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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 FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 2, 2022

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

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 2, 2022, at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable David Cohn, judge presiding, in Department S-26
4 of the above referenced Court, located at 247 W. Third Street, San Bernardino, California 92415,
5 Plaintiffs James Pevey and Anne Peterson (together, “Plaintiffs”) will seek an Order: (1) granting
6 final approval to the Joint Stipulation of Class Action/PAGA Settlement (“Agreement” or
7 “Settlement Agreement”) in this action; (2) approving distribution of the settlement funds to the
8 Class Members pursuant to the terms of the Settlement Agreement; (3) approving Plaintiffs’
9 request for an award of the Class Representative Enhancement Payment of \$10,000.00 to each
10 Plaintiff pursuant to the terms of the Settlement Agreement; (4) approving Class Counsel’s
11 request for an award of attorneys’ fees of one-third of the \$1,180,000.00 Gross Settlement
12 Amount, and reimbursement of litigation costs of \$20,319.57, pursuant to the terms of the
13 Settlement Agreement; (5) approving Plaintiffs’ request for payment of the settlement
14 administration costs to Phoenix Settlement Administrators in the amount of \$11,500.00 pursuant
15 to the terms of the Settlement Agreement; (6) approving Plaintiffs’ request for payment to the
16 California Labor and Workforce Development Agency for \$56,250.00 pursuant to the terms of
17 the Settlement Agreement; and (7) entering final judgment as to all members of the Class in this
18 action.

19 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
20 provides for court approval of the settlement of a purported class action and allows the Court to
21 grant final certification of a class for settlement purposes. In light of the overwhelmingly positive
22 response, as shown by the lack of objections and opt-outs to the settlement, there is no question
23 that the settlement is fair, reasonable, and adequate and thus should be granted final approval.

24 This Motion will be based on the attached Memorandum of Points and Authorities and
25 the supporting Declarations of Larry W. Lee, Max W. Gavron, William Marder, David J. Lee,
26 James Pevey, and Anne Peterson, and Jarrod Salinas of Phoenix Settlement Administrators, upon
27 the oral arguments of counsel (should there be any), and on the complete records and file herein.

28 ///

1 DATED: April 7, 2022

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Max W. Gavron

5 Attorneys for Plaintiffs, the Class, and Aggrieved
6 Employees

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1 **I. INTRODUCTION**

2 On July 23, 2021, Plaintiffs James Pevey (“Pevey”) and Anne Peterson (“Peterson”)
3 (together, the “Plaintiffs”) filed the operative Second Amended Complaint in this action (the
4 “Complaint”). On November 19, 2021, the Court granted preliminary approval of the proposed
5 class action settlement (the “Preliminary Approval Order”). Having provided notice to the Class
6 and having received a positive response with zero objections and zero requests for exclusion,
7 Plaintiffs now move for final approval.

8 As detailed previously, the Complaint alleges (1) violation of Labor Code § 226.7; (2)
9 violation of Labor Code §§ 226.7 and 512; (3) violation of Labor Code § 226; (4) violation of
10 Business and Professions Code § 17200, *et seq.*; and (5) violation of Labor Code § 2698, *et seq.*,
11 the Private Attorneys General Act (“PAGA”); as well as Peterson’s individual claims under the
12 FEHA. The Complaint alleged that Defendant Lumber City Corp. dba DIY Home Center
13 (“Defendant”) failed to provide compliant meal and rest periods, maintain accurate time records,
14 and provide wage statements that identified accurate gross and net wages earned, applicable
15 hourly rates of pay, and pay period start and end dates. Plaintiffs seek to represent all other
16 similarly situated individuals and aggrieved employees.

17 Plaintiffs seek the Court’s final approval of the Joint Stipulation of Class Action/PAGA
18 Settlement (“Agreement” or “Settlement Agreement”). The Settlement Agreement provides for a
19 \$1,180,000.00 fund to be created for the benefit of the Class, from which attorneys’ fees,
20 litigation costs, enhancement payment to the Class Representatives, payment to the California
21 Labor and Workforce Development Agency (“LWDA”), and costs of settlement administration
22 are to be paid. The entire net settlement fund after these deductions will be paid to all Class
23 Members who did not opt-out of the settlement and no funds shall revert to Defendant.

24 As directed by the Court, the Settlement Administrator distributed the Notice Packet to
25 958 Class Members. Declaration of Jarrod Salinas on Behalf of Settlement Administrator
26 (“Salinas Decl.”) ¶ 3. To date, zero requests for exclusion have been received and zero objections
27 have been filed. Salinas Decl. ¶¶ 8, 9. As such, there is a 100% participation rate. Thus, an
28 inference can be made that the Class supports the Court’s Preliminary Approval Order finding

that the Settlement Agreement is fair and reasonable.

In addition to the results of the notice process, for the same reasons as set forth earlier in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, the following represent the basic points supporting approval of the Settlement:

- The settlement provides a total settlement sum of \$1,180,000.00;
- The settlement is fair given that Participating Class Members will receive (*after deductions for fees, costs, etc.*) a substantial amount of money (on average, each Participating Class Member will receive approximately \$647.31). *See* Salinas Decl. ¶ 11;
- Class Members did not need to submit claim forms to participate in the settlement, but are being paid automatically;
- The allocation reflects that payment of claims will be paid to all Class Members in proportion to the number of pay periods each Class Member and/or Exempt Class Member worked during the Class Period or Exempt Class Period, respectively;
- Plaintiffs conducted significant investigation in this case, including formal and informal discovery, and exchanges of information by Plaintiffs and Defendant of class data necessary for Plaintiffs to fully evaluate this case;
- A highly regarded administrator, Phoenix Settlement Administrators, was retained for fees estimated to be \$11,500.00; and
- California's LWDA will also be the beneficiary of this settlement as it will receive \$56,250.00, should this settlement be granted final approval.

Accordingly, the Court should grant Final Approval consistent with the Preliminary Approval Order.

II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order, have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order

1 contemplated that the Notice of Class Action Settlement (“Notice Packet”), as approved in the
2 Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in the
3 settlement. Further, the Preliminary Approval Order contemplated that Phoenix Settlement
4 Administrators would serve as the Settlement Administrator.

5 As clearly stated in the Salinas Declaration, notice was provided to Class Members, as
6 required by the Preliminary Approval Order. On November 23, 2021, the Settlement
7 Administrator received a Class Member mailing list from Defendant’s counsel that included 958
8 Class Members. Salinas Decl. ¶ 3. On November 24, 2021, the Settlement Administrator
9 conducted a National Change of address search to confirm the addresses were accurate. Salinas
10 Decl., ¶ 4. On December 7, 2021, each of the persons identified on the mailing list were sent the
11 Class Notice via first class mail. *Id.* ¶ 5. From the date of mailing, sixty-five (65) Notice Packets
12 were returned due to incorrect addresses. Six (6) of the Notice Packets were returned with a
13 forwarding address and re-sent. *Id.* ¶ 6. Address traces were performed for the remaining fifty-
14 nine (59) Notice Packets. As of the date of this filing, five (5) Notice Packets are undeliverable
15 because new addresses could not be located by skip tracing. *Id.* ¶ 7. No Class Members requested
16 to be excluded from the settlement and no Class Members have objected. *Id.* ¶¶ 8, 9. Further, the
17 Notice Packet provided Class Members with Class Counsel’s contact information, where they
18 could further seek information regarding the class settlement, leave questions for the Settlement
19 Administrator, and update their address.

20 The provision of sending the notice to class members as described above meets the
21 requirements for the “best notice practicable” in this case as necessary to protect the due process
22 rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)
23 (provision of “best notice practicable” with description of the litigation and explanation of opt-
24 out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)
25 (individual notice must be sent to class members who can be identified through reasonable
26 means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best
27 practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise
28 interested parties of the pendency of the action and afford them an opportunity to present their

1 objections”).

2 Here, the Class Members were provided with a mailing regarding the settlement that
3 explained the settlement and allowed Class Members to seek information, ask questions, and
4 object, if so desired. As such, proper notice has been given to the Class Members. Thus, the
5 Court may proceed to determine the fairness and adequacy of the settlement and enter its Order
6 granting final approval, secure in the knowledge that all absent Class Members have been given
7 the opportunity to participate fully in the claims, exclusion, and the approval process.

8 **III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE,**
9 **AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

10 **A. Strength of Plaintiffs’ Case and Likelihood of Certifying the Class**

11 In order to proceed as a class, there are two requirements which must be met—
12 ascertainability and community of interest. *See Daar v. Yellow Cab Co.*, 67 Cal. 2d. 695, 704
13 (1967); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 809 (1971). “The community of interest
14 requirement embodies three factors: (1) predominant common questions of law or fact; (2) class
15 representatives with claims or defenses typical of the class; and (3) class representatives who can
16 adequately represent the class.” *Richmond v. Dart Industries*, 29 Cal. 3d. 462, 470 (1981).

17 **1. The Class is Ascertainable**

18 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section
19 382 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
20 available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors*,
21 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class is comprised of “All current and former
22 non-exempt employees of Defendant in the State of California who earned wages at any time
23 between April 6, 2016, through July 31, 2021” (the “Class”). In addition, the Exempt Class is
24 comprised of “All current and former exempt employees of Defendant in the State of California
25 who earned wages at any time between April 6, 2018, through July 31, 2021” (the “Exempt
26 Class”). There are 958 individuals that comprise the Class. Salinas Decl. ¶ 3. This is far more
27 than the minimum required to certify a class. Within the context of manageability, the issue is
28 whether there exists sufficient means for identifying class members at the remedial stage. *Reyes*,

1 196 Cal. App. 3d at 1274-75. Class Members have already been identified by Defendant and
2 notice was provided to all of the above Class Members.

3 **2. There is a Community of Interest**

4 The “community of interest” requirement embodies three separate factors: (1)
5 predominant common questions of law or fact; (2) class representatives whose claims are typical
6 of the class; and (3) class representatives who can adequately represent the class. *Richmond*, 29
7 Cal. 3d at 470; *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1234 (1999).

8 **a. There are Predominant Common Questions of Law and Fact**

9 “The ultimate question in every case of this type [class actions] is whether...the issues
10 which may be jointly tried, when compared with those requiring separate adjudication, are so
11 numerous and substantial that the maintenance of a class action would be advantageous to the
12 judicial process and to the litigants.” *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096,
13 1104-05 (2003).

14 Plaintiffs allege that Defendant, as a matter of its corporate policy, practice, or procedure
15 violated the Labor Code by its failure to provide compliant meal and rest periods, maintain
16 accurate time records, and provide wage statements that identified accurate gross and net wages
17 earned, applicable hourly rates of pay, and pay period start and end dates. Defendant denies
18 liability and contends that Plaintiffs cannot prove willfulness and thus would not be subject to
19 waiting time penalties.

20 **b. Plaintiffs’ Claims are Typical of the Class Claims**

21 The purported class representative’s claim must be “typical” but not necessarily identical
22 to the claims of other class members; it is sufficient that the representative is similarly situated so
23 that he or she will have the motive to litigate on behalf of the class. *Classen v. Weller*, 145 Cal.
24 App. 3d 27, 45 (1983). Courts look to whether class members have similar injuries, “whether the
25 action is based on conduct which is not unique to the named Plaintiff,” and whether other class
26 members were injured by the same conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
27 (9th Cir. 1992). The purpose of the typicality requirement “is to assure that the interest of the
28 named representative aligns with the interests of the class.” *Id.* at 508.

1 Plaintiffs were employed by Defendant and were subjected to the same payroll policies as
2 all other Class Members. Specifically, like other members of the Class, Plaintiffs were not
3 provided with compliant meal and rest periods and received wage statements that did not include
4 accurate gross and net wages earned, applicable hourly rates of pay, and the start and end dates
5 of the pay period. Plaintiffs were subjected to the same policies and practices as other Class
6 Members. Thus, Plaintiffs' claims are typical to those of Class Members.

7 **c. Plaintiffs Adequately Represented the Class**

8 The class representative, through qualified counsel, must be capable of "vigorously and
9 tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App. 3d
10 834, 846 (1984). Here, Plaintiffs do not have any interests adverse to the Class, nor have any
11 such issues been raised or presented. Plaintiffs have taken all necessary steps to represent the
12 interests of the Class, including providing information and documents to their counsel and
13 reviewing pleadings in this case. Declaration of James Pevey ("Pevey Decl.") ¶¶ 4-9; Declaration
14 of Anne Peterson ("Peterson Decl.") ¶¶ 4-9. For such reasons, Plaintiffs have adequately
15 represented the Class Members and will continue to do so.

16 **B. Defendant's Allegations and Unlikelihood of Class Certification**

17 Defendant asserts that it maintained lawful policies regarding meal and rest periods, and
18 further, that individualized issues predominate in this case, including without limitation, whether
19 Defendant provided accurate wage statements in compliance with the law. In any event, even
20 assuming that a class could be certified, Defendant asserts that it has complied with the law.
21 Based thereon, Defendant continues to maintain that it is not liable for the allegations made by
22 the Plaintiffs.

23 **C. Risks, Expenses, and Complexity of Further Litigation**

24 Plaintiffs believe that a class can be certified; however, Plaintiffs also believe in the
25 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiffs
26 involved in not prevailing on one or more of the causes of action or theories alleged in the
27 operative Complaint, the possibility of non-certification, and potential for appeals. These risks on
28 class certification are compounded by the California Supreme Court's holding in *Duran v. U.S.*

1 *Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014).

2 Defendant has maintained that there is no liability. As stated above, Defendant alleges
3 that a class could not have been certified. There is always a risk that the court will not grant
4 certification of the class, wherein the class will not be entitled to any damages. Based on the
5 foregoing, there was a substantial risk that Plaintiffs would not have obtained the total amount of
6 damages alleged, and a substantial amount of complex issues that would have necessitated
7 significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of
8 further litigation warrant granting of this motion.

9 **D. The Terms of the Settlement, Negotiation of Settlement, and Reception of the**
10 **Settlement by Class Members All Strongly Support the Conclusion that the**
11 **Settlement is Fair, Adequate, and Reasonable**

12 Without reiterating the Parties' showing that the Settlement Agreement and the
13 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
14 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
15 Settlement Agreement was the product of negotiation between highly able and experienced
16 attorneys on both sides who possessed the relevant data and extensive legal research which they
17 had carefully analyzed. Declaration of Max W. Gavron ("Gavron Decl.") ¶ 4.

18 At the preliminary approval hearing, the Court requested that Plaintiff provide the
19 number of potentially aggrieved employees and pay periods at issue in this action. The
20 Settlement Agreement provides that the Released Claims and the Exempt Released Claims
21 include the claims alleged under the PAGA, and thus the "aggrieved employees" include the
22 same individuals that comprise the Class Members. *See* Settlement Agreement ¶¶ 2-5, 28-29;
23 *see also Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 541 (2021), *review denied*
24 (Dec. 29, 2021) ("Nothing in the statute prohibits Amaro from releasing PAGA claims outside
25 the limitations period of her own claim. Nor is this practice contrary to PAGA's purposes.").
26 Accordingly, the number of aggrieved employees total 958, and the total number of pay periods
27 is approximately 47,000. *See* Settlement Agreement ¶¶ 3-4.

28 The results after mailing of the Notice Packet support confirmation of the Court's
preliminary approval of the settlement with final approval of the settlement, as evidenced by the

fact that to date, zero requests for exclusion and zero objections to the settlement have been received. Salinas Decl. ¶¶ 8, 9. The Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single class member has submitted an objection. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

E. Under Well-Established Legal Principles, the Court Should Grant Final Approval of the Settlement

1. Standard of Review

On a motion for final approval of a class action settlement under California Code of Civil Procedure § 382 and California Rule of Court 3.769, a court’s inquiry is whether the settlement is “fair, adequate and reasonable.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when “the interests of the class are better served by the settlement than by further litigation.” *See Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”). The law favors settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

Although the Court possesses “broad discretion” in determining that a proposed class action settlement is fair, the Court’s role must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *See Officers for Justice*, 688 F.2d at 625. Accordingly, the Court should give due regard to what is otherwise a “private consensual agreement” between the parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff’d sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a

1 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
2 or imposing conditions on it. The judge cannot rewrite the agreement”).

3 A court’s approval of a class action settlement will only be reversed for a clear abuse of
4 discretion. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Officers for*
5 *Justice*, 688 F.2d at 626 (“reverse only upon a strong showing that the district court’s decision
6 was a clear abuse of discretion”); *City of Seattle*, 955 F.2d at 1276; *Ackerman v. Kassar*, 1993
7 WL 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir.
8 1998).

9 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*:

10 “It cannot be overemphasized that neither the trial court in
11 approving the settlement nor this Court in reviewing that approval
12 have the right or duty to reach any ultimate conclusions on the
13 issues of fact and law which underlie the merits of the dispute. It is
14 well settled that in the judicial consideration of proposed
15 settlements, ‘the [trial] judge does not try out or attempt to decide
16 the merits of the controversy,’ [citation] and the appellate court
17 ‘need not and should not reach any dispositive conclusions on the
18 admittedly unsettled legal issue.’”

19 85 Cal. App. 4th 1135, 1146 (2000).

20 2. The Settlement is Presumed to Be Fair

21 The Court should begin its analysis with the presumption that the settlement is fair and
22 should be approved:

23 [A] presumption of fairness exists where: (1) the settlement is
24 reached through arm’s-length bargaining; (2) investigation and
25 discovery are sufficient to allow counsel and the court to act
26 intelligently; (3) counsel is experienced in similar litigation; and
27 (4) the percentage of objectors is small.

28 *Dunk*, 48 Cal. App. 4th at 1802; *accord*, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18
(N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at 1387.

The settlement in the case at bar warrants approval and carries a presumption of fairness.
As previously noted in the application for Preliminary Approval, this current settlement was
negotiated at arm’s length and resulted only after a failed mediation attempt and further
litigation. Gavron Decl. ¶ 5.

Second, Class Counsel engaged in extensive factual investigation before settling,

1 including reviewing class data. Gavron Decl. ¶ 4. Further, Class Counsel is highly experienced in
2 this type of litigation. As shown in the supporting declarations, Class Counsel has significant
3 experience in class actions and employment wage and hour matters. Gavron Decl. ¶¶ 10-15;
4 Declaration of Larry W. Lee (“LWL Decl.”) ¶¶ 11-13; Declaration of William L. Marder
5 (“Marder Decl.”) ¶¶ 3-8; Declaration of David J. Lee (“DJL Decl.”) ¶¶ 4-8.

6 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation**
7 **Favor Final Approval**

8 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
9 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
10 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
11 (3d Cir. 1995) (“present value of the damages plaintiffs would likely recover if successful,
12 appropriately discounted for the risk of not prevailing, should be compared with the amount of
13 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
14 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

15 If Plaintiffs pursued this case without settlement and failed to prevail, Plaintiffs would
16 have been potentially responsible for Defendant’s costs. As such, should individual current or
17 former employees of Defendant bring individual claims on the same causes of action, they would
18 each face the uncertainty of prevailing and the possibility of paying costs to Defendant.
19 Accordingly, such claims likely would not be brought by many of these current and former
20 employees—thus, this lawsuit achieves a true benefit for the class that they might not otherwise
21 get or seek as individuals. Here, given that a fair and reasonable settlement has been reached,
22 neither Plaintiffs nor any of the Class Members will be required to pay for Defendant’s litigation
23 costs.

24 The risks of this case were weighed by Class Counsel and should be considered a
25 significant factor by the Court in its determination of final approval. Class counsel also factored
26 in Defendant’s financial condition as part of the settlement, and the payment plan that was
27 required to achieve a just resolution for the Class. Class Counsel obtained a very substantial
28 settlement for the Class that resulted in a fair recovery which at the same time provides for

1 finality and no risk of costs by the Class Members or Class Representatives.

2 The Settlement Agreement also affords the Class prompt, fair relief while avoiding
3 significant legal and factual battles that otherwise may have prevented the Class from obtaining
4 any recovery at all. While Class Counsel believe the Class Members' claims are meritorious and
5 can be successfully litigated, they are experienced and fully understand the inherent risks and
6 uncertainty involved with such matters as the resolution of class certification, the outcome of a
7 potential trial, and the outcome of any appeals that would inevitably follow should the Class
8 prevail at trial. Class Counsel has also assessed the same risks in connection with the current
9 settlement. Because the settlement provides immediate and substantial relief, without the
10 attendant risks and delay of continued litigation—not to mention the threat of litigation fees and
11 costs—Class Counsel believe that the settlement warrants the Court's final approval.

12 **4. The Complexity, Expense, and Likely Duration of Continued**
13 **Litigation Against Defendant Favor Final Approval**

14 Another factor considered by courts in approving a settlement is the complexity, expense,
15 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at
16 157. In applying this factor, the Court must weigh the benefits of the settlement against the
17 expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v.*
18 *Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

19 As noted above, continued litigation could have led to appeals on a number of issues. On
20 the other hand, the settlement that was reached provides to all Class Members—regardless of
21 their means—fair relief in a prompt and efficient manner. Were the Court to deny final approval,
22 the Class Members would be left without a remedy as a practical matter and courts across the
23 State would have to address the issues presented here in a piecemeal, costly, and time-consuming
24 manner. The settlement in this case is therefore consistent with the “overriding public interest in
25 settling and quieting litigation” that is “particularly true in class action suits.” *See Van*
26 *Bronkhorst*, 529 F.2d at 950 (footnote omitted); *see also 4 Newberg* § 11.41. Here, this case
27 would have likely involved continued litigation and possible appeals given the ever-evolving
28 nature of wage and hour law.

1 **5. The Opinion of Experienced Counsel Favors Final Approval**

2 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
3 interest of the Class Members as a whole. LWL Decl. ¶ 5; Gavron Decl. ¶ 5; Marder Decl. ¶ 2;
4 DJL Decl. ¶ 3. Similarly, counsel for Defendant is in favor of this settlement. The endorsement
5 of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is
6 entitled to significant weight by the Court in its final approval determination. *See Officers for*
7 *Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F. Supp. at 617; *Linney*, 151 F.3d at
8 1242.

9 **IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS**
10 **SHOULD BE APPROVED**

11 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
12 settlement funds remain after 180 days, the Parties have agreed that all funds shall escheat to the
13 *cy pres* recipient Legal Aid at Work.

14 **V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT PAYMENTS**
15 **SHOULD BE APPROVED**

16 Class Representatives James Pevey and Anne Peterson request a total enhancement of
17 \$20,000.00. Plaintiffs regularly conferred with Class Counsel, including providing substantive
18 information regarding Defendant's practices. Pevey Decl. ¶ 7; Peterson Decl. ¶ 7. Plaintiffs
19 regularly conferred with their attorneys to discuss the status of the case, offer their input, and
20 assist their attorneys in gathering evidence that supported the class claims. Pevey Decl. ¶ 5;
21 Peterson Decl. ¶ 5. For example, Plaintiffs discussed Defendant's policies and practices related
22 to the distribution of wage statements to employees to prepare documents necessary to the
23 lawsuit. Pevey Decl. ¶ 7; Peterson Decl. ¶ 7. Plaintiffs also conferred with their attorneys
24 regarding the proposed settlement. Pevey Decl. ¶ 6; Peterson Decl. ¶ 6. Plaintiffs estimated that
25 throughout this case they spent a combined total of approximately 30 hours working with their
26 attorneys to provide documents and information that would support the successful resolution of
27 the case. Pevey Decl. ¶ 7; Peterson Decl. ¶ 7. This included helping Plaintiffs' counsel to draft
28 responses to written discovery and reviewing the responses and verifying their contents. Pevey

Decl. ¶ 7; Peterson Decl. ¶ 7. Accordingly, Plaintiffs provided invaluable information, evidence, and documents that resulted in this settlement.

In addition to the invaluable services that they provided, Plaintiffs took significant risks, both professionally and monetarily, in acting as Class Representatives, seeking benefits on behalf of the Class. Because the claims alleged by the Class Representatives involved the payment of costs to the prevailing party, Plaintiffs could have possibly faced paying the costs of Defendant, had they not prevailed in this action. Despite this, however, Plaintiffs agreed to pursue this case on behalf of the Class.

Also, given that future employers are much less likely to hire individuals who have filed employment-related lawsuits, particularly cases of this nature, the Class Representatives also faced significant risk in not being able to find suitable employment, all as a result of filing of this case against Defendant. Plaintiffs took these risks upon themselves to the benefit of the Class. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits that weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a significantly valuable benefit to the Class, and Plaintiffs took on substantial risks in helping to get this financial benefit to the Class. As such, the enhancement should be awarded to Plaintiffs for their commitment, dedication, and risks taken for this litigation.

Courts have routinely granted approval of settlements containing such enhancements. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142

1 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
2 ERISA case).

3 **VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

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

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

26 Here, the fee award representing one-third of the fund clearly falls within that range and
27 is consistent with other rulings of other courts and comprehensive surveys of class action
28 settlements and fee awards. *See Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, at

1 *23 (S.D. Cal. June 9, 2011) (recognizing that “courts may award attorney’s fees in the 30-40%
2 range in wage and hour class actions that result in recovery of a common fund under \$10
3 million”); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical*
4 *Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010) (independent studies of
5 class action litigation nationwide conclude that fees in the range sought here are consistent with
6 market rates).

7 The results delivered by Class Counsel also support the requested percentage of the fund.
8 Here, Plaintiffs and their counsel secured a \$1,180,000.00 settlement.

9 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
10 is relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
11 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
12 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Notice
13 Packet specifically notified Class Members that Class Counsel would be seeking \$393,333.33 in
14 attorneys’ fees. To date, no Class Member has objected to the Settlement or requested exclusion.
15 This strong favorable response also supports the requested fees.

16 In addition, it is recognized that one of the primary factors justifying an enhanced
17 attorney’s fees reward is the attendant risks inherent in the litigation. As observed in *City of*
18 *Detroit v. Grinnell Corp.*:

19 No one expects a lawyer whose compensation is contingent upon
20 his success to charge, when successful, as little as he would charge
21 a client who had agreed to pay for his services, regardless of
22 success. Nor, particularly in complicated cases producing large
recoveries, is it just to make a fee depend solely on the reasonable
amount of time expended.

23 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$1,180,000.00 has
24 been created. For Class Counsel, the fees here were wholly contingent in nature and the case
25 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
26 in class action litigation, as well as a long battle with a corporate Defendant who had retained a
27 highly experienced defense firm. As such, the requested fee should be awarded.

28 As a secondary support for the percentage of the fund method, when fees are allocated by

percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in this manner, does not override the trial court’s primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the primary reliance on the percentage of common fund method”).

The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check “undermines” one of the primary reasons for using the percentage method: aligning counsel’s incentives with the benefits delivered to the class and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000) (citing the recommendations of the Third Circuit Task Force with approval and observing that “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many authorities, who have been most vocal about the manner in which it exacerbates the problem of ‘cheap settlements’ and burdens already overworked trial judge”).

Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*, e.g., *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix*, 162 Cal. App. 4th 43, 60 (2008) (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a

1 cross-check, affirmed a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate
2 court opinion was affirmed in full by the California Supreme Court in its new decision guiding
3 lower courts on assessing fees.

4 With respect to Class Counsel's lodestar, to date, approximately 445.8 hours have been
5 expended by Class Counsel in this matter. LWL Decl. ¶ 7, Ex. A; Gavron Decl. ¶ 7, Ex. A;
6 Marder Decl. ¶ 9, Ex. A; DJL Decl. ¶ 10 Ex. A. Moreover, Class Counsel expects to incur
7 approximately 25.5 additional hours of attorney time in finalizing this settlement, including
8 responding to class members and implementing the settlement with the Settlement
9 Administrator. LWL Decl. ¶ 8; Gavron Decl. ¶ 8; DJL Decl. ¶ 10. As detailed in their
10 declarations, Plaintiffs' counsel requests rates ranging from \$450 to \$750, which is
11 commensurate with each counsel's experience and mimics the market. LWL Decl. ¶¶ 9, 10;
12 Gavron Decl. ¶ 9; Marder Decl. ¶ 10; DJL Decl. ¶ 9. The courts are quite liberal in the evidence
13 required to prove an attorney's hours. Detailed time records are not required. An attorney's
14 testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a
15 particular case is sufficient evidence to support an award of attorney fees, even in the absence of
16 detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

17 Reasonable hours include, in addition to time spent during litigation, the time spent
18 before the action is filed, including time spent interviewing the clients, investigating the facts and
19 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
20 62 (1980). Further, the fee award should include fees incurred to establish and defend the
21 attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*]. Thus, Class
22 Counsel requests that the court find that these hours were reasonable in this litigation.

23 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
24 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
25 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
26 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
27 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
28 4th 629, 632-33 (1998).

1 Class Counsel's skill and experience justify the requested rate. As shown in the
2 supporting declarations, Class Counsel have significant experience in the area of employment
3 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
4 employees in employment matters, particularly wage and hour cases. LWL Decl. ¶¶ 11-13;
5 Gavron Decl. ¶¶ 10-15; Marder Decl. ¶¶ 3-8; DJL Decl. ¶¶ 4-8. As such, based on the hours and
6 applicable rate, including anticipated time, the total lodestar to be expended by Class Counsel
7 through finalizing this settlement will be approximately \$295,710.00. LWL Decl. ¶ 7, Ex. A;
8 Gavron Decl. ¶ 7, Ex. A; Marder Decl. ¶ 9, Ex. A; DJL Decl. ¶ 10, Ex. A.

9 Once the court establishes the lodestar amount, it may enhance the fee award by a
10 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at 48. The pertinent
11 factors include the difficulty of the questions involved and the skill in presenting them, the
12 contingent nature of the fee award, the extent to which the litigation precluded other
13 employment, and the percentage-of-the-fund the attorney would have received on the fair
14 market. *Id.*, *Lealao*, 82 Cal. App. 4th at 49. However, this list is not exhaustive and the court can
15 consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal. 4th
16 1122, 1139 (2001).

17 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
18 the-benefit, namely, no objections by Class Members, commendable conduct by counsel, and
19 significant recoveries by Class Members, all of which were previously detailed above. *Lealao*,
20 82 Cal. App. 4th at 51-53. As in *Lealao*, the Class was notified of the settlement and attorney's
21 fee with no objections. The extreme effort undertaken by counsel, as shown by their hours and
22 the significantly high amount of claims being paid out, shows commendable conduct.

23 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
24 enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal. App. 4th at 52 (the promptness
25 of settlement "cannot be used to justify the refusal to apply a multiplier"). According to *Lealao*,
26 courts placed "an extraordinarily high value" on settlement, and counsel should be rewarded, not
27 punished, for achieving this goal in a timely fashion. *Id.*

28 The multiplier should be enhanced by the contingent nature of counsel's fee recovery.

1 The risks in taking on a class action case are enormous, not the least of which is time and effort.
2 As explained previously, Defendant maintained that there were significant obstacles to
3 succeeding in this lawsuit. Thus, the risk involved in this case was quite significant for Plaintiffs
4 and their counsel, and in the face of such risks, the current settlement was achieved by Plaintiffs'
5 counsel.

6 Here based upon Plaintiffs' counsel's lodestar of \$295,710.00, and the requested fees of
7 \$393,333.33, Plaintiff's request for a multiplier of 1.3 is reasonable and fair, particularly based
8 on the factors described above. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001)
9 (noting that courts using the lodestar method to calculate attorney fees awards in class actions
10 typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist.
11 LEXIS 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33% of the common fund, based on a
12 multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital*
13 *Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund, based on
14 a multiplier of 2.52).

15 As such, the requested fee award is fair and reasonable, and should be awarded in its
16 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
17 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
18 Class Counsel's request for attorneys' fees in the amount of \$393,333.33 is fair, reasonable, and
19 adequate.

20 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
21 **OF COSTS**

22 The request for reimbursement of costs, in the amount of \$20,319.57 is fair and
23 reasonable. The costs are all litigation related costs. LWL Decl. ¶ 14, Ex. B; DJL Decl. ¶ 11; Ex.
24 B. The authority for the Court to award this is the Parties' Settlement Agreement and Labor
25 Code §§ 226 and 2699. As such, this request should be approved.

26 **VIII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
27 **APPROVED**

28 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement

1 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
2 funds. As shown in the Declaration of Jarrod Salinas, the settlement administration fees
3 expended in this matter amount to a total of \$11,500.00, which is an amount that was agreed
4 upon by the Parties. Salinas Decl. ¶ 12. For such reasons, it is requested that the Settlement
5 Administrator's fees be approved.

6 **IX. NOTICE TO LWDA**

7 Concurrent with the filing of this Motion, Plaintiffs provided notice to the LWDA.
8 Gavron Decl. ¶ 17.art

9 **X. CONCLUSION**

10 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiffs
11 respectfully submit that the standards for final approval have been met and the terms of the
12 Settlement Agreement are fair, adequate, and reasonable.

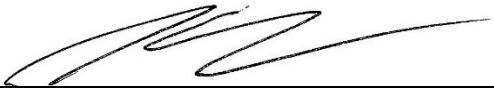
13 Accordingly, Plaintiffs respectfully request that the Court enter an Order in the form
14 proposed and submitted:

- 15 1. Granting final approval to the proposed Settlement Agreement in this action;
- 16 2. Approving distribution of the settlement funds to the Class Members pursuant to
17 the terms of the Settlement Agreement;
- 18 3. Approving Plaintiffs' request for an award of the Class Representative
19 Enhancement Payment of \$20,000.00, with payments pursuant to the terms of the Settlement
20 Agreement;
- 21 4. Approving Class Counsel's request for an award to Class Counsel for
22 \$393,333.33 in attorneys' fees and \$20,319.57 in costs with payment pursuant to the terms of the
23 Settlement Agreement;
- 24 5. Approving Plaintiffs' request for payment of the settlement administration costs
25 to Phoenix Settlement Administrators in the amount of \$11,500.00 with payment pursuant to the
26 terms of the Settlement Agreement;
- 27 6. Approving Plaintiffs' request for payment to the LWDA for \$56,250.00 with
28 payment pursuant to the terms of the Settlement Agreement; and

1 7. Entering final judgment as to all members of the Class in this action.

2
3 DATED: April 7, 2022

DIVERSITY LAW GROUP, P.C.

4
5 By: 

Larry W. Lee

6 Max W. Gavron

7 Attorneys for Plaintiffs, the Class, and Aggrieved
8 Employees
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