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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

Coordination Proceeding Special Title (Rule 3.550) **Black & Decker Wage and Hour Cases** Included Actions: *Mancillas v. Stanley Black & Decker, Inc.* *Cosico and Martell v. Stanley Black & Decker, Inc., et al.*	Judicial Council Coordination Proceeding Case No. **JCCP 5218** [Hon. David S. Cohn] **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** [*Filed with the Declaration of Kane Moon, Declaration of Plaintiff Paul Mancillas, Declaration of Plaintiff Matt Martell, Declaration of Plaintiff Edward Cosico, and [Proposed] Order*] SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN BERNARDINO NO. CIVSB2123358 SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA NO. 21CV002218 <u>PRELIMINARY APPROVAL HEARING</u> Date: January 30, 2023 Time: 10:00 AM Dept: S26 Complaint Filed: August 30, 2021 Trial Date: Not set

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

PLEASE TAKE NOTICE that on January 30, 2023 at 10:00 a.m., in Department S26 of this Court located at 247 West Third Street, San Bernardino, CA 92415-0210, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq*., Plaintiffs Paul Mancillas, Matt Martell, and Edward Cosico will move the Court for an Order granting preliminary approval of the proposed class and representative action settlement between Plaintiffs and Defendants Stanley Black & Decker, Inc. and Stanley Convergent Security Solutions, Inc. Plaintiffs further move the Court for an Order:

1. Granting preliminary approval of the Joint Stipulation of Class and PAGA Representative Action Settlement;
2. Certifying a Class for settlement purposes;
3. Approving the Notice and the plan for distribution of the Notice to Settlement Class Members;
4. Appointing Plaintiffs Paul Mancillas, Matt Martell, and Edward Cosico as Class Representatives for settlement purposes;
5. Appointing Plaintiffs' Counsel, Moon & Yang, APC and Wilshire Law Firm, as Class Counsel for settlement purposes;
6. Appointing ILYM Group, Inc. as the Settlement Administrator; and
7. Scheduling a final approval hearing.

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The motion will be based upon this notice, the attached memorandum of points and authorities, the Declaration of Kane Moon, the Declaration of Justin Marquez, the Declaration of Plaintiff Paul Mancillas, the Declaration of Plaintiff Matt Martell, and the Declaration of Plaintiff Edward Cosico, and the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

Respectfully submitted,

Dated: January 6, 2023

MOON & YANG, APC

By: */s/ Allen Feghali*
Kane Moon
Allen Feghali
Edwin Kamarzarian
Attorneys for Plaintiff Paul Mancillas

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I. INTRODUCTION

This is a wage and hour class action and PAGA representative action. Plaintiffs Paul Mancillas ("Plaintiff Mancillas"), Matt Martell ("Plaintiff Martell"), and Edward Cosico ("Plaintiff Cosico") (collectively the "Plaintiffs") seek preliminary approval of a proposed $3,500,000.00 non-reversionary, wage and hour class action settlement with Defendants Stanley Black Decker, Inc. ("SBD") and Stanley Convergent Security Solutions, Inc. ("SCSS") ("Defendants") (collectively Plaintiffs and Defendants are the "Parties"). The Settlement will provide substantial monetary payments to approximately 1,806 class members. As set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arm's-length and were facilitated by experienced neutral mediator, Mark Rudy, Esq. Accordingly, Plaintiffs request that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a final approval hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiffs' Claims

Plaintiff Mancillas worked for Black and Decker (U.S.) Inc., a subsidiary of Defendant SBD as a machine operator for approximately 4 years, from approximately October 2016 to November 2020, and was classified as non-exempt during the entirety of his employment. Plaintiff Martell was employed by Defendant SCSS until approximately five months ago, when Securitas acquired SCSS such that Plaintiff Martell is now an employee of Securitas. Plaintiff Martell was employed by Defendant SCSS from approximately December 2019, as a Service Technician III out of the Fremont Office, until its acquisition in approximately July 2022. Plaintiff Cosico was hired by Defendant SCSS in approximately March 2019 as a Fire Inspector, and he is also now employed by Securitas as a result of the acquisition. Plaintiffs Martell and Cosico are paid on an hourly basis and classified as non-exempt. During Plaintiffs' employment, Plaintiffs and other class members typically worked 5 days per workweek, and often in excess of 8 hours each workday. Plaintiffs were subjected to the same unlawful labor practices as their coworkers. (Declaration of Kane Moon in Support of Preliminary Approval ["Moon Decl."] ¶ 3.)

Plaintiffs' claim for unpaid wages is multi-fold and stems, in part, from Defendants' unlawful practice of not incorporating all remunerations into the calculation of regular rate of pay and Defendants' failure to pay Plaintiffs and the putative class for off-the-clock work. Additionally, based on Plaintiffs' investigation and an analysis of a sample of time and pay records, Plaintiffs have concluded that Defendants' records reflect a substantial meal period violation rate. Furthermore, many of the employee handbooks produced by Defendants did not have any specific policies regarding meal and rest breaks. Additionally, based on Plaintiffs' investigation, many class members were required to use their personal cell phones for work or purchase miscellaneous items without reimbursement by Defendants. In addition to the foregoing claims, Plaintiffs bring derivative claims against Defendants for waiting time penalties, wage statement violations, unfair business practices, and PAGA. (*Id*. at ¶ 4)

Because of Defendants' alleged violations of various provisions of the Labor Code, Plaintiff Mancillas filed a class and representative action on August 30, 2021, which, in its amended form, alleges that Defendants systematically: (1) failed to pay minimum wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest periods, (5) failed to indemnify necessary business expenses, (6) failed to timely pay wages at termination, (7) failed to provide accurate itemized wage statements, (8) engaged in unfair business practices, and (9) violated civil penalty provisions recoverable as PAGA penalties pursuant to Labor Code section 2698 *et seq* ("Mancillas Action"). (Moon Decl., ¶ 5.)

On November 9, 2021, Plaintiffs Martell and Cosico filed a class action and alleges that Defendants systematically: (1) failed to pay minimum and straight time wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest period, (5) failed to provide accurate itemized wage statements, (6) failed to indemnify necessary business expenses, and (7) engaged in unfair business practices ("Cosico Action"). (Moon Decl., ¶ 6.)

On or about December 10, 2021, Defendants filed a petition to coordinate the Mancillas Action and the Cosico Action. This Court heard and granted Defendants' petition on or about March 9, 2022. (Moon Decl., ¶ 7.)

Defendants ardently oppose the merits of this case and deny Plaintiffs' factual allegations. Defendants maintained that they complied with all of their meal and rest period obligations and that meal period waivers were in use where allowed by law. Defendants argued that everyone in fact had an opportunity to take uninterrupted meal and rest periods to which they were entitled, and any violation was the result of employees' choice to take a late or short meal or rest break. Defendants argued that Plaintiffs and the putative class members were paid all wages owed, and extra remuneration was discretionary so there was no failure to incorporate the regular rate of pay in overtime, meal premiums, and sick pay. As for off-the-clock work, Defendants maintained that any time spent by Plaintiffs and the putative class members to undergo COVID screening was not compensable, that its policies and practices prohibited off the clock work, and that if such work was performed without it being recorded on timesheets, Defendants were unaware of it. Defendants contended further that personal cell phone use was reimbursed when required by the Company and that employees were not required to furnish or pay for any work related items that were necessary for their jobs. Defendants maintained that none of the claims alleged are appropriate for class treatment given the individualized nature and testimony-intensive nature of such claims. Moreover, Defendants maintained that all wage statements were accurate, and to the extent that Plaintiffs received wage statements that were allegedly inaccurate, Defendants asserted that Plaintiffs suffered no actual damage or harm as a result. (*See, e.g., Angeles v. U.S. Airways, Inc.* (N.D. Cal. Feb. 19, 2013) No. C 12-05860 CRB, 2013 WL 622032, at *10 ["A plaintiff must adequately plead an injury arising from an employer's failure to provide full and accurate wage statements, and the omission of the required information alone is not sufficient."].) With respect to Plaintiffs' claim for waiting time penalties, Defendants alleged that their good-faith belief that they paid all wages precluded the imposition of waiting time penalties since Plaintiffs could not prove that Defendants' alleged failure to pay all final wages at the time of separation was "willful." (*See, e.g., Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) No. ED

CV 11–298 GHK (DTBx), 2012 WL 9506073, *5.) For these reasons, Defendants claimed that they did not engage in any unfair business practices and denied liability under PAGA. Defendants also maintained that Plaintiffs' claims were improper for class treatment. (Moon Decl., ¶ 8)

B. Discovery and Investigation

Following the filing of the Mancillas Action, Plaintiff Mancillas propounded formal discovery, but before responses were due, the Parties agreed to mediate this matter and scheduled mediation with Mark Rudy, Esq. on September 22, 2022. After mediation was scheduled, the *Mancillas* Action was consolidated with the *Cosico* Action. The Parties agreed on a protocol for exchanging documents and information before the mediation. Defendants produced a sample of time and pay records for class members, as well as policy manuals in effect during the statutory period, and additional documents. In their informal pre-mediation discovery responses, Defendants also provided information regarding the total number of current and former putative class members, the total number of pay periods worked by putative class members, the average hourly pay of all putative class members, and the total amounts paid in meal period premiums. (Moon Decl., ¶ 9.)

After reviewing documents regarding Defendants' wage and hour policies and practices, and analyzing Defendants' time and pay records, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. Moreover, Class Counsel retained an expert to analyze the records produced. Thus, Plaintiffs and their counsel's familiarity with the facts of the case and the legal issues raised by the pleadings allowed them to act intelligently in negotiating the settlement. (Moon Decl., ¶ 10.)

C. Settlement Negotiations

On September 22, 2022, the Parties participated in private mediation with professional neutral mediator Mark Rudy, Esq. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their positions through trial and appeal if a settlement had not been reached. After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, a settlement was reached by the parties, the material terms of which are encompassed within the Joint Stipulation of Class and PAGA Representative Action Settlement. (Moon Decl., Ex. 1 [Settlement Agreement].)

Class Counsel has conducted a thorough investigation into the facts of this case. Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate. Furthermore, in light of all known facts and circumstances, the risk of significant delay, trial risk, appellate risk, the defenses that could be asserted by Defendants both to certification and on the merits, the Settlement is in the best interests of the Settlement Class Members. (Moon Decl., ¶¶ 17-31.) **Indeed, the $3,500,000.00 Settlement represents approximately 91.31% of Defendants' realistic maximum potential overall liability of $3,832,965.25.** (Moon Decl., ¶ 25.)

D. <u>Key Terms of the Proposed Settlement</u>

Under the Settlement Agreement, Defendants will pay $3,500,000.00 to resolve this litigation. This amount is all-inclusive. The Settlement Agreement's key terms include:

1. <u>Class or Class Members</u>: All current and former non-exempt employees of Defendants who worked in California during the Class Period. (Settlement, ¶ 4.) The Parties estimate that as of the September 2022 mediation date, the Class is comprised of 1,806 individuals, approximately 1,100 of whom are also PAGA Employees.

2. <u>Class Period</u>: The Class Period is August 30, 2017 through the date the Court grants preliminary approval. (Settlement, ¶ 3.)

3. <u>Covered Workweeks:</u> the number of weeks a Class Member worked at Defendants' locations in California during the Class Period. (Settlement, ¶ 7.)

4. Non-reversionary Settlement: No portion of the Gross Settlement Amount will revert to Defendants. (Settlement, ¶ 38(d).)

5. Gross Settlement Amount: This amount is $3,500,000.00 and excludes Defendants' employer's taxes. (Settlement, ¶ 38(b).)

6. Release: The class release is limited to actions or causes of action which are alleged, or reasonably could have been alleged based on the facts and claims asserted in the action. (Settlement, ¶ 49.)

7. PAGA Allocation: The Parties have agreed that the PAGA Allocation will be $150,000 from the Gross Settlement Amount. Pursuant to PAGA, Seventy Five Percent (75%), or $112,500, of the PAGA Allocation will be paid to the Labor and Workforce Development Agency ("LWDA") ("PAGA Penalty Payment"), and Twenty Five Percent (25%), or $37,500, of the PAGA Allocation will be included in the Net Settlement Amount for PAGA Employees ("PAGA Settlement Payment"). (Settlement, ¶ 16.) Class Counsel has submitted the proposed settlement to the LWDA. (Moon Decl., ¶ 12, Ex. 2.)

8. Net Settlement Fund: The Net Settlement Amount shall be calculated by deducting from the Gross Settlement Amount ($3,500,000.00) the following sums, subject to approval by the Court: (1) attorney's fees (not to exceed one-third of the Gross Settlement Amount, or $1,166,667); (2) reasonable litigation costs (not to exceed $25,000.00); (3) the Service Payments (not to exceed $10,000.00 to each of the named Plaintiffs); (4) the PAGA Penalty Payment in the amount of $112,500.00 (which is 75% of the PAGA Allocation); and (5) costs of settlement administration (estimated not to exceed $30,000). (Settlement, ¶ 38(f).)

9. Settlement Class Payments (Excludes PAGA Payments): Settlement Class Payments will be paid out of the Net Settlement Amount. Each Settlement Class Member will be paid a pro-rata share of the Net Settlement Amount, as calculated by the Settlement Administrator. The pro-rata share will be determined by comparing the individual Settlement Class Member's Covered Workweeks employed during the Class Period in California to the total Covered Workweeks of all the Settlement Class Members during the Class Period. (Settlement, ¶ 38(h).)

10. PAGA Payments: Each PAGA Employee will be paid a pro-rata share of the PAGA Employees' PAGA Settlement Payment. PAGA Employees will not be permitted to exclude themselves from this portion of the Settlement. The pro-rata share will be determined by comparing the individual PAGA Employees' PAGA Pay Periods during the PAGA Period to the total PAGA Pay Periods of all the PAGA Employees during the PAGA Period. (Settlement, ¶ 38(i).)

11. Allocation of Settlement Payments: The Parties have agreed that Settlement Class Payments will be allocated as follows: 33 1/3% to wages, 33 1/3% to penalties, and 33 1/3% to interest. The PAGA Settlement Payment shares to PAGA Employees will be entirely allocated to penalties. (Settlement, ¶ 38(j).)

12. Service Payments: Subject to Court approval, Plaintiffs shall be paid a service payment of up to $10,000 to each Plaintiff. This amount is for Plaintiffs' time and effort in bringing and presenting the action. Additionally, Plaintiffs have agreed to release all individual claims, whether known and unknown, under federal law and state law against the Releasees, to the extent permitted by law, through the Class Period. (Settlement, ¶ 38 (m).)

13. Attorneys' Fees and Costs: Subject to Court approval, the Settlement provides that Defendants will not object to Class Counsel's application for attorney's fees not to exceed one-third of the Gross Settlement Amount and reimbursement of litigation costs and expenses not to exceed $25,000.00. (Settlement, ¶ 38(l).) At this time, Moon & Yang, APC's costs are approximately $19,425.75. (Moon Decl., ¶ 15, Ex. 4.)

14. Notice of Settlement: The Notice sets forth in plain terms, a statement of case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service payments being sought, and an explanation of how the settlement allocations are calculated. (Settlement Agreement, Ex. A.) Class Members will be notified by first class mail of the settlement. (Settlement, ¶ 44.) ILYM Group, Inc., the proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. If a Notice Packet is non-deliverable and no forwarding address is provided,

the Settlement Administrator shall do a computer search for a new address using the Class Member's social security and other information and shall re-mail the Notice Packet to those Class Members. (Settlement, ¶ 44.) Settlement Administration costs are estimated to be $22,500.00. (Moon Decl., ¶ 16, Ex. 5.) At the time of drafting the Settlement, administration costs were estimated to not exceed $30,000.00; accordingly, if the cost of administration decreases the difference between the estimate and actual costs will revert to participating Class Members.

15. <u>Procedure for Disputing Workweeks</u>: The Workweek Dispute procedure provided for in the Notice will permit class members to dispute their number of workweeks or opt-out of the settlement. (Settlement, Ex. A.)

III. <u>THE COURT SHOULD GRANT PRELIMINARY APPROVAL</u>

To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

In evaluating a settlement, the trial court considers the following factors: 1) the strength of plaintiff's case; 2) the risk, expense, complexity, and likely duration of further litigation; 3) the risk of maintaining class action status through trial; 4) the amount offered in settlement; 5) the extent of discovery completed and the stage of the proceedings; 6) the experience and views of counsel; 7) the presence of a governmental participant; and 8) the reaction of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc*., (2008) 168 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness. (*Id*. at p. 133.) The record need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims", but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."].)

As discussed below, Class Counsel has provided information exceeding the threshold required to provide this Court with materials and information necessary to determine that the proposed settlement is fair, adequate, and reasonable.

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

1. The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm's-Length Negotiations

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption here that the negotiations were conducted in good faith. (Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 11.51.) Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 ["The fact that a plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement."].)

The Settlement was reached following extensive negotiations following a mediation session with experienced mediator Mark Rudy, Esq. (Moon Decl. ¶ 11.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this Settlement, Class Counsel conducted informal discovery and investigation into the claims alleged by Plaintiffs, including, among other things, reviewing and analyzing internal memoranda, policy manuals, and training materials, and preparing a damage analysis. (Moon Decl., ¶¶ 17-31.) Significantly, Class Counsel's calculations are based on the analysis of a statistics expert retained by Class Counsel to analyze the records produced by

Defendants. (*Id*.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id*.) Thus, Plaintiffs and their counsel were able to act intelligently and effectively in negotiating the proposed settlement. (*Id*.)

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (Moon Decl., ¶¶ 42-54.) Again, this supports that the terms of the Settlement are based on objective evidence that has been considered and weighed against the risks, expenses, and time consumption to both sides of continued litigation of this action.

2. The Settlement Is Fair and Reasonable in Light of the Parties' Respective Legal Positions

A settlement is not judged against what might plaintiff recover had he prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 ["Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."])

The settlement obviates the significant risk that this Court may deny certification of all or some of Plaintiffs' claims. (Moon Decl., ¶¶ 17-31.) While Plaintiffs are confident in the merits of their claims, a legitimate controversy exists as to each cause of action. (*Id*.) Plaintiffs also recognize that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id*.) Furthermore, continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery by the class. (*Id*.)

The proposed settlement of $3,500,000.00 therefore represents a substantial recovery when compared to Plaintiffs' reasonably forecasted recovery. (*Id*.) Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, including the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of $3,500,000.00 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id*.) After deductions for fees and costs, the net settlement is approximately $2,148,907.25.[1] ***Accordingly, each Settlement Class Member is eligible to receive an average net benefit of approximately $1,189.87. Considering that the Class Members average hourly rate is $24.38, the average net benefit is approximately 48.8 hours of work.*** (Moon Decl., ¶ 30.) This amount will vary based on the duration of employment during the Class Period. Thus, Class Members who worked longer for Defendants during the Class Period will receive a net benefit greater than the average amount. (*Id*.)

3. Class Counsel Has Extensive Experience in Class Action Litigation

The settlement negotiations were conducted by highly capable and experienced counsel. Class Counsel have a strong record of vigorous and effective advocacy for their clients and are experienced in handling complex wage and hour class action litigation. (Moon Decl., ¶¶ 42-54.) Although Plaintiffs and their counsel were prepared to litigate the claims alleged in the litigation, they support the proposed Settlement as being in the best interest of the class.

B. The Proposed Class Notice of Settlement Should Be Approved

The proposed Notice, in the form attached to the Settlement Agreement as Exhibit A should be approved for dissemination to the class. The Notice informs the class members of the terms of the settlement and of their rights to be excluded from the settlement. If there are class members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing. Accordingly, the proposed Notice meet all the requirements of Rule 3.769(f) of the California Rules of Court.

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[1] The Net Settlement Amount is: $3,500,000.00 minus $30,000.00 for class representative service awards, minus $22,500.00 in administration costs, minus $112,500.00 for the PAGA portion sent to the LWDA, minus $1,166,667.00 for attorneys' fees, and minus $19,425.75 for our firm's current litigation expenses.

C. <u>The Proposed Attorneys' Fees and Costs Are Reasonable</u>

Under the Settlement, subject to the Court's approval, Defendants agrees to pay Class Counsel's reasonable attorneys' fees in the amount of $1,166,667.00, which is one-third of the gross settlement amount, and up to $25,000 in litigation costs. These amounts are disclosed to all class members in the proposed Notice and are reasonable.

1. Class Counsel Will Request an Award Of Fees Based On The "Common Fund" Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common fund" theory. The purpose of this approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air West, Inc.* (1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." (*Id.* at p. 110.)

The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc*. (2016) 1 Cal.5th 480 that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Id*. at p. 503.) The court explained: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts." (*Id*. [internal citations omitted].)

2. The Requested Fee Award Is in Line with Typical Cases

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." (*See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03.) Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively small. (*Id*; *see also Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million].)

Here, Plaintiffs request attorneys' fees equal to one-third of the Gross Settlement Amount, which is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Accordingly, Plaintiffs respectfully requests that the Court preliminarily approve the attorneys' fees as negotiated by the Parties and requested herein.

3. This Matter Involves A "Fee-Shifting" Provision of the Labor Code

Labor Code §§ 218.5, 226, 1194, 2802 and 2699, *et seq*. provide for the recovery of reasonable attorney's fees, and costs of suit, for the claims made in this action. Under these sections, Plaintiffs would be permitted to recover their actual attorneys' fees, even if those fees were larger than the total class recovery at the conclusion of this case. This Settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendants while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Moon Decl., ¶¶ 36-41.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (*Id*.) Once counsel undertook this litigation on behalf of the Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class ahead of all other concerns.

4. The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award

As demonstrated by their past experience in pursuing class actions on behalf of employees, Class Counsel possess considerable expertise in litigating class actions. (Moon Decl., ¶¶ 42-54.) Class Counsel has been involved as lead counsel or co-counsel in many class actions that resulted in millions in recovery. (*Id*.) Because it is reasonable to compensate class counsel commensurate with their skill, reputation and experience, Class Counsel's requested fee award is supported here.

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendants and the reasonableness of the Settlement. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of class action litigation. Based on these and other factors, Class Counsel has frequently received fee awards of this percentage from the gross recovery for the class. Therefore, the requested fee award is reasonable and fair.

D. <u>The Service Payments To Named Plaintiffs Are Reasonable</u>

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class and are appropriate given the benefit the class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59.)

Service payments are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage and hour laws. This strong policy is codified in California Labor Code section 90.5, which provides, "it is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…."). Nonetheless, the California Supreme Court has noted that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

Under the settlement agreement, subject to the Court's approval, Defendants agreed to pay a Service Payment in the amount not to exceed $10,000.00 to each Plaintiff. Class Counsel represent that Plaintiffs devoted a great deal of time and work assisting counsel in the case and communicated with counsel very frequently for litigation and to prepare for mediation. (Moon Decl., ¶¶ 32-35.) This amount is reasonable particularly in light of the significant benefits Plaintiffs generated for all class members. (*Id*.)

When compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive award given to class action plaintiffs from **1993 to 2002** found that the "average award per class representative was $15,992 and the median award per class representative was $4,357." (Theodore Eisenberg & Jeffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study", 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment discrimination class actions received an average award of $69,850 and a median award of $31,081, while named plaintiffs in other employment class actions received an average award of $12,121 and a median award of $13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards in employment cases reflected the "courts" wish to make representative plaintiffs whole by compensating them for the high costs of their service to the class, including risks of stigmatization or retaliation on the job." (*Id.* at p. 1308.)

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED

A. Legal Standard

The proposed Settlement Class is well suited for class certification. All of the claims derive from a core set of alleged violations of California's wage and hour laws and regulations. For the reasons set forth more fully below, for purpose of settlement the Class satisfies the prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) There are two requirements to section 382: "(1) There must be an ascertainable class; and (2) there must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." (*Daar v. Yellow Cab Co*. (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the community-of-interest requirement itself embodies three factors: "(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond v. Dart Indus., Inc*. (1981) 29 Cal. 3d 462, 470.)

California law and policy favor the fullest and most flexible use of the class action device. (*Id.* at pp. 469-73.) Indeed, "Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system" particularly where the rights of consumers are at issue. (*Linder v. Thrifty Oil Co*. (2000) 23 Cal. 4th 429, 434.) Any doubt as to the appropriateness of class treatment should be resolved in favor of certification. (*Richmond*, *supra*, 29 Cal.3d at pp. 473-75.)

B. Plaintiffs Maintain That The Criteria For Class Certification Are Satisfied

1. The Class Is Ascertainable and Numerous

When determining whether a class is ascertainable, California courts focus on the following three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. *See Miller v. Woods*, 148 Cal. App. 3d 862, 873 (1983). Here, the proposed class that Plaintiffs seek to represent is ascertainable because (1) the class definition is sufficiently precise, (2) consists of 1,806 class members, and (3) class members can be readily identified by looking at Defendants' records.

Plaintiffs maintain that there is an easily ascertainable class, defined by objective and precise criteria. Because class members are identified using specific criteria in the regular business records of Defendants, i.e., job position, the class is ascertainable. (*Wilner v. Sunset Life Ins. Co*. (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the subject of the lawsuit is sufficient to make the class ascertainable].)

"The requirement of Code of Civil Procedure section 382 that there be 'many' parties to a class action suit is indefinite and has been construed liberally." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.) "Where a question is of common interest to 'many' persons, an action may be maintained as a class action even where the parties are numerous and it is in fact practicable to join them all." (*Id.*) "No set number is required as a matter of law for the maintenance of a class action." (*Id.*) "Thus, our Supreme Court has upheld a class representing the 10 beneficiaries of a trust in an action for removal of the trustees." (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d 574; *see also*, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore, Plaintiffs contend that numerosity is plainly satisfied.

2. There are Many Common Issues of Law and Fact Which Predominate

To satisfy the community of interest requirement, Parties must show: (1) common questions of law and fact that predominate over individual issues; (2) class representatives must have claims or defenses typical of the class; and (3) class representatives must adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806. This inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp*. (1987) 191 Cal.App.3d 605.) Plaintiffs' claims satisfy all three requirements.

In this case, the employment practices at issue are: whether Defendants had legally compliant policies and practices to pay employees all wages owed; whether Defendants had legally compliant policies and practices to reimburse employees for necessary business expenses; whether Defendants had legally compliant policies and practices to provide employees with meal periods; whether Defendants had legally compliant policies and practices authorizing and permitting its employees to take rest periods; whether final payment of wages was untimely and excluded unpaid wages, including meal period premium wages, and rest period premium wages; whether all wages were paid to employees at the time of termination of the employment relationship; and whether the wage statements were consequently non-compliant. Plaintiffs contend that the factual and legal issues are the same for all identified class members, including Plaintiffs. Further, all class members suffered from and seek redress for the same alleged injuries. Considering that Settlement Class Members would need to prove the same issues of law and fact to prevail and their legal remedies are identical, it would be preferable to resolve all claims through a settlement agreement than to force each Settlement Class Member to litigate their own individual claims. Thus, the Court should grant conditional class certification for settlement because common questions of law and fact predominate over any individual questions within the class.

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

The typicality requirement does not focus on the individual characteristics or circumstances of the representative plaintiff compared to those of the remainder of the class, but rather upon the typicality of the proposed representative's claims as they relate to the defendant's conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 ["[t]he only requirements are that common questions of law and fact predominate and that the class representative be similarly situated" vis-à-vis the class.].) A representative plaintiff's claims are typical of the class if they arise from the same event, practice or course of conduct, and if the claims rest on the same legal theories. (*Id*.) That is precisely the case here. Plaintiffs are either former or current employees of Defendants; as such, they allege that they were subject to the same policies and practices as other similarly situated employees.

4. Plaintiffs and Their Counsel Meet the Adequacy Requirement

The adequacy of representation requirements is met by fulfilling two conditions: first, a named plaintiff must be represented by counsel qualified to conduct the pending litigation; second, a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451.)

Here, all requirements are met. Plaintiffs retained counsel with extensive experience in prosecuting complex class actions, including similar class actions that previously settled. (Moon Decl., ¶¶ 42-54.) With their combined experience, Class Counsel unquestionably are "qualified, experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 875.) In addition, Plaintiffs have no conflicts, and Plaintiffs have, with counsel, litigated this case and diligently reviewed the settlement terms, showing their dedication. Plaintiffs' willingness to serve as representatives demonstrates their serious commitment to bringing about the best results possible for the class. (*McGhee, supra,* 60 Cal.App.3d at p. 451.)

5. A Class Action is Superior to a Multiplicity of Litigation

Finally, in making its class certification decision, the Court must determine that a class action would be superior to alternative means for the fair and efficient adjudication of the litigation. By consolidating many potential individual actions into a single proceeding, this Court's use of the class action device enables it to manage this litigation in a manner that serves the economics of time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly situated employees with small but nevertheless meritorious claims for damages would, as a practical matter, have no means of redress because of the time, effort and expense required to prosecute individual actions. (*Gentry v. Super. Ct*. (2007) 42 Cal. 4th 443, 457-62; *Leyva v. Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the superiority concerns are essentially non-existent.

V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND

A. The Proposed Notice Plan Satisfies Due Process

Notice requirements are set forth in the California Rules of Court. Cal. Rules of Court, Rule 3.766 (e) and (f). California law vests the Court with broad discretion in fashioning an appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the class members will receive direct mailed notice. As the Court of Appeals has explained, "[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members . . . ." (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by direct mailing, the best possible form of notice under the circumstances.

B. The Notice is Accurate and Informative

The proposed Notice should be approved. It will be disseminated through direct U.S. first class mail to the last known address for each Class Member and will be provided in both English and Spanish. It informs the Class Members of the terms of the settlement and their right to be excluded from the Settlement. And if there are Class Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the terms and conditions of the settlement agreement, in an informative and coherent manner. It makes clear that the settlement agreement does not constitute an admission of liability by the Defendants, who deny all liability, and it recognizes that this Court has not ruled on the merits of the action. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a combined settlement-certification class notice.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement and set a Final Approval Hearing.

Respectfully submitted,

Dated: January 6, 2023

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Kane Moon
Allen Feghali
Edwin Kamarzarian

Attorneys for Plaintiff Paul Mancillas

Dated: January 6, 2023

WILSHIRE LAW FIRM

By: */s/ Christina M. Le*
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Zachary Greenberg

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1055 W. Seventh St., Suite 1880, Los Angeles, California 90017. On **January 6, 2023**, I served the foregoing document described as:

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

X__ by placing ___ the original _X_ a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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[✓] **BY U.S. MAIL:** I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal_cancellation da!9 9r postage meter date is more than one day after date of deposit for mailing in affidavit....

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

Executed this**, January 6, 2023** at Los Angeles, California.

Janelle Jickain
Type or Print Name

Signature