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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EFRAIN PEREZ, individually, and on behalf of other members of the general public similarly situated and on behalf of aggrieved employees pursuant to the Private Attorneys General Act ("PAGA");

Plaintiff,

v.

ARJO INC. D/B/A ARJOHUNTLEIGH INC., a Delaware corporation; and DOES 1 through 100, inclusive;

Defendants.

Case No.: 22STCV01261

Assigned for All Purposes to
Honorable William F. Highberger
Department 10

CLASS ACTION

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION, APPROVAL OF CLASS NOTICE, SETTING OF FINAL APPROVAL HEARING DATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Proposed Class Counsel (Douglas Han); Declaration of Proposed Class Representative (Efrain Perez); Declaration of Julie Green; and [Proposed] Order filed concurrently herewith]

Hearing Date: February 2, 2023
Hearing Time: 10:00 a.m.
Hearing Place: Department 10

Complaint Filed: January 12, 2022
Trial Date: None Set

PLEASE TAKE NOTICE that on February 2, 2023, at 10:00 a.m., or as soon as the matter may be heard, before the Honorable William F. Highberger in Department 10 of the Los Angeles County Superior Court, located at 312 North Spring Street, Los Angeles, California 90012 (Spring Street Courthouse), Plaintiff Efrain Perez ("Plaintiff") will and hereby moves for an order:

- Granting Preliminary Approval of the proposed class action settlement described herein and as set forth in the Parties' Class Action and PAGA Settlement Agreement ("Agreement," "Settlement Agreement," "Joint Stipulation," or "Settlement"), attached as **Exhibit 2** to the Declaration of Douglas Han, including, and not limited to, the means of allocation and distribution of funds, and the allocations for penalties under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the Class Representative Service Payment, and Administrator Expenses Payment;
- Conditionally certifying the proposed Class for settlement purposes only;
- Appointing Plaintiff as the Class Representative;
- Appointing Justice Law Corporation as Class Counsel;
- Approving the proposed Class Notice attached as **Exhibit A** to the Settlement Agreement;
- Approving the proposed procedures for Class Members to participate in, to opt out of, and to object to the Settlement as set for in the Class Notice;
- Directing the mailing of the proposed Class Notice;
- Approving the proposed deadlines for the notice and settlement administration process;
- Approving CPT Group, Inc. ("CPT Group") as the Administrator; and
- Scheduling a hearing to consider whether to grant Final Approval of the Settlement Agreement, at which time the Court will also consider whether to grant Final Approval of the requests for Class Counsel Fees Payment, Class Counsel

Litigation Expenses Payment, the Class Representative Service Payment, and the Administrator Expenses Payment, and approval of the allocation for PAGA penalties.

This motion is based upon the following memorandum of points and authorities; the Declaration of Proposed Class Counsel (Douglas Han); the Declaration of the Proposed Class Representative (Efrain Perez); the [Proposed] Order filed concurrently with this motion; the pleadings and other records on file with the Court in this matter; and such documentary evidence and oral argument as may be presented at the hearing on this motion.

Dated: January 6, 2023

JUSTICE LAW CORPORATION

By: _____

Douglas Han
Shunt Tatavos-Gharajeh
Phillip Song
Attorneys for Plaintiff

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I. INTRODUCTION

This motion seeks preliminary approval of a non-reversionary $1,100,000.00 proposed wage-and-hour class action settlement by Plaintiff on behalf of himself and on behalf of all persons employed by Arjo Inc. ("Defendant") in California and classified as an hourly, non-exempt employee who worked during the Class Period ("Class" and "Class Members"). The Class Period is the time period from July 16, 2017 to October 22, 2022. At the time of this filing, the number of Class Members provided by Defendant is estimated to be one hundred thirty-five (135).

It is requested this Court grant Preliminary Approval, as, when analyzing the strengths and vulnerabilities of the class claims alongside Defendant's potential liability exposure, this proposed settlement of $1,100,000.00 – with an average settlement payment currently estimated to be $4,305.55– is well within the range of reasonableness. Class Counsel is convinced that the proposed Settlement is in the best interests of the Class Members based on the negotiations and a detailed knowledge of the issues present in this action.

II. BACKGROUND

On March 15, 2021, Plaintiff, a former hourly-paid, non-exempt employee of Defendant, provided written notice to the California Labor and Workforce Development Agency ("LWDA") and Defendant of the specific provisions of the Labor Code he contends Defendant violated and the theories supporting his contentions. (Declaration of Douglas Han ("Han Dec."), ¶ 10.)

On January 12, 2022, Plaintiff filed a wage-and-hour class action lawsuit against Defendant in the Superior Court of California, County of Los Angeles, entitled *Perez v. Arjo Inc. d/b/a Arjohuntleigh Inc.*, Case Number 22STCV01261 (the "Action"). (Han Dec., *supra*, at ¶ 11.) Specifically, Plaintiff alleged ten (10) causes of action for violation of various sections of the California Labor Code and California Business & Professions Code. (*Ibid.*)

On February 11, 2022, Defendant removed this case to the United States District Court for the Central District of California. (Han Dec., *supra*, at ¶ 12.) Plaintiff filed his Motion to Remand and Defendant filed its Opposition to the Motion to Remand, as well as a Motion to Strike an argument made by Plaintiff in a reply brief. (*Ibid.*) While the motions were pending Plaintiff and Defendant (collectively, the "Parties") agreed to explore mediation. (*Ibid.*)

The Parties attended mediation on Plaintiff's claims with mediator Jason Marsili on August 22, 2022. (Han Dec., *supra*, at ¶ 13.) With the help of the mediator, the Parties agreed to a settlement of the Action. (*Ibid.*)

III. INVESTIGATION/ LITIGATION HISTORY

a. Discovery, Investigation, and the Parties' Staunchly Conflicting Positions

Prior to the mediation, and both before and after the lawsuit was filed, the Parties conducted significant investigation and discovery of the relevant facts and law. (Han Dec., *supra*, at ¶ 15.) Specifically, Defendant produced employee handbooks and other documents evidencing its policies pertaining to meal and rest periods, overtime, timekeeping, and payroll, among other things. (*Ibid.*) Defendant also assembled and produced, and Plaintiff reviewed, random sampling of time and pay records, information relating to the size and scope of the Class, as well as data permitting Plaintiff to understand the number of workweeks and pay periods in the Class Period and PAGA Period, respectively. (*Ibid.*) Class Counsel and Defendant's counsel also (separately) interviewed Class Members who worked for Defendant throughout the Class Period. (*Ibid.*)

Based upon the information provided by Defendant and interviews Class Counsel had with non-exempt employees, Plaintiff contends – and Defendant denies – that Defendant: (a) failed to provide employees with legally mandated rest and meal breaks, and failed to provided required premiums when required meal or rest breaks were not provided; (b) failed to pay employees for all hours worked; (c) failed to reimburse employees for necessary business expenses; (d) issued noncompliant wage statements; (e) is liable for waiting time penalties, and (f) failed to properly pay sick leave time to employees. (Han Dec., *supra*, at ¶¶ 17–23.)

b. The Parties Were Able to Reach an Agreement on Settlement of the Action

i. The Parties Attended Mediation Which Ultimately Led to the Class Action and PAGA Settlement Agreement

During the Parties' mediation on August 22, 2022, the Parties discussed the risks of continued litigation, the likelihood of certification, and the merits of the Parties' claims and defenses versus the benefits of settlement. (Han Dec., *supra*, at ¶ 25.) With the assistance of the mediator, the Parties were able to reach an agreement on settlement, the terms of which were

memorialized in the Settlement Agreement that the Parties now seek Preliminary Approval of. (Han Dec., *supra*, at ¶ 25; Exhibit 2.)

ii. The Settlement Was Reached as a Result of Arm's-length Negotiations

The Settlement Agreement was reached because of arm's-length negotiations. (Han Dec., *supra*, at ¶ 29.) Though cordial and professional, the settlement negotiations have always been adversarial and non-collusive in nature. (*Ibid.*) At the mediation on August 22, 2022, both Parties' counsel conducted extensive arm's-length settlement negotiations until an agreement was ultimately reached by all Parties. (*Ibid.*)

Plaintiff and Class Counsel believe in the merits of the case but also recognize the expense and length of additional proceedings necessary to continue the litigation against Defendant. (Han Dec., *supra*, at ¶ 30.) Plaintiff and Class Counsel have also considered the uncertainty and risk of further litigation, the potential outcome, and the difficulties and delays inherent in such litigation. (*Ibid.*) Based on the foregoing, Plaintiff and Class Counsel believe the Settlement is a fair, adequate, and reasonable settlement, and is in the Class Members' best interests. (*Ibid.*)

iii. The Settlement Is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of Plaintiff's claims and Defendant's defenses before reaching the Settlement and engaged in sufficient investigation, research, and discovery to support the Settlement. (Han Dec., *supra*, at ¶ 31.) The Settlement was only possible following significant investigation and evaluation of Defendant's relevant policies and procedures and the data Defendant produced for the putative class. (*Ibid.*) Furthermore, this case has also reached the stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the reasonableness, adequacy, and fairness of the Settlement. (*Ibid.*; *Boyd v. Bechtel Corp.* (N.D.Cal. 1979) 485 F.Supp. 610, 617.)

c. Terms of the Proposed Settlement

i. Deductions from the Settlement

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of $1,100,000.00 ("Gross

Settlement Amount"), which includes, subject to Court approval: (a) Class Counsel Fees Payment to Class Counsel in an amount not to exceed $385,000 (thirty-five percent (35%) of the Gross Settlement Amount); (b) Class Counsel Litigation Expenses Payment to Class Counsel in an amount not to exceed $15,000.00, for reimbursement of litigation costs and expenses;[1] (c) the Class Representative Service Payment to Plaintiff in the amount of $10,000.00 for his service as the Class Representative; (d) Administrator Expenses Payment to CPT Group, the Administrator, in an amount not to exceed $12,000.00; and (e) the PAGA Penalties of $100,000.00, seventy-five percent (75%) of which ($75,000.00) will be paid to the LWDA and twenty-five percent (25%) of which ($25,000.00) will be distributed to the Aggrieved Employees[2] on a pro-rata basis. (Han Dec., *supra*, at ¶ 26.)

ii. Calculation of the Class Members' Settlement Payments

After all Court-approved deductions from the Gross Settlement Amount, it is estimated that approximately $518,250.00 ("Net Settlement Amount") will be distributed to Class Members – with an average gross settlement payment estimated $4,305.55.[3] (Han Dec., *supra*, at ¶ 27.)

Each Participating Class Member's Individual Class Payment will be based on the number of Workweeks he worked. It will be calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (Settlement, § 3.2.4.)

Each Participating Class Member's Individual Class Payment will be apportioned as follows: twenty percent (20%) as Wage Portion and eighty percent (80%) as Non-Wage Portion.

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[1] The final amount of actual litigation costs will be provided to the Court in conjunction with Plaintiff's motion for final approval. (Han Dec., *supra*, at ¶ 27.) At that time, Plaintiff will ask the Court to approve the amount of these costs. (*Ibid.*) If Plaintiff's actual litigation costs exceed $15,000.00, Plaintiff will only seek reimbursement in the amount of $15,000.00. (*Ibid.*) If the amount awarded is less than the amount requested by Class Counsel for Class Counsel Litigation Expense Payment, the difference shall become part of the Net Settlement Amount and be available for distribution to all Class Members who do not submit valid and timely requests to exclude themselves ("opt out") from the Settlement ("Participating Class Members"). (*Ibid.*)

[2] Capitalized terms used herein throughout shall have the definitions set forth in the Settlement Agreement.

[3] $518,250 (Net Settlement Amount) / 135 (Class Members) = $4,305.55.

(Settlement, § 3.2.4.1.) The Administrator will pay the amount of the Participating Class Members' portion of normal payroll withholding taxes out of each person's Individual Class Payment. (*Ibid.*)

Individual PAGA Payment will be calculated by (a) dividing the amount of the Aggrieved Employee's 25% of the PAGA Penalties by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Pay Periods. (Settlement, § 3.2.5.)

iii. Notice to the Class

Not later than 15 days after the Court grants Preliminary Approval of the Settlement, Defendant will deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. (Settlement, § 4.2.) Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service ("USPS") mail, the Class Notice. (Settlement, § 8.4.2). Class Members shall have 60 days from the date of the mailing to submit written objections, challenges to Workweeks and/or Pay Periods, and Requests for Exclusion.

iv. Distribution of Funds

No later than 30 days after the Effective Date,[4] Defendant shall fund the Gross Settlement Amount and also fund the amounts necessary to fully pay Defendant's share of payroll taxes. (Settlement, § 4.3). Within 14 calendar days after the funding of the Settlement, the Administrator shall calculate and pay all payments due under the Settlement Agreement. (Settlement, § 4.4.)

Participating Class Members and Aggrieved Employees must cash or deposit their Individual Class Payment checks and checks for their portions of the PAGA Penalties within one hundred eighty (180) calendar days after the checks are mailed to them. (Settlement, § 4.4.1.) For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name

[4] As defined in the Settlement Agreement.

of the Class Member thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil Procedure Section 384. (Settlement, § 4.4.3.)

v. Release of Claims

All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from all claims, demands, rights, liabilities, penalties, fees, and causes of action arising from, or related to, or that were asserted, or that could have been asserted based on the Class Period facts stated in the Operative Complaint and/or ascertained in the course of the Action, including, any and all claims involving any alleged failure to pay all regular wages, minimum wages, and overtime wages due; failure to properly calculate overtime; failure to provide proper meal and rest periods, and to properly provide premium payment in lieu thereof; failure to provide complete, accurate, or properly formatted wage statements; failure to maintain payroll records; failure to timely pay all wages during employment or at separation of employment; waiting time penalties; failure to properly calculate and pay sick pay; failure to reimburse for business expenses; and unfair business practices that could have been premised on the claims, causes of action or legal theories of relief described above. Released claims by all Participating Class Members include all claims for unpaid wages, overtime wages, statutory penalties, damages of any kind, interest, attorneys' fees, costs, injunctive relief, restitution, and any other equitable relief under California or federal statute, ordinance, regulation, common law, or other source of law, including but not limited to the California Labor Code, California Business and Professions Code, California Civil Code and California Industrial Welfare Commission Wage Orders. (Settlement, § 6.2.)

All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims, demands, rights, liabilities, penalties, fees, and causes of action for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, stated in the PAGA Notice, and/or ascertained in the course of the Action, including, any and all claims involving any alleged failure to pay all regular wages, minimum

wages, and overtime wages due; failure to properly calculate overtime; failure to provide proper meal and rest periods, and to properly provide premium payment in lieu thereof; failure to provide complete, accurate, or properly formatted wage statements; failure to maintain payroll records; failure to timely pay all wages during employment or at separation of employment; waiting time penalties; failure to properly calculate and pay sick pay; failure to reimburse for business expenses; unfair business practices that could have bene premised on the claims, causes of action or legal theories of relief described above; and all claims under PAGA that could have been premised on the claims, causes of action, or legal theories described above. (Settlement, § 6.3).

All Participating Class Members who are also Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims, demands, rights, liabilities, penalties, fees, and causes of action stated in Paragraphs 6.2 and 6.3. (Settlement, § 6.4.)

In exchange for the Class Representative Service Payment in an amount not to exceed $10,000.00 and in recognition of his work and efforts in obtaining the benefits for the Class and undertaking the risk of paying litigation costs in the event this matter had not successfully resolved, Plaintiff will provide a general release of claims. (Settlement, § 6.1.)

The Released Parties include Defendant and all of its past, present, and/or future owners, officers, directors, shareholders, members, employees, agents, principals, heirs, representatives, accountants, auditors, assigns, attorneys, consultants, insurers, reinsurers, parent companies, and their respective successors and predecessors in interest, assigns, subsidiaries, joint ventures, parents and affiliates, if any (collectively, the "Released Parties"). (Settlement, § 1.41.)

With regard to class action releases, """[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint."""" (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) The scopes of the releases in this case are acceptable because they are limited to the scope of the allegations contained in the Complaint. Moreover, the released claims are """"based on *the identical factual predicate* as that

underlying the claims in the settled class action."'" (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) In other words, the released claims do not "'"go beyond the scope of the allegations in the operative complaint … ."'" (*Ibid.*)

vi. Defendant's Right to Withdraw

If the number of valid Requests for Exclusion (opt-outs) exceeds eight (8), Defendant may, but is not obligated to, elect to withdraw from the Settlement. The Parties agree that, if Defendant withdraws, the Settlement shall be void ab initio, have no force or effect whatsoever, and that neither Party will have any further obligation to perform under this Agreement; provided, however, Defendant will remain responsible for paying all Settlement Administration Expenses incurred to that point. Arjo must notify Class Counsel and the Court of its election to withdraw not later than ten (10) days after the Administrator sends the final Exclusion List to Defense Counsel; late elections will have no effect. (Settlement, § 9.)

d. Counsel for Both Parties Are Experienced in Similar Litigation

Counsel for both Parties are particularly experienced in wage-and-hour employment law and class actions. (Han Dec., *supra*, at ¶¶ 2-7; Exhibit 1.) Class Counsel have prosecuted numerous cases on behalf of employees for Labor Code violations and, thus, are experienced and qualified to evaluate the class claims, the advantages and disadvantages of settlement versus trial, and the viability of the defenses. (*Ibid.*) Class Counsel's experience also guided their determination to endorse the proposed Settlement.[5] (*Ibid.*)

IV. ARGUMENT

a. Class Action Settlements Are Subject to Court Review

California Rules of Court, rule 3.769 requires court approval for class action settlements.[6] "Before final approval, the court must conduct an inquiry into the fairness of the proposed

[5] The final factor mentioned in *Dunk v. Motor Co.* (1996) 48 Cal.App.4th 1794 – the number of objectors – is not determinable until the Class Notice has been provided to the Class Members, and they have had an opportunity to respond. This information will be provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

[6] The California Supreme Court has also authorized California's trial courts to use Federal Rule 23 and cases applying it for guidance in considering class issues. (See *Vasquez v. Superior*

settlement." (Cal. Rules of Court, rule 3.769(g).) Rule 3.769 further requires a noticed motion for preliminary approval of class settlements:

> (a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.
>
> . . .
>
> (c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion.

Courts have discretion to approve settlements that are fair, not collusive, and consider "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 607 F.2d 167, 179, cert. den. *sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n* (1981) 452 U.S. 905.)

b. The Proposed Settlement Is a Reasonable Compromise of Claims

An understanding of the amount in controversy is an important factor in whether the settlement "of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; see also *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.) The most important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar*, at p. 129; see also *Munoz*, at p. 409.)

In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to "decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys." (*Kullar v. Foot Locker Retail, Inc., supra,* 168 Cal.App.4th at p. 133.) Finally, *Kullar* does not require an explicit statement of the maximum amount the class could recover if the plaintiff prevailed on all his claims, provided there is a record that allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, *supra*, 186 Cal.App.4th at p.

Court (1971) 4 Cal.3d 800, 821; see *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.) Where appropriate, Plaintiff cites Federal Rule 23 and federal case law in addition to California law.

409.) Put differently, "as the court does when it approves a settlement as in good faith under Code of Civil Procedure § 877.6, the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness." (*Kullar*, at p. 133.)

i. The Gross Settlement Amount of $1,100,000 Is Fair and Reasonable

The proposed Settlement was only possible following significant investigation and evaluation of Defendant's relevant policies and procedures and the data Defendant produced for the putative class, as referenced in Section III above, which permitted Class Counsel to engage in a comprehensive analysis of liability and potential damages. (Han Dec., *supra*, at ¶ 31.)

This investigation and evaluation informed Plaintiff's central theories of liability. (Han Dec., *supra*, at ¶ 32.) Plaintiff's claims are predicated on Defendant's alleged: (a) failure to pay overtime wages; (b) failure to provide compliant rest and meal breaks and pay applicable premiums; (c) failure to pay minimum wages; (d) failure to timely pay wages; (e) failure to issue compliant wage statements; (f) failure to reimburse business expenses; (g) violation of Labor Code section 2698, *et seq.* (PAGA); and (h) violation of Business & Professions Code section 17200, *et seq.*. (*Ibid.*) Defendant denies Plaintiff's theories of liability. (*Id.* at ¶ 33.)

Although Plaintiff believes the case is suitable for certification, uncertainties with respect to certification are always present. (Han Dec., *supra*, at ¶ 34.) As the California Supreme Court ruled in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. (*Ibid.*) Decisions following *Sav-On Drug Stores, Inc.* have reached different conclusions concerning certification of wage-and-hour claims.[7] (Han Dec., *supra*, at ¶ 34.) These factors led Plaintiff to discount calculations of potential damages.

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[7] (See, e.g., *Harris v. Superior Court* (2007) 154 Cal.App.4th 164 [reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees], review granted Nov. 28, 2007, (2007) 171 P.3d 545 [not cited as precedent, but rather for illustrative purposes only]; *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal.App.4th 1440 [affirming decertification of class claiming misclassification]; *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121 [reversing denial of certification]; *Dunbar v. Albertson's Inc*. (2006) 141 Cal.App.4th 1422 [affirming denial of certification].)

ii. The PAGA Penalties of $100,000 Is Reasonable

The provisions of the Labor Code potentially triggering PAGA penalties in this case include but are not limited to Labor Code sections 201, 202, 203, 204, 218.5, 221, 226(a), 226.3, 226.7, 246, 510, 512(a), 558, 1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802. (Han Dec., *supra*, at ¶ 42.) Defendant asserts that, regardless of the results of the underlying causes of action, PAGA penalties are not mandatory but permissive and discretionary. (*Ibid.*) Defendant also maintains that, in addition to its strong arguments against the underlying claims, it had a strong argument that it would be unjust to award maximum PAGA penalties given the law's current unsettled state. (*Ibid.*; *Thurman v. Bayshore Transit Mgmt.* (2012) 203 Cal.App.4th 1112 [reducing penalties by 30% under this authority].) Defendant argued that without stacking and limited to the initial violation, the PAGA penalties would be limited to $9,700 (97 employees x $100 initial violations) on the low end and $77,600 (97 employees x $100 x 8 theories of recovery) on the high end. (Han Dec., at ¶ 45.)

Plaintiff also recognized the risk that any PAGA award could be significantly reduced. (Han Decl., *supra*, at ¶ 47.) Many of the causes of action brought were duplicative of the statutory claims such as violations of Labor Code sections 201, 202, 203, 204, 218.5, 226.3, 226.7, 510, 512(a), 1194, 1197, 1197.1, 1198, 2800, and 2802. (*Ibid.*) Thus, the maximum penalties for each pay period are not justified. It was indeed arguable whether the Court would award the maximum penalties under the law. Thus, allocating $100,000.00 to PAGA civil penalties was reasonable based on a rate of $28.87 per pay period [$100,000.00 ÷ 3,463 pay periods in PAGA date range = $28.87], given the fact that Defendant is also paying an additional $1,000,000.00 in the Settlement.[8] (Han Decl., *supra*, at ¶ 47.) When PAGA penalties are negotiated in good faith and "there is no indication that [the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable.[9] (*Ibid*.)

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[8] (See *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 [affirming a rate of $5 per violation and a total PAGA penalty of $150,000 while the plaintiff requested a rate of $25 to $75 per violation and a total PAGA penalty of $70,000,000].)

[9] (*Hopson v. Hanesbrands Inc.* (N.D.Cal. Apr. 3, 2009, No. CV-08-00844 EDL) 2009 U.S.Dist.LEXIS 33900, at *24; see, e.g., *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576,

Considering Defendant's defenses, its supporting evidence, and its position that the case is not suitable for class treatment, the settlement of $1,100,000.00 is reasonable, adequate, and fair.

c. Discount Analysis Justifies the Settlement

Excluding the civil penalties, which could be discretionary, for the reasons stated, the total estimated potential exposure, assuming certification and prevailing at trial, would be approximately $7,102,822.50. (Han Dec., *supra*, at ¶ 48.)

Category	Potential Exposure	Certification Risk	Merits Risk	Realistic Exposure
Rest Break Premiums	$326,310.18	25%	50%	$122,366.31
Meal Break Premiums: Auto-deduct	$55,000.38	25%	60%	$16,500.11
Meal Break Premiums: 2nd Meal	$428,169.26	20%	25%	$256,901.55
Overtime/Minimum Wage: Rounding	$35,189.28	15%	50%	$14,955.44
Overtime Wage: Regular Rate	$246,294.00	10%	25%	$166,248.45
Minimum Wage: On-Call	$5,172,037.00	30%	60%	$1,448,170.36
Unreimbursed Business Expenses	$78,246.00	20%	70%	$18,779.04
Wage Statement Penalty	$344,250.00	25%	50%	$129,093.75
Waiting Time Penalty	$417,326.40	20%	50%	$166,930.56
MAXIMUM TOTAL EXPOSURE	**$7,102,882.50**[10]			**$2,339,945.57**[11]

Based on this analysis, the realistic recovery for this case is **$2,339,945.57**. (Han Dec., *supra*, at ¶ 58.) The Gross Settlement Amount of $1,100,000.00 is approximately fifteen percent (15%) of the maximum potential exposure and approximately forty-seven percent (47%) of the

579, "[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims".)

(Han Dec., *supra*, at ¶¶ 36-41.)

[11] (*Id.* at ¶¶ 49-57.)

maximum realistic exposure at trial, which is a reasonable settlement. (Han Dec., *supra*, at ¶ 58.)

The only question at preliminary approval is whether the settlement is within the range of possible approval. (*In re Tableware Antitrust Litig*. (N.D.Cal. 2007) 484 F.Supp.2d 1059, 1079.) "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Ceullar Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242, "[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.") Nevertheless, this Settlement is in line with the realistic exposure had Plaintiff prevailed at trial and provides a significant recovery for the Class Members.

d. Conditional Certification of the Class Is Appropriate

Code of Civil Procedure section 382 "authorizes class actions '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.'" (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) California courts certify class actions where the plaintiff identifies "both [1] an ascertainable class and [2] a well-defined community of interest among class members." (*Ibid.*)

The proposed Class is ascertainable and numerous as to make it impracticable to join all Class Members, and there are common questions of law and fact that predominate over any questions affecting any individual Class Member. (Han Dec., *supra*, at ¶ 59.) Plaintiff contends that as a former hourly-paid, non-exempt employee of Defendant, his claims are typical of the claims of the Class, and Class Counsel will fairly and adequately protect the interests of the Class. (*Ibid.*) Also, Plaintiff asserts that the prosecution of separate actions by individual Class Members would create the risk of inconsistent or varying adjudications. (*Ibid.*)

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i. The Proposed Class Is Ascertainable and Sufficiently Numerous

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914.) "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) The proposed class must also be sufficiently numerous. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

This case involves approximately one hundred thirty-five (135) Class Members. (Han Dec., *supra*, at ¶ 69.) Thus, the Class is sufficiently numerous. (*Ibid.*; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531, n.5 [finding that a proposed class of "as many as 190 current and former employees" is sufficiently numerous].)

ii. The Class Members Share a Well-defined Community of Interest

The community of interest requirement "embodies three factors: (1) predominant common 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." (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) "[T]he community of interest requirement for certification *does not mandate that class members have uniform or identical claims*." (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 692 (emphasis in original).) Rather, courts focus on the defendant's internal policies and "pattern and practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate." (*Ibid.*) The application of each of these factors is discussed below.

1. Common Issues Predominate

The "common issues" requirement "involves analysis of whether the proponent's 'theory of recovery' is likely to prove compatible with class treatment." (*Capitol People First v. Department of Developmental Services*, *supra*, 155 Cal.App.4th at p. 690 (emphasis added).) In other words, courts determine whether the elements necessary to establish liability are susceptible

to common proof, even if the class members must individually prove their damages. (*Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1024). These types of claims are regularly granted class certification when the plaintiff can present evidence of common policies. (See, e.g., *Jones v. JGC Dallas LLC* (N.D.Tex. Nov. 29, 2012, Civil Action No. 3:11-CV-2743-O) 2012 U.S.Dist.LEXIS 185042 [certified collective action involving 190 dancers]; *Espinoza v. Galardi South Enters.* (S.D.Fla. Jan. 11, 2016, No. 14-21244-CIV-GOODMAN) 2016 U.S.Dist.LEXIS [court certified class of dancers on state law claims].)

Plaintiff asserts common issues of fact and law predominate as to each of the claims alleged. (Han Dec., *supra*, at ¶ 61.) Plaintiff contends all Class Members were subject to the same or similar employment practices, policies, and procedures, described in detail above. (*Ibid.*)

2. Plaintiff's Claims Are Typical of the Class Claims

Typical claims rely on legal theories and facts that are substantially like those of other class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) Plaintiff is a former employee of Defendant and alleges he and the Class Members were employed by the same company and injured by Defendant's common policies and practices related to the claims described above. (Han Dec., *supra*, at ¶ 62.) Plaintiff seeks relief for these claims and derivative claims on behalf of all Class Members. (*Ibid.*) Thus, Plaintiff's claims arise from the same employment practices and are based on the same legal theories as those applicable to the Class. (*Ibid.*)

3. Plaintiff Is Adequate to Represent the Class

Plaintiff has proven to be an adequate Class Representative. (Han Dec., *supra*, at ¶ 63.) He has conducted himself diligently and responsibly in representing the Class in this litigation, understands his fiduciary obligations, and has actively participated in the prosecution of this case. (*Ibid.*) Plaintiff has spent time in meetings and conferences with Class Counsel to provide Class Counsel with a complete understanding of his work environment and requirements. (*Ibid.*) Further, Plaintiff has no interest that is averse to the interests of the other Class Members. (*Ibid.*)

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4. Class Action Is Superior for the Fair and Efficient Adjudication of this Controversy

A class action is superior to other available means for the fair and efficient adjudication of this controversy. Plaintiff contends the joinder of all Class Members is impractical and that class treatment will permit many similarly situated persons to prosecute their common claims for settlement purposes simultaneously in a single forum without the duplication of effort and expense that numerous individual actions would necessitate. Because several Class Members are current employees, Plaintiff believes fear of retaliation further supports the superiority of class-wide relief as this fear often discourages current employees from seeking legal redress.

e. The Settlement Is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure section 382, the Court must find that a proposed settlement is "fair, adequate and reasonable." (*Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th at p. 1801.) A proposed class action settlement is presumed fair under the following circumstances: (1) the parties reached settlement after arm's-length negotiations; (2) investigation and discovery were 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. (*Id.* at p. 1802.) All these elements are present here.

f. Class Notice to Class Members Complies with California Rules of Court, Rule 3.769(f)

California Rules of Court, rule 3.769(f), provides:

> If the court has certified the action as a class action, notice of the final approval hearing must be given to class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

The proposed Class Notice meets all these requirements. The proposed Class Notice advises the Class Members of their right to participate in the Settlement; how and when to object to or request exclusion from the Settlement; and the date, time, and location of the Final Approval Hearing. (See Han Dec., *supra*; Exhibit A to Exhibit 2.)

V. CONCLUSION

Plaintiff submits that the proposed Settlement is in the best interests of the Class, as it is fair, adequate, and reasonable. Under the applicable class action criteria and guidelines, the proposed Settlement should be preliminarily approved by the Court, the Class should be conditionally certified for purposes of settlement only, and the Class Notice should be approved.

Dated: January 6, 2023

JUSTICE LAW CORPORATION

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