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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

CHARLES WALTON, as an individual and on
behalf of all others similarly situated, and as a
private attorney general,

Plaintiff,

vs.

PRAXAIR DISTRIBUTION, INC., a Delaware
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 20-CIV-03660

[Assigned for all purposes to Department 4,
Hon. Nancy L. Fineman]

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

*[Filed concurrently with Declaration of Larry W.
Lee; Declaration of Simon L. Yang; Declaration
of William L. Marder; Declaration of Charles
Walton; [Proposed] Order]*

Date: December 7, 2021
Time: 8:30 a.m.
Department: 4

Complaint Filed: August 28, 2020

1 **TO THE COURT, DEFENDANT, AND ITS COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 7, 2021, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard in Department 4, Courtroom N, Northern Court, of the above-entitled court located
4 at 1050 Mission Road, South San Francisco, California 94080, Plaintiff, Charles Walton, will and
5 hereby does seek an Order:

- 6 1. approving the Joint Stipulation of Class Action and PAGA Settlement (“Agreement”)
7 attached as Exhibit A to the concurrently filed Declaration of Simon L. Yang;
- 8 2. conditionally certifying the following Class for settlement purposes only: all current or
9 former non-exempt employees who worked for Defendant, Praxair Distribution, Inc., in the
10 State of California and were paid overtime wages at any time from August 26, 2019, through
11 August 5, 2021, for work performed through July 31, 2021, except for individuals who
12 released all relevant claims under the terms of the settlement in *Rita Garcia v. Praxair*
13 *Distribution, Inc., et al.*, United States District Court, Central District of California, Case No.
14 2:18-cv-08170-JAK (AFMx).
- 15 3. appointing Plaintiff, Charles Walton, as the Class Representative and Larry W. Lee and
16 Simon L. Yang of Diversity Law Group, P.C. and William L. Marder of Polaris Law Group
17 as Class Counsel;
- 18 4. approving the Agreement on a preliminary basis and finding that it, the total Gross
19 Settlement Amount in the amount of \$550,000, and the amounts for the Administration
20 Costs, Attorneys’ Fees and Costs Award, Class Representative Award, PAGA Penalty Fund,
21 and allocation of payments to Class Members and Aggrieved Employees appear to be within
22 the range of reasonableness for a settlement that could ultimately be given final approval;
- 23 5. approving the distribution of the Notice of Class Action Settlement attached as Exhibit A to
24 the Agreement;
- 25 6. appointing Phoenix Settlement Administrators as the Administrator; and
- 26 7. setting the matter for a final approval hearing.

27 The Motion is made pursuant to Rule 3.769 of the California Rules of Court, which allows the
28 Court to preliminarily certify a class for settlement purposes and to approve a class action settlement.

1 The basis for the Motion, filed without any opposition from Defendant is that the proposed settlement is
2 fair, adequate, and reasonable, and the procedures proposed by the Parties are adequate to ensure class
3 members are able to participate in, opt out of, or object to the settlement.

4 The Motion is based on this notice, accompanying memorandum of points and authorities, the
5 Agreement and proposed Notice of Class Action Settlement, the supporting Declarations of Larry W.
6 Lee, Simon L. Yang, William L. Marder, and Charles Walton, all pleadings and papers on file herein,
7 and any further oral and documentary evidence as may be presented before or at the hearing of this
8 matter.

9
10 DATED: October 18, 2021

DIVERSITY LAW GROUP, P.C.

11
12 By: _____

Larry W. Lee

Simon L. Yang

13 Attorneys for Plaintiff
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SUMMARY OF MOTION

This wage and hour class action alleges Defendant, Praxair Distribution, Inc. (now known as Linde Gas & Equipment Inc.), violates Labor Code section 226(a) when it pays non-exempt employees overtime wages. Plaintiff, Charles Walton, sues both on a classwide basis and as a proxy for the State of California pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”). Defendant denies the allegations.

Based on their own independent investigation and evaluation, the Parties have agreed to the settlement set forth in the Joint Stipulation of Class Action and PAGA Settlement (“Agreement”), which is attached as Exhibit A to the concurrently filed Declaration of Simon L. Yang. The Agreement requires Defendant to pay \$550,000 for the classwide settlement. Significantly, the entire \$550,000 settlement amount is non-reversionary; none of the settlement amount will revert back to Defendant. The Parties and their respective counsel are of the opinion that the settlement for the consideration and on the terms set forth in the Agreement would be fair, reasonable, and adequate.

The Parties and their respective counsel also are of the opinion that the settlement would be in the best interests of the Class in light of all known circumstances and the expenses and risks inherent in litigation. Plaintiff and his counsel believe the settlement is an exceptional result for the Class. Based on the terms in the Agreement, the settlement would require Defendant to pay **more than \$1,000 per Class Member, on average**, to resolve claims arising from a fixed Class Period of less than two years for approximately 542 Class Members. Although Plaintiff and his counsel are confident that litigation of the claims would result in a classwide judgment against Defendant, they recognize the inherent risks in litigation, including the specific risks that class certification could be denied, liability could not be established at trial, or the applicable law could change.

As the settlement would be in the best interests of the Class, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

RELEVANT BACKGROUND

On August 26, 2020, Plaintiff notified Defendant and the LWDA of alleged violations of Section 226(a).¹ Declaration of Simon L. Yang (“Yang Decl.”) ¶ 2. On August 28, Plaintiff initiated this class and representative PAGA action. *Id.* On behalf of current and former non-exempt employees in California who were paid overtime wages, and as a proxy for the State of California, the Complaint alleges that Defendant violates Section 226(a) in at least two ways.

First, Section 226(a)(9) requires employers to furnish wage statements that itemize and show “all applicable hourly rates in effect during the pay period.” The Complaint alleges that whenever overtime wages are paid Defendant issues wage statements that do not itemize and show the applicable overtime rate of pay of 1.5 times the regular rate. Rather, the wage statements show the base hourly rate of pay or 0.5 times the base rate. Compl. ¶ 23; Yang Decl. ¶ 2.

Second, Section 226(a)(2) requires employers to furnish wage statements that itemize and show the “total hours worked by the employee.” The Complaint alleges that whenever overtime wages are paid Defendant issues wage statements that do not itemize and show the accurate total hours worked. Moreover, the hours shown on the wage statements do not sum up to the total hours worked by an employee. Compl. ¶ 23; Yang Decl. ¶ 2.

From the outset of the litigation, the Parties thoroughly investigated the facts relating to the claims alleged in the Complaint and engaged in a thorough study of the legal principles applicable to those claims as well as the defenses Defendant asserted. Yang Decl. ¶ 3. To wit, on October 6, 2020, counsel for the Parties discussed Plaintiff’s claims. Upon the conclusion of the call, Plaintiff immediately provided sample wage statements to counsel for Defendant. *Id.* On October 7, Defendant’s counsel sent Plaintiff’s counsel a wage statement unlike the ones Plaintiff received during employment. *Id.* Plaintiff assisted his counsel to provide additional wage statements to show that he was not furnished wage statements like the ones provided by Defendant’s counsel. *Id.* Plaintiff served formal discovery, and Defendant provided additional information related to defenses that Defendant alleged would apply to Plaintiff’s claims, including information relating to a pending class action in *Rita Garcia v. Praxair*

¹ Except as otherwise noted, all “Section” references are to the Labor Code.

1 *Distribution, Inc., et al.*, United States District Court, Central District of California, Case No. 2:18-cv-
2 08170-JAK (AFMx). *Id.* ¶ 4. Throughout the litigation, Plaintiff continued to provide information and
3 documents. *Id.*

4 In March of 2020, after approximately six months of litigation, Defendant agreed to schedule a
5 mediation. Yang Decl. ¶ 5. Defendant provided the numbers of non-exempt employees and wage
6 statements relevant to Plaintiff’s allegations and Defendant’s defenses, among other things. *Id.* Plaintiff
7 thus was not required to respond to any formal written discovery. *Id.* No depositions were taken in the
8 Action. *Id.*

9 On June 17, 2021, the Parties commenced settlement negotiations through a well-respected
10 mediator, Michael J. Loeb. Yang Decl. ¶ 5. Following the mediation, the Parties were ultimately able to
11 agree to the settlement terms described in the Agreement. *Id.*

12 **LEGAL STANDARD**

13 Rule 3.769 of the California Rules of Court governs settlements of class actions. Any party to a
14 settlement agreement may submit a written notice for preliminary approval of the settlement. The
15 settlement agreement and proposed notice to class members must be filed with the motion. California
16 Rules of Court, rule 3.769(c).

17 Any settlement of a class action lawsuit must be reviewed and approved by the trial court. This is
18 done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice
19 has been distributed to class members for their comment or objections. As the Manual for Complex
20 Litigation (Third) explains, in the first step “counsel submits the proposed terms of settlement and the
21 court makes a preliminary fairness evaluation”:

22 If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its
23 fairness or other obvious deficiencies, such as unduly preferential treatment of class
24 representatives or of segments of the class, or excessive compensation for attorneys, and appears
25 to fall within the range of possible approval, the court should direct that notice ... be given to the
26 class members of a formal fairness hearing, at which arguments and evidence may be presented
27 in support of and in opposition to the settlement.

28 Manual for Complex Litigation (Third) § 30.41.

A preliminary approval by the trial court thus is a conditional finding that the settlement does not
appear to be unfair. As Professor Newberg comments, “[t]he strength of the findings made by a judge at

a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

The parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class—conditioned upon final approval of the settlement. As further explained by Professor Newberg:

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

4 Newberg on Class Actions, at § 11.26. Indeed, “pre-certification settlements are routinely approved if found to be fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); accord *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (explaining that a settlement before any “adversary certification” may still be approved if a court is satisfied that it is “fair, adequate and reasonable”).

DISCUSSION

I. The Proposed Settlement Terms Are Fair, Adequate, and Reasonable.

A. Proposed Class Definition

The proposed settlement class includes any current or former non-exempt employee who worked for Defendant in the State of California and was paid overtime wages at any time during the Class Period, except for individuals who released all relevant claims under the terms of the settlement in the *Garcia* class action. Agreement § 1.5. The Class Period (and PAGA Period) is August 26, 2019, through July 31, 2021, which includes claims based on wage statements issued through August 5, 2021, for work performed through July 31, 2021. *Id.* § 1.7. All “Class Members” also are “Aggrieved Employees.” *Id.* § 1.5. The number of Class Members is estimated to be approximately 542. *Id.*

B. Settlement Terms and Evaluation

The trial court must determine and approve a class action settlement is fair to “prevent fraud, collusion or unfairness to the class” through settlement and dismissal of the class action.” *Consumer*

1 *Advocacy Grp., Inc. v. Kintetsu Enters. of America*, 141 Cal. App. 4th 46, 60 (2006). Courts presume the
2 absence of fraud or collusion in the negotiation of settlement unless there is evidence to the contrary.
3 *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat’l*
4 *Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957,
5 962 (N.D. Ga. 1980). Indeed, a presumption of fairness exists where (i) the settlement is reached
6 through arm’s length bargaining; (ii) investigation is sufficient to allow counsel and the court to act
7 intelligently, (iii) counsel is experienced in similar litigation, and (iv) the percentage of objectors is
8 small. *Wershba*, 91 Cal. App. 4th at 245 (citing *Dunk*, 48 Cal. App. 4th at 1802).

9 While the recommendations of counsel proposing the settlement are not conclusive, the Court
10 can properly take them into account, particularly where, as here, they have been involved in formal and
11 informal investigation and negotiations, are experienced with this type of litigation, and mediated a
12 resolution with arm’s length negotiation. See Newberg on Class Actions, *supra*, at § 11.47; *National*
13 *Rural Telecomms. Coop.*, 221 F.R.D. at 528 (“So long as the integrity of the arm’s length negotiation
14 process is preserved, however, a strong initial presumption of fairness attaches to the proposed
15 settlement ... and ‘great weight’ is accorded to the recommendations of counsel, who are most closely
16 acquainted with the facts of the underlying litigation.”) (citations omitted). In such circumstances, as
17 here, courts do not substitute their judgment for that of the proponents. *National Rural Telecomms.*
18 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *accord Hammon v. Barry*, 752 F. Supp.
19 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
20 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan*
21 *Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).

22 Here, both Plaintiff’s counsel and Defendant’s counsel have a great deal of experience in wage
23 and hour class action litigation. Plaintiff’s counsel have extensive class action and litigation experience
24 and have been approved as class counsel in numerous wage and hour class actions. Declaration of Larry
25 W. Lee (“Lee Decl.”) ¶¶ 5-8; Yang Decl. ¶¶ 8-12; Declaration of William L. Marder (“Marder Decl.”)
26 ¶¶ 4-11. Each side has apprised the other of their respective factual contentions and legal theories, and
27 each side has considered the other’s contentions and theories—enabling negotiations to take place
28 between the Parties. Yang Decl. ¶¶ 4-5. Specifically, the Parties balanced Plaintiff’s allegations and

1 Defendant's defenses based on the *Garcia* class action settlement to determine a potential settlement
2 class would include three groups of employees: (i) non-exempt drivers; (ii) non-exempt non-drivers
3 hired on or after July 17, 2020; and (iii) *Garcia* class members (i.e., non-exempt non-drivers) who
4 remained employed on or after January 11, 2021. *Id.* ¶¶ 4-6. Defendant then provided the relevant
5 numbers of individuals and wage statements for each group, among other things. *Id.*

6 Based on information provided by Defendant prior to mediation for work through April 30,
7 2021, Plaintiff estimated that Defendant faced potential liability for approximately \$4,819,300 in
8 penalties. Yang Decl. ¶ 6. Defendant contended that the majority of this potential liability—more than
9 80% or \$3,993,500 under Section 226.3—would be subject to discretionary reductions. *Id.* Defendant
10 also contended that the remaining potential liability—approximately \$825,800 under Section 226(e)—
11 would be subject to additional defenses requiring proof of injuries resulting from knowing and
12 intentional violations. *Id.* While the Parties disagree on the application of the law to the facts, each Party
13 recognized in negotiations that, if taken to trial, the other Party would at least have reasonable
14 arguments, such that the Gross Settlement Amount to which the Parties ultimately agreed at mediation
15 was reasonable. *Id.*

16 Although Plaintiff and his counsel are confident that litigation of the claims would result in a
17 classwide judgment against Defendant, they recognize the inherent risks in litigation, including the
18 specific risks that class certification could be denied, liability could not be established at trial, or the
19 applicable law could change. Yang Decl. ¶ 6. The settlement for each participating Class Member is fair,
20 reasonable, and adequate, given the inherent risks of litigation, as well as the potential for appeals and
21 the costs of pursuing litigation. *Id.* The settlement is the result of extensive arms' length negotiations
22 between the Parties and their counsel. *Id.*

23 Ultimately, the Gross Settlement Amount secures approximately two-thirds—or 66.60%—of
24 Defendant's potential liability for penalties not subject to discretionary reductions. Yang Decl. ¶ 6.
25 When projecting the number of additional wage statements that would be issued to Class Members by
26 the end of the Class Period on July 31, 2021, the Gross Settlement Amount still secures more than
27 half—or 54.42%—of Defendant's potential liability for penalties not subject to discretionary reductions.
28 Indeed, numerous courts have held that gross settlement amounts of less than 20%—and as little as

8%—of a 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; “It 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.”); *Bellinghausen v. Tractor Supply Co.*, 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 exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, 2014 WL 2472316, at *3 (C.D. Cal. May 30, 2014) (acknowledging risks of continued litigation and granting preliminary approval of wage and hour class action settlement obtaining 9.1% of projected damages); *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable).

Class Members would not need to do anything to receive their share of settlement funds. This eliminates any burden to Class Members who wish to participate in the class action settlement. Despite the fairness of the settlement terms, should any Class Member wish to pursue his or her own case for the claims proposed to be settled and released, each Class Member has the right to submit a request for exclusion (i.e., opt out) from the settlement. Agreement § 4.3. Moreover, as set forth in the Notice of Class Action Settlement (“Class Notice”), Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the Agreement. Agreement § 4.2, Ex. A.

1. Class Member Payments

The Agreement provides for \$550,000 as the Gross Settlement Amount. Agreement § 5.1. From the Gross Settlement Amount, attorneys’ fees will be no more than 33⅓% of the Gross Settlement Amount, which amounts to \$183,333.33. *Id.* § 5.1.1. Class Counsel’s costs are expected to be no more than \$15,000. *Id.* The Class Representative Award will be no more than \$10,000. *Id.* § 5.1.2. Administration Costs will be no more than \$8,750. *Id.* § 5.1.3.

After deducting any approved Attorneys’ Fees and Costs Award, Class Representative Award, and Administration Costs from the Gross Settlement Amount, the remaining amount would be the Net Settlement Amount. Agreement § 5.2. 75% of the Net Settlement Amount would be classified as Section

226(e) penalties and allocated among Settlement Class Members on a pro rata basis based on the number of relevant wage statements for each Settlement Class Member. *Id.* §§ 5.2, 5.2.2. 25% of the Net Settlement Amount would be classified as Section 226.3 penalties for the PAGA Penalty Fund. *Id.* §§ 5.2, 5.2.1. Pursuant to statute, 75% of the PAGA Penalty Fund would be an LWDA Payment; the remaining 25% of the PAGA Penalty Fund would be allocated among Aggrieved Employees on a pro rata basis based on the number of relevant wage statements for each Aggrieved Employees. *Id.*

Pursuant to the settlement’s terms, more than \$270,000, at a minimum, should be available for distribution to Class Members. Based on the anticipated 542 Class Members, **each Class Member, on average, would receive more than \$499** pursuant to the settlement’s terms. Yang Decl. ¶ 7. The amount paid on average to each Class Member could increase, depending on how many Class Members opt out of the class action settlement. *Id.* The amount actually paid to any Class Member would increase or decrease depending on his or her number of relevant wage statements during the Class Period. *Id.*

As Plaintiff’s lawsuit sought penalties only, 100% of Class Member’s Individual Settlement Payments would be characterized as penalties. Agreement § 5.2.2. All other settlement payments also do not consist of wages and shall be characterized as IRS Form 1099 payments. *Id.* Finally, the principal for any uncashed checks (upon the expiration date) would escheat to the State of California’s Unclaimed Property Fund in the name of the Class Member. *Id.* § 5.4. None of the settlement funds will revert to Defendant. *Id.* § 5.1.

2. Class Members’ Releases of Claims

As a condition of participating in this settlement, Settlement Class Members shall waive and release any and all claims for violations of Section 226(a) during the Class Period that were alleged in the Action or that reasonably could have been alleged based on the facts alleged in the Action, against Defendant and Released Parties. Agreement § 6.1. Aggrieved Employees, whether requesting exclusion from the settlement or not, will release any and all claims for civil penalties for violations of Section 226(a) during the PAGA Period that were alleged in the Action or that reasonably could have been alleged based on the facts alleged in the Action. *Id.* § 6.2.

The release is thus appropriately limited. *Carter v. City of Los Angeles*, 224 Cal. App. 4th 808, 820 (2014) (“A general release—covering ‘all claims’ that were or could have been raised in the suit—is

common in class action settlements.”). Moreover, the Settlement Class Member release applies only to claims arising during the Class Period, and the Aggrieved Employee release applies only to claims arising during the PAGA Period.

C. Notice to Class Members

Within seven days of the Preliminary Approval Order, Defendant shall provide to the Administrator each Class Member’s last known mailing address, as well as data sufficient for the Administrator to perform all necessary responsibilities pursuant to this Agreement (the “Class Data”) to the Administrator to perform all necessary responsibilities pursuant to the settlement. Agreement § 3.2. Within 14 days of the Preliminary Approval Order, the Administrator shall send Class Notice to Class Members to provide notice of settlement via First Class U.S. Mail, using the last known mailing address for each Class Member, based on class data provided by Defendant. *Id.* §§ 3.3, 3.4. Any Class Notice returned to the Administrator as undeliverable shall be sent promptly via First Class U.S. Mail to the forwarding address affixed thereto. If no forwarding address is provided, the Administrator shall promptly attempt to determine the correct address using a single skip-trace search and shall then promptly send a single re-mailing. *Id.* § 3.4. As set forth in the Class Notice, Class Members will be allowed to opt out of the class action settlement by a certain deadline, or object to the settlement in writing or by appearing at the final approval hearing. *Id.* §§ 4.2, 4.3.

D. Elements of Class Certification

For purposes of settlement approval, a detailed analysis of the elements required for class certification is not required. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 620, 622-27 (1997). The trial court can appropriately utilize a lesser standard of scrutiny to determine the propriety of a settlement class as opposed to a litigation class. *Dunk*, 48 Cal. App. 4th at 1807 n.19; *see also Wershba*, 91 Cal. App. 4th at 240 (explaining there is no “ironclad requirement” to conduct an evidentiary hearing to satisfy the prerequisites for class certification). Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. *Global Mins. & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003) (“[I]t is well established that trial courts should use different standards to

determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.”) (citing *Dunk*, 48 Cal. App. 4th at 1807 n.19).

Even under the standard applicable to litigation classes, the allegations in this lawsuit present paradigmatic class action claims that satisfy the elements of class certification.

1. More than 500 Class Members Satisfy Numerosity.

There are more than 500 Class Members. Yang Decl. ¶¶ 6-7. Numerosity thus is sufficiently established. *E.g.*, *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (stating that “[n]o set number is required as a matter of law for the maintenance of a class action” and citing examples in which classes of 10—*Bowles v. Superior Court*, 44 Cal. 2d 574 (1955)—and of 28—*Hebbard v. Colgrove*, 28 Cal. App. 3d 1017 (1972)—were upheld).

2. The Defined Class Is Ascertainable.

Class Members are identifiable from Defendant’s records. The class definition “is precise, objective and presently ascertainable.” *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010).

3. Plaintiff Has Claims that Are Typical of the Class, Raises Predominant Common Questions, and Adequately Represents the Class.

“The community of interest requirement involves three factors: ‘(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

With respect to commonality, there are questions of law and fact common to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class”). Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s conduct is uniformly directed at a class of

employees, as it is here, the class wide impact of the Defendant’s policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

With respect to typicality, Plaintiff alleges that Defendant, as a matter of their corporate policy, practice, or procedure violated Section 226(a) by failing to furnish employees with wage statements that itemize and show all applicable hourly rates in effect during the pay period and the total hours worked. As with other members of the Class, Plaintiff was provided wage statements that do not itemize and show all applicable hourly rates in effect during the pay period or the total hours worked. Yang Decl. ¶ 3; Declaration of Charles Walton (“Walton Decl.”) ¶ 2.

With respect to adequate representation, Plaintiff does not have any interests adverse to the Class, and no such issues been raised or presented. Walton Decl. ¶ 3. Plaintiff has taken all necessary steps to represent the interests of the Class, including by providing information and documents to Class Counsel, making himself available to discuss the claims, providing wage statements that he was issued, reviewing wage statements while the lawsuit was pending, and answering any questions. *Id.* For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

4. Class Counsel Also Adequately Represents the Class.

From the inception of the case, Class Counsel has zealously represented the interests of the Class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Further, Class Counsel have been approved as class counsel in a number of prior cases, have litigated numerous other class action cases, and are competent to represent the Class. Lee Decl. ¶¶ 2-9; Yang Decl. ¶¶ 8-12; Marder Decl. ¶¶ 4-11.

E. Attorneys’ Fees and Costs, the Enhancement Award, and Settlement Costs

1. Attorneys’ Fees and Costs

California state and federal courts have recognized that an appropriate method for determining award of attorneys’ fees is based on a percentage of the total value of settlement benefits to Class Members. *E.g., Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Wershba*, 91 Cal. App. 4th at 254; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of the equitable doctrine is to “spread litigation costs proportionally among all

1 the beneficiaries so that the active beneficiary does not bear the entire burden alone” so as to avoid
2 unjust enrichment. *Vincent*, 557 F. 2d at 769.

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

13 Attorneys’ fees awards of 35% of the fund are within the expected range in the “market in legal
14 services. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J.
15 Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that
16 “[m]ost fee awards were between 25 percent and 35 percent”). An attorneys’ fees award of 35% of the
17 fund mimics the market and “is supported by the fact that typical contingency fee agreements provide
18 that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried.”
19 *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008)
20 (citing Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-*
21 *Competitive Fees* (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11). Indeed, an attorneys’ fees award of 35%
22 of the fund is consistent with “empirical studies [that] show that ... fee awards in class actions average
23 around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

24 Though a maximum attorneys’ fees award of 35% is within the range of reasonableness for the
25 market in legal services, the Parties have agreed to a maximum attorneys’ fee award of 33⅓% of the
26 Gross Settlement Amount, which amounts to \$183,333.33. Agreement § 5.1.1. The Parties’ agreement
27 should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel’s
28

litigation costs. *Id.* Class Counsel have incurred costs at their own risk, for example, for filing the lawsuit, service of process, mediation fees, and payment of other litigation related costs. *Id.*

2. Proposed Payment to the Class Representative

Plaintiff and proposed Class Representative Charles Walton requests a modest Class Representative Award of \$10,000. Agreement § 5.1.2. The request is quite reasonable in light of the general release that the Agreement requires of him but not any other Class Member. *Id.* § 6.3. The request is appropriate in recognition of Plaintiff's efforts on behalf of the Class; instead of pursuing individual claims following the termination of his employment while on a paid leave under San Francisco's Public Health Emergency Leave Ordinance, Plaintiff pursued this lawsuit for the benefit of the Class. Walton Decl. ¶ 2.

Plaintiff's efforts in the lawsuit also merit the requested award. Plaintiff met and conferred with Class Counsel on a number of occasions to discuss the case. Walton Decl. ¶ 3. He provided information and documents to Class Counsel, made himself available to answer any questions during litigation, and continued supplying wage statements during the pendency of the lawsuit. *Id.* In sum, as part of his duties as the Class Representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. *Id.* ¶¶ 2-3. Despite Defendant's initial efforts to litigate its defenses, Plaintiff's prompt assistance in refuting whether alternate wage statement formats were furnished to employees assisted Class Counsel in obtaining Defendant's agreement to schedule mediation, without Defendant conducting Plaintiff's deposition or serving formal discovery. Yang Decl. ¶ 5. Ultimately, Plaintiff's efforts secured an exceptional result for the Class.

In addition to the invaluable services that Plaintiff provided, he also took a significant risk, both professionally and monetarily, as an employee willing to pursue the claims. Walton Decl. ¶ 4. Because the alleged claims involve the payment of costs to the prevailing party, Plaintiff could have possibly faced paying Defendant's costs had Defendant prevailed in the action. Furthermore, Plaintiff risks prejudice in the future from other potential employers that may be less willing to hire an individual who has filed suit against a prior employer. Plaintiff took this risk upon himself and the whole class benefited. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face potential prejudice in future employment.

1 **3. Administration Costs**

2 Phoenix Settlement Administrators, a well-recognized class action settlement administrator, has
3 quoted Administration Costs not to exceed \$8,750 to send notices and administer the settlement.
4 Agreement § 3.1. The Parties believe that the Administration Costs are reasonable and should be
5 approved.

6 **II. The Actions Requested by the Motion for Preliminary Approval Should Be Granted.**

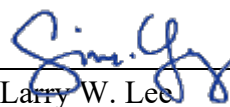
7 As discussed above, the proposed settlement would result in substantial monetary benefits to
8 class members. It was the result of informed, extensive, and arms-length negotiations conducted by
9 parties who are represented by counsel experienced in wage and hour class action litigation. Its terms
10 appear to be fair, adequate, and reasonable. And there is no reason to believe the proposal is outside the
11 range of reasonableness for such a settlement. The Court thus should (i) grant preliminary approval of
12 the settlement, (ii) approve and authorize the mailing of the proposed Class Notice, and (iii) schedule a
13 date for a final approval hearing.

14 **CONCLUSION**

15 For the benefit of the class, Plaintiff respectfully requests—and Defendant does not oppose—that
16 the Court grant preliminary approval of the settlement.

17
18 DATED: October 18, 2021

DIVERSITY LAW GROUP, P.C.

19 By: 
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21 Simon L. Yang
22 Attorneys for Plaintiff
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