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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

SERGIO J. NEVAREZ, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

CG INDUSTRIES, INC.; HARTUNG
GLASS INDUSTRIES, INC.; and DOES 1
through 20, inclusive,

Defendants.

Case No. 22CV007198

Assigned for all purposes to:

Hon. Brad Seligman

Dept. 23

**PLAINTIFF'S SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

Date: September 12, 2023

Time: 3:00 p.m.

Dept: 23

1 **I. INTRODUCTION**

2 Plaintiff Sergio J. Nevarez (“Plaintiff”) provides this supplemental submission in response to the
3 Court’s August 17, 2023 ruling on Plaintiff’s Motion for Preliminary Approval of Class Action
4 Settlement. On August 17, 2023, the Court continued the hearing to September 12, 2023 at 3:00 p.m.,
5 with instructions to address the concerns outlined in the August 17, 2023 tentative ruling on Plaintiff’s
6 Motion for Preliminary Approval of Class Action Settlement.

7 Concurrently with this submission, Plaintiff submits the Supplemental Declaration of Jessica L.
8 Campbell in support of Plaintiff’s Supplemental Submission in support of his Motion for Preliminary
9 Approval, with the following exhibits:

- 10 1. Exhibit 1: Redlined Revised Class Action and PAGA Settlement Agreement and Class
11 Notice;
12 2. Exhibit 2: Revised Class Action and PAGA Settlement Agreement and Class Notice; and
13 3. Exhibit 3: Confirmation of Submission of the Revised Class Action and PAGA Settlement
14 Agreement and Class Notice and Supplemental Briefing to the LWDA.

15 Plaintiff hereby supplements his July 31, 2023 MPA filings, and addresses the Court’s concerns
16 from its tentative ruling below.

17 **II. THE COURT’S TENTATIVE RULING**

18 **A. *Dunk/Kullar* Analysis – Defendant’s Maximum Exposure**

19 The tentative ruling states, in part:

20 **“The *Kullar* analysis includes unjustified percentage reductions, particular for minimum**
21 **wage and overtime and meal break claims and derivative claims related to them. The data**
22 **analysis for meal breaks shows an 88% non-compliance rate, but this claim is discounted**
23 **from \$475,000 to a mere \$47,000. The statistical analysis for the hourly claims is not**
24 **disclosed so there is no way to evaluate the steep discount (\$380,000 to \$76,000).”**

25 Plaintiff provides supplemental briefing as follows:

- 26 1. Meal Period Claims
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28

1 Plaintiff alleged separate meal period violations against CG Industries, Inc. and Hartung Glass
2 Industries, Inc. (“Defendants”). (Declaration of Alex J. Valle (“Valle Decl.”), ¶ 3.) These violations
3 included interrupting Class Members’ meal breaks by forcing Class Members to work through their
4 meal period to complete their work, automatically deducting meal periods from time punches, and
5 failing to pay meal premiums for those violations. (*Id.*) The expert retained by Plaintiff’s counsel
6 estimated these violations were collectively worth \$475,000, based on their review of the records and
7 estimation as to total violations in 88.4% of shifts. (*Id.*)

8 For Plaintiff’s interruption theory, the expert included shifts as violative if they included meal
9 breaks that were less than 30 minutes for shifts greater than five hours. (Valle Decl., at ¶ 4.) However,
10 these violations only amounted to 1.2% of shifts and about \$5,000.00 in damages. (*Id.*)

11 Plaintiff also alleged that Class Members were not provided with a meal period and that a meal
12 period that was never given was automatically deducted from their working hours. (Valle Decl., at ¶ 5.)
13 The expert analyzed Defendant’s employment data and found instances where Class Members had
14 exactly thirty-minute meal periods in their timekeeping data exactly five hours into their shifts. (*Id.*)
15 While Plaintiff argued these records could be interpreted as showing automatic deductions, Defendant
16 argued that its policies were facially compliant and the records merely showed compliant meal periods,
17 which would present a risk as to Plaintiff’s ability to certify the class. (*Id.*) To prove this claim, Class
18 Members would need to show they were consistently not provided with a meal period and someone
19 added the compliant meal periods into the records at Defendant’s directions, which was evidence
20 Plaintiff had not found and could not confidently say actually existed. (*Id.*) Thus, this was an extremely
21 risky claim which would fail completely if the Court disagreed with Plaintiff’s interpretation of the
22 records. (*Id.*)

23 Further, at mediation, Defendants (1) disputed the expert’s total calculations; (2) argued that its
24 meal policies were facially compliant since they relieved Class Members of duties during their meal
25 breaks; and (3) argued its meal period policies were facially compliant since they specified that any
26 Class Members who worked for five hours would receive a 30-minute meal period. (*Id.*, at ¶ 6.)
27 Defendants produced their employee handbook in informal discovery, which specified that employees
28 would receive 30-minute meal periods for working at least five hours, and that such meal periods would

1 be “duty-free.” (*Id.*) Plaintiff’s counsel believed that the Court would probably find that the policies
2 were facially compliant, which would reduce the chances of class certification, and threaten the Class’s
3 ability to recover the full amount available under this theory. (*Id.*) In order to certify the class, Plaintiff
4 would have to obtain numerous employee declarations stating that their meal-periods were frequently
5 interrupted, and that they properly recorded meal times. (*Id.*) Whereas, there was a risk Defendants
6 could present declaration from their employees stating that Class Members were provided all meal
7 periods, but that Class Members did not properly record meal times in order to defeat class certification.
8 (*Id.*) Thus, the value of this claim was reduced to take this into account. (*Id.*)

9 2. Minimum Wage and Overtime Claims

10 Plaintiff also alleges separate violations of minimum wage and overtime laws, which the expert
11 retained by Plaintiff’s counsel estimated were worth collectively \$380,000. (Valle Decl. at ¶ 7.) First,
12 Plaintiff alleged that Defendants improperly engaged in time rounding for the start and end times during
13 workdays. (*Id.*) Due to the time rounding, Plaintiff theorized that Class Members were not paid for time
14 spent working during each shift. (*Id.*) While the expert found violations across all Class Members, these
15 violations resulted in only a few minutes of unpaid time per employee each shift. (*Id.*) Since the Class
16 consisted of only 75 non-exempt employees, these violations were estimated to be approximately \$6,000
17 of the Plaintiff’s total value of \$380,000 for this claim. (*Id.*) Despite this, however, Defendants argued
18 that their time policies were neutral as to rounding. (*Id.*) Plaintiff’s counsel estimated that while this
19 claim could probably be certified based on class-wide rounding, the damages would be very low, and
20 thus they could not put a high value on this claim. (*Id.*)

21 Next, Plaintiff alleged that during his employment, Defendants paid Class Members a non-
22 discretionary bonus (labeled as an “incentive bonus”) and shift differentials, but failed to include the
23 calculation of incentive payments and differentials in Class Members’ regular rates of pay. (Valle Decl.
24 at ¶ 8.) Since Plaintiff alleges that Defendants failed to recalculate the regular rate of pay to include the
25 bonus, any earned overtime was not upwardly adjusted. (*Walling v. Harnischfeger Corp.* (1945) 325
26 U.S. 427, 431 (“[employees] who receive incentive bonuses in addition to their guaranteed base pay
27 clearly receive a greater regular rate than the minimum base rate.”) The expert retained by Plaintiff’s
28 Counsel analyzed the sampling of employee bonuses, shift differentials, and the hours worked of each

1 Class Member. (Valle Decl. at ¶ 8.) Unfortunately, the expert found that very few Class Members
2 worked shift differentials or received bonuses during the pay periods. (*Id.*) In total, this claim comprised
3 approximately \$1,000 of Plaintiff's total value of \$380,000 for this claim. (*Id.*) Defendants argued the
4 low violation rate of this theory of unpaid wages at mediation, and further argued that the bonuses that
5 their employees received were actually discretionary bonuses. (*Id.*) As such, Plaintiff did not believe
6 there was a high chance of certification for this theory because the claim did not appear to be widespread
7 enough to be a typical of the class. (*Id.*)

8 Third, Plaintiff alleged a separate unpaid wages claim based on Defendants automatically
9 deducting meal periods from time worked by Class Members, and thus not paying them for the time
10 spent actually working (whereas Plaintiff's meal period violation would recover the premiums that were
11 due for the missed meal violations). (Valle Decl. at ¶ 9.) These deductions constituted the bulk of the
12 Class Members' unpaid wages claim, and damages were liberally estimated at approximately \$374,000.
13 (*Id.*) Because damages for this would likely rely on the testimony of the Class Members, and recovery
14 would be based on the underlying theory of the automatic deduction meal period claim, Plaintiff's
15 Counsel estimated a lower than 50% chance at recovery, given the complete reliance on the Court
16 inferring the time records showing meal periods were synthetic and these meal periods were not
17 provided in practice. (*Id.*)

18 3. Derivative Waiting Time and Wage Statement Penalties Claim

19 Plaintiff's Counsel investigated and evaluated the claim for waiting time and wage statement
20 penalties. (Valle Decl. at ¶ 10.) Any penalties for these claims would be derivative of, and rise or fall
21 with, Plaintiff's other claims. (*Id.*) In considering the above-referenced claims, Plaintiff's Counsel
22 weighed the potential recoveries against probable defenses, specifically whether Plaintiff could prove
23 the "willful" prong needed to obtain waiting time penalties under Lab. Code § 203, whether Plaintiff
24 could show that Class Members suffered an "injury" as a result of wage statement violations, as required
25 by Lab. Code § 226, or whether Plaintiff could show that wage statements incorrectly reflected the
26 wages paid and owed. (*Id.*) Although the Class Members arguably could have seen a potential payout of
27 approximately \$270,000 for waiting time penalties (49 terminated employees multiplied by 8 hours per
28 day multiplied by 30 days multiplied by a final pay of \$23.03 per hour = \$270,807) and approximately

1 \$100,000 for wage statement penalties (25 employees who worked 1,025 pay periods x (\$50 per initial
2 violation, \$100 per subsequent violation with a \$4,000 per person cap)), Plaintiff discounted his
3 valuation of the case proportionally with his meal and overtime claims because Plaintiff would not
4 recover any of these derivative penalties if he failed to prove the underlying claims. (*Id.*) Thus, Plaintiff
5 estimated a 50% chance of class certification and 40% chance at the merits for both claims, resulting in
6 a realistic value of \$54,000 (\$270,000 x .5 x .4) for the waiting time claim and \$20,000 (\$100,000 x .5 x
7 .4) for the wage statement claim. (*Id.*)

8 Based on the analyses of employee data, and the risk Plaintiff would bear at trial proving such
9 violations, the Settlement of \$225,000.00 is reasonable, fair, and proper.

10 **B. Settlement Agreement – Release of Claims (PAGA)**

11 The tentative ruling states, in part:

12 **“The PAGA release in the Settlement appears overly broad and not consistent with the**
13 **release in the notice. (*Compare* SA, ¶ 5.3, with Notice, § 3, ¶ 10; p. 27.) In the Settlement**
14 **Agreement, the PAGA release releases claims that “arose during the Class Period or**
15 **PAGA Period,” and does not reference the PAGA notice. (SA, ¶ 5.3.) The release stated**
16 **in the notice appears more appropriately tailored. (*Cf. Amaro v. Anaheim Arena Mgmt.,***
17 ***LLC* (2021) 69 Cal.App.5th 521, 537.)”**

18 Plaintiff provides supplemental briefing as follows:

19 Based on the Court’s guidance, the Parties have revised the terms of the Revised Class Action
20 and PAGA Settlement Agreement and Class Notice (“Settlement Agreement”). The new, amended
21 Settlement Agreement (“Amended Settlement Agreement”) now reflects the revised language both in
22 the Class Notice (“Notice”) and in ¶ 5.3 of the Settlement Agreement. (Valle Decl., Exhibit 2, ¶ 5.3
23 & § 3, p. 27).

24 **C. Settlement Agreement – Cy Pres Beneficiary**

25 The tentative ruling states, in part:

26 **“The Court will not approve the State Controller’s Office Unclaimed Property Fund as**
27 **the cy pres beneficiary. (SA, ¶ 4.4.3; Notice, § 10, p. 30.) The parties may select any**
28 **recipient that furthers the purpose of the underlying litigation or promotes justice for**

1 all Californians, and submit a declaration explaining how the recipe achieves the
2 purpose of CCP § 384(a). To the extent necessary, the parties should submit a
3 declaration pursuant to Code of Civil Procedure § 382.4.”

4 Plaintiff provides supplemental briefing as follows:

5 Based on the Court’s guidance, the Parties have revised the terms of the Settlement Agreement.
6 The new Amended Settlement Agreement changes the cy pres beneficiary from the State Controller’s
7 Office Unclaimed Property Fund to Legal Aid at Work. (Valle, Exhibit 2, ¶ 4.4.3.) Because Legal Aid
8 at Work is a non-profit organization that provides “civil legal services to the indigent,” it is a proper
9 cy pres recipient under Code of Civil Procedure § 384(a)–(b). (Valle Decl., ¶ 12.)

10 **D. Settlement Agreement Notice – Location of Final Fairness Hearing**

11 The tentative ruling states, in part:

12 “Notice – Section 8, page 29 – The notice should provide the Court’s location for the
13 fairness hearing. Department 23 is on the 4th floor of the Administration Building
14 located at 1221 Oak Street, Oakland, CA 94612.”

15 Plaintiff provides supplemental briefing as follows:

16 Based on the Court’s guidance, the Parties have revised the terms of the Settlement Agreement.
17 (Valle Decl., Exhibit 1, Notice, § 8, p. 29). The new Amended Settlement Agreement adds the location
18 of the fairness hearing to the Notice, § 9. (*Id.*, at Exhibit 2, Notice, § 8, p. 29).

19 **E. Settlement Agreement Notice – Accessing Court Records**

20 The tentative ruling states, in part:

21 “The notice should contain the following language on accessing Court records, e.g., Notice,
22 § 7 (“How do I object to the settlement?”) and § 9 (“How can I get more information?”).

23 The language need not appear more than once:

24 The pleadings and other records in this litigation may be examined online on the
25 Alameda County Superior Court’s website known as ‘eCourt Public Portal,’ at
26 <https://eportal.alameda.courts.ca.gov>.

27 After arriving at the website, click the ‘Search’ tab at the top of the page, then select
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1 the Document Downloads link, enter the case number and click ‘Submit.’ Images of
2 every document filed in the case may be viewed at a minimal charge. You may also
3 view images of every document filed in the case free of charge by using one of the
4 computer terminal kiosks available at each court location that has a facility for civil
5 filings.”

6 Plaintiff provides supplemental briefing as follows:

7 Based on the Court’s guidance, the Parties have revised the terms of the Settlement Agreement.
8 (Valle Decl., Exhibit 1, Notice, ¶ 9, p. 30). The new Amended Settlement Agreement adds the Court’s
9 specified language to the Notice, § 9. (*Id.*, at Exhibit 2, Notice, § 9, p. 30).

10 **III. CONCLUSION**

11 Having provided additional information in support of the Motion for Preliminary Approval, the
12 Court is respectfully requested to grant preliminary approval of the Settlement and conduct the final
13 approval hearing on January 4, 2023 at 9:30 a.m.

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17 Dated: September 5, 2023

AEGIS LAW FIRM, PC

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19 By: /s/ Alex J. Valle
20 Alex J. Valle
21 Attorney for Plaintiff Sergio J. Nevarez
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