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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANN ESPINOZA and DIANA FONTANA, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

CICON ENGINEERING, INC., a corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 21STCV39385

CLASS ACTION

[Assigned for all purposes to Judge Maren Nelson, Dept. 17]

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

[*Filed concurrently with*: Declarations of Justin F. Marquez, Jarrett Gorlick, Ann Espinoza, and Diana Fontana in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement; and [Proposed] Order Granting Motion]

PRELIMINARY APPROVAL HEARING
Date: March 13, 2023
Time: 9:00 a.m.
Dept: 17

Complaint filed: October 26, 2021
SAC filed: November 1, 2022

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

PLEASE TAKE NOTICE that on March 13, 2023, at 9:00 a.m., in Department 17 of Los Angeles Superior Court, located at 312 N. Spring Street, Los Angeles, CA 90012, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq*., Plaintiffs Ann Espinoza and Diana Fontana ("Plaintiffs") will move the Court for an Order granting preliminary approval of the proposed class action settlement between Plaintiffs and Defendant Cicon Engineering, Inc. Plaintiffs 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 only;
3. Approving the Notice and Settlement Information Form (collectively, the "Notice Packet") and the plan for the distribution of the Notice Packet to Settlement Class Members;
4. Appointing Plaintiffs Ann Espinoza and Diana Fontana as Class Representatives for settlement purposes only;
5. Appointing Plaintiffs' Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes only;
6. Appointing CPT Group, Inc. as the Settlement Administrator; and
7. Scheduling a Final Approval Hearing.

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The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the Declarations of Justin F. Marquez, Jarrett Gorlick, Ann Espinoza, and Diana Fontana, 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.

Respectfully submitted,

Dated: December 12, 2022

WILSHIRE LAW FIRM

By: Christina M. Le

Justin F. Marquez
Christina M. Le
Arsiné Grigoryan

Attorneys for Plaintiffs

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I. INTRODUCTION

Plaintiffs Ann Espinoza and Diana Fontana ("Plaintiffs") seeks preliminary approval of a proposed $750,000.00 non-reversionary, wage and hour class action settlement with Defendant Cicon Engineering, Inc. ("Defendant," and together with Plaintiffs, the "Parties"). The Settlement will provide substantial monetary payments to approximately 545 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, Steve Cerveris, over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiffs requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class for settlement purposes only, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiffs' Claims

This is a wage and hour class and Private Attorneys General Act ("PAGA") (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiffs and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant is a contract manufacturer, specializing in wire harness and cable harness assemblies, primarily for the military and space industries. (Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ["Marquez Decl."], ¶ 2.)

Plaintiffs allege that Defendant's payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiffs allege that Defendant failed to pay for all hours worked off the clock by the putative class member. Plaintiffs also allege that there was systematic rounding resulting in an underpayment of wages. Plaintiffs further allege that Defendant failed to provide employees with legally compliant meal and rest periods, failed to pay for all meal and rest period premiums, and failed to reimburse employees for all necessary business expenses. Based on these allegations, Plaintiffs assert claims against Defendant for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, and unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On October 26, 2021, Plaintiff Ann Espinoza filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; and (7) violation of California's Unfair Competition Law, California Business and Professions Code §§ 17200, et seq. (*Id.* at ¶ 4.)

On November 3, 2021, Plaintiff Ann Espinoza filed a First Amended Complaint to add Plaintiff Diana Fontana as an additional named Plaintiff. Defendant subsequently answered the First Amended Complaint. (*Id.* at ¶ 5.)

On October 19, 2022, Plaintiffs also sent notice to Defendant and the California Labor & Workforce Development Agency ("LWDA") alleging similar wage and hour violations pursuant to the Labor Code Private Attorneys General Act ("PAGA") (Cal. Lab. Code §§ 2699, et seq.). (*Id.* at ¶ 6.)

On October 28, 2022, the Court issued an Order granting the Parties' Joint Stipulation for Leave for Plaintiff to file a Second Amended Complaint to add Plaintiffs' PAGA claim. (*Id.* at ¶ 7.)

On November 1, 2022, the Court issued an Order granting the Parties' Joint Stipulation for Leave for Plaintiffs to file a Second Amended Complaint to add Plaintiffs' PAGA claim for PAGA penalties. On the same date, Plaintiffs filed their Second Amended Complaint. On December 12, 2022, Defendant filed an answer to the Second Amended Complaint. (*Id.* at ¶ 8.)

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

Following the filing of the Complaint, the Parties exchanged documents and information before mediating this action. Defendant produced a sampling consisting of the timekeeping and payroll records for all class members from approximately 4 months (randomly selected) of each year in the class period. Defendant also provided documents of their 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. (*Id.* at ¶ 9.)

After reviewing the documents regarding Defendant's wage and hour policies and practices and analyzing Defendant's timekeeping and payroll records, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendant's maximum monetary exposure for all claims. (*Id*. at ¶ 10.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id*.) Class Counsel reviewed these records and utilized an expert to prepare a damages analysis prior to mediation. (*Id*.)

C. Settlement Negotiations

On September 8, 2022, the Parties participated in private mediation with experienced class action mediator, Steve Cerveris. (*Id.* at ¶ 11.) 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 Plaintiffs' claims and Defendant's defenses, the Parties were able to reach a resolution, the material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 12; Ex. 1 [Class Action and PAGA Settlement Agreement and Class Notice ("Settlement Agreement")].

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 Defendant both to certification and on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 13.)

Indeed, the $750,000.00 Settlement represents **55**% of **the realistic maximum recovery** of $1,375,527.40. (*Id.* at ¶ 27.) Although Class Counsel estimated that Defendant's maximum potential liability for all claims was approximately $11.5 million, when the risk of prevailing at certification and trial are factored into the equation, Class Counsel believes that Defendant's realistic exposure was $1,362,865.60, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 19-36.) Considering the risk and uncertainty of prevailing at class certification and at trial, this is an excellent result for the Class. 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, Defendant will pay $750,000.00 to resolve this Litigation. This amount is all-inclusive. The Settlement's key terms include:

1. <u>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: "a member of the Class, as either a Participating Class Member or Non-Participating Class Member (including a Non-Participating Class Member who qualifies as an Aggrieved Employee)." (Settlement, § 1.9.)

2. <u>Settlement Period</u>: The Settlement Period means the period from May 1, 2017 to November 7, 2022. (Settlement, § 1.12.)

3. <u>Participating Class Members:</u> Class Member who does not submit a valid and timely Request for Exclusion from the Settlement. (Settlement, § 1.35.)

4. <u>Aggrieved Employees</u>: Means a person employed by Defendant in California and classified as a nonexempt employee who worked for Defendant during the PAGA Period of May 1, 2020 to November 7, 2022. (Settlement, §§ 1.4, 1.32).)

5. <u>Gross Settlement Amount:</u> This amount is $750,000.00, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the Labor and Workforce Development Agency ("LWDA") for the alleged PAGA penalties, all other penalties, and the Class Representative Service Award. (Settlement, § 1.22.)

6. <u>Uncashed Checks & *Cy Pres*</u>: If a settlement check is returned to the Settlement

Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a valid mailing address by performing a skip trace search and, if another address is identified, shall mail the check to the newly identified address. Any settlement checks remaining uncashed after one hundred and eighty (180) days shall be deemed unpaid residue pursuant Code of Civil Procedure Section 384(a). Unpaid residue (uncashed or returned checks) will be paid to Legal Aid at Work. (Settlement, § 4.4.3.)

7. Release as to All Settlement Class Members: The class release is limited to "Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint, the LWDA Letter, and ascertained in the course of the Action including, but not limited to claims for (a) failure to pay minimum, straight time, overtime, or double time wages, and failure to pay other wages of any kind during employment; (b) failure to authorize and permit rest periods or pay rest period premiums; (c) failure to provide meal periods or pay meal period premiums; (d) failure to provide accurate and itemized wage statements; (f) failure to maintain accurate employment records; (e) failure to pay timely wages; (f) failure to pay final wages due at separation; (g) failure to reimburse or indemnify all necessary business expenses, (g) civil penalties under PAGA based on the alleged Labor Code violations and applicable Wage Orders; (i) claims brought under Business & Professions Code section 17200, *et seq*., based on the aforementioned, including, but not limited to all claims for unfair, unlawful and harmful conduct to class members, the general public, and Defendant's competitors and claims of unlawfully gaining an unfair advantage over other businesses, and all damages, interest, penalties, attorneys' fees, costs, and other amounts recoverable based on the aforementioned, to the extent permissible, including, but not limited to, the California Labor Code and the applicable Wage Orders. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on

facts occurring outside the Class Period." (Settlement, § 6.2.) This Release will be deemed effective Effective on the date when Defendant fully funds the entire Gross Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the Individual Class Payments. (Settlement, § 6).)

8. PAGA Allocation: The settlement includes $30,000.00 allocated to Plaintiffs' claims under PAGA, with 75% of which ($22,500.00) being paid to the LWDA and 25% ($7.500.00) being paid to the Participating PAGA Members. (Settlement, § 1.34.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 13.)

9. Net Settlement Fund: The "Net Settlement Fund" or "Net Settlement Amount" is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) attorneys' fees and Litigation costs, (2) Administrative Costs, (3) enhancement to the Named Plaintiffs, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § 1.28.)

10. 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, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section 3.2.4 of the Settlement Agreement.

11. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 20% wages, 80% to penalties and interest. (Settlement, § 3.2.4.1.) The tax allocation breakdown comports with Plaintiffs' *Kullar* analysis, as detailed in Justin F. Marquez's Declaration. (Marquez Decl., ¶¶ 19-31*; Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 128.)

12. Class Representative Service Award: Subject to Court approval, Plaintiffs shall be paid an enhancement award not to exceed $10,000.00 each, for a total of $20,000.00. (Settlement, § 3.2.1.) This amount is for Plaintiffs' 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, § 6.1.) 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, § 3.2.1.)

13. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% ($250,000.00) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed $20,000.00. (Settlement, § 3.2.2.) At this time, Class Counsel's costs are approximately $16,959.08. (Marquez Decl., ¶ 42.)

14. Notice of Proposed Class Action 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 award being sought, and an explanation of how the settlement allocations are calculated. (Settlement, Class Notice.) The Notice also includes an opt-out form that class members can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members will be notified by first-class mail of the settlement. (Settlement, § 8.4.) CPT Group, Inc., 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. (*Id.*) (Marquez Decl., ¶ 15; Ex. 3 [Settlement Administrator Bid].)

III. DISCUSSION

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 Plaintiffs' 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*, *supra,* 168 Cal.App.4th at p. 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 Plaintiffs 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.

A. The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation

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 Plaintiffs 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 a full day of mediation with experienced employment mediator, Steve Cerveris (Marquez Decl., ¶¶ 7-8.) 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.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as class member timekeeping and payroll records, Defendant's 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 ¶¶ 9-10.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Thus, Plaintiffs 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 ¶¶ 43-53.) 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 Plaintiffs recover had they 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., ¶ 29.) While Plaintiffs are confident in the merits of their claims, a legitimate controversy exists as to each cause of action. (*Id.* at ¶ 28.) Plaintiffs also recognize 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 $750,000.00 therefore represents a substantial recovery when compared to Plaintiffs' reasonably forecasted recovery. (*Id.* at ¶¶ 19-31.) 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 $750,000.00 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 $1,376.17.*** (*Id.* at ¶ 30.)

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., ¶¶ 43-53.) Although Plaintiffs 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 Notice of Proposed Class Action Settlement, in the form attached to the Settlement Agreement as Exhibit A, should be approved for dissemination to the class. The Notice 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 meets 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, Defendant agrees to pay Class Counsel reasonable attorneys' fees in amount of $250,000.00, which is 33 1/3% of the gross

Settlement Amount, and up to $20,000.00 in costs. These amounts are disclosed to all class members in the Notice of Proposed Class Action Settlement 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, Plaintiffs request 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, Plaintiffs 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, Plaintiffs would be permitted to recover their 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 Defendant 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., ¶¶ 33-38.) 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., ¶¶ 48-58.) 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 Defendant 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 Plaintiffs 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, Defendant agreed to pay a Service Award in the amount of $10,000.00 to each Plaintiff. This amount is also in exchange for Plaintiffs' general release of all claims against Defendant. Class Counsel represent that Plaintiffs 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 were frequently in contact with Class Counsel during the mediation. (Marquez Decl., ¶¶ 37-41; Declaration of Ann Espinoza ["Espinoza Decl."], ¶¶ 4-9; and Declaration of Diana Fontana ["Fontana Decl."], ¶¶ 4-9.) This amount is reasonable particularly in light of the substantial benefits Plaintiffs 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 $10,000.00 class representative incentive award for each named Plaintiff. (Marquez Decl., ¶ 41)

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 Legal Aid at Work 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 remained uncashed for 180 days, those funds shall be donated to Legal Aid at Work (located at 180 Montgomery Street, Suite 600, San Francisco, CA 94104) as a *cy pres* beneficiary. (Settlement, § 4.4.3.) Legal Aid at Work is a 501(c)(3) non-profit organization located in San Francisco, California. Legal Aid at Work provides essential public services which directly relate to the objective and purposes of this matter. "Legal Aid at Work is a non-profit legal services organization that has been assisting low-income, working families for more than 100 year."[1] Legal Aid at work provides free clinics and helplines, free legal information, assists in litigation which

[1] *See* "Our Mission and How We Work," accessed June 24, 2022, located at https://legalaidatwork.org/our-mission-and-how-we-work/

"enforces and strengthens the civil and employment rights of low wage workers in California," and works on policy advocacy to "strengthen civil and workplace rights at the local, state and federal level."[2]

F. The Parties' Settlement and Release of the PAGA Claim Is Appropriate.

This settlement includes a PAGA Release for the PAGA Period of May 1, 2020 to November 7, 2022. The settlement includes $30,000.00 allocated to Plaintiffs' claims under PAGA, with 75% of which ($22,500.00) being paid to the LWDA and 25% ($7.500.00) being paid to the Participating PAGA Members. (Settlement, § 1.34.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 13.) Plaintiffs submitted their PAGA notice to Defendant and the LWDA on October 19, 2022 and filed a Second Amended Complaint adding PAGA claim on November 1, 2022. (Marquez Decl., ¶¶ 6,7.) Defendant filed an answer to the Complaint on December 12, 2022. (Marquez Decl., ¶8.) At the time of this filing, the LWDA has given no indication that they (1) intend to investigate the alleged claims or (2) that they object to the settlement.[3]

To the extent that the Plaintiffs' PAGA claim was not tolled by the filing of the class complaint on October 26, 2021, Plaintiffs are permitted to release PAGA claims beyond the one-year limitations period. Indeed, in *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 541-542, 284 Cal.Rptr.3d 566 (*Amaro*), a California Court of Appeal recently rejected the argument that a plaintiff can only release class members' PAGA claims within the one-year limitations period of his or her own PAGA claim, holding: "Nothing in the statute prohibits [a plaintiff] from releasing PAGA claims outside the limitations period of her own claim. Nor is this practice contrary to PAGA's purposes."

In *Amaro,* a class action and PAGA settlement released PAGA claims dating back to December 5, 2010, even though notice was not submitted to the LWDA until February 21, 2017.

[2] *Id.*

[3] Should the LWDA choose to investigate the claims asserted or that it takes any issue with the proposed settlement, Plaintiffs will promptly advise the Court. Absent such notice from Plaintiffs, however, the Court can presume that the LWDA chose not to investigate when ruling on this Motion.

After an intervenor objected that the settlement could release only PAGA claims arising on or after February 21, 2016, the *Amaro* court explained:

> "'In civil cases, the statute of limitations is not jurisdictional but merely serves a procedural function and constitutes an affirmative defense that is waived unless pleaded and proved.' [Citations.] If the Legislature had intended to make the limitations period for PAGA jurisdictional rather than an affirmative defense, it would have said so. [Citation.] Since it did not, we must presume the general rule applies. As such, it was within [the employer]'s discretion to waive its statute of limitations defense so [the plaintiff] could release class members' PAGA claims dating back to December 2010. And even if PAGA's statute of limitations were jurisdictional, that would not bar the court from approving a release of claims outside the limitations period.
>
> Further, nothing in the purpose of the statute convinces us that plaintiffs should be barred from agreeing to such a release of PAGA claims. PAGA ' " 'is fundamentally a law enforcement action,' " not one for the benefit of private parties.' [Citation.] 'The Legislature's sole purpose in enacting PAGA was "to augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the [LWDA]." [Citations.] Accordingly, a PAGA claim is an enforcement action between the LWDA and the employer, with the PAGA plaintiff acting on behalf of the government.' [Citation.] The 'civil penalties recovered on the state's behalf are intended to "remediate present violations and deter future ones," not to redress employees' injuries.' " (*Amaro*, *supra*, 69 Cal.App.5th at pp. 541-542.)

As such, the parties are permitted to agree to a release of claims that may be outside the limitations period of the Plaintiffs' own PAGA claims, as they have done here. The release extends to May 1, 2020 because it takes into consideration and the date Plaintiffs filed their original class complaint in this matter and tolling.

IV. <u>CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED</u>

A. <u>Legal Standard</u>

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>Plaintiffs Maintain That the Criteria for Class Certification Are Satisfied for Settlement Purposes</u>

1. The Class is Ascertainable and Numerous

Plaintiffs contend that the proposed class that Plaintiffs seek to represent is easily ascertainable, and includes approximately 545 employees of Defendant.

Plaintiffs maintain 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, Plaintiffs 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 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 alleged employment practices at issue are: whether Defendant had legally compliant policies and practices for all hours worked, including overtime wages; whether Defendant had legally compliant policies and practices to provide employees with meal periods; whether Defendant had legally compliant policies and practices authorizing and permitting its employees to take rest periods; whether final payment of wages was untimely and excluded unpaid wages, including meal period premium and rest period premium wages; whether Plaintiff had an improper rounding practice that routinely left employees underpaid; and whether the wage statements were consequently non-compliant. Plaintiffs contend that the factual and legal issues are the same for all of the identified class members, including Plaintiffs. Further, all class members are alleged to have suffered from, and seek redress for, the same alleged injuries. Defendant denies all allegations.

3. Plaintiffs' Claims Are Typical of the Claims of the Class

The typicality requirement does not focus on the individual characteristics or circumstances of the representative Plaintiffs 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 Plaintiffs' 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. Plaintiffs are a former employee of Defendant; as such, they allege that they were subject to the same policies and practices as other similarly situated employees.

4. Plaintiffs and Their 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. Plaintiffs retained counsel with extensive experience in prosecuting complex class actions, including similar class actions that previously settled. (Marquez Decl., ¶¶ 43-53.) 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, Plaintiffs have no conflicts, and Plaintiffs have, with counsel, litigated this case and diligently reviewed the settlement terms, showing their dedication. Plaintiffs' willingness to serve as a representatives demonstrate their serious commitment to bringing about the best results possible for the class. (*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.

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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 Notice of Proposed Class Action Settlement 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, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement and set a Final Approval Hearing on or about July 11, 2023, which is approximately 120 days after the preliminary approval hearing, or the first available date thereafter.

Respectfully submitted,

Dated: December 12, 2022

WILSHIRE LAW FIRM

By: Christina M. Le

Justin F. Marquez
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Arsiné Grigoryan

Attorneys for Plaintiffs

PROOF OF SERVICE

Espinoza, et al. v. Cicon Engineering, Inc., et al.
21STCV39385

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Sandy S. Sespene, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is ssespene@wilshirelawfirm.com.

On **December 12, 2022**, I served the foregoing **PLAINTIFFS' 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:

Eric C. Schwettmann, Esq. (SBN 188784)
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Matthew B. Golper, Esq. (SBN 275979)
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Olga G. Pena, Esq. (SBN 307927)
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Attorneys for Defendant, Cicon Engineering, Inc.

(X) **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service **CASEANYWHERE.**

(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.

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

Executed on December 12, 2022, at Los Angeles, California.

Sandy S. Sespene