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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHRIS MILLS, individually and on behalf of all other persons similarly situated and the general public

Plaintiff,

v.

FACILITY SOLUTIONS GROUP, INC., a Delaware corporation, and DOES 1 through 30, inclusive,

Defendants.

Case No. 20STCV44879

Assigned to Hon. Lawrence P. Riff
Dept. 7

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER: (1) CONDITIONALLY CERTIFYING A SETTLEMENT CLASS; (2) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT; (3) APPROVING NOTICE OF CLASS ACTION SETTLEMENT; (4) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES; AND (5) SETTING HEARING FOR FINAL APPROVAL

[Notice of Motion; Declarations of Chris Mills and Shadie L. Berenji; and [Proposed] Order filed concurrently herewith]

Date: February 14, 2024
Time: 9:00 a.m.
Dept.: SS7

Complaint Filed: November 20, 2020

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I. INTRODUCTION

This motion seeks the Court's preliminary approval of a proposed wage and hour class action and Private Attorneys General Act ("PAGA") settlement reached on behalf of employees of Defendant FACILITY SOLUTIONS GROUP, INC. ("Defendant"). After a lengthy period of investigation and discovery, Plaintiff – aggrieved employee and proposed class representative – CHRIS MILLS ("Plaintiff") and Defendant (collectively with Plaintiff, the "Parties") reached a proposed class action and PAGA settlement for this action, memorialized in the "Joint Stipulation of Class and PAGA Settlement and Class Notice" by and between Plaintiff and Defendant (hereinafter incorporated by reference as "Settlement Agreement").[1] See Declaration of Shadie L. Berenji in Support of Plaintiff's Motion for an Order: (1) Conditionally Certifying a Settlement Class; (2) Preliminarily Approving Class Action Settlement; (3) Approving Notice Of Class Action Settlement; (4) Appointing Class Counsel And Class Representatives; and (5) Setting Hearing For Final Approval ("Berenji Decl."), ¶ 25, Ex. A, filed concurrently herewith.[2]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of Plaintiff's Claims

This case involves the wage and hour claims of the following putative class members: (i) approximately 221 individuals who were employed by Defendant in California in electrical (or similar) occupations between November 20, 2016 and the present; (ii) approximately 120 California employees from whom Defendant allegedly deducted wages unlawfully during that time period; and (iii) approximately 279 California employees who earned and accrued vacation during that time period. Berenji Decl., ¶ 11. Defendant is one of the nation's largest single-source providers of lighting and electrical products, electrical services, electrical

[1] Unless indicated otherwise, all capitalized terms used herein have the same meaning as those defined by the Settlement Agreement.

[2] The Settlement Agreement is based on the Los Angeles Superior Court's [Model] Class Action and PAGA Settlement Agreement and Class Notice. A redlined version of the Settlement Agreement that shows the changes made from the Los Angeles Superior Court's [Model] Class Action and PAGA Settlement Agreement and Class Notice is attached to the Berenji Declaration as "**Exhibit B**."

constructions, and energy management solutions. *Ibid.* Defendant employed Plaintiff as an Apprentice Electrician from approximately September 2018 to January 2019, and May 2019 to August 27, 2019. *Ibid.*

Plaintiff alleges that Defendant violated the California Labor Code, Industrial Welfare Commission ("IWC") Wage Order 16-2001 ("IWC Wage Order 16"), and California Business and Professions Code section 17200 *et seq*. by failing to: (1) pay all overtime wages owed; (2) provide meal periods; (3) timely pay wages; (4) provide accurate itemized wage statements; and (5) reimburse business expenses. *Id*. at ¶ 12. Plaintiff also asserts claims for unpaid minimum wages, unlawful deduction of wages, unpaid vacation wages, and failure to provide one day's rest in seven, but determined after conducting formal and informal discovery that he more than likely would recover nothing on those claims. *Ibid.*

Defendant denies Plaintiff's allegations, denies that this action is appropriate for class treatment (other than specifically for settlement purposes), and denies that Plaintiff and the putative class are entitled to recover any of the requested damages or penalties. *Id*. at ¶ 18.

B. Procedural History of Plaintiff's Lawsuit

On September 17, 2020, pursuant to California Labor Code section 2698 *et seq*., Plaintiff sent a letter to the California Labor and Workforce Development Agency ("LWDA") advising of his intent to seek PAGA penalties for Defendant's violations of the California Labor Code (Plaintiff's "PAGA Notice"). *Id*. at ¶ 13. To date, the LWDA has not expressed an intent to investigate Plaintiff's alleged violations. *Ibid.*

On November 16, 2020, Plaintiff filed a Class Action Complaint for Damages (the "Operative Complaint") alleging causes of action against Defendant for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Unlawful Deduction of Wages; (4) Failure to Pay Vested Vacation Wages; (5) Failure to Provide Meal Periods; (6) Failure to Reimburse Business Expenses; (7) Failure to Timely Pay Wages; (8) Failure to Maintain Payroll Records and Provide Accurate Itemized Wage Statements; (9) Failure to Provide One Day's Rest; (10) Violation of California Unfair Competition Laws; and (11) California Labor

Code Private Attorneys General Act (PAGA). *Id.* at ¶ 14; see also Plaintiff's Class Action Complaint for Damages filed on November 16, 2020.

On April 16, 2021, Defendant moved to compel this action to arbitration, dismiss Plaintiff's class claims, and stay his PAGA claims. Berenji Decl., ¶ 16. Defendant argued that the arbitration agreement it provided to Plaintiff was enforceable, and that a trial court order which granted Defendant's motion to compel arbitration in an unrelated and individual wrongful termination lawsuit operated as res judicata.[3] *Ibid.* Plaintiff opposed the motion. *Ibid.* On May 14, 2021, the Court (Hon. Amy D. Hogue presiding) denied Defendant's motion in the instant action. *Ibid.* The Court held that the granting of the motion to compel arbitration in the Individual Action did not operate as res judicata, and that the arbitration agreement was unconscionable and unenforceable. *Ibid.*

On July 12, 2021, Defendant appealed Judge Hogue's denial of its motion in this action. *Ibid.* A year and a half later, on November 1, 2022, the California Court of Appeal issued a *published* decision affirming the denial of Defendant's motion to compel arbitration and dismiss Plaintiff's class claims. See *Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035. The *Mills* court also ordered that Plaintiff shall recover his costs on appeal. *Id.* at p. 1068.

C. Discovery and Investigation

Before filing the lawsuit, the Berenji Law Firm, APC ("Plaintiff's Counsel" or "Class Counsel") investigated and researched the facts and circumstances underlying the pertinent issues and the law applicable thereto. Berenji Decl., ¶ 17. This required thorough discussions and interviews between Plaintiff's Counsel and Plaintiff, and a critical review and analysis of his records and wage statements. *Ibid.* After conducting its initial investigation, Plaintiff's Counsel determined that Plaintiff's claims were well-suited for class action adjudication, owing

[3] On November 23, 2020, Plaintiff filed a separate and unrelated individual lawsuit in Los Angeles County Superior Court against Defendant, alleging violations of California's Fair Employment and Housing Act ("FEHA") and wrongful termination (the "Individual Action"). Berenji Decl., ¶ 15. Defendant then moved to compel Plaintiff's claims in the Individual Action to arbitration, and on February 8, 2021, the Court in the Individual Action (Hon. Daniel S. Murphy presiding) granted Defendant's motion. *Ibid.*

that what appeared to be a common course of conduct that affected a similarly-situated group of employees. *Ibid.* After Plaintiff filed this action, he conducted formal and informal discovery to examine the wage and hour policies and practices applicable to the Class. *Id.* at ¶ 19. His formal discovery requests resulted in Defendant's production of (*inter alia*): its relevant employee handbooks, policies regarding payment of wages, meal and rest breaks, hours worked, expense reimbursement, and vacation wages; all general policy documents regarding its "Share the Light" payroll deduction program and a written authorization for those deductions which Plaintiff signed; and Plaintiff's personnel file and payroll records. *Ibid.*

The Parties also engaged in extensive negotiations to arrive at a method to sample the time and payroll records of the Class. *Id.* at ¶ 20. As a result of those negotiations, Defendant informally produced over 3,300 pages of documents, which included the time punch records and pay summaries of two randomly selected groups making up 30% of Electrician Class Members and 25% of Vacation Class Members. *Ibid.* Defendant also provided the number of Electrician Class Members (and the total number of weeks worked by them, and their average rate of pay), Vacation Class Members, Unlawful Deduction Class Members, and Aggrieved Employees (and their total number of pay periods); as well as the total number of wage statements issued to the Electrician and Unlawful Deduction Classes. *Ibid.* Additionally, Defendant provided information about meal period premiums and reimbursements to the Electrician Class for the cost of tools they were required to purchase. *Ibid.* Plaintiff's Counsel spent a substantial amount of time analyzing the above-mentioned information and data. *Ibid.*

In preparation for mediation, with the assistance of experts, Plaintiff's Counsel prepared a comprehensive damage analysis based on information gathered from Plaintiff, and the employment data and documents provided by Defendant. *Id.* at ¶ 21. Plaintiff's Counsel drafted a mediation brief containing a detailed review of the evidence and outlining the complex legal issues in this case. *Ibid.*

D. The Parties Reach a Settlement of all Claims

At all times relevant herein, Defendant disputed and denied, and continues to dispute and deny, that it was liable to Plaintiff for any of the claims asserted in Plaintiff's PAGA

Notice and/or Operative Complaint. *Id.* at ¶ 18. Additionally, there has been no determination on the merits of Plaintiff's legal claims and request for damages or civil penalties. *Ibid.*

Recently, in order to avoid the additional cost of litigation, the inconvenience and burden of legal proceedings, as well as the uncertainties of trial and appeals, the Parties agreed to resolve this matter and entered into a settlement agreement. *Id.* at ¶ 22. The material terms of the settlement agreement are discussed below.

III. MATERIAL SETTLEMENT TERMS

The proposed settlement provides monetary relief to Class Members and Aggrieved Employees, and resolves all class and representative action claims of the Plaintiff and Class Members against Defendant. The settlement provides class-wide relief for the alleged wage and hour violations. In exchange, Defendant will receive a release from all Class Members, who do not opt out of the settlement, of all wage and hour claims for monetary relief that were alleged by Plaintiff. The terms of the settlement are set forth in the Settlement Agreement. See Berenji Decl., Ex. A. The principal material terms are as follows:

A. Monetary Terms

1. The "Class" includes all persons employed by Defendant within each and every class and subclass as defined in the Action, including without limitation, the Electrician Class, alleged Unlawful Deduction Class, and Vacation Class, who worked for Defendant between November 20, 2016 and the date on which the Court grants preliminary approval of this settlement (the "Class Period"). Berenji Decl., Ex. A, ¶¶ 1.5, 1.12. The Electrician Class includes all employees who worked for Defendant in California in an electrical occupation or similar position during the Class Period. *Id*. at ¶ 1.18. The Unlawful Deduction Class includes all employees who worked for Defendant in California and whose wages were deducted through Defendant's "Share the Light" program during the Class Period. *Id*. at ¶ 1.45. The Vacation Class includes all employees who worked for Defendant in California and earned and accrued vacation during the Class Period. *Id*. at ¶ 1.46. Defendant determined that, at the time of mediation, there were 221 members of the Electrician Class, 120 members of the Unlawful Deduction Class, and 279 members of the Vacation Class. *Id*. at ¶ 4.1.

2. The "Gross Settlement Amount" is One Million Two Hundred Thousand Dollars and Zero Cents ($1,200,000.00), inclusive of the class counsel's fees and expenses, class representative enhancement, settlement administration costs, and the LWDA PAGA penalties ("PAGA Payment"). Berenji Decl., Ex. A, ¶ 1.23. Once the deductions are made for the class counsel's fees and expenses, the class representative enhancement, settlement administration costs, and the PAGA Payment, the balance of the Gross Settlement Amount will be available for distribution to the participating Class Members (the "Net Settlement Amount"). Berenji Decl., Ex. A, ¶ 1.29.

3. The Net Settlement Amount will be distributed among participating Class Members who will receive an Individual Class Payment in an amount determined by which Class(es) the Participating Class Member belongs to. Berenji Decl., Ex. A, ¶ 3.2.4. Each Participating Class Member in the Unlawful Deduction and Vacation Class will receive One Hundred Dollars ($100). *Id.* at ¶ 3.2.4.2. The Individual Class Payment to the Participating Class Members in the Electrician Class shall be apportioned by: (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members in the Electrician Class and (b) multiplying the result by each Participating Class Member's Workweeks. *Id.* at ¶ 3.2.4.1.

4. Subject to the Court's approval, seventy-five percent (75%) of One Hundred Thousand Dollars and Zero Cents (i.e., $75,000.00) will be paid from the Gross Settlement Amount to the LWDA for its share of the PAGA penalties negotiated and agreed-upon. *Id.* at ¶ 3.2.5. The remaining twenty-five percent (25%) (i.e., $25,000.00) will be available for distribution to Aggrieved Employees in the form of Individual PAGA Payments. *Ibid.* Individual PAGA Payments will be calculated by: (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (i.e., $25,000) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period; and (b) multiplying the result by each Aggrieved Employee's number of PAGA Period Pay Periods. *Id.* at ¶ 3.2.5.1.

5. Subject to the Court's approval, Plaintiff will seek a Class Representative Service Payment in the amount of Fifteen Thousand Dollars and Zero Cents ($15,000.00). *Id*. at ¶¶ 1.14, 3.2.1. Any Class Representative Service Payment granted will be paid from the Gross Settlement Amount. *Id*. at ¶ 1.23.

6. Subject to the Court's approval, the settlement administrator will be paid costs which are estimated not to exceed Ten Thousand Dollars and Zero Cents ($10,000.00) for administering the settlement. *Id*. at ¶¶ 1.3, 3.2.3. The actual cost of paying the settlement administrator will be paid from the Gross Settlement Amount. *Id*. at ¶¶ 3.2, 3.2.3.

7. Subject to the Court's approval, class counsel will seek an award of attorney fees equal to thirty-five percent (35%) of the Gross Settlement Amount (i.e., $420,000) and expenses not to exceed Eighteen Thousand Five Hundred Dollars and Zero Cents ($18,500.00). *Id*. at ¶ 3.2.2. Any award granted will be paid from the Gross Settlement Amount. *Id*. at ¶¶ 3.2, 3.2.2. If a lower amount is awarded, the difference will be distributed to Class Members on a proportional basis relative to the size of their Individual Settlement Payments. *Id*. at ¶ 3.2.2.

B. <u>Administration of Notice, Opt-Outs, and Payments</u>

The reasonable costs of settlement administration will be deducted from the Gross Settlement Amount. *Id*. at ¶¶ 3.2, 3.2.3. The Parties have jointly selected CPT Group, Inc. to serve as the Administrator. *Id*. at ¶ 7.1. The settlement administration costs are estimated not to exceed Ten Thousand Dollars and Zero Cents ($10,000.00). *Id*. at ¶ 3.2.3.

Class Members shall receive a notice packet which indicates how a Class Member may exclude themselves if they do not want to participate in the settlement. Berenji Decl., ¶ 25, Ex. C. Class Members who do not submit a valid and timely opt-out request, however, shall be deemed be bound by all terms of the Settlement Agreement (the "Participating Class Members"). Berenji Decl., Ex. A, ¶ 7.5.3. Any Class Member who does timely and validly opt out of the Settlement shall nonetheless be bound by the release of their PAGA claims if they are an Aggrieved Employee. *Id*. at ¶ 7.5.4. For any Participating Class Member or Aggrieved Employee whose Individual Class Payment check or Individual PAGA Payment check is

uncashed and cancelled after one hundred eighty (180) calendar days, the Settlement Administrator shall transmit the funds represented by such checks either to the California Controller's Unclaimed Property Fund in the name of the Class Member, thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil Procedure Section 384(b), or to a Court-approved nonprofit organization or foundation consistent with Code of Civil Procedure Section 384(b) ("Cy Pres Recipient"). *Id*. at ¶ 4.4.3. The Parties, Class Counsel, and Defense Counsel represent that they do not have any interest or relationship, financial or otherwise, with the intended Cy Pres Recipient. *Ibid*.

C. Scope of Release

Class Members are releasing only those claims which were or could have been brought in the Operative Complaint in this action and/or Plaintiff's PAGA Notice submitted to the LWDA. Berenji Decl., Ex. A, ¶¶ 1.39, 5.2. Effective on the date that Defendant fully funds the Gross Settlement Amount and funds all the employer payroll taxes owed on the Wage Portion of the Individual Class Payments, the Participating Class Members will release Defendant from all state and federal claims alleged or that could have been alleged based on the factual allegations included in the Operative Complaint (and/or Plaintiff's PAGA Notice), which occurred during the Class Period. *Id*. at ¶¶ 5, 5.2. Plaintiff will also execute a general release of all known and unknown claims he may have against Defendant.[4] *Id*. at ¶¶ 1.39, 5.1. Any Class Member who does timely and validly opt out of the settlement shall nonetheless be bound by the release of their PAGA claims if they are an Aggrieved Employee. *Id*. at ¶¶ 1.40, 5.3.

IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Express judicial policy favors maintaining wage and hour actions as class actions. *Prince v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1328; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 (finding that California public policy "encourages the use of the class action device," especially in the wage and hour context). Any doubt as to

[4] Plaintiff's general release does not cover or include his separate and unrelated individual claims that relate to the termination of his employment and were alleged in *Mills v. Facility Solutions Group, Inc*., Los Angeles County Superior Court, Case No. 20STCV44744, currently venued in the American

the appropriateness of class treatment should be resolved in favor of class certification, subject to later modification if necessary. *Richmond v. Dart Industries, Inc.* (*Richmond*) (1981) 29 Cal.3d 462, 473-75 ("Since the judicial system substantially benefits by the efficient use of its resources, class certifications should not be denied so long as the absent class members' rights are adequately protected."). The decision to certify a class is purely a procedural one, and should be based on the allegations in the operative complaint, and not in the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-441.

Plaintiff may, at the preliminary approval stage, request that the Court provisionally approve certification of a class for settlement purposes, conditioned upon final approval of the settlement. Herbert B. Newberg, *Newberg on Class Actions* ("Newberg") (4th ed. 2002) § 11.26 (the court's findings "at a preliminary hearing or conference concerning a tentative settlement proposal . . . may be set out in conditional orders granting tentative approval to the various items . . . These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel's application for fees and expenses."). Defendant denies that Plaintiff would be able to meet the threshold requirements for certification of the putative class in this action if this matter were to be litigated; however, taking into account the risks inherent to litigation, Defendant does not object to certification of the class for settlement purposes only. Defendant reserves all right to object to class certification outside of the settlement context, and reserve the right to oppose class certification should the court decline to approve this settlement. Provisional class certification is appropriate at the preliminary approval stage where, as here, the proposed Settlement Class has not previously been certified by the Court and the requirements for certification are met. The additional rulings sought on this motion—approving the form, content and distribution of the Class Notice and scheduling a formal fairness hearing—facilitate the settlement approval process, and are also typically made at the preliminary approval stage. The purpose of provisional class certification is to facilitate distribution to all class members of notice of the terms of the proposed settlement and the date

Arbitration Association ("AAA") (AAA Case No. 01-21-0016-0905). Berenji Decl., Ex. A, ¶¶ 1.39, 5.1.

and time of the final approval hearing. See *Manual for Complex Litigation* (Fourth) (2004) § 11.27. Neither formal notice nor a hearing is required for the Court to grant provisional class certification; the Court may grant such relief upon an informal application by the settling parties and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *Ibid*.

To certify a settlement class, the Court must find the two primary requirements for maintaining a class action: (1) an ascertainable class, and (2) a well-defined community of interest in the questions of law and fact involving the parties to be represented. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704; *Daniels v. Centennial Capital Group* (1993) 16 Cal.App.4th 467, 471; *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (*B.W.I. Custom Kitchen*) (1987) 191 Cal.App.3d 1341; *Richmond*, *supra*, 29 Cal.3d at 470. These criteria are met here for the reasons set forth below.

A. <u>There is a Numerous and Ascertainable Class</u>

Whether a class is ascertainable is determined by examining the class definition, the size of the class, and the means available for identifying class members. See *Vasquez v. Superior Court* (*Vasquez*) (1971) 4 Cal.3d 800, 821-22; *Reyes v. Board of Supervisors of San Diego County* (1987) 196 Cal.App.3d 1263, 1271; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873. Class members are "ascertainable" where they may be readily identified without unreasonable expense or time.

Here, the requirement is met. Class Members include all persons who worked for Defendant in California between November 20, 2016 and the date the Court preliminarily approves this settlement, and who either: (1) worked in an electrical occupation or similar position (the Electrician Class); (2) had their wages deducted through Defendant's "Share the Light" program during that time (the Unlawful Deduction Class); and/or, (3) earned and accrued vacation during that time (the Vacation Class). Berenji Decl., Ex. A, ¶¶ 1.5, 1.9 1.12, 1.18. At the time of mediation, there were approximately 221 Electrician Class Members, 120 Unlawful Deduction Class Members, and 279 Vacation Class Members. *Id*. at ¶ 4.1.

Defendant is required to and does maintain a record of each such person, including their contact information. *Id*. at ¶ 1.8. Therefore, there is a numerous and ascertainable class.

B. <u>There Is a Well-Defined Community of Interest</u>

A community of interest is established by the predominance of common issues of law and fact. See *Vasquez, supra,* 4 Cal.3d at 809. The requirement of a community of interest:

> [D]oes not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered . . . The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in Plaintiff's favor whatever questions were common to the class. *Ibid*.

Here, common questions of law and fact predominate as to each of the claims alleged by Plaintiff, as the Class is united in its proof. The Operative Complaint delineates a common course of conduct applicable to all Class Members. Plaintiff contends that all Class Members suffered the same alleged injuries in the same manner; for example, all Electrician Class Members were employed by Defendant as in electrical or similar occupations in California, and were allegedly deprived of overtime wages, meal breaks, accurate itemized wage statements, reimbursement of business expenses, and waiting time penalties as a result of Defendant's failure to properly compensate them for all hours worked. Berenji Decl., ¶¶ 30-31, 34-38. Unlawful Deduction Class Members all allegedly had the same improper deductions made from their pay through Defendant's "Share the Light" program. *Id*. at ¶ 32. Vacation Class Members similarly were all allegedly not timely paid their vested vacation wages, either at all or at their final rate of pay. *Id*. at ¶ 33. Therefore, "the relevant proof [does] not vary among class members" and "clearly presents a common question fundamental to all class members." *In re NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1997) 172 F.R.D. 119, 123. California courts show "no hesitancy" inferring class-wide causation, class-wide injury, and class-wide damages when a common course of action has been shown. *B.W.I. Custom Kitchen, supra,* 191 Cal.App.3d at 1350 (granting class certification in a manufacturing defect case

when a common course of action had been proven). This inference "eliminates the need for each class member to prove individually the consequences of the Defendant's actions to him or her." *Id.* at 1351 (quoting *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 753). Plaintiff contends that these issues will not be decided on the basis of facts peculiar to each Class Member, but rather on the basis of a single set of facts applicable to them all. Plaintiff also contends that all issues of liability can be determined on a class-wide basis by reference to Defendant's time records, payroll records, and records identifying the number of workweeks during which Class Members worked. Berenji Decl., ¶¶ 30-39.

C. Plaintiff and Plaintiff's Counsel Have and Will Adequately Represent the Class

In addition to the above factors, preliminary approval of this settlement is appropriate because Plaintiff and the proposed settlement class have been represented by counsel who are experienced in successfully prosecuting wage and hour class and representative actions. *Id*. at ¶¶ 3-9. Plaintiff himself also desires to represent that settlement class and understands that his obligation to act as a fiduciary to the settlement class requires commitment beyond what any litigant would do in prosecuting an action on their own behalf. Berenji Decl., ¶ 48; see also Declaration of Chris Mills in Support of Plaintiff's Motion for an Order: (1) Conditionally Certifying a Settlement Class; (2) Preliminarily Approving Class Action Settlement; (3) Approving Notice Of Class Action Settlement; (4) Appointing Class Counsel And Class Representatives; and (5) Setting Hearing For Final Approval ("Mills Decl."), filed concurrently herewith,

V. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

Any settlement of class action litigation must be reviewed and approved by the Court. Cal. Rules of Court, rule 3.769(a). This is accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a detailed review after notice has been distributed to the class members for their comments or objections. In this regard, the Manual for Complex Litigation (Second) explains:

> "A two-step process is followed when considering class settlements . . . of the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement."

Manual for Complex Litigation (Second) (1985) at § 30.44. Thus, the preliminary approval of the class action settlement by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. See, e.g., Newberg, *supra,* § 11.25; *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500; *North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1091 ("We must determine whether substantial evidence supports the trial court's determination that the settlement here was in the 'ballpark' and made in good faith.").

A review of the preliminary approval criteria demonstrates a substantial basis for granting the preliminary approval requested by this motion and proceeding to a full settlement hearing.

VI. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. See Newberg, *supra,* § 11.51; *North County Contractor's Ass'n., supra,* 27 Cal.App.4th at 1091 ("The burden is upon the party objecting to the proposed settlement to prove an absence of good faith."); See also *United States v. Oregon* (9th Cir. 1990) 913 F.2d 576, 581. There is also a presumption of fairness when: "(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; (4) the percentage of objectors is small." *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1802.

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A. The Settlement Is the Product of Serious, Informed, and Non-Collusive Negotiations

The settlement is the result of arm's length and non-collusive negotiations. Berenji Decl., ¶ 23. The Parties mediated because they concluded it was desirable that this action be settled in order to avoid the expense, inconvenience, and burden of further legal proceedings, as well as the uncertainties of trial and appeals. *Ibid.* Plaintiff concluded that alternative dispute resolution was beneficial to the Class due to the significant challenges the Class faced regarding class certification, eventual trial, trial manageability, and anticipated appeals. *Ibid.* Settlement negotiations took place on July 27, 2023 before David Rottman, Esq., a well-established and highly regarded neutral mediator of wage and hour class actions in California. *Id*. at ¶ 24.

The mediation occurred only after Plaintiff's Counsel had the opportunity to conduct a thorough independent investigation of the facts of the class action and after Defendant provided Plaintiff's Counsel with all of the necessary documents and data. *Id*. at ¶¶ 19-20. Defendant produced the following documents for the Class, as more specifically described above: the time punch records and pay summaries of two randomly selected groups making up 30% of the Electrician Class and 25% of the Vacation Class; Plaintiff's personnel file and pay summaries; and Defendant's employee handbooks and employment policies. Plaintiff's Counsel analyzed the data and created spreadsheets and complex formulas to prepare damage estimates. *Ibid.* The mediation lasted a full day, was contentious, and involved arm's length negotiations through the aid of Mr. Rottman. *Id.* at ¶ 24. After a long day of mediation, Mr. Rottman made a mediator's proposal that the Parties considered and ultimately accepted. *Ibid*. Thereafter, the Parties continued the arm's length negotiations until all terms of the Settlement Agreement were finalized on January 9, 2024. *Ibid*.

The Parties and their respective counsel believe that the settlement reached is fair, reasonable, and adequate and falls well within the range of reasonable outcomes, meriting preliminary approval. *Id*. at ¶ 44. As consideration to settle the claims between the Parties, Defendant agreed to pay a settlement of One Million Two Hundred Thousand Dollars and Zero

Cents ($1,200,000.00) to Class Members. *Id*. at ¶ 43. These monetary terms will settle all issues pending in this litigation between the Plaintiff and Class Members, on the one hand, and Defendant, on the other hand. *Ibid*.

Here, there can be no dispute that the litigation has been hard-fought with aggressive and capable advocacy on both sides. Indeed, before settlement discussions were even broached, Plaintiff had to not only successfully oppose Defendant's motion to compel his individual claims to arbitration and dismiss his class claims, but also prevail on the subsequent appeal (which resulted in a published decision affirming the Court's order). Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arm's length and without any suggestion of undue influence." *In re Walsh Public Power Supply System Sec. Litig.* (1989) 720 F.Supp. 1379, 1392; aff'd sub nom *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268.

B. The Settlement Falls Well Within the Range for Approval According to *Kullar/Munoz* Standards

The proposed settlement herein has no "obvious deficiencies" and is within the range of possible approval. In determining whether a settlement amount is reasonable, a class action settlement "need not obtain 100 percent of the damages sought in order to be fair and reasonable." *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 250 ("*Wershba*") citing *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139 [settlements found to be fair and reasonable even though monetary relief provided was 'relatively paltry'] and *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 455 [settlement amounted to only 'a fraction of the potential recovery']. "Compromise is inherent and necessary in the settlement process. Thus, 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.'" *Wershba, supra*, 91 Cal.App.4th at p. 250, citing *Air Line Stewards, etc., Local 550 v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109.

In *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 127-128, the appellate court explained that, although "not exhaustive," a determination of whether a settlement is "fair, adequate and reasonable" should take into account the strength of a plaintiff's case, as well as the risk, expense, complexity, and likely duration of further litigation. Following *Kullar* is the more recent case, *Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, in which there was a sole objector to the $1.1 million settlement of a wage and hour class action who appealed the trial court's approval of the settlement. The objector/appellant contended that the trial court lacked evidence concerning "the potential value of the claims," and that such a defect violated the *Kullar* standards because an "informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Id.* at 409. The *Munoz* court disagreed:

> "[Appellant] misunderstands *Kullar*, apparently interpreting it to require the record in all cases to contain evidence in the form of an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims—a number which appears nowhere in the record of this case. But *Kullar* does not, as [Appellant] claims, require any such explicit statement of value; it requires a record, which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Ibid*.

Accordingly, under the *Munoz* standard, a plaintiff need only provide sufficient information to allow for an understanding of the amount in controversy and the realistic range of outcomes, not an explicit quantification of the maximum amount of damages recoverable for each claim on a class-wide basis.

In *Glass v. UBS Fin. Servs.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476 at *12, the federal court held the following should be considered in evaluating the reasonableness of a settlement:

> "In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement."

See also *In re Mego Financial Corp. Securities Litigation* (9th Cir. 2000) 213 F.3d 454, 458.

Although Plaintiff believes that his claims, and those of the Class Members, are meritorious, Plaintiff faced substantial risks in trying to obtain certification and judgment against Defendant in this matter. The realistic range of outcomes for this litigation was discounted due to an analysis of Defendant's defenses for each claim, the likelihood of prevailing on a class certification motion, as well as trial and any appeals. Berenji Decl., ¶¶ 40-42. Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. As illustrated below, Defendant categorically disputed Plaintiff's claims and raised a number of defenses that presented threats to the claims of the Class. Berenji Decl., ¶ 25.

In preparation for mediation, Plaintiff's Counsel performed extensive damages analysis on the data and documents obtained from Defendant to calculate an estimated amount of damages for Plaintiff's claims. *Id*. at ¶¶ 19-21. Based on the foregoing information, Plaintiff derived the following estimated values for their alleged claims:

1. Failure to Pay Minimum Wages (Labor Code §§ 1194, 1197 and IWC Wage Order No. 16)

Plaintiff alleged that Defendant failed to pay him and the Electrician Class at least minimum wage for all hours worked because Defendant automatically deducted a one-hour meal period from the amount of time they worked each day, even when they did not receive a one-hour off-duty meal period. Berenji Decl., ¶ 30. Based on the documents that were produced in discovery and the 30% random sample of time and pay records, Plaintiff did not identify an automatic one-hour deduction for meal periods, and thus he and the Electrician Class would more than likely not recover any damages for this claim. *Ibid.*

2. Failure to Pay Overtime Wages (Labor Code §§ 510, 1194, 1198 and IWC Wage Order No. 16)

Plaintiff alleges that throughout his employment with Defendant, Defendant failed to pay Plaintiff and the Class overtime premium wages at the correct rate of pay. Berenji Decl., ¶ 31. California law provides that when employers calculate overtime payments in pay periods

in which an employee earns non-hourly compensation (e.g., bonus, meal allowance), employers must divide the total compensation earned in the pay period by the total hours worked by the employee. *Marin v. Costco Wholesale Co.* (2008) 169 Cal.App.4th 804; *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542, 562; *see also,* D.L.S.E. Enforcement Policies and Interpretations Manual ("DLSE Manual") § 49.1.2.2 [meals are added to the compensation paid for purposes of determining regular rate of pay for overtime computation]. An employer is also required to determine the average weekly rate ("weighted average") when it calculates the regular rate of pay of an employee who is paid two or more different rates for different types of work (e.g., private or public work projects) during the same pay period. *See* D.L.S.E. Manual § 49.2.5; 29 C.F.R. §§ 778.109, 778.115; *Parth v. Pomona Valley Hosp. Medical Center,* (9th Cir. 2010) 630 F.3d 794, 798, citing *Gorman v. Consol. Edison Corp.,* (2d Cir. 2007) 488 F.3d 586, 596; *Alvarado,* 4 Cal. 5th at p. 569-570. However, if an employee is paid two rates and "one of those rates is a **statutorily-mandated rate (i.e., prevailing wage),** the regular rate for calculating the overtime rate for work performed on the public works project must be based on the **higher** of either the weighted average or the prevailing wage rate in effect at the time that the work is performed." D.L.S.E. Manual § 49.2.6 (bold emphasis added).

In calculating Plaintiff's and the Electrician Class's regular rates of pay for the purpose of paying overtime wages, Defendant did not factor in the total compensation earned (e.g., bonuses, meal allowances) and/or did not use the higher rate when the employees earned two or more different rates and one of the rates was a Prevailing Wage. Berenji Decl., ¶ 31. As a result of Defendant's alleged unlawful compensation scheme, Plaintiff and the Electrician Class were allegedly deprived of earned overtime wages. *Ibid.* The maximum reasonable value of Plaintiff's claim for unpaid overtime was approximately Five Hundred Forty-Four Thousand Five Hundred Thirty-Seven Dollars and Zero Cents ($544,537.00). *Ibid.*

3. <u>Unlawful Deduction of Wages (Labor Code §§ 221, 223, 224)</u>

Plaintiff alleges that Defendant violated California Labor Code sections 221, 223, and 224, and Business and Professions Code sections 17200, *et seq.* by unlawfully deducting wages from Plaintiff and the Unlawful Deduction Class without an express written consent. Berenji

Decl., ¶ 32. He alleges that Defendant did so by requiring Plaintiff and the Unlawful Deduction Class to participate in the company's "Share the Light" program, wherein Defendant deducted $1 from Plaintiff's and the Unlawful Deduction Class's earned wages every pay period without an express agreement or policy. *Ibid.* Based on the documents that were produced in discovery and the 30% random sample of time and pay records, Plaintiff did not identify any deductions that were not accompanied by a signed authorization, and thus Plaintiff and the Unlawful Deduction Class more than likely would not recover any damages on this claim. *Ibid.*

4. Failure to Pay Vested Vacation Wages (Labor Code § 227.3)

Additionally, Plaintiff alleges that Defendant violated California Labor Code section 227.3 by failing to pay Plaintiff and the Vacation Class their vested wages upon separation of employment. Berenji Decl., ¶ 33. On occasions when Defendant did provide its employees with pay for their earned and unused vacation, Defendant failed to include the total compensation earned when it paid the Vacation Class their vested vacation wages, and thus systematically failed to pay those wages at the employees' final rate of pay when their employment ended. *Ibid.* Based on the documents that were produced in discovery and the 30% random sample of time and pay records, Plaintiff did not identify any former employees who did not receive their vested vacation wages at the separation of employment and thus, Plaintiff and the Vacation Class would thus more likely than not recover any damages on this claim. *Ibid.*

5. Meal Break Violations (Labor Code § 226.7 and IWC Wage Order No. 16)

Plaintiff also alleges that, in violation of California Labor Code section 226.7, Defendant failed to provide Plaintiff and the Electrician Class with legally-compliant meal breaks (i.e., late, missed, or short meal periods). *Id.* at ¶ 34. Thereafter, Defendant failed to properly compensate Plaintiff and the Class for its failure to provide the meal breaks because it: (i) did not pay minimum wages for all "on-duty meal periods;" (ii) automatically deducted one hour for a lunch from the amount of time worked each day, and/or (iii) failed to compensate

with one additional hour of pay at the regular rate of pay for each workday that a legally-required meal break was not provided. *Ibid.* The maximum reasonable value of Plaintiff's meal period claim was approximately Two Hundred Eighty-One Thousand Seven Hundred Twenty-Two Dollars and Zero Cents ($281,722.00). *Ibid.*

6. Business Expense Reimbursement (Labor Code § 2802)

Plaintiff's claim for failure to reimburse business expenses is premised on the allegation that Plaintiff and Electrician Class Members were required keep in constant communication with Defendant's more senior personnel via their personal cell phones when performing their job duties. *Id.* at ¶ 35. Plaintiff also alleges that he and members of the Electrician Class were required to purchase tools that were necessary to perform work on Defendant's job sites, and would be subject to discipline (including termination) if they failed to do so. *Ibid.* Plaintiff contends that Defendant did not reimburse him and the Electrician Class for these necessary business expenses they incurred. *Ibid.* The maximum reasonable value of Plaintiff's claim for unreimbursed business expenses was approximately Six Hundred Forty-Nine Thousand Dollars and Zero Cents ($649,000.00). *Ibid.*

7. Waiting Time Penalties (Labor Code §§ 201-204)

Plaintiff's claim for failure to timely pay wages at termination is based on Defendant's failure to pay meal break premiums, and overtime wages owed to Class Members. *Id.* at ¶ 36. Plaintiff additionally acknowledges there is a risk that Defendant could have prevailed in arguing that Class Members were paid all wages owed and any failure to pay during separation was not willful. *Ibid.* The maximum reasonable value of Plaintiff's claim for waiting time penalties is Nine Hundred Fifty-Four Thousand Four Hundred Thirty Dollars and Zero Cents ($954,430.00). *Ibid.*

8. Wage Statement Violations (Labor Code § 226)

Plaintiff's claim for failure to provide accurate wage statements to Class Members is derivative of the claims set forth above. *Id.* at ¶ 37. Plaintiff argued that, due to Defendant's failure to: (1) pay one additional hour of pay at the employee's regular rate for each workday that a meal period was not provided; and (2) pay overtime wages, Defendant failed to

accurately list the gross wages earned and net wages earned by Class Members. *Ibid.* Plaintiff also alleges that Defendant failed to provide him and other Class Members with itemized wages statements for wages paid to them at the time of their separation from employment. Plaintiff additionally acknowledges there is a risk that Defendant could have denied these violations and prevailed in arguing that all hours worked were paid and no injury resulted from the wage statements. *Ibid.* Based on information collected from Plaintiff and the documents produced by Defendant, the maximum reasonable value of Plaintiff's claim for failure to provide accurate itemized wage statement was approximately Seven Hundred Seventy-Three Thousand Nine Hundred Dollars and Zero Cents ($773,900.00). *Ibid.*

9. Failure to Provide One Day's Rest (Labor Code §§ 551, 552)

Plaintiff also alleges that Defendant violated California Labor Code sections 551 and 552 by requiring him and other Aggrieved Employees to work more than six days in a row without receiving the legally mandated one day's rest in seven. *Id.* at ¶ 38. Based on the documents that were produced in discovery and the 30% random sample of time and pay records, Plaintiff did not identify any workweeks wherein the Aggrieved Employees worked more than six days in a row without receiving the legally mandated one day's rest in seven, and thus Plaintiff and the Aggrieved Employees would more than likely not recover any PAGA penalties on this claim. *Ibid.*

10. PAGA Penalties

Plaintiff also sought penalties under PAGA for violations of all of the Labor Code sections at issue in this case. *Id.* at ¶ 39. If the Court awarded Plaintiff the maximum civil penalty for each pay period that fell within the PAGA period for violations Plaintiff believed he could recover penalties, the total amount of the PAGA penalties would be One Million Two Hundred Twenty-Nine Thousand Four Hundred Dollars and Zero Cents ($1,229,400). *Ibid.* Alternatively, if the Court permitted Plaintiff to stack the PAGA penalties by awarding the maximum civil penalty for all of the pay periods within each legal claim, Plaintiff's Counsel valued the amount in controversy at Four Million Four Hundred Forty-Four Thousand Three Hundred Fifty Dollar and Zero Cents ($4,444,350). *Ibid.*

In addition to the above-mentioned risks for each of the claims alleged in the Operative Complaint, the risk of proceeding on a class-wide basis was substantial. *Id.* at ¶¶ 40-41. More specifically, there was a significant risk that, if this action was not settled, Plaintiff would have been unable to obtain class certification or prove manageability of the PAGA claims, and thereby not recover on behalf of any employees other than himself. *Ibid.* Class-wide liability was far from certain due to the risk that individual issues may predominate. *Ibid.* Thereby, class certification in this action would have been hotly disputed and was by no means a foregone conclusion. *Ibid.* Even if the Court were to grant certification, the Parties would have faced a potentially lengthy, costly, and complicated trial which, as with all trials, entailed the risk of a loss. *Ibid.* If that were the case, the Class would have received no compensation at all. *Ibid.* Additionally, the Court would have remained free to decertify the Class at any time during trial. *Ibid.* Obviously, if the Court were to decertify the Class during trial, the impact on the Class would have been catastrophic. *Ibid.* Plaintiff's Counsel also understands that even if Plaintiff was ultimately successful in litigating this matter to a favorable judgment after trial, recovery would likely not materialize until after a lengthy appellate process. *Id.* at ¶ 42. By contrast, the settlement provides immediate benefits to the Class Members in the form of financial compensation. *Ibid.* Under these circumstances, and in light of the risks to all parties inherent in further litigation, it was reasonable for the Parties to elect to settle their differences in this manner. *Ibid.* Therefore, after contentious negotiations, the Parties entered into a Settlement Agreement, recognizing the potential risks both sides would face if litigation of this action continued. *Ibid.*

Here, the proposed settlement falls within the range of reasonableness. The settlement commits Defendant to pay a total of $1,200,000.00 to compensate Class Members for their alleged damages. *Id.* at ¶ 45. The terms of the Settlement Agreement are fair and adequate. *Ibid.* Although the precise amounts of the Individual Class Payments for each Participating Class Member cannot be calculated by the Administrator until after the total number of workweeks worked by the number of Participating Class Members has been determined, Plaintiff's Counsel estimates the average Individual Settlement Payment per Class Member will

be approximately Three Thousand Three Hundred and Thirty Dollars ($3,330). *Ibid.* Additionally, based on the number of workweeks worked by Electrician Class Members that Defendant provided before mediation (i.e., 17,144), the proposed settlement results in a gross amount of approximately Seventy Dollars ($70) per workweek. Accordingly, the overall monetary recovery adequately compensates Class Members in light of the estimated damages and value of their claims, as well as the risks of continued litigation. *Ibid.*

C. The Proposed Individual Class Payments to Settlement Class Members Are Fair, Adequate, and Reasonable

The Class Members shall be entitled to a distribution of the settlement amount, as set forth in the Settlement Agreement. Berenji Decl., Ex. A. After deducting the amount of attorney fees, litigation costs, and expenses, Class Representative Service Payment, the PAGA Payment, and the estimated costs of administering the settlement, the remainder of the settlement fund ("Net Settlement Amount") will be available for distribution to the Participating Class Members. *Id*. at ¶ 1.29.

The Individual Class Payments to Participating Class Members shall be apportioned based on the number of weeks worked by each Participating Class Member during the Class Period if they are a member of the Electrician Class, and will include an additional One Hundred Dollars ($100) if they are a member of the Unlawful Deduction or Vacation Class. *Id*. at ¶¶ 3.2.4.1, 3.2.4.2. Twenty percent (20%) of each Individual Class Payment shall be allocated as wages subject to all applicable tax withholding (the "Wage Portion") and eighty percent (80%) shall be allocated as non-wage penalties and interest not subject to payroll tax withholdings (the "Non-Wage Portion"). *Id*. at ¶ 3.2.4.3. Aggrieved Employees assume full responsibility and liability for any taxes owed on the portion of the PAGA Payment distributed to them, and no payroll taxes shall be withheld or deduced from those payments. *Id*. at ¶¶ 3.2.5.1, 3.2.5.3.

The proposed distribution to each of the Class Members is fair and reasonable because each Participating Class Member will receive a percentage of the net amount of the common fund logically based upon the weeks worked during the Class Period. *Id*. at ¶¶ 3.2.4.1, 3.2.4.2.

The settlement reasonably tailors each Participating Class Member's claim to the amount he or she will receive based on the number of weeks worked, which augurs a low objection rate. *Ibid.*

D. The Settlement Provides for Reasonable Compensation for Settlement Class Members in Light of Significant Litigation Risks

Defendant also denies failing to provide overtime wages, meal breaks, business expense reimbursements, accurate itemized wage statements, and all wages due at termination. Berenji Decl., ¶ 18. Thus, Plaintiff faced numerous risks in continued litigation, including: (1) the risk that the proposed Settlement Class would not be certified; (2) the risk that Defendant would be found not to have failed to pay overtime wages; (3) the risk that Defendant would be found not to have failed to provide meal breaks; (4) the risk that Defendant would be found not to have failed to provide accurate itemized wage statements; (5) the risk that Defendant would be found not to have failed to reimburse business expenses; and (6) the risk that Defendant would be found not to have failed to timely pay wages due at separation. *Id.* at ¶ 40.

Continued litigation would be costly and time consuming, and an appeal from any judgment would be likely. Berenji Decl., at ¶ 42. Such efforts would result in a delay of years before the case would be finally resolved. *Ibid.* This settlement provides a significant and timely recovery to the Class Members and easily falls within the range of reasonableness. *Ibid.*

E. The Settlement of Penalties Under PAGA Is Reasonable

The settlement of the PAGA penalties claim for One Hundred Thousand Dollars and Zero Cents ($100,000.00) is reasonable under the circumstances. Berenji Decl., ¶ 47. Under PAGA, the LWDA is entitled to 75% of any settlement of civil penalties awardable under PAGA. Lab. Code, § 2699, subd. (i). The parties negotiated a good faith amount of $100,000 for PAGA penalties, and this amount was not the result of self-interest at the expense of other Class Members. *Ibid.* Of this amount, Seventy-Five Thousand Dollars and Zero Cents ($75,000.00) will be paid to the LWDA and Twenty-Five Thousand Dollars and Zero Cents ($25,000.00) will be distributed to Aggrieved Employees pursuant to the settlement. *Ibid.* Where settlements "negotiate a good faith amount" for PAGA penalties and "there is no

indication that this amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. 7 Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Moreover, the amount, $100,000, is well within the range of reasonable PAGA settlement amounts approved by the courts. See, e.g., *id.* at *1 (approving a PAGA settlement of 0.3% or $1,500). The $100,000 allocated by the parties to PAGA penalties is therefore reasonable in light of the range of similar settlements and the potential exposure to Defendant for such penalties and wages. See e.g. *Hopson, supra*, 2009 WL 928133, at *1 (approving a PAGA settlement of $1,500 or 0.3% of total settlement amount); *Viceral v. Mistras Group* (N.D. Cal. October 11, 2016) 2016 WL 5907869 (approving PAGA payment of 0.15% of its total value); *McKenzie v. Fed. Express Corp.* (C.D. Cal. Jan. 23, 2012) 2012 WL 12882124 at *5 (approving PAGA payment that represents one percent (1%) of the maximum settlement amount); *Makabi v. Gedalia* (2016) 2016 WL 815937, at *2 (after trial, the court found in favor of plaintiffs on Labor Code claims, but declined to award PAGA penalties).

F. <u>The Class Representative Service Payment is Fair and Reasonable</u>

After preliminary approval of the settlement, Plaintiff's Counsel will move the Court for a Class Representative Service Payment of Fifteen Thousand Dollars and Zero Cents ($15,000.00) to Plaintiff to recognize his time and efforts on behalf of the Class Members and his release of potential individual claims against Defendant in addition to those claims he shares in common with the Class Members. Berenji Decl., ¶ 48. This payment will be in addition to the payment he may otherwise receive as a Class Member. *Id*.

It is appropriate to provide an additional incentive payment to the class representative. See Newberg, *supra,* § 12.1; *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-94 ("*Cellphone Termination*"); *In re Online DVD-Rental Antitrust Litigation* (9th Cir. Feb. 27, 2015, 12-15705) 2015 WL 846008, at *3-4; *Van Vranken v. Atlantic Richfield Co.* (*"Van Vranken"*) (N.D. Cal. 1995) 901 F.Supp. 294; *Bogosian v. Gulf Oil Corp.* (E.D. Pa. 1985) 621 F.Supp. 27 (award of $20,000.00 each to two class representatives in antitrust case); *Bryan v. Pittsburgh Plate Glass Co. (PPG Industries. Inc.)* (W.D. Pa. 1973) 59 F.R.D. 616,

617, aff'd 494 F.2d 799 (3d Cir. 1974). "The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Cellphone Termination, supra*, 186 Cal.App.4th at p. 1394, quoting *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 791. Courts have held that an incentive award is appropriate "if it is necessary to induce an individual to participate in the suit." *Clark, supra*, 175 Cal.App.4th at p. 804. The factors courts use in determining the amount of service awards include: (1) a comparison between the service awards and the range of monetary recovery available to the class (see, e.g., *Clark, supra*, 175 Cal.App.4th at p. 805; *Roberts v. Texaco, Inc.* ("*Roberts*") (S.D.N.Y 1997) 979 F.Supp. 185, 204); (2) time and effort put into the litigation (see, e.g., *Clark*, 175 Cal.App.4th at 804-05; *Van Vranken, supra*, 901 F. Supp. at 299; *Cook v. Neidert* ("*Cook*") (7th Cir. 1998) 142 F.3d 1004, 1016); (3) whether the litigation will further the public policy underlying the statutory scheme (see, e.g., *Roberts, supra*, 979 F. Supp. at 201 fn. 25); and, (4) risks of retaliation (see, e.g., *id.* at 202; *Cook, supra*, 142 F.3d at 1016).

Here, all of the above factors support the service awards that Plaintiff intends to request. In this case, Plaintiff assisted counsel during various stages of litigation, including helping with the investigation of the claims and preparation of the complaint; providing relevant documents; and working with Plaintiff's Counsel throughout the case. Berenji Decl., ¶ 48; Mills Decl., ¶¶ 3-12. Plaintiff's Counsel believes that no action would have been taken by Class Members individually, and no compensation would have been recovered for them at all, but for Plaintiff's actions on their behalf. Berenji Decl., ¶ 48. The Class Representative was a crucial participant in the prosecution of this litigation, as he actively participated in case development and settlement negotiations. *Ibid.*; Mills Decl., ¶¶ 3-12. The Class Representative also was forced to wait an additional one and a half years for any resolution of his wage and hour claims during the pendency of Defendant's appeal of the denial of its motion to compel arbitration. Berenji Decl., ¶ 48; Mills Decl., ¶ 10. In addition, the Class Representative incurred the substantial risk that Defendant would prevail on appeal and the Court of Appeal would award Defendant its costs on appeal, for which the Class Representative may be liable. See Cal. Rules of Court,

rule 8.891. The Class Representative, in agreeing to bring this action, also formally agreed to accept the responsibilities of representing the interests of all Class Members and to assume risks and potential costs that were not specifically agreed to by other Class Members in this case. Mills Decl., ¶¶ 3-4, 7.

Accordingly, it is appropriate and just for Plaintiff to receive a reasonable payment of $15,000 for his service, and the risk and delay he undertook, on behalf of the Class Members. These sort of payments to class representatives have been a common feature of settlements negotiated by Plaintiff's Counsel and have been routinely approved by trial courts.

G. The Award of Attorneys' Fees and Expenses Is Fair and Reasonable

As demonstrated through the concurrently filed Declaration of Shadie L. Berenji, appointment of class counsel is appropriate here. There has been an extraordinary amount of work performed by Plaintiff's Counsel. Plaintiff's Counsel conducted extensive research, investigation, and analysis of each potential cause of action and claim for damages in Plaintiff's case. Plaintiff's Counsel is highly experienced in wage and hour matters such as this action and is experienced in class action cases. Berenji Decl., ¶¶ 2-9. Plaintiff's Counsel is also highly experienced in opposing motions to compel arbitration and dismiss class claims. *Id*. at ¶¶ 53; see also *Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436*; Towell v. O'Gara Coach Company, LLC* (Oct. 27, 2022) 2022 WL 15205912. They applied that experience to defeat Defendant's motion in the trial court in this action and successfully defend that victory before the Court of Appeal. *Ibid*. Plaintiff's counsel's efforts resulted in not only a published decision affirming the trial court's denial of Defendant's motion, but also an award by the Court of Appeal of costs as the prevailing party. See *Mills, supra,* 84 Cal.App.5th at 1068. But for Plaintiff's Counsel's work in identifying the unconscionable provisions in Defendant's arbitration agreement, persuading the trial court, and prevailing before the Court of Appeal, this action would be an *individual case in arbitration* and none of the class members would receive the substantial monetary benefit that has been negotiated for them through the settlement agreement. Additionally, Plaintiff's Counsel has committed and continues to commit significant financial and staffing resources to the representation of the Class. Berenji

Decl., ¶ 49. Under the terms of the proposed settlement, Plaintiff's Counsel may seek attorney fees of up to Four Hundred Twenty Dollars and Zero Cents ($420,000.00) and expenses of up to Eighteen Thousand Five Hundred Dollars and Zero Cents ($18,500.00). *Ibid.* This fee request represents thirty-five percent (35%) of the Gross Settlement Amount. *Ibid.* Accordingly, Plaintiff's Counsel's fees and expenses request is very fair and reasonable in light of the time, money, and effort invested in this case to date.

As will be explained further in the attorney fee motion that will be filed along with the final approval motion, the requested fees and expenses are extremely reasonable, and Defendant does not oppose Plaintiff's Counsel's fees and expenses request. *Ibid.* Plaintiff's Counsel has had to divert many of its resources to this case in order to effectively prosecute and settle this action. *Ibid.* Plaintiff's Counsel's investigation and preparation for settlement negotiations included, among other things, the thorough review and analysis of thousands of pages of employee time and payroll records, employee manuals, and written policies and procedures produced by Defendant, as well as constant communication with Plaintiff. *Ibid.* Plaintiff's Counsel's fees and expenses request is warranted by the significant monetary results achieved on behalf of the settlement Class. Accordingly, for purposes of this motion, and as will be explained in detail in the fee application, the requested fee amount falls well within the range of reasonableness considering that case law supports a fee award as high as fifty percent (50%) on common law settlement funds less than $10 million. See, e.g., *Van Vranken, supra*, 901 F. Supp. at 297 (noting class counsel fee awards of 30-50% are more typical where the common fund is less than $10 million).

The California Supreme Court in *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 573 ("*Laffitte*") recently held that courts may use a percentage of the recovery calculation to calculate reasonable attorney fees when class action litigation establishes a common fund for the benefit of the class members. The common fund doctrine rests on the commonsense notion that attorneys should normally be paid by their clients, and that unless attorney fees are paid out of the common fund, those who benefited from the fund without contributing would be unjustly enriched while the client who created the fund faces the

possibility of receiving no benefit because his recovery might be consumed by expenses. *Boeing Co. v. Van Gernert* (1980) 444 U.S. 472, 478. Awards of common fund fees are also essential to furthering the important societal goal of attracting competent counsel to handle class actions, which California courts recognize as an important, necessary, and desirable tool for assuring the effective enforcement of the Labor Code and minimum labor standards. See, e.g., *Vasquez, supra*, 4 Cal.3d at 807 (class action justified to prevent "random and fragmentary enforcement" of employer's legal obligations); *Richmond, supra*, 29 Cal.3d at 473 ("this state has a public policy which encourages the use of the class action device"); *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th at 741 ("By preventing a failure of justice . . . the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions.") [citation omitted]. The *Lafitte* court also found that the percentage method assists the courts: in calculating fees; aligns the incentives between counsel and the class; provides a better approximation of market conditions in a contingency fee case; and, encourages counsel to seek an early settlement and avoid unnecessarily prolonging litigation to obtain a higher attorney fee award. *Laffitte, supra,* 1 Cal.5th at p. 573 (citing *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 48–49 ("*Lealao*") and *Rawlings v. Prudential–Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516).

Because our legal system relies upon private litigants "to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao, supra*, 82 Cal.App.4th at p. 47. Substantial fee awards in successful cases encourage meritorious class actions, thereby promoting private enforcement of, and compliance with, the law.

This common fund approach is especially suitable where, as here, a readily ascertainable (indeed, fixed) settlement fund is available. See *Dunk, supra,* 48 Cal.App.4th at pp. 1808-09. Under the settlement, Class Counsel will seek a total award of attorney's fees of thirty-five percent (35%) of the Gross Settlement Amount of $1,200,000.00. Berenji Decl.,

¶ 49. This amount is well within the range customarily approved by California courts in comparable wage and hour class actions. Newberg, *supra*, at § 14.6 (studies show that "fee awards in class actions average around one-third of the recovery").

The attorney fees agreed to by the Parties in the Settlement Agreement are in line with the prevailing guidelines established in California case law and academic literature, and are consistent with awards in California, including other class actions litigated by Plaintiff's Counsel. Accordingly, the Parties request that the Court preliminarily approve the attorney fees and expenses as negotiated by the Parties and requested herein.

VII. THE PROPOSED CLASS NOTICE PROVIDES ADEQUATE NOTICE TO CLASS MEMBERS

The Court has broad discretion in approving a practical administration of notice to class members. The "Court Approved Notice of Class Action Settlement and Hearing Date for Final Court Approval" (the "Notice"), which the Parties propose for approval by the Court, and is based on the Court's model notice, includes the required information pursuant to California Rules of Court, rules 3.766(d) and 3.769(f). See *State of California v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 485. The Notice provides, among other information: (1) a summary of the substance of the settlement, including the Class Representative Enhancements and Class Counsel's fees and expenses; (2) the class definition; (3) the date for the final approval hearing; (4) the formula used for calculating the Individual Settlement Payments; and, (5) and the procedure and deadlines for submitting an objection or request for exclusion. Berenji Decl., ¶ 26, Ex. C - "Court Approved Notice of Proposed Class Action Settlement and Hearing Date for Final Court Approval."[5]

A. The Notice, Opt-Out, and Objection Procedure

The Notice explains that Class Members who do not wish to participate in the settlement must timely request to be excluded from the settlement pursuant to the instructions

[5] The Notice is also based on the Los Angeles Superior Court's [Model] Class Action and PAGA Settlement Agreement and Class Notice. A redlined version of the Notice that shows the changes made from the Los Angeles Superior Court's [Model] Class Action and PAGA Settlement Agreement and Class Notice is attached to the Berenji Declaration as "**Exhibit D**."

contained therein. Berenji Decl., Ex. C at pp. 2-3, 6. The Notice also states that all objections to the settlement must be mailed to the Settlement Administrator by no later than not later than 30 days after the Administrator mails the Class Notice (plus an additional 7 days for Class Members whose Class Notice is re-mailed). Berenji Decl., Ex. A ¶ 7.4.4.

The Parties have jointly selected CPT Group, Inc. as the professional class action settlement administration firm to perform all duties related to the mailing of the Notice, processing claims, and issuing checks and tax reporting. Berenji Decl., Ex. A ¶ 7.1. The Parties, Plaintiff's Counsel, and Defendant's Counsel do not have a conflict of interest or any ownership interest in CPT Group, Inc. *Ibid.*

VIII. CONCLUSION

For the foregoing reasons, Plaintiff's Counsel respectfully requests that this Court issue an order: certifying the Settlement Class for settlement purposes only; preliminarily approving the class action settlement; approving the Notice of the class action settlement; appointing class counsel and the class representative; and setting a date for the final approval hearing.

DATE: January 10, 2024 **BERENJI LAW FIRM, APC**

By: 

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