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

JAMES PEVEY, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

LUMBER CITY CORP., a California
corporation d/b/a DIY HOME CENTER;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: CIVDS2010240

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

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

Date: November 19, 2021

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: June 2, 2020

FAC Filed: January 29, 2021

SAC Filed: July 23, 2021

Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 19, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable David Cohn, judge presiding, in Department S-26 of the above referenced Court, located at 247 W. Third Street, San Bernardino, California 92415, Plaintiffs James Pevey and Anne Peterson (together, “Plaintiffs”) will seek an Order: (1) approving the Joint Stipulation of Class Action Settlement (“Agreement” or “Settlement Agreement”) in this matter; (2) conditionally certifying the following Class for settlement purposes only: “all current and former non-exempt employees of Defendant in the State of California who earned wages at any time between April 6, 2016, through July 31, 2021” (the “Class”) and the Exempt Class: “all current and former exempt employees of Defendant in the State of California who earned wages at any time between April 6, 2018, through July 31, 2021” (the “Exempt Class”); (3) appointing Plaintiffs James Pevey and Anne Peterson as Class Representatives and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C.; William L. Marder of Polaris Law Group; and David J. Lee of David Lee Law, APC as Class Counsel; (4) preliminarily approving the Settlement Agreement and the total Gross Settlement Amount of One Million One Hundred Eighty Thousand Dollars (\$1,180,000.00); (5) finding on a preliminary basis that the Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative Enhancement Payment, Class Counsel Award, Settlement Administration Costs, and the allocation of payments to Class Members that could ultimately be given final approval by this Court; (6) approving the Notice of Class Action Settlement to be sent to Class Members; (7) appointing Phoenix Settlement Administrators as the Settlement Administrator; and (8) setting the matter for a Final Fairness and Final Approval hearing.

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

The basis for this Motion, filed without any opposition from Defendant Lumber City Corp. (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the

1 procedures proposed by the Parties are adequate to ensure the opportunity of Class Members to
2 participate in, opt-out of, or object to the settlement. This Motion will be based on the attached
3 Memorandum of Points and Authorities, the Settlement Agreement and the proposed Notice of
4 Class Action Settlement, and the supporting Declarations of Larry W. Lee, Max W. Gavron,
5 William Marder, David J. Lee, James Pevey, and Anne Peterson, and upon the oral arguments of
6 counsel (should there be any) and on the complete records and file herein.

7
8 DATED: October 27, 2021

DIVERSITY LAW GROUP, P.C.

9
10 By: 
11 Larry W. Lee
12 Max W. Gavron
13 Attorneys for Plaintiffs, the Class, and Aggrieved
14 Employees
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1 **I. INTRODUCTION**

2 Plaintiffs James Pevey and Anne Peterson (together, “Plaintiffs”) bring class,
3 representative, and individual action claims against Defendant Lumber City Corp. (“Defendant”)
4 under the California Labor Code (Plaintiffs and Defendant shall be jointly referred to as the
5 “Parties”). Plaintiffs allege in this lawsuit that Defendant had a policy and practice of failing to
6 provide proper meal and rest breaks and issuing defective wage statements in violation of Labor
7 Code §§ 201-203, 226, 226.7, 512, and 2698, *et seq.*, the Private Attorneys General Act
8 (“PAGA”).¹ Plaintiffs now move for preliminary approval of the proposed class and
9 representative settlement after thorough investigation of the claims alleged, mediation and
10 extended negotiations.

11 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
12 to the claims alleged in the operative Complaint and engaged in a thorough study of the legal
13 principles applicable to the claims asserted against Defendant. Defendant produced documents
14 for Plaintiffs’ review, including its employee handbook, meal and rest period policies, and copies
15 of wage statements issued to putative class members. Defendant also provided data related to the
16 number of putative class members, wage statements issued to each class member, and shifts
17 worked by each class member. Thereafter, the Parties commenced settlement negotiations
18 through a private mediator and were ultimately able to reach the current settlement after
19 continued negotiations conducted post-mediation. **Significantly, this entire amount is non-**
20 **reversionary, such that no monies will revert to Defendant.**

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

23 Although Plaintiffs and their counsel believe that they can prevail on class certification,
24 as well as on the merits, Plaintiffs and their counsel recognize the inherent risks in drawn-out
25 litigation and the specific risks that a class might not be certified and/or that Plaintiffs could fail
26 _____

27 ¹ Plaintiff Anne Peterson also brought individual claims against Defendant for wrongful
28 termination and violations of the Fair Employment and Housing Act (“FEHA”), which the
Parties resolved separately through a confidential individual settlement agreement.

1 to establish liability. Defendant denies the allegations in the operative Complaint and believes
2 that it can prevail at trial. Based on their own independent investigation and evaluation, the
3 Parties and their respective counsel are of the opinion that the settlement for the consideration
4 and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in
5 the best interests of the Class and Defendant in light of all known circumstances and the
6 expenses and risks inherent in litigation.

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

9 **II. DISCUSSION**

10 On May 21, 2020, James Pevey (“Pevey”) filed a notice with the LWDA alleging that
11 Defendant violated Labor Code § 226(a), pursuant to Labor Code § 2699 (“Pevey PAGA
12 Notice”). The Pevey PAGA Notice alleged that Defendant failed to identify the pay period
13 start and end dates, as well as the applicable hourly rates of pay, on wage statements issued to
14 employees. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2.

15 On June 2, 2020, Pevey filed an initial complaint in the Superior Court of the State of
16 California, County of San Bernardino. Pevey’s initial complaint alleges causes of action for (1)
17 violation of Labor Code § 226(a), and (2) violation of Labor Code § 2698, *et seq. Id.* ¶ 3.

18 On September 1, 2020, Anne Peterson (“Peterson”) filed a notice with the LWDA
19 alleging that Defendant violated Labor Code §§ 201-203, 226, and 226.7, pursuant to Labor
20 Code § 2699 (“Peterson PAGA notice”). The Peterson PAGA notice alleged that Defendant
21 failed to provide compliant rest periods and wage statements that identified accurate gross and
22 net wages earned and pay period start and end dates to employees. *Id.* ¶ 4.

23 On September 9, 2020, Peterson filed an initial complaint in the Superior Court of the
24 State of California, County of El Dorado. Peterson’s initial complaint alleges (1) violation of
25 Labor Code § 226.7; (2) violation of Labor Code § 226; (3) violation of Labor Code §§ 201-
26 203; and (4) violation of Business and Professions Code § 17200, *et seq. Id.* ¶ 5.

27 On or about October 2, 2020, Peterson filed a first amended complaint Superior Court of
28 the State of California, County of El Dorado. Peterson’s first amended complaint alleges

1 violation of (1) Labor Code § 226.7; (2) violation of Labor Code § 226; (3) violation of
2 Business and Professions Code § 17200, *et seq.*; and (4) violation of the PAGA, Labor Code §
3 2698, *et seq.* *Id.* ¶ 6.

4 On January 29, 2021, Pevey and Peterson jointly filed a first amended complaint in the
5 Superior Court of the State of California, County of San Bernardino. The joint first amended
6 complaint adds Peterson as a plaintiff to the action and alleges, among other things, (1)
7 violation of Labor Code § 226.7; (2) violation of Labor Code § 226; (3) violation of Business
8 and Professions Code § 17200, *et seq.*; and (4) violation of the PAGA, Labor Code § 2698, *et*
9 *seq.* Separately, Peterson dismissed her action in the El Dorado County Superior Court without
10 prejudice after the filing of the First Amended Complaint. *Id.* ¶ 7.

11 On or about March 10, 2021, Peterson filed a supplemental PAGA notice alleging that
12 Defendant violated Labor Code §§ 201-203, 226, 226.7, 512, 1174, 1198, 1199. Peterson's
13 supplemental PAGA notice alleged that Defendant failed to provide compliant meal periods
14 and maintain accurate time records. *Id.* ¶ 8.

15 On April 16, 2021, Plaintiffs moved for leave to file a Second Amended Complaint,
16 which alleged additional claims premised on the California Supreme Court's holding in *Donohue*
17 *v AMN Services, LLC*, 2021 WL 728871 (Feb. 25, 2021). *Id.* ¶ 9. On June 17, 2021, the Court
18 granted Plaintiffs' Motion for Leave. *Id.*

19 On July 23, 2021, Plaintiffs filed the operative Second Amended Complaint in this
20 action (the "Complaint"). The Complaint alleges (1) violation of Labor Code § 226.7; (2)
21 violation of Labor Code §§ 226.7 and 512; (3) violation of Labor Code § 226; (4) violation of
22 Business and Professions Code § 17200, *et seq.*; (5) violation of the PAGA, Labor Code §
23 2698, *et seq.*; as well as Peterson's individual claims under the FEHA. *Id.* ¶ 10. Peterson's
24 FEHA Claims have been separately settled through an Individual Settlement Agreement and
25 Release, which contains a confidentiality provision. *Id.* As alleged in the Complaint, Plaintiffs
26 seek to represent the Class Members and other aggrieved employees. Plaintiffs further seek
27 damages, penalties, interest, attorneys' fees, and costs. *Id.*

28 Following the filing of the complaint, the Parties engaged in formal and informal

1 discovery. Pevey propounded requests for production of documents and interrogatories, to which
2 Defendant responded. *Id.* ¶ 11. Defendant propounded requests for production of documents and
3 interrogatories to Plaintiffs. *Id.* Defendant also produced documents including Plaintiffs’
4 personnel files, Defendant’s employee handbook, its meal and rest period policies, copies of
5 wage statements issued to putative class members, schedules, and other documents. *Id.* This
6 information allowed Plaintiffs to conduct a full damage analysis. *Id.*

7 On December 2, 2020, the Parties engaged in an all-day mediation session with neutral
8 Steven G. Pearl, Esq. *Id.* ¶ 12. Although the Parties did not reach an agreement at the mediation,
9 they continued to engage in arm’s length negotiations over the course of several months, and
10 continued litigating, including Plaintiff’s Motion for Leave to file a Second Amended Complaint.
11 *Id.* The Parties ultimately reached an agreement in principle with the assistance of the mediator,
12 and finalized the terms of the agreement in the Joint Stipulation of Class Action Settlement, a
13 copy of which is attached to the Declaration of Max W. Gavron. *Id.*, Ex. A.

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

18 Approval of class action settlements involves a two-step process. First, counsel
19 submits the proposed terms of settlement and the court makes a preliminary
20 fairness evaluation. If the preliminary evaluation of the proposed settlement does
21 not disclose grounds to doubt its fairness or other obvious deficiencies, such as
22 unduly preferential treatment of class representatives or of segments of the class,
23 or excessive compensation for attorneys, and appears to fall within the range of
24 possible approval, the court should direct that notice...be given to the class
25 members of a formal fairness hearing, at which arguments and evidence may be
26 presented in support of and in opposition to the settlement.
(Fed. Jud. Ctr., 3rd ed. 1995).

27 Thus, the preliminary approval by the trial court is simply a conditional finding that the
28 settlement appears to be within the range of acceptable settlements. 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 procedures for the parties’ submission of a proposed settlement for preliminary approval by the court also are discussed in 4 *Newberg on Class Actions*:

When the parties to an action reach a monetary settlement, they will usually prepare and execute a joint stipulation of settlement, which is submitted to the court for preliminary 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.

Id. § 11.24.

Here, the Parties have reached such an agreement and have submitted to this Court in connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement reached among the Parties. The Settlement Agreement sets forth all terms of the agreement reached by the Parties, which include, among other things, the method for calculating the Class Members’ individual settlements.

The parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class—conditional upon final approval of the settlement. “[P]re-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) (although the settlement was reached before any “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals”). 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

1 hearing. These conditional rulings may approve a temporary settlement class, the
2 proposed settlement, and the class counsel's application for fees and expenses.

3 *4 Newberg on Class Actions* § 11.26.

4 In addition to such terms as class identification, settlement amount and payment
5 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant
6 to which the Parties stipulate to the Court's provisional certification of the Class for the purposes
7 of this settlement only. Settlement Agreement ¶ 100.

8 **A. Proposed Class Definition**

9 The current settlement is being settled on behalf of a Class of "all current and former
10 non-exempt employees of Defendant in the State of California who earned wages at any time
11 between April 6, 2016, through July 31, 2021," and an Exempt Class of "all current and former
12 exempt employees of Defendant in the State of California who earned wages at any time
13 between April 6, 2018, through July 31, 2021." *See* Settlement Agreement ¶¶ 3, 4.

14 **B. Settlement Terms and Evaluation**

15 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
16 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
17 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
18 *re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
19 judgment for that of the proponents, particularly where, as here, settlement has been reached
20 with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
21 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp.
22 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
23 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*
24 *& Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

25 While the recommendations of counsel proposing the settlement are not conclusive, the
26 Court can properly take them into account, particularly where, as here, they have been involved
27 in formal and informal discovery and negotiations for some period of time, appear to be
28 competent, have experience with this type of litigation, and have exchanged substantial evidence

1 from the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural Telecomms.*
2 *Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length negotiation process is
3 preserved, however, a strong initial presumption of fairness attaches to the proposed
4 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who
5 are most closely acquainted with the facts of the underlying litigation”).

6 Here, both Plaintiffs’ and Defendant’s counsel have a great deal of experience in wage
7 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
8 number of wage and hour class actions and have extensive litigation experience. Gavron Decl. ¶¶
9 39, 46; Declaration of Larry W. Lee (“LWL Decl.”) ¶¶ 3, 9; Declaration of William L. Marder
10 (“Marder Decl.”) ¶¶ 12-13; Declaration of David J. Lee (“DJL Decl.”) ¶¶ 4; 9-10. Each side has
11 apprised the other of their respective factual contentions, legal theories, and defenses, resulting in
12 negotiations taking place between the Parties. Gavron Decl. ¶12.

13 Based on the class data provided by Defendant, Plaintiffs estimated that Defendant would
14 face potential liability of up to approximately \$16 million for Plaintiffs’ class and PAGA claims
15 if Plaintiffs succeeded at trial. Gavron Decl. ¶ 20. This number is based upon an analysis of the
16 data provided by Defendant regarding the putative class. Specifically, the breakdown for the
17 approximate damages/penalties for each class claim is as follows:

- 18 • \$1.85 million in waiting time penalties for unpaid meal and rest period premiums,
19 calculated based on payroll data provided by Defendant for approximately 529
20 former employees with an average rate of pay of approximately \$14.61;
- 21 • \$2.39 million of premium pay owed for missed or rounded meal periods,
22 calculated based on an average pay rate of Class Members’ of \$14.61, over
23 327,088 shifts at issue during the Class Period, and assuming 50% violation rate
24 given Defendant’s rounding policy;
- 25 • \$2.39 million of premium pay owed for missed rest periods, calculated based on
26 an average pay rate of Class Members’ of \$14.61, over 327,088 shifts during the
27 Class Period, which assumes a 50% violation rate;
- 28 • \$4.41 million for Labor Code § 226(e) penalties for wage statement violations for

1 non-exempt employees based on 44,130 wage statements issued during the Class
2 Period, and \$327,300 for Labor Code § 226(e) penalties for wage statement
3 violations for exempt employees based on 3,273 wage statements issued during
4 the Exempt Class Period.

5 (*Id.*) This amounts to a total of approximately \$11.37 million if Plaintiffs were to prevail on all
6 the class claims, including the Court awarding waiting time penalties. (*Id.*)

7 With respect to potential liability of Plaintiffs' PAGA claims, Plaintiffs estimated that
8 Defendant could face civil penalties of up to \$4.7 million in PAGA penalties premised on 47,403
9 pay periods, assuming that the Court did not "stack" penalties.² *Id.* ¶ 21.

10 Based thereon, the collective total amount of class and PAGA recovery is approximately
11 \$16 million. *Id.* ¶ 22.

12 Even assuming Plaintiffs ultimately prevail on their PAGA claims, the Court still has
13 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can
14 decline to award PAGA penalties where "if, based on the facts and circumstances of the
15 particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive,
16 or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks*
17 *Corp.* (2018) 30 Cal. App. 5th 504, while the plaintiff prevailed on his PAGA claim upon trial,
18 the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good
19 faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court of Appeal found
20 such reduction to be proper. *Id.* at p. 539.

21 Although Plaintiffs believe in the merits of the alleged claims and maintain that there is
22 no reason for reducing PAGA penalties, Plaintiffs are aware that Defendant may raise defenses
23 to the wage statement claims and that with respect to the reduction of PAGA penalties, it could
24 be persuasive to the Court. Gavron Decl. ¶ 25. Thus, even if Plaintiffs were to successfully prove
25

26 ² Plaintiff's damages analysis, for purposes of settlement, contemplated a single penalty awarded
27 per pay period, regardless of the number of alleged Labor Code violations, given that some of
28 Plaintiffs' claims were premised on California Supreme Court precedent handed down during the
midst of this case.

1 their claims at trial, there is a possibility that the Court may only award a small percentage of
2 PAGA penalties, as the Court has discretion to do so.

3 The Gross Settlement Amount was premised with these risks in mind, associated with the
4 possibility of the Court significantly reducing Plaintiffs' PAGA penalties, along with other
5 attendant risks, even if Plaintiffs were to prevail at trial. *Id.*

6 Further, Defendant denies liability as to all of Plaintiffs' claims and it has raised several
7 defenses that presented risk. Gavron Decl. ¶ 23. In this regard, Defendant asserts that it has
8 maintained lawful policies and practices in place throughout the class period in relation to
9 Plaintiffs' claims, including that it has provided opportunities to take meal and rest periods and
10 that its meal and rest period policies and practices were facially compliant. Defendant also
11 contends that Plaintiff cannot prove willfulness and thus it would not be subject to waiting time
12 penalties under Labor Code § 203. Defendant further maintains that it would be unjust for the
13 Court to award maximum PAGA penalties as it has made good faith efforts to comply with the
14 Labor Code.

15 Defendant argued that waiting time penalties are not available in this case because of the
16 Court of Appeal's ruling in *Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal. App. 5th 444, 474
17 (2019), *as modified on denial of reh'g* (Oct. 10, 2019), *petition for review granted*, 455 P.3d 704
18 (2020). Gavron Decl. ¶ 24. There, the court held that waiting time penalties are not available
19 where they are derivative of another alleged violation of the Labor Code. The Court of Appeal's
20 holding is currently being reviewed by the California Supreme Court. This further impacted the
21 evaluation and increased the uncertainty surrounding the potentially available penalties. Further
22 supporting its position, Defendant argued, was the timing of the decision by the California
23 Supreme Court in *Donohue*. Because the decision came down during the pendency of this
24 lawsuit, Defendant argued that waiting time penalties were not appropriate because its alleged
25 violations were not willful or intentional, and that *Donohue* should not be applied retroactively in
26 any event. If Defendant were successful in these arguments, it would drastically reduce the
27 potentially available penalties.

28 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the

1 inherent risks of litigation, including the substantial risks relative to class certification and the
2 merits of the claims, the costs of pursuing such litigation, and the risks associated with the
3 Court's discretion to reduce PAGA penalties. The settlement is the result of extensive arm's-
4 length negotiations between the Parties and their counsel and was facilitated by an experienced
5 and neutral mediator.

6 Although Plaintiffs believe that a class can be certified, Plaintiffs also believe in the
7 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiffs
8 involved in not prevailing on one or more of the causes of action or theories alleged in the
9 operative Complaint, the possibility of non-certification, and the potential for appeals. Gavron
10 Decl. ¶ 28. These risks on class certification are compounded by the California Supreme Court's
11 holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained
12 class certification and subsequently prevailed at trial after eight years of litigation, but the
13 judgment and the certification ruling were reversed by the California Supreme Court after an
14 additional five years of litigation. The case was remanded to superior court where class
15 certification was denied and plaintiffs' subsequent appeal also was denied.

16 Indeed, numerous courts have held that **gross** settlements approximating between only 8
17 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
18 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
19 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
20 settlement amounting to only a fraction of the potential recovery does not per se render the
21 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
22 assessed relative to risks of pursuing the litigation to judgment"; noting that whether the
23 settlement is fair and adequate depends on the "the difficulties in proving the case");
24 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
25 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
26 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
27 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
28 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 Gross Settlement Amount is fair and reasonable as it is approximately 7.3% of the potential recovery of Plaintiffs' class and PAGA claims if Plaintiffs were to fully succeed at trial. Gavron Decl. ¶ 30. If the Court reduced the PAGA penalties to 10% like in *Carrington*, the percentage of recovery compared to the available penalties would be greater.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class Action Settlement, should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement. Settlement Agreement ¶ 70. Moreover, as set forth in the Notice Packet, Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the Settlement Agreement. Settlement Agreement ¶ 72.

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 One Million One Hundred Eighty Thousand Dollars (\$1,180,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ 19. Defendant will fund the Gross Settlement Amount in six equal installments over six months, with the first installment to be paid a Qualified Settlement Fund within 30 days of the Court granting preliminary approval. *Id.* ¶ 53.

The Net Settlement Amount, calculated after deduction of attorneys' fees (up to \$393,333.33), costs (up to \$25,000.00), Class Representative Enhancement Payment (up to \$10,000.00 each or \$20,000.00 total), payment to the LWDA (\$56,250.00), and Settlement Administration Costs (up to \$11,500.00), is estimated to be approximately \$673,916.67. The Settlement Administrator will allocate the Individual Settlement Payments by distributing the Net Settlement Amount to the Class and Exempt Class on a pro-rata basis from two funds. The Net Settlement Amount will be split into a Net Settlement Class Amount, a Net Settlement Exempt Class Amount and a PAGA Amount. The PAGA Amount will be 25% of the total

1 amount allocated for the satisfaction of claims for civil penalties under the PAGA, currently
2 estimated to total Eighteen Thousand Seven Hundred Fifty Dollars (\$18,750.00). The Net
3 Settlement Class amount will be 97% of the remaining Net Settlement Amount after deduction of
4 the PAGA Amount. The Net Settlement Exempt Class Amount will be 3% of the remaining Net
5 Settlement Amount after deduction of the PAGA Amount. *Id.* ¶ 58.

6 Each Participating Class Member who does not opt-out of the Settlement will be awarded
7 a portion of the Net Settlement Amount on a pro-rata basis, based upon the number of pay
8 periods each respective Participating Class Member worked during the Class Period, or Exempt
9 Class Period. *Id.* ¶ 58. Even if a Class Member decides to opt-out, they will still receive a pro
10 rata portion of the PAGA Amount. *Id.*

11 Based thereon, on a raw average, each Participating Class Member may potentially
12 recover approximately \$725.42 based on a raw average. Gavron Decl. ¶ 33. The amount actually
13 paid to each Participating Class Member may increase or decrease depending on the actual
14 number of pay periods he or she worked during the Class Period, Exempt Class Period, and/or
15 the number of timely Requests for Exclusion received. *Id.*

16 Finally, the terms of the settlement provide that uncashed checks (upon the expiration
17 date) shall be distributed to the Legal Aid at Work, a non-profit legal services organization that
18 provides legal services and policy advocacy for and on behalf of low-income workers.
19 Settlement Agreement ¶ 76.

20
21 **2. Whether, and Under What Circumstances, Amounts Available for
Payment in Settlement Might Not Be Paid to Class Members or Might
Revert to the Defendants**

22 None of the settlement funds will revert to Defendant. Settlement Agreement ¶¶ 52, 76.

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

24 As a condition of participating in this settlement, members of the Class shall waive and
25 release “a. All claims, including penalties, costs, and attorneys’ fees related thereto, that could
26 have been brought under the factual allegations made in the operative Complaint, including but
27 not limited to violations of Labor Code §§ 201-203, 226, 226.7, 512, and 2698, *et seq.* and
28 Business and Professions Code § 17200, *et seq.*, that accrued from April 6, 2016, through July

31, 2021; b. All claims for penalties under the California Labor Code Private Attorneys General Act of 2004, including costs and attorneys’ fees related thereto, predicated on the violation of Labor Code §§ 201-203, 226, 226.7, and 512, based on the facts as alleged in the operative Complaint that accrued from April 6, 2016, through July 31, 2021.” Settlement Agreement ¶¶ 28, 80. This release is appropriately limited, as it only applies during the time period of April 6, 2016, through July 31, 2021, and only applies to the claims alleged.

The Exempt Class’s release is similarly tailored to: “All claims, including penalties, costs, and attorneys’ fees related thereto, that could have been brought under the factual allegations made in the operative Complaint for violations of Labor Code § 226, and 2698, *et seq.* that accrued from April 6, 2018, through July 31, 2021. b. All claims for penalties under the California Labor Code Private Attorneys General Act of 2004, including costs and attorneys’ fees related thereto, predicated on the violation of Labor Code § 226, based on the facts as alleged in the operative Complaint that accrued from April 6, 2018, through July 31, 2021.” Settlement Agreement ¶ 29.

4. Tax Treatment of Settlement Amounts

As Plaintiffs’ lawsuit sought unpaid wages and penalties, the Parties have agreed that the Individual Settlement Payments to Participating Class Members shall be classified 20% as unpaid wages, for which an IRS Form W-2 will be distributed, and 80% as civil and statutory penalties, for which an IRS Form 1099 will be distributed. Settlement Agreement ¶ 59. Individuals will also receive a portion of the PAGA Amount, which will be allocated as 100% penalties. *Id.* The employer’s share of taxes for wage payments to Participating Class Members will be paid by Defendant separately from and in addition to the Gross Settlement Amount. *Id.*

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

As stated above, Class Members do not need to do anything should they wish to receive their share of the settlement funds. Thus, this substantially decreases the amount of burden each Class Member must bear in order to receive their settlement share. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit

1 an exclusion request. Settlement Agreement ¶¶ 31, 70.

2 **C. Notice to Class Members**

3 Within seven (7) days of the preliminary approval of this settlement, Defendant will
4 confidentially transmit to the Settlement Administrator a spreadsheet containing each Class
5 Member's full name, employee number, most recent mailing address, Social Security Number,
6 and number of pay periods worked during the period of April 6, 2016, through July 31, 2021
7 ("Class List and Data"). Settlement Agreement ¶¶ 8, 65. Upon receipt of the information and
8 prior to mailing the Notice of Class Action Settlement ("Notice Packet"), the Settlement
9 Administrator shall perform a search based on the National Change of Address Database for
10 information to update and correct for any known or identifiable address changes. *Id.* ¶ 67. Within
11 ten (10) business days of receipt of the Class List and Data, the Settlement Administrator shall
12 mail the Notice Packet to all Class Members. *Id.* ¶ 66. The Settlement Administrator will re-mail
13 the Notice Packet to Class Members for whom the notice is returned with a forwarding address
14 and perform a skip-trace or other search on Class Members and re-mailing for whom a Notice
15 Packet is returned as undeliverable. *Id.* ¶ 69.

16 As set forth in the Notice Packet, Class Members will be allowed to opt out of the
17 settlement by a certain deadline, or object to the settlement in writing or by appearing at the final
18 approval hearing. Settlement Agreement ¶¶ 70, 72.

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

20 **1. Class Representatives' Claims are Typical of the Class**

21 The commonality requirement is met when there are questions of law and fact common to
22 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
23 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
24 facts couple with disparate legal remedies within the class"). Commonality requires only that
25 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
26 litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981).
27 Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior*
28 *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).

Plaintiffs allege that Defendant, as a matter of its corporate policy, practice, or procedure violated the Labor Code by failing to provide proper meal and rest periods and issuing inaccurate wage statements. Declaration of James Pevey (“Pevey Decl.”) ¶ 3; Declaration of Anne Peterson (“Peterson Decl.”) ¶ 3. In other words, Plaintiffs were subjected to the same policy and practice as other Class Members. Thus, Plaintiffs’ claims are typical to those of Class Members.

Moreover, Plaintiffs do not have any interests adverse to the Class, nor have any such issues been raised or presented. Pevey Decl. ¶ 4; Peterson Decl. ¶ 4. Plaintiffs have taken all necessary steps to represent the interests of the Class, and by providing information and documents to Plaintiffs’ counsel. Pevey Decl. ¶ 5; Peterson Decl. ¶ 5. For such reasons, Plaintiffs have adequately represented the Class Members and will continue to do so.

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

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 has been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the class. Gavron Decl. ¶¶ 39, 46; LWL Decl. ¶¶ 3, 9; Marder Decl. ¶¶ 12-13; DJL Decl. ¶¶ 4; 9-10.

E. Costs and Fees

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 benefits to Class Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *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 this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs

1 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
2 burden alone.” *Vincent*, 557 F.2d at 769.

3 The common fund doctrine is predicated on the principle of preventing unjust
4 enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits,
5 he may require the passive beneficiaries to compensate those who created the fund. Both
6 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
7 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
8 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
9 been applied “consistently in California when an action brought by one party creates a fund in
10 which other persons are entitled to share.” The reasons for applying the common fund doctrine
11 include: “fairness to the successful litigant, who might otherwise receive no benefit because his
12 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
13 the others who are entitled to share in the fund and who should bear their share of the burden of
14 its recovery; encouragement of the attorney for the successful litigant who will be more willing
15 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
16 if he is assured that he will be properly and directly compensated should his efforts be
17 successful.” *Id.*

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

25 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
26 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
27 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
28

1 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
2 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

3 The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement
4 Amount (or \$393,333.33) for payment to Class Counsel as attorneys’ fees. The Parties have
5 agreed to a payment of the foregoing attorney’s fees and, thus, this payment should be presumed
6 to be fair.

7 Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs in
8 an amount up to \$25,000.00. Class Counsel has expended costs at their own risk, for example, to
9 file this instant action, effect service of process, pay the mediation fee, and pay of other
10 litigation-related costs.

11 Based on the foregoing, the Court should preliminarily approve the attorneys’ fees and
12 costs being requested by the Parties.

13 **2. Proposed Payment to the Class Representatives**

14 Class Representatives James Pevey and Anne Peterson each request an enhancement of
15 \$10,000.00. Settlement Agreement ¶¶ 12, 55. The Class Representatives met and conferred with
16 Class Counsel on a number of occasions to discuss the case, provided documents and
17 information to Class Counsel, and reviewed the Settlement Agreement. As part of their duties as
18 Class Representatives, Plaintiffs provided invaluable information and documents that resulted in
19 this settlement. Pevey Decl. ¶ 5; Peterson Decl. ¶ 5. In addition to the invaluable services that
20 they provided, Plaintiffs also took a significant risk, both professionally and monetarily, in acting
21 as Class Representatives and seeking benefits on behalf of the Class. Because the claims alleged
22 by the Class Representatives involved the payment of costs to the prevailing party, Plaintiffs
23 could have possibly faced paying the costs of Defendant had they not prevailed in this action.

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

1 they have to face the potential for retaliation and not getting future employment had they filed a
2 public lawsuit.

3 **3. Settlement Administration Fees**

4 The Parties have agreed to an estimated payment of \$11,500.00 to the Settlement
5 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
6 settlement. Settlement Agreement ¶¶ 34, 35, 56. Phoenix Settlement Administrators is a well-
7 recognized class action settlement administrator. The Parties believe that the administration fee
8 is reasonable and should be approved.

9 **F. Notice to the LWDA**

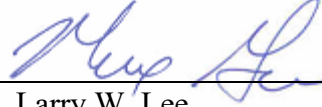
10 Concurrently with this filing, Plaintiffs submitted the Motion and settlement agreement to
11 the LWDA. Gavron Decl. ¶ 52.

12 **III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
13 **PRELIMINARY APPROVAL**

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

21
22 DATED: October 27, 2021

DIVERSITY LAW GROUP, P.C.

23
24 By: 

Larry W. Lee

25 Max W. Gavron

26 Attorneys for Plaintiffs, the Class, and Aggrieved
27 Employees
28