

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

JON BETTERTON, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

ACCENTURE FLEX, LLC, a Delaware limited
liability company; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 20CV368771

(Assigned to the Honorable Sunil R. Kulkarni,
Department 1)

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

Date: August 12, 2021

Time: 1:30 pm

Dept.: 1

Complaint Filed: July 29, 2020

Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on August 12, 2021, at 1:30 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Sunil R. Kulkarni, judge presiding, in
4 Department 1 of the above referenced Court located at 191 North First Street, San Jose,
5 California 95113, Plaintiff Jon Betterton (“Plaintiff”) will and hereby does move this Court for
6 the following relief with respect to the Joint Stipulation of Class Action and Release of Claims
7 (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Accenture Flex, LLC.
8 (“Defendant”) (together with Plaintiff, the “Parties”):

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

10 2. That the Court conditionally certify the following classes for settlement purposes
11 only:

12 a. All current and former non-exempt employees of Defendant in the State of
13 California who were paid shift differential and/or shift premium wages, including without
14 limitation “ShiftDiff” and/or “ShiftPremPerct” wages, at any time during April 6, 2019, to and
15 including February 6, 2021 (the “Wage Statement Class”); and

16 b. All non-exempt employees of Defendant in the State of California who
17 were paid non-discretionary incentive remuneration, including without limitation “ShiftDiff”
18 and/or “ShiftPremPerct” wages, and sick pay in the same pay period, and whose employment
19 ended (either voluntarily or involuntarily) at any time from April 6, 2017, through and including
20 July 31, 2021, or the date the Court grants preliminary approval of the settlement, whichever is
21 the earlier date (the “Sick Pay Class”);¹

22 3. That Plaintiff Jon Betterton be appointed as the Class Representative and Larry
23 W. Lee and Mai Tulyathan of Diversity Law Group, P.C., and William L. Marder of Polaris Law
24 Group, be appointed as Class Counsel;

25 4. That the Court preliminarily approve the Stipulation and the total Gross
26 Settlement Amount of One Million Five Hundred Thousand Dollars and Zero Cents
27 (\$1,500,000.00);

28

¹ The Wage Statement Class and Sick Pay Class are collectively referred to as the “Class.”

1 5. That the Court finds on a preliminary basis that the Stipulation appears to be
2 within the range of reasonableness of a settlement, including the amount of the PAGA penalties,
3 the service payment to the Class Representative, Class Counsel award of attorneys' fees and
4 litigation costs, settlement administration costs, and the allocation of individual settlement
5 payments to Class Members, that could ultimately be given final approval by this Court;

6 6. That the Court approve the mailing of the proposed Notice of Class Action
7 Settlement ("Class Notice") to be sent to Class Members;

8 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
9 Administrator; and

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

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

15 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
16 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
17 Class Members to participate in, opt-out of, or object to the settlement. This Motion is based on
18 the attached Memorandum of Points and Authorities, the Stipulation and the proposed Class
19 Notice, and the supporting Declarations of Larry W. Lee, Mai Tulyathan, William L. Marder,
20 and Plaintiff Jon Betterton, upon the oral arguments of counsel (should there be any), and on the
21 complete records and file herein.

22
23 DATED: July 21, 2021

DIVERSITY LAW GROUP, P.C.

24
25 By: 
26 Larry W. Lee
27 Mai Tulyathan
28 Attorneys for Plaintiff and the Class

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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Jon Betterton (“Plaintiff”) alleges that Defendant Accenture Flex, LLC (“Defendant”) failed to
5 provide accurate itemized wage statements to its employees in violation of Labor Code § 226(a),
6 and failed to timely and properly pay sick pay based on the correct regular rate of pay in
7 violation of Labor Code §§ 201-203 and 246. Based on these violations, Plaintiff asserts class
8 and PAGA claims for violations of Labor Code §§ 201-203, 226(a), and 246. The Parties have
9 reached a class action settlement, the terms of which are reflected in the Parties’ Joint Stipulation
10 of Class Action Settlement and Release of Claims (“Stipulation” or “Settlement Agreement”).²

11 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
12 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
13 principles applicable to the claims asserted against Defendant. Through the exchange of
14 informal discovery in connection with mediation, Defendant provided necessary data pertaining
15 to the number of putative class members, the number of pay periods at issue, the hourly rates of
16 pay for the putative class, as well as documents and information pertaining to Defendant’s
17 policies and practices regarding payment of sick pay wages and Defendant’s policies and
18 practices pertaining to its wage statements. The information provided by Defendant allowed
19 Plaintiff to review and analyze the liability and potential exposure. Thereafter, the Parties
20 attended a full day of mediation with experienced wage-and-hour mediator Joel Grossman, Esq.,
21 after which the Parties were able to reach the current settlement.

22 The terms of the Settlement Agreement provide that Defendant pay a Gross Settlement
23 Amount of One Million Five Hundred Thousand Dollars and Zero Cents (1,500,000.00) to
24 resolve the class and PAGA claims in this case. Significantly, this is a **non-reversionary**
25 **settlement**, meaning that the entirety of the Gross Settlement Amount will be distributed to the
26 class, such that **no remaining monies will revert to Defendant**. Further, no claim forms are
27

28 ² The Parties’ Joint Stipulation of Class Action Settlement and Release of Claims is attached to the
Declaration of Mai Tulyathan as **Exhibit A**.

required. The following represents the key terms of the Settlement:

- Gross Settlement Amount of \$1,500,000.00;
- Estimated class size of 584 individuals in the Wage Statement Class, and an estimated class size of 150 individuals in the Sick Pay Class;³
- Service award payment to the Class Representative of up to \$10,000.00;
- Class Counsel's attorneys' fees of one-third of the Gross Settlement Amount, up to \$500,000.00;
- Class Counsel's costs associated with prosecution and resolution of this action of up to \$20,000.00;
- Settlement administration costs of up to \$9,950.00;
- Payment to the Labor & Workforce Development Agency (LWDA) of \$75,000.00, representing 75 percent of the total PAGA allocation of \$100,000.00;
- Net Settlement Fund of approximately \$885,050.00, of which 80 percent will be apportioned among the Wage Statement Class Members on a pro rata basis, and 20 percent will be apportioned among the Sick Pay Class Members on a per capita basis; and
- Raw average of at least **\$1,212.40** to each participating Wage Statement Class Member, and at least **\$1,180.07** to each participating Sick Pay Class Member.

The Parties and their respective counsel believe that the Settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and his counsel are confident that they can prevail on class certification, as well as on the merits,

³ Class Members shall consist of members of two settlement classes. The Wage Statement Class consists of all current and former non-exempt employees of Defendant in the State of California who were paid shift differential and/or shift premium wages, including without limitation, "ShiftDiff" and/or "ShiftPremPerct" wages, at any time during April 6, 2019, to and including February 6, 2021 (the "Wage Statement Class"). The Sick Pay Class consists of all non-exempt employees of Defendant in the State of California who were paid non-discretionary incentive remuneration, including without limitation "ShiftDiff" and/or "ShiftPremPerct" wages, and sick pay in the same pay period, and whose employment ended (either voluntarily or involuntarily) at any time from April 6, 2017, through and including July 31, 2021, or the date the Court grants preliminary approval of the settlement, whichever is the earlier date (the "Sick Pay Class"). These two classes, collectively, shall be referred to as the "Class."

they recognize the inherent risks in drawn-out litigation and the specific risks that the classes might not be certified and/or that Plaintiff could fail to establish liability.

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

II. PROCEDURAL HISTORY

On June 3, 2020, Plaintiff filed his written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-203, 226, and 246 and pursuant to the PAGA, Labor Code § 2699. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2.) Thereafter, on July 29, 2020, Plaintiff filed his class and PAGA action Complaint against Defendant in Santa Clara County Superior Court. (*Id.*) The Complaint alleges causes of action for (1) violation of Labor Code § 226(a), (2) violation of Labor Code §§ 201-203, and (3) violation of the PAGA, Labor Code § 2698, *et seq.* (*Id.*)

Plaintiff’s class and PAGA claims as pled in the Complaint are predicated upon the following allegations. With respect to Plaintiff’s wage statement claims, Plaintiff contends that Defendant issued deficient wage statements whenever shift differential wages, such as “ShiftDiff” and/or “ShiftPremPerctn” wages, were paid. In this regard, Plaintiff contends that said wage statements do not correctly identify the applicable hourly rates of pay and number of hours worked used to calculate said wages. With respect to Plaintiff’s sick pay regular rate claims, Plaintiff contends that Defendant failed to factor non-discretionary incentives, including “ShiftDiff” and/or “ShiftPremPerctn” wages, into the calculation of the regular rate for purposes of paying sick pay wages, and thus Plaintiff and employees were underpaid sick pay. As a result of the alleged violations above, Plaintiff seeks statutory and civil penalties under the California Labor Code and the PAGA, as well as attorneys’ fees and costs. (Tulyathan Decl. at ¶ 3.)

After the filing of the Complaint, Defendant’s counsel informed Plaintiff about the existence of an arbitration agreement executed by the Parties. (Tulyathan Decl. at ¶ 4.) During the Parties’ meet and confer discussions regarding the enforceability of the arbitration agreement, the Parties agreed to participate in private mediation. (*Id.*) In connection with mediation, the Parties engaged in informal discovery to allow Plaintiff to assess the claims and

1 liability, as well as analyze the maximum exposure of damages and penalties. (*Id.* at ¶ 5.)
2 Defendant provided Plaintiff's counsel with informal data and information pertaining to the
3 number of putative class members, the number of pay periods at issue, the hourly rates of pay for
4 the putative class, as well as documents and information pertaining to Defendant's policies and
5 practices regarding payment of sick pay wages and Defendant's policies and practices pertaining
6 to its wage statements. (*Id.*) Based on the data provided by Defendant, Plaintiff's counsel
7 conducted an analysis of liability and potential maximum exposure for the class and PAGA
8 penalties. (*Id.*)

9 On April 26, 2021, the Parties engaged in a full-day mediation with mediator Joel
10 Grossman, Esq. (Tulyathan Decl. at ¶ 6.) After thorough investigation and evaluation of the
11 facts and claims, and as a result of the arm's-length negotiations facilitated by Mr. Grossman, the
12 Parties and their counsel ultimately reached the current settlement. (*Id.*) In resolution of
13 Plaintiff's class and PAGA claims in this lawsuit, the Parties entered into the Settlement
14 Agreement, a true and correct copy of which is attached as **Exhibit A** to the Declaration of Mai
15 Tulyathan. (*Id.*)

16 The Parties recognize the risk, expense, and delay in continuing litigation with the class
17 and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. (Tulyathan
18 Decl. at ¶ 7.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes
19 and claims arising from or relating to the class and PAGA claims as set forth in the Settlement
20 Agreement.

21 **III. DISCUSSION**

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

26 Approval of class action settlements involves a two-step process.
27 First, counsel submits the proposed terms of settlement and the
28 court makes a preliminary fairness evaluation. If the preliminary
evaluation of the proposed settlement does not disclose grounds to
doubt its fairness or other obvious deficiencies, such as unduly

1 preferential treatment of class representatives or of segments of the
2 class, or excessive compensation for attorneys, and appears to fall
3 within the range of possible approval, the court should direct that
4 notice...be given to the class members of a formal fairness
5 hearing, at which arguments and evidence may be presented in
6 support of and in opposition to the settlement.

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

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

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

24 (*Id.* at § 11.24.)

25 Here, the Parties have reached such an agreement and have submitted to this Court in
26 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
27 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties as to
28 settlement of the class and PAGA claims. Said terms in the Stipulation include, among other
things, the method for calculating the Class Members’ individual portions of the settlement
payment.

The parties also may, at the preliminary approval stage, request that the court
provisionally approve certification of the class for settlement purposes—conditional upon final

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

8 The strength of the findings made by a judge at a preliminary
9 hearing or conference concerning a tentative settlement
10 proposal...may be set out in conditional orders granting tentative
11 approval to the various items submitted to the court. Three basic
12 rulings are often conditionally entered at this preliminary hearing.
13 These conditional rulings may approve a temporary settlement
14 class, the proposed settlement, and the class counsel’s application
15 for fees and expenses.

16 (4 *Newberg on Class Actions*, at § 11.26.)

17 In addition to such terms as class identification, settlement amount, and payment
18 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
19 which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of
20 this settlement only. (*See* Stipulation at ¶ II.1.)

21 **A. Proposed Class Definition**

22 The current settlement is being settled on behalf of two settlement classes—the Wage
23 Statement Class and the Sick Pay Class. The Wage Statement Class consists of all current and
24 former non-exempt employees of Defendant in California who were paid shift differential and/or
25 shift premium wages, including without limitation, “ShiftDiff” and/or “ShiftPremPerct” wages,
26 at any time during April 6, 2019, to and including February 6, 2021. (*See* Stipulation at ¶ I.5.)
27 The Sick Pay Class consists of all non-exempt employees of Defendant in California who were
28 paid non-discretionary incentive remuneration, including without limitation, “ShiftDiff” and/or
29 “ShiftPremPerct” wages, and sick pay in the same pay period, and whose employment ended
30 (either voluntarily or involuntarily) at any time from April 6, 2017, through and including July
31 31, 2021, or the date the Court grants preliminary approval of the settlement, whichever is the

1 earlier date. (*Id.*)

2 Pursuant to the Settlement Agreement, Defendant has represented that there are no more
3 than 584 individuals that comprise the Wage Statement Class, and that there are no more than
4 150 individuals that comprise the Sick Pay Class. (*See* Stipulation at ¶ I.5.)

5 **B. Settlement Terms and Evaluation**

6 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
7 evidence to the contrary is offered. (*Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
8 *Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
9 *re Chicken Antitrust Litig.*, 560 F.Supp. 957, 962 (N.D. Ga. 1980).) Courts do not substitute
10 their judgment for that of the proponents, particularly where, as here, settlement has been
11 reached with the participation of experienced counsel familiar with the litigation. (*Nat’l Rural*
12 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*,
13 752 F.Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471 (S.D.N.Y. 1979); *In re*
14 *Armored Car Antitrust Litig.*, 472 F.Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln*
15 *Federal Sav. & Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).)

16 While the recommendations of counsel proposing the settlement are not conclusive, the
17 Court can properly take them into account, particularly where, as here, they have been involved
18 in informal discovery and negotiations for some period of time, appear to be competent, have
19 experience with this type of litigation, and have exchanged substantial evidence from the
20 opposing party. (*See Newberg on Class Actions, supra*, at § 11.47; *Nat’l Rural Telecomms.*
21 *Coop.*, 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is
22 preserved, however, a strong initial presumption of fairness attaches to the proposed
23 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who
24 are most closely acquainted with the facts of the underlying litigation”).)

25 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
26 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
27 number of wage and hour class actions and have extensive litigation experience. (Declaration of
28 Larry W. Lee (“Lee Decl.”) at ¶¶ 7-8; Tulyathan Decl. at ¶¶ 22-24; Declaration of William L.

1 Marder (“Marder Decl.”) at ¶¶ 5-12.) Each side has apprised the other of their respective factual
2 contentions, legal theories and defenses, resulting in negotiations taking place between the
3 Parties. (Tulyathan Decl. at ¶ 8.)

4 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
5 face potential liability of up to approximately \$1,599,618.00 for Plaintiff’s wage statement and
6 sick pay regular rate class claims if Plaintiff succeeded at trial. (Tulyathan Decl. at ¶ 9.)

7 Plaintiff was able to estimate the potential class penalties based on data provided by Defendant,
8 including the number of employees in the putative classes, the number of pay periods with wage
9 statement violations, and the average hourly rates of pay applicable to the putative class
10 members. (*Id.* at ¶ 5.) Specifically, Plaintiff calculated the amount of Labor Code § 226(e)
11 penalties based on 8,723 pay periods with wage statement violations during the relevant class
12 period. (*Id.* at ¶ 9.) With respect to Plaintiff’s sick pay regular rate claim, Plaintiff calculated
13 waiting time penalties under Labor Code § 203 based on 144 putative class members and their
14 average hourly rates of pay. (*Id.*)

15 With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that
16 Defendant could face civil penalties of up to a maximum of \$2,194,150.00 if Plaintiff were to
17 succeed at trial. (Tulyathan Decl. at ¶ 10.) However, even assuming Plaintiff ultimately prevails
18 on his PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to
19 Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on
20 the facts and circumstances of the particular case, to do otherwise, would result in an award that
21 is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s
22 decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, while the plaintiff
23 prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty
24 amount by 90 percent, citing the employer’s good faith attempt at complying with the law. (*Id.*
25 at p. 517.) Upon review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

26 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
27 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
28 the claims and further with respect to the reduction of PAGA penalties and that it could be

1 persuasive to the Court. (Tulyathan Decl. at ¶ 12.) Thus, even if Plaintiff were to successfully
2 prove his claims at trial, there is a possibility that the Court may only award a small percentage
3 of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was
4 premised with this risk in mind, associated with the possibility of the Court significantly
5 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to
6 prevail at trial. (*Id.*)

7 Further, Defendant raised several defenses that presented risk on both the wage statement
8 and sick pay regular rate theories of liability. With respect to the wage statement claim, it is
9 Defendant's position that its wage statements complied with the law, and that employees did not
10 suffer any injury as defined by Labor Code § 226(e). Moreover, Defendant has indicated that it
11 has revised its wage statement practices as of February 6, 2021. With respect to the sick pay
12 regular rate claim, Defendant has also raised that its sick pay policy is compliant with Labor
13 Code § 246, as its policy provides that it pays sick pay under a grandfathered PTO policy. As
14 another risk to prevailing on class certification, there is essentially no precedent from any
15 California courts granting class certification of a sick pay regular rate claim. Thus, while
16 Plaintiff believes that a class can be certified, there is a possibility that the Court will not grant
17 class certification on Plaintiff's sick pay regular rate claim here.

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

24 Although Plaintiff believes that both classes can be certified, 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 the potential for appeals.

28 (Tulyathan Decl. at ¶ 13.) These risks on class certification are compounded by the California

1 Supreme Court’s holding in *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal.4th 1 (2014). There, the
2 plaintiffs obtained class certification and subsequently prevailed at trial after eight years of
3 litigation, but the judgment and the certification ruling were reversed by the California Supreme
4 Court after an additional five years of litigation. The case was remanded back to superior court
5 where class certification was denied and plaintiffs’ subsequent appeal also was denied.

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

22 Here, the total amount of class and PAGA penalties amount to approximately
23 \$3,793,768.00, without discounting for potentially losing on any of the causes of action.
24 (Tulyathan Decl. at ¶ 11.) The Gross Settlement Amount is \$1,500,000, which is approximately
25 **39.54%** of the maximum class and PAGA penalties. (*Id.*) Thus, the settlement was negotiated
26 at arms’ length and the high settlement percentage-to-recovery further supports that the
27 settlement is fair and reasonable.

28 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class

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

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

10 The Stipulation provides for One Million Five Hundred Thousand Dollars and Zero Cents
11 (\$1,500,000.00) as the Gross Settlement Amount. (*See* Stipulation at ¶ I.17.) The Net
12 Settlement Fund, calculated after deduction of attorneys’ fees (up to \$500,000.00), litigation
13 costs (up to \$20,000.00), the service award payment to the Class Representative (up to
14 \$10,000.00), payment to the LWDA for PAGA penalties (\$75,000.00), and settlement
15 administration costs (up to \$9,950.00), is estimated to be approximately **\$885,050.00**. (*Id.* at ¶
16 III.9.)

17 Pursuant to the Stipulation, 80 percent of the Net Settlement Fund, or approximately
18 \$708,040.00, will be apportioned among the Wage Statement Class Members on a pro rata basis,
19 based on the number of pay periods with payments for shift differential and/or shift premium
20 wages between April 6, 2019, through and including and February 6, 2021. (*See* Stipulation at ¶
21 III.9.b.) The remaining 20 percent of the Net Settlement Fund, or \$177,010.00, will be
22 apportioned proportionally among participating Sick Pay Class Members on a per capita basis.
23 (*Id.*)

24 Based thereon, on a raw average, each Wage Statement Class Member may potentially
25 recover approximately \$1,212.40. (Tulyathan Decl. at ¶ 14.) The amount actually paid to each
26 Wage Statement Class Member will increase or decrease depending on the number of pay
27 periods each class member was paid shift differential and/or shift premium wages between April
28 6, 2019, through and including February 6, 2021. (*Id.*) On a raw average, each Sick Pay Class
Member may potentially recover approximately \$1,180.07. (Tulyathan Decl. at ¶ 15.) Since the

1 portion of the Net Settlement Fund to be distributed among Sick Pay Class Members is to be
2 distributed on a per capita basis, the amount actually paid to each Sick Pay Class Member may
3 fluctuate depending on the number of opt-outs received. (*Id.*)

4 Finally, the terms of the Settlement provide that uncashed settlement payment checks
5 (upon the expiration date) shall be redistributed among the Participating Class Members who
6 cashed their settlement payment checks during the first distribution. (*See* Stipulation at ¶ III.10.)
7 After ninety (90) days of the mailing of the re-distributed checks, funds attributable to
8 unclaimed, undeliverable, or expired checks shall be deposited with the State of California
9 unclaimed property fund in the name of the class member who received the re-distribution. (*Id.*)

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

13 This Settlement is **non-reversionary**, meaning that none of the settlement funds will
14 revert back to Defendant. (*See* Stipulation at ¶ III.9.)

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

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

18 For Wage Statement Class Members, all claims based on the facts
19 in the Complaint or in Plaintiff's PAGA Notice against the
20 Released Parties, that accrued during the Class Period for the
21 Wage Statement Class, arising out of any violation of Labor Code
22 section 226, including: (a) any and all claims for failure to furnish
23 accurate itemized wage statements; (b) all derivative claims for
24 statutory penalties and/or civil penalties under PAGA, Labor Code
25 §§ 2698, *et seq.*, premised on any violation of Labor Code section
26 226; and (c) pre-judgment interest and claims for attorneys' fees
27 and costs.

28 (*See* Stipulation at ¶ I.28.a.)

Sick Pay Class Members who do not opt out of the Settlement will provide the following
limited release:

For Sick Pay Class Members, all claims based on the facts in the
Complaint or in Plaintiff's PAGA Notice against the Released
Parties, that accrued during the Class Period for the Sick Pay
Class, arising out of any violation for failure to pay sick pay,

including: (a) any claims for waiting time penalties under Labor Code section 203; (b) all derivative claims for statutory penalties and/or civil penalties under PAGA, Labor Code §§ 2698, *et seq.*, premised on any violation of Labor Code sections 201, 202, 203 and/or 246; and (c) pre-judgment interest and claims for attorneys' fees and costs.

(See Stipulation at ¶ I.28.b.)

Given that the releases are tailored to only claims pled in the operative Complaint that pertain to each respective settlement class, the releases are appropriately limited.

4. Tax Treatment of Settlement Amounts.

As this lawsuit seeks statutory and civil penalties as recovery, the Parties have agreed that the entirety of each individual settlement payment to Class Members shall be treated as a payment in settlement of claims for penalties and shall be reported by IRS Forms 1099. (See Stipulation at ¶ III.9.a.)

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

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

However, if a Class Member does not wish to take part in this Settlement or be bound by the releases, the Class Member must submit a request for exclusion. (See Stipulation at ¶¶ III.7.f.)

C. Notice to Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing all Class Members' full names, last known addresses, Social Security numbers, and the dates of separation of employment (if applicable) ("Class Information"). (See Stipulation at ¶¶ I.4; III.7.a.) For the members of the Wage Statement Class, Defendant will provide the number of pay periods worked during the Class Period with

1 payment for “Shift Diff” and/or “ShiftPremPercnt” pay. (*Id.*) For the members of the Sick Pay
2 Class Members, Defendant will also provide confirmation of whether a Class Member whose
3 employment has ended received “ShiftDiff” and/or “ShiftPremPercnt” wages and sick pay in the
4 same pay period during the Class Period. (*Id.*)

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

18 The Class Notice will advise Class Members of what the lawsuit is about, their rights
19 and/or options under the settlement, the total settlement amount and other terms of the
20 settlement, their expected individual settlement payment share, their opportunity to and
21 procedures to opt out or to object to the settlement, information pertaining to the final approval
22 hearing, and the release of claims. (*See* Class Notice.) As set forth in the Class Notice, Class
23 Members will be allowed to opt out of or object to the Settlement by a certain deadline, which is
24 sixty (60) calendar days after the initial mailing of the Class Notice. (*See* Stipulation at ¶¶
25 III.7.f.) Class Members who received a re-mailed Class Notice will have that deadline extended
26 by 15 calendar days from the original response deadline. (*Id.* at ¶ III.7.c.) With respect to
27 objections, Class Members are also informed in the Class Notice that they may object in writing
28 or appear at the final approval hearing to present their objections to the Court. (*Id.* at III.7.g.; *see*

1 Class Notice.)

2 If Class Members need further information about the settlement and/or the lawsuit, Class
3 Members are provided with Class Counsel's contact information and the Settlement
4 Administrator's contact information in the Class Notice. (*See* Class Notice.) Class Members
5 are also provided with the URL to the Court's website where they can view the Settlement
6 Agreement and other documents on the docket. (*Id.*)

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

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

9 The commonality requirement is met when there are questions of law and fact common to
10 the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 ("The existence of shared
11 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
12 facts couple with disparate legal remedies within the class").) Commonality requires only that
13 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
14 litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.)
15 Defendant's conduct is central to the commonality inquiry. (*See City of San Jose v. Superior*
16 *Court* (1974) 12 Cal.3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 812-13.)
17 Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges
18 here, the classwide impact of the Defendant's policies satisfies the commonality requirement.
19 (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal.App.3d 411, 421.)

20 In the present case, Plaintiff alleges that Defendant is liable to the Class for failure to
21 provide accurate itemized wage statements in violation of Labor Code § 226(a), and for failure to
22 pay sick pay based on the correct regular rate of pay in violation of Labor Code §§ 201-203 and
23 246. Like all Class Members, Plaintiff was subjected to these same policies and practices.
24 (Declaration of Jon Betterton ("Betterton Decl.") at ¶¶ 3-4.) In particular, Plaintiff was issued
25 inaccurate wage statements that did not comply with Labor Code § 226(a) whenever he was paid
26 shift differential wages. (*Id.* at ¶ 3.) Additionally, Defendant also underpaid sick pay to
27 Plaintiff, as non-discretionary incentives, including "ShiftDiff" and/or "ShiftPremPerct" wages,
28 were not included in the regular rate of pay for purposes of paying sick pay. (*Id.* at ¶ 4.) In other

1 words, Plaintiff contends that he was subjected to the same policies and practices as other Class
2 Members and thus, the typicality requirement is met.

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

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

10 From the inception of the case, Class Counsel has zealously represented the interests of
11 the Class. Class Counsel has engaged in significant meet and confer discussions with opposing
12 counsel to obtain informal data and documents on behalf of the Class. (Tulyathan Decl. at ¶ 17.)
13 The Settlement was obtained for the benefit of the Class, as opposed to the individual Class
14 Representative. (*Id.*) Further, Class Counsel has been approved as class counsel on a number of
15 prior cases, have litigated numerous other class action cases, and are competent to represent the
16 class. (Lee Decl. at ¶¶ 7-8; Tulyathan Decl. at ¶¶ 20-24; Marder Decl. at ¶¶ 5-12.)

17 **E. Costs and Fees**

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

19 California state and federal courts have recognized that an appropriate method for
20 determining award of attorneys' fees is based on a percentage of the total value of benefits to
21 class members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
22 254; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472,
23 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of this
24 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
25 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
26 burden alone." (*Vincent*, 557 F.2d at p. 769.)

27 The Common Fund doctrine is predicated on the principle of preventing unjust
28 enrichment. When a litigant's efforts create or preserve a fund from which others derive

benefits, she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal.3d at p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” The reasons for applying the common fund doctrine include:

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

(*Id.*)

Indeed, in 2016, the California Supreme Court has also now held that the award of attorneys’ fees in common fund wage and hour class action settlements should start with 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”).)

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

The Parties have agreed to a payment of a maximum of one-third of the Maximum

1 Settlement Amount, or \$500,000.00, for payment to Class Counsel as attorneys' fees. (*See*
2 Stipulation at ¶ III.13.) The Parties have agreed to a payment of the foregoing attorneys' fees
3 and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to
4 reimbursement of Class Counsel's litigation costs of up to \$20,000.00. (*Id.*) Class Counsel has,
5 at their own risk, expended costs, for example, to file this instant action and other pleadings in
6 the case, effect service of process, participate in mediation, and advance other litigation-related
7 costs. If Class Counsel's actual costs are less than \$20,000.00, the remainder will become part of
8 the Net Settlement Fund to be distributed to Class Members. (*Id.*)

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

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

12 Class Representative Jon Betterton requests a modest enhancement of \$10,000.00. (*See*
13 Stipulation at ¶ I.8.) The Class Representative met and conferred with his counsel on a number
14 of occasions to discuss the case, provided documents and information to his counsel, and
15 reviewed pleadings and documents, including the Settlement Agreement. (Betterton Decl. at ¶¶
16 6-7.) As part of his duties as the Class Representative, Plaintiff provided invaluable information,
17 evidence, and documents that resulted in this Settlement. Furthermore, in consideration for his
18 service payment, Plaintiff also executed an individual general release of all claims under
19 California Civil Code § 1542, which other members of the Class did not have to do. (*See*
20 Stipulation at ¶ III.2.)

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

26 Furthermore, given that future employers are much less likely to hire individuals who
27 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
28 prejudice in the future from other potential employers. Plaintiff took this risk upon himself and

1 the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to file
2 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
3 have to face the potential for retaliation and not getting future employment had they filed a
4 public lawsuit.

5 **3. Class Administration Fees**

6 The Parties have agreed to an estimated payment of no more than \$9,950.00 to the
7 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
8 this settlement. (See Stipulation ¶ III.14.) Phoenix Settlement Administrators is a well-
9 recognized class action settlement administrator. The Parties believe that the administration fee
10 is reasonable and should be approved.

11 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
12 **PRELIMINARY APPROVAL**

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

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

21
22 DATED: July 21, 2021

DIVERSITY LAW GROUP, P.C.

23
24 By: 

25 Larry W. Lee
26 Mai Tulyathan
27 Attorneys for Plaintiff, the Class, and Aggrieved
28 Employees

1 **PROOF OF SERVICE**

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

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

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

10 On July 21, 2021, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF MAI TULYATHAN IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 13 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
- 14 **4. DECLARATION OF PLAINTIFF JON BETTERTON IN SUPPORT OF**
PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 15 **5. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 16 **6. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR**
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

17 on the interested parties in this action as follows:

18 Sophia Behnia
19 sbehnia@littler.com
20 Sarah Boxer
21 sboxer@littler.com

22 Littler Mendelson P.C.
23 333 Bush Street, 34th Floor
24 San Francisco, California 94104
25 *Attorneys for Defendant Accenture Flex, LLC*

26 Anthony G. Ly
27 aly@littler.com
28 Littler Mendelson, P.C.
2049 Century Park East, 5th Floor
Los Angeles, California 90067
Attorneys for Defendant Accenture Flex, LLC

1
2 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
3 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
4 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
5 the above-entitled case. The service transmission was reported as complete and a copy of the
6 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
7 in this office.

8
9 I declare under penalty of perjury under the laws of the State of California that the
10 above is true and correct. Executed on July 21, 2021, at Los Angeles, California.
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Erika Mejia