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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

FERNANDO GUTIERREZ; DAVID CASTILLO; MARCO GONZALEZ, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

SAARMAN CONSTRUCTION, LTD.; SAARMAN, LLC; and DOES 1 through 100, inclusive.

Defendants.

Case No. CGC-18-568258

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: April 7, 2023
Time: 10:00 a.m.
Dept.: 613
Judge: The Hon. Andrew Y.S. Cheng

Action Filed: July 20, 2018

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I.SUMMARY OF THE LITIGATION

A. Background And Claims

On July 20, 2018, Plaintiffs filed the instant wage and hour class action against Saarman Construction, Ltd., and Saarman, LLC for: (1) Failure to Pay Wages including State minimum and prevailing wages; (2) Failure to Pay Overtime Wages; (3) Failure to Furnish Accurate Wage Statements; (4) Failure to Indemnify for Work Expenses; and (5) Unfair Competition in Violation of Business & Professions Code Section 17200. The class action lawsuit has been brought on behalf of all hourly construction workers, laborers, and carpenters who worked for Defendants in California during the period of four years prior to the filing of this action through the present. Saarman, LLC was subsequently dismissed from the action without prejudice, and the pending class action is currently proceeding only as to Saarman Construction, Ltd. ("Defendant" or "Saarman Construction").

Saarman Construction is a licensed construction contractor that provides reconstruction, restoration, and seismic retrofitting services for existing and occupied properties in California and Hawaii. According Saarman Construction, Ltd., "[f]rom north of the delta to south of San Jose, we work on a broad array of construction projects throughout Northern California and Hawaii. Specializing in occupied space we provide general contracting services to homeowners associations, apartments, commercial and hospitality buildings as well as single-family homes."

On July 1, 2020, Plaintiffs filed a First Amended Complaint to add a Sixth Cause of Action for Failure to Pay Earned Wages Upon Termination or Discharge.

This wage and hour lawsuit concerns three main issues. The first issue concerns Defendant's failure to pay the proper prevailing wages to its carpenters at a public works project known as Francis of Assisi, a/k/a the Mercy Housing Project, located at 145 Guerrero Street, San Francisco, CA, 94103. The second issue concerns Defendant's Alternative Workweek Schedule ("AWS") whereby Plaintiffs and Class Members worked 8.5 hours Monday through Thursday and 6 hours on Friday every workweek without the payment of overtime wages for all hours worked in excess of 8 hours in a workday. The third issue concerns Defendant's failure to reimburse Plaintiffs and Class

Members for their travel time to and from their jobsites when they drove their vehicles to bring their personal work tools.

1. Failure to Pay Prevailing Wages at Francis of Assisi (Mercy Housing Project)

Francis of Assisi, also known as the Mercy Housing Project, was a public works project located at 145 Guerrero Street, San Francisco, 94103. As a public works project, it was subject to California prevailing wage laws. Saarman Construction was contracted to perform renovation work relating to inside and outside walls, cabinetry, windows, and roofs at this project from September of 2016 through September of 2018.

On this project, Saarman Construction employed carpenters and laborers (including their superintendents and foremen). These workers primarily performed job duties that are assigned to certified carpenters: waterproofing around window installations, waterproofing around sliding door installations, creating holes in the roof to anchor and mount solar panels and then waterproofing the holes and bolts, hanging sheetrock for inside walls (attaching sheetrock to interior metal frames using screws), hanging DenseGlass (a type of fiberglass exterior gypsum sheathing used for exterior walls) for outside walls, building interior walls with metal studs, and building metal framing made of metal studs to divide the rooms inside.

Based on their actual job duties and the nature of the work done at the Mercy Housing Project, their work hours should have been paid at the carpenter's prevailing wage rates. However, Saarman Construction implemented a payroll policy or practice of reclassifying 3 or more hours of their daily work hours each day as laborer's work. More specifically, on each shift each day, Saarman Construction reclassified a portion of their daily hours worked as Laborer Group 3 so that those reclassified hours are paid at the lower laborer's prevailing wage rate. According to Saarman Construction, a total of 8006.5 hours of their time (excluding any hours attributable to those workers who have settled and signed releases with Defendant) were reclassified as "Laborer Group 3" which allowed them to pay these hours at the lower "Laborer Group 3" prevailing wage rate.

2. Failure to Pay Overtime Wages Employees Under Its Alternative Workweek Schedule Whereby The Employees Worked 8.5 hours from Monday through

Thursday and 6 hours on Fridays

On all the other job sites other than the Mercy Housing Project, defendant Saarman Construction allegedly implemented an alterative workweek schedule whereby its employees, including Plaintiffs, would work 8.5 hours from Monday through Thursday and 6 hours on Friday without the payment of overtime wages for their work in excess of 8 hours in a workday. Plaintiffs contend that under the AWS laws, Defendant was required to have an AWS election at each job site where Defendant had this alternative workweek schedule. Plaintiffs' argument is primarily based on their interpretation of the term "work unit" in the Wage Order's Election Procedures where it provides: "[e]ach proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer who has control over wages, hours, and working conditions of the affected employees, and adopted in a secret ballot election, held before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit." Plaintiffs contend that the term "work unit" must be interpreted as "work site."

However, Saarman Construction contends that the Alternative Workweek Schedule was adopted at an election that was held on 12/18/2012. According to Saarman, the final vote tally showed that 170 out of 186 employees voted in favor of the AWS. In the course of discovery, Saarman has produced the Alternative Workweek Proposal and Disclosure (both in English and Spanish) that was allegedly given to all the qualifying employees, the Alternative Workweek Schedule Informational Packet Sign-Off sheets which contain employee signatures to acknowledge their receipt of the informational packet, the AWS voting results, the Notice of Implementation of Alternative Workweek Schedule, and a cover letter dated January 2, 2013 to the Division of Labor Statistics and Research enclosing the AWS election results.

Based on this 12/18/2012 AWS election, Saarrman Construction implemented this alternative workweek schedule at all other job sites subsequent to the election whereby its workers worked 8.5 hours from Monday through Thursday and 6 hours on Fridays without the payment of overtime wages. Saarman contends that it was not required to hold a separate AWS election at every other job site subsequent to the 12/18/2012 election.

3. Failure to Pay For Travel Expenses To And From The Job Sites

Saarman Construction's employes brought and use their own personal tools at their job sites. According to Plaintiffs, they were required to bring and use their own personal tools at Saarman Construction's work sites. While Defendant did provide large tools and equipment, they were required to bring their own smaller personal tools such as tape measures, utility knives, nail pullers, squares, drills, work belts, saws, sanders, jigsaws, multitools, and levels, which were not provided by Defendant and were essential and necessary to perform their work at Defendant's projects.

In addition, they had to drive their own vehicles to and from these work sites, bringing and transporting their personal tools with them. Despite this fact, they were not reimbursed for their miles or any travel expenses.

4. Defendant's Defenses

Defendant denies any wrongdoing and denies liability and contends that it has valid defenses to all of Plaintiffs' claims. More specifically, Defendant contends that there is a valid Alternative Workweek Schedule for all workers after 12/18/2012, that the statute and wage order concerning AWS does require a separate AWS election for each work site, that no statutory interpretation would require a contractor to hold a separate AWS election for each and every job site, that California law expressly permits payment of different wage rates to the same worker on any prevailing wage project, according to the character of the work actually performed, that accurate time records were maintained to track the different characters of the work performed by its employees at the Mercy Housing Project, and that California law allows an employer to require workers to furnish "hand tools and equipment" if such tools and equipment are "customarily required by the trade or craft." IWC Wage Order 16, section 8(B). Defendant maintains that the employer is not obligated to reimburse employees for use of these personal tools.

B. Discovery and Mediation

The Parties engaged extensively in both formal and informal discovery prior to resolving this Action, conducted a thorough investigation into the facts of this Action, including written discovery, extensive records production, and extensive meet and confer over Defendant's

responses. The information obtained by Plaintiffs included: (1) over 6000 pages of payroll records, time records, personnel files, Public Works Certified Payroll Reporting Form, U.S. Department of Labor Payroll relating to the Mercy Housing Project, (2) plaintiff's payroll and time records and personnel files; (3) Saarman Construction's Alternative Workweek Proposal and Disclosure, AWS Informational Packet Sign-Off, AWS Informational Meeting Sign-In, AWS Voting Results, Labor Code section 511(e) Notice to the Division of Labor Statistics and Research, Notice of Implementation of AWS, compensation agreements for nearly all non-exempt employees in the Class and specific pay plan scales in effect during the Class Period; (4) project locations; (5) AWS data, including the number of workers who worked on AWS projects, the total number of shifts worked on AWS, the total number of shifts longer than 8.0 hours on AWS projects, and the estimated average hourly wages for workers working on AWS projects, (6) payroll and time data relating to the Mercy Housing Project, including the number of shifts worked including hours, and the total hours classified as "Laborer Group 3."

With this information, the Parties participated in 3 separate ADR sessions, which included 1 mediation and 2 mandatory settlement conferences. On May 26, 2022, the Parties participated in a mediation presided over by the Honorable George Hernandez (Ret.) Dickstein, Esq., a respected mediator of wage and hour class actions. The Parties vigorously debated their positions, the likelihood of class certification, and the legal bases for their claims and defenses. Thereafter, on June 27, 2022, the Parties attended a mandatory settlement conference with the Honorable Anne-Christine Massullo. Again, the Parties vigorously debated their positions, the likelihood of class certification, and the legal bases for their claims and defenses. On September 30, 2022, the Parties participated in a second mandatory settlement conference with Judge Massullo, which ultimately resulted in this class action settlement. This settlement is now being presented to this Court for preliminary approval. The Parties agreed to settle the Action to resolve all claims alleged against Defendant in Plaintiffs' operative complaint to the fullest extent permitted by law without any admission of liability or wrongdoing by Defendants.

II.PROPOSED SETTLEMENT

A. Settlement Class

"Class," "Class Member(s)" or "Settlement Class" means all hourly employees who worked shifts over 8.0 hours under an Alternative Workweek Schedule in their employment by Defendant in California during the period of July 20, 2014, through the present, but who were not paid an overtime premium rate for time in excess of 8.0 hours for those shifts, but excluding all employees who executed individual settlement agreements with Defendant prior to January 1, 2023.

There is also a subclass for the small group of employees who worked at the Mercy Housing Project. "Mercy Housing Project Subclass" shall mean all hourly employees who worked for Defendant at the a public works project known as Francis of Assisi, a/k/a the Mercy Housing Project from July 20, 2014, through the present, and who were paid an hourly rate classified as "Laborer Group 3" while working on that project, but excluding all employees who executed individual settlement agreements with Defendant prior to January 1, 2023. There are approximately 484 Class Members and 18 Mercy Housing Project Subclass Members.

B. Settlement Consideration

If the Court approves this settlement, Defendant will pay a non-reversionary Gross Settlement Amount of One Hundred Fifty Thousand Dollars ($150,000). Significantly, no Class Member will be required to file a claim form in order to receive payment from the settlement. All Class Members will automatically receive an Individual Settlement Payment unless they affirmatively opt-out.

Under the Settlement, the Gross Settlement Amount consists of the following disbursements: (1) the Net Settlement Amount to the participating Class Members and Subclass Members; (2) Class Counsel's attorney fees and costs; (3) the Settlement Administrator's costs; (4) the Representative Plaintiffs' Service/ Enhancement Awards. Gross Settlement Amount does not include the employer's share of payroll taxes, which will be paid separately by Defendant outside of the Gross Settlement Amount. The monetary terms of the Settlement are summarized as below:

- Gross Settlement Amount $150,000
- Minus Court-approved attorneys' fees (26 2/3%) $40,000
- Minus Court-approved costs (maximum) $10,000

- Minus Court-approved Service Awards $15,000
- Minus Settlement Administrator's costs (max) $11,000 .
  - **Net Settlement Amount** **$74,000**

Thus, the Net Settlement Amount is estimated at $74,000. This Net Settlement Amount is further allocated between the Class and the Mercy Housing Project Subclass as follows: 75% of the NSA to the Class and 25% of the NSA to the Subclass.

Each participating Class Members' share of the Net Settlement Amount will be calculated by using the following formulae. The portion of the Net Settlement Amount allocated to the Class shall be divided by the total number of shifts over 8.0 hours that all Class Members worked during the Class Period under the Alternative Workweek Schedule, but were not paid an overtime premium rate for time in excess of 8.0 hours. This will result in the "Shift Value." Each Class Member's Individual Settlement Payment will be calculated by multiplying the Shift Value by the number of shifts over 8.0 hours that the Class Member worked during the Class Period under the Alternative Workweek Schedule, but were not paid an overtime premium rate for time in excess of 8.0 hours.

The portion of the Net Settlement amount allocated to the Mercy Housing Project Subclass shall be divided by the total number of hours worked by all Mercy Housing Project Subclass Members on the Mercy Housing Project that were allocated to "Laborer Group 3," resulting in the "Hour Value." Each Mercy Housing Project Subclass Member's Individual Settlement Payment will be calculated by multiplying the number of hours the individual worked that were allocated to "Laborer Group 3" by the "Hour Value."

C. Release by Class Members

Plaintiffs and Class members who do not submit a valid and timely Request for Exclusion, will release all claims, rights, demands, liabilities, statutory causes of action, and theories of liability of every nature and description, whether known or unknown, that were alleged in the Action, or could have been alleged based on any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions or failure to act pled in the Action against any of the Released Parties. This waiver and release will be final and binding on the Effective Date, and will

have every preclusive effect permitted by law.

D. Notice Procedure

The Parties have selected CPT Group, Inc. ("CPT") to serve as the Administrator. The Parties have agreed on the form of notice to be mailed to the Class and the method of notice to the class (a) the Notice of Class Action Settlement and Estimated Individual Settlement Payment [Exhibit A to the Settlement Agreement] and (b) the Request for Exclusion Form [Exhibit B to the Settlement Agreement] (collectively "Class Notice Packet"). This Notice Packet, if approved by the Court, shall be sent by the Administrator to the Settlement Class Members, by first class mail to those addresses provided by Defendants. Each Settlement Class Member will have sixty (60) days from the date the Notice Packet is initially mailed to postmark, fax or email any Requests for Exclusion or Objections to the Settlement.

To participate in the settlement, a Class Member need not take any action. All members of the settlement class shall receive a settlement check unless he or she opts-out of the settlement. Any Class Member wishing to opt-out from the Settlement Agreement must sign and postmark a written "Request for Exclusion" to the Settlement Administrator within the Response Deadline. The postmark, fax, or email date will be the exclusive means to determine whether a Request for Exclusion has been timely submitted.

The Class Members will have an opportunity to dispute their number of "shifts" and/or "hours" credited to them in their Notice, provided they file a dispute with the Settlement Administrator in writing postmarked, faxed, or emailed no later than 30 days after the mailing of the Notices of Class Action Settlement. To the extent that Class Members dispute the number of "shifts" and/or "hours", Class Members may produce evidence to the Settlement Administrator showing that such information is inaccurate. The Settlement Administrator will advise the Parties of such dispute. Defendant's records will be presumed correct, but the Settlement Administrator will evaluate the evidence submitted by the Class Member and will make the final decision as to the merits of the dispute within seven (7) days of receipt of the dispute.

To object to the Settlement Agreement ("Objection"), a Class Member can either submit a

written Objection to the Settlement Agreement or appear at the Final Approval hearing in person or by and through counsel, to state and argue his/her objection to the Settlement. If a written Objection is submitted, the Objection must be mailed, faxed, or emailed to the Settlement Administrator on or before the Response Deadline. invalid. Alternatively, Class Members may appear at the Final Approval Hearing to argue and present their Objections to the Court.

III.LEGAL ARGUMENT

A. The Settlement Agreement Resulted from Arm's-Length Negotiations

The presumption is that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. (*See Williams v. Vukovich* (6th Cir.1983) 720 F.2d 909, 922-923 ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig.* (S.D.N.Y. July 30, 2004) 2004 U.S. Dist. LEXIS 14822, at *34 ("Where 'the Court finds that the settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness'"); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.25 (4th ed. 2002); Manual For Complex Litig. (4th Ed. 2004), §21.612.)

The proposed settlement here is the product of arm's-length negotiations between the Parties after extensive discovery and analysis. The Parties have investigated the applicable laws, as applied to the facts discovered, regarding the alleged claims of the Class and potential defenses thereto, as well as the damages claimed by thereon. Armed with this extensive body of information and analysis, the Parties engaged in full, complete, and ultimately successful settlement discussions. At all times, the negotiations leading to the Settlement have been adversarial, non-collusive and at arm's length, which were mediated through a settlement judge at multiple mandatory settlement conferences.

B. Preliminary Approval of the Settlement is Warranted.

California Rules of Court 3.769 requires the court's approval of any class action settlement, and an inquiry into the fairness of the proposed settlement prior to final approval. Cal. R. Ct. 3.769(a), (g). California's "[p]ublic policy generally favors the compromise of complex class action

litigation." (*Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 581 (quoting *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117-1118).)

Class actions settlements are approved where the proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625, cert. denied, 459 U.S. 1217 (1983)). A presumption of fairness exists when: (1) the parties reached a settlement through arm's-length bargaining; (2) the parties conducted sufficient investigation and discovery to allow counsel and the Court to act intelligently; (3) counsel are experienced in similar litigation; and (4) the percentage of objector is small. *Dunk*, *supra*, 48 Cal.App.4th at 1802.

To determine whether the settlement is fair, the trial court considers all relevant factors, including, but not limited to, "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . and the reaction of the class members to the proposed settlement." *Dunk*, *supra*, 48 Cal.App.4th at 1801. The Court's primary function is to ensure that the settlement is not the product of fraud, overreaching, or collusion, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *Id*

1. The Strength of Plaintiffs' Case

Plaintiffs maintain that their claims are meritorious, and Plaintiffs are prepared to litigate their claims through class certification and ultimately through trial. However, Plaintiffs are cognizant of substantial risks and uncertainty in successfully proceeding with the litigation given the multiple defenses to Plaintiffs' claims that Defendant has presented, both on the merits and to class certification.

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

The Parties have been litigating this matter for over 4 years and engaged in significant formal discovery, document production, legal and data analysis. If the litigation is to continue, more discovery will need to be conducted, including taking multiple depositions and continuing with

written and document discovery, in addition to preparing to file for class certification. Even if Plaintiffs' class certification motion were granted, the Parties would incur significantly more attorneys' fees and costs through possible decertification motion, trial, and possible appeal. This settlement avoids those risks and avoids incurring further expense.

3. The Risk of Maintaining Class Action Status

As Plaintiffs have not yet filed for class certification, there is certainly a risk of not having a certified class at the time of trial. This settlement avoids this risk. Plaintiffs recognize the challenges they face in certifying a class and establishing liability on the underlying wage and hour claims.

4. The Amount Offered in Settlement

The proposed class settlement provides fair and reasonable monetary recovery for the proposed Class considering Defendant's defenses to Plaintiffs' claims. It is well settled that California courts recognize that "'the merits of the underlying class claims are not a basis for upsetting the settlement of a class action'" and the settlement need not provide one-hundred percent of the damages sought in order to be judged reasonable. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 246 and 250. "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 not a bar to class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side around in the interest of avoiding litigation.'" *Id*. (quoting *Air Lines Stewards v. American Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).

To allow this Court to make an informed assessment of the proposed Settlement pursuant to *Kullar v. Foot Locker Retail, Inc.* (2008) 18 Cal.App.4th 116, Plaintiffs' Counsel provides the following assessment of the claims and settlement. Courts have determined that settlements are, of course, reasonable even where Plaintiff recovers only a portion of their actual losses. *See Behrens v. Wometco Enters., Inc*. (S.D. Fla. 1988) 118 F.R.D. 534, 542 ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate."). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth

or even - a thousandth of a single percent of the potential recovery." *Id*; *see also Glass v. UBS Financial Servs.* (C.D.Cal. 2007) 2007 U.S. Dist. LEXIS 8476, *28-29 (approving settlement of an action claiming unpaid wages where the settlement amount constituted approximately 25% to 35% of the estimated actual loss to the class).

a. Failure to Pay Prevailing Wages

Plaintiffs contend that Defendant failed to pay prevailing wages at the Mercy Housing Project when their hours were classified as "Laborer Group 3" and were paid at the lower Laborer's Prevailing Wage Rate. To calculate Defendants' liability exposure for this claim, Plaintiffs obtained the following data: there are 18 members in the Mercy Housing Project Subclass, and the total number of hours that were paid as "Laborer Group 3" was 8007 hours. Assuming that these hours should have been paid at the higher Carpenter's Prevailing Wage Rate, Plaintiff calculate that the total exposure is approximately $176,989.83.

	Total Hours Classified as "Laborer Group 3"	Carpenter's Prevailing Wage Rate (Total Hourly Rate)	Laborer Group 3's Prevailing Wage Rate (Total Hourly Rate)	What Should Have Been Paid at the Carpenter's Prevailing Wage Rate	What Was Actually Paid at the Laborer Group 3's Prevailing Wage Rate	Unpaid Prevailing Wages
07/01/2016 - 06/30/2017	3129	$ 72.79	$ 51.24	$ 227,759.91	$ 160,329.96	$ 67,429.95
07/01/2017 - 06/30/2018	4878	$ 75.30	$ 52.84	$ 367,313.40	$ 257,753.52	$ 109,559.88
07/01/2018 - 06/30/2019	0	$ 77.97	$ 54.49	$ -	$ -	$ -
						$ 176,989.83

However, there is a significant risk that this claim may not be susceptible to class certification and may ultimately fail on its merits in light of Defendant's contention that California law expressly permits payment of different wage rates to the same worker on any prevailing wage project, according to the character of the work actually performed. Defendant contends that accurate time records were maintained to track the different characters of the work performed by its

employees at the Mercy Housing Project. Defendant cited to the Department of Industrial Relations Publics Works Manual, which contain a section titled "Different Classifications for the Same Worker," wherein it is stated that:

> The minimum prevailing wage for hours worked in the execution of a contract for pubic [sic] works is based upon the specified prevailing rates "for work of a similar character" (LC §§ 1771 and 1774.) Therefore, it is possible that one worker may perform more than one type of work during the course of a project.
>
> …
>
> Consistent with the language of Labor Code 1771, a contractor is generally not required to pay its workers at a rate higher than that specified in a particular wage determination for the type of work performed.

This conclusion would require individualized inquiries into how each worker at the Mercy Housing Project spent time in terms of their actual duties and may further support Defendant's merit-based defense.

Accordingly, based on the significant risk that Plaintiffs would be unable to establish liability for allegedly unpaid prevailing wages, Plaintiffs discounted the maximum potential exposure by 50% for risk of non-certification, and by an additional 50% to account for a risk of being unsuccessful on the merits and/or a substantial reduction in damages, to arrive at an estimated exposure of approximately **$44,247**.

b. Failure to Pay Overtime Wages

Plaintiffs' claim for unpaid overtime wages is based on Defendant's alternative workweek schedule. Plaintiffs contend that notwithstanding the 12/18/2012 AWS election, Defendant was required to hold a separate AWS election at every other job site subsequent to the 12/18/2012 election. Defendant did not have a separate AWS election at work sites other than the one held on 12/18/2012, and hence Defendant was required to pay overtime wages when its employees worked more than 8 hours per day.

To calculate Defendants' liability exposure for this claim, Plaintiffs obtained the following data: there are 484 members in the Class, the total number of shifts worked by all class members in excess of 8.0 hours under the AWS was 99,239 shifts, and the estimated average hourly rate for

workers on AWS projects was $28.01. Based on the foregoing, Plaintiffs estimated Defendant's maximum potential exposure as $694,921.

On the other hand, Defendant has presented a strong argument that (1) scores of employers in the construction industry have (like Saarman) conducted workforce-wide AWS elections and applied them to future projects; and (2) the DLSE has never taken any action to prevent it. Furthermore, Defendant argues that Wage Order 16 on AWS election procedures does not clearly support Plaintiffs' position that the term "work unit" must be interpreted to mean "work site" and that no court or legal authority has interpreted Wage Orde 16 in the manner Plaintiffs have argued. This argument would defeat Plaintiffs' claim for unpaid overtime wages entirely.

Accordingly, Plaintiffs discounted the maximum potential exposure by 50% for risk of non-certification, and by an additional 80% to account for a risk of being unsuccessful on the merits and/or a substantial reduction in damages, to arrive at an estimated exposure of approximately **$69,492**.

c. Failure to Reimburse for Commute Mileage/ Travel

Plaintiffs' claim for failure to indemnify work expenditures is based on Defendant's failure to reimburse Plaintiffs and Class Members for commute mileage under Labor Code § 2802, which requires an employer to indemnify an employee "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." To calculate Defendant's liability exposure for this claim, Plaintiffs relied on the following data provided by Defendant: there is a total of 804 project sites during the Class Period and 232,357 work shifts at those sites. Taking Defendant's main office in San Francisco as the starting point of their morning commute to the job site, and relying on the standard mileage rates from the Internal Revenue Service, Plaintiffs estimated the total unreimbursed commute mileage to be $3,590,466.

However, Defendant has argued that California law allows an employer to require workers to furnish "hand tools and equipment" if such tools and equipment are "customarily required by the trade or craft." IWC Wage Order 16, section 8(B). Wage Order 16, section 8(B) states: "[w]hen the employer requires the use of tools or equipment or they are necessary for the performance of a

job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may provide and maintain hand tools and equipment customarily required by the particular trade or craft in conformity with Labor Code Section 2802." Defendant argued that because Class Members and Plaintiffs were paid at a rate not less than two times the minimum wage, they could provide and maintain their own hand tools and equipment customarily required by their trade, and that they were not being "required" to bring their own tools and are not entitled to any separate commute mileage reimbursement or commute time payment. Additionally, any inquiry into Class Members' entitlement to commute mileage reimbursement would require individualized questions into what trade they were in, what duties they performed, what tools they carried, whether they were free from control of the employer during their commute time, and whether they drove their own vehicles or were given a ride.

Accordingly, Plaintiffs discounted the maximum potential exposure by 80% for risk of non-certification, and by an additional 80% to account for a risk of being unsuccessful on the merits and/or a substantial reduction in damages, to arrive at an estimated exposure of approximately **$143,618**.

d. Failure to Furnish Accurate Wage Statements

Plaintiffs contend that Defendant issued defective wage statements because (1) Defendant did not pay all prevailing wages at the Carpenter's Prevailing Wage Rate at the Mercy Housing Project; and (2) Defendant did not account for and pay overtime wages to those employees who worked more than 8 hours under the AWS. As a result, Plaintiffs contend that they are entitled to penalties under Labor Code section 226(e) as follows:

> An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney s fees.

As a penalty, this waiting time penalty claim under Labor Code § 226 is governed by the

one-year statute of limitations of Code of Civil Procedure § 340, which means that the relevant recovery period is July 20, 2017 through the present. The maximum waiting penalty recoverable per employee is $4000, assuming the employee has worked more than 40 pay periods in which there was at least one wage and hour violation. Plaintiffs and Class Members were paid biweekly or every 2 weeks. According to Defendant's data, Defendant's workforce working on its AWS projects decreased to 130-142 employees by 2017 and remained at this level through 2022. Assuming the maximum recovery of $4000 per employee, an estimated liability exposure is $568,000 ($4000 x 142 employees).

However, in order to obtain penalties under Labor Code section 226, Plaintiffs must prove that Defendant's failure to furnish accurate wage statements was "knowing and intentional." However, Defendant has presented a "good faith dispute" defense that would preclude the finding of "knowing and intentional" failure. In particular, Defendant argues that it relied on its reasonable interpretation of Wage Order 16 to apply the 12/18/2012 AWS to other projects, and relied on the Department of Industrial Relations Publics Works Manual to pay different wage rates to the same worker on any prevailing wage project, according to the character of the work actually performed.

Given Defendants' good faith defense to Plaintiffs' underlying claims, and individual inquiries that may be required to determine liability as discussed above, Plaintiffs discounted this amount by 80% for risk of non-certification and by an additional 80% for risk of being unsuccessful on the merits or not recovering the full amount sought, to arrive at an estimated exposure of **$22,720** on this claim.

e. Waiting Time Penalties

Plaintiffs contend that Defendants failed to compensate Class Members all wages due and owing at the end of each Class Member's employment if his/her employment ended during the Class Period. These earned and unpaid wages include Class Members' prevailing wages at the Mercy Housing Project and their overtime wages who worked more than 8 hours under the AWS. To calculate Defendant's liability exposure for this claim, Plaintiffs utilized the following data from Defendant: there are 484 members in the Class, and the estimated average hourly rate was $28.01.

As of the date of this Motion, there are 84 current employees and 400 former employees. Applying this figure to generate waiting time penalties for the maximum period of 30 days, Defendant's liability exposure is $2,688,960.

On the other hand, Defendants assert that they have several good faith defenses to waiting time penalties that would preclude a finding of willfulness under Section 203, which is sufficient to defeat a claim for and preclude waiting time penalties. *See* 8 Cal. Reg. Code § 13520 (A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute."); *In re Trombley* (1948) 31 Cal.2d 801, 808.

Defendant has presented a strong "good faith dispute" defense to both the unpaid prevailing wages and the unpaid overtime wages. Additionally, determining liability may require highly individualized inquiries. Accordingly, Plaintiffs discounted this amount by 80% for risk of non-certification and by an additional 80% for risk of being unsuccessful on the merits or not recovering the full amount sought, to arrive at an estimate exposure of **$107,558** on this claim.

5. Summary of *Kullar* Analysis

Using these estimated recovery figures for each of the claims described above, Plaintiffs estimate that the optimal recovery for the Class would be approximately **$387,635**, so that the Gross Settlement Amount of $150 ,000 would represent approximately **39%** of the recovery if Plaintiffs successfully certify the claims and win all of them on their merits. This is well within the realm of being fair, reasonable, and adequate. (*See, e.g. Glass v. UBS Financial Servs.* (C.D.Cal. 2007) 2007 U.S. Dist. LEXIS 8476, *28-29 (approving settlement which represented 25 to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement which represented "roughly one-sixth of the potential recovery); *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 ("The fact that a proposed settlement may only amount to a

fraction of the potential recovery does not, in and of itself, mean the proposed settlement is grossly inadequate or should be disapproved).)

6. The Extent of Discovery Completed and the Stage of the Proceedings

As described in detail above, the Parties have engaged in a thorough investigation before the proposed settlement was reached to allow the Parties to fully evaluate the claims and defenses. Based on the investigation and analysis conducted, Plaintiffs submit that the proposed settlement is reasonable. Absent settlement, Plaintiffs are at the stage of proceedings where they would be preparing to file a motion for class certification.

7. The Experience and Views of Counsel

The view of qualified and well-informed counsel of a class action that the settlement is fair, adequate, and reasonable is entitled to significant weight. *See Kullar, supra,* 168 Cal.App.4th 116, 133 (the trial court "may and undoubtedly should continue to place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement"); *see also Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.")

Plaintiffs' Counsel are experienced in employment law and wage and hour class actions, including cases involving similar claims at issue in this case. Counsel is thus qualified to evaluate the claims and defenses and to evaluate settlement versus continued litigation on a fully informed basis. Plaintiffs' Counsel thoroughly reviewed all information gathered through discovery and drew on their experience in similar cases to evaluate Plaintiffs' claims. Plaintiffs' counsel believe that this is a fair and reasonable settlement in light of the complexities of the case and uncertainties of class certification and further litigation.

Moreover, the settlement was reached with the assistance of Judge Massullo. The settlement was only reached after Judge Massullo engaged in extensive discussions with the Parties regarding the merits of their claims and defenses, their legal analyses, a fair settlement value for the case given the strengths and weaknesses of Plaintiffs' claims. This factor strongly supports preliminary

approval of the class settlement. *Kullar*, *supra*, 168 Cal.App.4th at 130.

8. The Settlement Has No "Obvious Deficiencies" and Falls Well Within the Range for Approval

The proposed Settlement Agreement has no "obvious deficiencies" and is well within the range of possible approval. The settlement provides significant monetary relief to Class Members, reflecting 39% of the estimated recovery that the Class could reasonably expect in light of the significant litigation risks and disputed wage claims. *See Dunleavy, supra,* 213 F.3d at 459 (approving settlement which represented "roughly one-sixth of the potential recovery"); *National Rural Telecomm. Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial").

C. The Court Should Approve the Proposed Notice of Class Action.

The threshold requirement regarding the sufficiency of class notice is whether the means proposed for distributing the notice are reasonably calculated to apprise the class of the pendency of the action, the proposed settlement, and the right to object to the settlement. Cal. R. Ct. 3.769(f). The standard for adequacy of notice to class members is "whether the notice has 'a reasonable chance of reaching a substantial percentage of the class members.'" *Wershba*, *supra*, 91 Cal.App.4th at 251 (citing *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974).

The content of the class notice is also subject to court approval and the notice must fairly apprise the class members of the terms of the proposed compromise and of the options open to opposing the settlement. Cal. R. Ct. 3.766(d); *Wershba, supra*, 91 Cal.App.4th at 251. If class members are given the option to opt-out, the notice must include: (1) brief explanation of the case, including the basic contentions or denials of the parties; (2) statement that the court will exclude the member from the class if the member so requests by a specified date; (3) procedure for the member to follow in requesting exclusion from the class; (4) statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel. *Id*.; *Cellphone Term. Fee Cases* (2010) 186 Cal.App.4th 1380, 1390; Cal. R. Ct. 3.766(d), 3.769(f).

Here, the proposed Notice of Class Action conforms to the Rules of Court and this Court's guidelines. The proposed plan to distribute the notice to Class Members by U.S. Mail is reasonable as it provides individual notice to all members who can be identified through reasonable effort. *Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156, 173 (deeming individual notice mailed to the class members to be one of the "best notice practicable."). The Parties have agreed to use CPT Group, an experienced settlement administrator, who will perform a National Change of Address search and in-depth skip tracing search in order to obtain the best possible addresses for Class Members.

The Notice is to be mailed in two versions, in English and Spanish. The Notice contains comprehensive information regarding the case, the terms of settlement, estimated payment for each Class Member and the method of calculation, the final approval hearing, and instructions as to how to opt-out or object to the settlement. Class Members will have 60 days to opt-out or object and 30 days to dispute their shifts and/or hours. Class Members who do not opt out will be bound to the terms of the settlement and will release all claims against Defendants that were pled or could have been pled based on the facts alleged in the Action. Further, each Plaintiff has agreed to a general release of all claims against Defendants, including a waiver of *Civil Code* section 1542. Plaintiffs submit that the content of the Notice is sufficient to fairly apprise Class Members regarding the terms of the settlement and option and instruction as to how to opt-out, object, or dispute shifts or hours, and satisfies the requirement under Rule 3.766 of California Rules of Court.

Dated: February 24, 2023

MICHAEL H. KIM, P.C.

By: _____
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