 does not render it liable for penalties, as the statute only provides it is jointly liable for "wages." *See* Cal. Labor Code § 2810.3(b)(1).

Similarly, on Plaintiff's wage statement claim, Plaintiff would face the additional burden of demonstrating that any alleged omission of information from the wage statements was a "knowing and intentional failure" by Defendants to comply with Labor Code § 226(a). *See Harris v. Vector Mktg. Corp*., 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct was not "knowing and intentional"); Defendants also would have argued that penalties under Section 226 are subject to a similar "good faith" defense as articulated above in the context of Plaintiff's claims for waiting time penalties. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) ("Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional."). The California Supreme Court also recently approved a good faith defense to the imposition of Section 226 penalties, which further undermines the certainty of recovering these damages even if Plaintiff prevailed on liability. *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024). Losing on this claim would lower the potential exposure approximately another $1 million.

Defendants also would have argued that Plaintiff could not demonstrate an underlying violation of the Labor Code to support his meal and rest period claims. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) ("On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed."). Defendants would have argued that their legally compliant written policies satisfied *Brinker* and that any failure to take a legally compliant meal or rest period by employees was the result of individual choice and thus not capable of class resolution.

Defendants also contended that they paid employees all minimum and overtime wages. Defendants argued that any work performed off the clock was unauthorized and not subject to a uniform policy and thus would not be susceptible of class resolution as some employees traveled between fields and others did not.

Plaintiff calculated Defendants' potential maximum exposure under the PAGA as approximately $1,011,200 (10,112 pay periods x $100 penalty). Gavron Decl. ¶ 17. This assumes complete victory at trial and that the Court would award the maximum penalty of $100 per pay period, which is far from certain as discussed above. Further, while the PAGA provides for a heightened penalty for a "subsequent violation," courts are hesitant to award the heightened penalty absent a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430 at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *see also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling).

Even assuming Plaintiff ultimately prevailed on his PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington* *v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id*. at p. 517. Upon review, the Court of Appeal found such a reduction to be proper. *Id*. at p. 539. Thus, even if Plaintiff was to successfully prove his claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

While Plaintiff believes in the merits of the alleged claims, Plaintiff is aware that Defendants may raise some of the defenses to the claims addressed above that could persuade the Court to reduce the PAGA penalties. Gavron Decl. ¶ 19. The Gross Settlement Amount was premised with this risk in mind, associated with the possibility of the Court significantly reducing Plaintiff's PAGA penalties, along with other attendant risks. *Id*.

Although Plaintiff believes that the class can be certified, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the operative Complaint, the possibility of non-certification, and the potential for appeals. Gavron Decl. ¶ 20. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

Defendant Brothers's financial condition also supports the reasonableness of the discounted settlement value. As demonstrated by the terms of the agreement, Defendant Brothers required a payment plan to fund the settlement. Agreement ¶ 42. Accordingly, even if Plaintiff litigated this case through trial and was successful, a judgment may not have been collectable. Gavron Decl. ¶ 21. Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, the costs of pursuing such litigation, and the risks associated with the Court's discretion to reduce PAGA penalties. The settlement is the result of extensive arm's-length negotiations between the Parties and their counsel and was facilitated by an experienced and neutral mediator. Gavron Decl. ¶ 21.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Proposed Class Action Settlement ("Notice Packet"), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a Request for Exclusion (*i.e.*, opt-out) from the settlement. *See* Notice Packet, attached as **Exhibit A** to the Agreement. Moreover, as set forth in the Notice Packet, Class Members are advised of their right to attend the final approval hearing and/or object to any of the terms contained in the Agreement. *Id*.

1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive

The Agreement provides for One Hundred Seventy-Four Thousand Six Hundred and Two Dollars and Sixteen Cents ($174,602.16), as the total Gross Settlement Amount. *See* Agreement ¶ 17. The Net Settlement Amount [calculated after deduction of the Class Counsel Award of attorneys' fees (up to $58,200.72), litigation costs (up to $12,500.00), Class Representative Enhancement Payment (up to $2,500.00), PAGA Payment ($15,000.00), and Settlement Administration Costs (up to $16,000.00)] is estimated to be approximately $70,901.44. *See* Agreement ¶¶ 6, 10, 17, 19, 22, 35. Each Class Member who does not opt-out of the settlement ("Participating Class Member") will be awarded a portion of the Net Settlement Amount on a pro-rata basis, based upon the total number of workweeks he or she worked during the Class Period. *See* Agreement ¶ 46.

Based thereon, on a raw average, each Participating Class Member potentially may recover approximately $46.56. Gavron Decl. ¶ 7. The amount actually paid to each Participating Class Member will increase or decrease depending on the actual number of workweeks he or she worked during the Class Period. Finally, funds from any checks that have not been cashed within 180 days of issuance shall be paid to the designated *cy pres* recipient: the Rancho Cielo. *See* Agreement ¶ 63. Class Counsel does not have any conflicts of interest with this designated recipient. Gavron Decl. ¶ 37; Fitzpatrick Decl. ¶ 6; Franklin Decl. ¶ 7; Lee Decl. ¶ 10.

2. The Calculation of the Individual PAGA Payments

Consistent with the requirements of PAGA, the Agreement requires that twenty-five percent of the PAGA Payment (the "Total Aggrieved Employee Payment") will be paid to Aggrieved Employees. Agreement ¶ 46. Aggrieved Employees are defined as "all current and former non-exempt employees employed by Defendant Brothers Harvesting Inc. ("Brothers") who were assigned to work for Defendant D'Arrigo Bros. Co., of California in California ("D'Arrigo Bros." or "D'Arrigo"), at any time from January 12, 2021, through August 4, 2022." *Id*. ¶ 3. The amount allocated to each Aggrieved Employee will be based on the number of pay periods he or she worked during the PAGA Period. *Id*. ¶ 46. All Individual PAGA Payments shall be allocated as 100% penalties. *Id*. ¶ 66.

Further, Aggrieved Employees may not opt-out of or object to the PAGA portion of the settlement. Agreement ¶ 57. In exchange for the individual payment of PAGA penalties, Aggrieved Employees will release:

> all claims for penalties under the Private Attorneys General Act that were alleged in the and in the notice to the LWDA and in the operative complaint in the Action and derivative claims related thereto, arising from the facts, claims, or causes of action alleged or that could have reasonably been alleged based on the facts alleged in the operative complaint in the Action and in the notice to the LWDA, including, but not limited Labor Code §§ 201-204, 207-211, 216, 218, 218.5, 218.6, 221, 223, 225.5, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2698 (PAGA), *et seq.*, including §§ 2699, 2699.3, and 2699.5, those arising under the Industrial Welfare Commission Orders, and California Code of Civil Procedure 1021.5 ("Released PAGA Claims").

Id. ¶ 30.

3. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants

None of the settlement funds will revert to Defendants. *See* Agreement ¶ 41.

4. Scope of the Release of Class Members' Claims

As a condition of participating in this class action settlement, Participating Class

Members shall release:

> all claims that were alleged in the operative complaint of the Action and derivative claims related thereto, arising from the facts, claims, or causes of action alleged or that could have reasonably been alleged based on the facts alleged in the operative complaint of the Action, including but not limited to Labor Code §§ 201-204, 207-211, 216, 218, 218.5, 218.6, 221, 223, 225.5, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2698 (PAGA), *et seq.*, including §§ 2699, 2699.3, and 2699.5, and Business and Professions Code § 17200 et seq., including §§ 17201, 17203, and 17208, those arising under the Industrial Welfare Commission Orders, and California Code of Civil Procedure 1021.5 ("Released Class Claims").

See Agreement ¶¶ 28. The release is limited to claims as pled or based on those alleged in the Action.

5. Tax Treatment of Settlement Amounts

The Parties have agreed that twenty percent (20%) of the Individual Settlement Payments to Class Members shall be classified as wages and subject to required withholdings and deductions for payments. Agreement ¶ 66. The remaining eighty percent (80%) of the Individual Settlement Payments shall be classified as penalties and interest. *Id*.

6. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations

As stated above, Class Members do not need to do anything should they wish to receive their share of the settlement funds. Class Members will not be required to make a submission to participate in the settlement. This substantially decreases the amount of burden each Class Member must bear in order to receive their settlement payment. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit a Request for Exclusion. *See* Agreement ¶¶ 32, 55.

C. Notice to Class Members

Should the Court grant the instant motion, Brothers will provide the Settlement Administrator with a list containing each Class Member's full name, most recent mailing address, employee number, Social Security number, the number of workweeks worked by each Class Member during the Class Period, and the number of pay periods worked by each Aggrieved Employee during the PAGA Period ("Class Data") within thirty (30) calendar days of preliminary approval. Agreement ¶¶ 7,50. Upon receipt of the information and prior to mailing the Notice of Proposed Class Action Settlement to Class Members, the Settlement Administrator shall perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. *Id.* ¶ 52. Within seven (7) calendar days of receipt of the Class Data from Brothers, the Settlement Administrator will mail the Notice Packet to Class Members. *Id*. ¶ 51. Any Notice Packet returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent via regular first-class U.S. mail to the forwarding address affixed thereto. *Id*. ¶ 54. If no forwarding address is provided, the Settlement Administrator shall perform a skip trace or similar search to locate the most current address and resend the Notice Packet. *Id*. As set forth in the Notice Packet, Class Members will be allowed to opt out of the settlement by a certain deadline, or object to the settlement. Agreement, Ex. A.

D. Typicality and Adequacy of Representation

1. Class Representative's Claims are Typical of the Class

The commonality requirement is met when there are questions of law and fact common to the class. *See Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (1998) ("The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class"). Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Industries, Inc*., 29 Cal. 3d 462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co*., 193 Cal. App. 3d 411, 421 (1987).

Plaintiff alleges that Defendants, as a matter of their corporate policy, practice, or procedure violated the Labor Code by failing to pay for all hours worked, including minimum and overtime wages, provide off-duty meal and rest breaks, pay premiums for missed or late meal and rest periods, pay sick pay at the regular rate of pay, pay all earned wages when due and upon separation of employment, and provide accurate wage statements and keep accurate records. Declaration of Juan Ramon Torres Reyes ("Torres Reyes Decl.") ¶ 3. Plaintiff contends that he was subjected to the same policy and practice as other Class Members and that his claims are typical to those of the Class.

Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. Torres Reyes Decl. ¶ 10. Plaintiff has taken all necessary steps to represent the interests of the Class, and by providing information and documents to Plaintiff's counsel. *Id.* ¶ 11. For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

2. Class Counsel Have Adequately Represented the Class and Have Experience with Wage and Hour Class Actions

From the inception of the case, Class Counsel have zealously represented the interests of the class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the class. Gavron Decl. ¶¶ 29-35; Fitzpatrick Decl. ¶ 4; Franklin Decl. ¶¶ 3-4; Lee Decl. ¶¶ 7-9.

E. Costs and Fees

1. Attorneys' Fees and Costs

California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

The Common Fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits, she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. *Serrano*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include: "fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful." *Id*.

Indeed, most recently, the California Supreme Court has also now held that the award of attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding 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").

The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a multiplier of 2.13. *Id*. at 487. As the Court held, only when the multiplier is "extraordinarily high or low [should] the trial court [] consider whether the percentage method should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id*. at 505.

The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount, or $58,200.72, for payment to Class Counsel as attorneys' fees.

Agreement ¶ 6. The Parties have agreed to a payment of the foregoing attorneys' fees and, thus, this payment should be presumed to be fair. Further, the parties have agreed to reimbursement of Class Counsel's litigation costs up to $12,500.00. *Id*. Class Counsel have, at their own risk, expended costs, for example, to file this instant action, effectuate service of process, pay mediation fees, and pay other litigation-related costs. Based on the foregoing, the Court should preliminarily approve the attorneys' fees and costs being requested by the Parties.

2. Proposed Payment to the Class Representative

Class Representative Juan Ramon Torres Reyes requests an enhancement of $2,500.00. Agreement ¶ 10. The Class Representative met and conferred with Class Counsel on a number of occasions to discuss the case, provided documents and information to Class Counsel, and reviewed the Settlement Agreement. As part of his duties as the Class Representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. Torres Reyes Decl. ¶ 11. In addition to the invaluable services that he provided, Plaintiff also took a significant risk, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendants, had he not prevailed in this action.

Furthermore, given that future employers are much less likely to hire individuals who have filed a lawsuit against their prior employer, particularly in cases of this nature, Plaintiff may face prejudice in the future from other potential employers. Plaintiff took this risk upon himself and the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a public lawsuit.

3. Settlement Administration Costs

The Parties have agreed to an estimated payment of $16,000.00 to the Settlement Administrator, CPT Group, Inc., to send notices and administer this settlement, which shall be paid out of the Gross Settlement Amount. Agreement ¶ 35. CPT Group, Inc. is a well-recognized class action settlement administrator. The Parties believe that the administration fee is reasonable and should be approved, as it results in an anticipated cost of approximately $10.58 per class member, which is commensurate with similar settlements. Gavron Decl. ¶ 39.

IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL & NOTICE TO LWDA

Here, the proposed settlement is fair, adequate, and reasonable. Plaintiff provided notice of the proposed settlement to the LWDA in conjunction with this filing. Gavron Decl. ¶ 38. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Class Notice, and set a date for a final approval hearing.

Date: August 29, 2024

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

By: */s/ Max W. Gavron*
Max W. Gavron
Attorneys for Plaintiff,
JUAN RAMON TORRES REYES on behalf of herself and all other similarly situated employees