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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO

DIEN TRUONG, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

DS SERVICES OF AMERICA, INC., a
Delaware corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: FCS054399

[Assigned to the Hon. E. Bradley Nelson, Dept. 4]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: March 29, 2021

Time: 9:00 A.M.

Dept.: 4

Complaint Filed: February 20, 2020

ADDITIONAL ATTORNEYS

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Attorneys for Plaintiff, the Class, and Aggrieved Employees

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 29, 2021, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable E. Bradley Nelson, Judge presiding, in
4 Department 4 of the above referenced Court located at 600 Union Avenue, Fairfield, California
5 94533, Plaintiff Dien Truong (“Plaintiff”) will seek an Order: (1) approving the Joint Stipulation
6 and Settlement Agreement (“Stipulation” or “Settlement Agreement”) (attached as Exhibit “A”
7 to the concurrently filed Declaration of Dennis S. Hyun) in this matter; (2) conditionally
8 certifying the following Class for settlement purposes only: “all current and former non-exempt
9 employees who were employed by Defendant or its predecessors in the State of California and
10 were paid a base hourly rate less than the applicable minimum wage, at any time from January 1,
11 2019, through March 29, 2021 (Minimum Wage Class);” (3) appointing Plaintiff Dien Truong as
12 the Class Representative and Larry W. Lee and Mai Tulyathan of Diversity Law Group, P.C.,
13 Dennis Hyun of Hyun Legal, APC and William L. Marder of Polaris Law Group LLP as Class
14 Counsel; (4) preliminarily approving the Stipulation and the total Gross Fund Value in the
15 amount of Seven Hundred Twenty-Five Thousand Dollars and Zero Cents (\$725,000); (5)
16 finding on a preliminary basis that the Stipulation appears to be within the range of
17 reasonableness of a settlement, including the class representative enhancement payments,
18 attorneys’ fees and costs, settlement administration costs, PAGA payment to the LWDA, and the
19 allocation of payments to Settlement Class Members, that could ultimately be given final
20 approval by this Court; (6) approving the Notice of Class Action Settlement to be sent to Class
21 Members; (7) appointing ILYM as the Settlement Administrator; and (8) setting the matter for a
22 Final Fairness and Final Approval hearing.

23 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
24 provides for court approval of the settlement of a purported class action and allows the Court to
25 preliminarily certify a class for settlement purposes.

26 The basis for this Motion, filed without any opposition from Defendant DS Services of
27 America, Inc. (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and
28 the procedures proposed by the Parties are adequate to ensure the opportunity of Class Members

1 to participate in, opt-out of, or object to the settlement.

2 This Motion will be based on the attached Memorandum of Points and Authorities, the
3 Settlement Agreement and the proposed Notice Packet, and the supporting Declarations of Larry
4 W. Lee, Mai Tulyathan, Dennis Hyun, William L. Marder, and Dien Truong, and upon the oral
5 arguments of counsel (should there be any) and on the complete records and file herein.

6
7 DATED: March 3, 2021

DIVERSITY LAW GROUP, P.C.

8
9 By: 
10 Larry W. Lee
11 Attorneys for Plaintiff, the Class, and Aggrieved
12 Employees
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1 **I. INTRODUCTION**

2 This is a wage and hour class action seeking unpaid wages and statutory and civil
3 penalties. Plaintiff Dien Truong (“Plaintiff”) brought his claims on a class-wide basis against
4 Defendant DS Services of America, Inc. (“Defendant”) for violation of Labor Code statutes.
5 Defendant denies each, every, and all of the allegations of the Complaint.

6 Prior to the settlement of this action, the Plaintiff and Defendant (together, the “Parties”)
7 thoroughly investigated the facts relating to the claims alleged in the Complaint and engaged in a
8 thorough study of the legal principles applicable to the claims asserted against Defendant.
9 Defendant provided voluminous information related to pay and work records of the class.
10 Thereafter, the Parties commenced settlement negotiations through a private mediator and were
11 ultimately able to reach the current settlement. **Significantly, the entire settlement amount is**
12 **non-reversionary, such that no monies will revert back to Defendant.**

13 The Parties believe that the settlement amount is fair, adequate, and reasonable, especially given
14 the risks and uncertainty of class certification and the merits of this case.

15 Although Plaintiff and his counsel are confident that they could prevail on class
16 certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation
17 and the specific risks that a class might not be certified and/or that Plaintiff could fail to establish
18 liability. Based on their own independent investigation and evaluation, the Parties and their
19 respective counsel are of the opinion that the Settlement for the consideration and on the terms
20 set forth in the concurrently filed Joint Stipulation and Settlement Agreement (“Stipulation” or
21 “Settlement Agreement”) (attached as Exhibit “A” to the Declaration of Dennis S. Hyun filed
22 herewith) is fair, reasonable, and adequate and is in the best interests of the Class and Defendant
23 in light of all known circumstances and the expenses and risks inherent in litigation.

24 Therefore, the Parties respectfully request that the Court grant this Motion for
25 Preliminary Approval of Class Action Settlement.

26 **II. DISCUSSION**

27 On February 20, 2020, Plaintiff filed a Class Action Complaint in the Superior Court of
28 the State of California for the County of Solano. Declaration of Dennis S. Hyun (“Hyun Decl.”)

1 at ¶ 10. The Complaint alleges the following claims: (1) failure to pay minimum wages in
2 violation of Labor Code sections 1194, 1197, and 1197.1; (2) failure to provide rest breaks in
3 violation of Labor Code sections 226.2 and 226.7. (3) failure to provide accurate itemized wage
4 statements in violation of Labor Code section 226(a); (4) violation of Business and Professions
5 Code section 17200 *et seq.* for unfair business practices. *Id.*

6 On March 26, 2020, Plaintiff filed a First Amended Complaint which added a cause of
7 action under Private Attorneys General Act, Labor Code sections 2698, *et seq.* (“PAGA”),
8 seeking Labor Code penalties on behalf of the State of California and Defendant’s non-exempt
9 California employees. *Id.* at ¶ 11.

10 Since the filing of the Complaint, the Parties engaged in formal and informal discovery,
11 including the production of payroll records for the Class, after which the Parties agreed to
12 mediate the case. *Id.* at ¶ 12. In connection with the mediation, Defendant produced data,
13 including payroll records for the Class, which allowed Plaintiff to conduct a full damage
14 analysis. *Id.* On December 1, 2020, the Parties participated in a full-day mediation with
15 mediator Michael E. Dickstein, Esq., wherein the Parties and their counsel agreed to settle this
16 action in its entirety. *Id.*

17 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
18 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
19 review after notice has been distributed to the class members for their comment or objections.
20 The Manual for Complex Litigation (Third) § 30.41 states:

21 Approval of class action settlements involves a two-step process. First, counsel
22 submits the proposed terms of settlement and the court makes a preliminary
23 fairness evaluation. If the preliminary evaluation of the proposed settlement does
24 not disclose grounds to doubt its fairness or other obvious deficiencies, such as
25 unduly preferential treatment of class representatives or of segments of the class,
26 or excessive compensation for attorneys, and appears to fall within the range of
27 possible approval, the court should direct that notice ... be given to the class
28 members of a formal fairness hearing, at which arguments and evidence may be
presented in support of and in opposition to the settlement.

Thus, the preliminary approval by the trial court is simply a conditional finding that the
settlement appears to be within the range of acceptable settlements. As Professor Newberg
comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference

1 concerning a tentative settlement proposal may vary. The court may find that the settlement
2 proposal contains some merit, is within the range of reasonableness required for a settlement
3 offer, or is presumptively valid subject only to any objections that may be raised at a final
4 hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed.
5 2002).

6 The procedures for the parties’ submission of a proposed settlement for preliminary
7 approval by the court also are discussed in 4 *Newberg on Class Actions*:

8 When the parties to an action reach a monetary settlement, they will usually
9 prepare and execute a joint stipulation of settlement, which is submitted to the
10 court for preliminary approval. The stipulation should set forth the central terms
11 of the agreement, including but not limited to, the amount of settlement, form of
12 payment, manner of determining the effective date of settlement and any
13 recapture clause.

14 *Id.* at § 11.24.

15 Here, the Parties have reached such an agreement and have submitted to this Court in
16 connection with this motion a copy of the Stipulation fully setting forth the agreement reached
17 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties,
18 which include, among other things, the method for calculating the Class Members’ Individual
19 Settlements Payments.

20 The parties also may, at the preliminary approval stage, request that the court
21 provisionally approve certification of the class—conditional upon final approval of the
22 settlement. “[P]re-certification settlements are routinely approved if found to be fair and
23 reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk*
24 *v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1803 (1996) (although the settlement was reached
25 before any “adversary certification,” the court was satisfied that it was “fair, adequate and
26 reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts
27 have employed this practice in the name of judicial efficiency in order to facilitate apparently
28 beneficial settlement proposals”). As further explained by Professor Newberg:

The strength of the findings made by a judge at a preliminary hearing or
conference concerning a tentative settlement proposal...may be set out in
conditional orders granting tentative approval to the various items submitted to

1 the court. Three basic rulings are often conditionally entered at this preliminary
2 hearing. These conditional rulings may approve a temporary settlement class, the
proposed settlement, and the class counsel's application for fees and expenses.

3 4 Newberg on Class Actions, at § 11.26.

4 In addition to such terms as class identification, settlement amount and payment
5 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
6 which the Parties stipulate to the Court's provisional certification of the Class for the purposes of
7 this settlement only. Defendant has reserved its right to contest class certification in the event
8 that the settlement is not approved and litigation resumes.

9 **A. Proposed Class Definition**

10 The current settlement is being settled on behalf of "all non-exempt employees who were
11 employed by Defendant or its predecessors in the State of California from January 1, 2019
12 through the date of preliminary approval, and who were paid a base hourly rate less than the
13 applicable minimum wage at any time during the Class Period". The Class Period is defined as
14 "January 1, 2019, through the date of preliminary approval." There are approximately 124
15 individuals that comprise the Class. See Stipulation at ¶ 3.

16 **B. Settlement Terms and Evaluation**

17 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
18 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
19 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re*
20 *Chicken Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
21 judgment for that of the proponents, particularly where, as here, settlement has been reached
22 with the participation of experienced counsel familiar with the litigation. *Nat'l Rural*
23 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*,
24 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471 (S.D.N.Y. 1979); *In re*
25 *Armored Car Antitrust Litig.*, 472 F.Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln*
26 *Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

27 While the recommendations of counsel proposing the settlement are not conclusive, the
28 Court can properly take them into account, particularly where, as here, they have been involved

in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions, supra*, at § 11.47; *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”).

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s attorneys have been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. Lee Decl. at ¶¶ 4-6; Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶¶ 4-7; Declaration of Dennis Hyun (“Hyun Decl.”) ¶¶ 3-6; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 8-14. Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties. Hyun Decl. at ¶ 7.

Based on the class data provided by Defendant, Plaintiff estimated that Defendant would face liability in the amount of approximately \$2.7 million if Plaintiff prevailed on his class and representative claims. *Id.* at ¶ 12. This number is based upon Plaintiff’s analysis of the payroll records of the putative class. Specifically, Plaintiff calculated this amount based on the following breakdowns for each class and PAGA claim:

Minimum wages principal damages	\$252,266.27
Minimum wages PAGA penalties	\$608,100.00
Rest break minimum wage principal damages (unpaid wages)	\$263,979.33
Rest break premium wages	\$395,969.00
Rest break PAGA penalties	\$608,100.00
203 penalties	\$154,560.00
Total	\$2,696,074.60

1 *See id.*

2 Here, even if Plaintiff prevailed on class certification, then Defendant would assert that
3 any violations were not willful and therefore do not justify imposition of waiting time penalties.
4 Moreover, Defendant would have argued that the minimum wage claim was not viable because
5 of Defendant's payment of commissions to supplement the minimum wage, and that this claim
6 could only possibly apply to hours when the employees were not earning commissions.
7 Defendant also asserted that the employees in question fall within the California outside sales
8 exemption and are therefore exempt from any minimum wage requirements. Defendant would
9 also have argued that the rest break claims were not viable because employees received off-duty
10 rest breaks and because a Section 226.7 claim is not an action brought for non-payment of
11 wages. Defendant would also have argued that the PAGA action was not manageable and that
12 any PAGA penalties should be reduced substantially.

13 Even assuming Plaintiff ultimately prevails on his class claims, Plaintiff may still face
14 liability issues on the merits and a reduction in the amount of PAGA penalties. Pursuant to
15 Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on
16 the facts and circumstances of the particular case, to do otherwise, would result in an award that
17 is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's
18 decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff
19 prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty
20 amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* at 517.
21 Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.

22 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
23 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses on
24 the reduction of PAGA penalties and that these arguments could be persuasive to the Court.
25 Hyun Decl. ¶ 7. Thus, even if Plaintiff were to successfully prove his claims at trial, there is a
26 possibility that the Court may only award a small percentage of the maximum PAGA penalties,
27 as the Court has discretion to do so. The Gross Fund Value was premised with these risks in
28 mind associated with the possibility of the Court denying class certification, refusing to award

1 waiting time penalties, and significantly reducing Plaintiff's PAGA penalties, along with other
2 attendant risks. *Id.*

3 Thus, the settlement for each Settlement Class Member is fair, reasonable, and adequate,
4 given the inherent risks of litigation, including the substantial risks relative to class certification
5 and the merits, the costs of pursuing such litigation, and the risks associated with the Court's
6 discretion to reduce PAGA penalties. The settlement is the result of extensive arm's length
7 negotiations between the Parties and their counsel and was facilitated by an experienced and
8 neutral mediator.

9 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
10 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
11 involved in not prevailing on one or more of the causes of action or theories alleged in the
12 operative Complaint, the possibility of non-certification, and potential for appeals. Hyun Decl.
13 at ¶ 7. These risks on class certification are compounded by the California Supreme Court's
14 holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained
15 class certification and subsequently prevailed at trial after eight years of litigation, but the
16 judgment and the certification ruling were reversed by the California Supreme Court after an
17 additional five years of litigation. The case was remanded back to superior court where class
18 certification was denied and plaintiffs' subsequent appeal also was denied.

19 Indeed, numerous courts have held that **gross** settlements approximating between only 8
20 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
21 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement
22 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
23 settlement amounting to only a fraction of the potential recovery does not per se render the
24 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
25 be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the
26 settlement is fair and adequate depends on the "the difficulties in proving the case");
27 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
28 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of

1 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
2 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
3 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
4 litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
5 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
6 approximately 15% of the potential recovery was fair and reasonable). Here, the Gross Fund
7 Value is fair and reasonable as it is approximately **27%** of the potential recovery of Plaintiff's
8 class and PAGA claims.

9 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
10 Action Settlement ("Notice Packet"), should any Class Member wish to pursue his or her own
11 case for the claims being released herein, each Class Member has the right to submit a request
12 for exclusion (*i.e.*, opt-out) from the settlement. *See Ex. A* to the Stipulation. Moreover, as set
13 forth in the Notice Packet, Class Members are advised of their right to attend the final approval
14 hearing and object to any of the terms contained in the Stipulation.

15 **1. Amount and Manner of Distribution of the Compensation to be Provided to**
16 **Class Members Including the Amount, or an Estimate, of What Each Class**
Member Will Receive

17 The Stipulation provides for \$725,000.00 as the Gross Fund Value. Stipulation at ¶ 6.
18 The Net Fund Value (calculated after deduction of Class Counsel Award of fees (up to
19 \$253,750.00) and costs (up to \$30,000.00), Class Representative Enhancement Award (up to
20 \$15,000.00), LWDA portion of the PAGA Payment (\$30,000.00), and Settlement Administration
21 Costs (estimated at \$2,997.45)), is estimated to be approximately \$393,252.55. Stipulation at ¶¶
22 5, 7-9. Each individual Settlement Share shall be determined by first dividing the NFV by the
23 total number of weeks worked by all Settlement Class Members (and paid below the applicable
24 minimum wage) during the Class Period and then multiplying that amount by the total number of
25 weeks worked by the individual Settlement Class Member (and paid below the applicable
26 minimum wage) during the Class Period. Stipulation at ¶ 12.

27 Based thereon, each Settlement Class Member will recover, on a raw average,
28 approximately \$3,171.39. Hyun Decl. at ¶ 13. Finally, uncashed checks (upon the expiration

1 date) shall be canceled or voided and the Settlement Administrator shall pay over the amount
2 represented by the checks, including any otherwise unpaid interest accumulated in the Payout
3 Fund, to the California State Controller's Office Unclaimed Property Program, with the identity
4 of the recipient of the check to whom the funds belong, so that Settlement Class Members can
5 seek their funds in the event that they were unable to cash the check for any reason. Stipulation
6 at ¶ 12.

7 **2. Whether, and Under What Circumstances, Amounts Available for Payment**
8 **in Settlement Might Not Be Paid to Class Members or Might Revert to the**
9 **Defendants**

9 None of the settlement funds will revert to Defendant.

10 **3. Scope of the Release of Class Members' Claims**

11 As a condition of participating in this class action settlement, Settlement Class Members
12 shall waive and release the following claims:

13 Upon payment of the Gross Fund Value by Defendant, each member of the
14 Settlement Class releases and discharges Defendant and any parent, subsidiary,
15 affiliate (including but not limited to Primo Water Corporation, Primo Water
16 Operations, Inc., etc.), predecessor or successor, and any of their officers,
17 directors, employees, partners, shareholders, attorneys, and agents, and any other
18 successors, assigns, or legal representatives thereof ("Released Parties"), from any
19 and all claims, demands, rights, liabilities, and causes of action during the Class
20 Period, of every nature and description whatsoever, known or unknown, asserted
21 or that might have been asserted, whether in contract, or for violation of any
22 California statute, rule or regulation, whether for economic damages, restitution,
23 penalties or liquidated damages, arising out of, relating to, or in connection with
24 the class and representative claims pleaded or that could have been pleaded based
upon the facts set forth in the Complaint and/or First Amended Complaint that
arose during the Class Period, including but not limited to claims for unpaid
minimum wages and failure to provide fully-compliant paid rest periods, in
violation of Labor Code §§ 226.2, 226.7, 1194, 1197, 1197.1, derivative waiting
time penalties in violation of Labor Code §§ 201-203, and any claims under
Business & Prof. Code §§ 17200 et seq. ("Released Claims"). The Released
Claims do not include claims for failure to provide proper wage statements.
The Released Claims expressly do not include claims for unemployment
compensation, workers' compensation, discrimination, or retaliation.

25 Settlement Agreement at ¶ 17. Thus, the release is appropriately limited.¹

26
27 ¹ It should also be noted that while the Complaint and First Amended Complaint allege violations of Labor Code
28 section 226, the Settlement Agreement specifically excludes the release of any such claims due to the fact that prior
to the settlement of this case, Defendant entered into a separate class and PAGA settlement for the release of such
claims in the matter of *Corona v DS Services of America, Inc.*, Los Angeles County Superior Court Case No.
19STCV03835.

1 **4. Tax Treatment of Settlement Amounts**

2 Settlement payments to Settlement Class Members shall be allocated as follows: twenty
3 percent (20%) as wages and eighty percent (80%) as interest and penalties. Wages shall be
4 reported on an IRS Form W-2 and interest and penalties shall be reported on an IRS Form 1099.
5 Defendant shall be separately responsible for paying employer-side payroll taxes on any amounts
6 allocated to wages. Stipulation at ¶ 6.

7 **5. Affirmative Obligations to be Undertaken by Class Members or Class**
8 **Counsel and the Reasons for Any Such Obligations**

9 As stated above, Class Members do not need to do anything should they wish to receive
10 their share of the settlement funds. In other words, because this is not a claims-made settlement,
11 Settlement Class Members will not be required to make a submission to participate in the
12 settlement. Thus, this substantially decreases the amount of burden each Settlement Class
13 Member must bear in order to receive their Individual Settlement Payment. If a Class Member
14 does not wish to take part in this settlement and be bound by the release, the Class Member must
15 submit a request for exclusion. Stipulation at ¶ 11.

16 **C. Notice to Class Members**

17 No later than 10 calendar days from when this Court grants preliminary approval,
18 Defendant will provide the Settlement Administrator with a list containing the name, last-known
19 residence phone number, last-known residence mailing address, and social security number of
20 every person within the Class. Stipulation at ¶ 11(a). Defendant shall also provide the
21 Settlement Administrator with the number of workweeks each person in the Class was paid a
22 base hourly rate less than the applicable minimum wage at the time, during the Class Period. *Id.*
23 Upon receipt of the information and prior to mailing the Notice Packet, the Settlement
24 Administrator shall perform a search based on the National Change of Address Database for
25 information to update and correct for any known or identifiable address changes. Stipulation at ¶
26 11(b). Within 21 calendar days of this Court's Order granting preliminary approval, the
27 Settlement Administrator will send mail a copy of the Notice Packet to all Class Members via
28 first class mail. Stipulation at ¶ 11(b). Any Notice Packet that is returned to the Settlement
Administrator as non-deliverable shall be re-mailed to the forwarding address provided (if any).

1 If no forwarding address is available, the Settlement Administrator shall perform a skip-trace or
2 other search to obtain a more current address for the Class Member and perform a re-mailing.
3 Stipulation at ¶ 11(d). As set forth in the Class Notice, Class Members will be allowed to opt out
4 of the settlement by a certain deadline, or object to the settlement. Stipulation at ¶ 11.

5 **D. Typicality and Adequacy of Representation**

6 **1. Class Representative's Claims are Typical of the Class**

7 The commonality requirement is met when there are questions of law and fact common to
8 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
9 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
10 facts couple with disparate legal remedies within the class"). Commonality requires only that
11 some common legal or factual questions exist; the Plaintiff need not show that all issues in the
12 litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 473 (1981).
13 Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior*
14 *Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971).
15 Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges
16 here, the class wide impact of the Defendant's policies satisfies the commonality requirement.
17 *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

18 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure,
19 violated the Labor Code by failing to pay minimum wages for all hours worked and for rest
20 breaks paid at less than minimum wage. Declaration of Dien Truong ("Truong Decl.") at ¶ 2.
21 In other words, Plaintiff contends that he was subjected to the same policy and practice as other
22 Class Members and that his claims are typical to those of the Class.

23 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
24 issues been raised or presented. Truong Decl. at ¶¶ 4-6. Plaintiff has taken all necessary steps to
25 represent the interests of the Class and to make himself available for further proceedings.
26 Truong Decl. ¶ 3. For such reasons, Plaintiff has adequately represented the Class Members and
27 will continue to do so.

28 **2. Class Counsel Has Adequately Represented the Class and Has
Experience with Wage and Hour Class Actions**

1 From the inception of the case, Class Counsel have zealously represented the interests of
2 the Class. The settlement was obtained for the benefit of the Class, as opposed to the individual
3 Class Representative. Further, Class Counsel have been approved as class counsel on a number
4 of prior cases, have litigated numerous other class action cases, and are competent to represent
5 the Class. Lee Decl. at ¶¶ 4-7; Tulyathan Decl. at ¶¶ 4-7; Hyun Decl. at ¶¶ 3-6; Marder Decl. at
6 ¶¶ 8-14.

7 **E. Costs and Fees**

8 **1. Attorneys' Fees and Costs**

9 California state and federal courts have recognized that an appropriate method for
10 determining award of attorneys' fees is based on a percentage of the total value of benefits to
11 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
12 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444
13 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The
14 purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread
15 litigation costs proportionally among all the beneficiaries so that the active beneficiary does not
16 bear the entire burden alone." *Vincent*, 557 F. 2d at 769.

17 The Common Fund doctrine is predicated on the principle of preventing unjust
18 enrichment. When a litigant's efforts create or preserve a fund from which others derive
19 benefits, she may require the passive beneficiaries to compensate those who created the fund.
20 Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at
21 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.
22 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine
23 has been applied "consistently in California when an action brought by one party creates a fund
24 in which other persons are entitled to share." The reasons for applying the common fund
25 doctrine include: "...fairness to the successful litigant, who might otherwise receive no benefit
26 because his recovery might be consumed by the expenses; correlative prevention of an unfair
27 advantage to the others who are entitled to share in the fund and who should bear their share of
28 the burden of its recovery; encouragement of the attorney for the successful litigant who will be

1 more willing to undertake and diligently prosecute proper litigation for the protection or recovery
2 of the fund if he is assured that he will be properly and directly compensated should his efforts
3 be successful.” *Id.*

4 Indeed, most recently, the California Supreme Court has also now held that the award of
5 attorneys’ fees in common fund wage and hour class action settlements should start with the
6 percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“We join the
7 overwhelming majority of federal and state courts in holding that when class action litigation
8 establishes a monetary fund for the benefit of the class members, and the trial court in its
9 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
10 of a reasonable fee by choosing an appropriate percentage of the fund created”).

11 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
12 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
13 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
14 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
15 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

16 The Parties have agreed to a payment of up to 35% of the Gross Fund Value
17 (\$725,000.00) for payment of attorneys’ fees, in the amount of \$253,750.00. Stipulation at ¶ 7.
18 The Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this payment
19 should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class
20 Counsel’s litigation expenses up to \$30,000.00. *Id.* Class Counsel have, at their own risk,
21 expended costs, for example, to file this instant action, perform service of process, and pay other
22 litigation-related costs. Based on the foregoing, the Court should preliminarily approve the
23 attorneys’ fees and costs requested by the Parties.

24 **2. Proposed Payment to the Class Representative**

25 Class Representative Dien Truong requests a modest enhancement of \$15,000.00.
26 Stipulation at ¶ 5. The Class Representative met and conferred with Class Counsel on a number
27 of occasions to discuss the case and settlement. As part of his duties as the Class Representative,
28 Plaintiff provided invaluable information, evidence, and documents that resulted in this

1 settlement. Truong Decl. at ¶ 3. In addition to the invaluable services that he provided, Plaintiff
2 also took a significant risk, both professionally and monetarily, in acting as the Class
3 Representative and seeking benefits on behalf of the Class. Truong Decl. at ¶ 7. Because the
4 claims alleged by the Class Representative involved the payment of costs to the prevailing party,
5 Plaintiff could have possibly faced paying the costs of Defendant, had he not prevailed in this
6 action. *Id.*

7 Furthermore, given that future employers are much less likely to hire individuals who
8 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
9 prejudice in the future from other potential employers. *Id.* Plaintiff also executed a general
10 release, including a waiver of Civil Code § 1542, which was not required of class members.
11 Truong Decl. at ¶ 8; Stipulation at ¶ 18. Plaintiff took this risk upon himself and the whole Class
12 benefited from these risks taken by Plaintiff. Class Members did not have to file individual
13 lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face
14 the potential for retaliation and not getting future employment had they filed a public lawsuit.

15 **3. Class Administration Fees**

16 The Parties have agreed to an estimated payment of \$2,997.45 to the Settlement
17 Administrator, ILYM, to send notices and to administer this settlement. Settlement Agreement
18 at ¶ 9. ILYM is a well-recognized class action settlement administrator. The Parties believe that
19 the administration fee is reasonable and should be approved.

20 **III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR** 21 **PRELIMINARY APPROVAL**

22 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
23 substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
24 result of informed, extensive, and arm's length negotiations conducted by counsel for the
25 respective parties who are experienced in wage and hour class action litigation. For the
26 foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the
27 proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed
28 Notice Packet, and set a date for a final approval hearing.

1 DATED: March 3, 2021

DIVERSITY LAW GROUP, P.C.

2
3 By: 
4 Larry W. Lee
5 Attorneys for Plaintiff, the Class, and Aggrieved
6 Employees
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STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

On March 3, 2021, I served the following document(s) described as:

- on the interested parties in this action as follows:

PROOF OF SERVICE

