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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

VICTORIA TICE, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

TRADER JOE'S COMPANY, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 20CV00892

[Assigned to the Honorable Thomas P. Anderle,
Department 3]

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

Date: April 12, 2023

Time: 10:00 A.M.

Dept.: 3

Complaint Filed: February 14, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 12, 2023, at 10:00 A.M., or as soon thereafter as the matter may be heard, before the Honorable Thomas P. Anderle, judge presiding, in Department 3 of the above referenced Court, located at 1100 Anacapa Street, Santa Barbara, California 93101, Plaintiff Victoria Tice (“Plaintiff”) will and hereby does move this Court for the following relief with respect to the Joint Stipulation of Class Action Settlement (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant Trader Joe’s Company (“Defendant”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Settlement Agreement referenced above;
2. That the Court conditionally certify the following Class for settlement purposes only:

all former employees of Defendant who were employed in the State of California at any time during the Class Period who received their final wages on a paycard, but for whom Defendants do not currently have a written authorization for payment of final wages via pay card (the “Class”);
3. That Plaintiff Victoria Tice be appointed as the Class Representative and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C., and William L. Marder of Polaris Law Group, be appointed as Class Counsel;
4. That the Court preliminarily approve the Settlement Agreement and the total Gross Settlement Amount of Three Hundred Forty Thousand Dollars (\$340,000.00);
5. That the Court finds on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, the incentive payment to the Class Representative, Class Counsel award of attorneys’ fees and litigation costs, settlement administration costs, and the allocation of individual settlement payments to Class Members, that could ultimately be given final approval by this Court;
6. That the Court approve the mailing of the proposed Notice of Class Action Settlement (“Class Notice”) to be sent to Class Members;
7. That the Court appoint Phoenix Settlement Administrators as the Settlement

1 Administrator; and

2 8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

3 This motion is made pursuant to Rule 3.769 of the California Rules of Court, which
4 provides for court approval of the settlement of a purported class action and allows the Court to
5 preliminarily certify a class for settlement purposes.

6 The basis for this unopposed motion is that the proposed settlement is fair, adequate, and
7 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
8 Class Members to participate in, opt-out of, or object to the settlement. This motion is based on
9 the attached Memorandum of Points and Authorities, the Stipulation and the proposed Class
10 Notice, and the supporting Declarations of Larry W. Lee, Max W. Gavron, William L. Marder,
11 and Plaintiff Victoria Tice, upon the oral arguments of counsel (should there be any), and on the
12 complete records and file herein.

13
14 DATED: March 9, 2023

DIVERSITY LAW GROUP, P.C.

15
16 By: 

Larry W. Lee

17 Max Gavron

18 Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act (“PAGA”)
3 action seeking statutory and civil penalties under the California Labor Code. Plaintiff Victoria Tice
4 (“Plaintiff”) alleges that Defendant Trader Joe’s Company (“Defendant”) issued payment of final
5 wages to employees in the form of a paycard without authorization in violation of Labor Code §§
6 201-203, 212, and 213. Based on these violations, Plaintiff asserts class and PAGA claims for
7 alleged violations of Labor Code §§ 201-203, 212, and 213. The Parties have reached a class and
8 PAGA representative action settlement, the terms of which are reflected in the Parties’ Joint
9 Stipulation of Class Action Settlement (“Stipulation” or “Settlement Agreement”).

10 As this Court will likely recall, prior to the settlement of this action, the Parties thoroughly
11 investigated the facts relating to the class and PAGA claims alleged in this lawsuit and engaged in
12 a thorough study of the legal principles applicable to the claims asserted against Defendant,
13 including significant motion practice. Through the exchange of formal and informal discovery,
14 Defendant provided necessary data pertaining to the number of putative class members as well as
15 documents and information pertaining to Defendant’s policies and practices regarding final wages
16 and use of paycards. The information provided by Defendant allowed Plaintiff to review and
17 analyze the liability and potential exposure. The Parties also attended mediation with experienced
18 wage-and-hour mediator Gig Kyriacou, Esq. and significant subsequent negotiation discussions
19 over the course of two years. After such extended negotiations, the Parties were able to reach the
20 current settlement.

21 The terms of the Settlement Agreement provide that Defendant pay a Gross Settlement
22 Amount of Three Hundred Forty Thousand Dollars (\$340,000.00) to resolve the class and PAGA
23 claims in this case. Significantly, this is a **non-reversionary settlement**, meaning that the entirety
24 of the Gross Settlement Amount will be distributed to the Class, such that **no remaining monies**
25 **will revert to Defendant**. Further, no claim forms are required. The following represents the key
26 terms of the Settlement:

- 27 • Gross Settlement Amount of \$340,000.00;
- 28 • Estimated class size of 948 individuals in the Class;

- Incentive payment to the Class Representative of up to \$10,000.00;
- Class Counsel’s attorneys’ fees of one-third of the Gross Settlement Amount, up to \$113,333.33;
- Class Counsel’s costs associated with prosecution and resolution of this action of up to \$55,000.00;
- Settlement administration costs of up to \$11,000.00;
- Payment to the Labor & Workforce Development Agency of \$18,750.00, representing 75% of the total PAGA penalties of \$25,000.00;
- Payment to aggrieved employees of \$6,250.00, representing 25% of the total PAGA penalties of \$25,000.00, which will be apportioned on a per capita basis; and
- Net Settlement Amount of approximately \$125,666.67, which will be apportioned on a per capita basis.

The Parties and their respective counsel believe that the settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that the Class might not be certified and/or that Plaintiff could fail to establish liability.

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

II. PROCEDURAL HISTORY

On February 10, 2020, Plaintiff filed her written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-204, 212, and 213. pursuant to the PAGA, Labor Code § 2699. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. Thereafter, on February 14, 2020, Plaintiff filed her class and PAGA action Complaint against Defendant in Santa Barbara County Superior Court. *Id.* The Complaint alleges causes of action for (1) violation of Labor Code §§ 201-203 and (2) violation of the PAGA, Labor Code

1 § 2698, *et seq.* *Id.*

2 Plaintiff's class and PAGA claims as pled in the Complaint are predicated upon the
3 allegations that Defendant issued payment of final wages to separated employees via a paycard
4 without authorization, which required employees to incur fees to use, was not fully cashable, and
5 was not usable at all financial institutions, resulting in a failure to timely pay all wages owed at
6 the time of separation of employment. As a result of the alleged violations above, Plaintiff seeks
7 statutory and civil penalties under the California Labor Code and the PAGA, as well as attorneys'
8 fees and costs. Gavron Decl. ¶ 4.

9 After the filing of the Complaint and early exchange of written discovery, the Parties
10 agreed to engage in mediation. Gavron Decl. ¶ 5. In connection with mediation, the Parties engaged
11 in informal discovery to allow Plaintiff to assess the claims and liability, as well as analyze the
12 maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiff's counsel with
13 informal data and information pertaining to the number of putative class members, as well as
14 documents and information pertaining to Defendant's policies and practices regarding payment of
15 final wages to separating employees and use of paycards. *Id.*

16 On November 17, 2020, the Parties attended mediation with Gig Kyriacou, Esq. Despite a
17 full day of arm's-length negotiations, the Parties were unable to reach an agreement during the
18 mediation and continued litigating the Action. *Id.* ¶ 6.

19 The Parties engaged in further formal discovery, including the taking of depositions,
20 issuance of third-party subpoenas, and production of documents. The Parties also engaged in
21 substantial motion practice, including a motion for class certification, motion to strike, and
22 litigation regarding Plaintiff's subpoena to the pay card provider, etc.... Thereafter, the Parties re-
23 engaged Mr. Kyriacou with further settlement discussions.

24 After thorough investigation and evaluation of the facts and claims, and as a result of the
25 arm's-length negotiations facilitated by Mr. Kyriacou, the Parties and their counsel reached a
26 settlement in principle and entered into a Memorandum of Understanding. *Id.* The Parties
27 negotiated the terms of the settlement over the course of subsequent months and ultimately entered
28 into the Settlement Agreement in resolution of Plaintiff's class and PAGA claims in this lawsuit.

1 A true and correct copy of the Settlement Agreement is attached as **Exhibit A** to the Declaration
2 of Max W. Gavron. *Id.*

3 The Parties recognize the risk, expense, and delay in continuing litigation with the class
4 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl. ¶
5 9. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims
6 arising from or relating to the class and PAGA claims as set forth in the Settlement Agreement.

7 **III. DISCUSSION**

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

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

23 (Fed. Jud. Ctr., 3rd ed. 1995).

24 Thus, the preliminary approval by the trial court is simply a conditional finding that the
25 settlement appears to be within the range of acceptable settlements. As Professor Newberg
26 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
27 concerning a tentative settlement proposal may vary. The court may find that the settlement
28 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.” Alba
Conte & Herbert B. Newberg, *4 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*:

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

6 *Id.* § 11.24.

7 Here, the Parties have reached such an agreement and have submitted to this Court in
8 connection with this motion a copy of the Settlement Agreement fully setting forth the agreement
9 reached by the Parties. The Settlement Agreement sets forth all terms of the agreement reached by
10 the Parties as to settlement of the class and PAGA claims. Said terms in the Settlement Agreement
11 include, among other things, the method for calculating the Class Members' individual settlement
12 payments.

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

22 The strength of the findings made by a judge at a preliminary
23 hearing or conference concerning a tentative settlement
24 proposal...may be set out in conditional orders granting tentative
25 approval to the various items submitted to the court. Three basic
26 rulings are often conditionally entered at this preliminary hearing.
These conditional rulings may approve a temporary settlement class,
the proposed settlement, and the class counsel's application for fees
and expenses.

27 4 *Newberg on Class Actions* § 11.26.

28 In addition to such terms as class identification, settlement amount, and payment

procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to which the Parties stipulate to the Court's provisional certification of the Class for the purposes of this settlement only. *See* Stipulation ¶ II.1.

A. Proposed Class Definition

The current settlement is being settled on behalf of the Class of "all former employees of Defendants who were employed in the State of California at any time during the Class Period who received their final wages on a paycard, but for whom Defendants do not currently have a written authorization for payment of final wages via pay card." *See* Stipulation ¶ I.2.

Pursuant to the Settlement Agreement, Defendant has represented that there are approximately 948 individuals that comprise the Class. *See* Stipulation ¶ I.17. If the number of those individuals increases above 996, then Defendant has the option to either increase the Gross Settlement Amount by a proportionate amount or cut off the Class Period and PAGA Period so that the number of Class Members will not exceed 996. *Id.*

B. Settlement Terms and Evaluation

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 substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F.Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the 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* § 11.47; *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at p. 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 counsel has been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 5-8; Gavron Decl. ¶¶ 27-33; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 5-12. Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 10.

Based on the class data provided by Defendant, Plaintiff estimated that Defendant would face potential liability of approximately \$3,879,216.00 if Plaintiff succeeded at trial. Gavron Decl. ¶ 16. Specifically, Plaintiff calculated waiting time penalties under Labor Code § 203 based on 948 putative class members and their average hourly rates of pay (948 employees x [(8 hours x \$17.05) x 30 days = \$3,879,216.0]). *Id.*

With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that Defendant could face civil penalties of up to a maximum of \$94,800.00 if Plaintiff were to succeed at trial, and the Court awarded a \$100 penalty per violation. Gavron Decl. ¶ 17. However, even assuming Plaintiff ultimately prevails on her PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90 percent, citing the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at p. 539.

1 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
2 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
3 the claims and further with respect to the reduction of PAGA penalties and that it could be
4 persuasive to the Court. Gavron Decl. ¶ 19. Thus, even if Plaintiff were to successfully prove her
5 claims at trial, there is a possibility that the Court may only award a small percentage of PAGA
6 penalties, as the Court has discretion to do so. The Gross Settlement Amount was premised with
7 this risk in mind, associated with the possibility of the Court significantly reducing Plaintiff's
8 PAGA penalties, along with other attendant risks, even if Plaintiff was to prevail at trial. *Id.*

9 Further, Defendant raised several defenses that presented risk. Defendant likely would have
10 argued that any failure to pay wages upon separation of employment was not “willful” within the
11 meaning of Section 203, and thus penalties would not be appropriate. A willful failure to pay wages
12 occurs only when “an employer intentionally fails to pay wages to an employee when those wages
13 are due.” 8 Cal. Code Regs. § 13520. However, when there is a “good faith dispute” as to whether
14 an employee is entitled to additional wages, no waiting time penalties can be awarded. 8 Cal. Code
15 Regs. § 13520; *see also Barnhill v. Saunders*, 125 Cal. App. 3d 1, 7 (1981). “A ‘good faith dispute’
16 that any wages are due occurs when an employer presents a defense, based in law or fact, which,
17 if successful, would preclude any recovery on the part of the employee”—it is irrelevant whether
18 the defense is ultimately successful. 8 Cal. Code Regs. § 13520(a); *Amaral v. Cintas Corp.*, 163
19 Cal. App. 4th 1157, 1201 (2008) (the “fact that a defense is ultimately unsuccessful will not
20 preclude a finding that a good faith dispute did exist”); *Road Sprinklers Fitters Local Union No.*
21 *669 v. G & G Fire Sprinklers Inc.*, 102 Cal. App. 4th 765, 782 (2002) (employer’s good faith, yet
22 mistaken, belief that wages are not owed negates finding of willfulness). Defendant also argued,
23 and the Court found that this case was not suitable for class certification.

24 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
25 inherent risks of litigation, including the substantial risks relative to class certification and the
26 merits of the claims, the costs of pursuing such litigation, and the risks associated with the Court’s
27 discretion to reduce PAGA penalties. The settlement is the result of extensive arm’s-length
28 negotiations between the Parties and their counsel and was facilitated by an experienced and

1 neutral mediator.

2 Indeed, numerous courts have held that **gross** settlements approximating between only 8
3 and 25 percent of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego*
4 *Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement
5 recovering 16 percent of potential exposure was fair and reasonable; “[i]t is well-settled law that a
6 cash settlement amounting to only a fraction of the potential recovery does not per se render the
7 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
8 assessed relative to risks of pursuing the litigation to judgment”; noting that whether the settlement
9 is fair and adequate depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor*
10 *Supply Co.*, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015) (holding that class action
11 settlement recovering between **8.5 percent and 25 percent** of the defendant’s potential exposure
12 was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal.
13 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1**
14 **percent** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan*
15 *Chase & Co.*, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action
16 settlement of approximately 15 percent of the potential recovery was fair and reasonable).

17 Here, the total amount of class and PAGA penalties amount to approximately
18 \$3,974,016.00 without discounting for potentially losing on any cause of action. Gavron Decl.
19 ¶ 18. The Gross Settlement Amount is \$340,000,000, which is approximately **8.6%** of the
20 maximum class and PAGA penalties. *Id.* Thus, the settlement was negotiated at arm’s length and
21 the high settlement percentage-to-recovery further supports that the settlement is fair and
22 reasonable.

23 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
24 Action Settlement (“Class Notice”), should any Class Member wish to pursue his or her own case
25 for the claims being released herein, each Class Member has the right to submit a request for
26 exclusion (*i.e.*, opt-out) from the class action settlement. *See* Stipulation ¶ III(6)(f). Moreover, as
27 set forth in the Class Notice, Class Members are advised of their right to object to any of the terms
28 contained in the Settlement Agreement and attend the final approval hearing.

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

4 The Settlement Agreement provides for Three Hundred Forty Thousand Dollars
5 (\$340,000.00) as the Gross Settlement Amount. *See* Stipulation ¶ I.17. The Net Settlement
6 Amount, calculated after deduction of attorneys' fees (up to \$113,333.33), litigation costs (up to
7 \$55,000.00), the incentive payment to the Class Representative (up to \$10,000.00), payment of
8 PAGA penalties (\$25,000.00), and settlement administration costs (up to \$11,000.00), is estimated
9 to be approximately **\$125,666.67**. *Id.* ¶ III.9.

10 Pursuant to the Settlement Agreement, the Net Settlement Amount, or approximately
11 \$125,666.67, will be equally apportioned among the Class Members. *See* Stipulation ¶ III.9.a. In
12 addition, Class Members who also worked during the PAGA Period (or PAGA Members) will be
13 apportioned 25% of the PAGA Payment, or approximately \$6,250.00, on a per capita basis. *Id.* ¶¶
14 I.21, I.24, III.9.a.

15 Based thereon, on a raw average, each Participating Class Member may potentially recover
16 approximately \$132.56 (\$125,666.67 ÷ 948 Class Members) plus any potential PAGA Payments.
17 Gavron Decl. ¶ 13. The amount actually paid to each Participating Class Member will increase or
18 decrease depending on the number of timely Requests for Exclusion received. *Id.*

19 Finally, the terms of the settlement provide that uncashed settlement payment checks (upon
20 the expiration date) shall be distributed to the *cy pres* recipient State Bar Justice Gap Fund,
21 pursuant to California Code of Civil Procedure § 384. *See* Stipulation ¶ III.10.

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

25 This Settlement is **non-reversionary**, meaning that none of the settlement funds will revert
26 back to Defendant. *See* Stipulation ¶ III.9.

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

28 As a condition of participating in this settlement, Class Members who do not opt out of the
Class Action Settlement will provide a limited release of the following claims:

all claims, rights, demands, liabilities and causes of action that are

1 alleged or could have been alleged based on the facts, allegations
2 and/or claims asserted in the operative complaint in this action
3 including the following claims: (i) failure to pay wages timely at
4 time of termination or resignation (Labor Code §§ 201-203, 212,
5 213). This release shall apply to claims arising during the Class
6 Period.

7 *See* Stipulation ¶ I.30.

8 Aggrieved employees will also provide a limited release of claims under
9 the PAGA:

10 all claims, rights, demands, liabilities and causes of action that are alleged or
11 could have been alleged based on the facts, allegations, and/or claims asserted in
12 the operative complaint, under the PAGA, Cal. Lab. Code §§ 2698, et seq., which
13 are premised on alleged violations of the California Labor Code for: (i) failure to
14 pay wages timely at time of termination or resignation (Labor Code §§ 201-203,
15 212,213). This release shall apply to claims arising during the PAGA Period

16 Stipulation ¶ I.25.

17 Given that the releases are tailored to only claims pled in the operative Complaint that
18 pertain to the settlement class, the release is appropriately limited.

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

20 As this lawsuit seeks statutory and civil penalties as recovery, the Parties have agreed that
21 the entirety of each Individual Settlement Payment to Class Members shall be treated as a payment
22 for penalties and interest and shall be reported by IRS Forms 1099. *See* Stipulation ¶ III.9.a.

23 **5. Affirmative Obligations to be Undertaken by Class Members or Class 24 Counsel and the Reasons for Any Such Obligations**

25 As stated above, Class Members do **not** need to do anything should they wish to receive
26 their share of the settlement funds. In other words, because this is not a claims-made settlement,
27 Class Members will not be required to make a submission to participate in the settlement. No claim
28 forms are required. Thus, this substantially decreases the amount of burden each Class Member
must bear in order to receive their share of the settlement funds.

However, if a Class Member does not wish to take part in this settlement or be bound by
the release, the Class Member must submit a request for exclusion. *See* Stipulation ¶ III.7.f.

1 **C. Notice to Class Members**

2 Should the Court grant the instant motion, Defendant will provide the Settlement
3 Administrator with a list containing each Class Member’s full name, last known home address,
4 last known telephone number, Social Security number, and any other information required by the
5 Settlement Administrator in order to effectuate the terms of the settlement (“Class List”). *See*
6 Stipulation ¶¶ I.5; III.6.a.

7 Pursuant to the Settlement Agreement, Defendant will provide said Class List within fifteen
8 (15) business days of preliminary approval. *See* Stipulation ¶ III.6.a. Within ten (10) calendar days
9 of receipt of the Class List from Defendant, the Settlement Administrator will mail the Class Notice
10 to Class Members via regular First-Class U.S. mail. *Id.* ¶ III.6.b. For any Class Notices returned
11 to the Settlement Administrator as undeliverable, the Settlement Administrator shall conduct a
12 skip trace to locate the correct address based on the National Change of Address Database. *Id.* ¶
13 III.6.c. If an updated/corrected address can be obtained through skip tracing, the Settlement
14 Administrator will re-mail the Class Notice within five (5) calendar days of receiving notice that
15 said Class Notice was undeliverable. *Id.* Class Members who receive a re-mailed Class Notice will
16 have their deadline to submit opt-outs, written objections, and/or disputes regarding information
17 pertaining to their individual settlement payments as contained in the Class Notice extended by
18 fifteen (15) calendar days. *Id.*

19 The Class Notice will advise Class Members of what the lawsuit is about, their rights and/or
20 options under the settlement, the total settlement amount and other terms of the settlement, their
21 expected individual settlement payment share, their opportunity to and procedures to opt out or to
22 object to the settlement, information pertaining to the final approval hearing, and the release of
23 claims. *See* Class Notice. As set forth in the Class Notice, Class Members will be allowed to opt
24 out of or object to the Settlement by a certain deadline, which is forty-five (45) days after the initial
25 mailing of the Class Notice. *See* Stipulation ¶ I.33. Class Members who received a re-mailed Class
26 Notice will have that deadline extended by 15 calendar days from the original response deadline.
27 *Id.* ¶ III.6.c. With respect to objections, Class Members are also informed in the Class Notice that
28 they may object in writing and/or appear at the final approval hearing to present their objections

1 to the Court. *Id.* ¶ III.6.g; *see* Class Notice.

2 If Class Members need further information about the settlement and/or the lawsuit, Class
3 Members are provided with Class Counsel’s contact information and the Settlement
4 Administrator’s contact information in the Class Notice. *See* Class Notice.

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 some
11 common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation
12 are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s
13 conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d
14 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s
15 conduct is uniformly directed at a class of employees, as Plaintiff alleges here, the class-wide
16 impact of the Defendant’s policies satisfies the commonality requirement. *See Stephens v.*
17 *Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

18 In the present case, Plaintiff alleges that Defendant is liable to the Class for unauthorized
19 issuance of payment of final wages via paycard. Like all Class Members, Plaintiff was subjected
20 to these same policies and practices. Declaration of Victoria Tice (“Tice Decl.”) ¶¶ 3, 4. In other
21 words, Plaintiff contends that she was subjected to the same policies and practices as other Class
22 Members and thus, the typicality requirement is met.

23 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
24 issues been raised or presented. *Id.* ¶ 5. Plaintiff has taken all necessary steps to represent the
25 interests of the Class, including by providing information and documents to Plaintiff’s counsel,
26 and being deposed. *Id.* ¶¶ 6-8. For such reasons, Plaintiff has adequately represented the Class
27 Members and will continue to do so.

28 //

1 **2. Class Counsel Has Adequately Represented the Class and Has**
2 **Experience with Wage and Hour Class Action**

3 From the inception of the case, Class Counsel has zealously represented the interests of the
4 Class. Class Counsel has engaged in significant discovery and meet and confer discussions with
5 opposing counsel to obtain documents and data on behalf of the Class, as well as engaging in
6 significant motion practice. Gavron Decl. ¶¶ 34. The settlement was obtained for the benefit of the
7 Class, as opposed to the individual Class Representative. *Id.* Further, Class Counsel has been
8 approved as class counsel on a number of prior cases, have litigated numerous other class action
9 cases, and are competent to represent the class. Lee Decl. ¶¶ 5-8; Gavron Decl. ¶¶ 27-33; Marder
10 Decl. ¶¶ 5-12.

11 **E. Costs and Fees**

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

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

21 The common fund doctrine is predicated on the principle of preventing unjust enrichment.
22 When a litigant's efforts create or preserve a fund from which others derive benefits, she may
23 require the passive beneficiaries to compensate those who created the fund. Both California state
24 and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at p. 35; *Vincent*, 557 F.2d
25 at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995),
26 the California Supreme Court recognized that the common fund doctrine has been applied
27 "consistently in California when an action brought by one party creates a fund in which other
28 persons are entitled to share." The reasons for applying the common fund doctrine include:

1 Fairness to the successful litigant, who might otherwise receive no
2 benefit because his recovery might be consumed by the expenses;
3 correlative prevention of an unfair advantage to the others who are
4 entitled to share in the fund and who should bear their share of the
5 burden of its recovery; encouragement of the attorney for the
6 successful litigant who will be more willing to undertake and
diligently prosecute proper litigation for the protection or recovery
of the fund if he is assured that he will be properly and directly
compensated should his efforts be successful.

7 *Id.*

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

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

20 The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement
21 Amount, or \$113,333.33, for payment to Class Counsel as attorneys' fees. *See* Stipulation ¶
22 III.13. The Parties have agreed to a payment of the foregoing attorneys' fees and, thus, this
23 payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of
24 Class Counsel's litigation costs of up to \$55,000.00. *Id.* Class Counsel has, at their own risk,
25 expended costs, for example, to file this instant action and other pleadings in the case, effect
26 service of process, participate in mediation, and advance other litigation-related costs, including
27 the costs of mailing of a *Belaire-West* notice and the issuance and processing of 348 deposition
28 subpoenas and notices to consumer. Gavron Decl. ¶ 26. If Class Counsel's actual costs are less

1 than \$55,000.00, the remainder will become part of the Net Settlement Amount to be distributed
2 to Class Members. Stipulation ¶ III.13.

3 Based on the foregoing, the Court should preliminarily approve the attorney's fees and
4 costs as requested by the Parties.

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

6 Class Representative Victoria Tice requests a modest award of \$10,000.00. *See* Stipulation
7 ¶ III.12. The Class Representative met and conferred with her counsel on a number of occasions
8 to discuss the case, provided documents and information to her counsel, provided her deposition,
9 and reviewed pleadings and documents, including the Settlement Agreement. Tice Decl. ¶¶ 6-8.
10 As part of her duties as the Class Representative, Plaintiff provided invaluable information,
11 evidence, and documents that resulted in this settlement. Furthermore, in consideration for her
12 service payment, Plaintiff also executed an individual general release of all claims under California
13 Civil Code § 1542, which other members of the Class did not have to do. *See* Stipulation ¶ III.2.

14 In addition to the invaluable services that she provided, Plaintiff also took a significant
15 risk, both professionally and monetarily, in acting as the Class Representative and seeking benefits
16 on behalf of the Class. Because the claims alleged by the Class Representative involved the
17 payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of
18 Defendant, had she not prevailed in this action.

19 Furthermore, given that future employers are much less likely to hire individuals who have
20 filed suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice
21 in the future from other potential employers. Plaintiff took this risk upon herself and the whole
22 Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual
23 lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the
24 potential for retaliation and not getting future employment had they filed a public lawsuit.

25 **3. Settlement Administration Fees**

26 The Parties have agreed to an estimated payment of no more than \$11,000.00 to the
27 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
28 this settlement. *See* Stipulation ¶¶ I.35, III.14. Phoenix Settlement Administrators is a well-

1 recognized class action settlement administrator. The Parties believe that the administration fee is
2 reasonable and should be approved.

3 **F. Notice to the LWDA**

4 In conjunction with the filing of this motion, Plaintiff will provide notice to the Labor and
5 Workforce Development Agency. Gavron Decl. ¶ 36.

6 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
7 **PRELIMINARY APPROVAL**

8 The settlement presented here is fair, adequate, and reasonable. The settlement will result
9 in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved
10 as the result of informed, extensive, and arm's length negotiations conducted by counsel for the
11 respective Parties who are experienced in wage and hour class action litigation and facilitated by
12 an experienced and neutral mediator.

13 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
14 approval of the proposed Settlement, sign the proposed Order, approve and authorize mailing of
15 the proposed Class Notice, and set a date for a final approval hearing.

16
17 DATED: March 9, 2023

DIVERSITY LAW GROUP, P.C.

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19 By: 
20 Larry W. Lee
21 Max Gavron
22 Attorneys for Plaintiff and the Class
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