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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

OFELIA ORTEGA, on behalf of herself
and all similarly aggrieved employees,

Plaintiff,

v.

SUNLIGHT BERRY FARMS, INC.; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 20CV002558

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

Date: October 28, 2022

Time: 8:30 a.m.

Dept.: 14

Complaint Filed: September 24, 2020

FAC Filed: January 1, 2021

SAC Filed: January 6, 2022

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 28, 2022, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Carrie M. Panetta, judge presiding, in Department 14 of the above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Ofelia Ortega (“Plaintiff”) will and hereby does move this Court for the following relief with respect to the Stipulation of Settlement (“Settlement Agreement”) entered into by Plaintiff and Defendants Sunlight Berry Farms, Inc. and Naturipe Berry Growers, Inc. (collectively, “Defendants”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Settlement Agreement referenced above;
2. That the Court certify the following class for settlement purposes: All Sunlight Berry Farms, Inc.’s current and former non-exempt employees in the State of California at any time between September 24, 2016 through the date the Court enters preliminary approval of the Class Action Settlement (the “Settlement Class”);
3. That Plaintiff Ofelia Ortega be appointed as the Class Representative and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston, and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;
4. That the Court preliminarily approve the Settlement Agreement and the Gross Settlement Amount in the amount of Two Hundred Thousand Dollars (\$200,000.00);
5. That the Court finds 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, Class Representative enhancement payment, attorneys’ fees and costs, settlement administration fees, and the allocation of payments to Settlement Class Members, that could ultimately be given final approval by this Court;
6. That the Court approve the mailing of the proposed Notice of Proposed Class Action Settlement (“Notice Packet”) to be sent to Settlement Class Members;
7. That the Court appoint Phoenix Settlement Administrators as the Settlement Administrator; and
8. That the Court schedule the matter for a Final Fairness and Final Approval

1 hearing.

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

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

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

14
15 Date: September 6, 2022

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

16
17 By: 

B. James Fitzpatrick
Larry W. Lee
Max W. Gavron
Attorneys for Plaintiff,
OFELIA ORTEGA, on behalf of herself
and all similarly aggrieved employees

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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative PAGA action arising from Defendants
3 Sunlight Berry Farms, Inc. and Naturipe Berry Growers, Inc.’s (together, “Defendants”)
4 various alleged Labor Code violations. Specifically, Plaintiff Ofelia Ortega (“Plaintiff”)
5 asserted that Defendants failed to provide all lawful meal periods; failed to provide rest
6 periods; failed to pay hourly and overtime wages; failed to comply with itemized employee
7 wage statement requirements; failed to pay all wages upon termination; failed to pay wages
8 timely engaged in unfair business practices; and are liable for civil penalties under PAGA.
9 Based on these claims, Plaintiff asserts violations of Labor Code §§ 201, 201.3, 202, 203, 204,
10 216, 218, 221, 223, 226, 226.7, 510, 512, 1174, 1175, 1194, 1198, 1199, and 2698, *et seq.*
11 (“PAGA”), and Business and Professions Code § 17200, *et seq.* (the “UCL”). Defendants deny
12 each, every, and all of the allegations of the operative Complaint and contends that their wage
13 and hour practices comply with the Labor Code.

14 Prior to the settlement of this action, Plaintiff and Defendants (jointly referred to as the
15 “Parties”) thoroughly investigated the facts relating to the claims alleged in the operative
16 Complaint against Defendants, including, but not limited to, conducting formal and informal
17 discovery and reviewing various payroll data and timesheets for members of the class.
18 Thereafter, the Parties commenced settlement negotiations through a private mediator and
19 were ultimately able to reach the current settlement. **Significantly, this entire amount is non-**
20 **reversionary, such that no monies will revert to Defendants.**

21 The Parties believe that this amount is fair, adequate, and reasonable, especially given
22 the risks and uncertainty of class certification and the merits of this case.

23 Although Plaintiff and her counsel are confident that they could prevail on class
24 certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation
25 and the specific risk that Plaintiff could fail to establish liability. Based on their own
26 independent investigation and evaluation, the Parties and their respective counsel are of the
27 opinion that the settlement for the consideration and on the terms set forth in the Stipulation of
28 Settlement (“Settlement Agreement”) is fair, reasonable, and adequate and is in the best

1 interests of the Settlement Class and Defendants in light of all known circumstances and the
2 expenses and risks inherent in litigation.

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

5 **II. PROCEDURAL HISTORY**

6 On September 24, 2020, Plaintiff filed a representative action complaint in the Superior
7 Court of California, County of Monterey on behalf of herself and all similarly aggrieved
8 employees against Defendant Sunlight Berry Farms, Inc. Declaration of Max W. Gavron
9 (“Gavron Decl.”) ¶ 2. Plaintiff filed a First Amended Complaint on January 1, 2021, adding
10 class action claims and Defendant Naturipe Berry Growers, Inc. to the action. *Id.* ¶ 3.

11 On January 6, 2022, Plaintiff filed a Second Amended Complaint. *Id.* ¶ 4. The Second
12 Amended Complaint is the operative complaint (“Complaint”) and alleges class and
13 representative action claims for (1) failure to provide meal periods in violation of Labor Code
14 §§ 226.7 and 1198; (2) failure to provide rest periods in violation of Labor Code §§ 226.7 and
15 1198; (3) failure to pay hourly and overtime wages in violation of Labor Code §§ 1194 and
16 1198; (4) failure to comply with itemized employee wage statement requirements in violation
17 of Labor Code §§ 226, 1174, and 1175; (5) failure to pay all wages upon termination in
18 violation of Labor Code §§ 201, 202, and 203; (6) failure to timely pay wages in violation of
19 Labor Code § 204; (7) claims for civil penalties pursuant to Labor Code § 2698; and (8)
20 engaging in unfair business practices in violation of Business and Professions Code § 17200,
21 *et seq.* *Id.* ¶ 4.

22 Since the initiation of the lawsuit, the Parties have engaged in formal and informal
23 discovery. Plaintiff has reviewed Defendants’ production of their policies and practices,
24 payroll data, sample wage statements and timesheets, and other documents. *Id.* ¶ 5. This
25 investigation enabled Plaintiff to perform an analysis of the putative class and Defendants’
26 liability. *Id.*

27 On April 6, 2022, the Parties engaged in a full-day mediation with neutral Mike
28 Masuda, Esq. *Id.* ¶ 6. After thorough investigation and evaluation of the facts and claims, as

1 well as arm's length negotiation, the Parties were ultimately able to reach an agreement to
2 resolve all claims and entered into a memorandum of understanding. *Id.* ¶ 6. The Parties
3 subsequently executed the Stipulation of Settlement ("Settlement Agreement"), a true and
4 correct copy of which is attached as **Exhibit A** to the Declaration of Max W. Gavron.

5 The Parties recognize the risk, expense, and delay in continuing litigation with the
6 class and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate.
7 Gavron Decl. ¶ 7. Accordingly, the Parties desire to settle, compromise, and discharge all
8 disputes and claims arising from or relating to the afore-referenced claims.

9 **III. DISCUSSION**

10 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
11 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
12 review after notice has been distributed to the class members for their comment or objections.

13 The *Manual for Complex Litigation, Third* § 30.41 states:

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

19 (Fed. Jud. Ctr., 3rd ed. 1995).

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

28 The procedures for the parties' submission of a proposed settlement for preliminary

1 approval by the court also are discussed in 4 *Newberg on Class Actions*:

2 When the parties to an action reach a monetary settlement, they will usually
3 prepare and execute a joint stipulation of settlement, which is submitted to the
4 court for preliminary approval. The stipulation should set forth the central terms
5 of the agreement, including but not limited to, the amount of settlement, form of
6 payment, manner of determining the effective date of settlement and any
7 recapture clause.

8 *Id.* at § 11.24.

9 Here, the Parties have reached such an agreement and have submitted to this Court in
10 connection with this Motion a copy of the Settlement Agreement fully setting forth the
11 agreement reached by the Parties. The Settlement Agreement sets forth all terms of the
12 agreement reached by the Parties, which include, among other things, the method for
13 calculating the Settlement Class Members' individual portions of the Net Settlement Amount.

14 **A. Proposed Class Definition**

15 The current settlement is being settled on behalf of "All Sunlight Berry Farms, Inc.'s
16 current and former non-exempt employees in the State of California at any time between
17 September 24, 2016 through the date the Court enters preliminary approval of the Class Action
18 Settlement" (the "Settlement Class"). *See* Settlement Agreement ¶ 1. The Settlement Period is
19 defined as "any time between September 24, 2016 through the date the Court enters
20 preliminary approval of the Class Action Settlement." *Id.* The settlement period for the claims
21 brought pursuant to the PAGA is September 24, 2019, through the date the court enters
22 preliminary approval of the settlement. *Id.* ¶ 2.B.

23 Defendant Sunlight Berry Farms, Inc. did not directly employ any W-2 employees in
24 the 2022 season and thus 2022 employees are not Sunlight Berry Farms, Inc. W-2 employees
25 and are not covered by the agreement submitted to the Court for approval.

26 Pursuant to the Settlement Agreement, Defendant has represented that there are
27 approximately 246 individuals that comprise the Class. *See* Settlement Agreement ¶ 3.E.
28 Should this number increase more than 10%, Plaintiff retains the right to rescind the
agreement, subject to Defendants increasing the Gross Settlement Amount on a proportional
basis, which would preserve the terms of the proposed settlement. *Id.*

1 **B. Settlement Terms and Evaluation**

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

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

21 Here, both Plaintiff’s and Defendants’ counsel have a great deal of experience in wage
22 and hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a
23 number of wage and hour class actions and have extensive litigation experience. Declaration
24 of B. James Fitzpatrick (“Fitzpatrick Decl.”) ¶ 6; Declaration of Laura L. Franklin (“Franklin
25 Decl.”) ¶ 5-6; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 7-9; Gavron Decl. ¶¶ 26-32. Each
26 side has apprised the other of their respective factual contentions, legal theories, and defenses,
27 resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 21.

28 Based on the class data provided by Defendants, Plaintiff estimated that Defendants

would face potential liability of up to approximately \$1.3 million for Plaintiff's class claims. Gavron Decl. ¶ 11. Specifically, this amount was calculated based on the following breakdowns for each class claim:

- \$2,829.00 for off-the-clock work for mandatory training (30 minutes per employee @ \$23.00 per hour (including piece rate) x 246 employees = \$2,829.00
- \$41,354.00 for meal period violations at a 25% violation rate (~7,192 shifts x \$23.00 average rate of pay) x 25% = \$41,354.00);
- \$41,354.00 for rest period violations at a 25% violation rate (~7,192 shifts x \$23.00 average rate of pay) x 25% = \$41,354.00);
- \$193,200 in Section 226(e) wage statement penalties (2,055 workweeks x \$100 = \$205,500) – (246 x \$50 = \$12,300) = \$193,200.00
- \$1,099,841.40 in waiting time penalties (premised on 246 former class members (((\$149.03 average per day x 30 days = \$4,470.90) x 246 = \$1,099,841.40).

See Gavron Decl. ¶ 11.

Plaintiff further estimated the maximum potential PAGA penalties to be approximately \$205,500. This amount was calculated based on approximately 2,055 workweeks during the relevant time period and a \$100 penalty per violation, which assumes that the Court would not “stack” PAGA penalties for distinct violations of the Labor Code. *Id.* ¶ 12. Courts have recently been hesitant to award a higher PAGA penalty for “subsequent” violations where there is no prior citation by the Labor Commissioner, which renders the evaluation of the potential PAGA penalties without “stacking” reasonable. *C.f. Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (“Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs’ motion for summary judgment. On this basis, we reverse the district court's holding that Virgin is subject to heightened penalties for any labor code violation that occurred prior to that point.”). While *Bernstein* addresses whether the higher subsequent penalty should be applied, defendants often argue that this decision supports their position that the court should

1 not award multiple penalties for different predicate violations of the Labor Code during the
2 same pay period. Gavron Decl. ¶ 12. Accordingly, evaluating the settlement compared to a
3 potential penalty of \$100 per pay period is fair, adequate, and reasonable.

4 Even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
5 recovery is uncertain. Under PAGA, trial courts have considerable discretion to reduce the
6 penalty award. Pursuant to Labor Code section 2699(f)(2) the Court can decline to award the
7 full amount of PAGA penalties where “if, based on the facts and circumstances of the
8 particular case, to do otherwise, would result in an award that is unjust, arbitrary and
9 oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington*
10 *v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court
11 reduced the maximum PAGA penalty amount by 90%, citing the employer’s good faith
12 attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court
13 of Appeal found such reduction to be proper and affirmed a judgment which only provided for
14 a PAGA penalty of \$5 per pay period. *Id.* at 539; *see O’Connor*, 2016 WL 4398271, at *17
15 (noting that even if PAGA penalties amounted to \$1 billion, such award “could well be
16 reduced, as a court may reduce the penalty when to do otherwise would result in an award that
17 is unjust, arbitrary and oppressive, or confiscatory”). If the Court were to award only \$5.00 a
18 pay period in this case, the potential PAGA penalties total \$10,275.00. Gavron Decl. ¶ 13.

19 Courts routinely award far less than the statutory maximum amount of civil penalties,
20 even where an underlying violation of the Labor Code is found. In the matter of *Magadia v.*
21 *Wal-Mart Assocs., et al.*, while the trial court imposed substantial PAGA penalties upon the
22 defendant, such amount still represented reductions of 67% and 80% of the potential PAGA
23 penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019).
24 Moreover, this was only after the plaintiff in *Magadia* had prevailed after trial. Thereafter, the
25 Ninth Circuit reversed the trial court’s ruling, which demonstrates the significant risk
26 presented in moving forward with litigation. *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668,
27 677 (9th Cir. 2021).

28 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the

1 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
2 involved in not prevailing on one or more of the causes of action or theories alleged in the
3 operative Complaint at trial, the possibility of non-certification, and the potential for appeals.
4 Gavron Decl. ¶ 18. These risks on class certification are compounded by the California
5 Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the
6 plaintiffs obtained class certification and subsequently prevailed at trial after eight years of
7 litigation, but the judgment and the certification ruling were reversed by the California
8 Supreme Court after an additional five years of litigation. The case was remanded to superior
9 court where class certification was denied and plaintiffs' subsequent appeal also was denied.

10 On the merits, there are also significant risks presented if Plaintiff was to move
11 forward with litigation. Defendant argued that it complied with the Labor Code in all respects
12 and that class certification was not appropriate. Defendant presented many arguments in their
13 defense, including, but not limited to, the following: 1) Plaintiff could not establish that
14 Naturipe was her employer; 2) Plaintiff's meal and rest period claims were not viable because
15 the majority of employees were able to leave the premises during their breaks, and Defendant
16 maintained legal policies and provided breaks to employees, *see Brinker Rest. Corp. v. Super.*
17 *Ct.*, 53 Cal. 4th 1004, 1041-42 (2012); 3) Defendant timely paid all wages due and owing at
18 separation of employment and issued accurate wage statements; and 4) Defendant did not
19 require employees to participate in orientation while off-the-clock.

20 Indeed, numerous courts have held that gross settlements approximating between only
21 8 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego*
22 *Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
23 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a
24 cash settlement amounting to only a fraction of the potential recovery does not per se render
25 the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement
26 should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether
27 the settlement is fair and adequate depends on the "the difficulties in proving the case");
28 *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 exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 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). Here, the proposed settlement is approximately 13% of the potentially available penalties, which factors in the risks described above if the case were to proceed through litigation and appeals. Gavron Decl. ¶ 15.

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

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

The Settlement Agreement provides for Two Hundred Thousand Dollars (\$200,000.00) as the total Gross Settlement Amount. *See* Settlement Agreement ¶ 3. The Net Settlement Amount (calculated after deduction of Class Counsel's attorneys' fees (up to \$66,666.67), costs (up to \$10,000.00), Class Representative Enhancement Payment (up to \$5,000.00), payment to the LWDA (\$18,750.00), and Settlement Administration Costs (estimated at 8,275.00¹)) is estimated to be approximately \$91,308.33. *See* Gavron Decl. ¶ 8; Settlement Agreement ¶ 3. Each Settlement Class Member who does not opt-out of the settlement will be

¹ Plaintiff obtained a quote for distribution from Phoenix Settlement Administrators, which is \$8,275.00. Gavron Decl. ¶ 8. The Settlement Agreement provides for administration costs of up to \$20,000.00. *See* Settlement Agreement ¶ 3.

1 awarded a portion of the Settlement Class Award on a pro-rata basis, based upon the total
2 number of weeks he or she worked during the Class Period, and a portion of the PAGA
3 Amount on a pro-rata basis, based upon the total number of weeks he or she worked from
4 September 24, 2019 through the date the court enters preliminary approval of the Settlement.
5 *See* Settlement Agreement ¶ 4.B.

6 Based thereon, on a raw average, each Settlement Class Member potentially may
7 recover approximately \$371.17. Gavron Decl. ¶ 9. The amount actually paid to each
8 Settlement Class Member will increase or decrease depending on the actual number of weeks
9 he or she worked during the relevant time period. Finally, funds from any checks that have not
10 been cashed within 180 days of issuance shall be paid to the Watsonville Law Center, as cy
11 pres recipient. *See* Settlement Agreement ¶ 4.E. Should the Court reject the Watsonville Law
12 Center, as a cy pres recipient, then uncashed funds will go to the State Controller's Unclaimed
13 Property Fund. *See* Settlement Agreement ¶ 4.E.

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

16 None of the settlement funds will revert to Defendants. *See* Settlement Agreement ¶ 3.

17 **3. Scope of the Release of Settlement Class Members' Claims**

18 As a condition of participating in this class action settlement, Settlement Class
19 Members shall provide the following limited release:

20 any and all claims and causes of action that were pled in the Action or which
21 could have been pled based on the factual allegations in the Action that arose
during the Class Period (the "Released Claims").

22 *See* Settlement Agreement ¶ 2.A.

23 Moreover, with respect to those Settlement Class Members who performed work for
24 Sunlight in the State of California between September 24, 2019 through the date the court
25 enters preliminary approval of the Class Action Settlement (the "PAGA Aggrieved
26 Employees"), said individuals will provide the following limited release:

27 all PAGA claims based on the Labor Code violations and facts alleged in the SAC
28 in the Action and/or Plaintiff's PAGA notice letter, that arose during the
Settlement Period (the "PAGA Released Claims").

1 See Settlement Agreement ¶ 2.B. Given that the release is tailored only to claims as pled
2 in the Second Amended Complaint and nothing more, the release is appropriately
3 limited.

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

5 As Plaintiff's lawsuit sought unpaid wages, interest, and penalties, the Parties have
6 agreed that ten percent (10%) of the settlement payments to Class Members shall be classified
7 as wages and subject to required withholdings and deductions for payments. Settlement
8 Agreement ¶ 4.D. The remaining ninety percent (90%) of the settlement payments shall be
9 classified as penalties and interest. *Id.* The penalties and interest portion of the settlement
10 payments shall be deemed IRS Form 1099 income and not subject to withholdings and
11 deduction. *Id.*

12 **5. Affirmative Obligations to be Undertaken by Class Members or Class** 13 **Counsel and the Reasons for Any Such Obligations**

14 As stated above, Settlement Class Members do not need to do anything should they
15 wish to receive their share of the settlement funds. In other words, because this is not a claims-
16 made settlement, Settlement Class Members will not be required to make a submission to
17 participate in the settlement. See Settlement Agreement ¶ 4. Thus, this substantially decreases
18 the amount of burden each Settlement Class Member must bear in order to receive their
19 Settlement Class Award. If a Class Member does not wish to take part in this settlement and be
20 bound by the release, the Class Member must submit a request for exclusion. See Settlement
21 Agreement ¶ 9.D.

22 **C. Notice to Class Members**

23 Should the Court grant the instant motion, Defendants will provide the Settlement
24 Administrator with employee contact information, including names, last known addresses,
25 phone numbers, Social Security numbers, dates of employment, and workweek data for all
26 Settlement Class Members within ten (10) business days of preliminary approval. Settlement
27 Agreement ¶ 9.A. Upon receipt of the information and prior to mailing the Notice Packet to
28 Settlement Class Members, the Settlement Administrator shall perform a search based on the

1 National Change of Address Database for information to update and correct for any known or
2 identifiable address changes. Settlement Agreement ¶ 9.B. Within ten (10) business days of
3 receipt of the employee contact information from Defendants, the Settlement Administrator
4 will mail the Notice Packet to Settlement Class Members. *Id.* Any Notice Packet returned to
5 the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent
6 via regular first-class U.S. mail to the forwarding address affixed thereto. Settlement
7 Agreement ¶ 9.C. If no forwarding address is provided, the Settlement Administrator shall
8 perform a skip trace to locate the most current address and resend the Notice Packet within
9 five (5) business days. *Id.* Settlement Class Members to whom Notice Packets are remailed
10 shall have an additional fourteen (14) calendar days after the Response Deadline to opt-out,
11 object, or dispute their settlement award. *Id.*

12 As set forth in the Notice Packet, Settlement Class Members will be allowed to opt out
13 of the settlement by a certain deadline, or object to the settlement. Settlement Agreement,
14 Exhibit A.

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

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

17 The commonality requirement is met when there are questions of law and fact common
18 to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of
19 shared legal issues with divergent legal factual predicates is sufficient, as is a common core of
20 salient facts couple with disparate legal remedies within the class”). Commonality requires
21 only that some common legal or factual questions exist; the plaintiffs need not show that all
22 issues in the litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473
23 (1981). Defendant’s conduct is central to the commonality inquiry. *See City of San Jose v.*
24 *Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13
25 (1971). Where the employer’s conduct is uniformly directed at a class of employees, as it is
26 here, the class wide impact of the Defendant’s policies satisfies the commonality requirement.
27 *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

28 Plaintiff alleges that Defendants, as a matter of its corporate policy, practice, or

1 procedure violated the Labor Code by failing to provide all lawful meal and rest periods,
2 failing to pay all hourly and overtime wages, failing to provide accurate itemized employee
3 wage statements, failing to pay all wages owed upon separation of employment, and failing to
4 timely pay all wages. Declaration of Ofelia Ortega (“Ortega Decl.”) ¶ 3. In other words,
5 Plaintiff contends that she was subjected to the same policy and practice as other Settlement
6 Class Members and that her claims are typical to those of the Settlement Class.

7 Moreover, Plaintiff does not have any interests adverse to the Settlement Class, nor
8 have any such issues been raised or presented. Ortega Decl. ¶ 4. Plaintiff has taken all
9 necessary steps to represent the interests of the Settlement Class, and by providing information
10 and documents to Plaintiff’s counsel. *Id.* ¶ 5. For such reasons, Plaintiff has adequately
11 represented the Settlement Class Members and will continue to do so.

12 **2. Class Counsel Has Adequately Represented the Class and Has**
13 **Experience with Wage and Hour Class Actions**

14 From the inception of the case, Class Counsel have zealously represented the interests
15 of the class. The settlement was obtained for the benefit of the class, as opposed to the
16 individual Class Representative. Further, Class Counsel have been approved as class counsel
17 on a number of prior cases, have litigated numerous other class action cases, and are
18 competent to represent the class. Fitzpatrick Decl. ¶ 6; Franklin Decl. ¶ 5-6; Lee Decl. ¶¶ 7-9;
19 Gavron Decl. ¶¶ 26-32.

20 **E. Costs and Fees**

21 **1. Attorneys’ Fees and Costs**

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

entire burden alone.” *Vincent*, 557 F.2d at 769.

The Common Fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits, she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” The reasons for applying the common fund doctrine include: “fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.” *Id.*

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

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

1 The Parties have agreed to a payment of a maximum of one-third of the Gross
2 Settlement Amount, or \$66,666.67, for payment to Class Counsel as attorneys' fees.
3 Settlement Agreement ¶ 5. The Parties have agreed to a payment of the foregoing attorneys'
4 fees and, thus, this payment should be presumed to be fair. Further, the parties have agreed to
5 reimbursement of Class Counsel's litigation costs up to \$10,000.00. *Id.* Class Counsel have, at
6 their own risk, expended costs, for example, to file this instant action, effect service of process,
7 pay mediation fees, and pay other litigation-related costs. Class Counsel will submit further
8 information for evaluation by the Court to the extent the Settlement is preliminarily approved.

9 Based on the foregoing, the Court should preliminarily approve the attorneys' fees and
10 costs being requested by the Parties.

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

12 Class Representative Ofelia Ortega requests an enhancement of \$5,000.00. Settlement
13 Agreement ¶ 6. The Class Representative met and conferred with Class Counsel on a number
14 of occasions to discuss the case, provided documents and information to Class Counsel, and
15 reviewed the Settlement Agreement. As part of her duties as the Class Representative, Plaintiff
16 provided invaluable information, evidence, and documents that resulted in this settlement.
17 Ortega Decl. ¶ 5. In addition to the invaluable services that she provided, Plaintiff also took a
18 significant risk, both professionally and monetarily, in acting as the Class Representative and
19 seeking benefits on behalf of the Settlement Class. Because the claims alleged by the Class
20 Representative involved the payment of costs to the prevailing party, Plaintiff could have
21 possibly faced paying the costs of Defendants, had she not prevailed in this action.

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

1 **3. Settlement Administration Fees**

2 The Parties have agreed to a maximum payment of \$20,000.00 to the Settlement
3 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
4 settlement, which is to be paid out of the Gross Settlement Amount. Settlement Agreement ¶
5 7. Phoenix Settlement Administrators is a well-recognized class action settlement
6 administrator. The quote provided for \$8,2750.00 is significantly less than provided for in the
7 Settlement Agreement and thus should be preliminarily approved. The Parties believe that the
8 administration fee is reasonable and should be approved.

9 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
10 **PRELIMINARY APPROVAL**

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

18
19 Date: September 6, 2022

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

20
21 By: 
22 B. James Fitzpatrick
23 Larry W. Lee
24 Attorneys for Plaintiff,
25 OFELIA ORTEGA, on behalf of herself
26 and all similarly aggrieved employees
27
28

1 **PROOF OF SERVICE**

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

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

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

10 On September 6, 2022, I served the following document(s) described as:

- 11 1. **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
- 12 **APPROVAL OF CLASS ACTION SETTLEMENT; AND MEMORANDUM OF**
- 13 **POINTS AND AUTHORITIES IN SUPPORT**
- 14 2. **DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFF'S**
- 15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
- 16 **SETTLEMENT**
- 17 3. **DECLARATION OF B. JAMES FITZPATRICK IN SUPPORT OF**
- 18 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**
- 19 **ACTION SETTLEMENT**
- 20 4. **DECLARATION OF LAURA L. FRANKLIN IN SUPPORT OF PLAINTIFF'S**
- 21 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
- 22 **SETTLEMENT**
- 23 5. **DECLARATION OF OFELIA ORTEGA IN SUPPORT OF PLAINTIFF'S**
- 24 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
- 25 **SETTLEMENT**
- 26 6. **DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S**
- 27 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
- 28 **SETTLEMENT**
7. **[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS**
ACTION SETTLEMENT AND SETTING A SETTLEMENT FAIRNESS
HEARING

on the interested parties in this action as follows:

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

15 I declare under penalty of perjury under the laws of the State of California that the above
16 is true and correct. Executed on September 6, 2022, at Los Angeles, California.

17 
18 Erika Mejia