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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 FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: December 8, 2021
Time: 1:30 P.M.
Dept.: 3

Complaint Filed: May 8, 2020
FAC Filed: July 16, 2021

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

2 **PLEASE TAKE NOTICE** that on December 8, 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 an Order:

7 1. Granting final approval to the Joint Stipulation of Class Action Settlement and
8 Release (“Stipulation” or “Settlement Agreement”) in this action;

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

11 3. Approving Plaintiff’s request for an award of the Class Representative
12 Enhancement Payment of \$10,000.00 to Plaintiff pursuant to the terms of the Settlement
13 Agreement;

14 4. Approving Class Counsel’s request for an award of attorneys’ fees of one-third of
15 the Maximum Settlement Amount, or \$83,333.33, and reimbursement of actual litigation costs of
16 \$15,067.68, pursuant to the terms of the Settlement Agreement;

17 5. Approving Plaintiff’s request for payment of the settlement administration costs
18 to Phoenix Settlement Administrators in the amount of \$4,950.00, pursuant to the terms of the
19 Settlement Agreement;

20 6. Approving Plaintiff’s request for payment to the California Labor & Workforce
21 Development Agency (“LWDA”) for 15,000.00 pursuant to the Private Attorneys General Act,
22 pursuant to the terms of the Settlement Agreement; and

23 7. Entering final judgment as to all Class Members in this action.

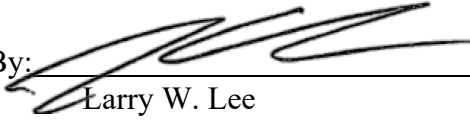
24 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
25 provides for court approval of the settlement of a purported class action and allows the Court to
26 grant final certification of a class for settlement purposes. In light of the overwhelmingly
27 positive response, as shown by the lack of opt-outs and objections to the settlement, there is no
28 question that the settlement is fair, reasonable, and adequate and thus should be granted final

1 approval.

2 This Motion will be based on the attached Memorandum of Points and Authorities and
3 the supporting Declarations of Larry W. Lee, Mai Tulyathan, Plaintiff Sylvia Bernabe, and
4 Elizabeth Kruckenberg of Phoenix Settlement Administrators, upon the oral arguments of
5 counsel (should there be any), and on the complete records and file herein.
6

7 DATED: November 11, 2021

DIVERSITY LAW GROUP, P.C.

8
9 By:  _____

Larry W. Lee

Mai Tulyathan

Attorneys for Plaintiff, the Class, and Aggrieved
Employees
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1 **I. INTRODUCTION**

2 Plaintiff Sylvia Bernabe (“Plaintiff”) now seeks the Court’s final approval of the Joint
3 Stipulation of Class Action Settlement and Release (“Stipulation” or “Settlement Agreement”).
4 The Settlement Agreement provides for a \$250,000.00 **non-reversionary** fund to be created for
5 the benefit of the Class¹, from which attorneys’ fees, litigation costs, service payment to the
6 named Plaintiff, payment to the California Labor and Workforce Development Agency
7 (“LWDA”), and costs of settlement administration are to be paid. The entire Net Settlement
8 Amount after these deductions will be paid to all Class Members who did not opt-out of the
9 Settlement.

10 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
11 Approval of Class Action Settlement. The Court preliminary approved this settlement on August
12 18, 2021, directing distribution of class notice and scheduling the hearing for final approval of
13 the settlement (the “Preliminary Approval Order”).

14 As directed by the Court, the Settlement Administrator selected by the Parties—Phoenix
15 Settlement Administrators—distributed the Class Notice to 120 Class Members. (Declaration of
16 Elizabeth Kruckenberg on behalf of Phoenix Settlement Administrators (“Kruckenberg Decl.”)
17 at ¶ 5.) To date, **there have been no requests for exclusions and/or objections to the**
18 **settlement submitted by any Class Members.** (*Id.* at ¶¶ 7-8.) As such, there is a 100%
19 participation rate. Thus, in light of the lack of objections and opt-outs, an inference can be made
20 that the Class supports the Court’s Preliminary Approval Order finding that the Settlement
21 Agreement is fair and reasonable.

22 In addition to the results of the notice process, for the same reasons as set forth earlier in
23 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, the following represents
24 the basic points supporting final approval of the settlement:

- 25 ▪ The settlement provides a total settlement sum of \$250,000.00, which is **non-**
26

27 ¹ The “Class” as used herein consists of “All current and former non-exempt employees of Defendant in
28 the State of California who were paid shift differential wages, bonuses, and commissions at any time
during the Class Period who do not opt out of this Settlement.” (Stipulation at ¶ III.A.2.) The “Class
Period” is defined as the period from April 6, 2017, through October 31, 2020. (*Id.* at ¶ III.A.1.)

1 reversionary;

2 ▪ The settlement is fair given that participating Class Members will receive (*after*
3 *deductions for fees, costs, etc.*) a substantial amount of money—on average, approximately
4 \$1,013.74 to each participating Class Member, with the estimated highest individual settlement
5 payment being **\$15,688.65**² (*See* Kruckenberg Decl. at ¶ 11);

6 ▪ Class Members did not need to submit claim forms to participate in the
7 settlement, but are being paid automatically;

8 ▪ The allocation reflects that payment of individual settlement amounts will be paid
9 to Class Members who do not opt out on a *pro rata* basis, in proportion to the number of pay
10 periods during which each Class Member was paid shift differentials, commissions, and/or
11 bonuses between April 6, 2017, and October 31, 2020, with a minimum base payment of
12 \$100.00;

13 ▪ Plaintiff’s counsel conducted significant investigation in this case, including
14 conducting informal discovery and significant exchanges of information pertaining to class data,
15 number of wage statements at issue, hourly rates of pay, sampling of time and payroll records
16 from members of the settlement class, as well as information pertaining to Defendant’s sick
17 pay/paid time off (PTO), shift differential pay, and wage statement policies and practices.
18 Plaintiff also engaged the services of an expert witness to conduct an exposure analysis based on
19 the data provided by Defendant;

20 ▪ A highly regarded settlement administrator, Phoenix Settlement Administrators,
21 was retained to administer the settlement for approximately \$4,950.00 (*See* Kruckenberg Decl. at
22 ¶ 12); and

23 ▪ The State of California’s LWDA will also be the beneficiary of this settlement, as
24 it will receive \$15,000.00 pursuant to the PAGA, should this settlement be granted final
25

26 _____
27 ² Each participating Class Member who does not opt-out of the Settlement will be awarded a portion of
28 the Net Settlement Amount on a pro rata basis, based upon the number of pay periods each Class Member
received with payment for shift differentials, commissions, and/or bonuses during the Class Period, along
with a minimum base payment to each Class Member of \$100.00. (Stipulation at ¶ III.B.9.) Thus, the
amounts stated herein include the \$100.00 minimum base payment. (See Kruckenberg Decl. at ¶ 11.)

1 approval.

2 Accordingly, the Court should grant Final Approval consistent with the Preliminary
3 Approval Order.

4 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**
5 **SETTLEMENT**

6 The notice procedures required by the Preliminary Approval Order have been followed
7 and satisfy all due process rights of Class Members. Specifically, the Preliminary Approval
8 Order contemplated that the Notice of Pendency of Class Action Settlement and Final Hearing
9 (“Class Notice”), as approved in the Preliminary Approval Order,³ be sent to all Class Members
10 by U.S. first class mail, as specified in the Settlement Agreement. As agreed by the Parties,
11 Phoenix Settlement Administrators would serve as the Settlement Administrator for this case.

12 As clearly stated in the Kruckenberg Declaration on behalf of Phoenix Settlement
13 Administrators, notice was provided to Class Members, as required by the Preliminary Approval
14 Order. On September 3, 2021, the Settlement Administrator received a Class Member mailing
15 list from Defendant’s counsel that included 120 Class Members. (Kruckenberg Decl. at ¶ 3.)
16 Prior to mailing the Class Notice, the Settlement Administrator conducted a National Change of
17 Address (NCOA) search to correct and/or update the class list in case of any address changes.
18 (*Id.* at ¶ 4.) On September 13, 2021, the Settlement Administrator mailed the Class Notice to all
19 Class Members on the mailing list via U.S. first class mail. (*Id.* at ¶ 5.) From the date of
20 mailing, zero (0) Class Notice packets were returned to the Settlement Administrator due to
21 incorrect addresses. (*Id.* at ¶ 6.) As of the date of this filing, **zero (0) Class Notices remain**
22 **undeliverable.** (*Id.*)

23 Further, the Class Notice provided Class Members with Class Counsel’s and the
24

25 ³ The Court directed the Parties to make slight modifications to the Class Notice in the Preliminary
26 Approval Order—specifically, to inform class members that they may appear at the final approval hearing
27 either in person or by telephone via CourtCall. The Parties have modified the Class Notice pursuant to
28 the Court’s instructions, and lodged the revised Class Notice with the Court on August 19, 2021. (*See*
Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 6, Ex. A.) Plaintiff’s counsel also provided the
revised Class Notice to Phoenix Settlement Administrators for purposes of notice dissemination on
September 9, 2021. (*Id.*)

1 Settlement Administrator’s contact information and website, where they could further seek
2 information regarding the settlement, ask questions, review pleadings in the case, and update
3 their address.

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

14 Here, all Class Members were provided with a mailing that explained the settlement and
15 allowed Class Members to seek information, ask questions, and exclude themselves and/or object
16 to the settlement, if so desired. As such, proper notice has been given to the Class Members.
17 Thus, the Court may determine the fairness and adequacy of the Settlement and enter its Order
18 granting final approval, secure in the knowledge that all absent Class Members have been given
19 the opportunity to participate fully in the settlement, exclusion, and the approval process.

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

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

23 The Court already addressed the requirements for certifying a class for settlement
24 purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements
25 again here.

26 **1. The Class is Ascertainable**

27 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure § 382
28 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means

1 available for identifying the class members.” (*Reyes v. San Diego County Board of Supervisors*
2 (1987) 196 Cal.App.3d 1263, 1271.)

3 Here, the Settlement Class is comprised of all current and former non-exempt employees
4 of Defendant in the State of California who were paid shift differential wages, bonuses, and
5 commissions at any time from April 6, 2017, through October 31, 2020. There are 120
6 individuals that comprise the Settlement Class. (Kruckenberg Decl. at ¶ 3.) This is more than
7 the minimum required to certify a class.

8 Within the context of manageability, the issue is whether there exists sufficient means for
9 identifying class members at the remedial stage. (*Reyes*, 196 Cal.App.3d at pp. 1274-75.) Class
10 Members have already been identified by Defendant and notice was provided to all of the above
11 Class Members

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

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

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

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

23 For Plaintiff’s regular rate claims, Plaintiff alleges that Defendant, as a matter of its
24 corporate policy, practice, or procedure, failed to factor non-discretionary incentives, including
25 shift differential wages, into the calculation of the regular rate for purposes of paying overtime
26 and sick pay wages. For Plaintiff’s Labor Code § 226(a) claim, Plaintiff alleges derivative
27 violations resulting from the overtime and sick pay regular rate claims. Plaintiff also alleges
28 standalone wage statement violations, contending that Defendant, as a matter of its corporate

1 policy, practice, or procedure, failed to provide accurate wage statements whenever shift
2 differential wages were paid. Specifically, Plaintiff alleges that the wage statements do not
3 correctly identify the total hours worked during the pay period whenever shift differential wages
4 are paid. As these are uniform corporate policies, practices, and procedures, the claims can be
5 jointly tried and thus the predominance requirement is satisfied.

6 Defendant denies that liability could be established on a class-wide basis and contends
7 instead that liability and damages would need to be conducted on a case-by-case basis. With
8 respect to Plaintiff's regular rate claims, it is Defendant's position that any purported regular rate
9 miscalculation was unintentional and based on a formula error caused by the third-party payroll
10 vendor. Defendant also asserts that it has revised its overtime regular rate calculations to include
11 shift differentials as of October 31, 2020. Further, Defendant contends that it has no further
12 liability for the regular rate claims since it has paid back any underpayments owed to its
13 employees as of April 5, 2021. In addition to these defenses, Plaintiff also faces risk with regard
14 to prevailing on class certification of the sick pay regular rate claim, as there is currently no
15 precedent in California courts for certification of a sick pay regular rate class. Finally, with
16 respect to Plaintiff's wage statement claims, it is Defendant's position that its wage statements
17 complied with the law, such that employees can determine total hours worked by way of
18 mathematical computation and thus Plaintiff cannot prove "injury" under Labor Code § 226(e).

19 **b. Plaintiff's Claims are Typical of the Class Claims**

20 The purported class representative's claim must be "typical" but not necessarily identical
21 to the claims of other class members; it is sufficient that the representative is similarly situated so
22 that he or she will have the motive to litigate on behalf of the class. (*Classen v. Weller* (1983)
23 145 Cal.App.3d 27, 45.) Courts look to whether class members have similar injuries, "whether
24 the action is based on conduct which is not unique to the named Plaintiff," and whether other
25 class members were injured by the same conduct. (*Hanon v. Dataproducts Corp.* (9th Cir. 1992)
26 976 F.2d 497, 508.) The purpose of the typicality requirement "is to assure that the interest of
27 the named representative aligns with the interests of the class." (*Id.* at p. 508.)

28 Plaintiff was subjected to the same payroll policies as all other Class Members. In this

1 regard, Plaintiff was employed by Defendant as an hourly, non-exempt employee from about
2 January 19, 2013, until about December 25, 2019. (Declaration of Sylvia Bernabe (“Bernabe
3 Decl.”) at ¶ 2.) Like other members of the Class, Plaintiff was routinely paid non-discretionary
4 incentives, including shift differentials such as “Mfr Shift Diff” wages. (*Id.* at ¶ 3.) However,
5 whenever overtime and sick pay wages were paid to Plaintiff in the same workweek, Defendant
6 miscalculated the overtime and sick pay regular rate such that it failed to include the non-
7 discretionary wages into the calculation of the regular rate. (*Id.*) In addition, the corresponding
8 wage statements issued to Plaintiff did not include the correct total number of hours worked. (*Id.*
9 at ¶ 4.)

10 In other words, Plaintiff was subjected to the same policies and practices as other Class
11 Members. Accordingly, Plaintiff’s claims are aligned with the interests of the Class and
12 typicality is satisfied.

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

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

17 Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
18 been raised or presented. (Bernabe Decl. at ¶ 7.) Plaintiff has taken all necessary steps to
19 represent the interests of the Class, including meeting and conferring with her counsel, providing
20 information and documents to her counsel, and reviewing pleadings and the Settlement
21 Agreement in this case. (*Id.* at ¶ 6.) For such reasons, Plaintiff has adequately represented the
22 Class members and will continue to do so.

23 **B. Risks, Expenses, and Complexity of Further Litigation**

24 Plaintiff believes that a class can be certified; however, Plaintiff also believes in the
25 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
26 involved in not prevailing on one or more of the causes of action or theories alleged in the
27 operative Complaint, the possibility of non-certification, and potential for appeals. These risks
28 on class certification are compounded by the California Supreme Court’s holding in *Duran v.*

1 *U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1.

2 As stated above, Defendant alleges that the classes could not have been certified, given
3 its position that its policies are compliant with the Labor Code and that any liability would need
4 to be determined on a case-by-case basis. Further, Defendant contends that there is no further
5 liability on the regular rate claims as it has paid back underpayments to Class Members.
6 Additionally, there is no precedent from any California courts granting class certification of a
7 sick pay regular rate claim, which presents another risk to Plaintiff prevailing on class
8 certification. Based on the foregoing, there were risks that Plaintiff would not have obtained the
9 total amount of damages and penalties alleged, and a substantial amount of complex issues that
10 would have necessitated significant expenditure of time and expenses. Therefore, the risks,
11 expenses, and complexity of further litigation warrant granting of this Motion.

12 **C. The Terms of the Settlement, Negotiation of Settlement, and Reception of the**
13 **Settlement by Class Members All Strongly Support the Conclusion that the**
14 **Settlement is Fair, Adequate, and Reasonable**

15 Without reiterating the Parties' showing that the Settlement Agreement and the
16 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
17 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
18 Settlement Agreement was the product of negotiations between highly able and experienced
19 attorneys on both sides who possessed the relevant data and extensive legal research which they
20 had carefully analyzed. (Tulyathan Decl. at ¶ 3.) Plaintiff also retained an expert witness to
21 review and analyze class data and sampling time and payroll records produced by Defendant.
22 (*Id.*) The Parties engaged in arm's length negotiations at mediation with a highly experienced
mediator, Michael E. Dickstein, Esq. (*Id.*)

23 The results after mailing of the Class Notice support confirmation of the Court's
24 preliminary approval of the settlement with final approval of the settlement, as evidenced by the
25 fact that **no Class Members opted out and/or submitted any written objections to the**
26 **settlement.** (Kruckenberg Decl. at ¶¶ 7-8.) The Court may appropriately infer that the class
27 action settlement is fair, adequate, and reasonable, given that not a single class member has
28 submitted a request for exclusion and/or an objection. (*See Class Plaintiffs v. City of Seattle* (9th

1 Cir. 1992) 955 F.2d 1268, 1291.)

2 **D. Under Well-Established Legal Principles, the Court Should Grant Final**
3 **Approval of the Settlement**

4 **1. Standard of Review**

5 On a motion for final approval of a class action settlement under California Code of Civil
6 Procedure Section 382 and California Rule of Court 3.769, a court's inquiry is whether the
7 settlement is "fair, adequate and reasonable." (*Officers for Justice v. Civil Serv. Comm'n* (9th
8 Cir. 1982) 688 F.2d 615, 625, *cert. denied subnom.*, *Byrd v. Civil Serv. Comm'n* (1983) 459 U.S.
9 1217.) A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
10 "the interests of the class are better served by the settlement than by further litigation." (*See*
11 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) ("MCL").)
12 The law favors settlement, particularly in class actions and other complex cases, where
13 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
14 (*See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002);
15 *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco*
16 *Corp.* (9th Cir. 1976) 529 F.2d 943, 950.)

17 Although the Court possesses "broad discretion" in determining that a proposed class
18 action settlement is fair, the Court's role must be limited to the extent necessary to reach a
19 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
20 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
21 adequate to all concerned. (*See Officers for Justice*, 688 F.2d at p. 625.) Accordingly, the Court
22 should give due regard to what is otherwise a "private consensual agreement" between the
23 parties. (*Id.*; *see also Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1993) 1993 WL
24 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720 F.Supp. 1379, *aff'd*
25 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 ("The judicial role in reviewing a
26 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
27 or imposing conditions on it. The judge cannot rewrite the agreement").)

28 A court's approval of a class action settlement will only be reversed for a clear abuse of

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

As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*:

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

(*7-Eleven Owners for Fair Franchising v. Southland Corp* (2000) 85 Cal.App.4th 1135, 1146.)

2. The Settlement is Presumed to Be Fair

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

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

(*Dunk*, 48 Cal.App.4th at p. 1802; *accord*, *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *In re Wash. Pub Power Supply*, 720 F.Supp. at p. 1387.)

The settlement in the case at bar warrants approval and carries a presumption of fairness. As previously noted in the application for Preliminary Approval, this current settlement was negotiated at arm’s length after a full day of mediation with an experienced wage-and-hour mediator, Michael E. Dickstein, Esq. (Tulyathan Decl. at ¶ 3.) Additionally, Class Counsel engaged in informal discovery before mediation, including reviewing the production of class data, sample of time and payroll records, and information pertaining to Defendant’s sick pay/paid time off, shift differential pay, and wage statement policies and practices. (*Id.*) The exchange of informal discovery allowed Class Counsel to conduct a full analysis of exposure. (*Id.*)

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. (Declaration of Larry W. Lee (“Lee Decl.”) at ¶¶ 6-8; Tulyathan Decl. at ¶¶ 10-13.)

**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 also 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 failed to prevail, Plaintiff would have been potentially responsible for Defendant’s costs. (Bernabe Decl. at ¶ 10.) As such, should individual current or former employees of Defendant bring individual claims on the same causes of action, they would each face the uncertainty of prevailing and the possibility of paying costs to Defendant. Accordingly, such claims likely would not be brought by many of these current and former employees—thus, this lawsuit achieves a true benefit for the class that they might not otherwise get or seek as individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff nor any of the Class Members will be required to pay for Defendant’s litigation costs.

The risks of this case were weighed by Class Counsel and should be considered a significant factor by the Court in its determination of final approval. Class Counsel obtained a significant settlement for the Class that resulted in a fair recovery which at the same time provides for finality and no risk of costs by the Class Members or Class Representative.

The Settlement Agreement also affords the Class prompt, fair relief while avoiding significant legal and factual battles that otherwise may have prevented the Class from obtaining

any recovery at all. While Class Counsel believe the Class Members' claims are meritorious and can be successfully litigated, they are experienced and fully understand the inherent risks and uncertainty involved with such matters as the resolution of class certification, the outcome of a potential trial, and the outcome of any appeals that would inevitably follow should the Class prevail at trial. Class Counsel has also assessed the same risks in connection with the current settlement. Because the settlement provides immediate and substantial relief, without the attendant risks and delay of continued litigation—not to mention the threat of litigation fees and costs—Class Counsel believe that the settlement warrants the Court's final approval.

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

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

As noted above, continued litigation could have led to appeals on several issues. On the other hand, the settlement that was reached provides to all Class Members—regardless of their means—fair relief in a prompt and efficient manner. Were the Court to deny final approval, the Class Members would be left without a remedy as a practical matter and courts across the State would have to address the issues presented here in a piecemeal, costly, and time-consuming manner. The settlement in this case is therefore consistent with the “overriding public interest in settling and quieting litigation” that is “particularly true in class action suits.” (*See Van Bronkhorst*, 529 F.2d at p. 950 (footnote omitted); *see also 4 Newberg* at § 11.41.) Here, this case could have involved years of litigation, especially given that the sick pay regular rate claim has never been certified by a California court before.

5. The Opinion of Experienced Counsel Favors Final Approval

Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best interest of the Class Members as a whole. (Lee Decl. at ¶ 4; Tulyathan Decl. at ¶ 4.) Similarly,

counsel for Defendant is in favor of this settlement. The endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its final approval determination. (*See Officers for Justice*, 688 F.2d at p. 625; *Ellis*, 87 F.R.D. at p. 18; *Boyd*, 485 F.Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.)

IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS SHOULD BE APPROVED

As referenced in the Motion for Preliminary Approval, to the extent any uncashed settlement funds remain after 180 days of the mailing of the individual settlement checks, the Parties have agreed that all such uncashed settlement funds shall be distributed to the *cy pres* recipient Asian Americans Advancing Justice – Los Angeles, a nonprofit organization that provide legal services and advocacy work, in accordance with C.C.P. § 384.

Pursuant to C.C.P. § 384, unpaid residue or unclaimed or abandoned class member funds in class action litigation shall be distributed “to nonprofit organizations or foundations that support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, *or to nonprofit organizations providing civil legal services to the indigent.*” (*See* Code of Civ. Proc. § 384(b) (emphasis added).) Here, Asian Americans Advancing Justice – Los Angeles meets the requirements of Section 384(b) as it is a legal and civil rights nonprofit organization that provides free legal aid to low-income communities with a focus on Asian Americans, Native Hawaiians, and Pacific Islanders. (*See* Tulyathan Decl. at ¶ 8, Ex. B.) As such, the Court should approve Asian Americans Advancing Justice – Los Angeles as the *cy pres* beneficiary for any uncashed settlement funds in this case.

V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD BE APPROVED

Class Representative Sylvia Bernabe requests a total enhancement of \$10,000.00. Plaintiff met with Class Counsel, had numerous discussions with Class Counsel, and provided substantive information regarding Defendant’s policies and practices at issue in this case. (Bernabe Decl. at ¶ 6.) Accordingly, Plaintiff provided invaluable information, evidence, and

documents that resulted in this settlement.

In addition to the invaluable services that she provided, Plaintiff also took significant risks, both professionally and monetarily, in acting as Class Representative, seeking benefits on behalf of the Class. (*Id.* at ¶ 10.) Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had she not prevailed in this action. (*Id.*) Despite this, however, Plaintiff agreed to pursue this case on behalf of the Class.

Also, given that future employers are much less likely to hire individuals who have filed employment-related lawsuits, particularly cases of this nature, the Class Representative also faced significant risk in not being able to find suitable employment and/or face retaliation from prospective employers, all as a result of filing of this case against Defendant. Plaintiff took these risks upon herself to the benefit of the Class. (*Id.* at ¶ 10.) Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits that weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a significantly valuable benefit to the Class, *i.e.*, the average award to Class Members in the amount of **\$1,013.74**, and the highest award being **\$15,688.65**, and Plaintiff took on substantial risks in helping to get this financial benefit to the Class. As such, the enhancement should be awarded to Plaintiff for her commitment, dedication, and risks taken for this litigation.

Courts have routinely granted approval of settlements containing such enhancements. (*See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299-300 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F.Supp.2d 907, 913-14 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.* (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52

(awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award to class representative in ERISA case).)

VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED

Class Counsel seeks a fee award calculated at one-third of the Maximum Settlement Amount, or \$83,333.33, for the successful prosecution and resolution of this action. California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 [*Serrano III*]; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of this equitable doctrine is to avoid unjust enrichment to the Class and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air West, Inc., supra*, 557 F.2d at p. 769.)

The California Supreme Court issued its ruling regarding the award of attorney's fees in wage and hour class action settlements in *Laffitte*. Under California law, the award of attorneys' fees in common fund wage and hour class action settlements is proper under the percentage method. (*See Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480, 503 ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created").) Under the percentage of the fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee. (*See Gaskill v. Gordon* (7th Cir. 1998) 160 F.3d 361, 363 (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will set....The judge, in other words, is trying to mimic the market in legal services.").)

Here, the fee award representing approximately one-third of the fund clearly falls within that range and is consistent with other rulings of other courts and comprehensive surveys of class

1 action settlements and fee awards. (*See Martin v. AmeriPride Servs.* (S.D. Cal. 2011) 2011 U.S.
2 Dist. LEXIS 61796, 23 (recognizing that “courts may award attorney’s fees in the 30-40% range
3 in wage and hour class actions that result in recovery of a common fund under \$10 million”); *see*
4 *also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-*
5 *2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action
6 litigation nationwide conclude that fees in the range sought here are consistent with market
7 rates).)

8 The results delivered by Class Counsel also support the requested percentage of the fund.
9 Here, Plaintiff and her counsel secured a \$250,000.00 non-reversionary common fund
10 settlement.

11 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
12 is relevant to the... reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
13 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
14 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class
15 Notice specifically notified Class Members that Class Counsel would be seeking up to
16 \$83,333.33 in attorneys’ fees. To date, no Class Member has objected to the settlement. This
17 strong favorable response also supports the requested fees.

18 In addition, it is recognized that one of the primary factors justifying an enhanced
19 attorney’s fees reward is the attendant risks inherent in the litigation. As observed in *City of*
20 *Detroit v. Grinnell Corp.*:

21 No one expects a lawyer whose compensation is contingent upon
22 his success to charge, when successful, as little as he would charge
23 a client who had agreed to pay for his services, regardless of
24 success. Nor, particularly in complicated cases producing large
recoveries, is it just to make a fee depend solely on the reasonable
amount of time expended.

25 (*City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470.) Here, it is clear that a
26 settlement fund of \$250,000.00 has been created as the entire amount is to be paid out without
27 any reversions. For Class Counsel, the fees here were wholly contingent in nature and the case
28 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent

1 in class action litigation, as well as a potentially drawn-out battle with a corporate Defendant.

2 As secondary support for the percentage of the fund method, courts have discretion to
3 “cross-check” the fees awarded through the lodestar method. However, the *Laffitte* Court
4 “emphasize[d] [that] the lodestar calculation, when used in this manner, does not override the
5 trial court’s primary determination of the fee as a percentage of the common fund and thus does
6 not impose an absolute maximum or minimum on the potential fee award.” (*Laffitte*, 1 Cal.5th at
7 p. 505; *In re Rite Aid Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar
8 cross-check does not trump the primary reliance on the percentage of common fund method”).)

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

23 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
24 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see also*,
25 *e.g.*, *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying a 2.52
26 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at p. 60
27 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
28 Cal.App.3d 78 (1988) (affirming a 2.34 multiplier without remand).) The intermediate court in

1 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
2 a 2.13 multiplier. (*Laffitte*, 231 Cal.App.4th at pp. 881-82.) The intermediate court opinion was
3 affirmed in full by the California Supreme Court in its new decision guiding lower courts on
4 assessing fees.

5 With respect to Class Counsel’s lodestar, to date, approximately 156.4 hours have been
6 expended by Class Counsel in this matter. (Tulyathan Decl. at ¶ 13, Ex. C; Lee Decl. at ¶ 9, Ex.
7 A.) Moreover, Class Counsel expects to incur approximately 18 additional hours in finalizing
8 this settlement, including handling any post-approval matters and settlement issues that may
9 arise. (Tulyathan Decl. at ¶ 14; Lee Decl. at ¶ 10.) Mr. Lee requests an hourly rate of \$750.00
10 per hour. (Lee Decl. at ¶ 11.) Ms. Tulyathan requests an hourly rate of \$500.00. (Tulyathan
11 Decl. at ¶ 15.) The courts are quite liberal in the evidence required to prove an attorney’s hours.
12 Detailed time records are not required. An attorney’s testimony alone may suffice: “Testimony
13 of an attorney as to the number of hours worked on a particular case is sufficient evidence to
14 support an award of attorney fees, even in the absence of detailed time records.” (*Martino v.*
15 *Denevi* (1986) 182 Cal.App.3d 553, 559.)

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

22 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
23 experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084,
24 1095.) The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
25 attorney’s skill and experience, the nature of the work performed, the relevant area of expertise
26 and the attorney’s customary billing rates. (*Flannery v. California Highway Patrol* (1998) 61
27 Cal.App.4th 629, 632-33.)

28 Class Counsel’s skill and experience justify the requested rate. As shown in the

1 supporting declarations, Class Counsel have significant experience in the area of employment
2 and wage and hour class actions. Specifically, Class Counsel’s practice focuses on representing
3 employees in employment matters, particularly wage and hour cases. (Lee Decl. at ¶¶ 7-8;
4 Tulyathan Decl. at ¶¶ 10-13.) As such, based on the hours and applicable rate, the total lodestar
5 to be expended by Class Counsel through finalizing this settlement will be approximately
6 \$101,975.00, based on 174.4 total hours. (Lee Decl. at ¶ 11; Ex. A; Tulyathan Decl. at ¶ 15, Ex.
7 C.)

8 Once the court establishes the lodestar amount, it may enhance the fee award by a
9 multiplier in order to make an appropriate fee award. (*Serrano III*, 20 Cal.3d at p. 48.) The
10 pertinent factors include the difficulty of the questions involved and the skill in presenting them,
11 the contingent nature of the fee award, the extent to which the litigation precluded other
12 employment, and the percentage-of-the-fund the attorney would have received on the fair
13 market. (*Id.*, *Lealao*, 82 Cal.App.4th at p. 49.) However, this list is not exhaustive, and the court
14 can consider other factors it deems important in setting the multiplier. (*Ketchum v. Moses* (2001)
15 24 Cal.4th 1122, 1139.)

16 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
17 enhancement based on a percentage-of-the-fund. (*Lealao*, 82 Cal.App.4th at p. 52 (the
18 promptness of settlement “cannot be used to justify the refusal to apply a multiplier”).)
19 According to *Lealao*, courts placed “an extraordinarily high value” on settlement, and counsel
20 should be rewarded, not punished, for achieving this goal in a timely fashion. (*Id.*)

21 Here based upon Plaintiff’s counsel’s lodestar of \$101,975.00, Plaintiff’s request for a fee
22 award of \$83,333.33 is more than reasonable and fair. As the Court can see, the lodestar well
23 *exceeds* the requested fee amount, such that it would result in a *negative multiplier*. Based
24 thereon, Plaintiff’s counsel’s request for attorneys’ fees in the amount of \$83,333.33 is fair and
25 reasonable, and the Court should approve this amount.

26 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
27 **OF COSTS**

28 The request for reimbursement of costs, in the amount of \$15,067.68 is fair and

reasonable, especially in light of the fact that the Parties agreed that Plaintiff's counsel may seek up to \$25,000.00 as reimbursement for litigation costs under the Settlement Agreement. As set forth in Plaintiff's counsel's declaration, the costs were all directly incurred in the prosecution of this action, including but not limited to, filing and service fees, postage fees, CourtCall fees, expert fees, and costs associated with mediation. (Tulyathan Decl. at ¶ 16, Ex. D.) As such, this requested costs should be approved as fair and reasonable.

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

Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement funds. As shown on the Declaration of Elizabeth Kruckenberg, the settlement administration fees expended in this matter amount to a total of \$4,950.00, which is the amount that was agreed upon by the Parties. (Kruckenberg Decl. at ¶ 12, Ex. B.) For such reasons, it is requested that the Settlement Administrator's fees be approved.

IX. CONCLUSION

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

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

1. Granting final approval to the proposed Settlement Agreement in this action;
2. Approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement;
3. Approving Plaintiff's request for an award of the class representative enhancement of \$10,000.00, with payment pursuant to the terms of the Settlement Agreement;
4. Approving Class Counsel's request for an award to Class Counsel for \$83,333.33 in attorneys' fees and \$15,067.68 in costs, with payment pursuant to the terms of the Settlement Agreement;

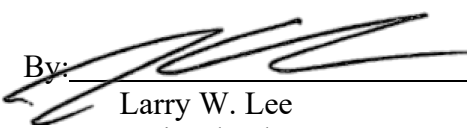
1 5. Approving Plaintiff's request for payment of the settlement administration costs
2 to Phoenix Settlement Administrators in the amount of \$4,950.00, with payment pursuant to the
3 terms of the Settlement Agreement;

4 6. Approving Plaintiff's request for payment to the LWDA for \$15,000.00, with
5 payment pursuant to the terms of the Settlement Agreement; and

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

7
8 DATED: November 11, 2021

DIVERSITY LAW GROUP, P.C.

9
10 By:  _____

Larry W. Lee

Mai Tulyathan

11 Attorneys for Plaintiff, the Class, and Aggrieved
12 Employees
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