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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SONOMA

RAFAEL ESCOBAR, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

HUNEEUS VINTNERS, LLC, a Delaware
limited liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No. SCV-265937

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

Date: TBD
Time: TBD
Dept.: 19

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at a date and time to be determined by the Court, before the
Hon. Gary Nadler, Judge presiding in Department 19 of the above-referenced Court located at 3055
Cleveland Avenue, Santa Rosa CA 95403, Plaintiff Rafael Escobar ("Plaintiff") will and hereby does
move the Court for an Order:

1. Preliminarily approving the Joint Stipulation of Class Action Settlement and Release

1 (“Settlement” or “Settlement Agreement”);

2 2. Provisionally certifying the Settlement Class, which is defined as any and all persons
3 who have been employed by Huneus Vintners LLC, or its related entities, as non-exempt employees in
4 California at any time from January 30, 2016 to the date of preliminary approval (“class period”);

5 3. Approving the proposed “Notice of Class Action Settlement” attached as Exhibit “A” to
6 the Settlement Agreement;

7 4. Approving Phoenix Settlement Administrators as the settlement administrator
8 (“Settlement Administrator”) jointly selected by the Parties for the purposes of this settlement;

9 5. Approving and directing distribution to the Class of the Notice of Proposed Class Action
10 Settlement; and

11 6. Setting a final fairness and approval hearing.

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

14 The basis for this Motion, filed without any opposition from Defendant Huneus Vintners LLC
15 (“Defendant”) is that the proposed settlement is fair, adequate, and reasonable and the procedures
16 proposed by the Parties are adequate to ensure the opportunity of class members to participate in, opt
17 out of, or object to the settlement.

18 This Motion will be based on the attached Memorandum of Points and Authorities, the Joint
19 Stipulation for Class Action Settlement Agreement and Release (“Settlement Agreement,” or “Joint
20 Stipulation”) and the proposed Notice of Class Action Settlement, and the supporting Declarations of
21 William L. Marder, Dennis S. Hyun, and Plaintiff, and upon the oral arguments of counsel (should
22 there be any) and on the complete records and file herein.

23 Dated: September 23, 2021

POLARIS LAW GROUP

24 By: William L. Marder
25 William L. Marder
26 Attorney for Plaintiff and the Class
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Named Plaintiff Rafael Escobar (“Named Plaintiff” or “Plaintiff”) seeks preliminary approval of
4 this class action settlement. As set forth in the Joint Stipulation of Class Action Settlement and Release
5 (“Settlement” or “Settlement Agreement”), the Settlement provides for a gross fund of \$425,000.00
6 and, more importantly, is **non-reversionary**, such that no funds will revert back to Defendant Huneeus
7 Vintners LLC (“Defendant”). Moreover, the Settlement does not require class members to complete
8 claim forms to participate. Rather, the class members will simply receive checks so long as they do not
9 opt-out.

10 This case involves a claim for failure to pay overtime based on the correct, regular rate of pay
11 and an alleged failure to provide meal periods. The First Amended Complaint (“FAC”) asserts five
12 causes of action for: (1) violation of Labor Code § 226(a); (2) violation of Labor Code §§ 510, 558, and
13 1194; (3) violation of Labor Code §§ 226.7 and 512; (4) violation of the Private Attorneys General Act
14 (the “PAGA”), Labor Code § 2698, *et seq.*; and (5) violation of the Unfair Competition Law (the
15 “UCL”), Business & Professions Code § 17200.¹

16 Defendant disputes these contentions and asserts that it has paid its employees correctly
17 throughout the class period and in many instances, may have overpaid employees.

18 This settlement was reached after Plaintiff’s counsel obtained and analyzed class data and
19 retained an expert to perform a damage analysis, attended mediation, and settled the case, which
20 involved arms’ length negotiations over the terms and conditions of this settlement. (Declaration of
21 Dennis S. Hyun (“Hyun Decl.”) ¶ 7).

22 The Parties and their respective counsel participated in a mediation with experienced class
23 action mediator Tripper Ortman, Esq. on July 16, 2021. (Hyun Decl. ¶ 7). After a full day of
24 mediation, the Parties were able to reach a settlement. (*Id.*) Thus, at all times, the negotiations leading
25 to this Settlement Agreement have been adversarial, non-collusive, and at arm’s length. (*Id.*) The

26 ¹ This Court previously sustained Defendant’s Demurrer to Plaintiff’s FAC as to the first cause of
27 action for violation of Labor Code § 226(a) without leave to amend and struck the prayer for waiting
28 time penalties from the third cause of action for violation of Labor Code §§ 226.7 and 512. However,
given that these issues are currently under consideration by the California Supreme Court in *Naranjo v.*
Spectrum Sec. Servs., 455 P.3d 704 (Cal. 2020), the Parties have agreed to include these claims in the
release herein.

1 current settlement is being settled on behalf of “any and all persons who have been employed by
2 Huneeus Vintners LLC, or its related entities, as non-exempt employees in California at any time from
3 January 30, 2016 to the date of preliminary approval.” (Joint Stipulation at § 6).

4 Based on their own independent investigation and evaluation, the Parties and their respective
5 counsel are of the opinion that settlement for the consideration and on the terms set forth in the
6 Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the Class and
7 Defendants in light of all known facts and circumstances and the expenses and risks inherent in
8 litigation. (Hyun Decl. ¶¶ 7-9). Therefore, the Parties respectfully request that the Court grant this
9 Motion for Preliminary Approval of Class Action Settlement.

10 **II. BACKGROUND OF THE SETTLEMENT**

11 **A. Investigative Background**

12 This is a wage and hour class action. This settlement was reached after over a year of litigation,
13 including briefing on Defendant’s Demurrer to and Motion to Strike Portions of the initial Complaint
14 and FAC. (Declaration of Dennis S. Hyun (“Hyun Decl.”) ¶ 7). Plaintiff also propounded his First Set
15 of Requests for Production of Documents and Special Interrogatories. (*Id.*) After this Court ruled on
16 Defendant’s Demurrer and Motion to Strike the FAC, the Parties agreed to put formal discovery on
17 hold and agreed to engage in private mediation with Tripper Ortman, Esq., on July 16, 2021. (*Id.*)
18 Plaintiff’s counsel obtained and analyzed class data and performed a damage analysis, attended
19 mediation, and settled the case, which has involved arms’ length negotiations over the terms and
20 conditions of this settlement. With respect to class data, Plaintiff’s counsel and his expert reviewed and
21 analyzed time and payroll data for 99 class members. (*Id.*) Based on all of the evidence and data,
22 Plaintiff’s counsel and expert were able to perform calculations based on the allegations and value the
23 maximum damages and penalties at issue. (*Id.*) After a full day of mediation, the Parties were able to
24 reach a settlement. (*Id.*) Thus, at all times, the negotiations leading to this Settlement Agreement have
25 been adversarial, non-collusive, and at arm’s length. (*Id.*)

26 **B. Summary of the Current Settlement**

27 The Settlement Agreement provides for \$425,000.00 as the gross settlement amount. This
28 amount is completely non-reversionary (*i.e.*, every single dollar will be paid out without any money
reverting back to Defendant). The settlement payments to each Class Member will depend on the

1 number of workweeks worked by each Class Member. Specifically, each Class Member's share of the
2 Individual Settlement Payments shall be apportioned based on the total number of wage statements
3 received by each Settlement Class Member during the Class Period. (Joint Stipulation at § 38).

4 Individual Settlement Payments will be allocated as follows: (i) Twenty Percent (20%) of each
5 Individual Settlement Payment will be allocated as wages for which IRS Forms W-2 will be issued; and
6 (ii) Eighty Percent (80%) will be allocated to penalties and interest for which IRS Forms 1099-MISC
7 will be issued. (Joint Stipulation at § 58).

8 "Released Claims" means any and all causes of action, claims, rights, damages, punitive
9 or statutory damages, penalties, liabilities, expenses, and losses alleged in the operative
10 complaint or which could reasonably have been alleged in either the complaint Plaintiff
11 filed on or about January 30, 2020 or the complaint Plaintiff filed on or about September
12 18, 2020 based on the facts alleged therein including but not limited to: (a) any alleged
13 failure by any Defendant (1) to pay wages, minimum wages, or overtime wages; (2) to
14 provide legally compliant meal periods or compensation in lieu thereof; (3) to provide
15 accurate wage statements to employees; (4) to maintain accurate records; (5) to pay all
16 wages due upon separation of employment; (b) any right or claim based on any (1) on-
17 duty meal period imposed or required by Defendant; or (2) off-the-clock work imposed
18 or required by Defendant; (c) any right or claim for civil penalties pursuant to PAGA, or
19 any penalties arising under the California Labor Code or Wage Orders based on the
20 alleged failures set forth herein; (d) any right or claim for unfair business practices in
21 violation of California Business & Professions Code §§ 17200, et seq., based on the
22 alleged failures set forth herein; (e) any violation of the Fair Labor Standards Act of
23 1938, 29 U.S.C. §§ 203, et. seq., and (f) any violation of the California Labor Code
24 arising from or related to the conduct alleged herein, including, without limitation,
25 violation of Labor Code Sections 201, 202, 203, 204, 218.5, 218.6, 221, 226, 226.3,
26 226.7, 510, 512, 558, 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 2698 et
27 seq., or any other ordinance, rule, regulation, or statute, whether federal state, or
28 administrative, or similar causes of action that any Class Member has or might have,
known or unknown, of any kind whatsoever, that was alleged or could have been alleged
based on the factual allegations in the operative complaint.

(See Joint Stipulation at § 26).

Based upon Defendants' records, the estimated number of Settlement Class Members is 472
individuals. Class Members may opt-out of the Settlement if they so choose. In agreeing to the
Settlement, Plaintiff took into consideration the number of Class Members, rates of pay, and the
number and length of shifts worked by each Class Member. This enabled Plaintiff to calculate the
potential damages and negotiate the settlement sum based on a clear understanding of the exposure in
this case.

As part of the Settlement Agreement, Defendant does not object to Plaintiffs' Counsel's request
for attorney's fees up to one-third (1/3) of the total settlement sum, or \$141,666.67, and up to \$25,000
for reimbursement of litigation costs. (Joint Stipulation at § 34). Also, as part of the Settlement

1 Agreement, Defendant does not object to Named Plaintiff's request for an enhancement of \$7,500.00.
2 (*Id.* at § 35). Additionally, the Settlement Agreement calls for a \$40,000.00 payment for PAGA
3 penalties - 75% of which is payable to the California Labor and Workforce Development Agency
4 ("LWDA") and 25% of which will be included in the settlement pool to be paid to the Class Members.
5 (*Id.* at § 37). Finally, the Settlement Agreement also provides for the payment of the settlement
6 administrator's costs, which shall not exceed \$7,900.00. (*Id.* at § 36).

7 **C. The Settlement is Fair, Reasonable, and Adequate**

8 Based on their own respective independent investigations and evaluations, the Parties and their
9 respective counsel are of the opinion that settlement for the consideration and on the terms set forth in
10 their Agreement is fair, reasonable, and adequate and is in the best interests of the Class and the
11 Defendants in light of all known facts and circumstances and the expenses and risks inherent in
12 litigation. (Hyun Decl. at ¶¶ 7-9). Defendants deny any liability or wrongdoing of any kind associated
13 with the claims alleged by Plaintiff.

14 Using the figures exchanged prior to mediation, based on a class size of approximately 472
15 Class Members and the \$425,000.00 recovery, Class Members will each get a raw average of
16 approximately \$451.13 based on the class size as of mediation, after deducting the PAGA payment to
17 the LWDA, Plaintiff's enhancement, attorneys' fees and costs, and administration costs. (Hyun Decl. ¶
18 10). Class members who worked more workweeks will receive higher Individual Settlement Payments.
19 (Joint Stipulation at § 38). This is fair, as it directly allocates greater recovery to individual Class
20 Members who have allegedly suffered greater harm. Further, Class Members may choose to exclude
21 themselves from this settlement and not participate in the settlement.

21 **III. LEGAL ANALYSIS**

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

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

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

1 class representatives or of segments of the class, or excessive compensation for
2 attorneys, and appears to fall within the range of possible approval, the court should
3 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.

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

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

13 When the parties to an action reach a monetary settlement, they will usually prepare and
14 execute a joint stipulation of settlement, which is submitted to the court for preliminary
15 approval. The stipulation should set forth the central terms of the 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.

16 *Id.* at § 11.24. Here, the Parties have reached such an agreement and have submitted to this Court in
17 connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement
18 reached among the Parties. The Settlement Agreement sets forth all terms of the agreement reached by
19 the Parties, which include, among other things, the method for calculating the Class Members'
20 individual settlements.

21 **B. The Settlement is Fair and Reasonable and Not the Result of Fraud or Collusion**

22 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
23 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel*
24 *Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken*
25 *Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that
26 of the proponents, particularly where, as here, settlement has been reached with the participation of
27 experienced counsel familiar with the litigation. *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221
28 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v.*
Carey, 470 F. Supp. 471 (S.D.N.Y. 1979).

1 While the recommendations of counsel proposing the settlement are not conclusive, the Court
2 can properly take them into account, particularly where, as here, they have been involved in informal
3 discovery and negotiations for some period of time, appear to be competent, have experience with this
4 type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on*
5 *Class Actions, supra*, § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (quoting *In re Paine*
6 *Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“[s]o long as the integrity of the
7 arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches
8 to the proposed settlement . . . [citations] and ‘great weight’ is accorded to the recommendations of
9 counsel, who are most closely acquainted with the facts of the underlying litigation”)).

10 Here, both Plaintiffs’ and Defendant’s counsel have a great deal of experience in wage and hour
11 class action litigation. (Declaration of William L. Marder (“Marder Decl.”) ¶¶ 8-14; and Hyun Decl. at
12 ¶¶ 3-6). Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class
13 actions. (Marder Decl. ¶ 14; Hyun Decl. at ¶ 6). Moreover, Plaintiff’s counsel conducted an extensive
14 investigation of the factual allegations involved in this case since the inception. (Hyun Decl. at ¶ 7).
15 Each side has apprised the other of their respective factual contentions, legal theories and defenses,
16 resulting in extensive arms-length negotiations taking place among the Parties. Plaintiff’s counsel
17 obtained class data from which he and his expert were able to perform a damage analysis. (*Id.*) This
18 settlement was the result of extensive arms’ length negotiations between counsel for the Parties,
19 including having the assistance of a mediation before a highly regarded mediator with significant
20 experience in wage and hour class actions.

21 The settlement for each participating Class Member is fair, reasonable and adequate, given the
22 inherent risk of litigation, the risk relative to class certification and the costs of pursuing such litigation.
23 Further, while Plaintiff believes that he could prevail on the merits, Plaintiff also believes in the
24 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in
25 not prevailing on one or more of the causes of action or theories alleged in the Complaint and in the
26 possibility of losing at trial or on summary judgment. (Hyun Decl. at ¶¶ 8-9). Defendants adamantly
27 dispute liability as well.

28 The settlement is a compromise for the alleged damages of Class Members for the claims
asserted in the Complaint. The settlement also compensates the Named Plaintiff for her individual

1 claims and provides Plaintiff with an additional incentive payment for Plaintiff's involvement in this
2 Action, which included providing meeting and conferring with Plaintiff's counsel and reviewing the
3 pleadings in this case. This incentive payment also takes into consideration the risks, time, effort and
4 expenses incurred by said Named Plaintiff in coming forward to provide invaluable information,
5 negotiate and litigate this matter on behalf of all Class Members.

6 Despite the asserted fairness of the settlement terms, should any potential Class Member, upon
7 reviewing the Notice of Class Action Settlement, object to the terms of the settlement as set forth in the
8 Settlement Agreement, each has the right to submit a request for exclusion (*i.e.*, opt out) from the
9 settlement, pursuant to which the Class Member would retain any claim he or she may have against
10 Defendant. Moreover, potential Class Members, upon providing proper notice to the Parties and the
11 Court, may attend the final fairness and approval hearing for the purpose of objecting to one or more of
12 the settlement terms set forth in the Settlement Agreement.

13 **C. The Proposed Class Settlement Meets the *Kullar* Factors**

14 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th
15 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has conducted
16 sufficient investigation and the settlement is reasonable in light of the strengths of the plaintiff's claims.
17 As discussed herein, Plaintiff's counsel has conducted extensive investigation and, in light of the
18 strength and weaknesses of Plaintiff's claims, Plaintiff's attorneys submit that this settlement is fair
pursuant to *Kullar*.

19 **1. Plaintiff's Counsel Conducted Extensive Investigation**

20 As stated above, in preparation for mediation, Plaintiff obtained various payroll data for 99 class
21 members, which comprised 21% of the 472-member class at the time of mediation. (Hyun Decl. ¶ 7).
22 Based thereon and an extrapolation of damages, the total exposure of both the overtime and meal period
23 claims totaled \$4 million. (*Id.*) However, it should be noted that this figure includes penalties under
24 Labor Code §§ 201-203, and 226, which this Court dismissed from this lawsuit. (*Id.*) When removing
25 these items of penalties, the total exposure actually totals \$2.7 million. (*Id.*)

26 **2. Strengths and Weaknesses of Plaintiff's Claims**

27 Here, Defendant would have argued that it correctly paid the regular rate of pay. Further,
28 Defendant would have also argued that the formula for calculating the overtime rate in *Alvarado v.*

1 *Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018) does not apply to this case because the bonuses at
2 issue are not flat-sum bonuses, but in many instances, commissions or production bonuses. And, again,
3 this Court already dismissed Plaintiff's claims for violation of Labor Code §§ 201-203 and 226, which
4 substantially reduces the value of this case. Defendant also contends that it had lawful meal period
5 policies, which would have rendered Plaintiff's meal period claim uncertifiable. Defendant may have
6 prevailed on class certification and/or appealed if this Court ruled in Plaintiff's favor.

7 **3. Potential Value of the Class Claims**

8 As stated above, in preparation for mediation, Plaintiff obtained various payroll data in order to
9 formulate an estimated damage analysis. Based thereon, the value of the class claims was
10 approximately \$4 million, which includes the penalties dismissed by this Court. (Hyun Decl. ¶ 7).
11 However, when the penalties under Labor Code §§ 201-203, and 226 are removed, the actual exposure
12 is \$2.7 million. (*Id.*) Thus, a \$425,000.00 gross settlement represents 15.7% of the potential realistic
13 exposure, which is in line with numerous court decisions. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*,
14 213 F.3d 454, 459 (9th Cir.2000); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015
15 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).

16 Here, the settlement fund is non-reversionary, such that 100% of the settlement amount will be
17 available for distribution to class members who do not opt-out. Moreover, the settlement does not
18 require claim forms. Rather, class members who did not opt-out will receive a check. Further, the
19 settlement fund will be paid out entirely in cash (as opposed to a voucher, coupon, etc.). Thus, as the
20 gross settlement amount of \$425,000.00 comprises approximately 15.7% of the total potential
21 exposure, the settlement is fair and reasonable.

22 **D. The Proposed Class Representative Enhancement and Attorneys' Fees Should be 23 Preliminarily Approved**

24 While Named Plaintiff and Class Counsel will submit detailed records and declarations in
25 connection with the final approval motion, the proposed class representative enhancement and
26 attorneys' fees should be preliminarily approved.

27 With respect to the class representative enhancement, Named Plaintiff asserts that this amount is
28 particularly justified in this case given the amount of time the Named Plaintiff has expended.
Specifically, the Named Plaintiff has invested approximately 20 hours into the prosecution of this

1 matter, including meeting and/or conferring with his counsel in connection with the assistance of the
2 class claims, such as providing information and various documents. (Declaration of Rafael Escobar ¶
3 3). In addition to the above, the risks and consequences involved in the filing of this lawsuit further
4 justify the requested enhancement amount. Indeed, the filing of a major class action lawsuit against a
5 former employer can result in unintended consequences of retaliation by future potential employers.

6 Moreover, while other class members will be reaping the benefits of the current settlement, such
7 individuals did not have to put up their personal stakes in the prosecution of this case. Indeed, had
8 Plaintiff failed to prevail on the wage/hour class claims, Plaintiff may have been solely responsible for
9 the costs incurred by Plaintiff's counsel. Given the size of this case, any such costs would have been
10 significant if Plaintiff failed to prevail. Despite all of this, Plaintiff still agreed to take upon such
11 burdens and risks alone, for the benefit of the various class members.

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

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

1 An award of 33% of the fund in attorneys' fees mimics the marketplace as it "is supported by
2 the fact that typical contingency fee agreements provide that class counsel will recover 33% if the case
3 is resolved before trial and 40% if the case is tried." *Fernandez v. Victoria Secret Stores LLC*, 2008
4 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of*
5 *Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U. L. Q.
6 653, 659 n. 11). Indeed, "empirical studies [that] show that . . . fee awards in class actions average
7 around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008). Thus,
8 Named Plaintiff respectfully requests that this Court preliminarily approve the request for class
9 representative enhancement and attorneys' fees.

10 **IV. PROPOSED SCHEDULE OF SETTLEMENT ADMINISTRATION**

11 Plaintiff proposes the following schedule for the fairness hearing and final proceedings:

12 1. Defendants shall provide the Settlement Administrator, in electronic format and within
13 21 calendar days upon granting of the preliminary approval Order by this Court, with the Class List, so
14 that the Settlement Administrator can mail the Notices of Class Action Settlement to the Class. Within
15 ten (10) calendar days of receipt of the Class List, the Settlement Administrator shall mail out the
16 Notices of Class Action Settlement to the Class Members using the most current mailing address
17 identified by reference to the Class Information and the National Change of Address ("NCOA")
18 database.

19 2. Deadline for Objection: within forty-five (45) calendar days after first mailing of notice
20 to class.

21 3. Deadline for Exclusion: within forty-five (45) calendar days after first mailing of notice
22 to class.

23 4. Filing date for Motion for Final Approval of Class Action Settlement, Attorneys' Fees
24 and Costs, Representative Enhancement and Administration Costs: 16 court days before final approval
25 hearing.

26 5. Fairness Hearing and Final Approval Hearing: to be determined by the Court.

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

Here, the proposed Settlement is fair, adequate, and reasonable. It will result in both substantial

monetary benefits to class members; it is **non-reversionary**; it is non-collusive; and it was achieved as the result of informed, extensive, and arms' length negotiations and discovery conducted by counsel for respective parties who are experienced in wage and hour class action litigation. In sum, Plaintiff respectfully request this Court, as part of the preliminary approval process, do the following:

1. Review the proposed Settlement Agreement;
2. Find that the proposed settlement preliminarily appears to be fair and adequate, and whether the proposed class of settling plaintiffs preliminarily appears to meet the applicable certification criteria;
3. Review and approve the Notice of Class Action Settlement which is attached as Exhibit "A" to the Settlement Agreement;
4. Direct notice to be given to the Class, and set a hearing for final review of the proposed Settlement; and
5. Approve Phoenix Settlement Administrator to serve as the Settlement Administrator to handle the notice and administration procedures.

DATED: September 23, 2021

POLARIS LAW GROUP

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