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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER**

MICHAEL TEBBS, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

v.

SUNBELT RENTALS, INC., a North Carolina
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. S-CV-0044313

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

Date: August 22, 2023
Time: 8:30 a.m.
Dept.: 31

Complaint Filed: January 21, 2020

PAUL PARKER, as an individual and on behalf
of all others similarly situated,

Plaintiffs,

v.

SUNBELT RENTALS, INC., a North Carolina
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. S-CV-0047378

Complaint Filed: September 29, 2021

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Attorneys for Plaintiffs and the Class

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

2 **PLEASE TAKE NOTICE** that, on August 22, 2023, at 8:30 a.m., or as soon thereafter
3 as the matter may be heard in Department 31 of the above-referenced Court located at 10820
4 Justice Center Drive, Roseville CA 95678, Plaintiffs Michael Tebbs and Paul Parker
5 (collectively, “Plaintiffs”) will and hereby do move the Court for an Order:

6 1. Preliminarily approving the Class and PAGA Action Settlement Agreement (the
7 “Agreement”), filed herewith;

8 2. Provisionally certifying the Settlement Class, which is defined as all current and
9 former non-exempt employees of Sunbelt in California who were paid overtime and/or double-
10 time wages and/or meal premium wages covered by any work week in which they also received
11 “On Call Earn” pay (as denoted on an employee’s paystub) at any time from January 13, 2016
12 through February 5, 2023 (the “Class Period”);

13 3. Appointing Larry W. Lee of Diversity Law Group, P.C., Edward W. Choi of the
14 Law Offices of Choi & Associates, P.C., William L. Marder of Polaris Law Group, and Dennis S.
15 Hyun of Hyun Legal, APC as Class Counsel;

16 4. Approving the proposed Notice of Class Action Settlement (attached as 1 to the
17 Agreement) and directing it be distributed to the Class;

18 5. Approving Phoenix Class Administrators as the Settlement Administrator
19 (“Administrator”) jointly selected by the Parties for the purposes of this settlement; and

20 6. Setting a final fairness and approval hearing.

21 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
22 provides for court approval of the settlement of a purported class action.

23 The basis for this Motion, filed without any opposition from Defendant Sunbelt Rentals,
24 Inc. (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the
25 procedures proposed by the Parties are adequate to ensure the opportunity of class members to
26 participate in, opt out of, or object to the settlement.

27 This Motion will be based on the Memorandum of Points and Authorities included herein,
28 the Stipulation of Settlement and Release (hereinafter referred to as “Stipulation” or “Settlement
Agreement”) and the proposed Notice of Class Action Settlement, and the supporting

1 Declarations of Larry W. Lee, Edward W. Choi, William L. Marder, Dennis S. Hyun, and
2 Plaintiffs, and upon the oral arguments of counsel (should there be any) and on the complete
3 records and file herein.

4
5 DATED: June 20, 2023

DIVERSITY LAW GROUP

6
7 By: 

Larry W. Lee

Attorneys for Plaintiffs and the Class
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Named Plaintiffs Michael Tebbs (“Tebbs”) and Paul Parker (“Parker”) (collectively, “Plaintiffs”) seek preliminary approval of this class action settlement. As set forth in the Class and PAGA Action Settlement Agreement (“Settlement Agreement,” or “Agreement”) filed herewith, the Settlement provides for a Gross Settlement Amount of \$950,000.00 for resolution of this consolidated action and, more importantly, is **non-reversionary**, such that no funds will revert back to Defendant Sunbelt Rentals, Inc. (“Defendant”) (Plaintiffs and Defendant collectively, the “Parties”). Moreover, the Settlement does not require class members to complete claim forms to participate. Rather, the class members will simply receive settlement checks so long as they do not opt-out of the settlement.

This case involves the consolidated actions, *Tebbs v. Sunbelt Rentals, Inc.*, Case No. S-CV-0044313 (the “*Tebbs Action*”) and *Parker v. Sunbelt Rentals, Inc.*, Case No. S-CV-0047378 (the “*Parker Action*”) (collectively, the “*Action*”), which this Court consolidated pursuant to the Parties’ Stipulation on March 6, 2023. The *Tebbs Action* alleges that Defendant failed to pay all overtime wages due to Defendant’s alleged incorrect calculation of the regular rate of pay. Specifically, based on discovery, *Tebbs* asserted that Defendant paid overtime based on one times the base rate of pay and 0.5 times the regular rate of pay when taking into account the On-Call Bonus. *Tebbs* asserts that Defendant should have multiplied the entire regular rate of pay by 1.5x and that this resulted to underpayment of overtime wages. The *Parker Action* alleges that Defendant failed to pay meal period premium wages based on the regular rate of pay. Plaintiffs also seek all associated penalties, including waiting time penalties pursuant to Labor Code §§ 201-203, inaccurate wage statement penalties pursuant to Labor Code § 226, and penalties under the Private Attorneys General Act (the “PAGA”), Labor Code § 2698, *et seq.*

This Action has been heavily litigated, including the completion of the depositions of Tebbs and Defendant's person most knowledgeable ("PMK"), as well as motions to compel further discovery. After two years of litigation, the Parties agreed to conduct mediation with

1 well-respected class action mediator, Mark S. Rudy, Esq. In connection with the mediation,
2 Defendant produced a sample of time/payroll data and wage statements for 10% of both the
3 *Tebbs* and *Parker* classes (comprised of 364 and 168 individuals, respectively) at the time of
4 mediation. Plaintiffs retained an expert to calculate damages. The Parties initially scheduled
5 two full days of mediation with Mr. Rudy, but were able to resolve the Action in one full day of
6 mediation on January 10, 2023. (Declaration of Edward W. Choi (“Choi Decl.”) ¶ 5). Thus, at
7 all times, the negotiations leading to this Settlement Agreement have been adversarial, non-
8 collusive, and at arm’s length. (*Id.*)

9 The current settlement is being settled on behalf of all current and former non-exempt
10 employees of Sunbelt in California who were paid overtime and/or double-time wages and/or
11 meal premium wages covered by any work week in which they also received “On Call Earn”
12 pay (as denoted on an employee’s paystub) at any time from January 13, 2016 through February
13 5, 2023 (the “Class Period”). (Agreement at § 5). The Parties have limited the Class to only
14 “On Call Earn,” because through discovery, including completing the PMK deposition, it
15 appears that the On Call Earn item is the only incentive compensation which is arguably non-
16 discretionary, such that it should be included in the regular rate of pay. (Choi Decl. ¶6).

17 Based on their own independent investigation and evaluation, the Parties and their
18 respective counsel are of the opinion that settlement for the consideration and on the terms set
19 forth in the Stipulation is fair, reasonable, and adequate and is in the best interests of the Class
20 and Defendant in light of all known facts and circumstances and the expenses and risks inherent
21 in litigation. (Choi Decl. ¶¶ 16-18).

22 Defendant would have argued that the on-call payment need not be included in the
23 calculation of the regular rate of pay and that it had lawful meal period policies, such that the
24 payment of meal period premiums in and of itself does not trigger liability. Setting aside the
25 merits, these lawful policies and practices render prevailing on class certification extremely
26 difficult and would likely create individualized inquiries. However, when proceeding to the
27 merits, given these lawful policies and practices, Plaintiffs and their counsel would face
28 significant risks in prevailing. As such, this settlement is fair, adequate and reasonable and,

1 therefore, Plaintiffs respectfully request that the Court grant this Motion for Preliminary
2 Approval of Class Action Settlement.

3 **II. BACKGROUND OF THE SETTLEMENT**

4 **A. Investigative Background**

5 This Action has been heavily litigated, including the completion of the depositions of
6 Tebbs and Defendant's PMK, as well as motions to compel further discovery. (Choi Decl. ¶ 4)
7 After two years of litigation, the Parties agreed to conduct mediation with well-respected class
8 action mediator, Mark S. Rudy, Esq. (*Id.* at ¶5) In connection with the mediation, Defendant
9 produced a sample of time/payroll data and wage statements for 10% of both the *Tebbs* and
10 *Parker* classes (comprised of 364 and 168 individuals, respectively, at the time of mediation).
11 Plaintiffs retained an expert to calculate damages. (*Id.* at ¶ 6) The Parties initially scheduled
12 two full days of mediation with Mr. Rudy, but were able to resolve the Action in one full day of
13 mediation on January 10, 2023. (*Id.* at ¶ 5) Thus, at all times, the negotiations leading to this
14 Settlement Agreement have been adversarial, non-collusive, and at arm's length. (*Id.*)

15 **B. Summary of the Current Settlement**

16 The Agreement provides for \$950,000.00 as the Gross Settlement Amount. (Agreement
17 at §§ 2, 18). This amount is completely non-reversionary (*i.e.*, every single dollar will be paid
18 out without any money reverting back to Defendant). The Parties have allocated \$50,000.00 for
19 PAGA penalties, 75% of which must go to the State (\$37,500.00) and 25% of which will be
20 distributed to Aggrieved Employees. (*Id.* at § 25). Aggrieved Employees is defined as all
21 current and former non-exempt employees of Sunbelt in California who were paid overtime
22 and/or double-time wages and/or meal premium wages covered by any work week in which
23 they also received "On Call Earn" pay (as denoted on an employee's paystub) at any time from
24 January 20, 2019, through February 5, 2023 (the "PAGA Period"). (*Id.* at §§ 3, 25).

25 The formula for distribution to Class Members and Aggrieved Employees is as follows:
26 68. The Individual Settlement Payment to each Settlement Class Member shall be
27 determined based on the number of Qualifying Workweeks worked by the Settlement
28 Class Member during the Class Period. The Net Settlement Amount shall be divided by
the total number of Qualifying Workweeks for all Settlement Class Members during the
Class Period. The result of this division shall yield a Workweek Payment Rate for the
Class. The gross amount of each Settlement Class Member's Individual Settlement

1 Payment shall be calculated by multiplying the number of Qualifying Workweeks
2 applicable to that Class Member by the Workweek Payment Rate. Likewise, the
3 Individual Settlement Payment to each Aggrieved Employee shall be determined based
4 on the number of Qualifying Workweeks worked by the Aggrieved Employee during
5 the PAGA Period. The 25% portion of the PAGA Penalty, or \$12,500, shall be divided
6 by the total number of Qualifying Workweeks worked by all Aggrieved Employees
7 during the PAGA Period. The result of this division shall yield a Workweek Payment
8 Rate for the Aggrieved Employee. The gross amount of each Aggrieved Employee's
9 Individual Settlement Payment shall be calculated by multiplying the number of
10 Qualifying Workweeks applicable to that Aggrieved Employee by the Workweek
11 Payment Rate.

12 (Agreement at § 68).

13 As set forth in the Agreement, Individual Settlement Payments to Settlement Class
14 Members shall be allocated as 80% penalties and interest not subject to withholdings and 20%
15 wages subject to withholdings. (*Id.* at § 72). Individual Settlement Payments to Aggrieved
16 Employees shall be allocated as 100% penalties. (*Id.*)

17 Additionally, the Settlement Agreement provides for an appropriately tailored release.
18 (Agreement at §§ 85, 86). The Settlement Agreement provides a release only for claims arising
19 out of or related to the factual allegations set forth in the Action, including claims for overtime,
20 meal periods, derivative waiting-time, wage statement and related PAGA penalties.

21 Defendant represents that there are 42,405 work weeks for the Settlement Class during
22 the Class Period. (Agreement at § 58). If the number of payroll work weeks is more than 5%
23 greater than the 42,405 estimate, the Gross Settlement Amount will increase on a pro-rata basis
24 equal to the increase in payroll work weeks over 42,405; provided, however, in the event the
25 actual number of payroll work weeks are more than 10% greater than the 42,405 estimate, then
26 Defendant shall, in its sole discretion, have the option to rescind this Agreement in its entirety
27 by providing written notice of such rescission to Class Counsel within fifteen (15) calendar
28 days of receiving notification from Class Counsel of the actual number of payroll work weeks.
(*Id.*)

As part of the Stipulation, Defendant does not object to Plaintiffs' Counsel's request for
attorney's fees up to 35% of the Gross Settlement Amount, or \$332,500.00, plus up to
\$50,000.00 for reimbursement of litigation costs. (Agreement at § 81). Also, as part of the
Settlement Agreement, Defendant does not object to Plaintiffs' requests for enhancements of

1 \$10,000.00 each, for a total of \$20,000.00. (*Id.* at § 80). Finally, the Settlement Agreement
2 also provides for the payment of the settlement administrator for the administration of this
3 settlement, which is currently estimated at \$10,000.00. (*Id.* at § 76).

4 **C. The Settlement is Fair, Reasonable, and Adequate**

5 Based on their own respective independent investigations and evaluations, the Parties
6 and their respective counsel are of the opinion that settlement for the consideration and on the
7 terms set forth in their Agreement is fair, reasonable, and adequate and is in the best interests of
8 the Class and the Defendant in light of all known facts and circumstances and the expenses and
9 risks inherent in litigation. (Choi Decl. at ¶¶ 16-17). Defendant denies any liability or
10 wrongdoing of any kind associated with the claims alleged by Plaintiffs.

11 Based on a class size of approximately 297 Class Members and the \$950,000.00
12 recovery, Class Members will each get a raw average of approximately \$1,683.50, after
13 deducting the PAGA payment to the LWDA, Plaintiffs' enhancements, attorneys' fees and
14 costs, and administration costs. This amount will be greater or lower based on the number of
15 weeks worked by a Class Member during the Class and/or PAGA Periods. This is fair, as it
16 directly allocates greater recovery to individual Class Members who have allegedly suffered
17 greater harm. Further, Class Members may choose to exclude themselves from this settlement
18 and not participate in the settlement.

19 **III. LEGAL ANALYSIS**

20 **A. The Proposed Settlement Class Satisfies The Elements For Certification for**
21 **Settlement Purposes**

22 Code of Civil Procedure § 382 authorizes class actions. Certification of a class is
23 appropriate when the party seeking certification establishes the existence of "an ascertainable
24 class and a well-defined community of interest among the class members." *Richmond v. Dart*
25 *Indus., Inc.*, 29 Cal. 3d 462, 470 (1981) (citations omitted); *see also Sav-on Drug Stores, Inc. v.*
26 *Superior Court*, 34 Cal. 4th 319, 326 (2004). "The community of interest requirement
27 embodies three factors: (1) predominant common questions of law or fact; (2) class
28 representatives with claims or defenses typical of the class; and (3) class representatives who

can adequately represent the class." *Ibid.* All the requirements for class certification are easily satisfied in this case for the purposes of Settlement. Moreover, the Parties have stipulated to certify the class for settlement purposes. (Agreement at § 49).

1. Numerosity

The class consists of approximately 297 total persons. (Choi Decl. ¶ 15). Courts have held that classes consisting of even 20-40 individuals satisfies the numerosity element. *See, e.g., Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978); *Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1320 (9th Cir.) (noting, in dicta, that the court “would be inclined to find the numerosity requirement ... satisfied solely on the basis of [39] ascertained class members”), *vacated on other grounds*, 459 U.S. 810 (1982); *Ark. Educ. Ass’n v. Bd. of Educ. of the Portland*, 446 F.2d 763, 765-66 (8th Cir. 1971) (approving class of twenty members); *Cross v. Nat’l Trust Life Ins. Co.*, 553 F.2d 1026, 1030 (6th Cir. 1977) (approving seven member class). Accordingly, here, the Class is numerous and clearly satisfies the numerosity prong.

2. Ascertainability

The California Supreme Court reiterated the lax standard for ascertainability in *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019): “a class as ascertainable when it is defined ‘in terms of objective characteristics and common transactional facts’ that make ‘the ultimate identification of class members possible when that identification becomes necessary.’” *Id.* (citations omitted). The Class is ascertainable based on the class definition and has already been identified in Defendant’s records. (Agreement at § 5).

3. Typicality

“The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues.” *Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 99-100 (2008) (finding Plaintiffs’ claims to be typical because “[s]he alleges she was subjected to the same alleged wrong, by the same defendant, as the other members of the putative class”). “[I]t has never been the law in California that the class representative must have *identical* interests with the class members. The only requirements are that common questions of law and fact *predominate* and that the class

representative be *similarly* situated.” *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1347 (1987) (emphasis in original, citation omitted); *see also Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497, 1509 (2008). Here, Plaintiffs submit that their claims are typical of those of other Class Members because they allege that they suffered injuries from the same specific actions that they allege harmed other members of the class. Specifically, Plaintiffs allege that they were not paid overtime based on the correct formula and were paid meal period premium wages at the base rate of pay. (Declaration of Michael Tebbs (“Tebbs Decl.”) ¶ 3; Declaration of Paul Parker (“Parker Decl.”) ¶ 3). Therefore, Plaintiffs’ claims are typical of the class as a whole.

4. Common Questions of Law and Fact Predominate

For common questions of law or fact to predominate, “the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the action advantageous to the judicial process and to the litigants.” *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 913-14 (2001); *see also Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 99-100 (2008) (“Predominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate. Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.”) (Citation omitted). “The existence of even one significant issue common to the class” has been found sufficient to warrant certification. *Californians for Disability Rights, Inc. v. California Dep’t of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008). Here, Plaintiffs contend that rate of pay cases can be certified. *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 238 (2013) (“whether the work uniform maintenance allowance and gasoline reimbursement must be included in calculating the overtime rate of pay can be decided on a class-wide basis as a legal matter based on common proof”). Thus, Plaintiffs contend that this class action may be certified for settlement purposes.

5. Adequacy

“Adequacy of representation depends on whether the Plaintiffs’ attorney is qualified to

1 conduct the proposed litigation and the Plaintiffs’ interests are not antagonistic to the interests
2 of the class.” *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). No conflict exists
3 between Plaintiffs and the Class because Plaintiffs allege that they have been injured by the
4 same alleged conduct as all Class Members and have the incentive to fairly represent all Class
5 Members’ claims to achieve the maximum possible recovery. (Tebbs Decl. ¶¶ 3-5; Parker
6 Decl. ¶¶ 3-5). Plaintiffs have spent considerable efforts in this case, including assisting with
7 investigation and Tebbs sat for his deposition. (Tebbs Decl. ¶ 4; Parker Decl. ¶ 4). Plaintiffs
8 remain willing to vigorously prosecute this action to the benefit of the class. (Tebbs Decl. ¶ 6;
9 Parker Decl. ¶ 6) Moreover, Plaintiffs are represented by attorneys who have extensive
10 experience in complex wage and hour litigation as is detailed in each of their declarations
11 supported herewith. (Choi Decl. ¶¶19-20; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 4-5;
12 Declaration of William Marder (“Marder Decl. ¶¶ 13-14; Declaration of Dennis S. Hyun
13 (“Hyun Decl.”) ¶¶ 3-6).

14 **6. Superiority of Class Action**

15 Class actions for groups of over a hundred persons, which is the case here, are superior
16 to hundreds of separate actions. *Sav-On Drug Stores*, 34 Cal. 4th at 326. In employment
17 actions, class actions are encouraged as “absent effective enforcement, the employer's cost of
18 paying occasional judgments and fines may be significantly outweighed by the cost savings of
19 not paying overtime.” *Gentry v. Superior Court*, 42 Cal. 4th 443, 462 (2007). Without class-
20 wide relief in this action, the Class Members would be forced to litigate numerous cases on a
21 piecemeal basis. Accordingly, as all of the elements for class certification have been
22 established, this Court should provisionally certify the class for settlement purposes.

23 **B. Two-Step Approval Process**

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

28 Approval of class action settlements involves a two-step process. First, counsel submits

the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice ... be given to the class 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 concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

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

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

Id. at § 11.24. Here, the Parties have reached such an agreement and have submitted to this Court in connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement reached among the Parties. The Agreement sets forth all terms of the agreement reached by the Parties, which include, among other things, the method for calculating the Class Members' individual settlements.

C. The Settlement Is Fair and Reasonable and Not the Result of Fraud or Collusion

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not

1 substitute their judgment for that of the proponents, particularly where, as here, settlement has
2 been reached with the participation of experienced counsel familiar with the litigation. *Nat'l*
3 *Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v.*
4 *Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979).

5 While the recommendations of counsel proposing the settlement are not conclusive, the
6 Court can properly take them into account, particularly where, as here, they have been involved
7 in significant discovery and negotiations for some period of time, appear to be competent, have
8 experience with this type of litigation, and have exchanged substantial evidence from the
9 opposing party. *See Newberg on Class Actions, supra*, §11.47; *Nat'l Rural Telecomms. Coop.*,
10 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125
11 (S.D.N.Y. 1997) (“[s]o long as the integrity of the arm's length negotiation process is preserved,
12 however, a strong initial presumption of fairness attaches to the proposed settlement . . .
13 [citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most
14 closely acquainted with the facts of the underlying litigation”)).

15 Here, both Plaintiffs’ and Defendant’s counsel have a great deal of experience in wage
16 and hour class action litigation. (Choi Decl. at ¶¶ 18-20; Lee Decl. ¶¶ 4-5; Hyun Decl. ¶¶ 3-6;
17 Marder Decl. ¶¶ 13-14). Plaintiffs’ counsel has been approved as class counsel in a number of
18 wage and hour class actions. (*Id.*) Moreover, Plaintiffs’ counsel conducted an extensive
19 investigation of the factual allegations involved in this case since the inception, including
20 deposing Defendant’s PMK, engaging in formal discovery and motion practice, and obtaining a
21 sampling of payroll data. (Choi Decl. at ¶¶ 4, 6). Each side has apprised the other of their
22 respective factual contentions, legal theories and defenses, resulting in extensive arms-length
23 negotiations taking place among the Parties. Further, Plaintiffs obtained and reviewed the
24 relevant employment policies and/or handbooks in effect during the relevant time period. (*Id.*)

25 The settlement for each participating Class Member is fair, reasonable and adequate,
26 given the inherent risk of litigation, the risk relative to class certification and the costs of
27 pursuing such litigation. It is the result of extensive arms’ length negotiations between counsel
28 for the Parties, including having the assistance of a mediation before a highly regarded mediator

1 with significant experience in wage and hour class actions.

2 Plaintiffs believe that they could prevail on the merits; however, Plaintiffs also believe
3 in the fairness of the settlement that is based on factoring in the uncertainty and risks to
4 Plaintiffs in not prevailing on one or more of the causes of action or theories alleged in the
5 Complaint and in the possibility of losing at trial or on summary judgment. (Choi Decl. ¶ 16).
6 Defendant adamantly disputes liability as well and believes it can establish Plaintiffs were
7 properly compensated and that the on-call payments were properly excluded from the regular
8 rate calculation. Additionally, Defendant maintains its good-faith defense would substantially
9 reduce or eliminate any civil penalties.

10 The settlement is a compromise for the alleged damages of Class Members for the
11 claims asserted in the Complaints. The settlement also compensates Plaintiffs for their claims
12 and provides Plaintiffs with additional incentive payments for executing general releases, as
13 well as for their involvement in this action. This incentive payments also take into
14 consideration the risks, time, effort and expenses incurred by Plaintiffs in coming forward to
15 provide invaluable information, negotiate and litigate this matter on behalf of all Class
16 Members.

17 Despite the asserted fairness of the settlement terms, should any potential Class Member,
18 upon reviewing the Notice of Class Action Settlement, object to the terms of the settlement as
19 set forth in the Agreement, each has the right to submit a request for exclusion (*i.e.*, opt out)
20 from the settlement, pursuant to which the Class Member would retain any claim he or she may
21 have against Defendant. Moreover, potential Class Members, upon providing proper notice to
22 the Parties and the Court, may attend the final fairness and approval hearing for the purpose of
23 objecting to one or more of the settlement terms set forth in the Stipulation.

24 **D. The Proposed Class Settlement Meets the *Kullar* Factors**

25 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
26 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has
27 conducted sufficient discovery and the settlement is reasonable in light of the strengths of the
28 Plaintiffs' claims. As discussed herein, Plaintiffs' counsel has conducted sufficient discovery

and investigation and, in light of the strength and weaknesses of Plaintiffs' claims, Plaintiffs' attorneys submit that this settlement is fair pursuant to *Kullar*.

1. Plaintiffs' Counsel Conducted Sufficient Discovery and Investigation

The Parties engaged in formal discovery, including the deposition of Defendant's PMK, Tebbs, and the production of Defendant's wage and hour policies and handbooks in effect during the class period, obtaining and analyzing class data for a damage analysis, attending mediation, and settling the case, which has involved lengthy, arms' length negotiations over the terms and conditions of this settlement. (Choi Decl. ¶¶ 4-6). With respect to class data, Plaintiff obtained, reviewed and analyzed time and payroll data for 10% of both the *Tebbs* and *Parker* classes (comprised of 364 and 168 individuals, respectively, at the time of mediation), which included payroll records and wage statements for 36 and 17 individuals for each action. (*Id.* at ¶6) Plaintiffs' counsel also obtained data on pay periods, number of class members (including former employees), and average hourly rates per year during the class period. (*Id.*) Based on all of the evidence and data, Plaintiffs' counsel was able to perform calculations based on the allegations and value the maximum damages and penalties at issue. (*Id.*)

2. Strengths and Weaknesses of Plaintiffs' Claims

Defendant produced documents, including its handbook and policies, which provided that meal periods be provided to non-exempt employees and pay overtime based on the regular rate of pay. Defendant would have argued that the on-call payments were tied to the hours worked and, therefore, were properly excluded from the regular rate calculation. Defendant would have also argued that it acted in good faith in following the formula for overtime approved by Fair Labor Standards Act (the "FLSA"). See 29 U.S.C. § 207(a)(1). Given these arguments, Plaintiffs and their counsel may have faced difficulty in seeking to certify this class action. Courts have repeatedly held that class certification is not appropriate where the employer does not maintain unlawful policies. See *Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 642 (N.D. Cal. 2010); *Reed v. Cnty. of Orange*, 266 F.R.D. 446, 460-61 (C.D. Cal. 2010).

Again, Plaintiffs' counsel has significant experience in obtaining class certification and litigating class actions, including trying two certified class actions to judgment. (Lee Decl. ¶¶

4-5; Hyun Decl. ¶¶ 5-6). However, given Defendant’s lawful policies and practices, Defendant could have prevailed on the merits and/or defeated class certification by arguing that determining unlawful conduct would require individualized inquiries. Accordingly, Plaintiffs’ counsel believes that settling this case for a concrete \$950,000.00 payment is fair, adequate and reasonable in light of the significant risks.

3. The Potential Value of the Claims

The Settlement provides fair and reasonable monetary recovery for the Class Members on vigorously disputed claims. Plaintiffs conducted the following exposure analyses.

Overtime Based on Regular Rate of Pay. Plaintiffs’ expert calculated maximum exposure on the actual underpaid overtime at \$31,204.24, derivative wage statement penalties at \$1,118,794.44, and waiting time penalties at \$780,328.10, for a total of \$1.93 million. (Choi Decl. ¶ 7). However, Plaintiffs assign a 50% discount to this claim, given that Defendant may have prevailed on its argument that the overtime formula is permitted by the FLSA and California Labor Code. (*Id.*) Moreover, this Court may have found that Defendant did not act willfully and/or knowingly and intentionally to warrant wage statement and waiting time penalties. (*Id.*) Further, Defendant would also argue that wage statement penalties are not available for rate violations. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018). (*Id.*) Plaintiffs disagree with such arguments, but this Court may have sided with Defendant. (*Id.*) As such, Plaintiffs apply a 50% discount, such that the total realistic exposure on this claim is \$965,163.39. (*Id.*)

Meal Periods. With respect to the meal period claim, Defendant maintained lawful meal period policies. (Choi Decl. ¶ 8) Plaintiffs’ expert calculated maximum exposure on the meal period claim at \$8,140.99 in principal damages, \$44,205.88 for wage statement penalties, and \$66,261.46 in waiting time penalties. (*Id.*) Defendant, however, would have argued that the payment of a meal period premium, in and of itself, does not establish liability. (*Id.*) Instead, Defendant would argue that Plaintiffs should establish an actual failure to provide meal periods and that Defendant is not obligated to police employees to ensure that meal periods are taken. *Cole v. CRST, Inc.*, 150 F. Supp. 3d 1163, 1168 (C.D. Cal. 2015) (“According to *Brinker*, an

1 employer is not obligated to police or ensure that that rest and meal breaks are taken, rather the
2 employer must not prevent employees from taking rest or meal breaks.”) (Emphasis added).
3 This Court may have also found that per *Maldonado*, that Plaintiffs cannot seek wage statement
4 penalties for rate violations. Thus, Plaintiffs’ counsel have applied a 50% discount for realistic
5 exposure, or \$59,304.17. (Choi Decl. ¶ 8).

6 PAGA Penalties. As for the PAGA penalties, Plaintiffs’ expert calculated maximum
7 exposure at \$5,981,845.68, which is premised on the underlying causes of action for unpaid
8 overtime and meal period premiums, as well as wage statement and waiting time violations.
9 Again, this Court may have found that Defendant acted in good faith. (Choi Decl. ¶ 9).
10 Moreover, recovery of such penalties might have been difficult given the issues on the merits of
11 the underlying claims discussed above. Under Labor Code Section 2699(e) of PAGA, the
12 presiding court has the same “discretion” as the labor enforcement agencies to impose civil
13 penalties upon an employer for the violation of the Labor Code. Lab. Code § 2699(e). Here, the
14 PAGA claims are derivative of the violations of the very same Labor Code sections that are the
15 basis of the class claims.

16 Moreover, under Section 2699(e)(2), using its discretion the presiding court “may award
17 a lesser amount than the maximum civil penalty amount . . . if, based on the facts and
18 circumstances of the particular case, to do otherwise would result in an award that is unjust,
19 arbitrary and oppressive, or confiscatory.” Lab. Code § 2699(e)(2); *see also Amaral v. Cintas*,
20 163 Cal. App. 4th at 1211-1212 (recognizing the reviewing court has discretion to reduce civil
21 penalties because of an employer’s “good faith defense”); *Thurman v. Bayshore Transit Mgmt.*,
22 *Inc.*, 203 Cal. App. 4th 1112, 1136 (2012) (holding that “trial court reasonably determined that
23 an award of the maximum penalty amount [under PAGA] would be unjust”); *Cotter v. Lyft, Inc.*,
24 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016) (same).

25 In this regard, the Court of Appeal’s recent decision in *Carrington v. Starbucks Corp.*,
26 30 Cal. App. 5th 504 (2018) is instructive. In *Carrington*, while the plaintiff prevailed on his
27 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
28 citing the employer’s good faith attempt at complying with the law. *Id.* at 517. Upon review,

1 the Court of Appeal found such reduction to be proper. *Id.* at 539. Again, the *Carrington*
2 decision was after Plaintiff actually prevailed at trial, and even then, the PAGA penalties were
3 reduced by 90%. *See also Makabi v. Gedalia*, 2016 WL 815937 at *3, fn 3 (Cal. App. 2d Mar. 2,
4 2016) (affirming verdict in favor of plaintiffs on Labor Code claims but declining to award
5 PAGA penalties); *Parr v. Golden State Overnight Delivery Serv., Inc.*, 2014 WL 11199452 (Cal.
6 Sup. Ct. Alameda County July 10, 2014) (reducing PAGA award by approximately 93%);
7 *Fleming v. Covidient Inc.*, 2011 WL 7563047 at *2, 4 (C.D. Cal. Aug. 12, 2011) (reducing
8 PAGA award by approximately 82%).

9 As a result, most supervising Courts approving of settlements of combined statutory
10 penalties to a class and civil penalties under PAGA allocate substantially smaller sums of the
11 settlement to the satisfaction of PAGA civil penalties. *See, e.g., Davis v. Cox Commc 'ns*
12 *California, LLC*, 2017 WL 1496407 at *1 (S.D. Cal. Apr. 26, 2017) (preliminarily approving
13 \$4,000 PAGA allocation in \$275,000); *Moore v. Fitness Int'l, LLC*, 2014 WL 12571448 at *5
14 (S.D. Cal. Jan. 22, 2014) (approving \$2,500 PAGA allocation); *Jack v. Hartford Fire Ins. Co.*,
15 2011 WL 4899942 at *6 (S.D. Cal. Oct. 13, 2011) (approving \$3,000 PAGA allocation in \$1.2
16 million settlement); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104 at *2 (S.D. Cal. June
17 1, 2010) (approving \$3,000 PAGA allocation in \$1 million settlement); *Hopson v. Hanesbrands*
18 *Inc.*, 2009 WL 928133 at *9 (N.D. Cal. Apr. 3, 2009) (approving \$1,500 PAGA allocation in
19 \$1,026,000 settlement); *In re Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 579 (2010)
20 (“[T]he trial court did not abuse its discretion in approving a settlement which does not allocate
21 any damages to the PAGA claims.”); *Ruelas v. Costco Wholesale Corp.*, 67 F. Supp. 3d 1137,
22 1143-1144 (N.D. Cal. 2014) (criticizing double recoveries of civil and statutory penalties as a
23 “windfall”).

24 Based on these risks, Plaintiffs discounted the maximum PAGA amount by 50%, to
25 arrive at an estimated exposure of \$2,990,922.84. (Choi Decl. ¶13)

26 Thus, Plaintiffs’ predicted realistic total recovery for the Settlement Class if the matter
27 proceeded through trial would be approximately \$4,015,390.40. (Choi Decl. ¶14) The proposed
28 settlement of \$950,000 therefore represents 24% of the realistic exposure for the class and

1 representative action claims. Numerous courts have held that gross settlements approximating
2 between 8% and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g.,*
3 *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action
4 settlement recovering 16% of potential exposure was fair and reasonable); *Bellinghausen v.*
5 *Tractor Supply Co.*, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class
6 action settlement recovering between 8.5% and 25% of the defendant's potential exposure was
7 fair).

8 **E. The Proposed Enhancement Awards Should be Preliminarily Approved**

9 With respect to the enhancements, Plaintiffs assert that this amount is particularly
10 justified in this case given the amount of time Plaintiffs have expended. Tebbs has invested
11 approximately 60 hours prosecuting this matter, including meeting and/or conferring with
12 Plaintiffs' counsel in connection with the assistance of the class claims, preparing for and
13 testifying at his deposition, providing information and various documents, responding to written
14 discovery, and reviewing the pleadings. (Tebbs Decl. ¶ 4). Likewise, Parker estimates that he
15 has spent approximately 40 hours in prosecuting this case, including meeting and/or conferring
16 with Plaintiffs' counsel in connection with the assistance of the class claims, providing
17 information and various documents, and reviewing pleadings. (Parker Decl. ¶ 4).

18 In addition to the above, the risks and consequences involved in the filing of this lawsuit
19 further justify the requested enhancement amount. Indeed, the filing of a major class action
20 lawsuit against a former employer can result in unintended consequences of retaliation by
21 future potential employers.

22 Moreover, while other class members will be reaping the benefits of the current
23 settlement, such individuals did not have to put up their personal stakes in the prosecution of
24 this case. Indeed, had Plaintiffs failed to prevail on the wage/hour class claims, Plaintiffs may
25 have been solely responsible for the costs incurred by Plaintiffs' counsel, as well as those of
26 Defendant. Given the size of this case, and experienced counsel retained by Defendant, any
27 such costs would have been significant if Plaintiffs failed to prevail. Despite all of this,
28 Plaintiffs still agreed to assume such risks for the benefit of the various class members.

1 Lastly, Plaintiffs executed general releases, which was not required of class members.
2 (Agreement at § 87). Notably, courts have routinely granted approval of representative
3 enhancements for far greater amounts. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F.
4 Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet*
5 *Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of
6 \$ 55,000, and three incentive awards of \$ 35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d
7 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v.*
8 *Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
9 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist.
10 LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA
11 overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming
12 \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiffs simply request
13 modest enhancements of \$10,000 each, for a total of \$20,000, for Plaintiffs’ extensive services
14 and investment of time and efforts into this case.

15 **F. Plaintiffs’ Attorneys’ Fees and Costs Should Be Preliminarily Approved**

16 California state and federal courts have recognized that an appropriate method for
17 determining award of attorneys’ fees is based on a percentage of the total value of settlement
18 benefits to Class Members. *E.g., Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Wershba*, 91 Cal.
19 App. 4th at 254; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air*
20 *West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of the equitable doctrine is to
21 “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary
22 does not bear the entire burden alone” so as to avoid unjust enrichment. *Vincent*, 557 F. 2d at
23 769.

24 Under California law, the award of attorneys’ fees in common fund wage and hour class
25 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1
26 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of federal and state courts in
27 holding that when class action litigation establishes a monetary fund for the benefit of the class
28 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,

1 the court may determine the amount of a reasonable fee by choosing an appropriate percentage
2 of the fund created”). Under the percentage of the fund method, a court’s objective remains to
3 “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th
4 Cir. 1998) (Posner, J.) (“When a fee is set by a court rather than by contract, the object is to set
5 it at a level that will approximate what the market will set The judge, in other words, is
6 trying to mimic the market in legal services.”).

7 Attorneys’ fees awards of 35% of the fund are within the expected range in the “market
8 in legal services. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee*
9 *Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and
10 concluding that “[m]ost fee awards were between 25 percent and 35 percent”). An attorneys’
11 fees award of 35% of the fund mimics the market and “is supported by the fact that typical
12 contingency fee agreements provide that class counsel will recover 33% if the case is resolved
13 before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL
14 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of*
15 *Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U.
16 L. Q. 653, 659 n. 11). Indeed, an attorneys’ fees award of 35% of the fund is consistent with
17 “empirical studies [that] show that . . . fee awards in class actions average around one-third of
18 the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

19 Here, Plaintiffs’ counsel will request an attorneys’ fees award of thirty-five percent
20 (35%) of the Gross Settlement Amount. Further, the Parties have agreed to reimbursement of
21 Class Counsel’s litigation costs. Class Counsel have incurred costs at their own risk, for
22 example, for filing the lawsuit, service of process, mediation fees, and payment of other
23 litigation related costs. Further, the results delivered by Plaintiffs’ Counsel also support the
24 requested percentage of the fund, in that a concrete settlement was achieved for the Class.

25 **G. The Settlement Administrator’s Costs Should Be Approved**

26 Phoenix Settlement Administrators, a well-recognized class action settlement
27 administrator, has quoted Settlement Administration Costs not to exceed \$10,000.00 to send
28

1 notices and administer the settlement. (Agreement at §§ 35, 76). The Administration Costs are
2 therefore reasonable and should be approved.

3 **IV. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS SETTLEMENT**

4 On June 20, 2023, Plaintiffs uploaded a copy of this motion and the Settlement
5 Agreement to the LWDA's website. (Choi Decl., Ex. A).

6 **V. PROPOSED SCHEDULE OF SETTLEMENT ADMINISTRATION**

7 Plaintiffs propose the following schedule for the fairness hearing and final proceedings:

8 1. Defendant shall provide the Administrator with the Class Data within 15
9 business days upon granting of the preliminary approval Order by this Court. Within 30
10 calendar days of the Court's Order granting preliminary approval, the Administrator shall mail
11 out the Notices of Class Action Settlement to the Class Members using the most current mailing
12 address identified by reference to the Database and the National Change of Address ("NCOA")
13 database.

14 2. Deadline for Objection: within 30 calendar days after first mailing of notice to
15 class.

16 3. Deadline for Exclusion: within 30 calendar days after first mailing of notice to
17 class.

18 4. Filing date for Motion for Final Approval of Class Action Settlement, Attorneys'
19 Fees and Costs, Representative Enhancement and Administration Costs: within 20 court days
20 after the Deadline for Objections and Exclusion or at least 16 court days before to the Final
21 Fairness Hearing, whichever is sooner.

22 5. Fairness Hearing and Final Approval Hearing: to be determined by the Court.

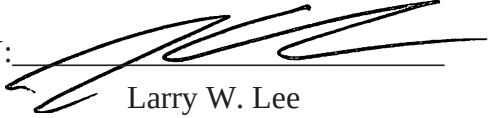
23 **VI. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
24 **PRELIMINARY APPROVAL**

25 Here, the proposed Settlement is fair, adequate, and reasonable. It will result in both
26 substantial monetary benefits to class members; it is **non-reversionary**; it is non-collusive; and
27 it was achieved as the result of informed, extensive, and arms' length negotiations between
28 counsel for respective parties who are experienced in wage and hour class action litigation. In

1 sum, Plaintiffs respectfully request this Court grant this Motion for Preliminary Approval.

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3 Dated: June 20, 2023

DIVERSITY LAW GROUP, PC

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5 BY: 

Larry W. Lee

6 Attorneys for Plaintiffs and the Class
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