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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ORANGE**

LUIS PAREDES MEDINA, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

KINDNESS GENERAL CONTRACTORS, LLC, a California limited liability company; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 30-2023-01300740-CU-OE-CXC

**CLASS ACTION**

*[Assigned for all purposes to Hon. Randall J. Sherman, Dept. CX105]*

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

**Reservation No.: 74360837**

Date: December 20, 2024
Time: 10:00 a.m.
Dept.: CX105

Action Filed: January 6, 2023
Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on December 20, 2024, 2024 at 10:00 a.m., in Department CX105 of the above-entitled Court, located at 751 W. Santa Ana Blvd, Santa Ana, California 92701, Plaintiff Luis Paredes Medina ("Plaintiff") will, and hereby does, move this Court for:

1. Preliminary approval of the proposed Settlement Agreement ("Settlement") between Plaintiff and Defendant Kindness General Contractors, LLC ("KGC");
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification, for settlement purposes only, of the following Settlement Class:

> All current and former non-exempt employees, except for unionized Hall employees and employees who have previously released the alleged claims, who were employed by KGC in California and performed work in California at any time from July 8, 2020 through May 18, 2024 (the "Class Period").

3. Preliminary appointment of Plaintiff as Class Representative;
4. Preliminary appointment of Abramson Labor Group as Class Counsel;
5. Appointment of Phoenix Settlement Administrators as the Settlement Administrator;
6. Approval of the proposed Class Notice and Notice of Estimated Settlement Award (together, the "Notice Packet"), and an order that the Notice Packet be disseminated to the Settlement Class as provided in the Settlement; and
7. The scheduling of a hearing to consider whether the Settlement should be finally approved and to award a Class Representative Enhancement Payment to Plaintiff, and attorneys' fees and costs to Class Counsel.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declaration of Neil M. Larsen and exhibits attached thereto; the declaration of Jodey Lawrence and exhibits attached thereto; the declaration of Plaintiff; the pleadings and other papers filed in this action; and any further evidence or argument presented at the time of hearing.

Respectfully Submitted,

Dated: August 14, 2024

**ABRAMSON LABOR GROUP**

Neil Larsen

Neil M. Larsen
Attorneys for Plaintiff

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff Luis Paredes Medina ("Plaintiff") seeks preliminary approval of a class action settlement agreement ("Settlement") with Defendant Kindness General Contractors, LLC ("KGC" or "Defendant") (together with Plaintiff, the "Parties"). The Settlement resolves a class and representative action pending before this Court (the "Action"), in which Plaintiff alleges that KGC failed to incorporate the prevailing wage, per diem, and other forms of compensation into the "regular rate" of pay, resulting in underpaid overtime wages and meal period premiums; failed to calculate overtime wages based on the weighted average, resulting in underpaid overtime wages; failed to reimburse employees for business expenses; and failed to issue accurate itemized wage statements. Plaintiff further alleges that as a result of these violations, KGC failed to comply with its final payment and wage statement obligations, and is liable for civil penalties under the Private Attorneys General Act ("PAGA").

Plaintiff now respectfully requests that this Court preliminarily approve this non-reversionary, common-fund class action Settlement,[1] in which KGC has agreed to pay $345,000.00 to the following Settlement Class, which is estimated to consist of 261 individuals:

> All current and former non-exempt employees, except for unionized Hall employees and employees who have previously released the alleged claims, who were employed by KGC in California and performed work in California at any time from July 8, 2020 through May 18, 2024 (the "Class Period").

The Settlement was reached after the parties engaged in mediation with Hon. Jan M. Adler (Ret.), an experienced wage and hour class action mediator. In connection with mediation, KGC provided Plaintiff with extensive informal discovery, including an approximate fifteen percent (15%) sampling of timekeeping and payroll records; a detailed class list that included each Settlement Class members' hire date and termination date (if applicable); relevant written policies; and additional relevant data and information. After extensive research and investigation, including a detailed analysis of KGC's potential exposure made with the assistance of an expert data analyst, the mediation session was held with Judge Adler on January 18, 2024. The Parties

[1] The Settlement is attached as Exhibit 1 to the Larsen Declaration. The Class Notice and Notice of Estimated Settlement Award are attached as Exhibits A and B to the Settlement.

reached a settlement in principle at mediation. Over the following months, the Parties negotiated the finer terms of the settlement, ultimately resulting in the Settlement.

Notably, Settlement Class members need not submit a claim to receive a payment ("Settlement Award"). After deductions for proposed settlement administration costs, attorneys' fees and costs, Plaintiff's Class Representative Enhancement Payment, and the LWDA's share of PAGA civil penalties, the average Settlement Award is estimated to be at least $660.91. For the reasons discussed herein, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

## II. <u>SUMMARY OF THE LITIGATION</u>

### A. <u>FACTUAL AND PROCEDURAL BACKGROUND</u>

KGC is a full service general contracting firm that is designed to manage and facilitate a range of construction projects throughout California. *See* Declaration of Neil M. Larsen ("Larsen Decl."), ¶ 7. Plaintiff is a former non-exempt Carpenter employee who worked for KGC in California from approximately November 2021 to approximately May 2022. *Id*.

On January 6, 2023, Plaintiff filed this Action, alleging class action claims for: (1) failure to pay overtime wages; (2) failure to pay meal period premiums at the regular rate of compensation; (3) wage statement violations; (4) waiting time penalties; (5) failure to reimburse business expenses; and, (6) unfair business practices. Larsen Decl., ¶ 8.

On January 9, 2023, Plaintiff provided written notice to the Labor & Workforce Development Agency ("LWDA") and KGC of his intent to pursue PAGA civil penalties for alleged violations of the California Labor Code, as required by Labor Code §2699.3. *Id*., ¶ 9, Exhibits 2-3.

On March 16, 2023, Plaintiff filed the operative First Amended Complaint ("FAC"), which added a claim for PAGA civil penalties. *Id*, ¶ 10. On March 17, 2023, Plaintiff electronically submitted a copy of the FAC to the LWDA. *Id*., Exhibit 4.

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### B. PLAINTIFF'S CLAIMS AND KGC'S DEFENSES

#### 1. Claim for Underpaid Overtime Wages Based on Regular Rate Miscalculation

Plaintiff alleges KGC failed to incorporate the prevailing wage, per diem, and other non-excludable forms of compensation in employees' "regular rate" and, as a result, under-paid overtime wages. Larsen Decl., ¶ 11. KGC contends that it did correctly calculate the overtime rate under the law, and to the extent any underpayment occurred, it was inadvertent, not willful or intentional, in good faith (including, but not limited to, a good faith dispute concerning the amount of wages due), and/or that KGC had reasonable ground to believe its conduct did not violate any provision of the applicable federal or state laws including wage orders. *Id*. KGC further argues that any overtime under-payments were *de minimis* and not recoverable. *Id*. KGC also maintains that employees received different types of remuneration throughout the Class Period, thus creating substantive differences among the putative class members with respect to the payments received as well as the expectations regarding those payments, making class certification unlikely. *Id*.

#### 2. Claim for Underpaid Meal Period Premiums Based on Regular Rate Miscalculation

Plaintiff alleges KGC failed to incorporate the prevailing wage, per diem, and other non-excludable forms of compensation in employees' "regular rate" and, as a result, under-paid meal period premiums. Larsen Decl., ¶ 12. KGC contends that any act or omission was inadvertent and very limited in scope, the result of clerical error, not willful or intentional, in good faith (including, but not limited to, a good faith dispute concerning the amount of wages due), and/or KGC had a reasonable ground to believe their conduct did not violate any provision of the applicable federal or state laws including wage orders. *Id.* KGC further argues that any overtime under-payments were *de minimis* and not recoverable. *Id.* KGC also maintains that employees received different types of remuneration throughout the Class Period, thus creating substantive differences among the putative class members with respect to the payments received as well as the expectations regarding those payments, making class certification unlikely. *Id.*

**3. Claim for Failure to Reimburse Business Expenses**

Plaintiff alleges that KGC failed to indemnify him and other employees for the use of their personal cell phones for work purposes, including to clock-in and clock-out of shifts, and to communicate with managers and supervisors. Larsen Decl., ¶ 13. KGC contends that its non-exempt employees are not required to use their personal cell phones in connection with their job duties, and that if they actually did, there are procedures in place for employees to request reimbursement of work-related expenses. *Id*. KGC also contends that employees are provided with any equipment necessary to perform their job duties. *Id.* KGC further contends that this claim would not be certified, as it would require hundreds of individualized inquiries as to whether employees incurred business-related expenses, whether they were reimbursed, whether KGC knew (or reasonably should have known) about the expense, and whether the expense was "necessary" under the circumstances. Larsen Decl., ¶ 13*; see also Gattuso v. Hart-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) ("In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices."); *Grissom v. Vons Companies, Inc.*, 1 Cal.App.4th 52, 58 (1991) (under § 2802, "ascertaining what was a necessary expenditure will require an inquiry into what was reasonable under the circumstances").

**4. Claims Under Lab. Code §§ 203, 226, and the PAGA**

As a result of its alleged failure to pay all overtime wages and meal period premiums, Plaintiff asserts that KGC failed to comply with its final payment and wage statement obligations, in violation of Cal. Labor Code §§ 203 and 226, respectively. Larsen Decl., ¶ 14. Finally, Plaintiff seeks civil penalties under the PAGA based on the aforementioned claims. *Id*.

KGC argues that Plaintiff's derivative claims fail for the same reasons his underlying claims fail. KGC further asserts it has strong, good-faith defenses to Plaintiff's underlying claims, precluding waiting time penalties. Larsen Decl., ¶ 15; *see also* 8 Cal. Code Regs. § 13520 (a "good faith dispute that any wages are due will preclude imposition of waiting time penalties"); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding "good faith dispute" precluded imposition of waiting time penalties); . *See Naranjo v. Spectrum Security Srvcs., Inc.*, 15 Cal.5th

1056, 1091 (2024) (holding that an employee's "good faith" belief that it is not violating Labor Code Section 226 precludes a finding of a knowing and intentional violation).

Finally, KGC contends Plaintiff's PAGA claim fails because the underlying claims fail. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail."). KGC further maintains that given its strong defenses and its good-faith attempts to comply with the law, the Court would substantially reduce PAGA penalties even if it were to find in Plaintiff's favor on his underlying claims. Larsen Decl., ¶ 15; *see also* Lab. Code § 2699(e)(2) (authorizing discretionary reduction in PAGA penalties); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because, *inter alia*, "the evidence showed…defendants took their obligations…seriously and attempted to comply with the law"); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer was "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

### C. <u>DISCOVERY AND MEDIATION</u>

In preparation for mediation, the Parties engaged in extensive informal discovery. KGC produced a sampling of timekeeping and payroll records for putative class members; a detailed class list that included each Settlement Class members' hire date and termination date (if applicable); its applicable wage and hour policies, and other relevant information. Larsen Decl., ¶ 16. Plaintiff's counsel hired an expert data analyst to analyze and extrapolate the data produced by KGC. *Id*. This discovery allowed the Parties to assess the merits and value of Plaintiff's claims and KGC's defenses, as well as the chances for class certification. *Id*.

The Parties attended a mediation with Hon. Jan M. Adler (Ret.) on January 18, 2024. At mediation the Parties vigorously debated Plaintiff's claims and KGC's defenses, the potential value of Plaintiff's claims, and the chances of certification. Larsen Decl., ¶ 17. The Parties reached a settlement in principle at mediation. *Id*. Over the following months, the Parties negotiated the finer terms of the settlement, ultimately resulting in the Settlement. *Id*.

## III. THE PROPOSED SETTLEMENT

### A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, KGC will pay a non-reversionary Maximum Settlement Amount ("MSA") of $345,000.00. The monetary terms of the Settlement are summarized below:

| | |
|---|---|
| • Maximum Settlement Amount ("MSA"): | $345,000.00 |
| • Minus Court-approved attorneys' fees (one-third): | $115,000.00 |
| • Minus Court-approved costs (up to): | $17,500.00 |
| • Minus Court-approved Enhancement Payment: | $7,500.00 |
| • Minus Amount Set Aside as PAGA penalties: | $30,000.00 |
| • Minus estimated Settlement Administration costs: | $10,000.00 |
| **Net Settlement Amount ("NSA"):** | **$165,000.00** |
| PLUS 25% of PAGA penalties ("PAGA Amount"): | $7,500.00 |
| **Total Amount Paid to Settlement Class:** | **$172,500.00** |

#### 1. Funding of the Settlement

The MSA shall be deposited with the Settlement Administrator no later than ten (10) Court days after the Settlement becomes "Final." *See* Settlement, § 7(B). The Settlement will become "Final" after either: (a) the 65th calendar day after a signed order finally approving this Agreement has been filed provided no motion to intervene or motion to vacate the judgment, appeal, writ or other appellate proceeding has been filed; or (b) the seventh (7th) calendar day after any motion to intervene or motion to vacate the judgment, appeal, writ, or other appellate proceeding opposing the Agreement has been finally dismissed with no material change to the terms of this Agreement and there is no right to pursue further remedies or relief, whichever is later. *Id*.

KGC's share of payroll taxes on any wage portion of the payments to Settlement Class members shall be paid by KGC separately from, and in addition to, the MSA. *See* Settlement, § 7(D). KGC's share of payroll taxes shall be deposited with the Settlement Administrator at the same time it deposits the MSA. *Id*.

#### 2. The Settlement Provides for Reasonable Monetary Payments

As noted above, after deducting amounts for a court-approved Class Representative Enhancement Payment, settlement administration costs, attorneys' fees and costs, and PAGA payment to the LWDA, KGC will pay at least $172,500.00 to Settlement Class members. *See* Settlement, § 7(C). KGC represents that there are approximately 261 Settlement Class members. *Id.*, § 1. Thus, **the average Settlement Award is estimated to be $660.91**. Larsen Decl., ¶ 19.

The NSA shall be distributed to Participating Settlement Class members (i.e., those Settlement Class members who do not opt-out of the Settlement) as follows: each Participating Settlement Class member will receive a payment from the NSA based on their proportionate number of Workweeks worked for KGC as a non-exempt employee in California during the Class Period. *See* Settlement, § 8(A)(i). The Settlement Administrator will calculate each Participating Class Member's payment from the NSA by multiplying the NSA by a fraction, the numerator of which is the Participating Class Member's number of Workweeks worked during the Class Period, and the denominator of which is the total Workweeks worked by all Participating Class Members during the Class Period. *Id*.

In addition, all Settlement Class members (regardless of whether they opt-out) who were employed by KGC in California at any time between January 9, 2022 and May 18, 2024 (the "PAGA Period"), will receive a portion of the $7,500 PAGA Amount, based on their proportionate number of pay periods worked during the PAGA Period. *See* Settlement, § 8(A)(ii).

Payments from the NSA will be treated as 20% wages reported on a Form W-2, 20% as expense reimbursements reported on a Form 1099, with the remaining 60% treated as interest and penalties and reported on a Form 1099. *See* Settlement, § 8(C). Payments from the PAGA Amount will be treated as 100% penalties. *Id.* As noted above, KGC will separately pay the employer's share of payroll taxes on the amount designated as "wages," in addition to the GSA. *Id.*, § 7(D). Settlement Class members will have forty-five (45) days from the Notice mailing to opt-out of or object to the Settlement, or submit disputes, thereby providing ample time to review the Notice without unduly delaying the Settlement. *See Id.*, § 13(C)-(E).

Upon the Settlement being approved and the Settlement being fully funded by KGC, Plaintiff and every Participating Settlement Class member will release and discharge KGC, as well as KGC's parents, subsidiaries, affiliates, officers, shareholders, directors, agents, employees, attorneys, and insurers (the "Released Parties") from any and all causes of action, claims, rights, damages, and penalties that were alleged in the Complaint or that could have been alleged based on the facts alleged in the Complaint, including, but not limited to: (a) any alleged failure by KGC (1) to pay overtime wages, (2) to pay meal period premium wages, (3) to issue compliant wage statements, (4) to timely pay wages at the end of employment, and (5) to reimburse work-related expenses; (b) any right or claim for unfair business practices in violation of California Business & Professions Code sections 17200, *et seq.*, based on the alleged failures set forth in (a)(1) through (a)(5) above; (c) any violation of the California Labor Code arising from the conduct alleged in (a)(1) through (a)(5) above, including, without limitation, violation of California Labor Code sections 201–204, 226, 226.7, 510, 558, 1194, 1198, 2802, 2804; and (d) any other applicable state or federal law, including any statute, ordinance, rule and/or regulation (Wage Order) imposing liability and/or obligations that could be brought based on the allegations in the Complaint, arising at any time during the Class Period ("Class Released Claims"). *See* Settlement, § 3.

In addition, Aggrieved Employees (whether or not they opt-out of the class portion of the Settlement) shall release KGC and the Released Parties from any right or claim for civil penalties pursuant to the PAGA based on Labor Code violations that were alleged in Plaintiff's January 9, 2022 notice letter to the LWDA and/or in the Complaint, for the duration of the PAGA Period ("PAGA Released Claims"). *Id.*, § 4.

### 3. <u>Attorneys' Fees and Costs, Service Award, and PAGA Payment</u>

At final approval, Plaintiff will apply for a Class Representative Enhancement Payment in the amount of $7,500. *See* Settlement, § 7(C)(iii). "[I]ncentive awards are fairly typical in class action cases…and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010).

As will be fully briefed at final approval, Plaintiff's requested payment is in recognition of the time and effort he expended on behalf of the Settlement Class, including providing factual information and documents to counsel, discussing with counsel the claims and theories at issue in the litigation, identifying potential witnesses, attending multiple telephonic meetings with my office to discuss the claims and theories at issue in this Action, remaining available during the mediation, reviewing the settlement agreement, and otherwise actively participating in the prosecution of this case, as well as his general release of claims and waiver of Civil Code § 1542.

*See* Settlement, § 5-6. Plaintiff respectfully submits that the requested payment is well within the range of approval. *See, e.g., Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving $15,000 payment to named plaintiff from wage and hour class action settlement, including $10,000 incentive payment and additional $5,000 for his general release, where payments to class members averaged just over $450); *Martinez v. Knight Transportation*, No. 1:16-cv-01730, 2023 WL 5917989 (E.D. Cal. Sept. 11, 2023) (approving $10,000 award to plaintiff in $400,000 wage and hour class action settlement where payments to class members averaged about $127).

The Parties have also designated $30,000 of the GSA as PAGA penalties, of which $22,5000 (75%) will be paid to the LWDA, with the remaining $7,500 (25%) distributed to Settlement Class members (*see* Settlement, § 7(C)(v)), consistent with the PAGA's requirement that 75% of penalties be allocated to the LWDA with the remaining 25% of penalties allocated to aggrieved employees (Labor Code § 2699(i)). Plaintiff submits this allocation to the LWDA is appropriate in light of other settlements allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of $7,500 to LWDA from $6.9 million settlement); *Hudson v. Libre Technology, Inc.*, No. 3:18-cv-1371-GPC, 2020 WL 2467060 at *8 (S.D. Cal. May 13, 2020) (approving $21,250 PAGA payment from $4235,000 settlement).

At final approval, Plaintiff's counsel will request attorneys' fees of one-third of the GSA (currently estimated at $115,000.00), and up to $17,500 in litigation costs. Larsen Decl., ¶ 28; *see also* Settlement, § 7(C)(iv). The requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Larsen Decl., ¶ 28. Plaintiff's counsel have incurred substantial attorneys' fees conducting pre-filing investigation and legal research; analyzing timekeeping, payroll, and other data with Plaintiff's data expert to create a comprehensive damages model; preparing for and attending mediation; negotiating and preparing the Settlement; preparing this Motion; and otherwise prosecuting this case. *Id.* Counsel will also incur future attorney fees in overseeing the Notice process, fielding phone calls from Settlement Class members, preparing the Final Approval Motion, and appearing at the Final

Approval Hearing. *Id*.

It is appropriate to award attorney fees as a percentage of the "common fund" created by the settlement. *Laffitte v. Robert Half Int'l, Inc.,* 1 Cal.5th 480 (2016) (holding "the percentage of fund method survives in California class action cases"). Counsel's fee request is well within the range of reasonableness and is typical for common fund settlements. *See*, *e.g.*, *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, n.11 (2008) ("regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"). As will be briefed at final approval, the fee request is reasonable in light of the substantial risks and work undertaken, the results obtained, and the efficiency with which counsel conducted the litigation.

## IV. ARGUMENT

### A. PRELIMINARY APPROVAL IS WARRANTED

California Rule of Court 3.769 conditions class action settlements on court approval, which is generally evaluated under the same standards as Fed. R. Civ. Proc. 23. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule 3.769 requires court to determine "that the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court's role is to ensure the settlement agreement taken as a whole is fair and within the range of reasonableness. *Hanlon*, 150 F.3d at 1027. There is a presumption of fairness when a settlement is negotiated at arm's length by counsel. *See, e.g.*, *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

#### 1. Standard for Preliminary Approval

To make a fairness determination, the Court should consider several factors, including: "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).

"The list of factors is not exclusive and the Court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

**a. The Strength of Plaintiff's Case**

Although he maintains his claims are meritorious, Plaintiff acknowledges there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described in section II.B., *supra*, KGC presented multiple defenses to Plaintiff's claims, both on the merits and to class certification, rendering success far from certain.

**b. Risk, Expense, Complexity, and Duration of Further Litigation**

Although the Parties engaged in significant informal discovery, they had not completed formal written and deposition discovery, which would have required expenditure of substantial time and resources. Larsen Decl., ¶ 30. Plaintiff also still had to file for class certification. *Id*. Even if Plaintiff obtained certification, the Parties would incur considerable fees and costs through a possible decertification motion, motions for summary judgment, trial, and potential appeals. *Id*. The Settlement avoids those risks and the accompanying expense.

**c. Risk of Maintaining Class Action Status**

Plaintiff had not yet filed his class certification motion, and as such, the extent to which of Plaintiff's proposed classes were certifiable is somewhat speculative. Absent settlement, there was a risk there would not be a certified class at trial, or if there were, that it would consist of a significantly smaller group of employees than the proposed Settlement Class, and the expected recovery would be significantly reduced. Thus, this factor supports preliminary approval.

**d. Amount Offered in Settlement Given Realistic Value of Claims**

The Settlement provides a fair and reasonable monetary recovery for the Settlement Class for disputed claims. As detailed in the Larsen Declaration, and with the assistance of an expert data analyst, Plaintiff conducted an analysis of potential damages due to KGC's allegedly unlawful policies and practices. After applying reasonable discounts for risks of not obtaining class certification and risks of losing on the merits, Plaintiff estimated his claims had a realistic potential value of approximately $492,205. Larsen Decl., ¶¶ 16, 20-27. The proposed settlement of $345,000 therefore represents about 70.09% of Plaintiff's reasonably forecasted classwide recovery. *Id.*, ¶ 27. As noted above, payments under the Settlement will average $660.91. Preliminary approval is appropriate as the Settlement provides significant monetary relief to the Class.

#### e. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, counsel have extensive experience litigating wage and hour class actions, and have been appointed class counsel in numerous cases alleging similar claims. *See* Larsen Decl., ¶¶ 2-5. Counsel conducted an in-depth review of KGC's policies, timekeeping and payroll records, and other relevant data, and drew on their extensive experience to assess Plaintiff's claims. Larsen Decl., ¶¶ 2-6, 20-27. The Settlement was also reached at the mediation session with Hon. Jan M. Adler (Ret.), an experienced and well-respected wage and hour class action mediator. *Id.*, ¶ 17. This strongly supports preliminary approval. *Kullar*, 168 Cal.App.4th at 130.

### 2. The Preliminary Approval Standard Is Met

The Court can grant preliminary approval of a proposed settlement and direct that notice be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

#### a. The Settlement Is Within the Range of Possible Approval

As noted, the Settlement reflects about 70.09% of the realistic estimated recovery on Plaintiff's claims, and will provide tangible, monetary compensation for hotly disputed wage claims. Accordingly, Plaintiff submits the Settlement is within the range of possible approval.

#### b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement resulted from an exchange of substantial information, arm's-length negotiations, mediation with an experienced mediator, and months of additional negotiations.

Plaintiff carefully vetted the claims at issue and conducted a detailed analysis of the relevant data and information. Larsen Decl., ¶¶ 17, 20-27. The Settlement is thus entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130.

#### c. The Settlement Is Devoid of Obvious Deficiencies

The Settlement provides tangible monetary relief to the Settlement Class, and the amounts proposed for attorneys' fees and costs, Plaintiff's Class Representative Enhancement Payment, and PAGA penalties are all reasonable and appropriate based on the facts of this case. Because the Settlement is devoid of obvious deficiencies, this supports preliminary approval.

### B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The proposed Settlement Class satisfies the criteria for certification because: (1) the Settlement Class is ascertainable and numerous; (2) common questions of law and fact predominate; (3) Plaintiff's claims are typical of the Settlement Class; and (4) Plaintiff and his counsel will fairly and adequately represent the Settlement Class. Cal. Code Civ. Proc. § 382.

#### 1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreason-able expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010). The Settlement Class includes non-exempt employees who worked for KGC in California during the Class Period, and thus can be readily identified from KGC's records. KGC represents there are approximately 261 Settlement Class members, rendering it impracticable to bring them all before the Court. Numerosity is therefore satisfied.

#### 2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiff's claims are predicated on KGC's alleged failure to include all non-discretionary compensation in the "regular rate", resulting in underpaid overtime wages; alleged failure to pay overtime wages based on the weighted average rate of pay; and alleged underpayment of meal period premiums. Such claims are commonly held proper for class certification. *See, e.g., Carlino v. CHG Medical Staffing, Inc.,* No. 1:17-cv-01323-DAD-

JLT, 2019 WL 1005070 (N.D. Cal. Oct. 20, 2019) (certifying regular rate claim); *Benton v. Telecom Network Specialists, Inc.* 220 Cal.App.4th 701, 726 (2013) (certifying meal and rest period claims).

**3. The Named Plaintiff's Claims Are Typical**

The typicality requirement is satisfied where class representatives have claims that are typical of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff was employed by KGC as a non-exempt employee in California during the Class Period, and he was injured by the same challenged policies that allegedly injured the Settlement Class as a whole. *See* Declaration of Luis Paredes Medina, ¶¶ 2-3. Thus, typicality is satisfied.

**4. Plaintiff and Class Counsel Will Adequately Represent the Class**

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the Settlement Class, as there are no known conflicts between Plaintiff or his counsel and the Settlement Class. *See McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff's counsel was not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation, as noted above.

**C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE**

The Court should order distribution of the proposed Notice by U.S. Mail, using last known mailing addresses provided by KGC. *See* Settlement, § 13. This is the "best notice practicable" under the circumstances, as it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff proposes the Settlement be administered by Pheonix Settlement Administrators, an experienced class action settlement administrator. *See* Jodey Lawrence Declaration and exhibits. Settlement Class members' addresses will be ascertainable through KGC's records. Phoenix will also run all addresses through the U.S. Postal Service National Change of Address database and/or perform "skip traces" to obtain current addresses. *See* Settlement, § 13(B) & (F).

The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement Class members of the nature of the claims; the basic contentions of the parties; the key terms of the Settlement; the 45-day deadline to opt-out, object, or submit a dispute and how to do so; explains the recovery formula and expected recovery amount for each Settlement Class member; and explains the releases of claims included in the Settlement. *See* Larsen Decl., Exh. A to Exh. 1. The proposed Notice also includes the final approval hearing date and time, and it provides contact information for Class Counsel and Settlement Administrator (Phoenix) in the event Settlement Class members have any questions about the Settlement. *Id*. This Notice satisfies Cal. Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching the Settlement Class.

**D. <u>THE COURT SHOULD SET A FINAL APPROVAL HEARING</u>**

Finally, the Court should set a hearing for final approval on a date appropriately scheduled to follow Settlement Class members' response deadline. *See* Cal. Rule of Court 3.769.

**V. <u>CONCLUSION</u>**

For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily approve the proposed Settlement, provisionally certify the Settlement Class, and enter the Proposed Order submitted concurrently herewith.

Respectfully submitted,

Dated: August 14, 2024

**ABRAMSON LABOR GROUP**

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