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16
17 **SUPERIOR COURT OF CALIFORNIA**

18 **COUNTY OF MONTEREY**

19 REBECCA PINEDA, as an individual and
20 on behalf of all others similarly situated,

21 Plaintiffs,

22 vs.

23 IPPOLITO INTERNATIONAL L.P.; and
24 DOES 1 through 50, inclusive,

25 Defendants.

Case No. 20CV001851

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

Date: November 16, 2021
Time: 9:00 A.M.
Dept.: 13

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 16, 2021, at 9:00 a.m., or as soon thereafter as the matter may be heard in Department 13 of the above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Rebecca Pineda (“Plaintiff”) will and hereby does move this Court for the following relief with respect to the Joint Stipulation of Class Action Settlement (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant Ippolito International L.P. (“Defendant”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Stipulation referenced above;
2. That the Court conditionally certify the following Class for settlement purposes only: all current and former employees of Defendant in the State of California who were paid wages at any time during the period of April 2, 2019 through October 31, 2020 (the “Class”);
3. That Plaintiff Rebecca Pineda be appointed as the Class Representative and Larry W. Lee of Diversity Law Group, P.C., and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston, be appointed as Class Counsel;
4. That the Court preliminarily approve the Stipulation and the total Gross Settlement Amount in the amount of Three Hundred Twenty-Five Thousand Dollars and Zero Cents (\$125,000.00);
5. That the Court finds on a preliminary basis that the Stipulation appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative Enhancement Payment, Class Counsel’s fees and costs, settlement administration fees, and the allocation of payments to Settlement Class Members, that could ultimately be given final approval by this Court;
6. That the Court approve the mailing of the proposed Notice of Class Action Settlement (“Class Notice”) to be sent to Class Members;
7. That the Court appoint Phoenix Settlement Administrators as the Claims Administrator; and
8. That the Court schedule the matter for a Final Fairness and Final Approval

1 hearing.

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

5 The basis for this Motion, filed without any opposition from Defendant, is that the
6 proposed settlement is fair, adequate, and reasonable, and the procedures proposed by the
7 Parties are adequate to ensure the opportunity of Class Members to participate in, opt-out of,
8 or object to the settlement.

9 This Motion will be based on the attached Memorandum of Points and Authorities, the
10 Settlement Agreement and the proposed Class Notice, and the supporting Declarations of
11 Larry W. Lee, B. James Fitzpatrick, Laura L. Franklin, and Plaintiff Rebecca Pineda, upon the
12 oral arguments of counsel (should there be any), and on the complete records and file herein.

13 Dated: October 22, 2021

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

14
15
16 By: 

B. James Fitzpatrick

Larry W. Lee

Attorneys for Plaintiff,

REBECCA PINEDA, as an individual and
on behalf of all others similarly situated

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1 **I. INTRODUCTION**

2 Plaintiff Rebecca Pineda (“Plaintiff”) brings class and representative Private Attorneys
3 General Act (“PAGA”) claims against Defendant Ippolito International L.P. (“Defendant”)
4 under the California Labor Code (Plaintiff and Defendant shall be jointly referred to as the
5 “Parties”). Plaintiff alleges in this lawsuit that Defendant failed to provide accurate itemized
6 wage statements to its employees, in violation of Labor Code §§ 226(a) and 2698, *et seq.*
7 Specifically, Plaintiff contends that Defendant failed to specify the pay period start dates on
8 wage statements issued by Defendant to its employees. Based on these violations, Plaintiff
9 asserts class and PAGA claims for violation of Labor Code §§ 226(a)(6).

10 Prior to the settlement of this action, the Parties thoroughly investigated the facts
11 relating to the class and PAGA claims alleged in the Complaint and engaged in a thorough
12 study of the legal principles applicable to the claims asserted against Defendant. Through the
13 exchange of formal and informal discovery, Defendant provided necessary data pertaining to
14 the number of putative class members and the number of wage statements at issue, as well as
15 information pertaining to Defendant’s wage statement policies and practices. Thereafter, the
16 Parties attended a full day of private mediation with the Honorable Richard M. Silver (Ret.),
17 and continued settlement negotiations facilitated by Judge Silver, after which the Parties were
18 able to reach the current settlement. The terms of the Settlement Agreement provide that
19 Defendant pay a Gross Settlement Amount of One Hundred Twenty-Five Thousand Dollars
20 (\$125,000.00) to resolve the class and PAGA claims. Significantly, the entire Gross
21 Settlement Amount will be distributed to the class on a **non-reversionary basis, such that no**
22 **remaining monies will revert back to Defendant.** Further, no claim forms are required. The
23 following represents the key terms of the Settlement:

- 24 • Gross Settlement Amount of \$125,000.00;
- 25 • Estimated Class of 99 individuals;
- 26 • Class Representative Enhancement Payment of up to \$6,500.00;
- 27 • Class Counsel’s attorneys’ fees of up to \$41,666.66;
- 28 • Class Counsel’s costs of up to \$15,000.00;

- Settlement Administration Costs of up to \$3,500.00;
- Payment to the Labor & Workforce Development Agency (“LWDA”) of \$7,500.00 (75% of the total PAGA allocation of \$10,000.00); and
- A Net Settlement Amount of approximately \$50,833.33.

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 her counsel are certain that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that a class 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 July 2, 2020, Plaintiff filed her written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging that Defendant’s wage statements failed to comply with Labor Code § 226(a), pursuant to the PAGA, Labor Code § 2699. (Declaration of Larry W. Lee (“Lee Decl.”) at ¶ 2.) Thereafter, on July 10, 2020, Plaintiff filed the operative Complaint in Monterey County Superior Court. (*Id.* at ¶ 3.) The Complaint alleges class and PAGA claims for violation of Labor Code § 226(a), and violation of California Labor Code § 2698, *et seq.* (*Id.*)

As alleged in the operative Complaint, and in addition to Plaintiff’s individual claims, Plaintiff’s class and representative claims arise from Defendant’s failure to provide accurate wage statements under Labor Code §§ 226(a)(6). (*Id.* at ¶ 4.) Plaintiff contends that Defendant failed to identify the pay period start dates on its wage statements. Rather, only the “Period Ending Date” was identified on the wage statements issued to Plaintiff and other employees, in violation of Labor Code § 226(a)(6). (*Id.*) As a result of the alleged violation, Plaintiff seeks statutory and civil penalties under the California Labor Code and the PAGA, as well as attorneys’ fees, and costs. (*Id.*)

1 Shortly after the filing her Complaint, Plaintiff initiated written discovery to
2 Defendant. (Lee Decl. at ¶ 5.) While Defendant responded to said discovery, there were still
3 disputes as to the adequacy of said responses. (Lee Decl. at ¶ 5.) In that regard, the Parties
4 engaged in informal discovery conferences with Judge Lydia Villarreal. (Lee Decl. at ¶ 6.)
5 Subsequently thereafter, the Parties discussed the potential for resolution of this case. As part
6 of the settlement discussions, Defendant provided Plaintiff's counsel with informal data and
7 information pertaining to the putative class size, the number of aggrieved employees, the
8 number of wage statements at issue, and Defendant's wage statement policies and practices.
9 (*Id.* at ¶ 6.) The Parties commenced informal settlement negotiations, but the Parties did not
10 resolve the matter at that time. (*Id.* at ¶ 6.)

11 The Parties subsequently agreed to attempt to resolve this matter through private
12 mediation. (*Id.* at ¶ 7.) On August 25, 2021, the Parties participated in an all-day mediation
13 session with the Honorable Richard M. Silver (Ret.), which ultimately resulted in the
14 settlement of this Action. (Lee Decl. at ¶ 8.)

15 In resolution of Plaintiff's class and PAGA claims, the Parties entered into the Joint
16 Stipulation of Class Action Settlement ("Stipulation" or "Settlement Agreement"), a true and
17 correct copy of which is attached as Exhibit A to the Declaration of Larry W. Lee. (*Id.* at ¶ 9.)

18 The Parties recognize the risk, expense, and delay in continuing litigation with the
19 class and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. (Lee
20 Decl. at ¶ 15.) Accordingly, the Parties desire to settle, compromise, and discharge all
21 disputes and claims arising from or relating to the class and PAGA claims as set forth in the
22 Settlement Agreement.

23 **III. DISCUSSION**

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

28 Approval of class action settlements involves a two-step process.
 First, counsel submits the proposed terms of settlement and the

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

10 Thus, the preliminary approval by the trial court is simply a conditional finding that the
11 settlement appears to be within the range of acceptable settlements. As Professor Newberg
12 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or
13 conference concerning a tentative settlement proposal may vary. The court may find that the
14 settlement proposal contains some merit, is within the range of reasonableness required for a
15 settlement offer, or is presumptively valid subject only to any objections that may be raised at
16 a final hearing.” (4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26
17 (4th ed. 2002).)

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

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

27 (*Id.* at § 11.24.)

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

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

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

17 (4 Newberg on Class Actions, at § 11.26.)

18 In addition to such terms as class identification, settlement amount, and payment
19 procedures, the Settlement Agreement reached among the Parties contains a provision
20 pursuant to which the Parties stipulate to the Court’s provisional certification of the Class for
21 the purposes of this settlement only. (*See* Stipulation at ¶ 75.)

22 **A. Proposed Class Definition**

23 The current settlement is being settled on behalf of “all current and former employees
24 of Defendant in the State of California who were paid wages at any time during the Class
25 Period.” (*See* Stipulation at ¶ 3.) The Class Period is defined as the period from “April 2,
26 2019, through October 31, 2020.” (*Id.* at ¶ 7.) Given that Defendant changed its wage
27 statement practices as of November 1, 2020, the Class Period end date is limited to October
28 31, 2020.

 Pursuant to the Settlement Agreement, Defendant has represented that there are
approximately 99 individuals that comprise this Class. (*Id.* at ¶ 3.)

B. Settlement Terms and Evaluation

1 Courts presume the absence of fraud or collusion in the negotiation of settlement
2 unless evidence to the contrary is offered. (*Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438,
3 447; *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.* (7th Cir. 1987) 834 F.2d
4 677, 682; *In re Chicken Antitrust Litig.* (N.D. Ga. 1980) 560 F.Supp. 957, 962.) Courts do not
5 substitute their judgment for that of the proponents, particularly where, as here, settlement has
6 been reached with the participation of experienced counsel familiar with the litigation. (*Nat'l*
7 *Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528; *Hammon v.*
8 *Barry* (D.D.C. 1990) 752 F.Supp. 1087; *Steinberg v. Carey* (S.D.N.Y. 1979) 470 F.Supp. 471;
9 *In re Armored Car Antitrust Litig.* (N.D. Ga. 1979) 472 F.Supp. 1357; *Sommers v. Abraham*
10 *Lincoln Federal Sav. & Loan Ass'n* (E.D. Pa. 1978) 79 F.R.D. 571.)

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

20 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
21 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
22 number of wage and hour class actions and have extensive litigation experience. (Declaration
23 of Larry W. Lee (“Lee Decl.”) at ¶¶ 16-23; Declaration of B. James Fitzpatrick (“Fitzpatrick
24 Decl.”) at ¶¶ 2-3. Each side has apprised the other of their respective factual contentions, legal
25 theories and defenses, resulting in negotiations taking place between the Parties. (Lee Decl. at
26 ¶ 15.)

27 Based on the class data provided by Defendant, Plaintiff estimated that Defendant
28 would face potential liability of up to approximately \$260,250 for Plaintiff’s class claims if

1 Plaintiff succeeded at trial. (Lee Decl. at ¶ 12.) Plaintiff was able to estimate the potential
2 damages and penalties based on data provided by Defendant, including the number of
3 employees in the putative class and the number of wage statements at issue. (*Id.* At ¶ 13)
4 Specifically, the amount of Labor Code § 226(e) penalties is based on the number of deficient
5 wage statements at issue and the specified penalties as set forth in Labor Code § 226(e). (*Id.*)

6 With respect to potential liability of Plaintiff's PAGA claim, Plaintiff estimated that
7 Defendant could face civil penalties of up to a maximum \$663,000 if Plaintiff were successful
8 at trial, based upon the penalty amounts set forth in Labor Code § 226.3. (*Id.* at ¶ 14.)
9 However, even assuming Plaintiff ultimately prevails on her PAGA claim, the Court still has
10 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can
11 decline to award PAGA penalties where "if, based on the facts and circumstances of the
12 particular case, to do otherwise, would result in an award that is unjust, arbitrary and
13 oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in
14 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, while the plaintiff prevailed on his
15 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
16 citing the employer's good faith attempt at complying with the law. (*Id.* at p. 517.) Upon
17 review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

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

27 Further, Defendant raised several defenses that presented risk, including that it had
28 made changes to the wage statements such that it was in compliance with Labor Code §

226(a), and that employees did not suffer any injury as defined by Labor Code § 226(e).

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

Although Plaintiff believes that a class can be certified, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the operative Complaint, the possibility of non-certification, and the potential for appeals. (Lee Decl. at ¶ 15.) These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1. There, the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation, but the judgment and the certification ruling were reversed by the California Supreme Court after an additional five years of litigation. The case was remanded back to superior court where class certification was denied and plaintiffs' subsequent appeal also was denied.

Indeed, numerous courts have held that gross settlements approximating between only 8 and 25% of the defendant's potential exposure are fair and reasonable. (See, e.g., *In re Mego Fin. Corp. Secs. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (holding that class action settlement recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the settlement is fair and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. Mar. 20, 2015) No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (holding that class action settlement recovering between **8.5% and 25%** of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.* (C.D.

1 Cal. 2014) U.S. Dist. Ct. Case No. 8:12-cv-02161 (granting preliminary approval of wage and
2 hour class settlement which obtained **only 9.1%** of projected damages, given the risks of
3 continued litigation); *Villegas v. J.P. Morgan Chase & Co.* (N.D. Cal. Nov. 21, 2012) No. CV
4 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (holding that gross class action settlement of
5 approximately 15% of the potential recovery was fair and reasonable).) Here, the Gross
6 Settlement Amount is fair and reasonable as it is approximately **15.8%** of the potential
7 recovery of Plaintiff's class and PAGA claims if Plaintiff were to fully succeed at trial.

8 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
9 Action Settlement ("Notice"), should any Class Member wish to pursue his or her own case
10 for the claims being released herein, each Class Member has the right to submit a request for
11 exclusion (*i.e.*, opt-out) from the settlement. (*See* Notice, attached as Exhibit A to the
12 Settlement Agreement.) Moreover, as set forth in the Notice, Class Members are advised of
13 their right to object to any of the terms contained in the Stipulation and attend the final
14 approval hearing. (*Id.*)

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

17 The Stipulation provides for One Hundred Twenty-Five Thousand Dollars and Zero
18 Cents (\$125,000.00) as the Gross Settlement Amount. (*See* Stipulation at ¶ 14.) The Net
19 Settlement Amount, calculated after deduction of attorneys' fees (up to \$41,666.66), costs (up
20 to \$15,000.00), the Class Representative Enhancement Payment (up to \$6,500.00), payment to
21 the LWDA (\$7,500.00), and Settlement Administration Costs (up to \$3,500.00), is estimated
22 to be approximately \$50,833.34. (*Id.* at ¶ 16.) Each Participating Class Member who does not
23 opt-out of the Settlement will be awarded a portion of the Net Settlement Amount on a pro-
24 rata basis, based upon the number of wage statements each respective Participating Class
25 Member received during the Class Period. (*See* Stipulation at ¶ 34.)

26 Based thereon, on a raw average, each Participating Class Member may potentially
27 recover approximately \$513.46. The amount actually paid to each Participating Class
28 Member may increase or decrease depending on the actual number of wage statements he or

1 she received during the Class Period.

2 Finally, the terms of the Settlement provide that uncashed checks (upon the expiration
3 date) shall be distributed to the California Rural Legal Assistance Foundation, a non-profit
4 civil legal aid organization that provides free legal services for California's rural communities
5 and farm workers. (*See* Stipulation at ¶ 53.)

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

8 This Settlement is non-reversionary, meaning that none of the settlement funds will
9 revert back to Defendant. (*See* Stipulation at ¶¶ 28, 53.)

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

11 As a condition of participating in this Settlement, Participating Class Members will
12 provide the following limited release:

13 Upon the Effective Date, for and in consideration of the mutual
14 promises, terms and conditions by and between the Participating
15 Class Members and Defendant set forth herein, the sufficiency of
16 which consideration is expressly acknowledged, the Participating
17 Class Members do hereby fully, finally and forever release, settle,
18 relinquish, and discharge the Released Parties from any and all
19 Released Claims.

17 (*See* Stipulation at ¶ 57.)

18 Participating Class Members agree to release the following claims (defined as
19 "Released Claims") accrued during April 2, 2019, through October 31, 2020 (the "Class
20 Period"):

21 [A]ny and all claims, causes of actions, lawsuits, demands, losses,
22 damages, compensation, wages, penalties, attorney's fees, costs,
23 and any other form of relief or remedy in law, equity, or whatever
24 kind or nature, alleged in the Complaint or that could have been
25 alleged in the Complaint based on the factual allegations in the
26 Complaint, including but not limited to, for failure to provide
27 accurate and/or compliant wage statements pursuant to Labor Code
28 § 226(a) and Labor Code § 2698 *et seq.*

26 (*See* Stipulation at ¶ 23.)

27 Given that the release is tailored to only claims pled in the operative Complaint and the
28 PAGA notice, the release is appropriately limited.

1 **4. Tax Treatment of Settlement Amounts.**

2 Given that Plaintiff's lawsuit sought penalties, the Parties have agreed that the
3 individual settlement payments to Participating Class Members shall be classified 100% as
4 penalties and shall be deemed IRS Form 1099 income. (*See* Stipulation at ¶ 35.)

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

7 As stated above, Class Members do not need to do anything should they wish to
8 receive their share of the settlement funds. In other words, because this is not a claims-made
9 settlement, Class Members will not be required to make a submission to participate in the
10 settlement. No claim forms are required. Thus, this substantially decreases the amount of
11 burden each Class Member must bear in order to receive their share of the settlement funds. If
12 a Class Member does not wish to take part in this Settlement or be bound by the release, the
13 Class Member must submit a request for exclusion. (*See* Stipulation at ¶¶ 47-48.)

14 **C. Notice to Class Members**

15 Should the Court grant the instant motion, Defendant will provide the Claims
16 Administrator with a list containing each Class Member's full name, employee number (if
17 applicable), most recent mailing address, Social Security number, and the number of wage
18 statements each Class Member received during the Class Period ("Class List") within fifteen
19 (15) calendar days of preliminary approval. (*See* Stipulation at ¶¶ 6, 42.) Upon receipt of the
20 information and prior to mailing the Notice to Class Members, the Claims Administrator shall
21 perform a search based on the National Change of Address Database for information to update
22 and correct for any known or identifiable address changes. (*Id.* at ¶ 44.)

23 Within ten (10) calendar days of receipt of the Class List from Defendant, the Claims
24 Administrator will mail the Notice Packet out to Class Members using the most current,
25 known mailing address. (*Id.* at ¶ 43.) Any Notice Packets returned to the Claims
26 Administrator as non-deliverable on or before the Response Deadline shall be re-sent via
27 regular First-Class U.S. Mail to the forwarding address affixed thereto and the Claims
28 Administrator shall indicate the date of such re-mailing on the Notice Packet. (*Id.* at ¶ 46.) If
no forwarding address is provided, the Claims Administrator shall promptly attempt to

1 determine the correct address using a skip-trace, or other search using the name, address,
2 and/or Social Security number of the Class Member involved, and shall then perform a re-
3 mailing. (*Id.*) Any Class Members who receive re-mailed Notice Packet shall have their
4 Response Deadline extended by up to fifteen (15) days from the original Response Deadline.
5 (*Id.*)

6 As set forth in the Notice, Class Members will be allowed to opt out of or object to the
7 Settlement by a certain deadline. (*See* Stipulation at ¶¶ 47, 49.)

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

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

10 The commonality requirement is met when there are questions of law and fact common
11 to the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 (“The existence of
12 shared legal issues with divergent legal factual predicates is sufficient, as is a common core of
13 salient facts couple with disparate legal remedies within the class”).) Commonality requires
14 only that some common legal or factual questions exist; the plaintiffs need not show that all
15 issues in the litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d
16 462, 473.) Defendant's conduct is central to the commonality inquiry. (*See City of San Jose*
17 *v. Superior Court* (1974) 12 Cal.3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800,
18 812-13.) Where the employer's conduct is uniformly directed at a class of employees, as
19 Plaintiff alleges here, the classwide impact of the Defendant's policies satisfies the
20 commonality requirement. (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal.App.3d
21 411, 421.)

22 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or
23 procedure, violated the Labor Code by failing to provide accurate itemized wage statements to
24 its employees. (Declaration of Rebecca Pineda (“Pineda Decl.”) at ¶¶ 3-4.) In other words,
25 Plaintiff contends that she was subjected to the same policy and practice as other Class
26 Members and that her claims are typical to those of the Class.

27 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
28 issues been raised or presented. (*Id.* at ¶ 4.) Plaintiff has taken all necessary steps to represent

1 the interests of the Class, including by providing information and documents to Plaintiff's
2 counsel. (*Id.* at ¶ 6.) For such reasons, Plaintiff has adequately represented the Class
3 Members and will continue to do so.

4 **2. Class Counsel Has Adequately Represented the Class and Has**
5 **Experience with Wage and Hour Class Actions.**

6 From the inception of the case, Class Counsel has zealously represented the interests of
7 the Class. The Settlement was obtained for the benefit of the Class, as opposed to the
8 individual Class Representative. Further, Class Counsel has been approved as class counsel
9 on a number of prior cases, have litigated numerous other class action cases, and are
10 competent to represent the class. (Lee Decl. at ¶¶ 23; Fitzgerald Decl. at ¶¶ 2-3; Franklin
11 Decl. at ¶ 4.)

12 **E. Costs and Fees**

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

14 California state and federal courts have recognized that an appropriate method for
15 determining award of attorneys' fees is based on a percentage of the total value of benefits to
16 class members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th
17 224, 254; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444
18 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The
19 purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread
20 litigation costs proportionally among all the beneficiaries so that the active beneficiary does
21 not bear the entire burden alone." (*Vincent*, 557 F.2d at p. 769.)

22 The Common Fund doctrine is predicated on the principle of preventing unjust
23 enrichment. When a litigant's efforts create or preserve a fund from which others derive
24 benefits, she may require the passive beneficiaries to compensate those who created the fund.
25 Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal.3d
26 at p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet*
27 (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund
28 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

1 common fund doctrine include:

2 Fairness to the successful litigant, who might otherwise receive no benefit
3 because his recovery might be consumed by the expenses; correlative
4 prevention of an unfair advantage to the others who are entitled to share in
5 the fund and who should bear their share of the burden of its recovery;
6 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.

7 (*Id.*)

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

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

21 The Agreement provides for a payment of a maximum of one-third of the Gross
22 Settlement Amount, or \$41,666.66, which Defendant will not oppose, for payment to Class
23 Counsel as attorneys' fees. (*See Stipulation at ¶ 30.*) The Parties have agreed to a payment of
24 the foregoing attorneys' fees and, thus, this payment should be presumed to be fair. Further,
25 the Parties have agreed to reimbursement of Class Counsel's litigation costs up to \$15,000.00.
26 (*Id.*) Class Counsel have, at their own risk, expended costs, for example, to file this instant
27 action, effect service of process, participate in mediation, and have paid other litigation-related
28 costs.

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

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

4 Class Representative Rebecca Pineda requests a modest enhancement of \$6,500.00.
5 (See Stipulation at ¶ 31.) The Class Representative met and conferred with her counsel on a
6 number of occasions to discuss the case, provided documents and information to her counsel,
7 and reviewed the Settlement Agreement. (Pineda Decl. at ¶ 5.) As part of her duties as the
8 Class Representative, Plaintiff provided invaluable information, evidence, and documents that
9 resulted in this Settlement. In addition to the invaluable services that Plaintiff provided, she
10 also took a significant risk, both professionally and monetarily, in acting as the Class
11 Representative and seeking benefits on behalf of the Class. Because the claims alleged by the
12 Class Representative involved the payment of costs to the prevailing party, Plaintiff could
13 have possibly faced paying the costs of Defendant, had she not prevailed in this action.

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

21 **3. Class Administration Fees.**

22 The Parties have agreed to an estimated payment of \$3,500.00 to the Claims
23 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
24 settlement. (See Stipulation ¶ 32.) Phoenix Settlement Administrators is a well-recognized
25 class action settlement administrator. The Parties believe that the administration fee is
26 reasonable and should be approved.

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

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

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

9
10
11 Dated: October 22, 2021

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

12
13 By: 

14 B. James Fitzpatrick
15 Larry W. Lee
16 Attorneys for Plaintiff,
17 REBECCA PINEDA, as an individual and
18 on behalf of all others similarly situated
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