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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

LEONARDO ORTEGA, on behalf of himself and all similarly aggrieved employees, Plaintiff, v. BALESTERI CONSTRUCTION, INC.; and DOES 1 through 50, inclusive, Defendants.	Case No. 23CV003755 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: December 27, 2024 Time: 8:30 a.m. Dept: 14

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 27, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Thomas W. Wills, judge presiding, in Department 15 of the above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Leonardo Ortega ("Plaintiff") will and hereby does move this Court for the following relief with respect to the Joint Stipulation and Stipulation of Settlement of Class Action and PAGA Claims ("Stipulation of Settlement," "Settlement," or "Agreement") entered into by Plaintiff and Defendant Balesteri Construction, Inc., a California corporation ("Defendant") (collectively with Plaintiff, the "Parties"):

1. That the Court approve the Stipulation of Settlement referenced above;

2. That the Court certify the following class for settlement purposes: all current and former non-exempt employees of Defendant who were employed in the State of California at any time during the Class Period (the "Class" or "Class Members");

3. That Plaintiff Leonardo Ortega be appointed as Class Representatives and B. James Fitzpatrick and Alison L. Baker of Fitzpatrick & Swanston be appointed as Class Counsel;

4. That the Court preliminarily approve the Stipulation of Settlement and the Gross Settlement Amount in the amount of Eighty-Two Thousand Five Hundred Dollars and Zero Cents ($82,500.00);

5. That the Court finds on a preliminary basis that the Stipulation of Settlement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, attorneys' fees and costs, settlement administration costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court;

6. That the Court approve the mailing of the proposed Notice of Pendency of Class Action, also referred to as the "Notice of Proposed Settlement" or "Notice," to be sent to Class Members;

7. That the Court appoint Phoenix Settlement Administrators as the Settlement Administrator; and

8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to preliminarily certify a class for settlement purposes.

The basis for this Motion, filed without any opposition from Defendant, is that the proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of Class Members to participate in, opt-out of, or object to the settlement.

This Motion will be based on the attached Memorandum of Points and Authorities, the Stipulation of Settlement and the proposed Notice, and the supporting Declarations of B. James Fitzpatrick, Alison L. Baker, and Leonardo Ortega, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

Dated: November 6, 2024 FITZPATRICK & SWANSTON

By: ______________________________
B. James Fitzpatrick
Attorneys for Plaintiff,
Leonardo Ortega on behalf of himself
and all similarly aggrieved employees

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I. INTRODUCTION

This is a wage and hour class and representative PAGA action arising from various alleged Labor Code violations by Defendant Balesteri Construction, Inc. ("Defendant"). Plaintiff Leonard Ortega ("Plaintiff") asserts violations of Labor Code §§ 201, 202, 203, 204, 226, 226.7, 246, 1174, 1175, 1194, 1197, 1198, 1199, 2802, and 2698, *et seq*., the Private Attorneys General Act of 2004 (the "PAGA"), Business and Professions Code § 17200, *et seq*. (the "UCL"), and common law. Defendant denies each, every, and all of the allegations of the operative Complaint and contends that its wage and hour practices comply with the Labor Code.

Prior to the settlement of this action, Plaintiff and Defendant (jointly referred to as the "Parties") thoroughly investigated and litigated the facts relating to the claims alleged in the operative Complaint against Defendant. The Parties participated in a full-day mediation with neutral Elizabeth Leitzinger, Esq., on September 28, 2023. The Parties were able to reach the current settlement through negotiations Ms. Leitzinger facilitated, which requires Defendant to pay a maximum total payment of $82,500.00 to settle the class and PAGA claims of the putative class members. The Parties believe that this amount is fair, adequate, and reasonable, especially given the risks and uncertainty of class certification and the merits of this case.

While Plaintiff and his counsel believe they could prevail on the merits of the claims at trial, they recognize the inherent risks in drawn-out litigation and the specific risk that Plaintiff could fail to establish liability and/or overturn the Court's order dismissing the class claims on appeal. Based on their own independent investigation and evaluation, the Parties and their respective counsel are of the opinion that the settlement for the consideration and on the terms set forth in the Stipulation of Settlement is fair, reasonable, and adequate and is in the best interests of the Class and Defendant in light of all known circumstances and the expenses and risks inherent in litigation. Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On August 15, 2023, Plaintiff provided notice of alleged PAGA claims to Defendant, and on October 24, 2023, Plaintiff provided notice of alleged PAGA claims to the LWDA, on behalf of himself and all similarly situated current and former employees of Defendant. (Declaration of B. James Fitzpatrick (Fitzpatrick Decl. ¶ 3.)

On September 28, 2023, the Parties participated in private mediation with mediator Elizabeth R. Leitzinger of Fenton & Keller. After a full day of mediation, the Parties were able to reach an agreement. The Parties entered a memorandum of understanding, with the agreement to prepare a more detailed, formalized settlement agreement to be submitted to the Court for preliminary and final approval. (Fitzpatrick Decl. ¶ 4.)

On November 16, 2023, Plaintiff filed a class and representative action complaint against Defendant. The initial complaint alleges the following causes of action: 1) Failure to Provide Meal Periods or Compensation in Lieu Thereof; 2) Failure to Provide Rest Periods or Compensation in Lieu Thereof; 3) Failure to Pay Hourly and Overtime Wages; 4) Failure to Comply with Itemized Employee Wage Statement Requirements; 5) Failure to Pay All Wages Upon Termination; 6) Violation of Labor Code § 2802; 7) California Labor Code Private Attorneys General Act of 2004; and 8) Unfair Business Practices. (Fitzpatrick Decl. ¶ 5.)

Specifically, Plaintiff alleges that employees were not paid for all hours worked. Employees were also not provided with proper meal and/or rest breaks, as they were required to remain on the premises and under Defendant's control. Moreover, Plaintiffs allege that Defendant failed to timely pay wages when due and upon separation of employment. Finally, Plaintiff alleges that Defendant failed to provide accurate itemized wage statements that included the applicable hourly rates of pay, as well as due to the above practices. (Fitzpatrick Decl. ¶ 6.)

The Parties memorialized the terms of their memorandum of understanding in the Joint Stipulation and Stipulation of Settlement of Class Action and PAGA Claims ("Stipulation of Settlement," "Settlement," or "Agreement"). *Id.* ¶ 7. A true and correct copy of the Stipulation of Settlement is attached as **Exhibit A** to the Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.") submitted concurrently herewith. The Parties recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. (Fitzpatrick Decl. ¶ 8.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims arising from or relating to the afore-referenced claims. *(Id.)*

III. DISCUSSION

Any settlement of a class action lawsuit must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections. The *Manual for Complex Litigation, Third* § 30.41 states:

> Approval of class action settlements involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice…be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

(Fed. Jud. Ctr., 3rd ed. 1995).

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, "[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing." Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed. 2002).

The procedures for the parties' submission of a proposed settlement for preliminary approval by the court also are discussed in *4 Newberg on Class Actions*:

> When the parties to an action reach a monetary settlement, they will usually prepare and execute a joint stipulation of settlement, which is submitted to the court for preliminary approval. The stipulation should set forth the central terms of the agreement, including but not

> limited to, the amount of settlement, form of payment, manner of determining the effective date of settlement and any recapture clause.

Id. § 11.24.

Here, the Parties have reached such an agreement and have submitted to this Court in connection with this Motion a copy of the Stipulation of Settlement fully setting forth the agreement reached by the Parties. The Stipulation of Settlement sets forth all terms of the agreement reached by the Parties, which include, among other things, the method for calculating the Class Members' individual portions of the Gross Settlement Amount.

A. Proposed Class Definition

The current settlement is being settled on behalf of "all current and former non-exempt employees of Defendant who were employed in the State of California at any time during the Class Period (the "Class")." *See* Agreement ¶ 4. The Class Period is defined as "the period commencing on November 16, 2019, and ending on November 16, 2023." *See id.* ¶ 8.

B. Settlement Terms and Evaluation

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co*., 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig*., 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig*., 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions*, *supra*, § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("[s]o long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement…[citations] and 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation").

Here, both Plaintiff's and Defendant's counsel have a great deal of experience in wage and hour class action litigation. Plaintiff's counsel have been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. (Fitzpatrick Decl. ¶ 22; Declaration of Alison L. Baker ("Baker Decl.") ¶¶ 3-7.) Each side has apprised the other of and litigated their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties.

In advance of mediation, Defendant provided data regarding the number of class members, weeks worked, and a sampling of approximately 10% of time and pay records for the putative class. (Fitzpatrick Decl. ¶ 9.) Based on the class data provided by Defendant, Plaintiff estimated that Defendant might face potential liability of up to approximately $1,047,115.00 for Plaintiff's class claims if Plaintiff succeeded at trial on every claim. (Fitzpatrick Decl. ¶ 10.) Plaintiff was able to estimate the potential class penalties based on class data and sample records provided by Defendant. *Id*. Specifically, this amount was calculated based on the following breakdowns:

- $145,840.00 for meal period violations (40% violation rate (~18,230 shifts x .4) x $20.00 (average rate of pay));
- $255,220.00 for rest period violations (40% violation rate (~18,230 shifts x .7) x $20.00 (average rate of pay));
- $45,575.00 for unpaid wages, including minimum wages and overtime (~18,230 shifts x ((.05 (3 minutes) x $20.00) + (.05 (3 minutes) x $30.00));
- $361,450.00 for Labor Code § 226(e) penalties ((~3,646 pay periods x $100 penalty) – (~63 employees x $50));
- $18,230.00 for unreimbursed business expenses (3,646 workweeks x $5.00); and
- $220,800.00 in waiting time penalties (~46 former employees x (30 days x 8 hours x $20.00)).

See Fitzpatrick Decl. ¶ 11.

With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that Defendant could face civil penalties of up to approximately $364,460.00 (~ 3,646 pay periods x $100 penalty). (Fitzpatrick Decl. ¶ 12.) This assumes complete victory at trial and that the Court would award the maximum penalty of $100 per pay period, which is far from certain as discussed above. (*Id.*) Further, while the PAGA provides for a heightened penalty for a "subsequent violation," courts are hesitant to award the heightened penalty absent a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *see also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling).

Even assuming Plaintiff ultimately prevailed on his PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id*. at p. 517. Upon review, the Court of Appeal found such reduction to be proper. *Id*. at p. 539. Thus, even if Plaintiff was to successfully prove his claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

Although Plaintiff believes in the merits of the alleged claims and maintain that there is no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to the claims. (Fitzpatrick Decl. ¶ 13.) Thus, even if Plaintiff was to successfully prove his claims at trial, there is a possibility that the Court may only award a small percentage of

PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was premised with this risk in mind, associated with the possibility of the Court significantly reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to prevail at trial. (*Id*.)

Defendant also would have argued that the waiting time penalties, which comprise a significant portion of the estimated damages, are subject to a complete defense. Defendant would have argued that a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiff and the class members considering Defendant's legally compliant policies. If Defendant was successful on the good faith defense, the Court may not have awarded waiting time penalties at all, reducing the exposure by $2.49 million. *Hill v. Walmart, Inc.*, 32 F. 4th 811 (9th Cir. 2022) (upholding good faith defense because defendant reasonably believed wages were not due and owing at time of separation of employment); *Naranjo v. Spectrum Security Services, Inc.*, 13 Cal. 5th 93 (2022); *Chavez v. Converse, Inc.,* 2020 WL 1233919, at *l (N.D. Cal. 2020) (holding that an employer's failure to pay is not willful where there is uncertainty in the law or a "good faith mistaken belief that wages are not owed").

Similarly, on Plaintiff's wage statement claim, Plaintiff would face the additional burden of demonstrating that any alleged omission of information from the wage statements was a "knowing and intentional failure" by Defendant to comply with Labor Code § 226(a). *See Harris v. Vector Mktg. Corp*., 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct was not "knowing and intentional"). Defendant also would have argued that penalties under Section 226 are subject to a similar "good faith" defense as articulated above in the context of Plaintiff's claims for waiting time penalties. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) ("Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional."); *Wright v. Adventures Rolling Cross Country, Inc.*, 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same); *Ricaldai v. U.S. Investigations Servs.*, LLC, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012 (same); *Dalton v. Lee Publ'ns, Inc.*, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same). *Naranjo* also permitted a good faith defense to rebut the plaintiff's claim for penalties, pursuant to Labor Code § 226.

Defendant also would have argued that Plaintiff could not demonstrate an underlying violation of the Labor Code to support his meal and rest period claims. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) ("On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed."). Defendant argued that it had legally compliant written policies, which satisfied *Brinker* and that any failure to take a legally compliant meal or rest period by employees was the result of individual choice and thus not capable of class resolution. Defendant disputed that it had a captive rest period policy and argued that employees were free to leave the premises during breaks so long as they were able to timely return to their workstation. Review of the sampling of time and pay records provided by Defendant demonstrated a largely compliant workforce, as it relates to meal periods.

On Plaintiff's reimbursement claim, Defendant argued that employees were not required to use personal cell phones to communicate for purposes of employment. While Plaintiff contended he was required to use personal phones, Defendant argued that any decision to use his cell phone for work purposes was voluntary and/or unique to him.

Although Plaintiff believes that the Class could be certified, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the operative Complaint, the possibility of non-certification, and the potential for appeals. (Fitzpatrick Decl. ¶ 14.) These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, the costs of pursuing such litigation, and the risks associated with the Court's discretion to reduce PAGA penalties. The settlement is the result of extensive arm's-length negotiations between the Parties and their counsel and was facilitated by an experienced and neutral mediator. (Fitzpatrick Decl. ¶ 15.)

Indeed, numerous courts have held that **gross** settlements approximating between only 8 and 25% of the defendant's potential exposure are fair and reasonable. *See*, *e.g.*, *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the settlement is fair and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which obtained *only 9.1%* of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012 (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable). Here, based on the amounts explained above, the total exposure for Plaintiff's class and PAGA claims amount to approximately $1,411,715.00, which assumes the Court would award $100 a pay period for the PAGA claim. If the Court reduced the PAGA penalties to $5 a pay period, like in *Carrington*, the total exposure would only amount to $1,065,345.00. Had Plaintiff not been able to overturn the Court's order dismissing the putative class claims, the potential exposure is reduced drastically and limited to the PAGA claim. The Gross Settlement Amount here is **$82,500.00**, and thus amounts to approximately **8%** of the maximum estimated liability and an even higher percentage depending on how one accounts for the various risk factors. (Fitzpatrick Decl. ¶ 16.) The percentage-to-recovery ratio of this settlement is within the range of fairness and reasonableness and should be approved by the Court. (*Id.)*

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Pendency of Class Action ("Notice of Proposed Settlement" or "Notice"), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a Request for Exclusion (*i.e*., opt-out) from the settlement. *See* Notice, attached as **Exhibit A** to the Agreement. Moreover, as set forth in the Notice, Class Members are advised of their right to attend the final approval hearing and/or object to any of the terms contained in the Stipulation of Settlement. *Id*.

1. Amount and Manner of Distribution of the Compensation to be Provided to Settlement Class Members Including the Amount, or an Estimate, of What Each Settlement Class Member Will Receive

The Stipulation of Settlement provides for $82,500.00 as the Gross Settlement Amount. *See* Agreement ¶ 16. The Net Settlement Amount (calculated after deduction of Class Counsel's attorneys' fees ($25,000.00), costs (up to $5,000.00), service award ($2,500.00), payment of PAGA Penalties ($2,500), and Settlement Administration Costs (up to $5,000.00) is estimated to be approximately $42,500.00. (*See* Agreement ¶¶ 6, 7, 10, 20, and 32; Fitzpatrick Decl. ¶ 17.) Each Class Member who does not opt-out of the Settlement will receive their share of the Net Settlement Amount based upon the number of workweeks employed during the Class Period. (*See* Agreement ¶ 45.d.i; Fitzpatrick Decl. ¶ 18.)

Based on a raw average, each Class Member may recover approximately $653.85 (NSF / 65 class members). (*Id*.) The amount actually paid to each Class Member will increase or decrease depending on the actual number of workweeks he or she worked during the Class Period. *(Id.)*

Finally, funds from any checks that have not been cashed within 180 days of issuance shall be paid to the CASA of Monterey County as the *cy pres* beneficiary. (*See* Agreement ¶ 45.d.iii.; Fitzpatrick ¶ 19.) Class Counsel do not have any conflicts of interest with the proposed *cy pres* recipient. (Fitzpatrick Decl. ¶ 25; Baker Decl. ¶ 9.)

2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Settlement Class Members or Might Revert to the Defendant

Any Class Member who validly excludes him/herself from this settlement shall not be bound by this Stipulation of Settlement, except for the PAGA Released Claims, and shall not be entitled to any portion of the Net Settlement Amount. *See* Agreement ¶¶ 50, 56. PAGA Members will still receive their portion of the PAGA Penalties even if they opt out. None of the settlement funds will revert to Defendant.

3. Scope of the Release of Class Members' Claims

As a condition of participating in this class action settlement, Class Members shall release the following claims ("Released Claims"):

> any claims could have been alleged based on the facts as alleged in the operative complaints of the Action.

See Agreement ¶¶ 30, 56. Given that the release is tailored only to claims as pled in the operative Complaint and during the Class Period and nothing more, the release is appropriately limited.

In addition, regardless of whether a valid and timely Request for Exclusion is submitted, Class Members who are PAGA Members will also release the following claims ("PAGA Released Claims"):

> all claim under the Private Attorneys General Act that were alleged in the operative complaint in the Action and any claims that could have been alleged based on the facts as alleged in the operative complaints in the Action.

See Agreement ¶¶ 27, 57.

4. Tax Treatment of Settlement Amounts

As Plaintiff's lawsuit sought unpaid wages, interest, and penalties, the Parties have agreed that twenty percent (20%) of each Individual Settlement Payment shall be classified as wages, subject to required withholdings and deductions, and the remaining eighty percent (80%) shall be classified as penalties and interest. Agreement ¶ 45.d.iii. One hundred percent (100%) of each Individual PAGA Payment shall be classified as penalties. *Id*. ¶ 45.d.vii.1.

5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations

Class Members do not need to do anything should they wish to receive their share of the settlement funds. Because this is not a claims-made settlement, Class Members will not be required to make a submission to participate in the settlement. Thus, this substantially decreases the amount of burden each Class Member must bear to receive their Individual Settlement Payment. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit a request for exclusion. *See* Agreement ¶ 50.

C. Notice to Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing each Class Member's full names, last known addresses, Social Security numbers, total number of workweeks Class Members worked during the Class Period, and total number of pay periods PAGA Members worked during the PAGA Period ("Class List"). Agreement ¶ 46. Upon receipt of the information and prior to mailing the Notice to Class Members, the Settlement Administrator shall perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. *Id*. ¶ 48. Within ten (10) calendar days of receipt of the Class List from Defendant, the Settlement Administrator will mail the Notice out to Class Members. *Id*. Any Notice returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent via regular first-class U.S. mail to the forwarding address affixed thereto. *Id*. If no forwarding address is provided, the Settlement Administrator shall perform an advanced skip trace to locate the most current address and resend the Notice within five (5) calendar days. *Id*.

As set forth in the Notice, Class Members will be allowed to opt out of the settlement by a certain deadline, or object to the settlement. Agreement at Exhibit A.

D. Typicality and Adequacy of Representation

1. Class Representative's Claims are Typical of the Class

The commonality requirement is met when there are questions of law and fact common to the class. *See Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (1998) ("The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class"). Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Industries, Inc*., 29 Cal. 3d 462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co*., 193 Cal. App. 3d 411, 421 (1987).

Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure violated the Labor Code by failing to provide proper meal and rest periods or pay premium compensation in lieu thereof, failing to pay minimum, hourly, and overtime wages owed, failing to provide accurate wage statements, and failing to timely pay all wages when due and upon separation of employment. In other words, Plaintiff contends that he was subjected to the same policy and practice as other Class Members and that his claims are typical to those of the Class.

Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. Plaintiff has taken all necessary steps to represent the interests of the Class by providing information and documents to his counsel. For such reasons, Plaintiff has adequately represented the Class and will continue to do so.

2. Class Counsel Have Adequately Represented the Settlement Class and Have Experience with Wage and Hour Class Actions

From the inception of the case, Class Counsel have zealously represented the interests of the class. The settlement was obtained for the benefit of the Class. Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the Class. Fitzpatrick Decl. ¶¶ 21-23; Baker Decl. ¶¶ 6-7.

E. Costs and Fees

1. Attorneys' Fees and Costs

California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

The Common Fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits, she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include: "fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful." *Id*.

Indeed, most recently, the California Supreme Court has also now held that the award of attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created”).

The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a multiplier of 2.13. *Id*. at 487. As the Court held, only when the multiplier is “extraordinarily high or low [should] the trial court [] consider whether the percentage method should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id*. at 505.

The Parties have agreed to a payment of a maximum of $25,000.00, or 30% of the Gross Settlement Amount for payment to Class Counsel as attorneys’ fees. Agreement ¶ 7. The Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs not to exceed $5,000.00. *Id*. ¶ 6. Class Counsel have, at their own risk, expended costs, for example, to file this instant action, effectuate service of process, pay mediation fees, and pay other litigation-related costs.

Based on the foregoing, the Court should preliminarily approve the attorneys’ fees and costs being requested by the Parties, which will be further supported and discussed in Plaintiff’s Motion for Final Approval, should the Court grant this Motion.

2. Settlement Administration Costs

The Parties have agreed to an estimated payment of $5,000.00 to the Settlement Administrator to send notices and to administer this settlement, which shall be paid out of the Gross Settlement Amount. Agreement ¶¶ 32. The Parties believe that the administration fee is reasonable and should be approved.

IV. PLAINTIFF PROVIDED NOTICE TO THE LWDA

Concurrent with the filing of this Motion, Plaintiff provided notice to the Labor and Workforce Development Agency. (Fitzpatrick Decl. ¶ 20.)

V. CONCLUSION AND ACTION REQUESTED

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice, and set a date for a final approval hearing.

Dated: November 6, 2024

FITZPATRICK & SWANSTON

By: ________________________________
B. James Fitzpatrick
Attorneys for Plaintiff,
Leonardo Ortega on behalf of himself
and all similarly aggrieved employees