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Attorneys for Plaintiff, the Class, and Aggrieved Employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

SYLVIA BERNABE, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

899 CHARLESTON, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 20CV366465

(Assigned to the Honorable Patricia M. Lucas,
Dept. 3)

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

Date: August 18, 2021
Time: 1:30 P.M.
Dept.: 3

Complaint Filed: May 8, 2020

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

2 **PLEASE TAKE NOTICE** that on August 18, 2021, at 1:30 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Patricia M. Lucas, judge presiding, in
4 Department 3 of the above referenced Court located at 191 North First Street, San Jose,
5 California 95113, Plaintiff Sylvia Bernabe (“Plaintiff”) will and hereby does move this Court for
6 the following relief with respect to the Joint Stipulation of Class Action Settlement and Release
7 (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant 899
8 Charleston. (“Defendant”) (together with Plaintiff, the “Parties”):

9 1. That the Court approve the Stipulation referenced above;

10 2. That the Court conditionally certify the following classes for settlement purposes
11 only: All current and former non-exempt employees of Defendant in the State of California who
12 were paid shift differential wages, bonuses, and commissions at any time from April 6, 2017,
13 through October 31, 2020, who do not opt out of this Settlement (“the Class”);

14 3. That Plaintiff Sylvia Bernabe be appointed as the Class Representative and Larry
15 W. Lee and Mai Tulyathan of Diversity Law Group, P.C., be appointed as Class Counsel;

16 4. That the Court preliminarily approve the Stipulation and the total Maximum
17 Settlement Amount of Two Hundred and Fifty Thousand Dollars and Zero Cents (\$250,000.00);

18 5. That the Court find on a preliminary basis that the Stipulation appears to be within
19 the range of reasonableness of a settlement, including the amount of the PAGA penalties, the
20 service payment to the Class Representative, Class Counsel’s award of attorneys’ fees and
21 litigation costs, settlement administration costs, and the allocation of individual payments to
22 Class Members, that could ultimately be given final approval by this Court;

23 6. That the Court approve the mailing of the proposed Notice of Pendency of Class
24 Action Settlement and Final Hearing (“Class Notice”) to be sent to Class Members;

25 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
26 Administrator; and

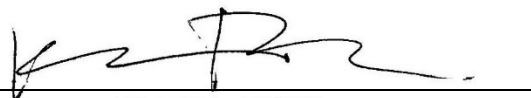
27 8. That the Court schedule the matter for a Final Fairness and Final Approval
28 hearing.

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

4 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
5 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
6 Class Members to participate in, opt-out of, or object to the settlement. This Motion is based on
7 the attached Memorandum of Points and Authorities, the Stipulation and the proposed Class
8 Notice, and the supporting Declarations of Larry W. Lee, Mai Tulyathan, Plaintiff Sylvia
9 Bernabe, upon the oral arguments of counsel (should there be any), and on the complete records
10 and file herein.

11
12 DATED: July 27, 2021

DIVERSITY LAW GROUP, P.C.

13
14 By: 

Larry W. Lee

Mai Tulyathan

15 Attorneys for Plaintiff, the Class, and Aggrieved
16 Employees

TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION.....	8
II. PROCEDURAL HISTORY.....	9
A. Initiation of the Lawsuit.....	9
B. Informal Discovery and Mediation.	10
C. The Claims In This Lawsuit.....	10
III. DISCUSSION.....	11
A. Proposed Class Definition	13
B. Settlement Terms and Evaluation	14
1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive.	18
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants..	19
3. Scope of the Release of Class Members' Claims.	19
4. Tax Treatment of Settlement Amounts.....	20
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.....	20
C. Notice to Class Members.....	20
D. Typicality and Adequacy of Representation	21
1. Class Representative's Claims are Typical of the Class.....	21
2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Action.....	22
E. Costs and Fees	23

1	1. Attorneys' Fees and Costs.	23
2	2. Proposed Payment to the Class Representative.	25
3	3. Class Administration Fees.....	25
4		
5	IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR	
6	PRELIMINARY APPROVAL	25

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	15
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	23, 24
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	22
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794, 1803	13
<i>Duran v. U.S. Bank Nat'l Ass'n</i> , 59 Cal. 4th 1 (2014).....	17
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal.5th 480, 503(2016)	24
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	22
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	23
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	22
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	22
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	13, 23

Federal Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015)	17
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	23
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	14
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	21
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	14
<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	13
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	14
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir. 2000)	17
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987)	14
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004).....	14
<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	14

1	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	14
2	<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	14
3	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) 17	
4	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6	
5	(N.D. Cal. Nov. 21, 2012).....	17
6	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	23
7	Statutes	
8	Business & Professions Code § 17200,	8, 10, 11
9	California Civil Procedure § 384	19
10	Civil Code § 1542	20
11	Labor Code § 1194.....	passim
12	Labor Code § 226.....	8, 19, 20
13	Labor Code § 226(a)	8, 10, 22
14	Labor Code § 226(e)	16
15	Labor Code § 246.....	passim
16	Labor Code § 2699(e)(2)	15
17	Labor Code § 510.....	passim
18	Labor Code § 558.....	passim
19	Labor Code §§ 201-203	passim
20	Labor Code §§ 2698, <i>et seq.</i>	passim
21	Other Authorities	
22	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)....	12, 13
23	<i>Newberg on Class Actions, supra</i> , at § 11.24	12
24	<i>Newberg on Class Actions, supra</i> , at § 11.47	14
25	Manual for Complex Litigation (Third) § 30.41	12

1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Sylvia Bernabe (“Plaintiff”) alleges that Defendant 899 Charleston (“Defendant”) failed to
5 properly pay overtime wages based on the correct regular rate of pay in violation of Labor Code
6 §§ 510, 558, and 1194, failed to timely and properly pay sick pay based on the correct regular
7 rate of pay in violation of Labor Code §§ 201-203 and 246, and failed to provide accurate
8 itemized wage statements to its employees in violation of Labor Code § 226(a). Based on these
9 violations, Plaintiff asserts class and PAGA claims for violation of Labor Code §§ 201-203, 226,
10 246, 510, 558, and 1194, and Business & Professions Code § 17200, *et seq.* The Parties have
11 reached a class and PAGA action settlement, the terms of which are reflected in the Parties’ Joint
12 Stipulation of Class Action Settlement and Release (“Stipulation” or “Settlement Agreement”).¹

13 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
14 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
15 principles applicable to the claims asserted against Defendant. Through the exchange of
16 informal discovery in connection with mediation, Defendant provided necessary data pertaining
17 to the number of putative class members, the number of wage statements at issue, the hourly
18 rates of pay, a sample of putative class members’ time and payroll records, as well as
19 information pertaining to Defendant’s sick pay/paid time off (PTO), shift differential pay, and
20 wage statement policies and practices. Plaintiff then retained an expert witness to review and
21 analyze the class data, payroll and time records to calculate potential exposure. Thereafter, the
22 Parties attended a full day of mediation with experienced mediator Michael E. Dickstein, Esq.,
23 and continued settlement negotiations facilitated by Mr. Dickstein, after which the Parties were
24 able to reach the current settlement.

25 The terms of the Settlement Agreement provide that Defendant pay a Maximum
26 Settlement Amount of Two Hundred and Fifty Thousand Dollars (\$250,000.00) to resolve the

27 ¹ The Parties’ Joint Stipulation of Class Action Settlement and Release is attached to the Declaration of
28 Mai Tulyathan as **Exhibit A**.

1 class and PAGA claims. Significantly, the entire Maximum Settlement Amount will be
2 distributed to the class on a **non-reversionary** basis, such that no remaining monies will
3 **revert to Defendant**. Further, **no claim forms** are required. The following represents the key
4 terms of the Settlement:

- 5 • Maximum Settlement Amount of \$250,000.00;
- 6 • Estimated class size not to exceed 116 individuals;
- 7 • Service award payment to the Class Representative of up to \$10,000.00;
- 8 • Class Counsel's attorneys' fees of one-third of the Maximum Settlement Amount,
9 or up to \$83,333.33;
- 10 • Class Counsel's litigation costs of up to \$25,000.00;
- 11 • Settlement administration costs of up to \$4,950.00;
- 12 • Payment to the California Labor & Workforce Development Agency ("LWDA")
13 of \$15,000.00, representing 75% of the total PAGA allocation of \$20,000.00;
- 14 • Net Settlement Amount of approximately \$111,716.67; and
- 15 • Raw average of at least **\$963.07** to each participating Class Member.

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

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

24 **II. PROCEDURAL HISTORY**

25 **A. Initiation of the Lawsuit.**

26 On April 6, 2020, Plaintiff filed her written notice with the California Labor &
27 Workforce Development Agency ("LWDA"), alleging the following violations against
28 Defendant: (1) failure to pay all overtime wages owed in violation of the California Labor Code;

1 and (2) failure to provide accurate itemized wage statements in violation of the California Labor
2 Code. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2.) Based on these allegations,
3 Plaintiff alleged that Defendant violated California Labor Code §§ 201-203, 226(a), 510, 558,
4 and 1194. (*Id.*) Thereafter, on May 8, 2020, Plaintiff filed her class and representative PAGA
5 Complaint against Defendant in Santa Clara County Superior Court. (*Id.* at ¶ 3.) The Complaint
6 alleges the following causes of action: (1) violation of Labor Code §§ 201-203, 510, 558, and
7 1194; (2) violation of Labor Code § 226(a); (3) violation of the California Business and
8 Professions Code § 17200, *et seq.*; and (4) violation of Labor Code §§ 2698, *et seq.*, the PAGA,
9 predicated on the same Labor Code violations as her class claims. (*Id.*)

10 **B. Informal Discovery and Mediation.**

11 After the filing of the Complaint, the Parties met and conferred and agreed to participate
12 in private mediation. (Tulyathan Decl. at ¶ 5.) In connection with mediation, the Parties
13 engaged in informal discovery to allow Plaintiff to assess the claims and liability, as well as
14 analyze the maximum exposure of damages and penalties. (*Id.*) Defendant provided Plaintiff’s
15 counsel with informal data and information pertaining to the number of putative class members,
16 the number of wage statements at issue, the hourly rates of pay, a sample of putative class
17 members’ time and payroll records, as well as information pertaining to Defendant’s sick
18 pay/paid time off (PTO), shift differential pay, and wage statement policies and practices. (*Id.*)
19 Plaintiff engaged the services of an expert witness to analyze and prepare an exposure analysis
20 based on the data that was provided by Defendant. (*Id.*)

21 On April 13, 2021, the Parties engaged in a full-day mediation with mediator Michael E.
22 Dickstein, Esq. (Tulyathan Decl. at ¶ 6.) After thorough investigation and evaluation of the
23 facts and claims, and as a result of the arm’s-length negotiations facilitated by Mr. Dickstein, the
24 Parties and their counsel ultimately reached the current settlement. (*Id.*) In resolution of
25 Plaintiff’s class and PAGA claims, the Parties entered into Settlement Agreement, a true and
26 correct copy of which is attached as **Exhibit A** to the Declaration of Mai Tulyathan. (*Id.*)

27 **C. The Claims In This Lawsuit.**

28 Plaintiff’s class and PAGA claims as pled in this lawsuit are predicated upon the

1 following allegations. With respect to Plaintiff's regular rate claim, Plaintiff contends that
2 Defendant failed to factor non-discretionary incentives, such as shift differential wages, into the
3 calculation of the regular rate of pay for purposes of paying overtime wages. As a result,
4 Plaintiff alleges that Plaintiff and employees were underpaid overtime wages. (Tulyathan Decl.
5 at ¶ 4.) With respect to Plaintiff's wage statement claims, Plaintiff alleges derivative violations
6 resulting from the overtime regular rate claim as well as standalone wage statement violations.
7 For Plaintiff's standalone wage statement violations, Plaintiff contends that Defendant issued
8 deficient wage statements whenever overtime wages were paid, as the wage statements do not
9 correctly identify the total hours worked in the pay period. (*Id.*)

10 In connection with the settlement, on July 9, 2021, Plaintiff filed a supplemental notice to
11 the LWDA adding a claim for violation of Labor Code §§ 201-203 and 246, alleging that
12 Defendant failed to timely and correctly pay sick pay at the correct regular rate of pay.
13 (Tulyathan Decl. at ¶ 7.) Plaintiff also filed a First Amended Complaint on July 16, 2021, to add
14 sick pay regular rate class and PAGA claims. (*Id.*) With respect to Plaintiff's sick pay regular
15 rate claim, Plaintiff contends that Defendant failed to factor non-discretionary incentives,
16 including shift differential wages, into the calculation of the regular rate for purposes of paying
17 sick pay wages. Thus, Plaintiff and employees were underpaid sick pay. (*Id.*)

18 As a result of the violations alleged above, Plaintiff seeks damages and penalties under
19 the California Labor Code, the California Business & Professions Code, and the PAGA, as well
20 as attorneys' fees and costs. (Tulyathan Decl. at ¶ 8.)

21 The Parties recognize the risk, expense, and delay in continuing litigation with the class
22 and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. (Tulyathan
23 Decl. at ¶ 9.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes
24 and claims arising from or relating to the class and PAGA claims as set forth in the Settlement
25 Agreement.

26 **III. DISCUSSION**

27 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
28 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final

1 review after notice has been distributed to the class members for their comment or objections.

2 The Manual for Complex Litigation (Third) § 30.41 states:

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

10 Thus, the preliminary approval by the trial court is simply a conditional finding that the
11 settlement appears to be within the range of acceptable settlements. As Professor Newberg
12 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
13 concerning a tentative settlement proposal may vary. The court may find that the settlement
14 proposal contains some merit, is within the range of reasonableness required for a settlement
15 offer, or is presumptively valid subject only to any objections that may be raised at a final
16 hearing.” (4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed.
2002).)

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

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

24 (*Id.* at § 11.24.)

25 Here, the Parties have reached such an agreement and have submitted to this Court in
26 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
27 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties as to
28

1 settlement of the class and PAGA claims. Said terms in the Stipulation include, among other
2 things, the method for calculating the Class Members' individual portions of the settlement
3 payment.

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

13 The strength of the findings made by a judge at a preliminary
14 hearing or conference concerning a tentative settlement
15 proposal...may be set out in conditional orders granting tentative
16 approval to the various items submitted to the court. Three basic
17 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.

(4 *Newberg on Class Actions*, at § 11.26.)

18 In addition to such terms as class identification, settlement amount, and payment
19 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
20 which the Parties stipulate to the Court's provisional certification of the Class for the purposes of
21 this settlement only. (*See* Stipulation at ¶ III.H.3.)

22 **A. Proposed Class Definition**

23 The current settlement is being settled on behalf of the following Class: “All current and
24 former non-exempt employees of Defendant in the State of California who were paid shift
25 differential wages, bonuses, and commissions at any time during the Class Period who do not opt
26 out of this Settlement.” (*See* Stipulation at ¶ III.A.2.) The Class Period is defined as the period
27 encompassing April 6, 2017, through October 31, 2020. (*Id.* at ¶ III.A.1.)

Pursuant to the Settlement Agreement, Defendant has represented that there are no more than 116 individuals that comprise the Class. (See Stipulation at ¶ III.B.1.a.)

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* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d 677, 682; *In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F.Supp. 957, 962.) 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.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v. Barry* (D.D.C. 1990) 752 F.Supp. 1087; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F.Supp. 471; *In re Armored Car Antitrust Litig.* (N.D. Ga. 1979) 472 F.Supp. 1357; *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n* (E.D. Pa. 1978) 79 F.R.D. 571.)

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*, at § 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.”) at ¶¶ 7-9; Tulyathan Decl. at ¶¶ 24-27.) Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in negotiations taking place between the Parties. (Tulyathan Decl. at ¶ 10.)

1 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
2 face potential liability of up to approximately \$525,758.00 for Plaintiff's overtime and sick pay
3 regular rate and wage statement class claims if Plaintiff succeeded at trial. (Tulyathan Decl. at ¶
4 11.) As mentioned above, Plaintiff retained an expert to calculate the potential class penalties
5 based on data provided by Defendant, including the number of employees, number of pay
6 periods at issue, and the hourly rates of pay applicable to the putative class members. (*Id.* at ¶
7 13.) Plaintiff's expert also analyzed the sample time and payroll records provided by Defendant
8 and extrapolated it to the entire class. (*Id.*)

9 With respect to potential liability of Plaintiff's PAGA claim, Plaintiff estimated that
10 Defendant could face civil penalties of up to a maximum \$555,650.00 if Plaintiff were successful
11 at trial. (Tulyathan Decl. at ¶ 12.) However, even assuming Plaintiff ultimately prevails on her
12 PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor
13 Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts
14 and circumstances of the particular case, to do otherwise, would result in an award that is unjust,
15 arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in
16 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, while the plaintiff prevailed on his
17 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
18 citing the employer's good faith attempt at complying with the law. (*Id.* at p. 517.) Upon
19 review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

20 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
21 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
22 the claims and further with respect to the reduction of PAGA penalties and that it could be
23 persuasive to the Court. (Tulyathan Decl. at ¶ 15.) Thus, even if Plaintiff were to successfully
24 prove his claims at trial, there is a possibility that the Court may only award a small percentage
25 of PAGA penalties, as the Court has discretion to do so. The Maximum Settlement Amount was
26 premised with this risk in mind, associated with the possibility of the Court significantly
27 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff were to
28 prevail at trial. (*Id.*)

1 Further, Defendant raised several defenses that presented risk on both the wage statement
2 claims, and overtime and sick pay regular rate claims. With respect to the regular rate claims, it
3 is Defendant's position that any purported regular rate miscalculation was unintentional and
4 based on a formula error caused by the third-party payroll company. Defendant has also
5 indicated that it has revised its overtime regular rate calculations to include shift differentials as
6 of October 31, 2020. Further, Defendant contends that it has no further liability for the regular
7 rate claims since it has paid back any underpayments owed to its employees. Based on
8 Defendant's calculations, any alleged failure to include non-discretionary bonuses only resulted
9 in underpayment of approximately \$15,000, which Defendant has fully paid back to its
10 employees as of April 5, 2021. In addition to these defenses, Plaintiff also faces risk with respect
11 to prevailing on class certification for Plaintiff's sick pay regular rate claim. In this regard, there
12 is essentially no precedent from any California courts granting class certification of a sick pay
13 regular rate claim. Thus, while Plaintiff believes that a class can be certified, there is a
14 possibility that the Court will not grant class certification on Plaintiff's sick pay regular rate
15 claim here.

16 With respect to the wage statement claim, it is Defendant's position that its wage
17 statements complied with the law, and that employees did not suffer any injury as defined by
18 Labor Code § 226(e). Specifically, Defendant contends that employees can determine total
19 hours by adding up hours based on information listed on Defendant's wage statements.

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

26 Although Plaintiff believes that the classes can be certified, Plaintiff also believes in the
27 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
28 involved in not prevailing on one or more of the causes of action or theories alleged in the

operative First Amended Complaint, the possibility of non-certification, and the potential for appeals. (Tulyathan Decl. at ¶ 16.) These risks on 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. There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded back to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

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

Here, the total amount of class and PAGA penalties amount to approximately \$1,081,408.00, without discounting for potentially losing on any of the causes of action. (Tulyathan Decl. at ¶ 14.) The Maximum Settlement Amount is \$250,000.00, which is approximately **23.12%** of the maximum class and PAGA penalties. (*Id.*) Thus, the settlement

1 was negotiated at arms' length and the high settlement percentage-to-recovery further supports
2 that the settlement is fair and reasonable.

3 Despite the asserted fairness of the settlement terms, as set forth in the Notice of
4 Pendency of Class Action Settlement and Final Hearing ("Class Notice"), should any Class
5 Member wish to pursue his or her own case for the claims being released herein, each Class
6 Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement. (*See*
7 Class Notice, attached as **Exhibit B** to Tulyathan Decl.) Moreover, as set forth in the Notice,
8 Class Members are advised of their right to object to any of the terms contained in the
9 Stipulation and attend the final approval hearing. (*Id.*)

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

13 The Stipulation provides for Two Hundred Fifty Thousand Dollars and Zero Cents
14 (\$250,000.00) as the Maximum Settlement Amount. (*See* Stipulation at ¶ III.B.1.) The Net
15 Settlement Amount, calculated after deduction of attorneys' fees (up to \$83,333.33), litigation
16 costs (up to \$20,000.00), the service award payment to the Class Representative (up to
17 \$10,000.00), payment to the LWDA pursuant to the PAGA (\$15,000.00), and Settlement
18 Administration costs (up to \$4,950.00), is estimated to be approximately **\$111,716.67**. (*Id.* at ¶¶
19 III.B.1-8.)

20 Each participating Class Member who does not opt-out of the Settlement will be awarded
21 a portion of the Net Settlement Amount on a pro rata basis, based upon the number of pay
22 periods each Class Member received with payment for shift differentials, commissions, and/or
23 bonuses during the Class Period, along with a minimum base payment to each Class Member of
24 \$100.00. (*Id.* at ¶ III.B.9.) To calculate each Class Member's individual settlement payment
25 amount, the Settlement Administrator will first divide the Net Settlement Amount by the total
26 number of pay periods with payment for shift differentials, commissions, and/or bonuses during
27 the Class Period. That value will then be multiplied by the number of pay periods each
28 respective Class Member received with payment of shift differentials, commissions, and/or
bonuses during the Class Period. The resulting amount will then be added to the base payment

of \$100.00 to each Class Member's estimated individual settlement payment. (*Id.* at ¶ III.B.9.b.)

On a raw average, each participating Class Member may potentially recover approximately \$963.07. (Tulyathan Decl. at ¶ 17.) The amount actually paid to each participating Class Member may increase or decrease depending upon the actual number of pay periods with payments for shift differentials, commissions, and/or bonuses during the Class Period. (*Id.*)

Finally, the terms of the Settlement provide that uncashed checks (upon the expiration date) shall be distributed to Asian Americans Advancing Justice – Los Angeles (AAJC), in accordance with California Civil Procedure § 384. (*See* Stipulation at ¶ III.E.2; *see* Tulyathan Decl. at ¶ 18; Lee Decl. at ¶ 5.)

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

This Settlement is **non-reversionary**, meaning that none of the settlement funds will revert back to Defendant. (*See* Stipulation at ¶¶ III.B.1.)

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

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

Plaintiff and Class Members who do not opt of the Settlement release any and all claims that were alleged or reasonably could have been alleged in the operative Complaint based upon the facts, allegations, or causes of actions contained therein, including the following claims for relief, that accrued during the Class Period: a) Claims for improper and/or inaccurate wage statements; underpayment of overtime wages; underpayment of sick or PTO pay wages; timeliness of payment of overtime wages; timeliness of payment of sick or PTO pay wages; waiting time penalties; any unpaid wages related to any of the foregoing; restitution for any of the foregoing; violations of Labor Code §§ 201-203, 226, 246, 510, 558, and 1194; and b) Any and all claims for penalties under the California Private Attorneys General Act predicated on claims for improper and/or inaccurate wage statements; underpayment of overtime wages; underpayment of sick or PTO pay wages; timeliness of payment of overtime wages; timeliness of payment of sick or PTO pay wages; waiting time penalties; any unpaid wages related to any of the foregoing; violations of Labor Code §§ 201-

203, 226, 246, 510, 558, and 1194, and all other claims under the
PAGA based on the facts as alleged in the Complaint.

(See Stipulation at ¶ III.A.4; *see also* Stipulation at ¶ III.G.)

Given that the releases are tailored to only claims that are part of this lawsuit, the release is appropriately limited. Further, the scope of the release does not waive Civil Code § 1542 for Class Members.

4. Tax Treatment of Settlement Amounts.

The Parties have agreed that the entirety of each individual settlement payment to Class Members shall be treated as a payment in settlement of claims for penalties and interest and shall be deemed IRS Form 1099 income. (See Stipulation at ¶ III.B.3.)

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

As stated above, Class Members do **not** need to do anything should they wish to receive their share of the settlement funds. In other words, because this is not a claims-made settlement, Class Members will not be required to make a submission to participate in the settlement. No claim 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.

If a Class Member does not wish to take part in this Settlement or be bound by the releases, the Class Member must submit a request for exclusion. (See Stipulation at ¶¶ III.C.8.)

C. Notice to Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing all Class Members' full names, most recent mailing addresses, telephone numbers, Social Security numbers, and the number of pay periods with payment(s) for shift differentials, commissions, and/or bonuses during the Class Period ("Class List and Data"). (See Stipulation at ¶¶ III.B.9.a; III.C.4.) Pursuant to the Stipulation, Defendant will provide said the Class List and Data within fifteen (15) calendar days following preliminary approval. (*Id.*)

Upon receipt of the information and prior to mailing the Class Notice to Class Members, the Settlement Administrator will perform a search based on the National Change of Address

1 Database for information to update and correct for any known or identifiable address changes.
2 (*Id.* at ¶ III.C.6.) Within ten (10) calendar days of receipt of the Class List and Information from
3 Defendant, the Settlement Administrator will mail the Class Notice out to Class Members via
4 first-class U.S. mail. (*Id.* at ¶ III.C.5.) Any Class Notices returned to the Settlement
5 Administrator as undeliverable shall be re-sent to the forwarding address affixed thereto. (*Id.*) If
6 no forwarding address is provided, the Settlement Administrator will attempt to find the correct
7 address using a computer/SSN and skip-tracing search via the USPS records to locate a more
8 recent address to re-mail the Notice. (*Id.*)

9 The Class Notice will advise Class Members of what the litigation is about, their rights
10 under the settlement, the total settlement amount and other terms of the settlement, their expected
11 settlement payment share, their opportunity to and procedures to opt out or to object to the
12 settlement, and the release of claims. (*See* Class Notice.) As set forth in the Class Notice, Class
13 Members will be allowed to opt out of, or object to the Settlement by a certain deadline, which is
14 45 calendar days after the initial mailing of the Class Notice. (*See* Stipulation at ¶¶ III.C.3;
15 III.C.7.) Class Members who received a re-mailed Class Notice will have that deadline extended
16 by 15 calendar days from the original response deadline. (*Id.* at ¶ III.C.7.)

17 With respect to objections, Class Members are also informed in the Class Notice that they
18 may object in writing, or appear at the final approval hearing to present their objections to the
19 Court. (*Id.* at ¶ III.C.9; *see* Class Notice.)

20 If Class Members need further information about the settlement and/or the lawsuit, Class
21 Counsel's contact information is provided in the Class Notice. (*See* Class Notice, at pp. 6-7.)
22 Class Members are also provided with the URL to the Court's website and the website
23 maintained by the Settlement Administrator containing the Settlement Agreement and other
24 documents in this case. (*Id.*)

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

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

27 The commonality requirement is met when there are questions of law and fact common to
28 the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 ("The existence of shared

1 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
2 facts couple with disparate legal remedies within the class”).) Commonality requires only that
3 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
4 litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.)
5 Defendant’s conduct is central to the commonality inquiry. (*See City of San Jose v. Superior*
6 *Court* (1974) 12 Cal.3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 812-13.)
7 Where the employer’s conduct is uniformly directed at a class of employees, as Plaintiff alleges
8 here, the classwide impact of the Defendant’s policies satisfies the commonality requirement.
9 (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal.App.3d 411, 421.)

10 In the present case, Plaintiff alleges that Defendant is liable to the Class for failure to
11 timely and properly pay sick pay and overtime pay based on the correct regular rate of pay, in
12 violation of Labor Code §§ 201-203, 246, 510, 558, and 1194, and for failure to provide accurate
13 itemized wage statements, in violation of Labor Code § 226(a). Like all Class Members,
14 Plaintiff was subjected to these same policies and practices. (Declaration of Sylvia Bernabe
15 (“Bernabe Decl.”) at ¶¶ 3-4.) In particular, Defendant miscalculated the regular rate of pay when
16 paying overtime and sick pay to Plaintiff whenever non-discretionary incentives, such as shift
17 differentials or “Mfr Shift Diff” wages, were paid to Plaintiff. (*Id.* at ¶ 3.) Plaintiff was also
18 issued inaccurate wage statements that did not comply with Labor Code § 226(a). (*Id.* at ¶¶ 3-4.)
19 In other words, Plaintiff contends that she was subjected to the same policies and practices as
20 other Class Members and thus, the typicality requirement is met.

21 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
22 issues been raised or presented. (*Id.* at ¶ 5.) Plaintiff has taken all necessary steps to represent
23 the interests of the Class, including by providing information and documents to Plaintiff’s
24 counsel. (*Id.* at ¶¶ 6-7.) For such reasons, Plaintiff has adequately represented the Class
25 Members and will continue to do so.

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

28 From the inception of the case, Class Counsel has zealously represented the interests of

1 the Class. Class Counsel has engaged in significant meet and confer discussions with opposing
2 counsel to obtain informal data and documents on behalf of the Class. (Tulyathan Decl. at ¶ 20.)
3 The Settlement was obtained for the benefit of the Class, as opposed to the individual Class
4 Representative. Further, Class Counsel has been approved as class counsel on a number of prior
5 cases, have litigated numerous other class action cases, and are competent to represent the class.
6 (Lee Decl. at ¶¶ 7-9; Tulyathan Decl. at ¶¶ 24-27.)

7 **E. Costs and Fees**

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

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

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

26 Fairness to the successful litigant, who might otherwise receive no
27 benefit because his recovery might be consumed by the expenses;
28 correlative prevention of an unfair advantage to the others who are
entitled to share in the fund and who should bear their share of the
burden of its recovery; encouragement of the attorney for the

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

4 (*Id.*)

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

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

17 The Parties have agreed to a payment of a maximum of one-third of the Maximum
18 Settlement Amount, or \$83,333.33, for payment to Class Counsel as attorneys' fees. (*See*
19 Stipulation at ¶ III.B.5.) The Parties have agreed to a payment of the foregoing attorneys' fees
20 and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to
21 reimbursement of Class Counsel's litigation costs up to \$25,000.00. (*Id.*) Class Counsel have,
22 at their own risk, expended costs, for example, to file this instant action and other pleadings in
23 the case, effect service of process, engaged an expert witness, participate in mediation, and
24 advance other litigation-related costs. If Class Counsel's actual costs are less than \$25,000.00,
25 the remainder will go to the Class for distribution. (*See id.*)

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

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

2 Class Representative Sylvia Bernabe requests a modest enhancement of \$10,000.00. (*See*
3 Stipulation at ¶ III.B.4.) The Class Representative met and conferred with her counsel on a
4 number of occasions to discuss the case, provided documents and information to her counsel, and
5 reviewed pleadings and documents, including the Settlement Agreement. (Bernabe Decl. at ¶¶
6 6-7.) As part of her duties as the Class Representative, Plaintiff provided invaluable information,
7 evidence, and documents that resulted in this Settlement. (*Id.*)

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

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

20 **3. Class Administration Fees**

21 The Parties have agreed to an estimated payment of no more than \$4,950.00 to the
22 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
23 this settlement. (*See* Stipulation ¶ III.B.6.) Phoenix Settlement Administrators is a well-
24 recognized class action settlement administrator. The Parties believe that the administration fee
25 is reasonable and should be approved.

26 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
27 **PRELIMINARY APPROVAL**

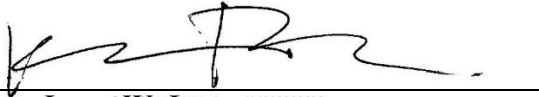
28 The Settlement presented here is fair, adequate, and reasonable. The Settlement will

1 result in both substantial monetary benefits to Class Members; it is non-collusive; and it was
2 achieved as the result of informed, extensive, and arm's-length negotiations conducted by
3 counsel for the respective Parties who are experienced in wage and hour class action litigation
4 and facilitated by an experienced and neutral mediator.

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

8
9 DATED: July 27, 2021

DIVERSITY LAW GROUP, P.C.

10 By: 

11 Larry W. Lee
12 Mai Tulyathan
13 Attorneys for Plaintiff, the Class, and Aggrieved
14 Employees
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28

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On July 27, 2021, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
12 **APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT**
- 14 **2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
- 17 **3. DECLARATION OF PLAINTIFF SYLVIA BERNABE IN SUPPORT OF**
18 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**
19 **ACTION SETTLEMENT**
- 20 **4. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR**
21 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

22 on the interested parties in this action as follows:

23 Susan E. Bishop
24 Susan.bishop@berliner.com
25 Sabina Hall
26 Sabina.Hall@berliner.com
27 Berliner Cohen, LLP
28 10 Almaden Blvd., 11th Floor
San Jose, California 95113
Attorneys for Defendant 899 Charleston

29 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
the above-entitled case. The service transmission was reported as complete and a copy of the

1 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
2 in this office.

3 I declare under penalty of perjury under the laws of the State of California that the
4 above is true and correct. Executed on July 27, 2021, at Los Angeles, California.

5 
6 Erika Mejia