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SUPERIOR COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY

CENTRAL CIVIL WEST

OMAR RODRIGUEZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

HAWK II ENVIRONMENTAL CORP., a California corporation; and DOES 1–10, inclusive,

Defendants.

Case No. BC625121

Assigned to the Hon. John Shepard Wiley, Jr., Department 311

PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR CONDITIONAL CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT;

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declarations of Abigail Zelenski, Joseph Hekmat, and Omar Rodriguez and [Proposed] Order filed concurrently herewith]

Judge: Hon. John Shepard Wiley, Jr.
Date: March 8, 2017
Time: 11:00 a.m.
Dep't: 311

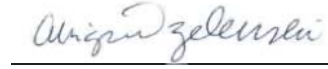
Complaint filed: June 24, 2016
Trial Date: None yet set

TO THE COURT, THE PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on March 8, 2017, at 11:00 a.m., or as soon thereafter as counsel may be heard, in Department 311 of the above-entitled Court located at 600 S. Commonwealth Avenue, Los Angeles, California 90005, Plaintiff Omar Rodriguez ("Plaintiff") will move and does hereby move for an order (1) granting conditional certification of a settlement class for the purpose of effectuating a Settlement reached with Defendant Hawk II Environmental Corporation ("Defendant"), (2) preliminary approval of a class-action settlement, (3) appointment of a third-party settlement administrator, (4) approval of the form and method of class notice, (5) approval of the proposed mechanism for receiving and handling objections to the settlement and requests for exclusion from the settlement, (6) approval of the named Plaintiff as class representative, (7) appointment of Abigail Zelenski, David Zelenski, and Sehreen Ladak of the Jaurigue Law Group, and Joseph Hekmat of Hekmat Law Group as Class Counsel, and (8) set the matter for hearing on final approval of the class-action settlement. The Motion will be made and based upon this Notice of Motion, the Memorandum of Points and Authorities appended hereto,[1] the Declarations of Abigail Zelenski, Joseph Hekmat, and Omar Rodriguez in Support of this Motion, filed and served herewith, and all of the pleadings, papers, and documents contained in the file of the within action; and such further evidence and argument as may be presented in support at or before the determination of the Motion.

Dated: February 6, 2017

JAURIGUE LAW GROUP
HEKMAT LAW GROUP



Abigail A. Zelenski
David Zelenski
Sehreen Ladak
Joseph Hekmat
Attorneys for Plaintiff

[1] The Memorandum exceeds fifteen pages in length, which is expressly permitted under the California Rules of Court. See Cal. R. Ct. 3.764(c)(2) (stating that "[a]n opening . . . memorandum filed in support of . . . a motion for class certification must not exceed 20 pages").

MEMORANDUM OF POINTS AND AUTHORITIES

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CASES

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I. INTRODUCTION.

Plaintiff Omar Rodriguez ("Plaintiff") respectfully requests this Court grant preliminary approval of the Settlement Agreement and Release ("Settlement") entered between Plaintiff, on behalf of himself and other similarly-situated Class Members whom he represents, on the one hand, and Defendant Hawk II Environmental Corp. ("Defendant"), on the other hand. Plaintiff further requests that this Court grant preliminary approval of the $250,000 non-reversionary settlement amount, finding that there is a *prima facie* showing that it is fair, adequate, and reasonable.[2] Plaintiff additionally requests that this Court conditionally certify the proposed class for settlement purposes; approve Abigail Zelenski, David Zelenski, and Sehreen Ladak of the Jaurigue Law Group and Joseph Hekmat of Hekmat Law Group as class counsel; approve Plaintiff Omar Rodriguez as class representative; approve Phoenix Class Action Administrators as the third-party settlement administrator ("Administrator"); approve the form and method of notice of settlement to putative Class Members; approve the proposed mechanism for receiving and handling objections and requests for exclusion from the settlement; and approve the subsequent automatic distribution of settlement proceeds to Class Members thereafter.

II. SUMMARY OF THE CASE.

Defendant owns and operates three gas stations in the greater Los Angeles area. During the relevant time period for the instant action, Plaintiff worked as an hourly employee between July 2013 and December 2015 at one of the gas stations. (*See* June 24, 2016, Compl., ¶ 8.) Plaintiff worked as a cashier, parking attendant, and general custodian primarily at Defendant's Chevron station located at 901 North Alameda Street, Los Angeles, California 90057. (*Id.* at ¶ 10.) Defendant's other locations include a Chevron station located at 2321 South Hacienda Boulevard, Hacienda Heights, California 91745, where Plaintiff briefly worked, and a Shell station located at 801 West Olympic Boulevard, Montebello, California 90640. (*Id.* at ¶ 8.) Plaintiff contends that Defendant blatantly failed to pay any overtime wages for hours worked over eight hours in a workday in addition to unpaid wages for at least fifteen minutes of daily overtime in violation of Labor Code sections 510 and 1198. (*See generally Id.*) Plaintiff also contends that Defendants failed to provide proper uninterrupted meal and rest breaks in

[2] A true and correct copy of the fully executed Settlement is attached as Exhibit 1 to the Declaration of Abigail Zelenski ("Zelenski Declaration"), filed and served herewith.

violation of Labor Code sections 512 and 226.7. Likewise, Plaintiff contends that Defendant failed to pay owed wages upon termination in violation of Labor Code sections 201, 202, and 203. (*See generally Id.*) Additionally, Plaintiff contends that Defendant failed to furnish accurate and proper itemized wage statements in violation of California Labor Code section 226. (*See generally Id.*) Moreover, Plaintiff asserts that Defendant wrongly charged for required uniforms in violation of Labor Code section 2802. (*See generally Id.*) Based on the aforementioned violations, Plaintiff claims that Defendant further violated California's unfair-competition laws and is also liable for additional derivative pay-stub and civil penalty claims for Defendant's various Labor Code violations. (*See generally Id.*)

On or about February 17, 2016, Plaintiff sent a pre-litigation demand letter to defense counsel outlining the facts and claims of the instant action. (Decl. of Abigail Zelenski in Supp. Of Pl.'s Mot. for Conditional Class Certification and Preliminary Approval of Class-Action Settlement ("Zelenski Declaration") [filed herewith] ¶ 8.) On or about February 24, 2016, Plaintiff and Defendant (collectively the "Parties"), through their respective counsel of record, entered into an agreement tolling their claims, defenses, and the applicable statute of limitations until April 23, 2016. (*Id.*) After receipt of the initial demand letter, Defendant began negotiating releases with the putative Class Members in exchange for payment of allegedly due amounts. (*See* Joint Initial Status Conference Class Action Response Statement, filed September 21, 2016.)

On or about April 24, 2016, the parties entered into a second tolling agreement extending the initial tolling agreement through June 24, 2016. (*Id.*) On or about April 25, 2016, pursuant to section 2699.3(a)(1), Plaintiff gave written notice to the Labor and Workforce Development Agency ("LWDA"), through his attorney of record, of the specific provisions of the California Labor Code alleged to have been violated. (*Id.* at ¶ 9.)

On or about June 24, 2016, Plaintiff filed a Class-Action Complaint in Los Angeles County Superior Court. (*See generally* June 24, 2016, Compl.) The Complaint asserts the following eight causes of action against Defendant: (1) failure to provide accurate itemized wage statements under Labor Code section 226; (2) failure to provide meal breaks under sections 512 and 226.7 of the Labor Code; (3) failure to provide rest breaks under section 226.7 of the Labor Code; (4) failure to pay proper overtime

compensation under Labor Code sections 510, 1194, and 1198; (5) failure to reimburse employees for their uniforms in violation of Labor Code section 2802; (6) violation of section 17200 *et seq*. of the California Business and Professions Code; (7) failure to pay wages upon termination in violation of Labor Code sections 201, 202, and 203; and (8) civil penalties under the Private Attorneys General Act (Labor Code section 2698 *et seq.*). (*Id.*)

Defendant, however, disputes all of Plaintiff's allegations, specifically and generally denying all of Plaintiff's allegations in the Complaint, as set forth in its Answer filed on November 18, 2016. Defendant contends that Plaintiff would only qualify to represent those employees who worked at the gas station location(s) at which he worked, rather than all three owned by Defendant. Defendant further alleges that the class size is less than 30 individuals (rather than the approximately 109 Class Members alleged by Plaintiff), because it purportedly solicited and obtained releases from its employees after Plaintiff served his pre-litigation demand letter in February 2016. (*See* Joint Initial Status Conference Class Action Response Statement, filed September 21, 2016.)

After the matter was filed in June 2016, the Parties agreed to attend private mediation. (*See* Zelenski Declaration ¶ 11.) Prior to the mediation, the Parties engaged in informal class discovery and Defendant produced payroll records in the form of payroll journal reports for all of the putative class members; timecards from a sampling of 21 employees (representing one-fifth of the alleged Class); purported releases solicited from employees; weekly employee schedules; and an exemplar arbitration agreement. (Zelenski Declaration ¶ 10.) Plaintiff relied on this information for his extensive damage analysis. (*Id.*) Plaintiff sat for his deposition on November 30, 2016. (*Id.*) On December 13, 2016, the Parties participated in a full-day mediation before Henry Bongiovi, an AV-Rated attorney and seasoned mediator with extensive experience in California employment and labor laws. (*See* Zelenski Declaration ¶ 11, Ex. 3.) Both parties and their counsel of record were in attendance at the mediation, including Plaintiff, on behalf of himself and the Class, and Joe Bezerra, Jr. on behalf of Defendant. (*Id.*) The Parties mediated for almost the entire day, came to an agreement, and executed a short-form settlement agreement before Mr. Bongiovi. (Zelenski Declaration ¶ 11.) The Parties later formalized the settlement reached at the mediation into the Settlement now presented to this Court for preliminary approval. (Zelenski Declaration, ¶ 12, Ex. 1.)

III. SUMMARY OF PLAINTIFF'S DAMAGE ANALYSIS.

As discussed above, the Parties engaged in substantial informal and formal discovery upon which Plaintiff based his damage analysis. (Zelenski Declaration ¶ 10.) Specifically, Defendant provided extensive employment data of the putative Class Members. (*Id*.) Based on this data and Plaintiff's experience under Defendant's employment, Plaintiff believes he possesses a strong class action case for unpaid overtime, inadequate meal and rest breaks, failure to reimburse uniforms, and related claims on behalf of himself and the putative class, including damages under Labor Code section 226 for himself and approximately 108 other Class Members. (Zelenski Declaration ¶¶ 15, 17.)

Specifically, Plaintiff estimates that the total unpaid overtime for Defendant's failure to apply the proper overtime rate when employees worked over eight hours in a workday is approximately $2,000 for all Class Members. Plaintiff further estimates that the total unpaid wages for off-the-clock time is approximately $4,000 for all Class Members. For civil-penalties liability, which is covered by a one-year limitations period, Plaintiff reasonably estimates 240 total overtime violations. Using the $100 civil-penalty set forth in Labor Code section 558, the total civil penalties totals approximately $24,000 for 109 employees. (Zelenski Declaration ¶ 18(a).) Plaintiff also conservatively calculates that approximately 9,100 meal breaks and 9,100 rest breaks were missed collectively amongst the 109 Class Members, resulting in $144,000 in missed meal and rest wages and approximately $250,000 in civil penalties. (Zelenski Declaration ¶ 18(b).) With respect to wage-statement violations under Labor Code section 226(a), Plaintiff found that wage statements issued by Defendant did not list employee identification numbers or the last four digits of employees' social security numbers, failed to list the employee's inclusive dates worked and the employer's legal address. (June 24, 2016, Compl. ¶ 33; Zelenski Declaration ¶ 18(c).) Plaintiff estimates that Defendant would be liable for $115,000 under Labor Code section 226(e) and $250,000 in civil penalties under Labor Code section 2699(f). (Zelenski Declaration ¶ 18(c).) Moreover, Plaintiff estimates that Defendant owes Class Members approximately $1,090 for uniforms, assuming each uniform cost $10, and an additional $21,800 in PAGA penalties for failure to reimburse Class Members for said uniforms. (Zelenski Declaration ¶ 18(d).) Lastly, based on informal discovery with Defendant, Plaintiff approximates 50 former employees make up the settlement class. Based on a conservative average hourly wage rate of $8.36 and an average workday of seven

hours, Plaintiff estimates that Defendant would be liable for approximately $1,755 in continuing wages per former employee, or approximately $87,750 total. (Zelenski Declaration ¶ 18(e).) Defendant vehemently denies all of Plaintiff's allegations and all claims.

However, if this case is not settled, it is likely that Defendant will dispute all of Plaintiff's claims and oppose class certification. Defendant will likely argue that Plaintiff is not an adequate representative for the employees at Defendant's other gas stations, namely the Hacienda Heights gas station (where he briefly worked) and the Shell gas station in Montebello, California (where Plaintiff did not work at all). Mainly, Defendant will likely argue that it obtained valid releases/waivers from potential Class Members, bringing the class-size down to less than thirty. Such arguments may affect the numerosity requirement to defeat class certification. With respect to damages under section 226, Defendant would likely contend that individualized inquiry into each putative class member's claim of damages would be required. (*See* Zelenski Declaration ¶¶ 15, 18.) Further, litigation could result simply in higher attorneys' fees, but there is a good chance it would not result in a significantly greater recovery for the individual Class Members. (Zelenski Declaration ¶ 19.)

IV. CONDITIONAL CLASS CERTIFICATION.

Concerns about the rights of absent Class Members are satisfied by a careful fairness review of the settlement by the trial court, and pre-certification settlements that have been subjected to such a review are routinely approved at the appellate level in both federal and California's judicial systems. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001). The trial court is required to make a determination that the class representative can and will adequately represent the interests of absent Class Members. However, this does not require that the representative's claims be identical to those of the absent members. Nor is there any ironclad rule requiring the trial court to conduct an evidentiary hearing on the issues. *Lazar v. Hertz Corp.,* 143 Cal.App.3d 128, 140 (1983).

A. The Settlement Class.

Wage-and-hour cases such as the above-captioned matter "routinely proceed as class actions." *Prince v. CLS Transp., Inc.,* 118 Cal. App. 4th 1320, 1328 (2004). Obviously, many such cases settle. Here, there has not yet been certification of a class; that is, the Settlement was negotiated *prior* to the filing of a motion for class certification. However, "[a] trial court unquestionably ha[s] the authority to

conditionally certify a class for settlement purposes." *Hernandez v. Vitamin Shoppe Indus. Inc.*, 174 Cal. App. 4th 1441, 1457 (2009).

Pursuant to the Settlement, the Parties have agreed to seek conditional certification of a Class defined as:

> [A]ll employees of Defendant employed in the State of California at any time during . . . the period beginning February 24, 2012, to the date the Settlement is signed by all the parties [January 26, 2017], excluding any person who submits a timely and valid request for exclusion as provided in th[e] Settlement.

(Zelenski Declaration ¶ 16; Ex. 1, ¶¶ 3, 6, 32, 37, 41.) Based on the foregoing definition and the discovery exchanged between the Parties, the Parties have stipulated to a class size of approximately 109 members. (Zelenski Declaration ¶ 17.) Plaintiff submits that this Settlement is entirely reasonable for absent Class Members. A determination of whether an action meets the standards of class certification requires a review of section 382 of the California Code of Civil Procedure, which section provides: "[W]hen the question is one of a common or general interest, or many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Cal. Civ. Proc. Code § 382. Here, the class meets the criteria for certification.

1. Numerosity and Ascertainability.

Class certification is proper when the parties are numerous and it is impractical to bring them all before the court. *See Int'l Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983) (explaining that a class size exceeding forty would satisfy the numerosity requirement); *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (holding that forty-two members is sufficient for numerosity purposes); *Perez-Funez v. District Dir. Immigration and Naturalization Serv.*, 611 F.Supp. 990, 995 (C.D. Cal. 1984)(explaining that a class size of twenty-five members is sufficient for numerosity purposes). Under California law, no minimum number of plaintiffs is required as a matter of law for maintenance of a state court class action. *Rose v. City of Hayward*, 126 Cal.App.3d 916, 934 (1981) (equitable considerations prevail over mere numbers. The size of the claim involved and any public interest factors in the case are determinative); *cf Steward v. Abraham*, 275 F.3d 220, 226-227(3rd Cir. 2001) (Under federal case law, the numerosity requirement is generally met if the potential number

of plaintiffs exceeds 40.) The California Supreme Court has upheld a class representing ten beneficiaries of a trust alleging improper conduct by trustees. *Hebbard v. Colgrove*, 28 Cal.App.3d 1017, 1030 (1972). Further, Courts have upheld a class action filed by nine named plaintiffs on behalf of 35 others. *See Collins v. Rocha*, 7 Cal.3d 232 (1972).

Here, the Parties have stipulated to a class of approximately 109 members. Individual Class Members are clearly ascertainable from a search of Defendant's own employment records that it is required to maintain and have maintained. *See* Cal. Lab. Code § 1174 (requiring employers to maintain employee records); (June 24, 2016, Compl. ¶ 25.). Joinder of all the putative Class Members' separate actions would be impracticable and would serve to make the case unmanageable. (*Id.*) Disposition of the claims of the settlement class by class-wide settlement will provide substantial benefits to the individual settlement Class Members, as well as to Defendant.

2. Common Issues of Fact and Law Predominate.

For the purposes of Settlement, the following issues are common across the putative class: (1) whether Defendant's failure to pay overtime for time worked after employees were required to clock out was a violation of Labor Code sections 510, 1194, and 1198; (2) whether Defendant prevented employees from taking uninterrupted meal breaks and rest breaks in violation of Labor Code sections 226.7 and 512; (3) whether Defendant failed to provide accurate wage statements in violation of Labor Code section 226 by (a) failing to list employee identification numbers or only the last four digits of employees' social security numbers on its pay stubs, (b) failing to list employees' actual hours worked on its pay stubs, and/or (c) failing to include the inclusive dates worked on its pay stubs; (4) whether Defendant's failure to promptly pay due wages at the time of each members termination of employment constitute continuing wages under Labor Code section 201, 202, and 203; (5) whether Defendant violated Business and Professions Code section 17200 *et seq.*; (6) whether Defendant's failure to reimburse members for uniforms violated California Labor Code section 2802; and (7) whether Defendant's alleged violations of the various provisions of the Labor Code give rise to civil penalties under the Private Attorneys General Act (PAGA), California Labor Code section 2698 *et seq*. These issues need be decided only once for the settlement class as a whole, rendering this case ripe for certification. Plaintiff and Class Members were all hourly-employees and performed substantially the

same duties as gas station workers/cashiers, subject to the same policies, supervision, and management. (*See* June 24, 2016, Compl. ¶¶ 12, 26.)

The only significant "non-common" issues will be the specific dollar amounts of recover to which each class member is entitled, which is insufficient to bar class certification because individual assessment of damages is commonly required in all class-action cases. *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 743 (2004) ("[T]he necessity for an individual determination of damages does not weigh against class certification. The community of interest requirement recognizes that ultimately each class member will be required in some manner to establish his individual damages[;]. . . a class action is not inappropriate simply because each member of the class may at some point be required the make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.")(internal citations omitted).

3. The Claims of the Named Plaintiff Is Typical of Those of Class Members.

The element of typicality only requires that the named plaintiff of a class action possesses claims similar to those of the putative Class Members—not identical. *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 474-75 (1981); *Classen v. Weller*, 145 Cal.App.3d 27, 46-47 (1983). Here, Plaintiff contends, as class representative, claims that are greatly similar to those of the settlement Class Members, all of whom formerly worked or currently work as hourly employees for Defendant's gas stations, and all of whom were subject to the same corporate policies. All members of the settlement class have a common interest in holding Defendant responsible for any amounts that may be owed to them under the provisions of the Labor Code. (*See* June 24, 2016, Compl. ¶ 27.)

4. The Named Plaintiff and his Counsel Will Adequately Represent the Class.

Finally, Plaintiff is an adequate class representative. Plaintiff has no conflict of interest with any class member, as he shares the same desire to be made whole under the Labor Code. Plaintiff is committed to pursuing the claims of the Class Members, and his motivation in retaining counsel and pursuing this action has solely been to collect the amount owed for himself and his fellow Class Members. Plaintiff has taken the time to be an active participant in this action, including sitting for his deposition on November 30, 2016 and attending mediation on December 13, 2016, with his counsel.

(Zelenski Declaration ¶¶ 9, 22; Hekmat Declaration ¶ 12; Rodriguez Declaration ¶¶ 3-5.)

The qualifications of class counsel—Abigail Zelenski, David Zelenski, Sehreen Ladak, and Joseph Hekmat—are set forth in the accompanying Zelenski Declaration and Declaration of Joseph Hekmat ("Hekmat Declaration"). Those qualifications should assure the Court that the interests of the unnamed Class Members will be adequately and vigorously represented. (Zelenski Declaration ¶¶ 2–7; Hekmat Declaration ¶¶ 2–3.) Suffice it to say that, collectively, Plaintiff's counsel have recovered millions of dollars for employee Class Members in a myriad of wage-and-hour cases. (Zelenski Declaration ¶ 2–5.) Under the circumstances, this Court can be assured that proposed class counsel will adequately discharge its responsibilities to the class.

V. SUMMARY OF PROPOSED SETTLEMENT.

A. The Settlement Amount and Payments to Settlement Class Members.

The proposed Settlement entitles Plaintiff and the settlement class to a fixed, non-reversionary common settlement fund of $250,000 that shall be allocated as follows, subject to Court approval:

(i) A request for class counsel's attorneys' fees in the amount of $83,325 or 33.33% of the settlement fund, plus costs and expenses as supported by declaration.

(ii) A request for payment for third-party settlement administration fees estimated not to exceed $12,000.

(iii) A request for Plaintiff's enhancement award in the amount of $7,500.

(iv) A request for payment to the Labor and Workforce Development Agency in the amount of $20,000 for alleged civil penalties owning under PAGA.

(v) A request for employer-side payroll taxes be paid;

(v) The net settlement fund after deducting (i) through (v) above to be distributed to the Class, as follows:

(a) Eighty percent of the net settlement fund (i.e. the total settlement fund of $250,000 less the Plaintiff's enhancement, class counsel's attorneys' fees and costs, third party settlement administration fees, employer-side payroll taxes, and payment to the Labor and Workforce Development Agency) to be paid *pro rata* to each class member based on the number of workweeks worked throughout the class period beginning February 24, 2012, to January 26, 2017.

(b) Twenty percent of the net settlement fund to be paid *pro rata* to all class members who are former employees of Defendant for waiting-time penalties under section 203 of the Labor Code. (Zelenski Declaration ¶ 20.)

Some Class Members previously executed a "Confidential General Release Agreement" with Defendant between February 17, 2016, and December 12, 2016, and received a previous settlement payment therefrom. For Class Members who signed said agreement and received such payment, his or her individual settlement payment will be reduced from the Class Member's individual settlement payment. The amount deducted will be paid to the Los Angeles Mission (and earmarked for the Urban Training Institute at the Los Angeles Mission), as the *cy pres* recipient. (*Id*.)

The specific dollar amount allocated to each class member will not be known until the administration process has completed and it is known how many Class Members request to be excluded from the Settlement. If no class member files an exclusion, each Class Member will, on average, receive approximately $1,170. (*Id.; see also* Zelenski Declaration, Exhibit 1, ¶¶ 60–67.)

Individual settlement payments shall be mailed by regular first-class U.S. Mail to Settlement Class Members' respective last-known mailing addresses no later than fourteen (14) calendar days after the Effective Date, i.e. (a) the date when the Final Approval Order and Judgment is signed, if there are no objectors; or (b) in the event there are objectors, forty-five (45) calendar days after service of notice of entry of the Final Approval Order and Judgment on the Parties and all objectors to the Settlement without any appeals or request for review being taken, or (c) forty-five (45) calendar days after service of orders affirming said Final Approval Order and Judgment or denying review after exhaustion of all appellate remedies, if appeals or requests for review have been taken. (Zelenski Declaration ¶ 22.)

In the event that any individual settlement payment check remains uncashed after one-hundred-eighty (180) calendar days, said check shall be voided, and such funds shall escheat in accordance with the applicable escheat laws of the States involved. It shall be the responsibility of the Settlement Administrator to maintain an escheatment account and to administer such uncashed Individual Settlement Payments in accordance with the applicable escheat laws of the involved States pursuant to this provision. (Zelenski Declaration ¶ 22.)

B. Tax Implications.

The Parties make no representations as to the tax treatment or legal effect of the settlement distributions. Settlement Class Members will be responsible for the payment of any taxes and penalties assessed on the individual settlement payments described in the Settlement, other than the employer-side payroll taxes. Employer-side payroll taxes shall be paid from the settlement amount. (Zelenski Declaration Ex. 1, Settlement ¶ 68.) The Settlement Administrator shall issue form 1099 and/or W2s to each class member for the year in which payments are made. (Zelenski Declaration Exhibit 1, ¶ 63.)

C. Appointment of Class Counsel and the Settlement Administrator.

For purposes of settlement, the Parties have stipulated to the appointment of Jaurigue Law Group's Abigail Zelenski, David Zelenski, and Sehreen Ladak and Hekmat Law Group's Joseph Hekmat as class counsel, subject to Court approval. (Zelenski Declaration, Exhibit 1, ¶ 4.) As noted above, the qualifications of class counsel are set forth in the accompanying Zelenski Declaration and Hekmat Declaration. (Zelenski Declaration ¶¶2–7; Hekmat Declaration ¶¶ 3–4.) The Parties have also stipulated to the appointment of Phoenix Class Action Administrators as the Settlement Administrator to provide Notice to putative Class Members and to administer the settlement. (Zelenski Declaration ¶ 28.) The settlement-administration estimate is attached as Exhibit 4 to the Zelenski Declaration.

D. Attorneys' Fees and Costs.

The Settlement provides that class counsel's fees and costs shall be paid from the $250,000 settlement fund, in an amount to be approved and ordered by the Court after consideration of Class Counsel's application for attorney's fees and costs. (Zelenski Declaration, Exhibit 1, ¶ 65.) Defendant has agreed not to object to an award to class counsel of fees in an amount up to 33.33% of the settlement fund, or $83,325, plus costs. (Zelenski Declaration ¶ 27; Exhibit 1, ¶65.) Class counsel will file a motion seeking an award of fees and costs before the close of the objections deadline, which will be set for hearing simultaneously with the motion for final approval of the Settlement. (Zelenski Declaration ¶ 27.) Accordingly, compensation for class counsel will be left entirely to the determination of the Court at the time of final approval of the Settlement. The Settlement Administrator shall pay the class counsel the Attorney's Fees and Costs award pursuant to the Court's order no later than fourteen days after the Effective Date. (Zelenski Declaration, Exhibit 1, ¶ 65.)

E. Class Notice and Request for Exclusion.

"[A] trial court has virtually complete discretion as to the manner of giving notice to class Members." *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 57 (2008) (internal citations omitted). Upon proper notice to and assessment of any objections or requests for exclusion from putative Class Members (as described below), net settlement fund will automatically be distributed to Class Members without any contingent requirement of putative Class Members to submit a claim form.

Specifically, no later than seven days after preliminary approval, Defendant will provide the Settlement Administrator with the full names, employee numbers, last-known addresses, last-known home telephone number, social security numbers, and dates of hire and termination of the Class Members. (Zelenski Declaration ¶ 23.) Upon receipt of said information from Defendant, the Settlement Administrator will perform a search based on the National Change of Address Database to update and correct any known or identifiable address changes. (*Id.*) No later than fourteen days after receiving said information from Defendant, the Settlement Administrator shall mail copies of the Notice Packet via regular first-class mail containing in English and Spanish: (a) a Notice of Class Action Settlement informing Class Members that no action need be taken except to apprise the Settlement Administrator of any change of address in order to receive their individual settlement payment, (b) an Employment Information Sheet, containing the Class Member's starting and ending dates during the class period, the number of compensable workweeks, and the estimated amount of his or her individual settlement payment if he or she does not request to be excluded from the Settlement; and (c) a Change of Address form. Any Notice Packets returned to the Settlement Administrator as non-delivered on or before the response deadline shall be re-mailed to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator shall exercise its best judgment to determine the current mailing address. (*Id.*) Class members will then have forty-five days after the Settlement Administrator mails the Notice Packet to Class Members to request to be excluded from the Settlement.[3] (*Id.*) Class Members will have an additional fifteen days if they are re-mailed a Notice

[3] If seven percent or more of the Class Members submit an Exclusion Letter, Defendant shall have the option of cancelling the settlement (within 7 days after the Settlement Administrator notifies the Parties of the number of requests for exclusion), and all actions taken in its furtherance will be null and void. (Zelenski Declaration, Exhibit 1, ¶ 59.)

Packet due to the initial Notice Packet being returned to the Settlement Administrator as non-delivered. (*Id.*) Plaintiff contends that the proposed notice procedure and mailing is the best means of giving notice under the circumstances and will likely give actual notice to most of the Class Members and does not burden the Class Members by requiring them to submit a claim form.

F. Plaintiff's Class Representation Enhancement Award.

The Settlement provides for an additional payment in the amount of $7,500 for Plaintiff for the services that he has rendered to the settlement class in bringing this litigation and on account of the time he has devoted in support of this litigation. Incentive awards "are not uncommon and can serve an important function in promoting class action settlements." *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, 2002 U.S. Dist. LEXIS 16314 at *16 (E.D.N.Y. filed August 1, 2002). It is appropriate to provide a payment to class representatives for his or her services to the class. *Van Vraken v. Atlantic Richfield Co.,* 901 F.Supp. 294, 299 (N.D. Cal. 1995); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005) ("Proceeding by means of a class action avoids subjecting each employee to the risks associated with challenging an employer"); *Bogosian v. Gulf Oil Corp.*, 621 F.Supp. 27, 32 (E.D. Pa. 1985).

Plaintiff's payment of $7,500 shall be in addition to whatever portion of the settlement fund he is entitled to receive. In light of his willingness to come forward with this action on behalf of the class, and in light of his efforts in advancing the litigation, including obtaining the services of counsel, sitting for a deposition and attending mediation, this proposed payment is reasonable. (Zelenski Declaration ¶22; Rodriguez Declaration ¶ 3-5.) Hekmat Declaration ¶ 12.) In doing so, he has successfully brought and maintained claims that may have never been brought. Plaintiff should be compensated accordingly for his individualized efforts. Any incentive award will be left entirely to the determination of the Court at the time of final approval of the Settlement.

G. Releases.

The Settlement provides for a release of those claims asserted in the operative Complaint. (Zelenski Declaration ¶ 25.) It is entirely appropriate for a class settlement agreement to release claims raised in a complaint. *See, e.g.*, *Casey v. Proctor*, 59 Cal.2d 97 (1963); *see also, Kelly v. City & County of San Francisco*, No. C 05-1287 SI, 2008 WL 2662017, at *2 (N.D. Cal June 30, 2008).

VI. SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

The proposed Settlement is fair, reasonable, and adequate. According to the California Court of Appeal:

> The trial court must determine whether a class action settlement is fair and reasonable, and has broad discretion to do so. That discretion is to be exercised through the application of several well-recognized factors. The list, which "'is not exhaustive and should be tailored to each case,'" includes "'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, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.'" (*Kullar, supra*, 168 Cal. App. 4th at p. 128, *quoting Dunk, supra*, 48 Cal. App. 4th at p. 1801.) """The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."""" (*Kullar, supra*, 168 Cal. App. 4th at p. 130.)

Clark v. American Residential Servs. LLC, 175 Cal. App. 4th 785, 799 (2009*). See also Chavez*, *supra* 162 Cal. App. 4th at 52. An informed evaluation of a proposed settlement also requires "an understanding of the amount in controversy and the realistic range of outcomes of the litigation." *Clark, supra,* 175 Cal. App. 4th at 801 (*citing Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 120 (2008)). An estimated amount of damages and penalties owed to members of the class are set forth in the Zelenski Declaration filed herewith. (Zelenski Declaration ¶ 17.)

Here, Plaintiff believes he possesses a strong case for payment of unpaid overtime, rest and meal break violations, and continuing wages under section 203 of the Labor Code. (Zelenski Declaration ¶ 15.) Plaintiff alleges he was forced to clock out and work beyond eight hours a workday without payment of overtime wages. (June 26, 2016, Compl. ¶ 15.) Plaintiff further alleges that he was not provided adequate meal or rest breaks, was not reimbursed for his uniform, or paid wages all owed upon his termination. (June 26, 2016, Compl. ¶¶ 11-22.) Specifically, Plaintiff contends that Defendant failed to provide accurately itemized wage statements in violation of California Labor Code section 226 by (a) failing to list employee identification numbers or only the last four digits of employees' social security numbers on its pay stubs, (b) failing to list employees' actual hours worked on its pay stubs, and (c) failing to include the inclusive dates worked on its pay stubs. Plaintiff further contends that Defendant forced Plaintiff and Class Members to clock out at least fifteen minutes prior to the end of each shift to avoid payment of overtime wages in violation of Labor Code sections 510, 1194, and 1198.

Plaintiff also contends that Defendant prevented employees from taking uninterrupted meal breaks and rest breaks in violation of Labor Code sections 226.7 and 512. In addition, Plaintiff contends that Defendant failed to promptly pay due wages at the time of each member's termination of employment constitute continuing wages under Labor Code sections 201, 202, and 203. Lastly, Plaintiff contends that Defendant failed to reimburse members for uniforms violated California Labor Code section 2802. Accordingly, Plaintiff contends that Defendant violated Business and Professions Code section 17200 *et seq.* and responsible for civil penalties under the Private Attorneys General Act (PAGA), California Labor Code section 2698 *et seq.*

On the other hand, Defendant denies each of Plaintiff's allegations and admits no wrongdoing. (*See* Zelenski Declaration ¶ 18.) Plaintiff recognizes that Defendant has arguable defenses regarding class size and commonality. Defendant alleges that it obtained valid releases from the majority of the Class Members, except approximately thirty individuals who would have otherwise been considered a part of the putative class between February 2016 and December 2016. Defendant will likely allege that, pursuant to *Chindarah v. Pick Up Stix, Inc.,* 171 Cal. App. 4th 796 (2009), an employee and employer may settle a bona fide dispute over past overtime wages, even though the statutory right to receive overtime pay is not waivable. In carving out the exception to Labor Code sections 206.5 and 1194, however, the court noted that the "there is no statute providing that an employee cannot release his claim to past overtime wages as part of a settlement of a ***bona fide dispute over those wages***." *Id.* at 803 (emphasis supplied). Nor, for that matter, did the releases in *Chindarah* "condition the payment of wages concededly due on their executions." *Id.* Here, the releases explicitly state that the employee signing the release "may or may not be one of the employees that was affected," and in fact, recited the net amount ($187) as "consideration for the execution of this Agreement." The releases also required the employees to give up unknown claims (under Civil Procedure section 1542) as well as the right to testify in any investigation or litigation brought by or on behalf of any other person or class of persons." Plaintiff alleges that the employees were not advised of the nature of the dispute and the settlement funds were conditioned—not only on a release of past wages owed—but on future rights as well. Further, the releases were all in English even though many of Defendant's employees only speak Spanish. Plaintiff alleges that Defendant had knowledge of this (which is why it recently supplied it

employees with copies of Arbitration agreements in Spanish), and yet proceeded to provide English-only releases. As such, Plaintiff contends these waivers were invalid and improper. Although the releases are arguably invalid, Defendant still has a potential argument that the releases were, in fact, valid, thereby defeating class certification.

Defendant also contends that Plaintiff would only qualify to represent those employees who worked at the gas station location(s) at which he worked, rather than all three owned by Defendant. On the other hand, Plaintiff argues that the policies and employment environment were identical and pervasive throughout all the locations, and therefore Plaintiff is an adequate class representative for all employees for the duration of the class period set forth in the Settlement. Settlement is, therefore, an extremely attractive option for both Parties, given the reasonable arguments that can be made by both sides.

Further, as a class action, the case presents a clear risk of lengthy and expensive litigation. It would probably be a significant amount of time before this case could go to trial so that, *inter alia,* the Parties could properly complete class discovery, Plaintiff could file a motion for certification, and the Parties could file cross-motions for summary judgment. That said, in preparation for mediation, the Parties have, in fact, conducted some informal and formal discovery. Defendant provided Plaintiff relevant information regarding extensive employment records of Plaintiff and 21 Class Members. Defendant also provided all of the 109 Class Members' payroll detail reports. Nevertheless, the law makes clear that exhaustive, protracted, and costly discovery need not be conducted in a class action before a settlement can be reached. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1150 (2000). "In the context of class action settlement, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement . . . '[N]otwithstanding the status of discovery, Plaintiffs' negotiators had access to a plethora of information regarding the facts of their case.'" *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239-40 (9th Cir. 1998)(citations omitted.) Here, there was sufficient investigation conducted to permit counsel to enter into the Settlement.

The Ninth Circuit opinion in *Rodriguez v. West Publishing Corp*., 563 F. 3d 948 (9th Cir. 2009), establishes that class settlements of this nature should focus on the recovery of actual losses rather than

recovery of penalties (such as Plaintiff's claims under sections 203 and 226 of the Labor Code).[4] As stated above, Plaintiff's damage analysis suggests that Plaintiff and Class Members, collectively, suffered approximately $7,090 in actual damages out-of-pocket damages for unpaid overtime and uniform reimbursements. The remainder of the damages are statutory damages, penalties, and civil penalties. Viewed in that light, and accessing the general amount that shall be recovered by each class member, the Settlement is entirely reasonable.

The Settlement provides that the amount previously received by Class Members in connection with executing a "Confidential General Release Agreement" between February 17, 2016 and December 12, 2016 should be offset from his or her individual settlement amount received from the instant action. This offset is the only reasonable means to avoid a windfall to the Class Members who agreed to waive their claims against Defendant and received compensation as a result. Providing the same individual settlement payment to those Class Members who already received some form of compensation for their claims would be unfair to those who refused to sign the releases and attempted to preserve their claims for the instant action. Further, reducing individual settlement payments of those Class Members who previously received payment and subsequently distributing said funds to the remaining Class Members would also be unjust by giving the remaining Class Members an unfair windfall. Defendants should also not benefit from their violations of the Labor Code. Thus, the Parties have agreed that the offset amount should be donated to the *cy pres* recipient outlined in the Settlement—Los Angeles Mission's Urban Training Institute. (Zelenski Declaration ¶¶20-21.) This program is reasonably related to the goals of the instant litigation, and therefore fair and reasonable. California Code of Civil Procedure

[4] It is submitted that the decision in *Rodriguez*, an antitrust class-action lawsuit, supports the granting of preliminary approval in this case. In *Rodriguez*, as here, most of the potential damages were funds that are theoretically recoverable as penalties: in *Rodriguez*, threefold "treble damages," *Rodriguez*, 563 F. 3d at 964 (citing 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."); here, penalties for violations of the California Labor Code. *Rodriguez* teaches that, in considering whether to approve an antitrust class-action settlement, a court can conclude that the settlement is "reasonable even though it evaluate[s] the monetary potion of the settlement based only on an estimate of single damages [rather than treble damages]." *Id.* at 955. *See also id.* at 964–66 ("This circuit has long deferred to the private consensual decision of the parties. *See Hanlon v. Chrysler Corp.,* 150 F.3d 1027. Experienced counsel such as those representing all the parties in this case will certainly be aware of exposure to treble damages in an antitrust action."). Similarly, here, the Court may consider the Settlement based only on an estimate of the actual damages, putting the penalty aspects of the case to the side in the process. Given the uncertainty and the risks faced by the parties to the litigation, it is reasonable for this Court to give preliminary approval of the $250,000 settlement.

section 384 states in relevant part that:

> (a) It is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians [. . .]
> (b) [cy pres recipients should be] 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.

Cal. Civ. Proc. Code § 834; *See In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 721 (2006) (finding that although the *cy pres* distribution of two-thirds of any unclaimed settlement funds be issued as vouchers to low-income schools to obtain Microsoft products did not fall within the strict confines section 384(b), the provision was legal because it effectuated the statute's purpose to "prevent subsequent reversion of residue to defendant.") Here, the *cy pres* recipient is the Los Angeles Mission's Urban Training Institute, a 501(c)(3) non-profit corporation located at 303 East Fifth Street, Los Angeles, California 90013, located in the same general area as Defendant's Alameda gas station where many Class Members worked. (Zelenski Declaration ¶ 21.) The Urban Training Institute provides employment training services, adult education courses, and education and thorough career assessments. (*Id*.)

Obviously, the reaction of Class Members to the proposed Settlement cannot be known until preliminary approval is granted, notice sent out, and requests for exclusion (if any) to that notice received. That said, class counsel is of the view that the Settlement is reasonable for all involved. Again, class counsel has substantial experience in prosecuting class actions, including actions involving the application of state and federal wage-and-hour laws. (Zelenski Declaration ¶¶ 2–7.) While acknowledging that some persons might feel that Defendant should pay more and others might feel that Defendant are paying too much, the undersigned are of the opinion that the proposed Settlement represents a reasonable balancing of the various strengths and weaknesses borne by each of the Parties. Considering the inherent risks, hazards, and expenses of carrying the case through trial, counsel is of the opinion that the settlement is fair, reasonable, and adequate.

VII. CONCLUSION.

It is respectfully submitted that the $250,000 settlement with Defendant is fair, reasonable, and

adequate. The Court should conditionally certify the Class, grant preliminary approval, appoint Phoenix Settlement Administrators as the settlement administrator, approve the form and means of giving Notice, appoint Abigail Zelenski, David Zelenski, and Sehreen Ladak of the Jaurigue Law Group and Joseph Hekmat of the Hekmat Law Group as Class Counsel, approve the named Plaintiff as the class representative, and set the matter for a final-approval hearing.

Dated: February 6, 2017

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