

Larry W. Lee (State Bar No. 228175)
Kristen M. Agnew (State Bar No. 247656)
Nicholas Rosenthal (State Bar No. 268297)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

Attorneys for Plaintiff and the Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN**

JOSE PABLO JIMENEZ, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

NESTLE WATERS NORTH AMERICA,
INC., a Delaware corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No.: BCV-20-102561

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

Date: August 15, 2022
Time: 8:30 a.m.
Division: J

Complaint Filed: November 2, 2020
FAC Filed: February 7, 2022
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 15, 2022, at 8:30, a.m., or as soon thereafter
as the matter may be heard, before the Honorable J. Eric Bradshaw, judge presiding, in Division
J, of the above referenced Court located at 1215 Truxtun Avenue, Bakersfield California 93301,
Plaintiff Jose Pablo Jimenez ("Plaintiff") will seek an Order:

(1) granting final approval to the Joint Stipulation of Class and Representative Action
Settlement ("Settlement Agreement" or "Settlement") in this action;

1 (2) approving distribution of the settlement funds to the Class Members pursuant to
2 the terms of the Settlement Agreement;

3 (3) approving Plaintiff's request for an award of the enhancement payment of
4 \$10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

5 (4) approving Plaintiff's Counsel's request for an award of attorneys' fees to Class
6 Counsel for approximately thirty-five percent of the \$1,600,00.00 settlement amount, or
7 \$560,000.00, and reimbursement of litigation costs of \$8,522.18, pursuant to the terms of the
8 Settlement Agreement;

9 (5) approving Plaintiff's request for payment of the settlement administration costs to
10 Phoenix Settlement Administrators in the amount of \$15,000.00, pursuant to the terms of the
11 Settlement Agreement; and

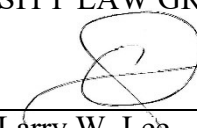
12 (6) entering final judgment as to all members of the Settlement Class in this action.

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

18 This Motion will be based on the attached Memorandum of Points and Authorities and
19 the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, Jose Pablo
20 Jimenez, and Taylor Mitzner of Phoenix Settlement Administrators, upon the oral arguments of
21 counsel (should there be any), and on the complete records and file herein.

22
23 DATED: July 21, 2022

DIVERSITY LAW GROUP, P.C.

24
25 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

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1 **I. INTRODUCTION**

2 Plaintiff Jose Pablo Jimenez (“Plaintiff”) now seeks the Court’s final approval of the
3 Joint Stipulation of Class and Representative Action Settlement (“Settlement Agreement” or
4 “Settlement”). The Settlement Agreement provides for a \$1,600,000.00 **non-reversionary** fund
5 to be created for the benefit of the Class, from which attorneys’ fees, litigation costs,
6 enhancement payment to the Plaintiff, PAGA penalties, and costs of settlement administration to
7 the Settlement Administrator are to be paid. After these deductions are made, the entire Net
8 Settlement Amount will be paid to all Class Members who did not opt-out of the settlement.

9 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
10 Approval of Class Action Settlement. This Court preliminarily approved this settlement on April
11 8, 2022, directing distribution of the Notice of Class Action Settlement (the “Notice Packet”) and
12 scheduling the hearing for final approval of the settlement (the “Preliminary Approval Order”).

13 As directed by the Court, the Settlement Administrator selected by the Parties—Phoenix
14 Settlement Administrator—distributed the Notice Packet to 1,962 Class Members. Declaration of
15 Taylor Mitzner With Respect to Settlement Notice Administration (“Admin Decl.”) ¶ 5. To date,
16 **there have been no requests for exclusions and/or objections to the settlement submitted by**
17 **any Class Members.** *Id.* ¶¶ 9-10. As such, there is a 100% participation rate by Class Members.
18 In light of the lack of objections and opt-outs, an inference can be made that the Class supports
19 the Court’s Preliminary Approval Order finding that the Settlement Agreement is fair and
20 reasonable.

21 In addition to the results of the notice process, for the same reasons as set forth earlier in
22 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, the following represent
23 the basic points previously covered that support approval of the settlement:

- 24 • The Settlement Agreement provides a total settlement sum of \$1,600,000.00
25 which is **non-reversionary**;
- 26 • The Settlement Agreement is fair given that Class Members will receive (*after*
27 *deductions for fees, costs, etc.*), an average of approximately \$487.50, with the estimated highest
28 individual settlement payment being \$1,208.31, and the estimated lowest individual settlement

1 payment being \$7.90 (*see* Admin Decl. ¶ 13);

2 • Class Members did **not** need to submit claim forms to participate in the
3 settlement, but are being paid automatically;

4 • The allocation reflects that payment of individual settlement amounts will be paid
5 to all participating Class Members on a pro-rata basis, based on the number of pay periods he or
6 she worked during the Class Period;

7 • Plaintiff’s counsel conducted significant investigation of the claims at issue,
8 including conducting formal and informal discovery such as the number of putative class
9 members, payroll records of putative class members, Defendant’s policies and procedures with
10 respect to the calculation of the regular rate of pay used to calculate overtime wages, sick pay
11 earnings and meal and rest period premiums, and policies governing when and how putative
12 class members were provided meal and rest periods. Plaintiff’s counsel then conducted an
13 exposure analysis, which allowed Plaintiff’s counsel to fully evaluate this case; and

14 • A highly regarded administrator, Phoenix Settlement Administrators, was retained
15 to administer the settlement for \$15,000.00 (*see* Admin Decl. ¶ 16, Ex. B).

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

18 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE** 19 **SETTLEMENT**

20 The notice procedures required by the Preliminary Approval Order have been followed
21 and satisfy all due process rights of Class Members. Specifically, the Preliminary Approval
22 Order contemplated that the Notice of Class Action Settlement (the “Notice Packet”), as
23 approved in the Preliminary Approval Order, be sent to all Class Members by first class mail, as
24 specified in the Settlement. The Preliminary Approval Order further designated that Phoenix
25 Settlement Administrators would serve as the Settlement Administrator.

26 As clearly stated in the Declaration of Taylor Mitzner, notice was provided to Class
27 Members as required by the Preliminary Approval Order. On April 22, 2022, the Settlement
28 Administrator received the Class Data from Defendant’s counsel that included 1,962 Class

1 Members. Admin Decl. ¶ 3. Prior to mailing the Notice Packet, the Settlement Administrator
2 conducted a National Change of Address (NCOA) search to correct and/or update the class list in
3 case of any address changes. *Id.* ¶ 4. On May 9, 2022, the Settlement Administrator mailed the
4 Notice Packet to all Class Members on the Class List via U.S. first class mail. *Id.* ¶ 5, Ex. A.
5 From the date of mailing, sixty-two (62) Notice Packets were returned to the Settlement
6 Administrator without forwarding addresses. *Id.* ¶ 6. The Settlement Administrator subsequently
7 conducted skip tracing to identify updated addresses for the returned Notice packets, and was
8 able to locate updated addresses for forty-three (43) Class Members. *Id.* The Settlement
9 Administrator subsequently re-mailed them via U.S. first class mail. *Id.* As of the date of this
10 filing, twenty-five (25) Notice Packets remain undeliverable since an updated address could not
11 be obtained by the Settlement Administrator via skip trace or forwarding from the U.S. Postal
12 Service. *Id.* ¶ 7. Further, the Notice Packet provided Class Members with Plaintiff’s counsel’s
13 and the Settlement Administrator’s contact information, where they could further contact and/or
14 seek information regarding the settlement and/or update their address.

15 The provision of sending the Notice Packet to Class Members as described above meets
16 the requirements for the “best notice practicable” in this case as necessary to protect the due
17 process rights of class members. *See, e.g., Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797,
18 811-12 (provision of “best notice practicable” with description of the litigation and explanation
19 of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 174-
20 75 (individual notice must be sent to class members who can be identified through reasonable
21 means); *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 (best
22 practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise
23 interested parties of the pendency of the action and afford them an opportunity to present their
24 objections”).

25 Here, the Class Members were sent a mailing regarding the settlement that satisfies due
26 process rights. The mailing described the litigation and settlement, provided an explanation of
27 the terms of the settlement, explained Class Members’ rights, allowed Class Members to seek
28 additional information with Class Counsel and/or the Settlement Administrator, and explained

ways for Class Members to exclude themselves and/or object to the settlement, if so desired. As such, proper notice has been given to the Class Members. Thus, the Court may determine the fairness and adequacy of the settlement and enter its Order granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the settlement, exclusion, and the approval process.

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

A. Strength of Plaintiff’s Case and Likelihood of Certifying the Class

In order to proceed as a class, there are two requirements which must be met—ascertainability and community of interest. *See Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d. 695, 704. Under California law, there are two basic requirements which must exist to sustain a class action: “[t]he first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved.” *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809. “The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Richmond v. Dart Industries* (1981) 29 Cal. 3d. 462, 470.

1. The Class is Ascertainable

Whether a class is “ascertainable” within the meaning of Code of Civil Procedure § 382 is determined by examining “(1) class definition, (2) the size of the class, and (3) the means available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271.

Here, the Class is defined as: all current and former non-exempt employees of Defendant Nestle Waters North America, Inc., now known as Blue Triton Brands, Inc. (“Defendant”), who worked in the State of California at any time during the period of May 6, 2016 through January

1 10, 2022.¹ There are 1,962 individuals that comprise the Class. Admin Decl. ¶ 3 This is far more
2 than the minimum required to certify a class.

3 Within the context of manageability, the issue is whether there exists sufficient means for
4 identifying class members at the remedial stage. *Reyes, supra*, 196 Cal. App. 3d at pp. 1274-75.
5 Class Members have already been identified by Defendant and notice was provided to all of the
6 above Class Members.

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

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

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

13 “The ultimate question in every case of this type [class actions] is whether...the issues
14 which may be jointly tried, when compared with those requiring separate adjudication, are so
15 numerous and substantial that the maintenance of a class action would be advantageous to the
16 judicial process and to the litigants.” *Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal. 4th 1096,
17 1104-05.

18 For Plaintiff’s overtime and sick pay regular rate claims, Plaintiff alleges that Defendant
19 failed to pay overtime and sick pay wages at the correct regular rate of pay. Specifically, Plaintiff
20 alleges that Defendant failed to factor non-discretionary remuneration such as incentive pay,
21 shift differentials, and/or shift premiums into the calculation of the regular rate for purposes of
22 paying overtime wages and sick pay wages. Thus, Plaintiff and employees were underpaid said
23 wages. With respect to Plaintiff’s meal and rest period claims, Plaintiff alleges that employees
24 were required to carry their cell phones and/or handheld computers and respond if necessary
25

26 ¹ Excluding (a) those Class Members who participated in the *Ortega et al. v. Nestle Waters North*
27 *America, Inc.* (Los Angeles Sup. Ct. Case No. No. BC623610) settlement and separated
28 employment on or before May 9, 2018, and (b) any pay periods on or before May 9, 2018 for
those in the Class who participated in the Ortega Settlement and remained employed after May 9,
2018.

1 during meal and rest breaks. As a result, Plaintiff's meal and rest breaks were frequently
2 interrupted and shortened due to being required to respond to work calls. Plaintiff was not paid
3 for the time spent working during his meal breaks, nor was he provided premium compensation
4 at the regular rate of pay in lieu of the missed and/or shortened breaks. Furthermore, Plaintiff
5 alleges that employees were not paid for all hours worked due to Defendant's practice of
6 rounding time. As these are uniform corporate policies, practices, and procedures, the claims can
7 be jointly tried and thus the predominance requirement is satisfied.

8 Defendant denies that liability could be established on a class-wide basis. Instead,
9 Defendant contends that liability and damages would need to be conducted on a case-by-case
10 basis, and that Plaintiff's legal theories lack merit.

11 With respect to Plaintiff's unpaid overtime claim, Defendant maintains that, as a matter
12 of policy, retroactive adjustments to the overtime rate with the payment were paid with bonuses.
13 Defendant further maintains that these true-up payments at the flat-sum bonus rate under
14 *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal. 5th 542, such that the rate was not
15 diluted by overtime hours. Defendant provided confirmatory evidence to support this defense,
16 including wage statements and the formula used to calculate the incentive payments. Moreover,
17 Defendant argues that the overtime claim is preempted by FMSCA and DOT regulations.

18 With respect to Plaintiff's meal and rest break claims, Defendant contends that these
19 claims are preempted by FMSCA and DOT regulations and that there is no common method of
20 proof to establish liability for class certification. In addition, Defendant argues that time records
21 showing missed, short, or delayed meal periods do not result in "automatic liability for
22 employers." *Donohue v. AMN Servs.* (2021) 11 Cal. 5th 58. As such, Defendant argues that
23 individualized issues will predominate as to the specific reason for an allegedly improper meal or
24 rest period.

25 **b. Plaintiff's Claims are Typical of the Class Claims**

26 The purported class representative's claim must be "typical" but not necessarily identical
27 to the claims of other class members; it is sufficient that the representative is similarly situated so
28 that he or she will have the motive to litigate on behalf of the class. *Classen v. Weller* (1983) 145

1 Cal. App. 3d 27, 45. Courts look to whether class members have similar injuries, “whether the
2 action is based on conduct which is not unique to the named [p]laintiff,” and whether other class
3 members were injured by the same conduct. *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976
4 F.2d 497, 508. The purpose of the typicality requirement “is to assure that the interest of the
5 named representative aligns with the interests of the class.” *Id.* at p. 508.

6 Here, Plaintiff was subjected to the same policies and practices as all other Class
7 Members. In this regard, Plaintiff was employed by Defendant as a non-exempt employee from
8 about July 2007, until about July 2020. Declaration of Jose Pablo Jimenez (“Jimenez Decl.”) ¶ 2.
9 Like other Class Members, Plaintiff regularly earned non-discretionary wages, including without
10 limitation incentive pay, shift differentials, and/or shift premiums. The non-discretionary wages,
11 however, were not factored into the regular rate of pay for the purposes of paying overtime
12 and/or sick leave pay. As a result, Plaintiff was underpaid said wages. Jimenez Decl. ¶ 2. In
13 addition, during his employment, Plaintiff was required to carry a cell phone and/or handheld
14 computer and respond to calls during meal and rest periods, resulting in shortened breaks.
15 Plaintiff was not paid for the time spent working during his meal breaks, nor was he provided
16 premium compensation for missed or shortened meal and rest breaks. *Id.* ¶ 3. Finally, Plaintiff
17 was not paid for all hours worked due to Defendant’s improper rounding policies. In other
18 words, Plaintiff was subjected to the same policies and practices as other Class Members.
19 Accordingly, Plaintiff’s claims align with the interests of the Class and typicality is satisfied.

20 **c. Plaintiff Adequately Represented the Class**

21 The class representative, through qualified counsel, must be capable of “vigorously and
22 tenaciously” protecting the interests of the class members. *Simons v. Horowitz* (1984) 151 Cal.
23 App. 3d 834, 846.

24 Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
25 been raised or presented. Jimenez Decl. ¶ 8. Plaintiff has taken all necessary steps to represent
26 the interests of the Class, and has carried out the duties as a class representative, including
27 without limitation, including discussing the case with his counsel, providing information and
28 documents to his counsel, and reviewing pleadings and documents in this case. *Id.* ¶ 9. For such

1 reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

2 **B. Risks, Expenses, and Complexity of Further Litigation**

3 Plaintiff believes that a class can be certified. However, Plaintiff also believes in the
4 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
5 involved in not prevailing on one or more of the causes of action or theories alleged in the
6 operative complaint at trial, the possibility of non-certification, and the potential for any appeals.
7 These risks of class certification are compounded by the California Supreme Court's holding in
8 *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal. 4th 1.

9 As stated above, Defendant alleges that any class could not have been certified, given its
10 position that any liability for the claims would need to be determined on a case-by-case basis.
11 Further, there is no precedent from any California courts granting class certification of a sick pay
12 regular rate claim, which presents another risk to Plaintiff prevailing on class certification. Based
13 on the foregoing, there was a substantial risk that Plaintiff would not have obtained the total
14 amount of damages and/or penalties alleged, and a substantial amount of complex issues that
15 would have necessitated significant expenditure of time and expenses. Therefore, the risks,
16 expenses, and complexity of further litigation warrant granting of this Motion.

17 **C. The Negotiation, Terms, and Reception of the Settlement by Class Members**
18 **Strongly Support the Conclusion that the Settlement is Fair, Adequate, and**
19 **Reasonable**

20 Without reiterating the Parties' showing that the Settlement Agreement and the
21 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
22 Preliminary Approval of Class Action Settlement, the Parties highlight several key facts. First,
23 the settlement was the product of negotiation between highly able and experienced attorneys on
24 both sides who possessed the relevant data and extensive legal research which they had carefully
25 analyzed. Declaration of Kristen M. Agnew ("Agnew Decl.") ¶ 3. The Parties then engaged in
26 arm's length negotiations at mediation with a highly experienced mediator, the Honorable Brian
C. Walsh (Ret.). *Id.* ¶ 3.

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

fact that **no Class Members opted out and/or submitted any written objections to the settlement.** Admin Decl. ¶¶ 9-10. In light of overwhelmingly positive response to the settlement, the Court may appropriately infer that the Settlement is fair, adequate, and reasonable, given that no class members submitted request(s) for exclusion and/or objection(s). *See Chemical Bank v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291 (reaction of class members to the settlement is a factor supporting approval of a class action settlement).

D. 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 Rules of Court, Rule 3.769, a court's inquiry at this juncture is whether the settlement is "fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625, *cert. denied subnom.*, *Byrd v. Civil Serv. Comm'n* (1983) 459 U.S. 1217. 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* (Fed. Jud. Ctr, 4th ed. 2004) § 21.6 at p. 309 ("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* (2008) § 11.41; *Chemical Bank v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950.

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 parties. *See Officers for Justice, supra*, 688 F.2d at p. 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.* (N.D. Cal. 1993) 1993 WL 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720

1 F. Supp. 1379; MCL § 21.6 at p. 309 (“The judicial role in reviewing a proposed settlement is
2 critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions
3 on it. The judge cannot rewrite the agreement.”).

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

10 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*
11 (2000) 85 Cal. App. 4th 1135, 1146:

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

18 **2. The Settlement is Presumed to Be Fair**

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

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

25 *Dunk*, 48 Cal. App. 4th at p. 1802; *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at p.
26 1146; *accord, Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18; *In re Wash.*
27 *Pub Power Supply, supra*, 720 F. Supp. at p. 1387.

28 The settlement here warrants approval and carries a presumption of fairness. As

1 previously noted in the Motion for Preliminary Approval, this settlement was negotiated at arm's
2 length after a full-day of mediation with an experienced wage-and-hour mediator, the Honorable
3 Brian C. Walsh (Ret.). Agnew Decl. ¶ 3. Additionally, Class Counsel engaged in formal and
4 informal discovery before mediation, including reviewing the production of class data, sample
5 time and payroll records, and information pertaining to Defendant's policies and procedures. *Id.*
6 The exchange of informal discovery allowed Class Counsel to conduct a full analysis of
7 exposure. *Id.*

8 Further, Class Counsel is highly experienced in this type of litigation. As shown in the
9 supporting declarations, Class Counsel has significant experience in class actions and
10 employment wage and hour matters. Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 7-9; Agnew
11 Decl. ¶¶ 9-14; Declaration of Nicholas Rosenthal ("Rosenthal Decl.") ¶¶ 8, 9.

12 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation** 13 **Favor Final Approval**

14 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
15 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
16 the risks inherent in continued litigation. *See In re General Motors Corp.* (3d Cir. 1995) 55 F.3d
17 768, 806 ("present value of the damages plaintiffs would likely recover if successful,
18 appropriately discounted for the risk of not prevailing, should be compared with the amount of
19 the proposed settlement") (internal citations omitted); *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d 1
20 53, 157; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 616-17.

21 If Plaintiff pursued this case without settlement and not prevailed, Plaintiff would be
22 potentially responsible for Defendant's fees and costs. Jimenez Decl. ¶ 11. As such, should
23 individual current or former employees of Defendant bring individual claims on the same causes
24 of action, they would each face the uncertainty of prevailing and the possibility of paying costs
25 to Defendant. Accordingly, such claims likely would not be brought by many of these current
26 and former employees—thus, this lawsuit achieves a true benefit for the Class that they might
27 not otherwise get or seek as individuals. Here, given that a fair and reasonable settlement has
28 been reached, neither Plaintiff nor any of the Class Members will be required to pay for
Defendant's litigation costs.

1 The risks of this case were weighed by Class Counsel and should be considered a factor
2 by the Court in its determination of final approval. Class Counsel obtained a significant
3 settlement for the Class that resulted in a fair recovery which at the same time provides for
4 finality and no risk of costs by the Class Members or Class Representative.

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

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

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

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

could have potentially involved years of litigation, as evidenced by the Parties' litigation record and history in similar wage and hour cases.

5. The Opinion of Experienced Counsel Favors Final Approval

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

IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD BE APPROVED

Class Representative Jose Pablo Jimenez requests an enhancement of \$10,000.00 in accordance with the terms of the Settlement Agreement. Plaintiff numerous discussions with Class Counsel to discuss the case at various stages of the lawsuit, from inception to settlement, and provided substantive information regarding Defendant's policies and practices at issue in this case. Jimenez Decl. ¶ 9. Plaintiff also gathered documents pertaining to the lawsuit, and reviewed pleadings and documents in this case, including the complaints, PAGA letters, policy documents, declarations, and the Settlement Agreement. *Id.* Accordingly, Plaintiff provided invaluable information, evidence, and documents that resulted in this Settlement.

In addition to the invaluable services that he provided, Plaintiff took significant risks, both professionally and monetarily, in acting as the Class Representative, seeking benefits on behalf of the Class. Jimenez Decl. ¶¶ 11, 12. Because the claims alleged by Plaintiff involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had he not prevailed in this action. *Id.* ¶ 11. Despite this, however, Plaintiff 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 Representative also

1 faced significant risk in not being able to find suitable employment and/or face retaliation from
2 prospective employers, all as a result of filing of this case against Defendant. Plaintiff took these
3 risks upon himself to the benefit of the Class. *Id.* ¶ 13. Class Members did not have to file
4 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
5 have to face the potential for retaliation and not getting future employment had they filed a
6 lawsuit which is a public record. These are significant benefits that weigh in favor of granting the
7 requested enhancement. Moreover, this litigation has resulted in a valuable benefit to the Class,
8 *i.e.*, an average award to Class Members in the amount of \$487.50, and Plaintiff took on
9 substantial risks in helping to get this financial benefit to the Class. As such, the enhancement
10 should be awarded to Plaintiff for his commitment, dedication, and risks taken for this litigation.

11 Finally, Plaintiff provided a general release and waiver of the protections of Civil Code §
12 1542, which other Class Members did not have to do. Settlement Agreement ¶ F.1; Jimenez
13 Decl. ¶ 14. This is a more extensive release than that provided by the Class at large, also
14 supporting the request for the enhancement.

15 Courts have routinely granted approval of settlements containing such enhancements. *See*
16 *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299-300 (incentive
17 award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio 1990) 130
18 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three incentive awards of \$35,000);
19 *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907, 913-14 (granting a \$50,000
20 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991)
21 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*
22 (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (awarding
23 \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th Cir. 1998)
24 142 F.3d 1004, 1016 (affirming \$25,000 incentive award to class representative in ERISA case).

25 **V. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

26 Class Counsel seeks a fee award calculated at approximately thirty-five percent (35%) of
27 the total value of the settlement amount, or \$560,000.00, for the successful prosecution and
28 resolution of this action. California state and federal courts have recognized that an appropriate

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

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

21 Here, the fee award representing approximately one-third of the fund clearly falls within
22 that range and is consistent with other rulings of other courts and comprehensive surveys of class
23 action settlements and fee awards. *See Martin v. AmeriPride Servs.* (S.D. Cal. 2011) 2011 U.S.
24 Dist. LEXIS 61796, 23 (recognizing that "courts may award attorney's fees in the 30-40% range
25 in wage and hour class actions that result in recovery of a common fund under \$10 million"); *see*
26 *also Eisenberg & Miller, Attorney Fees in Class Action Settlements: An Empirical Study: 1993-*
27 *2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action
28 litigation nationwide conclude that fees in the range sought here are consistent with market

1 rates).

2 The results delivered by Class Counsel also support the requested percentage of the fund.
3 Here, Plaintiff and his counsel secured a \$1,600,000.00 non-reversionary common fund
4 settlement.

5 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
6 is relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala* (D.C.
7 Cir. 1993) 1 F.3d 1261, 1272. A positive response rate tends to suggest that the court’s
8 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Notice
9 Packet specifically notified Class Members that Class Counsel would be seeking up to
10 \$560,000.00 in attorneys’ fees. To date, no Class Member has objected to the settlement. This
11 strong favorable response also supports the requested fees.

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

15 No one expects a lawyer whose compensation is contingent upon
16 his success to charge, when successful, as little as he would charge
17 a client who had agreed to pay for his services, regardless of
18 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.

19 *City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470. Here, it is clear that a
20 settlement fund of \$1,600,000.00 has been created as the entire amount is to be paid out without
21 any reversions. For Class Counsel, the fees here were wholly contingent in nature and the case
22 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
23 in class action litigation, as well as a potentially drawn-out battle with a corporate Defendant.

24 As such, the requested fee award is fair and reasonable, and should be awarded in its
25 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
26 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
27 Class Counsel’s request for attorneys’ fees in the amount of \$560,000.00 is fair, reasonable, and
28 adequate.

1 **VI. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
2 **OF COSTS**

3 The request for reimbursement of costs, in the amount of \$8,522.18 is fair and
4 reasonable, especially in light of the fact that the Parties agreed that Plaintiff's counsel may seek
5 up to \$20,000.00 as reimbursement for litigation costs under the Settlement Agreement. *See*
6 Settlement Agreement ¶¶ A.5, D.4. As set forth in Plaintiff's counsel's declaration, the costs
7 were all directly incurred in the prosecution of this action, including without limitation, filing
8 and service fees, court fees, postage fees, and mediation fees. Agnew Decl. ¶ 15, Ex. A.) The
9 authority for the court to award this is the Parties' Settlement Agreement and the California
10 Labor Code. As such, the requested costs should be approved as fair and reasonable.

11 **VII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
12 **APPROVED**

13 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
14 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
15 funds. As shown in the Declaration of Taylor Mitzner, the settlement administration fees
16 expended in this matter amount to a total of \$15,0000.00. Admin Decl. ¶ 16, Ex. B. For such
17 reasons, it is requested that the Settlement Administrator's fees be approved.

18 **VIII. CONCLUSION**

19 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff
20 respectfully submits that the standards for final approval have been met, and the terms of the
21 Settlement Agreement are fair, adequate, and reasonable.

22 Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form
23 proposed and submitted:

- 24 1. Granting final approval to the proposed Settlement Agreement in this action;
25 2. Approving distribution of the settlement funds to the Class Members pursuant to
26 the terms of the Settlement Agreement;
27 3. Approving Plaintiff's request for an enhancement payment of \$10,000.00 to
28 Plaintiff, with payments pursuant to the terms of the Settlement Agreement;

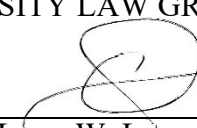
1 4. Approving Plaintiff's Counsel's request for an award to Class Counsel for
2 \$560,000.00 in attorneys' fees and \$8,522.18 in costs, with payment pursuant to the terms of the
3 Settlement Agreement;

4 5. Approving Plaintiff's request for payment of the settlement administration costs
5 to Phoenix Settlement Administrators in the amount of \$15,000.00, with payment pursuant to the
6 terms of the Settlement Agreement; and

7 6. Entering final judgment as to all members of the Class in this action.
8

9 DATED: July 21, 2022

DIVERSITY LAW GROUP, P.C.

10
11 By:  _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
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*Attorneys for Defendant Nestle Waters
North America, Inc.*

Spencer.skeen@ogletree.com
Jesse.ferrantella@ogletree.com

1 4370 La Jolla Village Drive, Suite 990 Cameron.flynn@ogletree.com
2 San Diego, CA 92122

3 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of
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6 indicated above or on the attached mailing list. I certify that said electronic transmission was
completed and that all pages were received by the party(ies) identified herein or on the attached
mailing list.

7 I declare under penalty of perjury under the laws of the State of California that the above
8 is true and correct. Executed on July 21, 2022, at Los Angeles, California.

9
10 
Erika Mejia