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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

EMMANUEL CALDERA, individually, and on behalf of other members of the general public similarly situated, Plaintiffs, vs. ZEB'S WORLD FAMOUS BOATHOUSE INC. DBA GOAT HILL TAVERN, a California corporation; and DOES 1 through 25, inclusive, Defendants.	Case No. 30-2023-01310801-CU-OE-CXC Honorable Randall J. Sherman Department CX105 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Reservation ID: 74276082 Date: July 5, 2024 Time: 10:00 a.m. Dept.: CX105 Complaint Filed: March 7, 2023 FAC Filed: May 12, 2023 Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on **July 5, 2024** at **10:00 a.m.** in **Department CX105** of the above-captioned Court located at Civil Complex Center, 751 W. Santa Ana Boulevard, Santa Ana, California 92701, pursuant to California Code of Civil Procedure section 382 and Rule 3.769 of the California Rules of Court, Plaintiff Emmanuel Caldera ("Plaintiff") will and hereby does move the Court for an Order granting preliminary approval of the proposed class action and PAGA settlement between Plaintiff and Defendant Zeb's World Famous Boathouse, Inc. dba Goat Hill Tavern ("Defendant").

Plaintiff requests that the Court enter an Order:

1. Preliminarily approving the Joint Stipulation of Class Action and PAGA Settlement ("Settlement" or "Settlement Agreement") attached as Exhibit 2 to the Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement ("Genish Decl.");

2. Certifying the Class for Settlement purposes;

3. Appointing Plaintiff Emmanuel Caldera as the Class Representative;

4. Appointing Jonathan M. Genish, Miriam L. Schimmel, Joana Fang, and Alexandra Rose of Blackstone Law, APC as Class Counsel;

5. Appointing Apex Class Action LLC as the Settlement Administrator;

5. Approving the proposed Notice of Class Action Settlement ("Class Notice") and Request for Exclusion Form ("Exclusion Form"), attached as Exhibit 1 and Exhibit 2, respectively, to the [Proposed] Order Granting Preliminary Approval of Class Action and PAGA Settlement, to be mailed to the Class;

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

7. For each Class Member, directing Defendant to furnish their full name, last known mailing address, Social Security number, dates worked for Defendant during the Class Period and PAGA Period (if applicable), and such other information as is necessary for the Settlement Administrator to calculate Workweeks and PAGA Workweeks to the Settlement Administrator within twenty (20) calendar days after entry of the order granting preliminary approval of the Settlement;

8. Approving the proposed deadlines for the settlement administration process; and

9. Setting a Final Approval Hearing.

Pursuant to California Labor Code section 2699(1)(2) and concurrently with the filing of this Motion, a copy of the Settlement was submitted to the California Labor and Workforce Development Agency ("LWDA") via online submission through the LWDA's website. (Genish Decl., ¶ 45).

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Jonathan M. Genish, the Declaration of Plaintiff Emmanuel Caldera, 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: April 19, 2024

BLACKSTONE LAW, APC

By: ______________________________
Jonathan M. Genish
Attorneys for Plaintiff Emmanuel Caldera

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Emmanuel Caldera ("Plaintiff") seeks preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement ("Settlement" or "Settlement Agreement") entered into between Plaintiff and Defendant Zeb's World Famous Boathouse, Inc. dba Goat Hill Tavern ("Defendant") (together, with Plaintiff, the "Parties"). (Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement ["Genish Decl."], Exh. 2). The Settlement terms are outlined as follows:

- Class Size: Approximately 142 individuals.
- Gross Settlement Amount: Four Hundred Thousand Dollars and Zero Cents ($400,000.00).
- Attorneys' Fees and Costs: Attorneys' fees of one-third (1/3) of the Gross Settlement Amount ($133,333.33 if the Gross Settlement Amount is $400,000.00) plus actual litigation costs and expenses not to exceed Twenty Thousand Dollars and Zero Cents ($20,000.00), to be paid from the Gross Settlement Amount.
- Enhancement Payment: Five Thousand Dollars and Zero Cents ($5,000.00), to be paid from the Gross Settlement Amount.
- PAGA Amount: Thirty-Five Thousand Dollars and Zero Cents ($35,000.00) from the Gross Settlement Amount, 75% of which will be paid to the Labor and Workforce Development Agency ("LWDA") and the remaining 25% to be paid to the PAGA Employees.
- Settlement Administration Costs: Not to exceed Eight Thousand Dollars and Zero Cents ($8,000.00), to be paid from the Gross Settlement Amount.
- Estimated Net Settlement Amount: One Hundred Ninety-Eight Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents ($198,666.67) to be distributed to Settlement Class Members.

As set forth herein, the Settlement is the product of informed discovery and 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 Settlement, conditionally certify the Class, approve the proposed Notice of Class Action Settlement ("Class Notice") and Request for Exclusion Form ("Exclusion Form") (together, the "Notice Packet"), and set a hearing date for final settlement approval, among other requested relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a dive bar located in Costa Mesa, California. Plaintiff was employed by Defendant as an hourly-paid, non-exempt Doorman from approximately June 2022 to August 2022. (Declaration of Emmanuel Caldera in Support of Motion for Preliminary Approval of Class Action and PAGA Settlement ["Caldera Decl."], ¶ 2).

On March 7, 2023, Plaintiff provided written notice to the LWDA by online submission and to Defendant by U.S. Certified Mail, pursuant to California Labor Code Section 2699.3, of the specified provisions of the California Labor Code alleged to have been violated by Defendant ("PAGA Letter"). (Genish Decl., ¶ 9; Exh. 1 thereto).

On March 7, 2023, Plaintiff filed a Class Action Complaint for Damages in the action entitled *Emmanuel Caldera v. Zeb's World Famous Boathouse Inc. dba Goat Hill Tavern*, Orange County Superior Court Case No. 30-2023-01310801-CU-OE-CXC ("Action"), thereby commencing a putative class action against Defendant. (*Id.*, ¶ 10).

On May 12, 2023, Plaintiff filed a First Amended Class Action Complaint for Damages and Enforcement Action Under the Private Attorneys General Act, California Labor Code §§ 2698, *Et Seq*. ("Operative Complaint") in the Action, which added a cause of action under PAGA. (*Id.*, ¶ 11). The Operative Complaint alleges nine (9) causes of action for violations of the California Labor Code for failure to pay overtime wages, failure to provide compliant meal periods and premium payments in lieu thereof, failure to provide compliant rest periods and premiums payments in lieu thereof, failure to pay minimum wages, failure to timely pay wages upon termination, failure to provide accurate wage statements, and failure to reimburse necessary business expenses, for violations of California Business & Professions Code Section 17200, *et seq*. based on the aforementioned California Labor Code violations, and for civil penalties under PAGA based on the aforementioned California Labor Code violations. (Ibid).

On July 31, 2023, the Parties participated in a formal mediation conducted by Miriam Zadeh, Esq. ("Mediator"), a neutral and respected mediator with extensive experience in complex wage and hour matters. (*Id.*, ¶ 12). After a full day of mediation, and with the help of the Mediator, the Parties were able to reach an agreement to resolve this dispute on a class and representative basis, and shortly thereafter executed a memorandum of understanding memorializing the key settlement terms. (Ibid). Following the mediation, the Parties worked diligently to negotiate and memorialize the terms in a long form settlement agreement. (Ibid).

On February 27, 2024, the Parties executed the Settlement Agreement. (*Id*, ¶ 13; Exh. 2 thereto).

III. THE SETTLEMENT TERMS

A. Class Definition

For purposes of settlement only, the Parties have agreed that the Class shall be defined as "all current and former hourly-paid and/or non-exempt employees who worked for Defendant in the State of California at any time during the Class Period" ("Class Members" or "Class"). (Genish Decl., ¶ 14; Settlement Agreement, ¶ 6.b). The Class Period is defined as the period from March 7, 2019 through October 1, 2023. (Genish Decl., ¶ 14; Settlement Agreement, ¶ 6.f). Based on information provided by Defendant, it is estimated that there are a total of one hundred and forty-two (142) Class Members. (Genish Decl., ¶ 14).

B. Amount of Settlement

The Parties have agreed to settle the class and PAGA claims at issue in the Operative Complaint for a non-reversionary Gross Settlement Amount of Four Hundred Thousand Dollars and Zero Cents ($400,000.00), inclusive of employer-side payroll taxes. (Genish Decl., ¶ 15; Settlement Agreement, ¶ 6.p).

C. Allocation and Funding of the Gross Settlement Amount

The Gross Settlement Amount is a common fund and therefore includes all requested costs, fees, and other allocations. (Genish Decl., ¶ 15; Settlement Agreement, ¶ 6.p). The Gross Settlement Amount includes: (1) Class Counsel's fees in the amount of one-third (1/3) of the Gross Settlement Amount (i.e., $133,333.33 if the Gross Settlement Amount is $400,000.00); (2) Class Counsel's actual litigation costs and expenses, not to exceed Twenty Thousand Dollars and Zero Cents ($20,000.00); (3) Settlement Administration Costs, not to exceed Eight Thousand Dollars and Zero Cents ($8,000.00); (4) Enhancement Payment in the amount of Five Thousand Dollars and Zero Cents ($5,000.00); and (5) PAGA Amount in the amount of Thirty-Five Thousand Dollars and Zero Cents ($35,000.00). (Genish

Decl., ¶ 15; Settlement Agreement, ¶¶ 6.p, 9, 10, 11, and 12). After the above-estimated amounts are deducted from the Gross Settlement Amount, the Net Settlement Amount that will be available for Class Members is currently estimated to be One Hundred Ninety-Eight Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents ($198,666.67). (Genish Decl., ¶ 15). Additionally, 25% of the PAGA Amount ("PAGA Employee Amount"), which is $8,750.00 out of $35,000.00 will be fully distributed to "all current and former hourly-paid and/or non-exempt employees who worked for Defendant in the State of California at any time during the PAGA Period" ("PAGA Employees"). (Genish Decl., ¶ 15; Settlement Agreement, ¶¶ 6.p, 6.x, 6.y, and 11). The "PAGA Period" is defined as the period from March 7, 2022 through October 1, 2023. (Genish Decl., ¶ 15; Settlement Agreement, ¶ 6.aa).

Defendant has represented that, to the best of its knowledge, there are approximately 128 Class Members who worked a total of 2,145 workweeks during the period from April 1, 2019 through April 2, 2023. (Genish Decl., ¶ 16; Settlement Agreement, ¶ 13). If it is determined by the Settlement Administrator that the total number of workweeks worked by the Class Members during the time period referenced actually exceeds 2,145 by more than 10% (i.e., by more than 2,360 workweeks), then the Gross Settlement Amount will be increased on a *pro rata* basis equal to the percentage increase in the number of workweeks worked by the Class Members above 10%. (Genish Decl., ¶ 16; Settlement Agreement, ¶ 13). For example, if the number of workweeks increases by 11% to 2,381 workweeks, then the Gross Settlement Amount will increase by 1%. (Genish Decl., ¶ 16; Settlement Agreement, ¶ 13).

The Net Settlement Amount will be distributed and paid to all Class Members who do not submit a timely and valid Request for Exclusion ("Settlement Class Members") on a *pro rata* basis based on the number of weeks each Class Member worked for Defendant as an hourly-paid and/or non-exempt employee in California during the Class Period ("Workweeks"). (Genish Decl., ¶ 17; Settlement Agreement, ¶¶ 6.mm and 6.nn). The *pro rata* share of the Net Settlement Amount that a Class Member may be eligible to receive under the Class Settlement ("Individual Settlement Share") will be calculated by the Settlement Administrator, in accordance with the Settlement Agreement. (Genish Decl., ¶ 17; Settlement Agreement, ¶¶ 6.s and 14).

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The PAGA Employee Amount will be distributed and paid to all PAGA Employees on a *pro rata* basis based on the number of weeks each PAGA Employee worked for Defendant as an hourly-paid and/or non-exempt employee in California during the PAGA Period ("PAGA Workweeks"). (Genish Decl., ¶ 18; Settlement Agreement, ¶¶ 6.cc and 11). The *pro rata* share of the PAGA Employee Amount that a PAGA Employee may be eligible to receive under the PAGA Settlement ("Individual PAGA Payment") will be calculated by the Settlement Administrator, in accordance with the Settlement Agreement. (Genish Decl., ¶ 18; Settlement Agreement, ¶¶ 6.q and 15).

Each Individual Settlement Share will be allocated as twenty percent (20%) wages and eighty percent (80%) penalties, interest, and non-wage damages. (Genish Decl., ¶ 19; Settlement Agreement, ¶ 16). The portion allocated to wages will be reported on an IRS Form W-2 and the portions allocated to penalties, interest, and non-wage damages will be reported on an IRS Form 1099 (if applicable) by the Settlement Administrator. (Ibid). The Settlement Administrator will withhold the employee's and employer's share of taxes and withholdings with respect to the wages portion of the Individual Settlement Shares, and issue checks to Settlement Class Members for their net payment of their Individual Settlement Share ("Individual Settlement Payment"). (Genish Decl., ¶ 19; Settlement Agreement, ¶¶ 6.r and 16). Each Individual PAGA Payment will be allocated as one hundred percent (100%) penalties and will be reported on an IRS Form 1099 (if applicable) by the Settlement Administrator. (Genish Decl., ¶ 19; Settlement Agreement, ¶ 16).

The Settlement Agreement is a non-reversionary and non-claims made settlement. (Genish Decl., ¶ 20; Settlement Agreement, ¶¶ 6.p and 34). The Net Settlement Amount will be fully distributed to Settlement Class Members and the PAGA Amount will be fully distributed to the LWDA and PAGA Employees, in accordance with the Settlement Agreement. (Genish Decl., ¶ 20; Settlement Agreement, ¶¶ 14 and 15). No money will revert to Defendant. (Genish Decl., ¶ 20; Settlement Agreement, ¶ 6.p).

Each Individual Settlement Payment and Individual PAGA Payment check will be valid and negotiable for one hundred and eighty (180) calendar days from the date the checks are issued, and thereafter, shall be canceled. (Genish Decl., ¶ 21; Settlement Agreement, ¶ 34). Any funds associated with such canceled checks will be distributed by the Settlement Administrator to the State of California's Unclaimed Property Fund in the name of the Settlement Class Member and/or PAGA Employee. (Ibid).

D. Released Claims

Concurrently with the full funding of the Gross Settlement Amount, Plaintiff and all Settlement Class Members will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released Parties of all Released Class Claims. (Settlement Agreement, ¶ 35).

Concurrently with the full funding of the Gross Settlement Amount, Plaintiff, the State of California with respect to all PAGA Employees, and all PAGA Employees will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released Parties of all Released PAGA Claims. (*Id*., ¶ 36).

"Released Class Claims" means any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorneys' fees, damages, or causes of action which were alleged or which could have been alleged based on the factual allegations in the Operative Complaint, arising during the Class Period, under any federal, state, local, and/or or common law, and shall specifically include any and all claims by Plaintiff and all Settlement Class Members for Defendant's alleged failure to pay overtime and minimum wages, provide compliant meal and rest periods and associated premium payments, timely pay wages upon termination, provide complaint wage statements, and reimburse necessary business-related expenses in violation of California Labor Code §§ 201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1194, 1197, 1197.1, 1198, 2800, and 2802, and Industrial Welfare Commission Wage Orders, and all claims for attorneys' fees and costs and statutory interest in connection therewith, California Business and Professions Code sections 17200, *et seq*., and any other claims, including claims for statutory penalties, pertaining to the Class Members. (*Id*., ¶ 6.ff).

"Released PAGA Claims" means any and all claims arising from any of the factual allegations in the PAGA Letter, arising during the PAGA Period, for civil penalties under the Private Attorneys General Act of 2004, California Labor Code sections 2698 *et seq*., including all claims for attorneys' fees and costs related thereto, for Defendant's alleged failure to pay overtime and minimum wages, provide compliant meal and rest periods and associated premium payments, timely pay wages during employment and upon termination, provide complaint wage statements, maintain complete and accurate payroll records, and reimburse necessary business-related expenses in violation of California Labor Code §§ 201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802, and Industrial Welfare Commission Wage Orders, including *inter alia*, Wage Order 5-2001. (*Id*., ¶ 6.gg).

"Released Parties" means Defendant and its current and former officers, directors, members, insurers, shareholders, subsidiaries affiliates, predecessors, successors, and assigns. (*Id*., ¶ 6.hh).

IV. STANDARD OF REVIEW FOR PRELIMINARY APPROVAL

The settlement of a class action requires court approval. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996). "In general, questions whether a settlement was fair and reasonable, whether notice to the class was adequate, 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(c). First, counsel submit the proposed terms of the 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. *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). Rather, the limited 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 at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to object or exclude themselves from the settlement. *See* Cal. Rules of Court, Rule 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*, 688 F.2d 615, 625 (9th Cir. 1982).

V. THE SETTLEMENT IS PRESUMED FAIR

A. The Settlement Was Reached as a Result of Arm's-Length Bargaining

California courts recognize that "a presumption of fairness exists where . . . [a] settlement is reached through arm's-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' settlement negotiations were at all times made at arm's-length and were adversarial. (Genish Decl., ¶ 22). The Settlement was reached following a full day of mediation with a highly respected mediator with substantial experience mediating wage and hour cases. (Ibid). At all times, Plaintiff was willing and prepared to litigate this matter through class certification and trial if the Parties had been unable to reach a favorable resolution. (*Id.*, ¶ 42).

B. Sufficient Investigation and Discovery 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. Prior to mediation, Defendant produced a random sampling of putative class members' time and pay data, as well as Defendant's employee handbooks, relevant wage and hour policies, and information regarding the total number of putative class members. (Genish Decl., ¶ 23).

This allowed Plaintiff's counsel to conduct an informed assessment and analysis of the strengths and weaknesses of the claims and the potential class-wide damages. (*Id.*, ¶ 24). Based on information exchanged, the Parties extensively briefed issues regarding class certification and liability and provided their analyses to the Mediator who helped the Parties debate the strengths and weakness of their respective positions. (*Id.*, ¶ 25). Additionally, settlement negotiations were conducted by highly capable and experienced counsel. (Genish Decl., ¶¶ 1-8). Accordingly, Class Counsel had sufficient information and experience to act intelligently in negotiating the Settlement.

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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. In evaluating the reasonableness of a settlement, a trial court must consider "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 v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008).

Here, the reasonableness of the Settlement is underscored by the fact that Defendant has legal and factual grounds for defending the Action. Based upon Class Counsel's experience litigating similar complex matters, Plaintiff reasonably expected a vigorous and lengthy defense to both class certification and the merits of the Action absent a settlement.

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

Class Counsel analyzed all available data and estimated Defendant's maximum potential exposure to be approximately $668,922, assuming the litigation was successful at trial on all claims at issue and every employee had a violation for each claim on every shift worked, and then reduced this exposure analysis based on the challenges facing the likelihood of obtaining class certification, prevailing at trial, and other attendant risks. (Genish Decl., ¶ 26). This estimate is based off an estimated maximum liability for all claims at issue and the total aggregate workweeks during the relevant time period, less interest, and based on the analysis of the data which was extrapolated out for all class members across the entire putative class period, which included: $17,916 for meal period violations; $107,496 for rest period violations; $10,756 for unpaid overtime wages; $279,824 for waiting time penalties; $35,100 in wage statement penalties; and $217,830 for unreimbursed business expenses. (Ibid). Plaintiff further estimated that Defendant faced an additional exposure of $38,000 in potential, non-stacked (i.e., one penalty, per employee, per pay period during the PAGA statutory period) PAGA penalties. (Ibid). Together with the PAGA penalties, Defendant's maximum potential exposure totaled $706,922 in damages. (Ibid).

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

While Plaintiff believes that Defendant faced significant exposure, substantial barriers to a recovery existed. Defendant contended that Plaintiff's claims are not suitable for class certification because individual issues and affirmative defenses would predominate should this case go to trial. (Genish Decl., ¶ 29; *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 35-36 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). While Plaintiff and Class Counsel disagree with Defendant's predictions, they also recognize that there is a significant risk that the Court may deny class certification. (Genish Decl., ¶ 29; *see also*, *Findings of the Study of California Class Action Litigation*, 2000-2006, available at http://www.courts.ca.gov/documents/class-action-lit-study.pdf (finding that only 21.4% of all class actions were certified either as part of a settlement or as part of a contested certification motion)).

For example, Plaintiff's meal period claims, which were based on Defendant's alleged failure to provide lawful meal periods, have been increasingly difficult to certify in recent years. (Genish Decl., ¶ 30; *See Brinker*, 53 Cal. 4th at 1034-35). Plaintiff's theory of liability for meal period violations was based on allegations that Defendant had failed to implement its policies and that its practices failed to allow Class Members to take meal breaks in the manner required under California law. (Genish Decl., ¶ 30; *See Bradley v. Networkers Int'l, LLC,* 211 Cal.App.4th 1129, 1150 (2012) (holding that "the lack of a meal/rest break policy and uniform failure to authorize such breaks are matters of common proof.")). In contrast, Defendant contended that its practices at all times during the Class Period were lawful. (Genish Decl., ¶ 30). Defendant further argued that the rate of purported meal period violations reflected in the data would require individualized inquiry and that such inquiry would prohibit a class from being certified. (Ibid). Here, Class Counsel's analysis revealed that the majority of meal break violations reflected in the timekeeping records was low – under 20%, but employee time records also revealed that the overwhelming majority of the clocked meal breaks – almost 99% of all clocked meal breaks – were *exactly* 30 minutes in length. (Ibid). This raised the strong suspicion that Defendant was either automatically deducting meal breaks or inputting precise 30 minute meal breaks that were not reflective of the actual length of time that employees took their meal breaks. (Ibid). Class Counsel also had to consider the risk that the Court would find validity in an individualized proof defense to certification of

Plaintiff's meal period claim. (Ibid).

Additionally, a large portion of Defendant's overall liability lies in Plaintiff's rest period allegations. (*Id.*, ¶ 31). As with the meal period allegations, Defendant contended that it had a lawful written rest period policy, provided compliant rest breaks and relieved Class Members of all duties as required under California law. (Ibid). Additionally, this claim was even more uncertain given the difficulties associated with proving the alleged rest period violations, as Defendant was not required to record these breaks. (Ibid). Given the lack of records demonstrating rest period violations, there were legitimate concerns Plaintiff would not be able to certify these claims or prove substantial damages with requisite certainty, which made the estimated value of this claim subject to much challenge. (Ibid).

Plaintiff also faced challenges certifying and proving liability for his minimum wage and overtime claims. (*Id.*, ¶ 32). These claims were largely based on unrecorded, off-the-clock work performed by the Class Members before their shifts and during purported meal and rest periods. (Ibid). However, the individualized nature of why this work was performed and the individualized nature of damages presented substantial concerns regarding the manageability of the case and the risk the Court could find these issues prevented certification, and the estimated damages for this claim were based on an assumption that all putative class members worked off the clock for at least one hour per week. (Ibid).

There are also substantial risks associated with Plaintiff's waiting time penalties and wage statement claims. (*Id.*, ¶ 33). First, these claims were derivative of Plaintiff's claims for unpaid meal period premiums, unpaid rest period premiums, unpaid minimum wages, and unpaid overtime wages, and if certification was denied on those underlying claims, these derivative claims for penalties would also likely fail. (Ibid). Further, even if Plaintiff prevailed on his underlying claims, he would still be required to demonstrate that Defendant's violations of California Labor Code section 203 were *willful* violations. (Genish Decl., ¶ 33; *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")). Wage statement claims have also seen varying treatment at the appellate level because such claims have an element of discretion attached to them rather than a pure calculation of damages after liability is proven. (Genish Decl. ¶ 33; *Jaimez v. DAIOHS USA, Inc*., 181 Cal.App.4th 1286 (2010) *with Price v. Starbucks Corp*., 192 Cal.App.4th 1136 (2011)). Accordingly, these derivative claims, which comprised a substantial portion of Defendant's estimated liability, were therefore uncertain. (Genish Decl., ¶ 33).

Class Counsel also recognized that, even if Plaintiff prevailed at class certification, proving the amount of wages due to Class Members would be an expensive, time-consuming, and uncertain proposition. (*Id*., ¶ 34). In order to prove liability and damages, Class Counsel would need to request and analyze thousands of pages of documents, obtain the Class Members' contact information, contact them, and obtain their declarations at great expense. (Ibid). Obtaining the cooperation of current employees would also be difficult, given the likely reluctance to aid prosecution of a lawsuit against a current employer. (Ibid). On the other hand, Defendant would likely be able to obtain the cooperation of their employees. (Ibid). Moreover, even if Plaintiff prevailed at class certification and trial, possible appeals would substantially delay any recovery by the Class. (Ibid).

Therefore, taking into account how each of the above risks potentially effected Plaintiff's ability to obtain class certification, then prove the underlying violations, and the cost and delay in recovering the alleged potential damages, Class Counsel discounted Defendant's estimated liability by 25% to $530,192. (*Id*., ¶ 35). The merits-based risk factors further reduced Defendant's estimated liability by an additional 15%. (Ibid). This resulted in an adjusted estimated liability of $450,664. In light thereof, the settlement amount of $400,000 is a significant settlement. (Ibid).

Class Counsel also contemplated the risks of proceeding with the PAGA action and potential liability Defendant could face from this claim as part of the global resolution. (*Id*., ¶ 36). Existing case law makes PAGA claims subject to the same defenses and risks as Plaintiff's underlying wage claims. (Genish Decl., ¶ 36; see, *Elliot v. Spherion Pac. Work, LLC*, 572 F.Supp.2d 1169, 1181-82 (C.D. Cal. 2008) ("Plaintiff's claim under [PAGA] is wholly dependent upon her other claims. Because all of Plaintiff's other claims fail as a matter of law, so does her PAGA claim"). Moreover, although California case law clearly states that PAGA actions need not satisfy class action requirements, Class Counsel remained mindful of the fact that some courts have nevertheless held that PAGA claims must meet a threshold "manageability" requirement. (Genish Decl., ¶ 36; *See, e.g*., *Wesson v. Staples the Office Superstore, LLC*, 68 Cal.App.5th 746 (2021)). Class Counsel also anticipated that even if successful on the merits at trial, the imposition of cumulative civil penalties based on the alleged wage and hour violations could be considered unjust, arbitrary and oppressive, or confiscatory, and that Defendant would argue that it made a good faith attempt to comply with its legal obligations warranting a reduction in penalties. (Genish Decl., ¶ 36).[1] Class Counsel also anticipated Defendant would argue that it made a good faith attempt to comply with its legal obligations and that the violations per pay period were low, warranting an additional reduction in civil penalties. (Ibid). Finally, Class Counsel was also mindful of the fact that PAGA is fundamentally not intended to be compensatory in nature but is instead intended to facilitate enforcement of California's labor laws by financing state activities and educating and deterring non-compliance. (Ibid).

Therefore, after considering this multitude of factors, Plaintiff and Class Counsel concluded that it was in the best interest of the State of California and the PAGA Employees to enter into the Settlement, and to allocate Thirty-Five Thousand Dollars and Zero Cents ($35,000.00) of the Gross Settlement Amount towards the PAGA claim, which represents approximately 8.75% of the Gross Settlement Amount. (*Id*., ¶ 37). This percentage of the settlement is well within 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. (Ibid). Typically, such hybrid cases allocate only 1% of the gross settlement value to resolve PAGA claims, and, indeed, settlements allocations as little as 0.22% of the gross settlement amount have been approved as reasonable by courts. (Ibid). Moreover, the overall relief obtained by the Settlement is significant, not only from a monetary perspective, but also because it fulfills the public policy objectives of PAGA—to promote enforcement of California's labor laws, provide funds to the state, and deter future non-compliance by the employer. (Ibid).

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[1] 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); *Aguirre v. Genesis Logistics*, 2013 WL 10936035, at *3 (C.D. Cal. 2013) ("duplicative effect" of penalties is a factor in favor of "reducing ...the PAGA penalty"); *Smith v. Lux Retail North America, Inc.*, 2013 WL 2932243, at *3 (N.D. Cal. June 13, 2013) (declining to stack penalties based on the same conduct); *Castillo v. ADT, LLC*, 2017 WL 363108, at *4 (E.D. Cal. Jan. 25, 2017); *Sanchez v. McDonalds Restaurants of California, Inc.*, 2017 WL 4620746 (LA Super. Ct. July 6, 2017) (declining to stack penalties arising out of the same conduct); *Fleming v. Covidien, Inc.*, 2011 WL 756304718, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 80%); *Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030 (N.D. Cal. 2016) (indicating that a substantial reduction is warranted where good faith dispute exists in legal obligations); *Carrington v. Starbucks Corp*., 30 Cal.App.5th 504, 529 (2018) (approving reduction in penalties from $50 per pay period to $5 per pay period based on good faith attempts to comply with obligations and minimal violations).

The Settlement is in the best interest of the Class Members, the PAGA Employees, and the State of California and is within the accepted range of recoveries for this type of litigation given the inherent risk of litigation, the risk of obtaining and maintaining class certification, and the costs of further litigation. (*Id*., ¶ 38).

VI. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

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 action is superior to other methods. *See Dunk*, 48 Cal.App.4th at 1806. Plaintiff contends that the Action, which is 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 the Settlement only, Defendant has stipulated to certification of the Class.

A. An Ascertainable Class Exists Which is So Numerous That Joinder of All Members is Impracticable

Whether an ascertainable class exists turns 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 and/or non-exempt employees who worked for Defendant in the State of California at any time during the Class Period." (Genish Decl., ¶ 14; Settlement Agreement, ¶ 6.b). This provides a clear and definite scope for the proposed class.

Next, the Class is sufficiently numerous. There is no magic number that satisfies the numerosity requirement. Courts have certified classes with as few as ten or twenty-eight class members. *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981); *Bowles v. Superior Court*, 44 Cal. 2d 574 (1995); *Hebbard v. Colgrove*, 28 Cal.App.3d 1017, 1030 (1972). Here, the estimated Class size of one hundred and forty-two (142) individuals meets the numerosity requirement.

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Finally, the question of 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, 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).

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. Here, all three requirements are easily satisfied.

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).

Here, Plaintiff's claims present 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 actually worked. These policies and practices meant that Defendant allegedly 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 plaintiffs' claims be 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 ibid*.

Here, Plaintiff alleges that his claims are similar to that of the other Class Members and that Plaintiff's claims arise out of the same alleged course of conduct giving rise to the claims of the other Class Members. 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. Class Counsel is well-regarded and is qualified and experienced in employment-related, class-action litigation. (Genish Decl., ¶¶ 1-8). Plaintiff will vigorously, adequately, and fairly represent the interests of the Class. Plaintiff has, at all times, throughout the course of the litigation considered the interests of the Class and understood that he must take steps to adequately represent the Class and their interests. (Caldera Decl., ¶ 10). 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.

C. A 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.

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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 In re Online DVD Rental*, 779 F.3d 934, 947-948 (9th Cir. 2014) (approving incentive award 417 times larger than individual payments where incentive award made up a mere .17% of the settlement); *Gaudin v. Saxon Mortgage Servs., Inc.*, 2015 WL 7454183, at *10 (N.D. Cal. Nov. 23, 2015) (finding service award of $15,000 to be "fair and reasonable").

Plaintiff initiated this litigation on behalf of his former co-workers who will now be entitled to receive payment from the Settlement. Plaintiff invested substantial time and effort into litigation, including his own research, reviewing documents, and extensive discussions with Class Counsel. (Caldera Decl., ¶¶ 3-5). Further, the requested amount for Plaintiff is also reasonable given the average award and the benefit gained by other Class Members. For these reasons, Plaintiff requests that an Enhancement Payment of Five Thousand Dollars and Zero Cents ($5,000.00) to Plaintiff be preliminarily approved by the Court. (Genish Decl., ¶ 39; Caldera Decl., ¶ 12).

VIII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE

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 class members present claims against a common fund and the defendant agrees to a percentage of the fund as part of the settlement, use of the percentage method is appropriate. *Id.* at 32.

Here, the requested attorneys' fees of one-third (1/3) the Gross Settlement Amount (i.e., $133,333.33 if the Gross Settlement Amount is $400,000.00) is disclosed to Class Members in the proposed Class Notice. (Settlement Agreement, Exh. 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 and expenses not to exceed Twenty Thousand Dollars and Zero Cents ($20,000.00). (Genish Decl., ¶¶ 40 & 42). The Attorneys' Fees and Costs that are not ultimately approved by the Court shall instead be included in the Net Settlement Amount to be distributed to Settlement Class Members. (Settlement Agreement, ¶ 9).

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

The Parties have jointly drafted the Class Notice, which will be mailed to the Class Members. (*Id*., Exh. A). The Class Notice will include information regarding the nature of the Action, a summary of the terms of the Settlement, the Class definition, information on how to object to and/or opt-out of the Class Settlement and to dispute Workweeks and/or PAGA Workweeks, and the date of the Final Approval Hearing. (Ibid). The Class Notice will list each Class Member's total Workweeks and their estimated Individual Settlement Share and each PAGA Employee's total PAGA Workweeks and their estimated Individual PAGA Payment. (Ibid).

Within twenty (20) calendar days after entry of the preliminary approval order, Defendant will provide a list in a formatted readable Microsoft Office Excel spreadsheet to the Settlement Administrator containing the following information for each Class Member: full name; last known mailing address; Social Security number; dates worked for Defendant during the Class Period and PAGA Period (if applicable); and such other information as is necessary for the Settlement Administrator to calculate Workweeks and PAGA Workweeks (collectively referred to as the "Class List"). (*Id*., ¶¶ 6.d & 23). Within seven (7) calendar days after receiving the Class List from Defendant, the Settlement Administrator will perform a search based on the National Change of Address Database or other similar services available, such as provided by Experian, for information to update and correct for any known or identifiable address changes, and will mail a Class Notice and Exclusion Form (i.e., Notice Packet) in English and Spanish to all Class Members via First-Class U.S. Mail, using the most current, known mailing addresses identified by the Settlement Administrator. (*Id*., ¶ 24.a). The Parties have agreed to use Apex Class Action LLC as the Settlement Administrator. (Genish Decl., ¶ 43; Settlement Agreement, ¶ 6.kk).

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. (Genish Decl., ¶ 44). The original source of the mailing addresses is from Class Members, who provided the information to Defendant. (Ibid).

Class Members will have forty-five (45) calendar days after the initial mailing of the Notice Packet by the Settlement Administrator to submit a Request for Exclusion, Notice of Objection, and/or Workweeks Dispute ("Response Deadline"). (Settlement Agreement, ¶ 6.jj).

Any Notice Packet returned to the Settlement Administrator as undeliverable on or before the Response Deadline will be sent promptly via First-Class U.S. Mail to the forwarding address affixed thereto and the Settlement Administrator will indicate the date of such re-mailing on the Class Notice. (*Id*., ¶ 24.b). If no forwarding address is provided, the Settlement Administrator will promptly attempt to determine a correct address using a skip-trace or other search, using the name, address, and/or Social Security number of the Class Member, and perform a single re-mailing within five (5) calendar days. (Ibid). In the event that a Notice Packet is re-mailed to a Class Member, the Response Deadline for that Class Member shall be extended fifteen (15) calendar days from the original Response Deadline. (*Id*., ¶ 6.jj).

Class Members will have an opportunity to dispute the number of Workweeks and/or PAGA Workweeks to which they have been credited, as reflected in their respective Class Notices, by submitting a timely and valid letter ("Workweeks Dispute") to the Settlement Administrator, by mail, on or before the Response Deadline. (*Id*., ¶¶ 6.oo and 25). A Workweeks Dispute must: (a) contain the case name and number of the Action; (b) contain the Class Member's full name, signature, address, telephone number, and the last four (4) digits of her, his, or their Social Security number; (c) clearly state that the Class Member disputes the number of Workweeks and/or PAGA Workweeks credited to her, him, or them and what she, he, or they contend is the correct number to be credited to her, him, or them; and (d) be returned by mail to the Settlement Administrator at the specified address, postmarked on or before the Response Deadline. (*Id*., ¶ 6.oo).

Any Class Member wishing to be excluded from the Class Settlement must submit a timely and valid Exclusion Form or letter (both of which are referred to as a "Request for Exclusion") to the Settlement Administrator, by mail, on or before the Response Deadline. (*Id*., ¶¶ 6.ii & 26). A Request for Exclusion must: (a) contain the case name and number of the Action; (b) contain the Class Member's full name, signature, address, telephone number, and last four (4) digits of her, his, or their Social Security number; (c) clearly state that the Class Member does not wish to be included in the Class Settlement; and (d) be returned by mail to the Settlement Administrator at the specified address, postmarked on or before the Response Deadline. (*Id*., ¶ 6.ii). Notwithstanding the above, all PAGA Employees will be bound to the PAGA Settlement and will be issued their Individual PAGA Payment, irrespective of whether they submit a Request for Exclusion. (*Id*., ¶ 26).

To object to the Class Settlement, Settlement Class Members must submit a timely and complete written objection ("Notice of Objection") to the Settlement Administrator, by mail, on or before the Response Deadline. (*Id*., ¶¶ 6.v & 27). A Notice of Objection must: (a) contain the case name and number of the Action; (b) contain the objector's full name, signature, address, telephone number, and the last four (4) digits of her, his, or their Social Security number; (c) contain a written statement of all grounds for the objection accompanied by any legal support for such objection; (d) contain copies of any papers, briefs, or other documents upon which the objection is based; and (e) be returned by mail to the Settlement Administrator at the specified address, postmarked on or before the Response Deadline. (*Id*., 6.v). Settlement Class Members, individually or through counsel, may also present their objection orally at the Final Approval Hearing, regardless of whether they have submitted a Notice of Objection. (*Id*., ¶ 27).

X. CONCLUSION

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

Respectfully submitted,

Dated: April 19, 2024

BLACKSTONE LAW, APC

By: ______________________________
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