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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

ANDY DIAZ, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

ACUITY BRANDS LIGHTING, INC., a
Delaware corporation; and DOES 1 through
50, inclusive,

Defendants.

Case No.: CIVDS2015583

[Assigned for all purposes to the Hon. David
Cohn, Dept. S-26]

**PLAINTIFF ANDY DIAZ'S MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT**

Date: September 17, 2021

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: July 29, 2020

Trial Date: None

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 17, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable David Cohn, judge presiding, in Department S-26 of the above referenced Court located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff Andy Diaz (“Plaintiff”) will seek an Order:

(1) Preliminarily approving the Joint Stipulation of Class and Representative Action Settlement (“Settlement Agreement” or “Settlement”) in this matter;

(2) Conditionally certifying the following Class for settlement purposes only: all current and former California non-exempt employees of Defendant who received shift differential wages, including, but not limited to “Shift Diff Night” payments, at any time during the Covered Period (April 6, 2019 through May 31, 2021);

(3) Appointing Plaintiff as the Class Representative and Larry W. Lee, Kristen M. Agnew, and Nicholas Rosenthal of Diversity Law Group, P.C., and William L. Marder of Polaris Law Group, as Class Counsel;

(4) Preliminarily approving the Settlement and the Maximum Settlement Amount of \$321,680;

(5) Finding on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Enhancement Payment to Plaintiff, Class Counsel’s fees and costs, the settlement administration fees, and the allocation of payments to Settlement Class Members, that could ultimately be given final approval by this Court;

(6) Approving the Notice of Class Action Settlement (“Notice Packet”) to be sent to Class Members, which is attached as an exhibit to the Settlement Agreement;

(7) Approving the distribution of the Notice Packet to Class Members substantially in the manner and form set forth in the Settlement Agreement;

(8) Appointing Phoenix Settlement Administrators as the settlement administrator; and

(9) Setting the matter for a Final Fairness and Final Approval hearing.

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

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

8 This Motion will be based on the attached Memorandum of Points and Authorities, the
9 Settlement Agreement, the proposed Notice Packet, and the supporting Declarations of Larry W.
10 Lee, Kristen M. Agnew, Nicholas Rosenthal, William L. Marder, Plaintiff Andy Diaz and
11 Phoenix Settlement Administrators (Jodey Lawrence), and upon the oral arguments of counsel
12 (should there be any) and on the complete records and file herein.

13
14 DATED: August 23, 2021

DIVERSITY LAW GROUP, P.C.

15
16 By: _____

Larry W. Lee
Kristen M. Agnew
Nicholas Rosenthal

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 (“PAGA”) action seeking statutory and civil penalties. Plaintiff Andy Diaz (“Plaintiff”) alleges that Defendant Acuity Brands Lighting, Inc. (“Defendant”), as a matter of corporate policy and practice, furnished wage statements that failed to identify the correct total hours worked when shift differential wages were paid, in violation of Labor Code section 226(a)(6).

7 Prior to the settlement of this action, Plaintiff and Defendant (the “Parties”) engaged in the exchange of information through informal discovery. With the assistance of experienced mediator Michael Loeb, the Parties reached the current settlement. The terms of the settlement provide that Defendant shall pay a Maximum Settlement Amount of \$321,680. **Significantly, the entire settlement amount is non-reversionary, such that no monies will revert back to Defendant.** Further, the class members will not need to do anything to participate in the settlement. The Parties believe that this amount is fair, adequate, and reasonable, especially given the risks and uncertainty of class certification and the merits of this case. Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class and Representative Action Settlement.

16 **II. PROCEDURAL HISTORY**

17 On July 1, 2020, Plaintiff filed his written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging that Defendant’s wage statements failed to comply with Labor Code section 226(a), pursuant to Labor Code section 2699 (“PAGA Notice”). Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 3. Thereafter, on July 29, 2020, Plaintiff filed the operative Complaint in Superior Court of California for the County of San Bernardino. *Id.* at ¶ 4. The Complaint alleges a class claim for violation of Labor Code section 226(a) and a derivative claim for PAGA penalties predicated on Labor Code section 226(a). *Id.*

24 As alleged in the Complaint, Plaintiff contends that Defendant failed to provide employees with accurate itemized wage statements, in violation of Labor Code section 226(a)(2). Agnew Decl. ¶ 5. Plaintiff alleges that whenever shift differential wages were paid, the corresponding wage statements identified the wrong total hours worked. *Id.* Plaintiff contends that these wage statements improperly list redundant hours worked, such that an employee cannot

1 simply add the hours listed on the wage statement and arrive at the correct total hours worked
2 during the pay period. *Id.* As a result of the alleged violations, Plaintiff seeks statutory and civil
3 penalties under the California Labor Code and the PAGA, as well as attorneys' fees and costs. *Id.*

4 On or about February 16, 2021, Parties agreed to participate in private mediation. Agnew
5 Decl. ¶ 7. Defendant produced wage statements representative of those issued to Class Members,
6 and data relating to the number of Class Members and wage statements issued to each Class
7 Member, which allowed Class Counsel to conduct a full damage analysis. *Id.*

8 On May 18, 2021, the Parties participated in private mediation with Mr. Loeb. During the
9 mediation, a well-regarded neutral with experience mediating employment matters. Agnew Decl.
10 ¶ 9. As a result of the mediation, and based upon further negotiations between the Parties, a class-
11 wide settlement has been reached. *Id.* at ¶¶ 9-10.

12 **III. SUMMARY OF THE CURRENT SETTLEMENT**

13 The material terms of the settlement are described below and set forth in detail in the
14 Settlement Agreement. A true and correct copy of the Settlement Agreement is attached to the
15 Declaration of Kristen M. Agnew as Exhibit A.

16 **A. The Class Definition.**

17 The proposed Class consists of: "all current and former California non-exempt employees
18 of Defendant who received shift differential wages, including, but not limited to "Shift Diff
19 Night" payments, at any time during the Covered Period (April 6, 2019 through May 31, 2021)."
20 *See* Joint Stip. §§ A-3, A-7.

21 **B. The Maximum Settlement Amount.**

22 The Settlement provides for the Maximum Settlement Amount of Three Hundred
23 Twenty-One Thousand Six Hundred Eighty Dollars (\$321,680). *See* Joint Stip. § A-18. The
24 Settlement allocates Twenty Thousand Dollars (\$20,000.00) of the Maximum Settlement
25 Amount to PAGA penalties (the "PAGA Payment"). *See* Joint Stip. § A-22. Pursuant to PAGA,
26 seventy-five percent of the PAGA Payment, *i.e.* the sum of Fifteen Thousand Dollars
27 (\$15,000.00), shall be paid to the LWDA. *See* Joint Stip. § C-6. The remaining twenty-five
28 percent of the PAGA Payment, *i.e.* the sum of Five Thousand Dollars (\$5,000.00), shall be

distributed to Class Members (the “Net PAGA Settlement Amount”). *See id.* The Net PAGA Settlement Amount will be allocated proportionally to Class Members on a pro rata basis. *See* Joint Stip. § C-7.

C. The Individual Settlement Payments.

The balance of the Maximum Settlement Amount remaining after deduction of the approved Service Payment to Plaintiff, Settlement Administration Costs, the LWDA’s portion of the PAGA Payment, and Class Counsel Award (“Net Settlement Amount”), will be available for distribution to Settlement Class Members (*i.e.* Class Members who do not opt-out). *See* Joint Stip. § A-19. The amount allocated to each Settlement Class Member will be based on the number of wage statements reflecting the payment of shift differential wages the individual received during the Covered Period. *See id.* § C-8. Class Members do not need to do anything should they wish to receive their share of the settlement funds.¹ *See id.* at § C-15.

Based on the size of the Class, the number of wage statements at issue and the Maximum Settlement Amount, Class Members will be entitled to recover, on average, up to approximately \$643.81 each or \$20.01 per wage statement reflecting the payment of shift differential wages issued during the Covered Period, after deductions for the LWDA payment, enhancement payment to Plaintiff, fees and costs.² Agnew Decl. ¶ 22. The amount any particular Class Member will be entitled to recover will be greater or lower than this average depending on the number of wage statements reflecting the payment of shift differential wages he or she received during the Covered Period, with some entitled to receive more, and others less. *Id.* This is fair, as it directly allocates greater recovery to individual Class Members who have allegedly suffered greater harm. *Id.* ¶¶ 19, 24.

¹ This substantially decreases the amount of burden each Class Member must bear in order to receive his/her settlement share. If a Class Member does not wish to take part in this settlement and be bound by the release of the class claims, he/she must submit an exclusion request. Such obligations are thoroughly identified in the Notice Packet. *See* Joint Stip., Ex. A.

² The Joint Stipulation provides that all individual settlement payments shall be treated at 100% interest, penalties, and other non-wage damages. Joint Stip. § C-27, C-28.

1 **D. The Settlement Is Non-Reversionary.**

2 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
3 paid out. *See* Joint Stip. §§ C-1. Any individual settlement payments to Settlement Class Members
4 that remain un-cashed within one hundred twenty (120) days of the mailing of settlement payment
5 checks by the Settlement Administrator will be paid to the *cy pres* recipient, the State Bar of
6 California Justice Gap Fund, pursuant to California Rule of Civil Procedure section 384. *See* Joint
7 Stip. at § C-24. The Parties does not have a relationship with the *cy pres* recipient. Agnew Decl. ¶
8 23; Declaration of Larry W. Lee (“Lee Decl.”) ¶ 6; Declaration of Nicholas Rosenthal (“Rosenthal
9 Decl.”) ¶ 6; Declaration of William Marder (“Marder Decl.”) ¶ 12.

10 **E. Attorneys’ Fees and Reimbursement for Litigation Costs.**

11 As part of the Settlement, Defendant does not object to Plaintiff’s Counsel’s request for
12 attorney’s fees up to one-third (1/3) of the Maximum Settlement Amount, *i.e.* the sum of One
13 Hundred Seven Thousand Two Hundred Twenty-Six Dollars and Sixty-Six Cents (\$107,226.66),
14 plus up to Twenty Thousand Dollars (\$20,000.00) for reimbursement of litigation costs, subject
15 to the Court finally approving this Settlement. *See* Joint Stip. § C-3.

16 **F. Enhancement Payment to Plaintiff.**

17 Pursuant to the terms of the Settlement Agreement, and without opposition from
18 Defendant, Plaintiff is entitled to request an Enhancement Payment of Seven Thousand Five
19 Hundred Dollars (\$7,500). *See* Joint Stip. § C-4. Both Plaintiff and Class Counsel expressly
20 acknowledge that the Court has final discretion in any fee award or Class Representative
21 Enhancement Payment. *See* Joint Stip. §§ C-3, C-4.

22 **G. Settlement Administration Costs.**

23 Finally, the Settlement provides for the payment of the fees and expenses reasonably
24 incurred by the Settlement Administrator. The Parties have received a quote from Phoenix
25 Settlement Administrators for a fee of approximately Six Thousand Dollars (\$6,000). *See* Joint
26 Stip. §§ A-31, A-32; Declaration of Jodey Lawrence (“Lawrence Decl.”) ¶ 8, Ex. B. Any portion
27 of the Settlement Administration Costs not used or approved by the Court shall be added to the
28 Net Settlement Amount. *Id.*

1 **H. Scope of the Class Members' Release.**

2 **1. Class Release**

3 The release, as listed below, is identified in the Settlement Agreement at section A-25, as
4 well as in the Class Notice that will be sent to Class Members:

5 “Released Class Claims” means any and all claims for statutory and
6 civil penalties and damages interest, fees and costs, action or causes
7 of action and all other forms of legal or equitable relief based on
8 federal, state or local law, that are now recognized by law or that
9 may be created or recognized in the future by statute, regulation,
10 judicial decision, or in any other manner, that were alleged or could
11 have been alleged, whether such forms of relief are known or
12 unknown, based upon the factual allegations in the Complaint,
13 including but not limited to all claims for violation of Cal. Labor
14 Code sections 226 and 226.3 during the Covered Period, and all
15 recoverable statutory penalties related thereto, whether based on
16 federal, state or local law now existing or created in the future.

17 Joint Stip. §§ A- 25, C-33. As shown, the class release is limited to the claims and facts pled in the
18 operative Complaint.

19 **2. PAGA Release**

20 The Settlement Agreement includes a separate PAGA release. Joint Stip. § A-26. As shown
21 below, the Released PAGA Claims is narrowly tailored to encompass the PAGA claims alleged in
22 the Action:

23 “Released PAGA Claims” means any and all claims, known and
24 unknown, for civil penalties under the California Labor Code
25 Private Attorneys General Act of 2004, Labor Code section 2698 *et*
26 *seq.*, based upon the factual allegations in the Complaint for
27 violation of Labor Code sections 226 and 226.3 during the Covered
28 Period.

29 Joint Stip. §§ A- 26, C-34. The Released PAGA Claims will be set forth in the Class Notice that
30 will be sent to Class Members. *See* Stip. Ex. A. Class Members may not opt out of or be excluded
31 from participating in the settlement of the Released PAGA Claims. Joint Stip. § C-18. However,
32 all Class Members will receive a portion of the Net PAGA Settlement Amount – even if the
33 employee opts out of the Settlement Class. Joint Stip. § C-7.

1 **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
2 **SETTLEMENT**

3 **A. Two-Step Approval Process.**

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

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

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

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

23 When the parties to an action reach a monetary settlement, they will usually prepare
24 and execute a joint stipulation of settlement, which is submitted to the court for
25 preliminary approval. The Joint Stipulation should set forth the central terms of the
26 agreement, including but not limited to, the amount of settlement, form of payment,
manner of determining the effective date of settlement and any recapture clause.
Id. § 11.24.

27 Here, the Parties have reached such an agreement and have submitted to this Court in
28 connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement

1 reached among the Parties. *See* Agnew Decl. ¶ 11, Ex. A. The Settlement sets forth all terms of
2 the agreement reached by the Parties, which include, among other things, the method for
3 calculating the Class Members' individual settlement payments.

4 **B. The Settlement Is Fair, Reasonable and Adequate.**

5 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
6 requires court approval. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1800-01 (1996). In
7 considering whether a settlement is reasonable, the trial court should consider relevant factors,
8 which may include the strength of the plaintiff's case, the risk, expense, complexity and likely
9 duration of further litigation, the risk of maintaining class action status through trial, the amount
10 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
11 experience and views of counsel, the presence of a governmental participant, and the reaction of
12 the class members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th
13 116, 128 (2008).³

14 In order to approve a class action settlement, the court must satisfy itself that the class
15 settlement is within the "ballpark" of reasonableness. *Kullar*, 168 Cal.App.4th. at 133. The record
16 need not contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-*
17 *Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399, 408-9 (2010).

18 **1. The Settlement Was Reached Through Arms' Length Negotiations**
19 **Between Experienced Wage and Hour Attorneys.**

20 The settlement is a result of arms' length negotiations. Both Plaintiff's and Defendant's
21 counsel have a great deal of experience in wage and hour class action litigation. Plaintiff's counsel
22 has been approved as class counsel in a number of wage and hour class actions and has extensive
23 litigation experience. Agnew Decl. ¶¶ 32-38; Lee Decl. ¶¶ 3, 7-9; Rosenthal Decl. ¶ 3; Marder
24 Decl. ¶¶ 2-9. Both during and prior to the mediation, the Parties spoke at length about the strengths
25

26 ³ Courts presume the absence of fraud or collusion in the negotiation of settlement unless
27 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
28 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
re Chicken Antitrust Litig., 560 F. Supp. 957, 962 (N.D. Ga. 1980).

1 and weaknesses of each sides' claims and defenses, whether the claims could be certified, and the
2 scope of Defendant's liability. Agnew Decl. ¶¶ 6, 9, 25, 27. Furthermore, the arms' length
3 negotiations were facilitated by a mediator. *Id.* at ¶ 9. With the assistance of Mr. Loeb, the Parties
4 reached an agreement for a global resolution of the Action. *Id.* at ¶¶ 9-10.

5 **2. The Parties Engaged in Significant Investigation and Discovery.**

6 Plaintiff engaged in extensive investigation regarding the merits of the alleged wage
7 statement violation. Agnew Decl. ¶¶ 6-9, 25, 27. The Parties met and conferred regarding the legal
8 and factual bases for the parties' respective claims and defenses. *Id.* at ¶ 6. The Parties also engaged
9 in informal discovery to facilitate settlement discussions. *Id.* at ¶ 8. In advance of the mediation,
10 Defendant produced data relating to the number of Class Members and wage statements issued to
11 each Class Member, which allowed Class Counsel to conduct a full damage analysis. *Id.*

12 **3. The Strengths and Weaknesses of the First Cause of Action for Violation** 13 **of Labor Code § 226(a).**

14 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
15 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved
16 in not prevailing on one or more of the theories alleged in the Complaint, the possibility of non-
17 certification and potential for appeals. Agnew Decl. ¶¶ 25, 27-28, 31; Lee Decl. ¶ 4; Rosenthal
18 Decl. ¶ 4; Marder Decl. ¶ 10.

19 Labor Code section 226(a)(2) expressly requires that wage statements display the "total
20 hours worked by the employee." As touched on above, Plaintiff alleges that Defendant's wage
21 statements improperly list redundant hours worked, such that an employee cannot simply add the
22 hours listed on the wage statement and arrive at the correct total hours worked during the pay
23 period. *See Soto v. Motel 6 Operating, L.P.*, 4 Cal .App. 5th 385, 390 (2016) (A compliant wage
24 statement "***must*** contain the information specified in the statute") (emphasis in original). Courts
25 routinely grant class certification for similar wage statement violations. *See Lubin v. The*
26 *Wackenhut Corp.*, 5 Cal. App. 5th 926, 959 (2016); *Boyd v. Bank of America Corp.*, 300 F.R.D.
27 431, 440-44; *Magadia v. Wal-Mart Associates, Inc.*, 2018 WL 339139 (N.D. Cal. 2018).

28 Plaintiff's claims, however, are contested. Defendant raised numerous defenses to class

1 certification and liability. Agnew Decl. ¶¶ 6, 9, 25, 27. Defendant argued that employers are not
2 required to expressly list a total of hours worked to comply with Labor Code section 226. *See*
3 *Morgan v. United Retail, Inc.*, 186 Cal. App. 4th 1136, 1147 (2010) (finding no violation of Section
4 226(a) where “[t]he employee could simply add together the total regular hours figure and the total
5 overtime hours figure shown on the wage statement to arrive at the sum of hours worked”).
6 Defendant further argued that, even if Plaintiff established a technical violation of the statute, the
7 alleged violation was not a “knowing and intentional failure” by Defendant to comply with Labor
8 Code section 226(a), and penalties are therefore unwarranted. *See Harris v. Vector Mktg. Corp.*,
9 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (summary adjudication warranted on Section
10 226(e) claim where dispute existed as to whether plaintiff was independent contractor or employee
11 and record lacked evidence that conduct was knowing or willful); *Woods v. Vector Mktg. Corp.*,
12 2015 U.S. Dist. LEXIS 67303, at *8-*9, *12-*14 (N.D. Cal. May 22, 2015) (finding that when the
13 defendant made a good faith claim that the employee was properly classified as exempt its failure
14 to provide accurate wage statements was not knowing and intentional).

15 Additionally, Defendant presented argument that Plaintiff would be unable to establish a
16 common “actual injury” on a class-wide basis. Agnew Decl. ¶ 13. As argued by Defendant, an
17 actual injury is shown where “there is a need for [] additional documentation.” *Raines v. Coastal*
18 *Pac. Food Distribs., Inc.*, 23 Cal. App.5th 667, 676 (2018) (internal citations omitted); *see also*
19 *Hernandez v. BCI Coca-Cola Bottling Co.*, 554 Fed. App’x 661, 662 (9th Cir. 2014) (finding that
20 a wage statement does not violate Section 226(a) if “a plaintiff employee can ascertain the required
21 information by performing simple math, using figures on the face of the wage statement”). Here,
22 Defendant maintains that employees fully understand the shift differential notations. Agnew Decl.
23 ¶ 25. Thus, as argued by Defendant, the wage statements provided sufficient information to allow
24 an employee promptly and easily determine their total hours worked. *Id.* Significantly, Defendant’s
25 defenses present legal questions that can be adjudicated through a motion for summary judgment.
26 An adverse ruling on just one of these defense could have been dispositive on the claims alleged
27 by Plaintiff. *Id.*

28 //

1 **4. The Strengths and Weaknesses of the Second Cause of Action for**
2 **Violation of PAGA.**

3 Plaintiff also pursued a derivative representative PAGA claims predicated on Defendant’s
4 alleged failure to provide accurate wage statements. For the purpose of PAGA liability, a plaintiff
5 only needs to establish a violation of Labor Code section 226(a) —he need not establish the
6 “knowing and intentional” and “injury” elements of section 226(e) to prevail. *See Lopez v. Friant*
7 *& Associates, LLC*, 15 Cal. App. 5th 773, 784-85 (2017). As touched on above, Plaintiff believes
8 that he could recover PAGA penalties had this matter proceeded to trial.

9 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
10 recovery is uncertain. Defendant argues that a court would not award duplicative statutory and
11 PAGA civil penalties for the same alleged wage statement violations. Agnew Decl. at ¶¶ 27-28;
12 *Guifu Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, *17 (N.D. Cal. Jun. 15, 2012)
13 (finding that the plaintiffs “are not entitled to PAGA penalties for failure to provide accurate wage
14 statements under [Section] 226” because “granting PAGA penalties for failure to provide accurate
15 wage statements would be duplicative recovery”).

16 Furthermore, the trial court has the discretion to reduce PAGA civil penalties “if, based on
17 the facts and circumstances of the particular case, to do otherwise would result in an award that is
18 unjust, arbitrary and oppressive, or confiscatory.” Labor Code §2699(e)(2). Defendant argues that
19 trial courts regularly exercise this discretion to award PAGA civil penalties far below the statutory
20 maximums. Agnew Decl. ¶¶ 27-28. For example, in *Fleming v. Covidien*, the Court reduced PAGA
21 civil penalties for wage statement violations from \$2,800,000 to \$500,000, an 82% discount,
22 because “the aggrieved employees suffered no injury” as a result of the violations, the defendants
23 “were not aware” their wage statements violated the law, and the defendants “took prompt steps
24 to correct all violations once notified.” 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011);
25 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (affirming reduction of PAGA
26 penalties where the trial court found the reduction was warranted based on the employer’s “good
27 faith attempts” to comply with the Labor Code and “because the court found the violations were
28

minimal”).⁴ Under the particular circumstances of this case, Defendant could make a persuasive argument that nominal PAGA penalties should be awarded. In this respect, Defendant points to the absence of willfulness as grounds for the Court to award modest, if not nominal, penalties. Agnew Decl. ¶ 27.

5. The Settlement Is Reasonable as Compared to the Potential Estimated Value of the Class and Representative PAGA Claims.

Based on the payroll data provided by Defendant, Plaintiff’s counsel estimated total penalties to be approximately \$2,802,200. Agnew Decl. ¶¶24, 26, 29.⁵ More specifically, the total penalties under Labor Code section 226(e) amount to \$791,700. *Id.* at ¶ 24. The maximum potential PAGA civil penalties total \$2,010,500. *Id.* at ¶ 26. Therefore, Plaintiff’s settlement of \$321,680 is about 11.47% of the total estimated liability, which is consistent with other class settlements. Agnew Decl. ¶ 30.

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.*, 213 F.3d 454, 459 (9th Cir.2000) (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.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the defendant’s potential

⁴ As the California Supreme Court and Courts of Appeal have held, the purpose of PAGA is not to seek wages or recovery for the individual employees. *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (holding that an action to recover civil penalties “is fundamentally a law enforcement action designed to protect the public and **not** to benefit private parties”) (emphasis added); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 1499 (2011).

⁵ Again, this number assumes that the Court would award Section 226(e) statutory penalties and full PAGA penalties, Agnew Decl. ¶ 29.

1 exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161
2 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which
3 obtained only 9.1% of projected damages, given the risks of continued litigation) *Villegas v. J.P.*
4 *Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov.
5 21, 2012) (holding that gross class action settlement of approximately 15% of the potential
6 recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, No. 10-cv-02576 NC, 2013 WL
7 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24% was reasonable).

8 **C. The Court Should Preliminary Approve the Award of Litigation Costs and Fees.**

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

17 Under California law, the award of attorneys' fees in common fund wage and hour class
18 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal.
19 5th 480, 503 (Aug. 11, 2016) ("We join the overwhelming majority of federal and state courts in
20 holding that when class action litigation establishes a monetary fund for the benefit of the class
21 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
22 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
23 fund created"). Under the percentage of the fund method, the court's objective remains to "mimic
24 the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
25 (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level
26 that will approximate what the market will set....The judge, in other words, is trying to mimic the
27 market in legal services").

28 An award of one-third of the fund in attorneys' fees mimics the marketplace as it "is

1 supported by the fact that typical contingency fee agreements provide that class counsel will
2 recover 33% if the case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria*
3 *Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman,
4 *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*
5 (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11). Indeed, “empirical studies [that] show that...fee
6 awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.
7 App. 4th 43, 66 n.11 (2008).

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

13 Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3
14 percent of the common fund is consistent with, and in the range of, awards in other class action
15 lawsuits.” *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award
16 representing one-third of the fund clearly falls within that range, and is consistent with other
17 comprehensive surveys of class action settlements and fee awards. *See Fitzpatrick, An Empirical*
18 *Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010)
19 (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were between
20 25 percent and 35 percent, with almost no awards more than 35 percent”); Eisenberg & Miller,
21 *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg.
22 Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation nationwide conclude
23 that fees representing one-third of the total recovery is consistent with market rates).

24 The results delivered by Class Counsel also support the requested percentage of the fund.
25 Here, the Parties have agreed to a payment of a maximum of one-third (1/3) of the Maximum
26 Settlement Amount (\$107,226.66) for payment to Class Counsel as attorneys’ fees. The Parties
27 have agreed to a payment of the foregoing attorney’s fees and, thus, this payment should be
28 presumed to be fair. Further, it is not uncommon for courts to award attorneys’ fees as one-third

1 or 33.3% of the settlement amount in wage and hour class action settlements. For example, in
2 *McKinnon v. Best Buy Co., Inc.*, (Alameda Superior Court Case No. RG03082294), the court
3 awarded over \$9 million as attorneys' fees, which was 33% of the maximum settlement amount
4 of \$26.9 million. At the time of Final Approval, Plaintiff's counsel will also provide the court with
5 declarations and time records to show that a payment of 1/3 of the recovery is justified and fair
6 even under the lodestar method.

7 Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs. Class
8 Counsel have, at their own risk, expended costs, for example, to file this instant action, effect
9 service of process, pay mediation fees and other litigation related costs. Lee Decl. ¶ 5. Based on
10 the foregoing, the Court should preliminarily approve the attorney's fees and costs being requested
11 by the Parties.

12 **D. The Court Should Preliminary Approve the Award of Settlement**
13 **Administration Fees**

14 The Parties have agreed to payment of a maximum of Six Thousand Dollars (\$6,000) to
15 the settlement administrator, Phoenix Settlement Administrators ("Phoenix"), to send notices and
16 to administer this settlement. Phoenix is a well-recognized class action settlement administrator.
17 Lawrence Decl. ¶ 4, Ex. A. The Parties believe that the administration fee is reasonable and should
18 be approved. Agnew Decl. ¶ 18

19 **E. The Court Should Preliminarily Approve the Proposed Payment to Class**
20 **Representative**

21 Plaintiff requests an enhancement of Seven Thousand Five Hundred Dollars (\$7,500).
22 Plaintiff met with Class Counsel on various occasions to discuss the case, provide documents and
23 information to Class Counsel, and review the Settlement Agreement. *See* Declaration of Andy
24 Diaz ("Diaz Decl.") ¶ 5. Moreover, as part of his duties as the representative, Plaintiff provided
25 invaluable information, evidence, and documents that resulted in this settlement. In addition to the
26 invaluable services that he provided, Plaintiff also took significant risks, both professionally and
27 monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class.
28 Because the claims alleged by the class representatives involved the payment of costs to the

1 prevailing party, Plaintiff could have possibly faced paying the fees and costs of Defendant, had
2 Plaintiff not prevailed in this action. *Id.* at ¶ 6.

3 Further, given that future employers are much less likely to hire individuals who have filed
4 suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in
5 the future from other potential employers. Plaintiff took this risk upon himself and the whole Class
6 benefited from these risks taken by Plaintiff. Class Members did not have to file individual lawsuits
7 and bear the risks of payment of fees and costs if they did not prevail, nor did they have to face the
8 potential for retaliation and not getting future employment had they filed a public lawsuit.

9 Notably, courts have routinely granted approval of representative enhancements for far
10 greater amounts than the \$7,500 sought by Plaintiff in this case. *See, e.g., Van Vranken v. Atlantic*
11 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
12 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
13 incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141
14 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy*
15 *Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
16 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist.
17 LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA
18 overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming
19 \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests an
20 enhancement of \$7,500, which is reasonable and consistent with case law.

21 **F. Notice to the LWDA Has Been Provided.**

22 On August 23, 2021, Plaintiff uploaded the instant motion, Settlement Agreement, and
23 proposed order to the LWDA's website. Agnew Decl. ¶ 39.

24 **V. THE PROPOSED CLASS MEETS ALL CERTIFICATION REQUIREMENTS**

25 The Parties also may, at the preliminary approval stage, request that the court provisionally
26 approve certification of the class—conditional upon final approval of the settlement. “[P]re-
27 certification settlements are routinely approved if found to be fair and reasonable.” *Wershba v.*
28 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *Accord Dunk v. Ford Motor Co.*, 48 Cal.

1 App. 4th 1794, 1803 (1996) (although the settlement was reached before any “adversary
2 certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In re Baldwin-*
3 *United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this practice in
4 the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals”).⁶

5 As further explained by Professor Newberg:

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

12 4 Newberg on Class Actions, at § 11.26.

13 Here, in addition to such terms as class identification, settlement amount and payment
14 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to
15 which the Parties stipulate to the Court’s provisional certification of the Class, but do so for the
16 purposes of this settlement only.

17 **A. The Class is Ascertainable and Sufficiently Numerous.**

18 The Class that Plaintiff seeks to conditionally certify is ascertainable. “Class members are
19 ‘ascertainable’ where they may be readily identified without unreasonable expense or time by
20 reference to official records.” *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008); *see also*
21 *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240 (2013) (same). Here, members
22 of the Class are readily identifiable. Defendant has determined that there are approximately 250
23 individuals that comprise the Class. *See* Joint Stip. §C-9. Furthermore, the Class is sufficiently
24 numerous. Courts generally find that numerosity is satisfied if the class includes forty or more
25 members. *See Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606 (N.D. Cal. 2014); *see*
26 *also Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir.) (noting, in dicta, that the court “would
27 be inclined to find the numerosity requirement...satisfied solely on the basis of [39] ascertained

28 ⁶ In determining the fairness and reasonableness of a proposed settlement, California courts may
look to federal cases for guidance. *See Wershba*, 91 Cal. App. 4th at 239-40.

1 class members”), *vacated on other grounds*, 459 U.S. 810 (1982).

2 **B. There are Common Questions of Law and Plaintiff’s Claims are Typical of the Class.**

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

14 Plaintiff alleges that Defendant, as a matter of its corporate policy and procedure, violated
15 the Labor Code by its uniform policy of furnishing wage statements that incorrectly identify the
16 total number of hours worked when shift differential wages are paid. *See Cal. Lab. Code § 226(a)*.
17 Plaintiff, like all of the other Class Members, was not provided compliant wage statements. *See*
18 *Diaz Decl. ¶ 3*. Thus, Plaintiff’s claims are typical to those of the Class Members.

19 **C. Plaintiff and Class Counsel Have Adequately Represented the Class**

20 The adequacy requirement is also met. “Adequacy of representation depends on whether
21 the plaintiff’s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests
22 are not antagonistic to the interests of the class.” *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442,
23 450 (1976). Here, Plaintiff does not have any interests adverse to the Class, nor have any such
24 issues been raised or presented. *Diaz Decl. ¶ 4*. Plaintiff has taken all necessary steps to represent
25 the interests of the Class, by providing information and documents. *Id.* at ¶ 5. For such reasons,
26 Plaintiff has adequately represented the Class Members and will continue to do so.

27 Further, as detailed in their declarations, Class Counsel are experienced and well-qualified
28 class action litigators who have litigated many wage and hour class actions and have each been

certified as class counsel in numerous other class actions, particularly wage and hour class actions. Agnew Decl. ¶¶ 32-38; Lee Decl. ¶¶ 3, 7-9; Rosenthal Decl. ¶ 3; Marder Decl. ¶¶ 2-9. From the inception of the case, Class Counsel have solely represented the interest of the Class. For example, Class Counsel expended significant time and resources propounding written discovery, conducting legal research, drafting a mediation statement, and attending mediation. *See* Agnew Decl. ¶¶ 2-10. Finally, the mediation and settlement were also obtained for the benefit of the Class, not for the individual Plaintiff. Agnew Decl. ¶ 10.

VI. CONCLUSION

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective Parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully request that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice Packet, and set a date for a final approval hearing.

DATED: August 23, 2021

DIVERSITY LAW GROUP, P.C.

By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

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STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

On August 23, 2021, I served the following document(s) described as:

- ## PROOF OF SERVICE

on the interested parties in this action as follows:

Shannon R. Boyce sboyce@littler.com Littler Mendelson, P.C. 2049 Century Park East, 5th Floor Los Angeles, California 90067 <i>Attorneys for Defendant Acuity Brands Lighting, Inc.</i>	Jeffrey J. Mann jmann@littler.com Cassandra Cresci-Smith CCrescismith@littler.com Mary Ann Gerard MGerard@littler.com Littler Mendelson, P.C. 1255 Treat Boulevard, Suite 600 Walnut Creek, California 94597 <i>Attorneys for Defendant Acuity Brands Lighting, Inc.</i>
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 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of the above-described document(s) to the party(ies) listed above or on the attached mailing list from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s) indicated above or on the attached mailing list. I certify that said electronic transmission was completed and that all pages were received by the party(ies) identified herein or on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 23, 2021, at Los Angeles, California.



Erika Méjia