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

VAN WALKER, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

WFS EXPRESS, INC., a Delaware
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 34-2020-00285301-CU-OE-GDS

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

Date: March 9, 2022

Time: 1:30 p.m.

Dept.: 53

Reservation No.: 2603858

Complaint Filed: August 5, 2020

Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on March 9, 2022, at 1:30 p.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Shama H. Mesiwala, judge presiding, in
4 Department 53 of the above referenced Court located at 720 9th Street, Sacramento, California
5 95814, Plaintiff Van Walker (“Plaintiff”) will and does hereby move this Court for an Order:

6 1. Granting final approval of the Joint Stipulation for Class Action Settlement
7 (“Stipulation” or “Settlement Agreement”) in this matter;

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

10 3. Approving Plaintiff’s request for an enhancement award of \$10,000.00 to Plaintiff
11 pursuant to the terms of the Settlement Agreement;

12 4. Approving Class Counsel’s request for an award of attorneys’ fees of 35 percent
13 of the Gross Settlement Amount of \$950,000.00, or \$332,500.00, and reimbursement of actual
14 litigation costs of \$13,300.18 pursuant to the terms of the Settlement Agreement;

15 5. Approving Plaintiff’s request for payment of the settlement administration costs
16 to Phoenix Settlement Administrators in the amount of \$19,500.00 pursuant to the terms of the
17 Settlement Agreement;

18 6. Approving Plaintiff’s request for payment to the California Labor & Workforce
19 Development Agency (“LWDA”) for \$30,000.00 pursuant to the Private Attorneys General Act,
20 pursuant to the terms of the Settlement Agreement; and

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

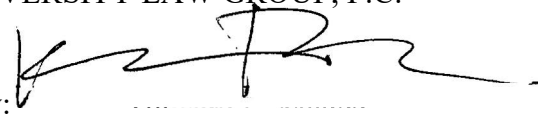
22 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
23 provides for court approval of the settlement of a purported class action and allows the Court to
24 grant final certification of a class for settlement purposes. In light of the overwhelmingly
25 positive response,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

28 This Motion will be based on the attached Memorandum of Point and Authorities and the

1 supporting Declarations of Larry W. Lee, Mai Tulyathan, Plaintiff Van Walker, and Taylor
2 Mitzner of Phoenix Settlement Administrators, and upon the oral arguments of counsel (should
3 there be any), and on the complete records and file herein.

4
5 DATED: February 14, 2022

DIVERSITY LAW GROUP, P.C.

6
7 By: 

Larry W. Lee

Mai Tulyathan

8 Attorneys for Plaintiff, the Class, and Aggrieved
9 Employees

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1 **I. INTRODUCTION**

2 Plaintiff Van Walker (“Plaintiff”) now seeks the Court’s final approval of the Joint
3 Stipulation for Class Action Settlement (“Stipulation,” “Settlement,” or “Settlement
4 Agreement”). The Settlement Agreement provides for a \$950,000.00 **non-reversionary** fund to
5 be created for the benefit of the Settlement Class, from which attorneys’ fees, litigation costs,
6 service award to the named Plaintiff, the PAGA payment, including payment to the California
7 Labor & Workforce Development Agency (“LWDA”), and costs of settlement administration are
8 to be paid. The entire Net Class Settlement Amount, after these deductions, will be paid to all
9 Settlement Class Members who did not opt-out of the Settlement (“Participating Class
10 Members”). Further, the Gross Settlement Amount includes a \$40,000.00 payment pursuant to
11 the PAGA, of which 75 percent will go to the LWDA, and 25 percent will become part of the
12 Net Settlement Amount to be allocated to Settlement Class Members.

13 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
14 Approval of Class Action Settlement. The Court preliminarily approved this Settlement on
15 December 1, 2021, directing distribution of class notice and scheduling the hearing for final
16 approval of settlement (the “Preliminary Approval Order”).

17 As directed by the Court, the Settlement Administrator selected by the Parties—Phoenix
18 Settlement Administrators—distributed the Notice of Class Action Settlement (“Class Notice”)
19 to 2,242 Settlement Class Members on the class list provided by Defendant WFS Express, Inc.
20 (“Defendant”). (Declaration of Taylor Mitzner (“Mitzner Decl.”) at ¶ 3.) To date, **there have**
21 **been no requests for exclusions and/or objections to the settlement submitted by any**
22 **Settlement Class Member**.¹ (*Id.* at ¶¶ 8-9.) Finally, there were no disputes submitted by
23 Settlement Class Members to the Settlement Administrator, and as such, there are no outstanding
24 disputes from Settlement Class Members. (*Id.* at ¶ 10.) As such, there is a 100 percent
25 participation rate. In light of the lack of objections and opt-outs from Settlement Class
26

27
28 ¹ The deadline to request exclusion from the Settlement and/or objection to the Settlement is February 19,
2022. (*See* Mitzner Decl. at ¶¶ 8-9.) Plaintiff will submit a supplemental declaration from the Settlement
Administrator regarding the final number of opt-outs and objections after the deadline has lapsed.

Members, an inference can be made that the Settlement Class supports the Court’s Preliminary Approval Order finding that the Settlement Agreement is fair and reasonable.

In addition to the results of the notice process, the following represent the basic points previously covered in Plaintiff’s Motion for Preliminary Approval of Class Action Settlement that support final approval of the Settlement:

- The Settlement provides a total settlement sum of \$950,000.00 which is **non-reversionary**;

- The Settlement is fair given that Participating Class Members will receive (*after deductions for attorneys’ fees, costs, etc.*) a monetary share of the Net Class Settlement Amount. The highest individual settlement payment to be paid to a Participating Class Member is approximately **\$1,265.35**, and the average individual settlement payment to be paid to Participating Class Members is estimated to be **\$242.95** (Mitzner Decl. at ¶ 13);

- The allocation reflects that payment of individual settlement payments to Participating Class Members will be allocated proportionately among all Participating Class Members on a pro rata basis, based on the number of pay periods each Settlement Class Member worked while actively employed by Defendant during the Settlement Class Period;

- Settlement Class Members did not need to submit claim forms to participate in the Settlement, but are being paid automatically;

- The Settlement also provides for a \$40,000.00 payment attributable to the satisfaction of PAGA claims (the “PAGA Amount”), of which 75 percent, or \$30,000.00, will go to the State of California’s LWDA as a beneficiary of this Settlement pursuant to the PAGA, and 25 percent, of \$10,000.00, will become part of the Net Settlement Amount to be allocated to Settlement Class Members;

- Plaintiff’s counsel conducted significant investigation in this case, including the exchange of informal discovery and significant exchanges of information regarding class data, the number of pay periods at issue, time and payroll records for the class members, and Defendant’s policies, practices, and procedures pertaining to shift premiums and shift differentials, the payment of overtime wages and meal period premiums, its wage statement

1 practices, and use of personal cell phones for mobile applications to be used for work-related
2 purposes; and

3 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was retained
4 to administer the settlement for approximately \$19,500.00 (Mitzner Decl. at ¶ 14).

5 Accordingly, the Court should grant Final Approval consistent with the Preliminary
6 Approval Order.

7 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE** 8 **SETTLEMENT**

9 The notice procedures required by the Preliminary Approval Order have been followed
10 and satisfy all due process rights of Class Members. Specifically, the Preliminary Approval
11 Order contemplated that the Class Notice, as approved in the Preliminary Approval Order, be
12 sent to all Settlement Class Members by first class mail, as specified in the Settlement. The
13 Preliminary Approval Order contemplated, further, that Phoenix Settlement Administrators
14 would serve as the Settlement Administrator.

15 As clearly stated in the Mitzner Declaration, notice was provided to Settlement Class
16 Members, pursuant to the Preliminary Approval Order. On December 16, 2021, the Settlement
17 Administrator received a list from Defendant’s counsel containing information pertaining to
18 Settlement Class Members (“Class List”). (Mitzner Decl. at ¶ 3.) The Class List contained
19 2,242 unique individuals, consisting of 2,242 Settlement Class Members. (*Id.*) Prior to mailing
20 the Class Notice, the Settlement Administrator conducted a National Change of Address
21 (NCOA) search to correct and/or update the Class List in case of any address changes. (*Id.* at ¶
22 4.) On January 5, 2022, the Settlement Administrator mailed the Class Notice to all 2,242
23 unique individuals on the Class List via U.S. first class mail. (*Id.* at ¶ 5.)

24 From the date of mailing, 199 Class Notice packets were returned to the Settlement
25 Administrator due to incorrect address without forwarding addresses. (*Id.* at ¶ 6.) The
26 Settlement Administrator subsequently conducted skip tracing to identify updated addresses for
27 the Class Notices packets that were returned. From that process, the Settlement Administrator
28 obtained updated addresses for 178 Class Members and remailed those Class Notice packets via

1 U.S. first class mail. (*Id.*) As of the date of this filing, 38 Class Notices remain undeliverable as
2 the Settlement Administrator was unable to obtain updated addresses for 21 Class Notice packets
3 through skip tracing for re-mailing, and 17 Class Notice packets were returned to the Settlement
4 Administrator after re-mailing. (*Id.* at ¶¶ 6-7.) Further, the Class Notice provided class members
5 with the Class Counsel’s and the Settlement Administrator’s contact information and website,
6 where they could further seek information regarding the Settlement, ask questions, and update
7 their addresses.

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

18 Here, Class Members were provided with a mailing regarding the settlement that
19 explained the settlement and their rights. Further, the Class Notice allowed Settlement Class
20 Members to opt out of the Settlement and/or object to the Settlement, if so desired, and provided
21 clear instructions to do so. As such, proper notice has been given regarding the Settlement.
22 Thus, the Court may proceed to determine the fairness and adequacy of the Settlement and enter
23 its Order granting final approval, secure in the knowledge that all absent Settlement Class
24 Members have been given the opportunity to participate fully in the settlement, exclusion, and
25 the approval process.

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

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

1 In order to proceed as a class, there are two requirements which must be met—
2 ascertainability and community of interest. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695,
3 704; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809 (there are two basic requirements
4 which must exist to sustain a class action: “[t]he first is existence of an ascertainable class, and
5 the second is a well-defined community of interest in the questions of law and fact involved.”).)
6 “The community of interest requirement embodies three factors: (1) predominant common
7 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
8 (3) class representatives who can adequately represent the class.” (*Richmond v. Dart Industries*
9 (1981) 29 Cal. 3d 462, 470.)

10 **1. The Class is Ascertainable**

11 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure § 382
12 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
13 available for identifying the class members.” (*Reyes v. San Diego County Board of Supervisors*
14 (1987) 196 Cal. App. 3d 1263, 1271.)

15 Here, the Settlement Class includes all persons who worked for WFS Express, Inc. in
16 California as a non-exempt employee at any time from January 1, 2017, through July 31, 2021
17 (the “Class Period”). Based on Defendant’s records, there are 2,242 individuals that comprise
18 this Settlement Class. (Mitzner Decl. at ¶ 3.) This is significantly more than the minimum
19 required to certify a class.

20 Within the context of manageability, the issue is whether there exists sufficient means for
21 identifying class members at the remedial stage. (*Reyes*, 196 Cal. App. 3d at pp. 1274-75.)
22 Settlement Class Members have already been identified by Defendant and notice was provided to
23 all of the above Settlement Class Members. (Mitzner Decl. at ¶¶ 3, 5.)

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

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

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

2 “The ultimate question in every case of this type [class actions] is whether...the issues
3 which may be jointly tried, when compared with those requiring separate adjudication, are so
4 numerous and substantial that the maintenance of a class action would be advantageous to the
5 judicial process and to the litigants.” (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.
6 4th 1096, 1104-05.)

7 In this case, Plaintiff alleges that Defendant, as a matter of its corporate policy, practice,
8 or procedure, failed to provide off-duty rest breaks, or pay rest period premium compensation in
9 lieu thereof, in violation of Labor Code § 226.7. In this regard, Plaintiff alleges that employees
10 were required to remain on-duty and continue working through their rest breaks and thus were
11 not provided with compliant rest periods. Plaintiff also alleges that Defendant failed to correctly
12 pay overtime wages and meal period premiums at the regular rate of pay in violation of Labor
13 Code §§ 226.7, 510, 512, 558, 1194. In this regard, Plaintiff asserts that Defendant failed to
14 factor in non-discretionary incentives, such as shift premiums and shift differentials, into the
15 calculation of the regular rate of pay for overtime wages and premium compensation.

16 Additionally, Plaintiff alleges that Defendant failed to pay all wages owed to its employees,
17 including minimum, regular, overtime, and reporting time pay. Plaintiff also alleges that
18 Defendant violated Labor Code § 2802 as Defendant required employees to use their personal
19 cell phones for work-related purposes, including to utilize the “Discord” mobile application for
20 work communication purposes, without proper reimbursement for said usage. Lastly, Plaintiff
21 alleges that Defendant violated Labor Code § 226(a) by failing to provide accurate itemized
22 wage statements. More specifically, Plaintiff alleges that whenever shift premiums and/or shift
23 differential wages were paid to employees, Defendant’s wage statements identified the wrong
24 total hours worked. As these are all uniform corporate policies, practices, and procedures of
25 Defendant, the claims can be jointly tried and thus the predominance requirement is satisfied.

26 Defendant denies that liability could be established on a class-wide basis and contends
27 that liability and damages would need to be conducted on a case-by-case basis.

28 ///

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

2 The purported class representative’s claim must be “typical” but not necessarily identical
3 to the claims of other class members; it is sufficient that the representative is similarly situated so
4 that he or she will have the motive to litigate on behalf of the class. (*Classen v. Weller* (1983)
5 145 Cal. App. 3d 27, 45.) Courts look to whether class members have similar injuries, “whether
6 the action is based on conduct which is not unique to the named Plaintiff,” and whether other
7 class members were injured by the same conduct. (*Hanon v. Dataproducts Corp.* (9th Cir. 1992)
8 976 F.2d 497, 508.) The purpose of the typicality requirement “is to assure that the interest of
9 the named representative aligns with the interests of the class.” (*Id.* at p. 508.)

10 Plaintiff was subject to the same policies, practices, and procedures as his fellow
11 Settlement Class Members. In this regard, Plaintiff worked for Defendant as a non-exempt
12 employee from in or about March 2018, until on or about January 14, 2020. (Declaration of Van
13 Walker (“Walker Decl.”) at ¶ 2.) Like all Settlement Class Members, Plaintiff was subjected to
14 these same policies and practices. (*Id.* at ¶¶ 3-7.) In particular, Plaintiff did not receive
15 compliant off-duty rest periods as he had to remain on-duty to perform work throughout his
16 shifts, nor did he receive rest period premium compensation for said non-compliant rest periods.
17 (*Id.* at ¶ 3.) Plaintiff was also not paid all wages owed, including overtime wages, meal period
18 premium compensation, and reporting time pay. (*Id.* at ¶¶ 4-5.) With respect to overtime wages
19 and meal period premium compensation, Plaintiff was underpaid said wages as Defendant did
20 not factor in non-discretionary incentives into the regular rate of pay. (*Id.* at ¶ 4.) Plaintiff also
21 received inaccurate wage statements that did not comply with Labor Code § 226(a). (*Id.* at ¶ 6.)
22 Lastly, Plaintiff was also required to use his personal cellphone during his work shifts, but were
23 not compensated and/or reimbursed for the charges he incurred for such work usage. (*Id.* at ¶ 7.)
24 In other words, Plaintiff was subjected to the same policies and practices as other Settlement
25 Class Members. Thus, typicality is satisfied.

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

27 The class representative, through qualified counsel, must be capable of “vigorously and
28 tenaciously” protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.

1 App. 3d 834, 846.)

2 Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
3 been raised or presented. (Walker Decl. at ¶ 9.) Plaintiff has taken all necessary steps to
4 represent the interests of the Settlement Class, including discussing the case with his counsel,
5 searching for and providing information and documents to his counsel, and reviewing the various
6 documents and pleadings in this case, including the PAGA letters, complaint, settlement
7 agreement, and his declarations. (*Id.* at ¶ 8.) For such reasons, Plaintiff has adequately
8 represented the Settlement Class and will continue to do so.

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

10 Plaintiff believes that a class can be certified; however, Plaintiff also believes in the
11 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
12 involved in not prevailing on one or more of the causes of action or theories alleged in the
13 Complaint, the possibility of non-certification and potential for appeals. These risks on class
14 certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank*
15 *Nat'l Ass'n* (2014) 59 Cal. 4th 1.

16 As stated above, Defendant alleges that Plaintiff would not be able to obtain class
17 certification. Based on the foregoing, there were risks that Plaintiff would not have obtained the
18 total amount of damages and penalties alleged on behalf of the class, and a substantial amount of
19 complex issues that would have necessitated significant expenditure of time and expenses.
20 Therefore, the risks, expenses and complexity of further litigation warrant granting of this
21 Motion.

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

25 Without reiterating the Parties' showing that the Settlement Agreement and the
26 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
27 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
28 Agreement was the product of negotiation between highly able and experienced attorneys on

1 both sides who possessed the relevant data and extensive legal research which they had carefully
2 analyzed. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 3.) The Parties engaged in
3 arm’s length negotiations at mediation with a highly experienced and known mediator, Michael
4 J. Loeb, Esq. (*Id.*)

5 The results after dissemination of the Class Notice support confirmation of the Court’s
6 preliminary approval of the settlement with final approval of the settlement, as evidenced by the
7 fact that no Settlement Class Members opted out and/or submitted any objections to the
8 Settlement. (Mitzner Decl. at ¶¶ 8-9.) The Court may appropriately infer that the class action
9 settlement is fair, adequate, and reasonable, given that no class member has submitted a request
10 for exclusion and/or an objection. (*See Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d
11 1268, 1291.)

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

14 **1. Standard of Review**

15 On a motion for final approval of a class action settlement under California Code of Civil
16 Procedure § 382 and California Rule of Court 3.769, a court’s inquiry is whether the settlement
17 is “fair, adequate and reasonable.” (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982)
18 688 F.2d 615, 625, *cert. denied subnom., Byrd v. Civil Serv. Comm’n* (1983) 459 U.S. 1217.) A
19 settlement is fair, adequate, and reasonable, and therefore merits final approval, when “the
20 interests of the class are better served by the settlement than by further litigation.” (*See Manual*
21 *for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”).) The law
22 favors settlement, particularly in class actions and other complex cases, where substantial
23 resources can be conserved by avoiding the time, cost, and rigors of formal litigation. (*See Alba*
24 *Conte and Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41 (2008); *Class Plaintiffs v.*
25 *City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco Corp.* (9th Cir.
26 1976) 529 F.2d 943, 950.)

27 Although the Court possesses “broad discretion” in determining that a proposed class
28 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a

1 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
2 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
3 adequate to all concerned. (*See Officers for Justice*, 688 F.2d at p. 625.) Accordingly, the Court
4 should give due regard to what is otherwise a “private consensual agreement” between the
5 parties. (*Id.*; *see also Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1993) 1993 WL
6 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720 F. Supp. 1379, *aff’d*
7 *sub nom., Chemical Bank*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
8 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
9 or imposing conditions on it. The judge cannot rewrite the agreement”).)

10 A court’s approval of a class action settlement will only be reversed for a clear abuse of
11 discretion. (*See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801; *Officers for*
12 *Justice*, 688 F.2d at p. 626 (“reverse only upon a strong showing that the district court’s decision
13 was a clear abuse of discretion”); *Class Plaintiffs*, 955 F.2d at p. 1276; *Ackerman v. Kassar* (9th
14 Cir. 1993) 1993 WL 326453; *Linney v. Cellular Alaska P’ship* (9th Cir. 1998) 151 F.3d 1234,
15 1238.)

16 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*
17 (2000) 85 Cal. App. 4th 1135, 1146:

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

27 **2. The Settlement is Presumed to Be Fair**

28 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; *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at p. 1146; *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 J. Loeb, Esq. (Tulyathan Decl. at ¶ 3.)

Second, Class Counsel engaged in extensive factual investigation before settling, including exchange of informal discovery before mediation. (*Id.*) Specifically, Class Counsel reviewed class data and data pertaining to the number of class members, the number of pay periods at issue, time and payroll records for the class members, as well as information pertaining to Defendant's policies, practices, and procedures pertaining to shift premiums and shift differentials, the payment of overtime wages and meal period premiums, its wage statement practices, and use of personal cell phones for mobile applications to be used for work-related purposes. (*Id.*) Plaintiff then retained an expert witness to review and analyze the data and records provided by Defendant to calculate the potential exposure for the claims involved. (*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. (Tulyathan Decl. at ¶¶ 10-12; Declaration of Larry W. Lee ("Lee Decl.") at ¶¶ 7-8.)

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

1 the risks inherent in continued litigation. (*See also In re General Motors Corp.* (3d Cir. 1995)
2 55 F.3d 768, 806 (“present value of the damages plaintiffs would likely recover if successful,
3 appropriately discounted for the risk of not prevailing, should be compared with the amount of
4 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d
5 153, 157; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 616-17.)

6 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would have
7 been potentially responsible for Defendant’s costs. (Walker Decl. at ¶ 12.) As such, should any
8 individual employee of Defendant bring individual claims on the same causes of action, they
9 would each face the uncertainty of prevailing and the possibility of paying costs to Defendant.
10 Accordingly, such claims likely would not be brought by many of these employees—thus, this
11 lawsuit achieves a true benefit for the class that they might not otherwise get or seek as
12 individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff,
13 nor any of the Class Members will be required to pay for Defendant’s litigation costs.

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

18 The Settlement Agreement also affords the Class prompt, fair relief, while avoiding
19 significant legal and factual battles that otherwise may have prevented the Class from obtaining
20 any recovery at all. While Class Counsel believe the Class Members’ claims are meritorious and
21 can be successfully litigated, they are experienced and fully understand the inherent risks and
22 uncertainty involved with such matters as the resolution of class certification, the outcome of a
23 potential trial, and the outcome of any appeals that would inevitably follow should the Class
24 prevail at trial. Class Counsel has also assessed the same risks in connection with the current
25 settlement. Because the settlement provides immediate and substantial relief, without the
26 attendant risks and delay of continued litigation—not to mention the threat of litigation fees and
27 costs—Class Counsel believe that the settlement warrants the Court’s final approval.

28 ///

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

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

8 Here, the Settlement that was reached provides to all Class Members—regardless of their
9 means—fair relief in a prompt and efficient manner. Were the Court to deny final approval, the
10 Class Members would be left without a remedy as a practical matter and courts across the State
11 would have to address the issues presented here in a piecemeal, costly, and time-consuming
12 manner. The Settlement in this case is therefore consistent with the “overriding public interest in
13 settling and quieting litigation” that is “particularly true in class action suits.” (*See Van*
14 *Bronkhorst*, 529 F.2d at p. 950 (footnote omitted); *see also 4 Newberg* § 11.41.)

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

16 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
17 interest of the Class Members as a whole. (Tulyathan Decl. at ¶ 7; Lee Decl. at ¶ 5.) Similarly,
18 counsel for Defendant is in favor of this settlement. The endorsement of qualified and well-
19 informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight
20 by the Court in its final approval determination. (*See Officers for Justice*, 688 F.2d at p. 625;
21 *Ellis*, 87 F.R.D. at p. 18; *Boyd*, 485 F. Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.)

22 **IV. THE REQUESTED CLASS REPRESENTATIVE INCENTIVE AWARD SHOULD**
23 **BE APPROVED**

24 Class Representative Walker requests a total enhancement of \$10,000.00. Plaintiff
25 provided significant assistance with the lawsuit, including discussing the case with Class
26 Counsel on multiple occasions, searching for and providing documents and information
27 regarding Defendant’s practices at issue in the case, including his paystubs, work schedules,
28 employment forms, and policy documents, and reviewing the various files and pleadings

submitted in this case. (Walker Decl. at ¶ 8.) Accordingly, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement.

In addition to the invaluable services that she provided, Plaintiff took significant risks, both professionally and monetarily, in acting as the Class Representative, seeking benefits on behalf of the class. (*Id.* at ¶¶ 12-13.) 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 he not prevailed in this action. (*Id.* at ¶ 12.) Despite this, however, Plaintiff agreed to pursue this case on behalf of the other employees.

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. (*Id.* at ¶ 13.) Plaintiff took these risks upon himself to the benefit of the Class. As a result, 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. (*Id.*) 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, 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 his commitment, dedication, and risks taken for this litigation.

Finally, Plaintiff provided a general release and waiver of all claims, including a waiver under California Civil Code § 1542, which other Class Members did not have to do. (Walker Decl. at ¶ 14; Settlement Agreement § 8.2.) This is a more extensive release than that provided by the class at large, also supporting the request for the enhancement.

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

1 \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907, 913-14 (granting a
2 \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio
3 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
4 *Servs.* (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52
5 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th
6 Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award to class representative in
7 ERISA case).)

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

9 Class Counsel seeks a fee award calculated as thirty-five percent (35%) of the Gross
10 Settlement Amount, or \$332,500.00, for the successful prosecution and resolution of this action.
11 California state and federal courts have recognized that an appropriate method for determining
12 an award of attorneys' fees is based on a percentage of the total value of benefits to class
13 members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224,
14 254; *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472,
15 78; *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1997).) The purpose of this
16 equitable doctrine is to avoid unjust enrichment to the Class and to "spread the litigation costs
17 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
18 burden alone." (*Vincent v. Hughes Air West, Inc.*, *supra*, 577 F.2d at p. 769.)

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

1 in legal services”).)

2 Here, the fee award representing thirty-five percent (35%) of the Gross Settlement
3 Amount falls within that range and is consistent with other rulings of other courts and
4 comprehensive surveys of class action settlements and fee awards. (*See Martin v. AmeriPride*
5 *Servs.* (S.D. Cal. June 9, 2011) (recognizing that “courts may award attorney’s fees in the 30-
6 40% range in wage and hour class actions that result in recovery of a common fund under \$10
7 million”); *see also* Eisenberg & Miller (2010) *Attorney Fees in Class Action Settlements: An*
8 *Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (independent studies of
9 class action litigation nationwide conclude that fees in that range sought here are consistent with
10 market rates).) The results delivered by Class Counsel also support the requested percentage of
11 the fund. Here, Plaintiff and his counsel secured a \$950,000.00 non-reversionary common fund
12 settlement.

13 “[T]he response of the class members to attorneys’ fee notice, though not decisive, is
14 relevant to the... reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
15 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
16 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class
17 Notice specifically notified Class Members that Class Counsel would be seeking up to
18 \$332,500.00 in attorneys’ fees. To date, no Class Member has objected to the settlement. This
19 strong favorable response also supports the requested fees.

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

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

27 (*City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470.) For Class Counsel, the fees
28 here were wholly contingent in nature and the case presented far more risk than the usual

contingent fee case. Among the risks was the cost inherent in class action litigation, as well as a potentially drawn-out battle with a corporate defendant. As such, the requested fee should be awarded.

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

The request for reimbursement of costs, in the amount of \$13,300.18 is fair and reasonable, especially in light of the fact that the Parties agreed that Class Counsel may seek up to \$20,000.00 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, court filing and service fees, postage fees, expert fees, and costs associated with mediation. (Tulyathan Decl. at ¶ 13, Ex. A.) As such, the requested costs should be approved as fair and reasonable.

VII. 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 from individual settlement checks issued to Settlement Class Members remain after the expiration date, the Parties have agreed that all such uncashed settlement funds be distributed to the State Bar of California's Justice Gap Fund, in accordance with C.C.P. § 384.

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 Taylor Mitzner, the settlement administration fees expended in this matter amount to a total of \$19,500.00, which is less than the amount that was agreed upon by the Parties. (Mitzner Decl. at ¶ 14.) 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

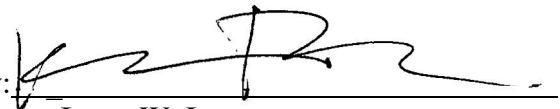
1 respectfully submits that the standards for final approval have been met, and the terms of the
2 Settlement Agreement are fair, adequate and reasonable.

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

- 5 1. Granting final approval to the proposed Settlement Agreement in this action;
- 6 2. Approving distribution of the settlement funds to Settlement Class Members
7 pursuant to the terms of the Settlement Agreement;
- 8 3. Approving Plaintiff's request for an award of the class representative
9 enhancement of \$10,000.00, with payment pursuant to the terms of the Settlement Agreement;
- 10 4. Approving Class Counsel's request for an award to Class Counsel of \$332,500.00
11 in attorneys' fees and \$13,300.18 in costs, with payment pursuant to the terms of the Settlement
12 Agreement;
- 13 5. Approving Plaintiff's request for payment of the settlement administration costs
14 to Phoenix Settlement Administrators in the amount of \$19,500.00, with payment pursuant to the
15 terms of the Settlement Agreement; and
- 16 6. Approving Plaintiff's request for payment to the LWDA for \$30,000.00, with
17 payment pursuant to the terms of the Settlement Agreement; and
- 18 7. Entering final judgment as to all Settlement Class Members in this action.

19
20 DATED: February 14, 2022

DIVERSITY LAW GROUP, P.C.

21
22 By: 

Larry W. Lee

Mai Tulyathan

23 Attorneys for Plaintiff, the Class, and Aggrieved
24 Employees
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