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

SAKHOEUTH “KURT” SAO, individually
and on behalf of all others similarly situated,

Plaintiff,

vs.

AUTOMATED GATE SERVICES, INC., a
California corporation; and DOES 1 through
50, inclusive,

Defendants.

Case No. RIC2001904

[Assigned for all purposes to the Hon. Sunshine
S. Sykes, Dept. 6]

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

Date: May 2, 2022

Time: 9:00 A.M.

Dept.: 6

Complaint Filed: June 1, 2020

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on May 2, 2022, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Sunshine S. Sykes, judge presiding, in Department 6
4 of the above-referenced courthouse, located at 4050 Main Street, Riverside, Plaintiff Sakhoeuth
5 “Kurt” Sao (“Plaintiff”) will and hereby does move this Court for an Order:

6 1. Granting final approval to the Joint Stipulation of Class Action Settlement,
7 including the amendments thereto (“Settlement” or “Settlement Agreement”) entered into by
8 Plaintiff and Defendant Automated Gate Services, Inc. (“Defendant”) (together with Plaintiff, the
9 “Parties”) in this action;

10 2. Approving distribution of the settlement funds to Class Members pursuant to the
11 terms of the Settlement Agreement;

12 3. Approving Plaintiff’s request for an award of the Class Representative
13 Enhancement Payment of \$5,000.00 to Plaintiff pursuant to the terms of the Settlement
14 Agreement;

15 4. Approving Plaintiff’s Counsel’s request for an award of attorneys’ fees to Class
16 Counsel for one-third of the Gross Settlement Amount of \$162,500.00, or \$54,166.67, and
17 reimbursement of actual litigation costs of \$2,576.43, pursuant to the terms of the Settlement
18 Agreement;

19 5. Approving Plaintiff’s request for payment of Settlement Administration Costs to
20 Phoenix Settlement Administrators in the amount of \$2,845.00, pursuant to the terms of the
21 Settlement Agreement;

22 6. Approving Plaintiff’s request for payment to the California Labor & Workforce
23 Development Agency (“LWDA”) for \$11,250.00, pursuant to the terms of the Settlement
24 Agreement; and

25 7. Entering final judgment as to all members of the Settlement Class in this action.

26 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
27 provides for court approval of the settlement of a purported class action and allows the Court to
28 grant final certification of a class for settlement purposes. In light of the overwhelmingly

1 positive response, as shown by the lack of any requests for exclusion and objections, there is no
2 question that the settlement is fair, reasonable, and adequate, and thus should be granted final
3 approval by the Court.

4 This Motion will be based on the attached Memorandum of Points and Authorities and
5 the supporting Declarations of Larry W. Lee, and Mai Tulyathan, Plaintiff Sakhoeuth “Kurt”
6 Sao, and Taylor Mitzner of Phoenix Settlement Administrators, the oral arguments of counsel
7 (should there be any), and on the complete records and file herein.

8
9 DATED: April 8, 2022

DIVERSITY LAW GROUP, P.C.

10
11 By: 
12 Larry W. Lee
13 Howard L. Magee
14 Mai Tulyathan
15 Attorneys for Plaintiff, the Class, and Aggrieved
16 Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Sakhoeth “Kurt” Sao (“Plaintiff”) now seeks the Court’s final approval of the
4 Settlement Agreement. In sum, the Settlement Agreement provides for a \$162,500.00 non-
5 reversionary fund to be created for the benefit of the Class, from which attorneys’ fees, litigation
6 costs, enhancement payment to the Plaintiff, payment to the California Labor & Workforce
7 Development Agency (“LWDA”), and costs of settlement administration are to be paid.¹ After
8 these deductions are made, the entire net settlement fund will be paid to all Class Members who
9 did not opt-out of the Settlement.

10 This history of this litigation was previously detailed in Plaintiff’s Preliminary Approval
11 Motion. The Court preliminary approved this Class Action Settlement on January 28, 2022,
12 directing distribution of the Notice of Class Action Settlement (“Class Notice”) and scheduling
13 the hearing final approval of the settlement (the “Preliminary Approval Order”).

14 As directed by the Court, the Settlement Administrator distributed the Class Notice to 48
15 Class Members. (Declaration of Taylor Mitzner (“Mitzner Decl.”) (on behalf of Phoenix
16 Settlement Administrators) ¶ 5.) The deadline for Class Members to submit requests for
17 exclusion or submit any objections is April 29, 2022. (Mitzner Decl. ¶ 8.) To date, no
18 individuals have filed any objections to the Settlement and only two (2) class members, David
19 Nickerson and Derrick Burroughs, have opted out. (*Id.* ¶¶ 7-8.) Based on this information
20 provided by Phoenix Settlement Administrators, there is a 95.83% participation rate by Class
21 Members. Thus, an inference can be made that the Class supports the Court’s Preliminary
22 Approval Order finding that the Settlement Agreement is fair and reasonable.

23 In sum, as a result of the settlement administration process, the lack of any objections,
24 and the amount of class funds being paid out to the Class Members, the Court should confirm its
25

26 _____
27
28 ¹ The employer’s share of payroll taxes are to be paid separately by Defendant.

1 preliminary approval. The lack of opposition from the Class supports the Court's initial finding
2 that the Settlement is fair and reasonable.

3 In addition to the overwhelming positive results of the class notice process, the following
4 summary of the basic points outlined in this memorandum supports approval of this Settlement:

- 5 ▪ The Settlement provides a total settlement sum of \$162,500.00 which is **non-**
6 **reversionary**;
- 7 ▪ Class Members did not need to submit claim forms to participate in the
8 settlement, and will be paid automatically;
- 9 ▪ The allocation reflects that payment of claims will be paid to all Class Members
10 on a pro-rata basis, based on the number of weeks worked by each Class Member
11 during the Class Period, with an average payment of \$\$1,802.43 per person (*See*
12 Mitzner Decl. ¶ 12);
- 13 ▪ Plaintiff investigated the claims at issue, including exchanges of information by
14 Plaintiff and Defendant of class data for the entire class necessary for Plaintiff to
15 fully evaluate this case;
- 16 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was retained
17 for fees estimated payment not to exceed \$2,845.00; and
- 18 ▪ The LWDA will also be a beneficiary of this Settlement as it will receive
19 \$11,250.00, should this Settlement be granted final approval.

20 Accordingly, the Court should grant Final Approval consistent with the Preliminary
21 Approval Order.

22 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE** 23 **SETTLEMENT**

24 The notice procedures required by the Preliminary Approval Order have been followed
25 and satisfy all due process rights of Class Members. The Preliminary Approval Order
26 contemplated that the Class Notice be sent to all Class Members by U.S. First-Class Mail, as
27 specified in the Settlement Agreement. The Preliminary Approval Order contemplated, further,
28 that Phoenix Settlement Administrators would serve as the Settlement Administrator.

1 As clearly stated in the Mitzner Declaration, notice was provided to all Class Members as
2 required by the Preliminary Approval Order. (Mitzner Decl. ¶ 5.) On February 11, 2022, the
3 Settlement Administrator received a class data file from Defendant’s counsel that included the
4 names and other information for 48 Class Members. (*Id.* ¶ 3.) On March 15, 2022, the
5 Settlement Administrator sent each Class Member the Class Notice via U.S. First-Class Mail.
6 (*Id.* ¶ 5.) After the initial mailing of the Class Notice, zero (0) Class Notices were returned to the
7 Settlement Administrator. (*Id.* ¶ 6.) Thus, as of the date of this filing, there are no undeliverable
8 Class Notices, and the Class Notice was effectively sent to all 48 Class Members.

9 The Class Notice also provided Class Members with Class Counsel’s contact information
10 so that Class Members could seek further information regarding the Settlement, as well as the
11 contact information for the Settlement Administrator so that they may post questions for the
12 Settlement Administrator and/or update their mailing address.

13 The provision of sending the Class Notice to Class Members as described above meets
14 the requirements for the “best notice practicable” in this case as necessary to protect the due
15 process rights of class members. (*See, e.g., Phillips Petroleum Co. v. Shutts* (1985) 472 U.S.
16 797, 811-12 (provision of “best notice practicable” with description of the litigation and
17 explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin* (1974) 417
18 U.S. 156, 174-75 (individual notice must be sent to class members who can be identified through
19 reasonable means); *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314
20 (best practicable notice is that which is “reasonably calculated, under all the circumstances, to
21 apprise interested parties of the pendency of the action and afford them an opportunity to present
22 their objections”).)

23 Here, Class Members were provided mailed notices regarding the Settlement that
24 described the litigation, explained the terms of the Settlement and Class Members’ rights,
25 allowed Class Members to seek further information and/or ask questions, and provided Class
26 Members with the opportunity to exclude themselves and/or object to the Settlement, if so
27 desired. As such, this constitutes proper notice to the Class Members. Accordingly, the Court
28 may proceed to determine the fairness and adequacy of the Settlement and enter its Order

granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the claims, exclusion, and the approval process.

III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE,
AND THUS THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL

A. Strength of Plaintiff’s Case and Likelihood of Certifying the Class

In order to proceed as a class, there are two requirements which must be met—ascertainability and community of interest. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d. 695, 704.) Under California law, there are two basic requirements which must exist to sustain a class action: “[t]he first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved.” (*Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809.) “The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Richmond v. Dart Industries* (1981) 29 Cal. 3d. 462, 470.)

1. The Class is Ascertainable

Whether a class is “ascertainable” within the meaning of Code of Civil Procedure § 382 is determined by examining “(1) class definition, (2) the size of the class, and (3) the means available for identifying the class members.” (*Reyes v. San Diego County Board of Supervisors*, (1987) 196 Cal. App. 3d 1263, 1271.)

Here, as approved by the Court at preliminary approval, the Class is defined as: “All current and former non-exempt employees of Defendant in the State of California at any time from April 1, 2016 through December 31, 2020” (the “Class”). There are 48 individuals that comprise of the Class. (Mitzner Decl. ¶ 5.) This is far more than the minimum required to certify a class. Within the context of manageability, the issue is whether there exists sufficient means for identifying class members at the remedial stage. (*Reyes, supra*, 196 Cal. App. 3d at pp. 1274-75.) Class Members have already been identified by Defendant and notice has been provided to all 48 Class Members. Accordingly, the Class is ascertainable under Code of Civil Procedure § 382.

1 **2. There is a Community of Interest**

2 The “community of interest” requirement embodies three separate factors: (1)
3 predominant common questions of law or fact; (2) class representatives whose claims are typical
4 of the class; and (3) class representatives who can adequately represent the class. (*Richmond*,
5 *supra*, 29 Cal. 3d at p. 470; *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal. App. 4th 1225, 1234.)

6 **a. There are Predominant Common Questions of Law and Fact**

7 “The ultimate question in every case of this type [class actions] is whether...the issues
8 which may be jointly tried, when compared with those requiring separate adjudication, are so
9 numerous and substantial that the maintenance of a class action would be advantageous to the
10 judicial process and to the litigants.” (*Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal. 4th
11 1096, 1104-05.)

12 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure,
13 violated the Labor Code by failing to properly pay wages, provide off-duty meal and rest
14 periods, reimburse business expenses, and provide accurate itemized wage statements to its
15 employees. Defendant denies that liability could be established on a class-wide basis.

16 **b. Plaintiff’s Claims are Typical of the Class Claims**

17 The purported class representative’s claim must be “typical” but not necessarily identical
18 to the claims of other class members; it is sufficient that the representative is similarly situated so
19 that he or she will have the motive to litigate on behalf of the class. (*Classen v. Weller* (1983)
20 145 Cal. App. 3d 27, 45.) Courts look to whether class members have similar injuries, “whether
21 the action is based on conduct which is not unique to the named [p]laintiff,” and whether other
22 class members were injured by the same conduct. (*Hanon v. Dataproducts Corp.* (9th Cir. 1992)
23 976 F.2d 497, 508.) The purpose of the typicality requirement “is to assure that the interest of
24 the named representative aligns with the interests of the class.” (*Id.* at p. 508.)

25 Here, Plaintiff was subjected to the same wage statement policy and practice as other
26 Class Members. Like all other Class Members, Plaintiff alleges that Defendant failed to
27 correctly calculate the regular rate of pay that included non-discretionary incentives and thus
28 underpaid overtime wages to him. Plaintiff also alleges that he was regularly denied requests to

1 take meal and rest breaks, had purported meal break times deducted from his work hours, was
2 required to purchase specialized tools for work purposes but not reimbursed for such costs, and
3 was not provided accurate wage statements. (Declaration of Sakhoeuth “Kurt” Sao (“Sao
4 Decl.”) ¶¶ 2-4.) Thus, Plaintiff’s claims are typical to those of Class Members.

5 **c. Plaintiff Adequately Represented the Class**

6 The class representative, through qualified counsel, must be capable of “vigorously and
7 tenaciously” protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.
8 App. 3d 834, 846.)

9 Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
10 been raised or presented. (Sao Decl. ¶ 6.) Plaintiff has taken all necessary steps to represent the
11 interests of the Class, including providing information and documents to his counsel,
12 communicating with this counsel throughout the litigation, and reviewing the various pleadings
13 and documents in this case. (*Id.* ¶ 5.) For such reasons, Plaintiff has adequately represented the
14 Class Members and will continue to do so.

15 **B. Defendant’s Allegations and Unlikelihood of Class Certification**

16 Defendant asserts that it has maintained lawful policies and practices in place throughout
17 the class period in relation to Plaintiff’s claims, and that Plaintiff would not prevail on class
18 certification. Specifically, Defendant contends that it provided opportunities to take meal and
19 rest periods and that its meal and rest period policies and practices were facially compliant.
20 Defendant also argues that it correctly calculates the overtime regular rate of pay based on a
21 weighted average method and that it does not require employees to purchase any specialized
22 tools for jobs and/or projects. In addition, Defendant asserts that Plaintiff cannot prove
23 willfulness and thus Defendant would not be subject to waiting time penalties under Labor Code
24 § 203. Finally, Defendant contends that since Plaintiff would not be able to prove any of the
25 claims above, his wage statement claims, which are entirely derivative in nature, would fail.

26 In any event, even assuming that one or more classes could be certified, Defendant
27 asserts that it has complied with Labor Code §§ 201-204, 226, 226.7, 510, 512, 558, 1194, and
28 2802. Based thereon, Defendant continues to maintain that it is not liable for the allegations

made by the Plaintiff.

C. Risks, Expenses, and Complexity of Further Litigation

Plaintiff believes that a class can be certified. However, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in his operative complaint at trial, the possibility of non-certification, the possibility that the Court may award only a small percentage of PAGA penalties, and the potential for any appeals. These risks of class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal. 4th 1.

Defendant has maintained that there is no liability. As stated above, Defendant alleges that a class could not have been certified. There is always a risk that the Court will not grant certification of the class, wherein the class will not be entitled to any damages and/or penalties. Based on the foregoing, there was a substantial risk that Plaintiff would not have obtained the total amount of damages and/or penalties alleged. Therefore, the risks, expenses, and complexity of further litigation warrant granting of this Motion.

D. The Negotiation and Terms of the Settlement, and the Reception of the Settlement by Class Members Strongly Support the Conclusion that the Settlement is Fair, Adequate, and Reasonable

Without reiterating the Parties' showing that the Settlement Agreement and the negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for Preliminary Approval of Class Action Settlement, the Parties highlight several key facts. First, the Settlement was the product of negotiation between highly able and experienced attorneys on both sides who possessed the relevant data and conducted extensive legal research. (Declaration of Mai Tulyathan ("Tulyathan Decl.") ¶ 3.) The Parties reviewed and analyzed necessary data pertaining to the Class Members, as well as Defendant's payroll, prevailing wage pay, meal and rest break, business expense reimbursement, and wage statement policies and practices. The Parties also participated in a months-long negotiation process. (*Id.* ¶ 4.) Thus, this Settlement is the result of arm's length negotiations, and should be granted final approval.

Second, the results after mailing of the Class Notice also fully support confirmation of

1 the Court’s preliminary approval of the settlement, as evidenced by the **97.92% participation**
2 **rate**. Further, none of the Class Members filed any objections to the Settlement. (Mitzner Decl.
3 ¶¶ 7-8.) In light of overwhelmingly positive response to the Settlement, the Court may
4 appropriately infer that the settlement is fair, adequate, and reasonable, when among other
5 reasons, no Class Members have objected to it. (*See Class Plaintiffs v. City of Seattle* (9th Cir.
6 1992) 955 F.2d 1268, 1291 (reaction of class members to the settlement is a factor supporting
7 approval of a class action settlement).)

8 **E. Under Well-Established Legal Principles, the Court Should Grant Final**
9 **Approval of the Settlement**

10 **1. Standard of Review**

11 On a motion for final approval of a class action settlement under California Code of Civil
12 Procedure § 382 and California Rules of Court, Rule 3.769, a court’s inquiry at this juncture is
13 whether the settlement is “fair, adequate and reasonable.” (*Officers for Justice v. Civil Serv.*
14 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 625, *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n*
15 (1983) 459 U.S. 1217.) A settlement is fair, adequate, and reasonable, and therefore merits final
16 approval, when “the interests of the class are better served by the settlement than by further
17 litigation.” (*See Manual for Complex Litigation, Fourth* (Fed. Jud. Ctr., 4th ed. 2004) § 21.6 at
18 p. 309 (“MCL”).) The law favors settlement, particularly in class actions and other complex
19 cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of
20 formal litigation. (*See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* (2008) §
21 11.41; *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v.*
Safeco Corp. (9th Cir. 1976) 529 F.2d 943, 950.)

22 Although the Court possesses “broad discretion” in determining that a proposed class
23 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
24 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
25 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
26 adequate to all concerned parties. (*See Officers for Justice, supra*, 688 F.2d at p. 625.)
27 Accordingly, the Court should give due regard to what is otherwise a “private consensual
28 agreement” between the parties. (*Id.*; *see also Church v. Consolidated Freightways, Inc.* (N.D.

1 Cal. 1993) 1993 WL 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720
2 F. Supp. 1379; *MCL* § 21.6 at p. 309 (“The judicial role in reviewing a proposed settlement is
3 critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions
4 on it. The judge cannot rewrite the agreement.”).)

5 A court’s approval of a class action settlement will only be reversed for a clear abuse of
6 discretion. (*See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801; *Officers for*
7 *Justice, supra*, 688 F.2d at p. 626 (reversal of class settlement “only upon a strong showing that
8 the district court’s decision was a clear abuse of discretion”); *Class Plaintiffs, supra*, 955 F.2d at
9 p. 1276; *Ackerman v. Kassar* (9th Cir. 1993) 1993 WL 326453; *Linney v. Cellular Alaska P’ship*
10 (9th Cir. 1998) 151 F.3d 1234, 1238.)

11 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*
12 (2000) 85 Cal. App. 4th 1135, 1146:

13 It cannot be overemphasized that neither the trial court in approving the
14 settlement nor this Court in reviewing that approval have the right or duty to reach
15 any ultimate conclusions on the issues of fact and law which underlie the merits
16 of the dispute. It is well settled that in the judicial consideration of proposed
17 settlements, ‘the [trial] judge does not try out or attempt to decide the merits of
18 the controversy,’ [citation] and the appellate court ‘need not and should not reach
19 any dispositive conclusions on the admittedly unsettled legal issue.

17 2. The Settlement is Presumed to Be Fair

18 The Court should begin its analysis with the presumption that the Settlement is fair and
19 should be approved:

20 [A] presumption of fairness exists where: (1) the settlement is reached through
21 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
22 counsel and the court to act intelligently; (3) counsel is experienced in similar
23 litigation; and (4) the percentage of objectors is small.

23 (*Dunk*, 48 Cal. App. 4th at p. 1802; *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at p.
24 1146; *accord, Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *In re Wash.*
25 *Pub Power Supply, supra*, 720 F. Supp. at p. 1387.)

26 The Settlement here warrants approval and carries a presumption of fairness. As
27 previously noted in the Motion for Preliminary Approval, this Settlement was negotiated at arm’s
28 length between the Parties and their counsel over the course of several months. (Tulyathan Decl.

¶¶ 3-4.)

Second, Class Counsel engaged in extensive factual investigation before settling, including formal and informal discovery, as well as an extensive review and analysis of class data and information pertaining to the putative class members, including without limitation, the number of current and former putative class members during the class period and PAGA period at issue, the number of wage statements at issue, the hourly rates of pay during the class period, spreadsheets containing time and payroll records for putative class members, Defendant's policies pertaining to payment of overtime wages, prevailing wage pay, meal and rest break, reimbursement of business expenses, and the issuance of wage statements. (Tulyathan Decl. ¶ 3.) Further, Class Counsel is highly experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has significant experience in class actions and employment wage and hour matters. (Tulyathan Decl. ¶¶ 7-10; Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 7-12.)

3. Two-Way Costs and Other Risks Inherent in Continued Litigation Favor Final Approval

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. (*See In re General Motors Corp.* (3d Cir. 1995) 55 F.3d 768, 806 ("present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement") (internal citations omitted); *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d 153, 157; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 616-17.)

If Plaintiff pursued this case without settlement and not prevail, Plaintiff would be potentially responsible for Defendant's fees and costs. Likewise, were any individual current or former employees of Defendant to bring individual claims on the same causes of action, they would each face the uncertainty of prevailing and the same possibility of becoming liable to pay fees and costs to Defendant. Accordingly, such claims likely would not be brought by many of these current and former employees who make up the Settlement Class. Thus, this lawsuit

1 achieves a true benefit for the Settlement Class that they might not otherwise get or seek as
2 individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff
3 nor any of the Class Members will be required to pay for Defendant's litigation fees and costs.
4 Thus, the risks undertaken by Class Counsel should be considered a significant factor by the
5 Court in its determination of final approval. The Settlement provides a fair recovery to Class
6 Members and eliminates the risk of costs to Class Members or the Class Representative.

7 The Settlement also affords finality, avoiding significant legal and factual battles that
8 otherwise may have prevented the Class from obtaining any recovery at all. While Class
9 Counsel believe that the Class Members' claims are meritorious and can be successfully
10 litigated, counsel are experienced and fully understand the inherent risks and uncertainty
11 involved with such matters including the resolution of class certification, the outcome of a
12 potential trial, and the outcome of any appeals that would inevitably follow should the Class
13 prevail at trial. Class Counsel has also assessed the same risks in connection with the current
14 settlement. Because the Settlement provides immediate and substantial relief, without the
15 attendant risks and delay of continued litigation—not to mention the threat of litigation fees and
16 costs—Class Counsel believe that the Settlement warrants the Court's final approval.

17 **4. The Complexity, Expense, and Likely Duration of Continued** 18 **Litigation Against Defendant Favor Final Approval**

19 Another factor considered by courts in approving a settlement is the complexity, expense,
20 and likely duration of the litigation. (*See Officers for Justice, supra*, 688 F.2d at p. 625; *Girsh,*
21 *supra*, 521 F.2d at p. 157.) In applying this factor, the Court must weigh the benefits of the
22 settlement against the expense and delay involved in achieving an equivalent or more favorable
23 result at trial. (*Young v. Katz* (5th Cir. 1971) 447 F.2d 431, 433-34.)

24 Here, as noted above, continued litigation could potentially have led to appeals. On the
25 other hand, the Settlement that was reached provides all Class Members—regardless of their
26 means—with fair relief in a prompt and efficient manner. Were the Court to deny final approval,
27 the Class Members would be left without a remedy as a practical matter and courts across the
28 state would have to address the issues presented here in a piecemeal, costly, and time-consuming

1 manner. The Settlement is therefore consistent with the “overriding public interest in settling
2 and quieting litigation” that is “particularly true in class action suits.” (*See Van Bronkhorst*, 529
3 F.2d at p. 950 (footnote omitted); *see also 4 Newberg* at § 11.41.) Here, this case could have
4 potentially involved years of litigation, as seen in similar wage and hour cases.

5 **5. The Opinion of Experienced Counsel Favors Final Approval**

6 Class Counsel supports the Settlement as fair, reasonable, and adequate, and in the best
7 interest of the Class Members as a whole. (Lee Decl. ¶ 4; Tulyathan Decl. ¶ 4.) Similarly,
8 counsel for Defendant is in favor of the Settlement. The endorsement of qualified and well-
9 informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight
10 by the Court in its final approval determination. (*See Officers for Justice*, 688 F.2d at p. 625;
11 *Ellis*, 87 F.R.D. at p. 18; *Boyd*, 485 F. Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.)

12 **IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD** 13 **BE APPROVED**

14 Class Representative Sao requests an enhancement of \$5,000.00 in accordance with the
15 terms of the Settlement Agreement. Plaintiff had multiple discussions and phone conferences
16 with Class Counsel about the case throughout the litigation. (Sao Decl. ¶ 5.) Plaintiff also
17 provided substantive information and documents regarding Defendant’s policies and practices to
18 help support the class claims alleged in this case. (*Id.*) Plaintiff provided declarations and
19 reviewed pleadings and documents in the case as well as the Settlement Agreement. (*Id.*)
20 Accordingly, Plaintiff provided invaluable information, evidence, and documents that resulted in
21 this Settlement.

22 In addition to the invaluable services that he provided, Plaintiff took significant risks,
23 personally, professionally, and monetarily in acting as the Class Representative, seeking benefits
24 on behalf of the Class. (Sao Decl. ¶¶ 11-12.) Because the claims alleged by Plaintiff involved
25 the payment of costs to the prevailing party, Plaintiff undertook the risk that he may be required
26 to pay Defendant’s fees and costs, in the event that Defendant prevailed in this action. (*Id.*)
27 Significantly, given that future employers are much less likely to hire individuals who have filed
28 employment-related lawsuits, particularly cases of this nature, Plaintiff also faced significant risk

1 in not being able to find suitable prospective employment, as a result of filing of this case against
2 Defendant. (*Id.* ¶ 11.)

3 Plaintiff took these risks upon himself for the benefit of the Class. Class Members did
4 not have to file individual lawsuits and bear the risks of payment of fees and costs if they did not
5 prevail, nor did they have to face the potential for retaliation and not getting future employment
6 had they filed a lawsuit which is a public record. These are significant benefits that weigh in
7 favor of granting the requested enhancement. Moreover, this litigation has resulted in a
8 significantly valuable benefit to the Class, and Plaintiff took on substantial risks in helping Class
9 Members obtain this financial benefit. As such, the enhancement should be awarded to Plaintiff
10 for his commitment, dedication, and risks taken for this litigation.

11 **V. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

12 Class Counsel seeks a fee award calculated as one-third (1/3) of the total value of the
13 Gross Settlement Amount, or \$54,166.67, for the successful prosecution and resolution of this
14 action. Under California law, the award of attorneys' fees in common fund wage and hour class
15 action settlements should start with the percentage method. (*See Laffitte v. Robert Half Int'l*
16 (2016) 1 Cal. 5th 480, 503 ("We join the overwhelming majority of federal and state courts in
17 holding that when class action litigation establishes a monetary fund for the benefit of the class
18 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
19 the court may determine the amount of a reasonable fee by choosing an appropriate percentage
20 of the fund created").) Under the percentage of the fund method, the Court's objective remains
21 to "mimic the market" in fixing a reasonable fee. (*See Gaskill v. Gordon* (7th Cir. 1998) 160
22 F.3d 361, 363 (J. Posner) ("When a fee is set by a court rather than by contract, the object is to
23 set it at a level that will approximate what the market will set....The judge, in other words, is
24 trying to mimic the market in legal services").)

25 An award of one-third of the fund in attorneys' fees "mimics the marketplace" as it is
26 "supported by the fact that typical contingency fee agreements provide that class counsel will
27 recover 33% if the case is resolved before trial and 40% if the case is tried." (*Fernandez v.*
28 *Victoria Secret Stores LLC* (C.D. Cal. 2008) 2008 WL 8150856 at p. *16 n. 59 (citing Brickman,

1 *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive*
2 *Fees* (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11.) Indeed, “empirical studies [that] show
3 that...fee awards in class actions average around one-third of the recovery.” (*Chavez v. Netflix,*
4 *Inc.* (2008) 162 Cal. App. 4th 43, 66 n.11.)

5 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
6 percent of the fund. (*Laffitte*, 1 Cal. 5th at p. 506.) The award approved in *Laffitte* was supported
7 by a lodestar cross-check that employed a multiplier of 2.13. (*Id.* at p. 487.) The Court in
8 *Laffitte* explained that when cross-checking a percentage fee request against the lodestar method,
9 the Court should examine the imputed multiplier in the lodestar calculation and, only when the
10 multiplier is “extraordinarily high or low [should] the trial court [] consider whether the
11 percentage method should be adjusted so as to bring the imputed multiplier within a justifiable
12 range.” (*Id.* at p. 505.)

13 Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3
14 percent of the common fund is consistent with, and in the range of, awards in other class action
15 lawsuits.” (*Laffitte v. Robert Half Int’l* (2014) 231 Cal. App. 4th 860, 871.) Here, the fee award
16 representing one-third of the Settlement clearly falls within that range and is consistent with
17 other comprehensive surveys of class action settlements and fee awards. (*See Fitzpatrick, An*
18 *Empirical Study of Class Action Settlements and Their Fee Award* (2010) 7 J. Empirical Leg.
19 Stud. 811, 833 (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards
20 were between 25 percent and 35 percent, with almost no awards more than 35 percent”);
21 Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*
22 (2010) 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (independent studies of class action litigation
23 nationwide conclude that fees representing one-third of the total recovery is consistent with
24 market rates).)

25 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
26 is relevant to the...reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
27 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
28 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class

1 Notice specifically notified Class Members that Plaintiff’s Counsel would be seeking \$54,166.67
2 of the settlement fund as attorneys’ fees. To date, no Class Member has objected to the
3 Settlement or the request for attorneys’ fees. This strong favorable response also supports the
4 requested fees.

5 When the primary method employed to determine fees is the percentage method, courts
6 have discretion to use the lodestar method to “cross-check” the amount of fees calculated by way
7 of percentage. The *Laffitte* Court emphasized, however, that “the lodestar calculation, when
8 used in this manner, does not override the trial court’s primary determination of the fee as a
9 percentage of the common fund and thus does not impose an absolute maximum or minimum on
10 the potential fee award.” (*Laffitte, supra*, 1 Cal. 5th at p. 505 (emphasis added); *In re Rite Aid*
11 *Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, pp. 306-307 (“[The lodestar cross-check does not
12 trump the primary reliance on the percentage of common fund method”).)

13 Nonetheless, the Supreme Court in *Laffitte* stated: “If the multiplier calculated by means
14 of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether
15 the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
16 range, but the court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a
17 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not required;
18 in many cases, performing a cross-check “undermines” one of the primary reasons for using the
19 percentage method: aligning counsel’s incentives with the benefits delivered to the class and
20 discouraging protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the discretion to
21 forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney*
22 *Fees* (1985) 108 F.R.D. 237, 258; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 29-
23 30 (citing the recommendations of the Third Circuit Task Force with approval and observing that
24 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
25 authorities, who have been most vocal about the manner in which it exacerbates the problem of
26 ‘cheap settlements’ and burdens already overworked trial judge.”).)

27 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
28 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also*,

1 e.g., *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying a 2.52
2 multiplier on a cross-check in an antitrust class action); *Chavez, supra*, 162 Cal. App. 4th at p. 60
3 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders* (1988)
4 203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).) The intermediate court in
5 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
6 a 2.13 multiplier. (*Laffitte, supra*, 231 Cal. App. 4th at pp. 881-82.) The intermediate court
7 opinion was affirmed in full by the California Supreme Court in its new decision guiding lower
8 courts on assessing fees.

9 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
10 awarded by the percentage method showing that the majority of multipliers awarded are “in the
11 1.5-3.0” range. (*See Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (affirming
12 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
13 over 30 cases).) Federal district courts applying California law have likewise routinely approved
14 cross-check multipliers between 2 and 3 in employment cases. (*See, e.g., Willner v. Manpower*
15 *Inc.* (N.D. Cal. June 22, 2015) No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (affirming a
16 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
17 *N.A.* (N.D. Cal. 2014) 303 F.R.D. 326, 334 (approving attorneys' fees that resulted in lodestar
18 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.* (N.D. Cal. Feb. 6, 2013) No. 11-CV-02786-
19 LHK, 2013 WL 496358, at *5 (approving a multiplier of 2.76 in settlement of Labor Code
20 violations).) Other courts have found even higher multipliers to be reasonable by comparison to
21 other cases. (*See Craft v. County of San Bernardino* (C.D. Cal. 2008) 624 F. Supp. 2d 1113,
22 1125-26 (approving a 5.2 multiplier on a cross-check after surveying a large body of cases
23 affirming a higher multiplier).)

24 With respect to Class Counsel’s lodestar, to date, approximately 162.9 hours have been
25 expended by Class Counsel in this matter. (Lee Decl. ¶ 10, Ex. A; Tulyathan Decl. ¶ 11, Ex. A.)
26 Moreover, Class Counsel expects to incur approximately 15 additional hours of attorney time in
27 finalizing this settlement. (Lee Decl. ¶ 11; Tulyathan Decl. ¶ 12.) Mr. Lee requests an hourly
28 rate of \$750.00 per hour. (Lee Decl. ¶ 12.) Ms. Tulyathan requests an hourly rate of \$500.00 per

1 hour. (Tulyathan Decl. ¶ 13.) The courts are quite liberal in the evidence required to prove an
2 attorney's hours. Detailed time records are not required. An attorney's testimony alone may
3 suffice: "Testimony of an attorney as to the number of hours worked on a particular case is
4 sufficient evidence to support an award of attorney fees, even in the absence of detailed time
5 records." (*Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.)

6 Reasonable hours include, in addition to time spent during litigation, the time spent
7 before the action is filed, including time spent interviewing the clients, investigating the facts and
8 the law, and preparing the initial pleadings. (*New York Gaslight Club, Inc. v. Carey* (1980) 447
9 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and defend the
10 attorneys' fee claim. (*Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 (1982) [*Serrano IV*].) Thus,
11 Class Counsel requests that the Court find that these hours were reasonable in this litigation.

12 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
13 experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084,
14 1095.) The Court may consider other factors when determining a reasonable hourly rate, *e.g.*,
15 the attorney's skill and experience, the nature of the work performed, the relevant area of
16 expertise and the attorney's customary billing rates. (*Flannery v. California Highway Patrol*
17 (1998) 61 Cal. App. 4th 629, 632-33.)

18 Class Counsel's skill and experience justify the requested rate. As shown in the
19 supporting declarations, Class Counsel have significant experience in the area of employment
20 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
21 employees in employment matters, particularly wage and hour cases. (Lee Decl. ¶¶ 7-12;
22 Tulyathan Decl. ¶¶ 8-10.) As such, based on the hours and applicable rate, Class Counsel's
23 lodestar amount through finalization of this settlement—without a multiplier—will be
24 approximately \$98,650.00. (Lee Decl. ¶ 12; Tulyathan Decl. ¶ 13.)

25 Here, based upon Plaintiff's counsel's lodestar of \$98,650.00, there is no need for a
26 multiplier and is further proof that the requested fee is reasonable and fair, particularly based on
27 the factors described above. (*Wershba v. Apple Computer, Inc.* (Ct. App. 2001) 91 Cal. App. 4th
28 224 (noting that courts using the lodestar method to calculate attorney fees awards in class

actions typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp.* (C.D. Cal. Nov. 18, 2014) 2014 U.S. Dist. LEXIS 162880 (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital Corp.* (C.D. Cal. 2014) 8 F. Supp. 3d 1200, 1210 (awarding 33% of the common fund, based on a multiplier of 2.52).)

As such, the requested fee award is fair and reasonable, and should be awarded in its entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Class Members. For such reasons, Class Counsel's request for attorneys' fees in the amount of \$54,166.67 is fair, reasonable, and adequate.

VI. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

The request for reimbursement of costs, in the amount of \$2,576.43 is fair and reasonable. The costs are all actual, litigation-related costs, which have been detailed in the supporting declaration of Class Counsel. (Tulyathan Decl. ¶ 14, Ex. B.) The authority for the court to award this is the Parties' Settlement Agreement and the California Labor Code. As such, this request should be approved.

VII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE APPROVED

Plaintiff also requests that the Court approve \$2,845.00 in administration costs to the Settlement Administrator, Phoenix Settlement Administrators. As detailed in the Declaration of Ms. Mitzner submitted herewith, Phoenix Settlement Administrators performed duties in connection with this Settlement that were integral in effectuating the Settlement and the Notice process. Among other things, Phoenix Settlement Administrators calculated each Class Member's individual settlement payment, updated addresses contained in the class data supplied by Defendant, prepared, formatted, translated, and distributed Class Notices to all 48 Class Members, and has otherwise administered the Settlement. (Mitzner Decl. ¶ 5.) For such reasons, it is requested that the Settlement Administrator's fees be approved.

1 **VIII. CONCLUSION**

2 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff
3 respectfully submits that the standards for final approval have been met, and the terms of the
4 Settlement Agreement are fair, adequate, and reasonable.

5 Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form
6 proposed and submitted:

- 7 1. Granting final approval to the proposed Settlement Agreement in this action;
8 2. Approving distribution of the settlement funds to the Class Members pursuant to
9 the terms of the Settlement Agreement;
10 3. Approving Plaintiff's request for an award of the class representative
11 enhancement of \$5,000.00, pursuant to the terms of the Settlement Agreement;
12 4. Approving Plaintiff Counsel's request for an award to Class Counsel for
13 \$54,166.67 in attorneys' fees and \$2,576.43 in actual costs, pursuant to the terms of the
14 Settlement Agreement;
15 5. Approving Plaintiff's request for payment of the settlement administration costs
16 to Phoenix Settlement Administrators in the amount of \$2,845.00, pursuant to the terms of the
17 Settlement Agreement;
18 6. Approving Plaintiff's request for payment to the LWDA for \$11,250.00, pursuant
19 to the terms of the Settlement Agreement; and
20 7. Entering final judgment as to all members of the Class in this action.

21
22 DATED: April 8, 2022

DIVERSITY LAW GROUP, P.C.

23
24 By: 

Larry W. Lee

Howard L. Magee

Mai Tulyathan

25 Attorneys for Plaintiff, the Class, and Aggrieved
26 Employees
27
28