

1 B. James Fitzpatrick (SBN: 129056)
2 Laura L. Franklin (SBN: 282642)
3 **FITZPATRICK & SWANSTON**
4 555 S. Main Street
5 Salinas, CA 93901
6 Telephone: (831) 755-1311
7 Facsimile: (831) 755-1319

8 Attorneys for Plaintiff
9 ANGELICA MACIAS, on behalf of herself and all similarly aggrieved employees

10 (Additional Counsel on Next Page)

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF MONTEREY**

13 CECILIA ZAMUDIO, on behalf of herself
14 and all similarly aggrieved employees,

15 Plaintiff,

16 v.

17 CYPRESS HEALTHCARE PARTNERS,
18 LLC; and DOES 1 through 50, inclusive,

19 Defendants.

20 Case No. 20CV003329
21 [Related Case No. 21CV000056]

22 **PLAINTIFFS' NOTICE OF MOTION AND**
23 **MOTION FOR PRELIMINARY**
24 **APPROVAL OF CLASS ACTION**
25 **SETTLEMENT; MEMORANDUM OF**
26 **POINTS AND AUTHORITIES IN**
27 **SUPPORT**

28 Date: March 10, 2023
Time: 8:30 a.m.
Dept.: 15

ANGELICA MACIAS, on behalf of herself
and all similarly aggrieved employees,

Plaintiff,

v.

CYPRESS HEALTHCARE PARTNERS,
LLC; and DOES 1 through 50, inclusive,

Defendants.

Complaint Filed: December 11, 2020
FAC Filed: February 23, 2021
Trial Date: Not Set

ADDITIONAL COUNSEL

Larry W. Lee (SBN 228175)
Max W. Gavron (SBN 291697)

DIVERSITY LAW GROUP, P.C.

515 S. Figueroa Street, Suite 1250
Los Angeles, California 90071
Telephone: (213) 488-6555
Facsimile (213) 488-6554
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff
ANGELICA MACIAS, on behalf of herself and all similarly aggrieved employees

Chaim Shaun Setareh (SBN: 204514)

SETAREH LAW GROUP

9665 Wilshire Blvd., Suite 430
Beverly Hills, CA 90212
Telephone: (310) 888-7771
Facsimile: (310) 888-0109

Attorneys for Plaintiff,
CECILIA ZAMUDIO, on behalf of herself and all similarly aggrieved employees

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

2 **PLEASE TAKE NOTICE** that, on March 10, 2023, at 8:30 a.m. before the Honorable
3 Thomas W. Wills, judge presiding in Department 15 of the above-referenced Court, located at 1200
4 Aguajito Road, Monterey, California 93940, Plaintiffs Angelica Macias and Cecilia Zamudio
5 (together, “Plaintiffs”) will and hereby does move the Court for the following relief with respect to
6 the Joint Stipulation of Class Action Settlement (“Agreement” or “Settlement Agreement”) entered
7 into by Plaintiffs and Defendant Cypress Healthcare Partners, LLC (“Defendant”) (together with
8 Plaintiff, the “Parties”):

9 1. That the Court approve the Settlement Agreement referenced above;

10 2. That the Court conditionally certify the following Class for settlement purposes only:
11 all current and former non-exempt employees of Defendant who worked for Defendant in the
12 State of California at any time from December 11, 2016, through May 31, 2022.

13 3. That Plaintiffs Angelica Macias and Cecilia Zamudio be appointed as Class
14 Representatives, and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston, Larry
15 W. Lee and Max W. Gavron of Diversity Law Group, P.C., and Chaim Shaun Setareh and David
16 Keledjian of Setareh Law Group be appointed as Class Counsel;

17 4. That the Court preliminary approve the Settlement Agreement and the total Gross
18 Settlement Amount in the amount of One Million Six Hundred Thousand Dollars (\$1,600,000.00);

19 5. That the Court finds on a preliminary basis that the Settlement Agreement appears to
20 be within the range of reasonableness of a settlement, including the amount of the PAGA penalties,
21 the enhancement payment to the Class Representatives, Class Counsel award of attorneys’ fees and
22 costs, settlement administration costs, and the allocation of individual payments to Class Members,
23 that could ultimately be given final approval by this Court;

24 6. That the Court approve the mailing of the proposed Notice of Proposed Class Action
25 Settlement (“Notice Packet”) to be sent to Class Members;

26 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
27 Administrator; and

28 8. That the Court schedule the matter for a final approval hearing.

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

4 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
5 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
6 Class Members to participate in, opt out of, or object to the settlement. This Motion is based on the
7 Memorandum of Points and Authorities included herein, the Settlement Agreement and the
8 proposed Notice Packet, and the supporting Declarations of B. James Fitzpatrick, Laura L. Franklin,
9 Larry W. Lee, Max W. Gavron, Chaim Shaun Setareh, David Keledjian, Plaintiff Angelica Macias,
10 and Plaintiff Cecilia Zamudio, and upon the oral arguments of counsel (should there be any), and on
11 the complete records and file herein.

12 Dated: February 15, 2023

SETAREH LAW GROUP

13 BY: /s/ Chaim Shaun Setareh
14 Chaim Shaun Setareh
15 Attorneys for Plaintiff Cecilia Zamudio

16 Dated: February 15, 2023

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

17
18 By: /s/ B. James Fitzpatrick
19 B. James Fitzpatrick
20 Larry W. Lee
21 Max W. Gavron
22 Attorneys for Plaintiff Angelica Macias
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TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	8
II. <u>PROCEDURAL HISTORY</u>	10
A. The Allegations Set Forth in the PAGA Notices and Complaints	10
B. The Parties Participate in Private Mediation.....	11
III. <u>DISCUSSION</u>	12
A. Proposed Class Definition	14
B. Settlement Terms and Evaluation	14
1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive	18
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendant.....	19
3. Scope of the Release of Class Members' Claims	20
4. Tax Treatment of Settlement Amounts.....	20
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations.....	21
C. Notice to Class Members	21
D. Typicality and Adequacy of Representation.....	22
1. Class Representatives' Claims are Typical of the Class	22
2. Class Counsel Have Adequately Represented the Class and Have Experience with Wage and Hour Class Action	23
E. Costs and Fees	23
1. Attorneys' Fees and Costs	23
2. Proposed Payment to the Class Representatives.....	25
3. Settlement Administration Fees.....	26
IV. <u>CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL</u>	26

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342 (N.D. Cal. Mar. 20, 2015)	18
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	23
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018).....	16
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105 (1995).....	24
<i>City of San Jose v. Superior Court</i> , 12 Cal.3d 447 (1974)	22
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	13
<i>Duran v. U.S. Bank Nat’l Ass’n</i> , 59 Cal.4th 1 (2014).....	17
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	14
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (1998).....	22
<i>In re Armored Car Antitrust Litig.</i> , 472 F.Supp. 1357 (N.D. Ga. 1979)	14
<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475 (S.D.N.Y. 1984).....	13
<i>In re Chicken Antitrust Litig.</i> , 560 F.Supp. 957 (N.D. Ga. 1980).....	14
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454 (9th Cir. 2000)	17
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal.5th 480 (2016)	24, 25
<i>Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.</i> , 834 F.2d 677 (7th Cir. 1987) ..	14
<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004).....	14, 15
<i>Priddy v. Edelman</i> , 883 F.2d 438 (6th Cir. 1989).....	14
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal.3d 462 (1981).....	22
<i>Serrano v. Priest</i> , 20 Cal.3d 25 (1977)	23, 24
<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978).....	14
<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	14
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal.App.3d 411 (1987)	22
<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)....	18
<i>Vasquez v. Superior Court</i> , 4 Cal.3d 800 (1971)	22

1	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390 (N.D. Cal. Nov. 21, 2012)	18
2	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F.2d 759 (9th Cir. 1997)	23, 24
3	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001)	13, 23
4	<u>Statutes</u>	
5	California Business & Professions Code § 17200	8
6	California Civil Procedure § 384	19
7	Civil Code § 1542	9
8	Labor Code § 203.....	15
9	Labor Code § 2699(e)(2).....	16
10	Labor Code § 512.....	8, 23
11	<u>Other Authorities</u>	
12	Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 11.26 (4th ed. 2002).....	12, 13
13	<i>Manual for Complex Litigation, Third</i>	12
14		
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act (“PAGA”)
3 action under the California Labor Code. Plaintiffs Angelica Macias and Cecilia Zamudio (together,
4 “Plaintiffs”) allege that Defendant Cypress Healthcare Partners, LLC (“Defendant”) failed to pay
5 wages for all hours worked, failed to pay overtime wages, meal and rest period premiums, vacation,
6 and sick pay at the correct regular rate of pay, failed to provide off-duty meal and rest periods or
7 pay premium compensation in lieu thereof, failed to reimburse business expenses, failed to timely
8 pay wages at the time owed and upon separation of employment, and failed to provide accurate
9 wage statements. Based on these violations, Plaintiff asserts class and PAGA claims for violation of
10 Labor Code §§ 201-203, 204, 226, 226.7, 510, 512, 558, 1174, 1175, 1194, 1198, 2802, and 2698,
11 *et seq.*, and California Business & Professions Code § 17200, *et seq.* (the “UCL”). The Parties have
12 reached a class and PAGA action settlement, the terms of which are reflected in the Parties’ Joint
13 Stipulation of Class Action Settlement (“Agreement” or “Settlement Agreement”).

14 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating to
15 the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
16 principles applicable to the claims asserted against Defendant. Through the exchange of informal
17 discovery, Defendant provided necessary data pertaining to the number of putative class members
18 and aggrieved employees and their average rates of pay, the number of pay periods at issue, and
19 Defendant’s policies regarding employee timekeeping, meal and rest periods, and payment of
20 wages. The information provided by Defendant allowed Plaintiffs to review and analyze the liability
21 and potential exposure. Thereafter, the Parties attended a full day of mediation with experienced
22 mediator Mike Masuda, Esq. The Parties were unable to reach an agreement and continued
23 litigation of the matter. After further arm’s length negotiations conducted over the course of several
24 months, the Parties were able to reach the current settlement of the class and PAGA claims. The
25 following represents the key terms of the settlement:

- 26 • Gross Settlement Amount of \$1,600,000.00, which will be paid by Defendant and
27 distributed to the class on a **non-reversionary basis, such that no monies will**
28 **revert back to Defendant** (Agreement ¶ 41);

- Class size of approximately 1,337 individuals (Agreement ¶ 4);
- Class Members do not need to submit claim forms to participate in the settlement (Agreement ¶ 53);
- Class Representative Enhancement Payment of up to \$10,000 to each Plaintiff for their efforts in prosecuting this action on behalf of other Class Members and in consideration for providing a general release of all claims, including a waiver under Civil Code § 1542 (Agreement ¶¶ 10, 73);
- Class Counsel’s attorneys’ fees of up to one-third of the Gross Settlement Amount, or up to \$533,333.33 (Agreement ¶ 43);
- Class Counsel’s litigation costs of up to \$30,000.00 (Agreement ¶ 43);
- Settlement Administration Costs of up to \$13,495.00 (Agreement ¶ 45);
- Payment to the California Labor and Workforce Development Agency (“LWDA”) of \$75,000.00, representing 75% of the total PAGA allocation of \$100,000.00 (Agreement ¶ 46);
- The remaining 25% of the PAGA allocation of \$100,000.00, or \$25,000.00, to be distributed to Aggrieved Employees¹ on a *pro rata* basis, based on the number of pay periods worked during the PAGA Period (Agreement ¶ 46);
- Net Settlement Amount of approximately **\$903,171.67** (Agreement ¶¶ 18, 47); and
- Raw average of at least **\$675.52** to each Participating Class Member.

The Parties believe that this amount is fair, adequate, and reasonable, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiffs and their counsel are confident that they could prevail on class certification and on the merits of the claims, they recognize the inherent risks in drawn-out litigation and the specific risks that a class might not be certified and/or that Plaintiffs could fail to establish liability. Based on their own independent investigation and evaluation, the Parties and their respective counsel are of the opinion that the

¹ Pursuant to the Settlement Agreement, the “Aggrieved Employees” consist of all current and former non-exempt employees of Defendant who worked for Defendant in the State of California at any time from December 11, 2019, through May 31, 2022.

1 settlement for the consideration and on the terms set forth in the Settlement Agreement is fair,
2 reasonable, and adequate and is in the best interests of the Class and Defendant.

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

5 **II. PROCEDURAL HISTORY**

6 **A. The Allegations Set Forth in the PAGA Notices and Complaints**

7 On December 11, 2020, Plaintiff Cecilia Zamudio (“Zamudio”) submitted her written notice
8 to the LWDA, alleging violations of Labor Code §§ 201-203 and 226, pursuant to the PAGA, Labor
9 Code § 2699. Declaration of Chaim Shaun Setareh (“Setareh Decl.”). On December 11, 2020,
10 Zamudio filed a complaint against Defendant in the Superior Court of California, County of
11 Monterey (the “Action”). Setareh Decl. Zamudio filed an amended complaint on February 23,
12 2021, alleging claims for: (1) failure to provide meal periods; (2) failure to provide accurate wage
13 statements; (3) failure to timely pay wages; (4) unfair competition; and (5) penalties pursuant to
14 PAGA. *Id.*

15 On January 8, 2021, Plaintiff Angelica Macias (“Macias”) submitted her written notice to
16 the LWDA, alleging violations of Labor Code §§ 201, 201.3, 202, 203, 204, 207, 208, 209, 216,
17 218, 218.5, 218.6, 223, 225.5, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1199,
18 2800, and 2802, pursuant to the PAGA. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. On
19 January 7, 2021, Macias filed a complaint against Defendant in the Superior Court of California,
20 County of Monterey (the “Macias Action”). Gavron Decl. ¶ 3. The Macias Action complaint alleges
21 claims for: (1) failure to provide meal periods or pay premiums at the correct rate; (2) failure to
22 provide rest periods or pay premiums at the correct rate; (3) failure to pay hourly and overtime
23 wages; (4) failure to provide accurate wage statements; (5) failure to pay all wages upon
24 termination; (6) failure to timely pay wages; (7) failure to reimburse work-related expenses; (8)
25 penalties pursuant to PAGA; and (9) unfair business practices. *Id.*

26 Plaintiffs’ class and PAGA claims as pled in their respective complaints are predicated on
27 the following allegations. Plaintiffs allege that Defendant failed to pay wages for all hours worked.
28 Specifically, Defendant required employees to keep their personal cell phones on their person and

1 respond to work calls and text messages while off-the-clock. Plaintiffs also allege that Defendant
2 failed to factor in non-discretionary incentive pay into the regular rate of pay for the purposes of
3 paying overtime. Whenever non-discretionary incentive wages and overtime wages were paid
4 during the same pay period, overtime pay was paid at the base rate of pay, rather than the higher,
5 regular rate of pay. Further, Plaintiffs allege that Defendant failed to provide off-duty meal or rest
6 periods to employees and failed to provide premium compensation in lieu of missed breaks.
7 Plaintiff also allege that employees were not reimbursed for work-related costs, such as the use of
8 personal cell phones and vehicles. Moreover, all wages owed were not paid within the time limits
9 specified by Labor Code § 204 and were not paid upon separation of employment. Due to the above
10 allegations, the wage statements issued to employees did not identify accurate information. As a
11 result of these alleged violations, Plaintiffs seek damages and penalties under the California Labor
12 Code, California Business & Professions Code, and the PAGA, as well as attorneys' fees and costs.
13 Gavron Decl. ¶ 5.

14 **B. The Parties Participate in Private Mediation**

15 After Plaintiffs initiated their respective actions, the Parties agreed to participate in a global
16 mediation. In connection with mediation, the Parties agreed to exchange informal discovery
17 sufficient to allow Plaintiffs to assess the claims and liability, as well as analyze the maximum
18 exposure of damages and penalties. Gavron Decl. ¶ 6. Defendant produced data, including the
19 number of putative class members and aggrieved employees and their average rates of pay, the
20 number of pay periods at issue, and Defendant's policies regarding employee timekeeping, meal
21 and rest periods, and payment of wages. *Id.* This allowed Plaintiffs to conduct a full damages
22 analysis. *Id.*

23 On April 20, 2022, the Parties engaged in a full-day mediation with mediator Michael
24 Masuda, Esq. Gavron Decl. ¶ 7. While the Parties did not reach an agreement at the mediation, they
25 continued negotiations over the course of several months and reached an agreement with the
26 assistance of Mr. Masuda. *Id.* In resolution of the class and PAGA claims, the Parties executed the
27 Joint Stipulation of Class Action Settlement, a true and correct copy of which is attached as **Exhibit**
28 **A** to the Declaration of Max W. Gavron.

1 On October 21, 2022, the Parties submitted a stipulation to consolidate the Action and the
2 Macias Action for the purposes of settlement. The Court approved the Parties’ stipulation on
3 November 2, 2022. Gavron Decl. ¶ 9.

4 The Parties recognize the risk, expense, and delay in continuing litigation with the class and
5 PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl. ¶ 10.
6 Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims arising
7 from or relating to the afore-referenced claims.

8 **III. DISCUSSION**

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

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

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

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

The procedures for the parties’ submission of a proposed settlement for preliminary

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

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

8 *Id.* § 11.24

9 Here, the Parties have reached such an agreement and have submitted to this Court in
10 connection with this Motion a copy of the Settlement Agreement fully setting forth the agreement
11 reached by the Parties. The Settlement Agreement sets forth all terms of the agreement reached by
12 the Parties as to settlement of the class and PAGA claims. Said terms in the Settlement Agreement
13 include, among other things, the method for calculating the Class Members’ individual portions of
14 the settlement payment. *See* Agreement ¶ 47.

15 The parties also may, at the preliminary approval stage, request that the court provisionally
16 approve certification of the class for settlement purposes—conditional upon final approval of the
17 settlement. “[P]re-certification settlements are routinely approved if found to be fair and
18 reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk v.*
19 *Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached before
20 any “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In*
21 *re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this
22 practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement
23 proposals”). As further explained by Professor Newberg:

24 The strength of the findings made by a judge at a preliminary hearing
25 or conference concerning a tentative settlement proposal...may be set
26 out in conditional orders granting tentative approval to the various
27 items submitted to the court. Three basic rulings are often conditionally
28 entered at this preliminary hearing. These conditional rulings may
29 approve a temporary settlement class, the proposed settlement, and the
30 class counsel’s application for fees and expenses.

31 4 *Newberg on Class Actions* § 11.

32 The Settlement Agreement reached by the Parties contains such terms as class identification,

1 settlement amount, and payment procedures, as well as methods for individuals to opt-out of or
2 object to the settlement.

3 **A. Proposed Class Definition**

4 The current settlement is being settled on behalf of the following Class: all current and
5 former non-exempt employees of Defendant who worked for Defendant in the State of California
6 at any time from December 11, 2016, through May 31, 2022 (“Class” or “Class Member(s)”). *See*
7 Agreement ¶ 4. The Class Period means the period from December 11, 2016, through May 31,
8 2022. *Id.* ¶ 8. Pursuant to the Agreement, Defendant has represented that there are approximately
9 1,337 individuals that comprise the Class. Agreement ¶ 4.

10 With respect to PAGA, employees who comprise the Aggrieved Employees include: all
11 current and former non-exempt employees of Defendant who worked for Defendant in the State
12 of California at any time from December 11, 2019, through May 31, 2022 (“Aggrieved
13 Employees”). *See* Agreement ¶ 3. Pursuant to the Agreement, Defendant has represented that there
14 are approximately 938 Aggrieved Employees. *Id.*

15 **B. Settlement Terms and Evaluation**

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

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

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

7 Here, both Plaintiffs’ and Defendant’s counsel have a great deal of experience in wage and
8 hour class action litigation. Plaintiffs’ counsel have been approved as class counsel in a number of
9 wage and hour class actions and have extensive litigation experience. Declaration of J. James
10 Fitzpatrick (“Fitzpatrick Decl.”) ¶¶ 5-6; Declaration of Laura L. Franklin (“Franklin Decl.”) ¶¶ 5-6;
11 Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 4-7; Gavron Decl. ¶¶ 11, 33-39; Setareh Decl.;
12 Declaration of David Keledjian (“Keledjian Decl.”). Each side has apprised the other of their
13 respective factual contentions, legal theories, and defenses, resulting in negotiations taking place
14 between the Parties. Gavron Decl. ¶ 9.

15 Based on the class data provided by Defendant, Plaintiffs estimated that Defendant would
16 realistically face potential liability of up to approximately \$11,552,540.90 for Plaintiffs’ class
17 claims if Plaintiffs succeeded at trial on all class claims. Gavron Decl. ¶ 25. Plaintiffs were able to
18 estimate the potential class penalties based on class data and sample records provided by Defendant.
19 *Id.* Specifically, this amount was calculated based on the following breakdowns for each class
20 claim:

- 21 • \$3,236,625 for meal period violations;
- 22 • \$3,236,625 for rest period violations;
- 23 • \$1,521,116.50 for unpaid wages;
- 24 • \$2,674,000 for Labor Code § 226(e) penalties;
- 25 • \$225,000 for unreimbursed business expenses; and
- 26 • \$659,174.40 for waiting time penalties under Labor Code § 203

27 *See* Gavron Decl. ¶ 25.

28 With respect to potential liability of Plaintiffs’ PAGA claims, Plaintiffs estimated that

1 Defendant could face civil penalties of up to \$3,858,600. Gavron Decl. ¶ 26. The breakdown for the
2 calculation of Plaintiffs' PAGA penalties is as follows:

- 3 • \$771,720 for meal period violations;
- 4 • \$771,720 for rest period violations;
- 5 • \$771,720 for unpaid wages;
- 6 • \$771,720 for wage statement violations; and
- 7 • \$771,720 for PAGA penalties with respect to the overtime regular rate claim.

8 See Gavron Decl. ¶ 26. However, even assuming Plaintiffs ultimately prevail on their PAGA
9 claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code §
10 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on the facts and
11 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
12 arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in
13 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his
14 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing
15 the employer's good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court
16 of Appeal found such reduction to be proper. *Id.* at p. 539.

17 Although Plaintiffs believe in the merits of the alleged claims and maintains that there is no
18 reason for reducing PAGA penalties, Plaintiffs are aware that Defendant may raise defenses to the
19 claims and further with respect to the reduction of PAGA penalties and that it could be persuasive to
20 the Court. Gavron Decl. ¶ 28. Thus, even if Plaintiffs were to successfully prove their claims at trial,
21 there is a possibility that the Court may only award a small percentage of PAGA penalties, as the
22 Court has discretion to do so. The Gross Settlement Amount was premised with this risk in mind,
23 associated with the possibility of the Court significantly reducing Plaintiffs' PAGA penalties, along
24 with other attendant risks, even if Plaintiffs were to prevail at trial. *Id.*

25 Further, Defendant raised several defenses that presented risk on Plaintiffs' claims. Gavron
26 Decl. ¶ 29. With respect to the meal and rest period premium claims, it is Defendant's position that
27 it maintains and follows a compliant meal and rest break policy, and that it provides proper training
28 and periodic reminders to employees regarding the policy. Furthermore, Defendant contends that

1 waiting time penalties are not available for any alleged late payment of meal and rest period
2 premiums, as it disputes that meal and rest period premiums constitute “wages.” It is Defendant’s
3 position that waiting time penalties are only available in an action or claim to recover nonpayment
4 of wages. *Id.*

5 While Defendant acknowledged that it failed to include its COVID stipend in the regular
6 rate for purposes of calculating the overtime premium, it maintains that such practices were limited
7 to a 6-month period. Thus, Defendant asserted that the underpaid overtime associated with this
8 claim was limited to a maximum value of about \$18,000 for the class. Defendant further maintains
9 that waiting time penalties associated with this overtime calculation error are unsupported because it
10 did not willfully withhold this overtime pay from its employees.

11 Although Plaintiffs believe that the class can be certified, Plaintiffs also believe in the
12 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiffs involved
13 in not prevailing on one or more of the causes of action or theories alleged in the operative
14 complaints, the possibility of non-certification, and the potential for appeals. Gavron Decl. ¶ 30.
15 These risks on class certification are compounded by the California Supreme Court’s holding in
16 *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class
17 certification and subsequently prevailed at trial after eight years of litigation, but the judgment and
18 the certification ruling were reversed by the California Supreme Court after an additional five years
19 of litigation. The case was remanded back to superior court where class certification was denied and
20 plaintiffs’ subsequent appeal also was denied.

21 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
22 inherent risks of litigation, including the substantial risks relative to class certification, the costs of
23 pursuing such litigation, and the risks associated with the Court’s discretion to reduce PAGA
24 penalties. The settlement is the result of extensive arm’s-length negotiations between the Parties and
25 their counsel and was facilitated by an experienced and neutral mediator. Gavron Decl. ¶ 32.

26 Indeed, numerous courts have held that **gross** settlements approximating between only 8 and
27 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp.*
28 *Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16%

1 of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement
2 amounting to only a fraction of the potential recovery does not per se render the settlement
3 inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed
4 relative to risks of pursuing the litigation to judgment”; noting that whether the settlement is fair
5 and adequate depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor Supply*
6 *Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015) (holding that
7 class action settlement recovering between **8.5% and 25%** of the defendant’s potential exposure
8 was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal.
9 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1%**
10 of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*,
11 No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that
12 gross class action settlement of approximately 15% of the potential recovery was fair and
13 reasonable). Here, based on the amounts explained above, the total exposure for Plaintiffs’ class and
14 PAGA claims amount to **\$15,411,140.90**. The Gross Settlement Amount here is **\$1,600,000.00**, and
15 thus amounts to approximately **10.38%** of the total estimated liability. The percentage-to-recovery
16 ratio of this settlement is within the range of fairness and reasonableness and should be approved by
17 the Court. *Id.*

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

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

27 The Settlement Agreement provides for One Million Six Hundred Thousand Dollars
28 (\$1,600,000.00) as the Gross Settlement Amount. *See* Agreement ¶ 16. The Net Settlement Amount,

1 calculated after deduction of attorneys' fees (up to \$533,333.33), litigation costs (up to \$30,000.00),
2 the enhancement payment to the Class Representatives (up to \$20,000.00), the PAGA Payment
3 (\$100,000.00), and Settlement Administration Costs (up to \$13,495.00), is estimated to be
4 approximately **\$903,171.67**. *Id.* ¶¶ 6, 16, 10, 18, 21, 34; Gavron Decl. ¶ 14. Each Class Member that
5 does not opt-out of the settlement will be awarded a portion of the Net Settlement Amount on a *pro*
6 *rata* basis, based upon the total number of workweeks each Class Member worked during the Class
7 Period. *See* Agreement ¶ 47.

8 Based thereon, on a raw average, each Class Member may potentially recover approximately
9 **\$675.52**. Gavron Decl. ¶ 23. The amount actually paid to each Class Member may increase or
10 decrease depending on the actual number of workweeks worked during the Class Period and the
11 number of opt-outs received. *Id.* To the extent that there are valid opt-outs, the Settlement
12 Administrator will proportionately increase the individual settlement payments to each Participating
13 Class Member so that the amount actually distributed to Participating Class Members equals 100%
14 of the Net Settlement Amount. *Id.*

15 Additionally, as part of the PAGA Payment, 25% of the PAGA Payment, or \$25,000.00,
16 will be distributed to Aggrieved Employees who worked during the PAGA Period (December 11,
17 2019, through May 31, 2022), on a *pro rata* basis, based on the number of pay periods worked by
18 each Aggrieved Employee during the PAGA Period as compared to the total number of pay periods
19 during the PAGA Period. Agreement ¶ 46.

20 Finally, the terms of the Settlement provide that uncashed checks (upon the expiration date)
21 shall be distributed to Legal Aid at Work as the *cy pres* beneficiary. *See* Agreement ¶ 63. Legal Aid
22 at Work is a non-profit legal services organization that provides free clinics and legal information,
23 litigation services, and policy advocacy to strengthen workers' rights, in accordance with California
24 Civil Procedure § 384. Gavron Decl. ¶ 20.

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

27 None of the settlement funds will revert to Defendant. *See* Agreement ¶ 41.
28

1 **3. Scope of the Release of Class Members’ Claims**

2 As a condition of participating in this Settlement, Class Members who do not opt out of the
3 Settlement (“Participating Class Members”) will provide a limited release of the following claims
4 against the Released Parties (“Released Class Claims”):

5 [A]ll claims that were alleged in the operative complaints of the
6 Action and any claims that could have been alleged based on the facts
as alleged in the operative complaints of the Action.

7 *See* Agreement ¶ 27. Pursuant to the Settlement Agreement, the release of claims is as follows:

8 Upon the Effective Date and funding of the Gross Settlement Amount,
9 all Participating Class Members, on behalf of themselves and their
10 heirs, executors, representatives, administrators, trustees, and/or
11 permitted assigns, hereby do and shall be deemed to have fully, finally
and forever released, settled, compromised, relinquished and
12 discharged any and all of the Released Parties of and from any and all
Released Class Claims that accrued during the Released Claims Period.

13 Agreement ¶ 71. The Parties agreed to the Released Claims Period of December 11, 2016, through
14 May 31, 2022. *Id.* ¶ 28. Given that the release is tailored to only claims pled in the operative
15 complaints of the Action and nothing more, the release is appropriately limited.

16 In addition, Class Members who meet the criteria of Aggrieved Employees will also provide
17 a limited release of the following claims against the Released Parties (“Released PAGA Claims”):

18 [A]ll claims under the Private Attorneys General Act that were
19 alleged in the operative complaints in the Action and any claims that
20 could have been alleged based on the facts as alleged in the operative
complaints in the Action.

21 *Id.* ¶ 29. Pursuant to the Settlement Agreement, the release of claims is as follows:

22 Upon the Effective Date and funding of the Gross Settlement Amount,
23 all Aggrieved Employees, on behalf of themselves and the State of
24 California, hereby do and shall be deemed to have fully, finally and
forever released, settled, compromised, relinquished and discharged
25 any and all of the Released Parties of and from any and all Released
PAGA Claims that accrued during the PAGA Period.

26 *Id.* ¶ 72.

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

28 The Parties have agreed that the individual settlement payment to Class Members shall be

1 allocated as follows: ten percent (10%) as payment for wages, less withholdings and deductions, for
2 which an IRS Form W-2 shall issue, and ninety percent (90%) as payment of penalties and interest,
3 for which an IRS Form 1099 shall issue. Agreement ¶ 66.

4 With respect to PAGA payments distributed to Aggrieved Employees, one hundred percent
5 (100%) of those payments shall be allocated as penalties and interest and shall be deemed IRS Form
6 1099 income. *Id.*

7 Pursuant to the Settlement Agreement, employer-side payroll taxes on the wage portion of
8 the individual settlement payments paid to Class Members will be paid by Defendant separate and
9 in addition to the Gross Settlement Amount. Agreement ¶ 41.

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

12 As stated above, Class Members do not need to do anything other than keep the Settlement
13 Administrator apprised of any address changes should they wish to receive their share of the
14 settlement funds. Agreement ¶ 53. In other words, because this is **not** a claims-made settlement,
15 Class Members will not be required to make a submission to participate in the settlement. No claim
16 forms are required. Thus, this substantially decreases the amount of burden on each Class Member
17 to receive their share of the settlement funds. If a Class Member does not wish to take part in this
18 settlement or be bound by the release, the Class Member must submit a Request for Exclusion. *See*
19 Agreement ¶ 55.

20 **C. Notice to Class Members**

21 Should the Court grant the instant motion, Defendant will provide the Settlement
22 Administrator with a list containing each Class Member's full name, most recent mailing address,
23 employee number, Social Security number, estimated number of workweeks worked by each Class
24 Member during the Class Period, and number of pay periods worked by each Aggrieved Employee
25 during the PAGA Period ("Class List and Data") within fifteen (15) calendar days of preliminary
26 approval. Agreement ¶¶ 7, 50. Upon receipt of the information and prior to mailing the Notice
27 Packet to Class Members, the Settlement Administrator shall perform a search based on the
28 National Change of Address Database for information to update and correct for any known or

1 identifiable address changes. *Id.* ¶ 52. Within seven (7) calendar days of receipt of the Class List
2 and Data from Defendant, the Settlement Administrator will mail the Notice Packet out to Class
3 Members via First-Class U.S. Mail. *Id.* ¶ 51. Any Notice Packets returned to the Settlement
4 Administrator as non-deliverable on or before the opt-out deadline shall be re-sent via regular first-
5 class U.S. mail to the forwarding address affixed thereto. *Id.* ¶ 54. If no forwarding address is
6 provided, the Settlement Administrator shall perform a skip trace or other search to locate the most
7 current address and perform a re-mailing. *Id.* Class Members who received a re-mailed Notice
8 Packet will have their deadline to submit opt-outs or written objections extended by fifteen (15)
9 calendar days. *Id.*

10 As set forth in the Notice Packet, Class Members will be allowed to opt out of or submit
11 written objections to the settlement by a certain deadline. Agreement ¶ 53. Regardless of whether a
12 Class Member submits a written objection, Class Members may appear and make oral objections at
13 the Final Approval Hearing. *Id.* ¶ 58.

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

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

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

27 Plaintiffs allege that Defendant, as a matter of its corporate policy, practice, or procedure
28 violated the Labor Code by failing to pay wages for all hours worked, failing to pay overtime wages

1 at the correct regular rate of pay, failing to provide off-duty meal and rest periods or pay premium
2 compensation in lieu thereof, failing to reimburse business expenses, failing to timely pay wages at
3 the time owed and upon separation of employment, and failing to provide accurate wage statements.
4 Declaration of Angelica Macias (“Macias Decl.”) ¶¶ 3-7; Declaration of Cecilia Zamudio
5 (“Zamudio Decl.”). In other words, Plaintiffs contend that they were subjected to the same policies
6 and practices as other Class Members and that their claims are typical to those of the Class.

7 Moreover, Plaintiffs do not have any interests adverse to the Class, nor have any such issues
8 been raised or presented. Macias Decl. ¶ 8; Zamudio Decl. Plaintiffs have taken all necessary steps
9 to represent the interests of the Class, and by providing information and documents to Plaintiffs’
10 counsel. Macias Decl. ¶ 9; Zamudio Decl. For such reasons, Plaintiffs have adequately represented
11 the Class Members and will continue to do so.

12 **2. Class Counsel Have Adequately Represented the Class and Have Experience**
13 **with Wage and Hour Class Action**

14 From the inception of the case, Class Counsel have zealously represented the interests of the
15 Class. Class Counsel have engaged in significant meet and confer discussions with opposing
16 counsel to obtain informal data and documents and to discuss the merits of the claims on behalf of
17 the Class. Gavron Decl. ¶ 10. The settlement was obtained for the benefit of the Class, as opposed
18 to the individual Class Representatives. *Id.* Further, Class Counsel have been approved as class
19 counsel on a number of prior cases, have litigated numerous other class action cases, and are
20 competent to represent the class. Fitzpatrick Decl. ¶¶ 5-6; Franklin Decl. ¶¶ 5-6; Lee Decl. ¶ 4-7;
21 Gavron Decl. ¶ 11; Setareh Decl.; Keledjian Decl.

22 **E. Costs and Fees**

23 **1. Attorneys’ Fees and Costs**

24 California state and federal courts have recognized that an appropriate method for
25 determining award of attorneys’ fees is based on a percentage of the total value of benefits to class
26 members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001);
27 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980);
28 *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable

1 doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs proportionally
2 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.”
3 *Vincent*, 557 F.2d at p. 769.

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

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

25 The California Supreme Court in *Laffitte* affirmed a fee award representing one-third of the
26 fund. *Laffitte*, 1 Cal. 5th at p. 506. And this was based on a lodestar amount that required a
27 multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is “extraordinarily high
28 or low [should] the trial court [] consider whether the percentage method should be adjusted so as to

bring the imputed multiplier within a justifiable range.” *Id.* at p. 505.

Here, the Parties have agreed to a payment of approximately one-third of the Gross Settlement Amount, or \$533,333.33, for payment to Class Counsel as attorneys’ fees. *See* Agreement ¶ 43. The Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs up to \$30,000.00. *Id.* Class Counsel have, at their own risk, expended costs, for example, to file this instant action and other pleadings in the case, effect service of process, participate in mediation, and advance other litigation-related costs.

Based on the foregoing, the Court should preliminarily approve the attorney’s fees and costs as requested by the Parties.

2. Proposed Payment to the Class Representatives

Class Representatives Angelica Macias and Cecilia Zamudio each request a modest enhancement of \$10,000.00. Agreement ¶ 44. The Class Representatives discussed the lawsuit with their counsel on a number of occasions, provided documents and information to their counsel, and reviewed various pleadings and documents, including the PAGA letters, complaints, and the Settlement Agreement. Macias Decl. ¶ 9; Zamudio Decl. As part of their duties as the Class Representative, Plaintiffs provided invaluable information, evidence, and documents that resulted in this settlement. Furthermore, in consideration for the enhancement payment, Plaintiffs also executed a general release of all claims including a waiver under California Civil Code § 1542, which other members of the Class did not have to do. Agreement ¶ 73; Macias Decl. ¶ 11; Zamudio Decl.

In addition to the invaluable services that they provided, Plaintiffs also took a significant risk, both professionally and monetarily, in acting as a Class Representative and 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.

Furthermore, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiffs may face prejudice in the future from other potential employers. Plaintiffs took this risk upon themselves and the whole

1 Class benefited from these risks taken by Plaintiffs. Class Members did not have to file individual
2 lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the
3 potential for retaliation and not getting future employment had they filed a public lawsuit.

4 **3. Settlement Administration Fees**

5 The Parties have agreed to an estimated payment of approximately \$13,495.00 to the
6 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this
7 settlement. Agreement ¶¶ 35, 45. Phoenix Settlement Administrators is a well-recognized class
8 action settlement administrator. The Parties believe that the administration fee is reasonable and
9 should be approved.

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

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

19 Dated: February 15, 2023

SETAREH LAW GROUP

20 BY: /s/ Chaim Shaun Setareh
21 Chaim Shaun Setareh
22 Attorneys for Plaintiff Cecilia Zamudio

23 Dated: February 15, 2023

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

24 By: /s/ B. James Fitzpatrick
25 B. James Fitzpatrick
26 Larry W. Lee
27 Max W. Gavron
28 Attorneys for Plaintiff Angelica Macias