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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

LUIS MORENO, an individual, on behalf of himself and others similarly situated

PLAINTIFF,

v.

HATHAWAY DINWIDDIE CONSTRUCTION COMPANY; and DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. CGC-16-554443

[Case Assigned for All Purposes to Hon. A.C. Massullo]

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declarations of Liane Katzenstein Ly, Luis Moreno and Stephen Gomez, Proposed Order, and Proposed Judgment]

Date: February 11, 2020
Time: 9:15 a.m.
Dept.: 304

Trial Date: None
Complaint Filed: September 22, 2016

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 11, 2020 at 9:15 a.m. in Department 304 of the above-entitled court, Plaintiff LUIS MORENO ("Plaintiff") will, and hereby does, move the Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court for an order:

1. Finally approving the Fifth Amended Joint Stipulation of Resolution ("Settlement Agreement" or "Settlement");

2. Affirming Luis Moreno as Representative Plaintiff;

3. Affirming Kingsley & Kingsley, APC as Class Counsel; and

4. Entering the Proposed Order Granting Final Approval of Class Action Settlement and Final Judgment.

This Motion will be made pursuant to Code of Civil Procedure section 382 and California Rule of Court, rule 3.769 on the grounds that the proposed Class Settlement is fair, adequate, reasonable, and in the best interest of the Class and the parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Liane Katzenstein Ly, Luis Moreno, Stephen Gomez, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

Dated: January 28, 2020

KINGSLEY & KINGSLEY, APC

By: _____
Liane Katzenstein Ly
Attorneys for Plaintiff and the Proposed Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff LUIS MORENO ("Plaintiff") submits this Motion for Final Approval of Class Settlement and requests that the Court:

1. Grant final approval of the settlement in this case pursuant to the Fifth Amended Joint Stipulation of Resolution ("Settlement Agreement" or "Settlement"), a copy of which is attached to the concurrently-filed Declaration of Liane Katzenstein Ly as Exhibit "A";

2. Award attorneys' fees and costs as detailed in the Motion for Attorneys' Fees and Costs filed on December 10, 2019;

3. Award CPT Group Inc. claims administration fees of $11,000.00 for its services as Claims Administrator;

4. Affirm Named Plaintiff LUIS MORENO as Representative Plaintiff and award a cumulative Representative Plaintiff payment of $5,000.00; and

5. Enter judgment.

II. FACTUAL BACKGROUND

A. Litigation Overview and Procedural History

On September 22, 2016, Plaintiff Luis Moreno filed a class action against Defendant, asserting the following claims: (1) Failure to Reimburse Expenses pursuant to Labor Code section 2802; (2) Failure to Provide Itemized Wage Statements pursuant to Labor Code section 226(a); and (3) a violation of Business and Professions Code section 17200. Plaintiff Moreno asserted a claim for Failure to Provide Employment and Payroll records under Labor Code sections 226 and 1198.5, on behalf of himself (hereinafter referred to as "The Action"). (Declaration of Liane Katzenstein Ly ¶ 5, filed concurrently herewith). (hereafter "Ly Decl.").

On September 22, 2016, pursuant to Labor Code §2699.3(a)(l), Plaintiff gave written notice by online filing to the LWDA and mailed notice to Defendant. (Ly Decl. ¶ 6). Plaintiff provided the LWDA with a copy of the Complaint on November 29, 2016. (Ly Decl. ¶ 7). Plaintiff has also filed this Motion with LWDA. (Ly Decl. ¶ 8). On November 29, 2016, Plaintiff filed a First Amended Complaint, adding a claim for penalties under the Private Attorney General Act of 2004

("PAGA"). (Ly Decl. ¶ 9). On August 28, 2017, the Parties stipulated to a Second Amended Complaint. (Ly Decl. ¶ 10).

On September 25, 2017, the Parties attended mediation with Mark Rudy, Esq. and reached an agreement through arms-length negotiations and Plaintiff and his counsel believe it to be fair and reasonable. (Ly Decl. ¶ 11).

Plaintiff moved for preliminary approval on six occasions (February 14, 2018; April 26, 2018; June 8, 2018, August 29, 2018; October 11, 2018; February 25, 2019) which were each denied without prejudice, with instructions. (Ly Decl. ¶ 12). After the denials, the Parties re-drafted the Settlement Agreement. (Ly Decl. ¶ 13).

Plaintiff filed a Third Amended Class Action Complaint on April 24, 2019 eliminating a sub-class and modifying the class definition. (Ly Decl. ¶ 14). Ultimately, the Court granted preliminary approval of the Class Action Settlement on October 15, 2019.

B. The Discovery Process

The Parties engaged in extensive informal discovery to arrive at the proposed settlement. (Ly Decl. ¶ 15). Defendant provided Plaintiff with all versions of itemized wage statements issued to the Class, the number of itemized wage statements issued during the Class Period, and the date upon which the alleged deficiencies on the wage statements were corrected. (Ly Decl. ¶ 16). Finally, Defendant provided Plaintiff with various collective bargaining agreements ("CBAs"). (Ly Decl. ¶ 17). This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with litigation. (Ly Decl. ¶ 18).

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class and Class Definitions

Defendant provides contract management and complete project planning/management for large commercial/institutional projects, tenant improvements and historic renovations. (Ly Decl. ¶ 19). Plaintiff was a member of the Carpenter's Local Union #405 and worked as a Journeyman Carpenter from May 15, 2012 through July 17, 2016. (Ly Decl. ¶ 20).

The Settlement reached by the Parties is on behalf of one Class defined as:

"All persons who are employed or have been employed as an employee

> by HATHAWAY DINWIDDIE CONSTRUCTION COMPANY, in the State of California who are or were members of a Union with a collective bargaining agreement to which HATHAWAY DINWIDDIE CONSTRUCTION COMPANY is a signatory, from September 22, 2015 to October 16, 2016. ('Proposed Class')"

(Amended Joint Stipulation, Ex. 1, ¶ III.)

The final settlement Class contained 513 individuals. (Declaration of Stephen Gomez ¶ 12) (hereafter "Gomez Decl.").

B. The Statute of Limitations for the Class

The original Complaint in this Action was filed on September 22, 2016. The statute of limitations for failure to provide accurate itemized wage statements pursuant to Labor Code section 226(a) is one year. The statute of limitations for a PAGA claim is also one year.

As such, the statute of limitations for the Proposed Class and the PAGA claim begins one year from the filing of the original Complaint, September 22, 2015. The Proposed Class has a class period end date of October 16, 2016, because Defendant has provided proof that it fixed the issues with the alleged violations on October 26, 2016.

C. The Scope of the Class Definition

Since the filing of the first Motion for Preliminary Approval, one sub-class (The Reimbursement Class) has been eliminated and the Class has been narrowed to included only members of a Union with a collective bargaining agreement to which HATHAWAY DINWIDDIE CONSTRUCTION COMPANY is a signatory, from September 22, 2015 to October 16, 2016. (Ly Decl. ¶ 21). The Proposed Class is made up of 513 union members, issued approximately 19,420 wage statements during the Class Period (September 22, 2015 to October 16, 2016). (Ly Decl. ¶ 22). Plaintiff is alleging that the wage statements did not include the name and address of the employer, the inclusive pay dates, and only the last four digits of the social security number. (Ly Decl. ¶ 23).

D. Settlement Payments and the Class Distribution Fund

As detailed fully in the Settlement Agreement, Defendant is to pay a Total Settlement Amount of $658,642.50. (Ex. 1, ¶ IV.) The settlement is non-reversionary. (Ex. 1, ¶ IV.) This

amount includes the Administration Costs ($11,000.00)[1], attorney's fees ($219,547.50), litigation costs ($15,000.00), a service fee to the Named Plaintiff ($5,000.00), and a payment pursuant to California Labor Code section 2698 *et seq.* ("PAGA") ($50,000.00 with $37,500.00 allocated to the LWDA). (Ex. 1, ¶ IX.) After these deductions, the maximum amount for payments to participating Class Members is $370,595.00 ("The Distribution Amount").

E. Costs Associated with Claims Administration

The Settlement Agreement allocates $12,750.00 as administration expenses. (Ex. 1, ¶ IX.) The updated bid we obtained after reducing the class size from the claims administrator, CPT Group, Inc., provides for a discounted rate of $11,000.00. CPT Group is requesting $11,000.00 in its declaration. (Gomez Decl. ¶6.) Additionally, at preliminary approval the Court approved a second distribution. This second distribution is explained below, and the costs of the second distribution ($2,750.00) will be deducted from the uncashed checks.

F. The Pro Rata Distribution

The Settlement Administrator shall calculate the individual Settlement Awards for the Class Members and perform the notice and administration procedures. (Ex. 1, ¶ IX.) The proposed plan for the Distribution Amount amongst the Class Members is as follows: (1) each Class Member shall receive a pro rata share of the Distribution Amount based on the number of wage statements they received during the Class Period; and (2) the wage statements for each Class Member in the Class will be derived from the hire and termination dates and payroll data contained in the records kept by Defendant in the ordinary course of business during the respective Class Period. (Ex. 1, ¶ IX.) Any unapproved attorneys' fees, costs, the PAGA Payment, or Plaintiff Enhancement will be added to the Distribution Amount. (Ex. 1, ¶ IX.)

G. Class Notice

The procedures for giving notice to the Class Members, as set forth in the Settlement Agreement and approved by the Court, have been fully and properly carried out. (Gomez Decl. ¶ 15). The Court approved the proposed Class Notice and directed the mailing of the Notice by first-

[1] The original bid was for $12,750. However, we have decreased the class size as a result of eliminating the Reimbursement Class and the updated bid reflects this decrease.

class mail to Class Members in accordance with the proposed implementation schedule. (Ly Decl. ¶ 24).

On October 29, 2019, Notice Packets were mailed via U.S. First-Class mail to five hundred eighteen (518) Class Members. (Gomez Decl. ¶ 6) (A copy of which is attached to the concurrently-filed Gomez Declaration as Exhibit "A"). The Notice included Class Members' credited number of wage statements and their estimated settlement award. (*Id.*)

The Parties informed the Claims Administrator that for each notice packet returned as undeliverable, without a forwarding address, the Claims Administrator should perform a "skiptrace" search to obtain an updated address within two (2) days of receipt and re-mail the Notice packet within five (5) days if a new address is identified by the skiptrace.

To date, twelve (12) Notice Packets were returned by the U.S. Postal Service, of which one (1) was provided a new address by the Post Office. (Gomez Decl. ¶ 7) For the remaining eleven (11) Notice Packets, the settlement administrator performed a skip trace in an effort to locate a better address using Accurint, one of the most comprehensive address databases available. (*Id.*) As a result of skip trace effort, or re-mail requests from Counsel or the Class Members themselves, a total of eleven (11) Notice Packets have been re-mailed to date. (Gomez Decl. ¶ 8) In addition, two (2) Notice Packets were also forwarded by the Settlement Administrator. (*Id.*) At the time of the filing of this Motion it has been fifty-three (53) days since the last Notice Packet was re-mailed. To this day, a total of two (2) Notice Packets were ultimately deemed undeliverable as no better address was provided from the U.S. Postal Service nor obtained through skip trace. (*Id.*) If any opt outs come in before the Final Approval hearing for those re-delivered notices, Class Counsel will bring that to the Court's attention.

To date, CPT Group, Inc. received five (5) requests to be excluded from the proposed Settlement and no objections. (Gomez Decl. ¶¶ 10-11).

H. Check Mailed Settlement – No Reversion

The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement without the possibility of reversion of settlement funds to Defendant. Under the Settlement, every Class Member will receive a settlement check and Class Members do not need to submit a claim

in order to receive a settlement check.

The Class Members have 180 days to cash their settlement checks. (Ex. 1, ¶ X.) C.C.P. Section 384 requires that unpaid cash residues shall be transmitted as follows:

> (b) ... before the entry of a judgment in a class action ... that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residue or unclaimed or abandoned class member funds derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers.

In accordance with section 384, any uncashed amounts in excess of $7,350.00, shall be redistributed amongst the Class Members that cashed their checks on a pro rata basis based on the number of wage statements each Class Member that cashed their check received during the Class Period. (Ex. 1, ¶ X.) The costs associated with this second distribution shall be deducted from the uncashed amounts and shall not exceed $2,750.00. (Ex. 1, ¶ X.) If the uncashed amounts do not exceed $7,350.00, these amounts shall be allocated pursuant Section 384, subject to Court approval. (Ex. 1, ¶ X.) The Parties have selected the Homeless Advocacy Project. (Ex. ¶ X.) More information can be found at http://www.sfbar.org/jdc/legal-services/hap/. Defendant shall pay any interest that has accrued.

I. The Class Member's Release and Tax Treatment of the Settlement Awards

The scope of the Release in this matter is narrowly tailored to the claims. (Ex. 1, ¶ VII.) Participating Class Members will release Defendant and its agents from:

> any and all claims, charges, complaints, liens, demands, causes of action, obligations, damages, and liabilities that each participating Class Member had, now has, or may hereafter claim to have for

> those claims or causes of action that were asserted in or could have been asserted in the Lawsuit, as alleged in Plaintiff's Third Amended Complaint, regardless of whether such claims arise under state and/or local law, statute, ordinance, regulation, common law, or other source of law. The Released Claims specifically include, but are not limited to: (1) failure to provide itemized wage statements pursuant to Labor Code section 226(a); (2) Penalties Pursuant to Labor Code § 2699(f) for failure to provide itemized wage statements, that were or could have been asserted during the Class Period. (Ex. 1, ¶ VII.)

The scope of the release is appropriate. The release of claims by the class is limited by the "factual predicate rule." See *Hesse v. Sprint Corp.* (9th Cir. 2010) 598 F.3d 581, 590. 4. The Release only releases claims in the Third Amended Complaint which does not include the reimbursement claim. The Parties are in agreement that the Release does not cover the reimbursement claim.

The Settlement allocates the damages as 2/3 penalties and 1/3 interest. (Ex. 1, ¶ VII.) The allocation has no impact aside from how it will be reported (on a 1099 Form and not a W-2/W-9).

J. NOTICE TO THE LWDA

Concurrently, with the filing of this Motion, Plaintiff gave notice of this hearing to the LWDA. Plaintiff served the LWDA (see the Proof of Service) with the entire Motion for Final Approval and the Settlement Agreement. (Ly Decl. ¶ 73).

IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT

Pursuant to California Code of Civil Procedure § 1781(f), "a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the Class in such manner as the court directs . . . ." In deciding whether to grant final approval to a proposed class action settlement under Code of Civil Procedure § 382, the court's overriding concern is whether the proposed settlement is "fair, adequate, and reasonable." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801).

A. The Settlement is Entitled to a Presumption of Fairness

"A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act

intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk, supra*, 48 Cal.App.4th at p. 1802). The proposed Settlement in the present case meets all of the *Dunk* factors and is therefore entitled to a presumption of fairness.

As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and arm's-length negotiations. All settlement discussions were made by experienced and informed counsel, who believe that this settlement represents a favorable resolution for the Class. (Ly Decl. ¶ 25). The settlement negotiations have been, at all times, adversarial and non-collusive, and no self-dealing or other type of misconduct by either side has taken place. (Ly Decl. ¶ 26).

Second, the Parties engaged in discovery that permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. This included the number of allegedly violating itemized wage statements at issue, all versions of itemized wage statements issued to the Class, and numerous collective bargaining agreements. (Ly Decl. ¶ 27). This allowed Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Ly Decl. ¶ 28).

Third, Class Counsel have significant experience in cases of this type, including over 17 years prosecuting wage, hour, and working condition violations. (Ly Decl. ¶ 29). Class Counsel believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and that the average recovery for each Class Member of $722.41 is substantial, given the risks inherent in litigation and the defenses asserted. (Ly Decl. ¶ 30; (Gomez Decl. ¶ 14).

Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were five (5) requests to be excluded and no objectors. (Gomez Decl. ¶¶10-11). As all of the *Dunk* factors are satisfied, this settlement is entitled to a presumption of fairness. (Ly Decl. ¶ 31).

B. Plaintiff Requests That the Court Approve This Class Action Settlement Because It Satisfies Each of the *Kullar* Factors

In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth several factors that should be analyzed in determining whether to approve a class action settlement. These factors include: (1) the strength of Plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4)

the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

However, the record need not contain an explicit statement of the maximum theoretical amount that the class could recover:

> Greenwell 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 Greenwell 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."

Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, 186 Cal. App. 4th 399, 409 (2010).

In this matter, the proposed settlement satisfies each of these factors and Class Counsel has provided information exceeding the threshold required to provide this Court with "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.". Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter as previously noted. (Ly Decl. ¶ 32). This discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶ 33). Class Counsel is experienced in handling wage and hour class actions and supports this Settlement. (Ly Decl. ¶ 34).

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption here that the negotiations were conducted in good faith. 3 ALBA CONTE & NEWBERG, Newberg on Class Actions §§ 11.51 (4th Ed. 2002). Settlement is favored, and settlement agreements are realistically assessed. *Stamburgh v. Superior Court,* 62 Cal. App. 3d 231, 236 (1976); *Priddy v. Edelman,* 883 F.2d 438, 447 (6th Cir. 1989) ("The fact that a plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.").

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1. The Strength of Plaintiffs' Case

a) The Risks Associated with the Wage Statement Claim

Labor Code section 226(a) states in relevant part:

> (a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, ... an accurate itemized statement in writing showing .... (6) the inclusive dates of the period for which the employee is paid .... (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number .... (8) the name and address of the legal entity that is the employer....

Recent federal and state cases have further clarified itemized wage statement requirements under Labor Code section 226(a): "[u]nder section 226, employers must provide accurate itemized statements of wages to their employees. Subdivision (a) of the statute sets forth the specific information that must be included in the wage statements...." *(Morgan v. United Retail Incorporated* (2010) 186 Cal.App.4th 1136, 1143.)

Plaintiff is alleging that during the relevant time period, Defendant failed to furnish accurate and complete itemized wage statements by omitting the full name and address of the employer, the start dates of the pay periods, and each employee's identification number. (Ly Decl. ¶ 35). These omissions of statutorily required information are in direct contravention of the express language of the Labor Code. *(See* Cal. Lab. Code § 226(a)(8), (9); *Morgan, supra,* 186 Cal.App.4th 1136 at p. 1145 [failure by defendant to list precise number of hours worked conflicts with language of statute and the statutory purpose].)

Informal discovery produced by Defendant established that Defendant amended its wage statements on October 26, 2016, and Plaintiff is satisfied that the revised wage statements are in compliance. (Ly Decl. ¶ 36). Here, Plaintiff was very confident that he could establish liability. It is Plaintiffs position that a simple review of the itemized wage statements at issue reveals that Defendant failed to comply with the Labor Code. (Ly Decl. ¶ 37). However, there were certainly risk factors that Plaintiff was forced to consider. (Ly Decl. ¶ 38).

First, Defendant took immediate corrective action. Counsel for Defendant demonstrated that within a month of receiving notice of Plaintiff's allegations, Defendant took immediate efforts

to ensure that its wage statements were corrected. (Ly Decl. ¶ 39).

Second, Labor Code section 226(e)(1)(B) also requires that the Class Members not be able to "promptly and easily" determine the information from the face of the wage statement. Defendant argued that, at least as it relates to Labor Code section 226(a)(6), the employee could have promptly and easily determined the period start date from the face of the wage statement by doing simple math. (Ly Decl. ¶ 40). Defendant argued that the employees could easily determine the start date by counting back one week. (Ly Decl. ¶ 41). Plaintiff disagrees, but this issue would have to be litigated and there is risk. (Ly Decl. ¶ 42).

Third, Defendant argued that none of Defendant's employees suffered any harm, injury, or actual damage as a result of the conduct that forms the basis for Plaintiffs allegations all of which, Defendant argued, should mitigate in favor of reducing any penalties. (Ly Decl. ¶ 43). Defendant maintained that Plaintiff was required to show injury per the Labor Code §226(e)(1). However, Plaintiff maintains that pursuant to Labor Code §226(e)(2)(B) injury is presumed by virtue of an employer failing to provide a properly itemized wage statement. ["An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly ...".]

Additionally, and perhaps most importantly, Defendant made an argument that the omission of the name and address of the company, the start date, and the last four digits of the social security number was not done knowingly and intentionally. Labor Code section 226(e)(1) states that the penalty for a violation of Labor Code section 226(a) is only available if the injury is a result of a "knowing and intentional failure by the employer." Labor Code section 226(f) defines "knowing and intentional" as not including "an isolated and unintentional payroll error due to a clerical or inadvertent mistake." Defendant provided evidence that the omission was the result of a switch from one payroll software (Vista Viewpoint) to a new payroll software (JD Edwards). Defendant argued that as a result of this switch, information was mistakenly and inadvertently left off of the wage statement template. As a result, if the trier of fact believed this testimony and found it negated the "knowing and intentional" requirement, this claim was worth no money.

Finally, Defendant contends that the Class Members were covered by collective bargaining agreements, and Defendant has argued that those Class Members are exempt from California's wage statement requirements under the Labor Code. (Ly Decl. ¶ 44).

Considering these arguments and especially with the argument that the omissions were not "knowing and intentional," Plaintiff determined that a reduction was warranted.

The full value of the Section 226(a) claim amounted to approximately $1,942,000. (Ly Decl. ¶ 45). This comes to approximately $19.08 per wage statement for this claim from the Net Settlement Amount and to $33.92 per statement when calculated from the Total Settlement Amount. (Ly Decl. ¶ 46). Class Counsel believes that this is well within the range of settlements approved across the State for these types of claims. (Ly Decl. ¶ 47).

Attached to the Ly Declaration (Ex. B-D) are several orders from cases handled by Class Counsel approving settlements of Labor Code section 226(a) claims for similar amounts. See e.g. *Sparks v. Diamond Foods, Inc.,* No. CGC 15-549147, (San Francisco Sup. Court, Nov. 25, 20 15) (Hon. Curtis E.A. Karnow approved a class settlement for a violation of Labor Code section 226(a) and PAGA in the amount of $656,000.00 for over 1000 Class Members and 37,598 itemized wage statements, or $17.45 per wage statement); *Knox et al. v. Gerdau Ameristeel US Inc., et al.,* No. FCS046622 (Solano Sup. Court, Feb. 7, 20 17) (Hon. Scott Kays approved a class settlement for a violation of Labor Code section 226(a) and PAGA in the amount of$475,000.00 for over 1000 Class Members and 21,701 wage statements, or $21.89 per wage statement); *Lopez v. Red Robin International, Inc.,* No. 30-2016-00846001-CU-OE-CXC (Orange County Sup. Court, Apr. 13, 20 16) (Hon. Glenda Sanders approved a class settlement for a violation of Labor Code sections 226(a) and 558 and PAGA in the amount of $497,500.00 for over 1000 Class Members and 28,382 wage statements, or $17.53 per wage statement).

Additionally, attached to the Ly Declaration (Ex. E-G) are several cases handled by other firms in California approving similar settlements. See e.g., *Adams v. Sam's West, Inc.,* No. CIVDS1403987 (San Bernardino County Sup. Court, Oct. 9, 2015) (Hon. Bryan F. Foster approved a class settlement for a violation of Labor Code section 226(a) and PAGA in the amount of$1,725,000 for approximately 11,000 class members and 400,000 wage statements, or $4.31 per

wage statement); *Figueroa v. San Jose Water,* No. 2015-1-CV-288483 (Santa Clara Sup. Court, October 28, 2016) (Hon. Peter H. Kirwan approved a class settlement for a violation of Labor Code section 226(a) in the amount of $140,000.00 for approximately 9,444 wage statements, or $14.82 per wage statement); *Esparza v. Spectrolab, Inc.,* No. BC628479 (Los Angeles Sup. Court, May 18, 2017) (Hon. Carolyn B. Kuhl approved a class settlement for a violation of Labor Code section 226(a) and PAGA in the amount of $240,000.00 for approximately 183 people and 3,737 wage statements, or $64.22 per wage statement).

Class Counsel believes that this is a fair and reasonable settlement when accounting for the risks identified above and taking into consideration the amount usually apportioned to these types of claims at the settlement stage. (Ly Decl. ¶ 48).

b) The Risks Associated with the PAGA Claim

The PAGA statute gives aggrieved employees the right to pursue specific labor code violations by way of a civil action. (Lab. Code § 2699.3.) Here, the aggrieved employees' PAGA claims are predicated on the wage statement claim described above. The Class is compensated for these violations in the proposed settlement, and thus any PAGA recovery for these same violations would be duplicative. (Ly Decl. ¶ 49).

Additionally, while PAGA provides a penalty amount of $100 for each aggrieved employee per pay period for the initial violation, and $200 for each aggrieved employee per pay period for each subsequent violation, it also gives the Court discretion to award a lesser amount. (Lab. Code § 2699(e).) Also, if a civil penalty is provided in a specified amount by the Labor Code section on which a PAGA claim is predicated, such as with the wage statement claim, the penalty amount from the underlying statute applies. *(Ibid.)* As such, the penalty amount for the wage statement claim is $100.00 per violation (at most).

The significant uncertainty associated with PAGA claims increased the Plaintiffs' and required a discount of those claims' settlement value. (Ly Decl. ¶ 50).

Given that there was no independent basis for the PAGA allegations and any penalties awarded would be duplicative, Plaintiff felt that a significant discount was warranted. (Ly Decl. ¶ 51). Class Counsel believes this could also lead the Court to use its discretion to award a lesser

amount. (Ly Decl. ¶ 52). This is especially true in light of the fact that Defendant promptly corrected the deficiencies in the wage statements, provided evidence that the omission of the wage statement information was a result of inadvertence. (Ly Decl. ¶ 53).

There 19,420 itemized wage statements in the one-year PAGA Period. (Ly Decl. ¶ 54). As such, the full value of the PAGA penalties attributed to the itemized wage statement claim is $1,942,000 ($100 per pay period). (Ly Decl. ¶ 55).

The Parties have allocated approximately $2.57 per wage statement. (Ly Decl. ¶ 56). The Parties felt that given the duplicative nature of the PAGA penalties, the fact that the wage statement violation was promptly fixed, and the inadvertence evidence described above, the decrease in penalty amount was appropriate. (Ly Decl. ¶ 57).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Given the risks outlined above, the issues in this case were complex and the risk for Plaintiff and the Class Members associated with this litigation was high. (Ly Decl. ¶ 58).

If the Court did eventually certify this case, trial involving 500 Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Ly Decl. ¶ 59). Finally, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Ly Decl. ¶ 60).

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified, but Plaintiff believes there is strong evidence to support certification. However, decertification is always a possibility. (Ly Decl. ¶ 61). In attempting to certify a class, the parties would need to conduct multiple depositions, and there is a risk for both sides as to whether the depositions support class certification. *(Id.)*

4. The Amount Offered in Settlement

A settlement is not judged against what might have been recovered had plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be reasonable. *Wershba v. Apple Computers, Inc.,* 91 Cal. App. 4th 224, 246, 250 (2001) ("Compromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed

settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.").

It was very difficult for the Parties to reach this Settlement. (Ly Decl. ¶ 62). They arrived at it only after hours of negotiation, aided by Mr. Rudy, and a careful evaluation of the records. *(Id.)* The full value of the claims was approximately $3,884,000.00, but this the maximum amount of penalties for each claim. (Ly Decl. ¶ 63). Once Class Counsel was able to determine the maximum damages, they decided on a fair and reasonable settlement for the Class considering the risks outlined above. *(Id.)*

In the end, the average settlement amount per Class Member is $722.41. (Gomez Decl. ¶ 14). The range of settlement amounts is $19.51 to $1,795.12. (Gomez Decl. ¶ 14).

5. The Experience and Views of Counsel

Plaintiff request that the Court appoint the law firm of Kingsley & Kingsley LLP, as Class Counsel. Kingsley & Kingsley is experienced in prosecuting and defending employment litigation, and the firm has focused a substantial percentage of its practice since the year 2000 on wage, hour, and working condition violations. (Ly Decl. ¶ 64-65). The firm is well versed in class action litigation and has diligently and aggressively pursued this action. *(Id.)* Class Counsel is unquestionably "qualified, experienced and generally able to conduct the proposed litigation." *Miller v. Woods,* 148 Cal. App. 3d 862, 875 (1983).

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630). As explained above, and detailed in the Settlement Agreement, the proposed plan of allocation compensates each participating Class Member on a pro rata share of the Distribution Amount based on the number of wage statements they received during the Class Period. (Ly Decl. ¶ 66; Ex. 1, ¶ IX). Further, the wage statements for each Class Member in the Class will be derived from the hire and termination dates and payroll data contained in the records kept by Defendant in the ordinary course of business during the

respective Class Period. (*Ibid.*) This allocation distributes Settlement funds proportionally to each class member and should therefore be approved as fair, adequate, and reasonable. (*Ibid.*)

7. The Reaction of the Class Members to the Proposed Settlement

To date, there are five (5) requests to be excluded from the proposed Settlement and no objections. (Gomez Decl. ¶¶ 10-11). This indicates that the reaction of Class Members on the whole is positive and weighs in favor of approval.

V. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT TO PLAINTIFF

The claims of the Representative Plaintiff, Luis Moreno, are typical of the Class Members' claims. (Ly Decl. ¶ 67). Mr. Moreno is an adequate Representative Plaintiff because he has diligently, adequately and fairly represented the Class and has not placed his interests above any member of the Class. (Ly Decl. ¶ 68; Luis Moreno Decl. ¶¶ 1-11; ("Moreno Decl.").

Class Counsel requests an enhancement for Mr. Moreno's valiant effort and time expended in this matter. The time spent by Mr. Moreno include identifying competent counsel, providing information to Class Counsel regarding his relevant employment experiences, compiling documents, conducting several telephone conferences with his attorneys, and reviewing settlement documents. (Ly Decl. ¶ 69; Moreno Decl. ¶¶ 7-10).

Thus, in addition to the sums paid to Class Members, Class Counsel requests approval of an enhancement payment to the Representative Plaintiff of $5,000.00, to be paid from the Total Settlement Amount. Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶ 70). The enhancement takes into consideration the time, effort, and expenses incurred by Mr. Moreno in coming forward to litigate this matter on behalf of all Class Members. (Ly Decl. ¶ 71). Additionally, the Representative Plaintiff was at risk for paying Defendant's legal fees and costs in the event that Defendant prevailed at trial. (Ly Decl. ¶ 72).

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VI. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and in the best interest of the Class. Therefore, Plaintiff respectfully requests that the Court (1) grant Final Approval of the Settlement and all of its terms; (2) award attorneys' fees and costs in the amount detailed in the Motion for Attorneys' Fees and Costs filed on December 10, 2019; (3) award CPT Group, Inc. claims administration fees of $11,000.00; and (4) award the Named Plaintiff an enhancement of $5,000.00; and (5) enter judgment.

DATED: January 28, 2020

KINGSLEY & KINGSLEY, APC

By: _____

Liane Katzenstein Ly
Attorneys for Plaintiff LUIS MORENO and the Proposed Class