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SALVADOR CORTEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SALVADOR CORTEZ, individually and on behalf of others similarly situated, Plaintiff, vs. DIRECT PAINTING & DECORATING, INC., a California corporation; and DOES 1 through 50, inclusive, Defendants.	Case No. 23STCV02248 Consolidated with Case No. 23STCV07806 *Assigned for All Purposes to: Judge William F. Highberger, Department 10* **<u>CLASS ACTION</u>** **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** Hearing Date: November 20, 2024 Hearing Time: 11:00 a.m. Department: 10 Complaint Filed: February 1, 2023 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 20, 2024, at 11:00 a.m. in Department 10 of the above-captioned Court located at 312 N Spring St., Los Angeles, CA 90012, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, Named Plaintiff Salvador Cortez ("Plaintiff") will and hereby does move the Court for an Order granting preliminary approval of the proposed class action settlement between Plaintiff and Defendant Direct Painting & Decorating, Inc., ("Defendant").

Specifically, Plaintiff requests that the Court enter an Order:

1. Preliminarily approving the Joint Stipulation of Class Action and PAGA Settlement ("Agreement" or "Settlement Agreement") attached as **Exhibit 1** to the Declaration of Heather Davis ("Davis Decl.");

2. Certifying a Class for settlement purposes;

3. Appointing Plaintiff Salvador Cortez as the Class Representative for settlement purposes;

4. Appointing Protection Law Group, LLP as Class Counsel for settlement purposes;

5. Approving the proposed Notice of Class Action Settlement ("Notice"), attached as Exhibit A to the Settlement Agreement to be mailed to the Class;

6. Approving the opt-out and objection procedures provided in the Settlement Agreement and set forth in the Notice;

7. Directing Defendant to furnish the name, last known address, last known telephone number, social security number, dates of employment of all Class Members, total Workweeks worked by each Class Member during the Class Period; total Workweeks worked by each PAGA Member during the PAGA Period; to the Settlement Administrator within fourteen (14) calendar days after the Court grants preliminary approval of the Settlement as well as any other information the Settlement Administrator may reasonably need to administer this Settlement; and

8. Setting a date for a hearing on final approval of the proposed settlement.

Pursuant to California Labor Code § 2699(l)(2), a copy of the proposed Joint Stipulation of Class Action and PAGA Settlement, as well as the hearing date, time and location for the scheduled preliminary approval hearing on this matter, were submitted to the California Labor Workforce Development Agency via online filing at https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html on October 10, 2024. See Davis Decl. ¶¶26, 86, Ex. 2.

The motion is based upon this notice, the attached memorandum of points and authorities, the Declaration of Heather Davis filed concurrently herewith under separate cover and exhibits thereto, the Declaration of Plaintiff Salvador Cortez filed concurrently herewith, the pleadings and other records on file with the Court in this matter, and any other further evidence or argument that the Court may properly receive at or before the hearing.

Respectfully submitted,

DATED: October 10, 2024

PROTECTION LAW GROUP, LLP

By: ______________________

D. Luke Clapp
Arnel O. Tan
Joseph Marshall
Attorneys for Plaintiff,
SALVADOR CORTEZ

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Salvador Cortez ("Plaintiff") seeks preliminary approval of a Joint Stipulation of Class Action and PAGA Settlement ("Settlement" or "Settlement Agreement") on behalf of all current and former hourly-paid, non-exempt employees of Defendant Direct Painting & Decorating, Inc. ("Defendant") who were employed by Defendant in the State of California at any time from February 1, 2019, through May 31, 2024. The Settlement terms are outlined as follows:

- Size of the class: approximately 48 individuals
- Gross Settlement Amount: $168,043.00[1]
- Settlement Administration Costs: $4,500.00
- Requested Class Representative Enhancement Payment: $5,000.00
- PAGA Payment: $8,000.00
- Requested Attorney's Fees and Costs: One-Third (1/3) of the Gross Settlement Amount ($56,014.33) plus actual litigation costs and expenses not to exceed $6,000.00.
- Estimated Net Settlement Amount: $88,528.67

As part of the Settlement, the Parties have agreed to grant Defendant a credit in the amount of $20,543.00 in recognition of Prior Release Payments made by Defendant after the filing of this litigation. Participating Class Members who previously received a Prior Release Payment shall have this amount credited against their payment from the Net Settlement Amount.

As set forth herein, the Settlement is the product of informed discovery, arms-length negotiations, and provides a fair, adequate, and reasonable recovery for the Class. Plaintiff therefore respectfully requests that the Court grant preliminary approval of the proposed Settlement, conditionally certify the Class, approve the proposed Notice, and set a hearing date for final settlement approval, among other requested relief.

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[1] The Parties agree that Defendant shall receive credit towards the Gross Settlement Amount for release payments previously made to Class Members after the filing of this lawsuit in the amount of $20,543.00. Thus, Defendant shall not pay more than $147,500.00, excluding employer side payroll taxes.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a painting contractor based in the City of Industry, California. Plaintiff Salvador Cortez ("Plaintiff") worked for Defendant as a Painter from approximately 2007 until April 12, 2022, when he suffered a workplace injury. Declaration of Heather Davis ("Davis Decl.") ¶¶12-13. Declaration of Salvador Cortez ("Cortez Decl.") ¶2. Following his employment, on February 1, 2023, Plaintiff filed a class action complaint against Defendant with the Los Angeles Superior Court, Case No. 23STCV02248. Plaintiff seeks to represent a class of current and former non-exempt employees employed by Defendant in California for, *inter alia*, alleged failure to provide overtime, failure to provide meal periods, failure to authorize and permit rest breaks, failure to pay minimum wages, failure to pay timely pay wages upon termination, failure to timely pay wages during employment, failure to provide accurate wage statements, failure to keep requisite payroll records, failure to reimburse necessary business expenses, and violation of California Business and Professions Code §17200. Davis Decl. ¶14.

On April 10, 2023, Plaintiff filed a separate PAGA Representative Action Complaint with the Los Angeles Superior Court, Case No. 23STCV07806 for a single PAGA cause of action against Defendant. Davis Decl. ¶15.

The Parties thereafter filed a Joint Stipulation Regarding Discovery and Mediation to stay all formal discovery and started to focus their efforts toward settlement negotiations to informally resolve this matter. Defendant provided Plaintiff with extensive documents regarding the claims brought in this action, including the time and payroll records for employees during the covered period. Defendant also produced the operative employee handbooks for the covered period, which contained all policies and procedures in place during the class period related to meal breaks, rest breaks, timekeeping, the payment of wages and other relevant areas of investigation. From July 2023 to November 2023, the Parties attempted to resolve the matter informally but were unable to do so. Davis Decl. ¶¶16-18.

Following the failed settlement negotiations Defendant entered into individual settlement agreements with approximately 17 non-exempt employees for alleged wage and hour violations and paid out settlements totaling $20,543.00. Davis Decl. ¶19.

On November 16, 2023, the Court lifted the stay on discovery, and consolidated the Class Action and PAGA Action, with the Class Action case designated as the lead case. After the lifting of the discovery stay Plaintiff served his initial set of discovery requests comprised of Form Interrogatories, Set One ("FROGS"), Special Interrogatories, Set One ("SROGS"), Demand for Production of Documents, Set One. Plaintiff also noticed the Deposition of Defendant's Person Most Qualified ("PMQ"). On December 19, 2024, Defendant served its discovery responses. Defendant served its supplemental responses to FROGS and SROGS on February 5, 2024. As part of its document production Defendant produced the redacted individual settlement agreements it had entered with 17 putative class members purporting to release the wage and hour claims alleged in this litigation. Davis Decl. ¶¶20-23.

While engaging in formal discovery, the Parties continued settlement negotiations and on May 31, 2024, reached an agreement to resolve this matter on a class and representative basis for a Gross Settlement Amount of $168,043.00. Thereafter, the Parties worked diligently to negotiate and memorialize the terms of the settlement in a Joint Stipulation of Class Action and PAGA Settlement. After extensive discussions and multiple revisions to the agreement, the Parties entered into a fully executed Joint Stipulation of Class Action and PAGA Settlement on August 19, 2024. Davis Decl. ¶¶24-25, Ex. 1 (hereinafter "Settlement Agreement or "Agreement"). A copy of the proposed Class Action and PAGA Settlement Agreement negotiated by the Parties was submitted to LWDA via online filing at https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html, on October 10, 2024, in compliance with California Labor Code § 2699(l)(2). Davis Decl. ¶¶26, 86, Ex. 2.

Following the investigation undertaken into the claims presented in this action, as well as the efforts expended by Parties to reach this Settlement, Plaintiff hereby moves for preliminary approval of the proposed Settlement. Davis Decl. ¶¶27-28, Ex. 1.

III. THE SETTLEMENT TERMS

A. Class Definition

For purposes of settlement only, the Parties have agreed that the Class shall be defined as follows: all current and former hourly-paid, non-exempt employees of Defendant who worked for Defendant in the State of California at any time during the Class Period, which spans February 1, 2019, through May 31, 2024. Davis Decl. ¶29; Settlement Agreement ¶¶6-7. There are an estimated 48 Class Members within the Class Period. Davis Decl. ¶30.

B. Amount of Settlement

The Parties have agreed to settle the class and PAGA claims at issue in this action for a non-reversionary Gross Settlement Amount of $168,043.00, with Defendant receiving a credit towards the Gross Settlement Amount for payments previously made by the Company for the release of certain class member's individual wage claims and individual PAGA claims after the filing of this lawsuit pursuant to individual settlement agreements in the amount of $20,543.00 ("Prior Release Payments"). Thus, the additional total payment by Defendant in connection with this Settlement shall not exceed $147,500.00, excluding employer side payroll taxes. Davis Decl. ¶31; Settlement Agreement ¶¶16, 28, 40.

C. Allocation of the Gross Settlement Amount

The Gross Settlement Amount is a Common Fund, including all requested costs, fees, and other allocations. Specifically, the Gross Settlement Amount includes: (1) attorneys' fees in the amount of one-third (1/3) of the Gross Settlement Amount, equaling $56,014.33; (2) actual litigation costs, not to exceed $6,000.00; (3) Settlement Administration Costs not to exceed $4,500.00; (4) Class Representative Enhancement Payment in the amount of $5,000.00 to Plaintiff Salvador Cortez; and (5) a PAGA Payment of $8,000.00, 75% of which shall be distributed to the LWDA and 25% of which shall be distributed to the PAGA Members. Davis Decl. ¶32; Settlement Agreement ¶¶16, 40-47.

After the amounts above are deducted from the Gross Settlement Amount, the estimated 48 potential Class Members will share a Net Settlement Amount of approximately $88,528.67. The Net Settlement Amount will be distributed to the Participating Class Members based on the number of Workweeks the Class Member worked during the Class Period. Any Participating Class Members who received payment from the Prior Release Payment made by Defendant shall have such amounts credited against their Individual Settlement Payment. If the amount a Participating Class Member received from their Prior Release Payment made by Defendant exceeds the amount the Participating Class Member would be entitled to as an Individual Settlement Payment, then that Participating Class Member will receive $0 of the Net Settlement Amount. In addition, PAGA Members will receive a *pro-rata* share of the 25% portion of the PAGA Payment allocated for aggrieved employees. The individual settlement payments will be allocated as follows: twenty percent (20%) wages, forty percent (40%) penalties, and forty (40%) interest. The PAGA portion of each individual settlement payment will be allocated 100% as penalties. The portion of the individual payment allocated by the settlement administrator will be reported on an IRS W-2 and 1099 Form where required by law. Davis Decl. ¶¶33-36; Settlement Agreement ¶¶48-49.

The proposed Agreement is a non-reversionary, non-claims made settlement. All money from the Net Settlement Amount will be distributed to Participating Class Members. No money from the Settlement will revert to Defendant. Davis Decl. ¶37. Settlement Agreement ¶¶16, 40.

Any residue from the settlement payments remaining uncashed after 180 days will be distributed to the Controller of the State of California to be held in trust for such Class Members pursuant to California unclaimed property law. As such, no "unpaid residue" will result from the /settlement. Davis Decl. ¶38; Settlement Agreement ¶63.

D. Release of all Wage and Hour Claims

Participating Class Members have agreed to release their wage and hour claims against Defendant in exchange for the settlement value. The release for Participating Class Members will occur only upon the complete funding of the Gross Settlement Amount. The release is also narrowly tailored to only release those claims which would be based upon the facts alleged in the operative complaint for this action. The release of claims arising under PAGA is limited to civil penalties that could have been premised on the facts alleged in both the PAGA Notice provided to the LWDA and in the operative complaint in this Action. Davis Decl. ¶¶39-40; Settlement Agreement ¶¶30-31, 68-69.

IV. STANDARD OF REVIEW FOR PRELIMINARY APPROVAL

Court approval is required for the settlement of a class action. *See Dunk v. Ford Motor Co.*, 48 Cal. App.4th 1794 (1996). "In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-35 (2001) (disapproved on other grounds).

The review and approval of a proposed class action settlement involves a two-step process. *See* Cal. Rules of Court, Rule 3.769. First, counsel submit the proposed terms of settlement and the Court makes a preliminary assessment of whether the settlement appears to be sufficiently within the range of a fair settlement to justify providing notice of the proposed settlement to class members. After notice is provided to the class, the Court must conduct a second inquiry into whether the proposed settlement is fair, reasonable and adequate. *See id.*

The initial evaluation of the settlement at the preliminary approval step "is not a fairness hearing." *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980)(disapproved on other grounds). Rather, the purpose of this initial inquiry is to determine, at a threshold level, only whether the proposed settlement is within the range of possible approval and, as a result, "whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are 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. *See In re Microsoft I-V Cases*, 135 Cal.App 4th 706, 723 (2006).

Preliminary approval does not require a court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only after notice of the settlement has been given to the class and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. *See* Cal. R. Ct. 3.769(g). In considering a potential class settlement, the court need "not reach any ultimate conclusions" on the issues of fact and law which underlie the merits of the dispute and need not engage in a trial on the merits. *See Officers for Justice v. Civil Service Commission of S.F.* 688 F.2d 615, 625 (1982).

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V. PRESUMPTION OF FAIRNESS

A. The Parties Engaged in Arm's-Length Bargaining

California courts recognize that "a presumption of fairness exists where . . . [a] settlement is reached through arms length bargaining." *Wershba*, 91 Cal. App. 4th at 245; *see also Clark v. Am. Residential Servs. LLC*, 175 Cal. App 4th 785, 799 (2009). Here, the Parties have engaged in arms-length, non-collusive negotiations at all times. This litigation was vigorously contested and settlement negotiations were at all times arm's length and adversarial. The Parties engaged in settlement negotiations over the course of several months and engaged in formal and informal discovery. After several months of settlement negotiations and the initial round of formal discovery, the Parties were able to come to an agreement to settle this matter on a class and representative basis. Thereafter, the Parties spent several weeks finalizing the long-form agreement presented before this Court. At all times, Plaintiff was prepared to litigate this matter through class certification and trial if the Parties had been unable to reach an agreement. Davis Decl. ¶¶44-46.

B. Sufficient Investigation by Experienced Class Counsel

Courts typically assess the status of discovery in determining whether a class action settlement agreement is fair, reasonable, and adequate. *Dunk*, 48 Cal.App.4th at 1801. As discussed above, the parties engaged in extensive informal discovery before entering settlement negotiations and engaged in formal discovery while continuing to actively engage in settlement negotiations. Prior to reaching a settlement in this matter Defendant produced time and payroll records for all employees during the Class Period, as well as their Employee Handbook conveying relevant policies related to meal breaks, rest breaks, timekeeping, the payment of wages and other relevant areas of investigation. Defendant also produced relevant data points such as the total number of employees, the number of weeks during the class period, and the number pay periods in the PAGA Period. These documents and data points were used by Plaintiff's counsel to conduct a damages analysis and estimate Defendant's liability prior to engaging in settlement negotiations. Davis Decl. ¶¶44-46.

Additionally, settlement negotiations were conducted by highly capable and experienced counsel. Class Counsel are respected members of the California State Bar with extensive experience in handling complex wage and hour class action litigation. *See* Davis Decl. ¶¶2-11. Accordingly, Class Counsel had sufficient information and experience to act intelligently in negotiating the Settlement.

C. The Settlement is Fair and Reasonable in Light of the Parties' Respective Legal Positions and Recovery Risks

A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to obtain 100% of the damages sought to be fair and reasonable. *Wershba*, 91 Cal.App.4th at 246, 250 (disapproved on other grounds). In evaluating the reasonableness of a settlement, a trial court must consider "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008). Here, the proposed settlement is reasonable given the strength of Plaintiff's claims and the factual circumstances surrounding the proceedings. Based upon Class Counsel's experience litigating similar complex matters, Plaintiff expected a vigorous and lengthy defense to both class certification and the merits absent a settlement. Davis Decl. ¶¶47-78.

1. Class Counsel's Analysis of the Maximum Available Liability and Damages

Prior to engaging in settlement negotiations with Defendant, Class Counsel used the time and payroll records provided by Defendant to assess potential liability and damages. As part of their assessment, Class Counsel estimated Defendant faced a maximum potential liability of $1,659,785.50. This estimated maximum liability is based on the primary claims at issue as follows: $311,517.50 for meal periods, $311,517.50 for rest period violations, $186,910.50 for unpaid overtime and off-the-clock work, waiting time penalties of $194,040.00, $116,000.00 in penalties for inaccurate wage statements, $4,800 in unreimbursed business expenses, and approximately $535,000.00 in non-derivative PAGA penalties. Davis Decl. ¶47. However, as explained below and set forth extensively in the supporting declaration, each of these claims had varying strengths and weaknesses, and presented unique challenges to both certification and eventual recovery.

2. Class Counsel's Analysis of Claims and Risk-Based Adjustments

Despite the above predicted liability, Plaintiff recognizes several barriers to potential recovery that were factored into the ultimate decision to accept settlement in this action. As a preliminary matter, after the filing of this litigation, Defendant made a coordinated effort pick off members of the putative class through individual settlement negotiations. Plaintiff contested that the releases obtained by Defendant for the alleged claims were unenforceable and did not adequately compensate the putative class members. *See e.g. Pollar v. Judson Steel Corp.*, 1984 WL 161273, *2 (N.D. Cal. 1984) (finding unilateral communications coercive); *Mevorah v. Wells Fargo Home Mortgage, Inc*. 2005 WL 4813532 at *4 (N.D. Cal. 2005). Indeed, Plaintiff intended to move for declaratory relief if the settlement had not been reached. On the other hand, Defendant maintained that such releases were both fair and enforceable. *See e.g. Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App. 4th 796 (2009)(upholding employer's individual negotiation of wage claims with putative class members.) Defendant claimed that it had obtained releases for approximately 1/3 of the putative class. Although Plaintiff and his Counsel were confident that the Court would ultimately find these releases invalid, they recognized the potential risk that the Court might ultimately find that these releases precluded such employees from participating in this Action. Davis ¶¶48-49.

Defense counsel also argued generally that Plaintiff's claims are not suitable for class certification due to individual issues and affirmative defenses predominating the case if it were to go to trial. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1051 (2012); *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 35-36 (2014). A large portion of Defendant's overall liability is premised on Plaintiff's meal period claims. Plaintiff's meal period theory of liability was based upon Defendant's failure to provide timely, full, and/or uninterrupted meal periods. Plaintiff contended that Defendant failed to enforce its meal period policies and that employees were routinely forced to take late, short, or even entirely skip their meal periods to complete their job duties. Plaintiff contended that for a significant portion of the Class Period Defendant had failed to adequately recorded meal periods as required under California law. Accordingly, Plaintiff argued that there was a presumption that no meal period had occurred. *See Donohue v. AMN Services, Inc.* 11 Cal.5th 58 (2021). In contrast, Defendant contended that it maintained compliant practices and that no premiums were owed. Plaintiff recognizes that meal period claims have been increasingly difficult to certify in recent years and Defendant contended its practices were lawful and whether a meal period violation occurred raised individualized issues. *See Brinker*, 53 Cal. 4th at 1034-35. Class Counsel had to consider the risk that the Court would find validity in the individualized proof defense to certification of Plaintiff's meal period claim and Defendant's argument that proving damages with respect to such a claim would be unmanageable. Davis Decl. ¶¶50-52.

Plaintiff's rest period claims faced similar challenges. However, Plaintiff was also likely to face difficulty proving the alleged rest period violations as Defendant was not required to record these breaks. Plaintiff contended that Defendant failed to provide class members with timely, full, and uninterrupted rest periods during the class period. For instance, Plaintiff alleged that employees were required to interrupt their rest breaks and perform work related tasks and work through their breaks. However, Defendant claimed it allowed employees to take their state mandated rest periods and given the lack of records demonstrating rest period violations, there were legitimate concerns regarding Plaintiff's ability to certify this claim or prove substantial damages even assuming a uniform practice could be established. Davis Decl. ¶¶53-55.

Plaintiff also faced challenges certifying and proving liability for his minimum wage and overtime claims. These claims were based on unrecorded and off-the-clock work performed by the Class Members both before and after their shifts. For instance, Plaintiff contended that the Class Members were often required to begin work off-the-clock in order to clean tools and put things away. Defendant contended it did not permit off-the-clock work, that it was not aware off-the-clock work was being performed, and that there were numerous individualized inquiries surrounding these claims. Defendant argued even if a class could be certified, the individualized nature of the damages presented substantial concerns regarding the manageability of the case and the risk the Court could find these issues prevented certification. Plaintiff and Defendant also disputed the accuracy of Defendant's time records and whether Defendant paid employees for all time worked. Davis Decl. ¶¶56-58. Similar issues potentially affected Plaintiff's unreimbursed business expenses claim. Davis Decl. ¶59.

Plaintiff also faced substantial risk sand challenges with regard to his waiting time penalty and wage statement claims. These claims could not survive without the certification of Plaintiff's prior claims. Even if Plaintiff prevailed on certification for his prior claims, he would face the challenge of proving Defendant violated Labor Code § 203, a difficult burden to meet. *See, e.g*., *Choate v. Celite Corp*., 215 Cal App. 4th 1460, 1468 (2013) (holding that "an employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness"). Davis Decl. ¶¶ 60-61. Defense counsel also argued that Plaintiff would not be able to demonstrate actual injury with respect to his wage statements claim or that the inaccuracies lying therein could be proven to be knowing and intentional. Wage statement claims have received varying treatment at the appellate level as well, such claims have an element of discretion attached to them rather than a pure calculation of damages after liability is proven. *Cf., Jaimez v. DAIOHS USA, Inc*., 181 Cal.App.4th 1286 (2010) *with Price v. Starbucks Corp*., 192 Cal.App.4th 1136 (2011). Davis Decl. ¶¶62-63.

The risk of pursuing the PAGA action was also seriously considered by Class Counsel. During settlement negotiations, the Parties agreed to allocate $8,000 of the Gross Settlement Amount for civil penalties under PAGA. This is approximately 4.76% of the Gross Settlement Amount, which is well above the range of wage and hour settlements regularly approved in both state and federal court for cases that include both a class and PAGA action. Settlements that allocate only 1% of the total settlement value to resolve PAGA claims are typical of wage and hour settlements. Davis Decl. ¶64.

Class Counsel further recognizes that the PAGA claims in this action would be subject to the same defenses and risks as Plaintiff's class action claims, practical concerns regarding the manageability of these claims, defenses unique to PAGA disputes regarding the calculation of PAGA penalties including that arguments may not be stacked for violations based on the same conduct, and the substantial risk that PAGA penalties may be reduced where they are duplicative, arbitrary or oppressive. *See e.g. Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1131 (2012) (imposition of both statutory and civil penalties for same conduct is impermissible double recovery) (disapproved on other grounds); *Fleming v. Covidien, Inc.*, 2011 WL 756304718, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 80%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (reducing penalties from $50 per pay period to $5 per pay period based on good faith attempt to comply with obligations and minimal violations). Davis Decl. ¶¶65-73.

In consideration of the strengths, weaknesses and risks associated with each claim, as well as the general risks associated with litigating the case, and the significant costs and expenses that may be incurred in pursuing litigation further through class certification, trial and potential appeals, Class Counsel estimated an overall adjusted risk-based liability of approximately $165,681.28. Accordingly, the final settlement is fair, adequate and reasonable. Davis Decl. ¶¶74-78.

VI. <u>CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED</u>

Code of Civil Procedure section 382 provides that three basic requirements must be met in order to sustain any class action: (1) there must be an ascertainable class; (2) there must be a well-defined community of interest in the question of law or fact affecting the parties to be represented; and (3) certification will provide substantial benefits to litigants and the courts, i.e., proceeding as a class is superior to other methods. *See Dunk*, 48 Cal.App.4th at 1806. Plaintiff contends that this action, which is primarily based upon Defendant's wage and hour policies and practices, satisfies the class certification requirements under California Code of Civil Procedure section 382. Defendant denies Plaintiff's allegations, but for purposes of this Settlement only, have stipulated to certification of the proposed class action.

A. An Ascertainable Class Exists Which Is So Numerous That Joinder Of All Members Is Impracticable

Whether an ascertainable class exists depends on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal.App.3d 862, 873 (1983). In this case, all three considerations strongly favor class certification. Here, the Class is defined as all current and former hourly-paid, non-exempt employees of

Defendant who were employed by Defendant in the State of California at any time between February 1, 2019, through May 31, 2024. Davis Decl. ¶29; Settlement Agreement ¶¶6-7. This provides a clear and definite scope for the proposed class.

The class is also sufficiently numerous. There is no set number that satisfies the numerosity requirement. Under the Federal Rules, the minimum number of a class is one-hundred individuals. Under California law, that number is significantly less. *See e.g., Rose v. City of Haywood*, 126 Cal.App.3d 926, 934 (1981) (holding forty-two class members sufficient to satisfy numerosity). Here, the estimated Class size of 48 plainly favors class certification. Davis Decl. ¶30.

Finally, the question whether class members are easily identifiable turns on whether a plaintiff can establish "the existence of an ascertainable class." *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 at 706 (1967). The existence of an ascertainable class in this case can be established through Defendant's payroll records, and the class definition is sufficiently specific to enable the parties, potential Class Members, and the Court to determine the parameters of the Class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.App.3d 605, 617 (1987) (proposed class defined as all persons nationwide subscribing to telephone service who were charged for long distance calls deemed "plainly" ascertainable).

B. The Class Shares a Well-Defined Community of Interest

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Dunk*, 48 Cal.App. 4th at 1806. Plaintiff easily satisfies all three requirements.

The commonality criterion requires the existence of common question of law or fact and is generally established with the issues of predominance and typicality. *See Daar*, 67 Cal. 2d 695, 706. What is required is that a common question of fact or law exists which predominates over issues unique to individual plaintiffs. The existence of individual issues or facts—generally present in any case arising from employment—is not a bar to class certification as long as they do not render class litigation unmanageable or predominate over the common issues. *See B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1354 (1987).

In this action, Plaintiff's claims present sufficient common issues of law and fact that predominate and warrant class certification. Plaintiff alleges that Defendant denied compliant meal and rest periods to employees, required employees to perform work off-the-clock, and failed to fully compensate employees for all time worked. These policies and practices meant that Defendant failed to pay minimum and overtime wages, and other related claims. Plaintiff alleges that Defendant's policies and practices were uniform as to all Class Members. Thus, class treatment is appropriate.

To satisfy the typicality requirement, California law does not require that Plaintiff have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct, which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct. *See Seastrom v. Neways, Inc.*, 149 Cal.App.4th 1496, 1502 (2007). The typicality requirement for a class representative refers to the nature of the claim or defense of the representative, and not to the specific facts from which it arose or the relief sought. *See id*.

Here, Plaintiff alleges that his claims are similar to that of the other Class Members and arise out of the same alleged facts and course of conduct. Plaintiff's claims are typical of the other Class Members because they seek the exact same relief for the alleged violations. Because Plaintiff's claims are based upon the same alleged conduct and business practices as those of Class Members, the typicality requirement has been satisfied.

Finally, the question of adequacy of representation "depends on whether the plaintiff's attorney qualifies to conduct the proposed litigation in the plaintiff's interest or not antagonistic to the interests of the class." *McGee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976). Here, these considerations are satisfied. Counsel for Plaintiff includes well-regarded and accomplished lawyers who are qualified and experienced in employment-related, class-action litigation. Plaintiff's will vigorously, adequately and fairly represent the interests of the class. Davis Decl. ¶¶2-11. Because Plaintiff's claims are typical of other class members and are not based on unique circumstances, there is no antagonism between the interests of Plaintiff and the class.

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C. Class Action is Superior to a Multiplicity of Litigation

Under the circumstances, proceeding as a class action is a superior means of resolving this dispute, as the class members and the court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged violations. *See Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434 (2000) (relevant considerations include the probability that each class member will come forward to prove his or her separate claim and whether the class approach would actually serve to deter and redress the alleged wrongdoing). Further, individual actions arising out of the same operative facts would unduly burden the courts and could result in inconsistent results. Therefore, class action proceedings are superior to individual litigation.

VII. THE REQUESTED ENHANCEMENT PAYMENT IS REASONABLE

Plaintiffs in class action lawsuits are eligible for reasonable incentive payments as compensation "for the expense or risk they have incurred in conferring a benefit on other members of the class." *Munoz v. BCI Coca-Cola Bottling Co.*, 186 Cal.App.4th 399, 412 (2010). Courts routinely grant approval of class action settlement agreements containing enhancements for the class representative, 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. S*ee Van Vranken*, 901 F.Supp. 294, 299 (N.D. Cal. 1995) (approving $50,000.00 enhancement).

Plaintiff's initiation of this litigation on behalf of his former co-workers has led to the Class benefiting from this settlement. Plaintiff invested substantial time and effort into this litigation including reviewing documents and extensive discussions with Class Counsel. For these reasons, Plaintiff requests that an enhancement payment of $5,000.00 to Salvador Cortez be preliminarily approved by the Court. Davis Decl. ¶79; Declaration of Salvador Cortez ¶¶1-14.

VIII. REQUESTED ATTORNEYS' FEES AND COSTS

Trial courts have "wide latitude" in assessing the value of attorneys' fees and their decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v. Beneficial Cal, Inc.*, 82 Cal.App.4th 19, 41 (2000). California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Id*. at 47. In cases where there is a common fund, and the defendant agrees a percentage of the fund as part of the settlement, use of the percentage method is appropriate. *Id.* at 32.

Here, following the filing of Plaintiff's Complaint, Defendant entered into individual settlement agreements with several Class Members for alleged wage and hour violations, totaling $20,543.00. Defendant has stipulated and agreed that the filing of Plaintiff's lawsuit had the catalytic effect of prompting Defendant to issue the $20,543.00 in Prior Release Payments, and that Class Counsel should be entitled to recover attorneys' fees for their role in securing said payments. *See* Settlement Agreement ¶ 4; *Graham v. Daimler Chysler Corp.,* 34 Cal. 4th 553, 566, (2005) ("Attorney fees may be proper whenever an action results in relief for the plaintiff, whether the relief is obtained through a 'voluntary' change in the defendant's conduct, through a settlement, or otherwise. Thus, an award of attorney fees may be appropriate where plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought."). The requested attorneys' fees of $56,014.33, is one-third (1/3) of the common fund, is disclosed to Class Members in the proposed Notice of Class Action Settlement ("Notice"). *See* Agreement, Ex. A. The requested fee was freely negotiated, is common in the legal marketplace, and is not opposed by Defendant. The Motion for Final Approval will elaborate on the nature of the legal services provided and will also support Class Counsel's request for the reimbursement of litigation costs not to exceed $6,000.00. Davis Decl. ¶80.

IX. NOTICE TO THE CLASS, THE OPT OUT AND OBJECTION PROCESS MEETS DUE PROCESS REQUIREMENTS

The Parties have jointly drafted a Notice which will be delivered to the Class Members in both English and Spanish. The Notice will include information regarding the nature of the lawsuit, a summary of the terms of the Settlement, the Class definition, information on how to object and opt-out, and the date of the Final Approval Hearing. The Notice will also list each Class Member's Total Work Weeks and the approximate Individual Settlement Payment to be paid to the Class Member. The Notice will indicate that the Court has determined only that there is sufficient evidence to suggest that the proposed settlement might be fair, adequate and reasonable, and a final determination of such issues will be made at the final hearing. *See* Settlement Agreement Exhibit A.

No later than fourteen (14) days after the Court grants preliminary approval of the Settlement, Defendant will provide the Class List to the Settlement Administrator including the name, last known address, last known telephone number, social security number, dates of employment as a non-exempt employee during the Class Period, and workweeks worked by all Class Members, amongst other information. The Settlement Administrator shall perform any searches necessary for confirmation of the Class Members' addresses and shall mail the Notice to the Class Members within 7 days of receiving the Class List from Defendant. Davis Decl. ¶¶81-82, Settlement Agreement ¶¶5, 51-55.

In determining whether to approve a settlement of a class action, a trial court has virtually complete discretion as to the manner of giving notice to class members, and review on appeal is governed by the abuse of discretion standard. *See In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380 (2010). Here, Class Counsel is not aware of an alternative method of providing Notice to the Class which would result in a higher likelihood of actual notice.. The original source of the mailing addresses is from each Class Member, who provided the information to Defendant. As a fail-safe, additional searches will be performed on any notice returned as non-deliverable. The Settlement Administrator will track any and all opt outs, objections and disputes. Davis Decl. ¶83; Settlement Agreement ¶¶5, 54, 56, 58, 61.

Any Class Member who wishes to be excluded from the Settlement must mail the Settlement Administrator a written request for exclusion including (a) their name, address, telephone number and last 4 digits of their social security number or employee ID number; and (b) a clear statement requesting to be excluded from the settlement of the class claims. The request for exclusion must be postmarked no later than 60 days after mailing of the Class Notice. Davis Decl. ¶84; Settlement Agreement ¶¶33-34, 58.

Any Class Member wishing to object to the approval of this Settlement shall provide a signed written statement stating the specific reason for the objection as well as their full name, address, telephone number, last 4 digits of their social security number or employee ID number, and the name of the case and case number. Such written statement must be mailed to the Settlement Administrator within 60 days following the initial mailing of the Notice. Class Members may also appear and object at the final approval hearing, regardless of whether they have submitted a written objection. Davis Decl. ¶85; Settlement Agreement ¶¶34, 61.

X. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Preliminary Approval and the relief requested herein.

Dated: October 10, 2024

PROTECTION LAW GROUP, LLP

By: ______________________

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