

Larry W. Lee (State Bar No. 228175)
Mai Tulyathan (State Bar No. 316704)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa St., Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

Attorneys for Plaintiff, the Class, and Aggrieved Employees

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Bernabe Montijo, Deputy Clerk

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

JAIME MOEN, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

GENENTECH, INC., a Delaware
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 37-2021-00008619-CU-OE-CTL

(Assigned for all purposes to the Honorable
Katherine A. Bacal, Dept. C-69)

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

Date: January 27, 2023

Time: 1:30 P.M.

Dept.: C-69

Complaint Filed: March 1, 2021

FAC Filed: March 10, 2022

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on January 27, 2023¹, at 1:30 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Katherine A. Bacal, judge presiding, in
4 Department C-69 of the above referenced Court, located at 330 W. Broadway, San Diego,
5 California 92101, Plaintiff Jaime Moen (“Plaintiff”) will seek an Order:

6 1. Granting final approval to the Joint Stipulation of Class and PAGA Action
7 Settlement and Release (“Stipulation” or “Settlement Agreement”) in this action;

8 2. Approving distribution of the settlement funds to the Settlement Class Members
9 and Aggrieved Employees pursuant to the terms of the Settlement Agreement;

10 3. Approving Plaintiff’s request for an award of the Class Representative
11 Enhancement Award of \$20,000.00 to Plaintiff pursuant to the terms of the Settlement
12 Agreement;

13 4. Approving Class Counsel’s request for an award of attorneys’ fees of one-third of
14 the Maximum Settlement Amount, or \$1,333,333.33, and reimbursement of actual litigation
15 costs of \$5,508.09, pursuant to the terms of the Settlement Agreement;

16 5. Approving Plaintiff’s request for payment of the settlement administration costs
17 to Phoenix Settlement Administrators in the amount of \$28,950.00, pursuant to the terms of the
18 Settlement Agreement;

19 6. Approving Plaintiff’s request for payment to the California Labor & Workforce
20 Development Agency (“LWDA”) for \$150,000.00 pursuant to the Private Attorneys General
21 Act, pursuant to the terms of the Settlement Agreement; and

22 7. Entering final judgment as to all Settlement Class Members in this action.

23 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
24 provides for court approval of the settlement of a purported class action and allows the Court to
25 grant final certification of a class for settlement purposes. In light of the overwhelmingly

26
27 ¹ Plaintiff’s counsel sincerely apologizes to this Court and Defendant for the late filing of this Motion, which is
28 overdue by 2 days. This was solely due to Plaintiff’s counsel’s office having mis-calendared the deadline due to the
recent holidays. Plaintiff’s counsel respectfully requests that this Court allow this late filing, particularly as this
Motion is unopposed.

1 positive response, as shown by the minimal number of opt-outs and the lack of any objections to
2 the settlement, there is no question that the settlement is fair, reasonable, and adequate and thus
3 should be granted final approval.

4 This Motion will be based on the attached Memorandum of Points and Authorities and
5 the supporting Declarations of Larry W. Lee, Plaintiff Jaime Moen, and Kevin Lee of Phoenix
6 Settlement Administrators, upon the oral arguments of counsel (should there be any), and on the
7 complete records and file herein.

8
9 DATED: January 6, 2023

DIVERSITY LAW GROUP, P.C.

10 By: 
11 _____

Larry W. Lee

Mai Tulyathan

12 Attorneys for Plaintiff, the Class, and Aggrieved
13 Employees
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1 **I. INTRODUCTION**

2 Plaintiff Jaime Moen (“Plaintiff”) now seeks the Court’s final approval of the Settlement
3 Agreement. The Settlement Agreement provides for a \$4,000,000.00 **non-reversionary** fund to
4 be created for the benefit of the Class, from which attorneys’ fees, litigation costs, service
5 payment to the named Plaintiff, payment to the California Labor and Workforce Development
6 Agency (“LWDA”), and costs of settlement administration are to be paid. The entire Net
7 Settlement Amount after these deductions will be paid to all Class Members who did not opt-out
8 of the Settlement and the Aggrieved Employees.

9 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
10 Approval of Class Action Settlement and the supplemental briefs thereto. The Court preliminary
11 approved this Settlement Agreement on September 28, 2022, directing distribution of class
12 notice and scheduling the hearing for final approval of the settlement (the “Preliminary Approval
13 Order”).

14 As directed by the Court, the Settlement Administrator selected by the Parties—Phoenix
15 Settlement Administrators—distributed the Class Notice to 3,958 Settlement Class Members.
16 (Declaration of Kevin Lee on behalf of Phoenix Settlement Administrators (“Phoenix Decl.”) at
17 ¶ 5.) To date, **there have been only two (2) requests for exclusions and a complete lack of**
18 **any objections to this Settlement.** (*Id.* at ¶¶ 8-9.) As such, there is a 99.9% participation rate.
19 Thus, in light of the lack of objections and the minimal opt-outs, an inference can be made that
20 the Class supports the Court’s Preliminary Approval Order finding that the Settlement
21 Agreement is fair and reasonable.

22 In addition to the results of the notice process, for the same reasons as set forth earlier in
23 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, the following represents
24 the basic points supporting final approval of the settlement:

25 ▪ The settlement provides a total settlement sum of \$4,000,000.00, which is **non-**
26 **reversionary;**

27 ▪ The settlement is fair given that participating Class Members will receive (*after*
28 *deductions for fees, costs, etc.*) a substantial amount of money—an average of \$609.76 to each

1 participating Class Member (*See* Phoenix Decl. at ¶ 14);

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

4 ▪ Plaintiff conducted significant investigation in this case, including informal
5 discovery and exchanges of information by Plaintiff and Defendant of class data;

6 ▪ A highly regarded settlement administrator, Phoenix Settlement Administrators,
7 was retained to administer the settlement for approximately \$28,950.00 (*See* Phoenix Decl. at ¶
8 17); and

9 ▪ The State of California’s LWDA will also be the beneficiary of this settlement, as
10 it will receive \$150,000.00 pursuant to the PAGA, should this settlement be granted final
11 approval.

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

14 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**
15 **SETTLEMENT**

16 The notice procedures required by the Preliminary Approval Order have been followed
17 and satisfy all due process rights of Settlement Class Members. Specifically, the Preliminary
18 Approval Order contemplated that the Notice of Class Action Settlement and Release (“Class
19 Notice”), as approved in the Preliminary Approval Order, be sent to all Class Members by U.S.
20 first class mail, as specified in the Settlement Agreement. As agreed by the Parties, Phoenix
21 Settlement Administrators would serve as the Settlement Administrator for this case.

22 As clearly stated in the Kevin Lee Declaration on behalf of Phoenix Settlement
23 Administrators, notice was provided to Class Members, as required by the Preliminary Approval
24 Order. On October 4, 2022, the Settlement Administrator received a Class Member mailing list
25 from Defendant’s counsel that included 3,958 Class Members. (Phoenix Decl. at ¶ 3.) Prior to
26 mailing the Class Notice, the Settlement Administrator conducted a National Change of Address
27 (NCOA) search to correct and/or update the class list in case of any address changes. (*Id.* at ¶ 4.)
28 On October 11, 2022, the Settlement Administrator mailed the Settlement Class Notice to all

1 Class Members on the mailing list via U.S. first class mail. (*Id.* at ¶ 5.) As of the date of this
2 filing, not a single Class Notice remains undeliverable. (*Id.* at ¶¶ 7.)

3 Further, the Class Notice provided Settlement Class Members, in both English and
4 Spanish, with Class Counsel’s and the Settlement Administrator’s contact information, where
5 they could further seek information regarding the settlement, ask questions, and update their
6 address.

7 The provision of sending the notice to Settlement Class Members as described above
8 meets the requirements for the “best notice practicable” in this case as necessary to protect the
9 due process rights of Class Members. (*See, Phillips Petroleum Co. v. Shutts* (1985) 472 U.S.
10 797, 811-12 (provision of “best notice practicable” with description of the litigation and
11 explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin* (1974) 417
12 U.S. 156, 174-75 (individual notice must be sent to class members who can be identified through
13 reasonable means); *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314
14 (best practicable notice is that which is “reasonably calculated, under all the circumstances, to
15 apprise interested parties of the pendency of the action and afford them an opportunity to present
16 their objections”).)

17 Here, all Settlement Class Members were provided with a mailing that explained the
18 settlement and allowed Class Members to seek information, ask questions, and exclude
19 themselves and/or object to the settlement, if so desired. As such, proper notice has been given
20 to the Settlement Class Members. Thus, the Court may determine the fairness and adequacy of
21 the Settlement and enter its Order granting final approval, secure in the knowledge that all absent
22 Settlement Class Members have been given the opportunity to participate fully in the settlement,
23 exclusion, and the approval process.

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

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

27 The Court already addressed the requirements for certifying a class for settlement
28 purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements

again here.

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 Settlement Class is comprised of all current and former non-exempt employees of Defendant in the State of California who earned overtime wages or sick pay or meal or rest period premiums and nondiscretionary remuneration, including without limitation, bonuses, incentives, and shift differentials, in the same pay period, at any time from September 2, 2016, through August 5, 2022. The “PAGA Members” are comprised of all current and former non-exempt employees of Defendant in the State of California who earned overtime wages or sick pay or meal or rest period premiums and nondiscretionary remuneration, including without limitation, bonuses, incentives, and shift differentials, in the same pay period, at any time from July 27, 2019, through August 5, 2022. There are 3,958 individuals that comprise the Settlement Class. (Phoenix Decl. at ¶ 5.) This is more than the minimum required to certify a class.

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

2. There is a Community of Interest

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

a. There are Predominant Common Questions of Law and Fact

“The ultimate question in every case of this type [class actions] is whether...the issues which may be jointly tried, when compared with those requiring separate adjudication, are so

1 numerous and substantial that the maintenance of a class action would be advantageous to the
2 judicial process and to the litigants.” (*Lockheed Martin Corp. v. Superior Court* (2003) 29
3 Cal.4th 1096, 1104-05.)

4 For Plaintiff’s claims, Plaintiff alleges that Defendant, as a matter of its corporate policy,
5 practice, or procedure, failed to account for all necessary forms of remuneration when
6 calculating the regular rate of pay for purposes of overtime wages, sick pay, meal-period
7 premiums, and rest-period premiums, resulting in an alleged failure to: (1) pay all overtime
8 wages earned; (2) pay all sick-pay wages owed to terminated employees; (3) pay all rest-period
9 premium penalties owed; (4) pay all meal-period premium penalties owed; (5) provide accurate
10 wage statements; and (6) comply with unfair competition law. As these are uniform corporate
11 policies, practices, and procedures, the claims can be jointly tried and thus the predominance
12 requirement is satisfied.

13 Defendant denies that liability could be established on a class-wide basis and contends
14 instead that liability and damages would need to be conducted on a case-by-case basis.

15 **b. Plaintiff’s Claims are Typical of the Class Claims**

16 The purported class representative’s claim must be “typical” but not necessarily identical
17 to the claims of other class members; it is sufficient that the representative is similarly situated so
18 that he or she will have the motive to litigate on behalf of the class. (*Classen v. Weller* (1983)
19 145 Cal.App.3d 27, 45.) Courts look to whether class members have similar injuries, “whether
20 the action is based on conduct which is not unique to the named Plaintiff,” and whether other
21 class members were injured by the same conduct. (*Hanon v. Dataproducts Corp.* (9th Cir. 1992)
22 976 F.2d 497, 508.) The purpose of the typicality requirement “is to assure that the interest of
23 the named representative aligns with the interests of the class.” (*Id.* at p. 508.)

24 Plaintiff was subjected to the same payroll policies as all other Class Members. In this
25 regard, Plaintiff was employed by Defendant as an hourly, non-exempt employee from about
26 2008, to on or about November 4, 2020. (Declaration of Jaime Moen (“Moen Decl.”) at ¶ 2.)
27 Like other members of the Class, Plaintiff was paid non-discretionary remuneration, including
28 without limitation, bonuses, incentives, and shift differentials. Moen Decl. ¶ 3. However, when

1 Plaintiff was paid overtime, meal/rest period premiums, and/or sick pay in the same pay periods
2 as such non-discretionary remuneration, Plaintiff alleges he was not paid such wages at the
3 regular rate of pay. Moen Decl. ¶ 4.

4 In other words, Plaintiff was subjected to the same policies and practices as other Class
5 Members. Accordingly, Plaintiff's claims are aligned with the interests of the Class and
6 typicality is satisfied.

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

8 The class representative, through qualified counsel, must be capable of "vigorously and
9 tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151
10 Cal.App.3d 834, 846.)

11 Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues
12 been raised or presented. (Moen Decl. at ¶ 5.) Plaintiff has taken all necessary steps to represent
13 the interests of the Class, including meeting and conferring with his counsel, providing
14 information and documents to his counsel, and reviewing pleadings and the Settlement
15 Agreement in this case. (*Id.* at ¶ 8.) For such reasons, Plaintiff has adequately represented the
16 Class members and will continue to do so.

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

18 Plaintiff believes that a class can be certified; however, Plaintiff also believes in the
19 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
20 involved in not prevailing on one or more of the causes of action or theories alleged in the
21 operative Complaint, the possibility of non-certification, and potential for appeals. These risks
22 on class certification are compounded by the California Supreme Court's holding in *Duran v.*
23 *U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1.

24 Defendant alleges that the class could not have been certified, given its position that its
25 policies are compliant with the Labor Code and that any liability would need to be determined on
26 a case-by-case basis. Further, Defendant contends that even if various wages were underpaid,
27 which Defendant denies, any such underpayment was not willful/intentional. Based on the
28 foregoing, there were risks that Plaintiff would not have obtained the total amount of wages and

penalties alleged, and a substantial amount of complex issues that would have necessitated significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of further litigation warrant granting of this Motion.

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

Without reiterating the Parties' showing that the Settlement Agreement and the negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for Preliminary Approval of Class Action Settlement and the subsequent briefings, the Parties highlight the following facts. The Settlement Agreement was the product of negotiations between highly able and experienced attorneys on both sides who possessed the relevant data and extensive legal research which they had carefully analyzed. (Declaration of Larry W. Lee ("Lee Decl.") at ¶ 2.) The Parties engaged in arm's length negotiations at mediation with Christopher Panetta, Esq., a well-experienced mediator. (*Id.*)

The results after mailing of the Class Notice support confirmation of the Court's preliminary approval of the settlement with final approval of the settlement, as evidenced by the fact that **only two (2) Class Members opted out the lack of any objections to the settlement.** (Phoenix Decl. at ¶¶ 8-9.) The Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single class member has submitted a request for exclusion and/or an objection. (*See Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291.)

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 Section 382 and California Rule of Court 3.769, a court's inquiry is whether the settlement is "fair, adequate and reasonable." (*Officers for Justice v. Civil Serv. Comm'n* (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

1 “the interests of the class are better served by the settlement than by further litigation.” (See
2 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”).)
3 The law favors settlement, particularly in class actions and other complex cases, where
4 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
5 (See 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002);
6 *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco*
7 *Corp.* (9th Cir. 1976) 529 F.2d 943, 950.)

8 Although the Court possesses “broad discretion” in determining that a proposed class
9 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
10 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
11 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
12 adequate to all concerned. (See *Officers for Justice*, 688 F.2d at p. 625.) Accordingly, the Court
13 should give due regard to what is otherwise a “private consensual agreement” between the
14 parties. (*Id.*; see also *Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1993) 1993 WL
15 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720 F.Supp. 1379, *aff’d*
16 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
17 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
18 or imposing conditions on it. The judge cannot rewrite the agreement”).)

19 A court’s approval of a class action settlement will only be reversed for a clear abuse of
20 discretion. (See *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Officers for Justice*,
21 688 F.2d at p. 626 (“reverse only upon a strong showing that the district court’s decision was a
22 clear abuse of discretion”); *Class Plaintiffs*, 955 F.2d at p. 1276; *Ackerman v. Kassar* (9th Cir.
23 1993) 1993 WL 326453; *Linney v. Cellular Alaska P’ship* (9th Cir. 1998) 151 F.3d 1234, 1238.)

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

25 “It cannot be overemphasized that neither the trial court in
26 approving the settlement nor this Court in reviewing that approval
27 have the right or duty to reach any ultimate conclusions on the
28 issues of fact and law which underlie the merits of the dispute. It is
well settled that in the judicial consideration of proposed
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.”

(7-Eleven Owners for Fair Franchising v. Southland Corp (2000) 85 Cal.App.4th 1135, 1146.)

2. The Settlement is Presumed to Be Fair

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

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

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

The settlement in the case at bar warrants approval and carries a presumption of fairness.
As previously noted in the application for Preliminary Approval and the supplemental briefings,
this current settlement was negotiated at arm’s length after a full day of mediation with neutral
Christopher Panetta, Esq. (Lee Decl. at ¶ 3.) Additionally, Class Counsel obtained significant
class data prior to the mediation which allowed Class Counsel to perform a detailed analysis of
the potential damages. (Id.)

Further, Class Counsel is highly experienced in this type of litigation. As shown in the
supporting declarations, Class Counsel has significant experience in class actions and
employment wage and hour matters. (Lee Decl. at ¶¶ 6-8)

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

To assess the fairness, adequacy, and reasonableness of a class action settlement, the
Court also should weigh the immediacy and certainty of substantial settlement proceeds against
the risks inherent in continued litigation. (See also In re General Motors Corp. (3d Cir. 1995) 55
F.3d 768, 806 (“present value of the damages plaintiffs would likely recover if successful,
appropriately discounted for the risk of not prevailing, should be compared with the amount of

the proposed settlement”) (internal citations omitted); *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d 153, 157; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 616-17.)

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

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

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

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

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

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

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

16 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
17 interest of the Class Members as a whole. (Lee Decl. at ¶ 4) Similarly, counsel for Defendant is
18 in favor of this settlement. The endorsement of qualified and well-informed counsel of a
19 settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its
20 final approval determination. (*See Officers for Justice*, 688 F.2d at p. 625; *Ellis*, 87 F.R.D. at p.
21 18; *Boyd*, 485 F.Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.)

22 **IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS** 23 **SHOULD BE APPROVED**

24 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
25 settlement funds remain after 180 days of the mailing of the individual settlement checks, the
26 Parties have agreed that all such uncashed settlement funds shall be distributed to the *cy pres*
27 recipient Legal Aid At Work, a nonprofit organization that provide legal services and advocacy
28 work, in accordance with C.C.P. § 384.

Pursuant to C.C.P. § 384, unpaid residue or unclaimed or abandoned class member funds in class action litigation shall be distributed “to nonprofit organizations or foundations that support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, *or to **nonprofit organizations providing civil legal services to the indigent.***” (See Code of Civ. Proc. § 384(b) (emphasis added).)

V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD BE APPROVED

Plaintiff requests that the enhancement amount be awarded. As set forth in his declaration, Plaintiff met with Class Counsel, had numerous discussions with Class Counsel, and provided substantive information regarding Defendant’s policies and practices at issue in this case. (Moen Decl. at ¶ 8.) Accordingly, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement.

In addition to the invaluable services that he provided, Plaintiff also took significant risks, both professionally and monetarily, in acting as Class Representative, seeking benefits on behalf of the Class. (*Id.* at ¶ 7.) Because the claims alleged by the Class Representative involved the payment of fees and costs to the prevailing party, Plaintiff could have possibly faced paying the fees and costs of Defendant, had he not prevailed in this action. (*Id.*) 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 faced significant risk in not being able to find suitable employment and/or face retaliation from prospective employers, all as a result of filing of this case against Defendant. Plaintiff took these risks upon himself to the benefit of the Class. (*Id.*) Class Members did not have to file individual lawsuits and bear the risks of payment of fees/costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits that weigh in favor of granting the requested enhancement.

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

VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED

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

The California Supreme Court issued its ruling regarding the award of attorney's fees in wage and hour class action settlements in *Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480. Under California law, the award of attorneys' fees in common fund wage and hour class action settlements is proper under the percentage method. (See *Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480, 503 ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund

1 created”).) Under the percentage of the fund method, the Court’s objective remains to “mimic
2 the market” in fixing a reasonable fee. (*See Gaskill v. Gordon* (7th Cir. 1998) 160 F.3d 361, 363
3 (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level
4 that will approximate what the market will set....The judge, in other words, is trying to mimic the
5 market in legal services.”).)

6 Here, the fee award representing 33% of the fund clearly falls within that range and is
7 consistent with other rulings of other courts and comprehensive surveys of class action
8 settlements and fee awards. (*See Martin v. AmeriPride Servs.* (S.D. Cal. 2011) 2011 U.S. Dist.
9 LEXIS 61796, 23 (recognizing that “courts may award attorney’s fees in the 30-40% range in
10 wage and hour class actions that result in recovery of a common fund under \$10 million”); *see*
11 *also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-*
12 *2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action
13 litigation nationwide conclude that fees in the range sought here are consistent with market
14 rates).)

15 Further, “the response of the class members to attorneys’ fee notice, though not decisive,
16 is relevant to the... reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
17 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
18 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class
19 Notice specifically notified Class Members that Class Counsel would be seeking up to
20 \$1,333,333.33 in attorneys’ fees. To date, no Class Member has objected to the settlement. This
21 strong favorable response also supports the requested fees.

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

25 No one expects a lawyer whose compensation is contingent upon
26 his success to charge, when successful, as little as he would charge
27 a client who had agreed to pay for his services, regardless of
28 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.

1 (*City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470.) Here, it is clear that a
2 settlement fund of \$4,000,000.00 has been created as the entire amount is to be paid out without
3 any reversions. For Class Counsel, the fees here were wholly contingent in nature and the case
4 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
5 in class action litigation, as well as a potentially drawn-out battle with a corporate Defendant.

6 As such, the requested fee award is fair and reasonable, and should be awarded in its
7 entirety.

8 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
9 **OF COSTS**

10 The request for reimbursement of costs, in the amount of \$5,508.09 is fair and
11 reasonable, especially in light of the fact that the Parties agreed that Plaintiff's counsel may seek
12 up to \$20,000.00 as reimbursement for litigation costs under the Settlement Agreement. As set
13 forth in Plaintiff's counsel's declaration, the costs were all directly incurred in the prosecution of
14 this action, including but not limited to, filing fees, service fees, and mediation fees. (Lee Decl.
15 at ¶ 5, Ex. A.) As such, the requested costs should be approved as fair and reasonable.

16 **VIII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
17 **APPROVED**

18 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
19 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
20 funds. As shown on the Declaration of Kevin Lee, the settlement administration fees expended
21 in this matter amount to a total of \$28,950.00, which is the amount that was agreed upon by the
22 Parties. (Phoenix Decl. at ¶ 17, Ex. B.) For such reasons, it is requested that the Settlement
23 Administrator's fees be approved.

24 **IX. CONCLUSION**

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

28 Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form

proposed and submitted:

1. Granting final approval to the proposed Settlement Agreement in this action;
2. Approving distribution of the settlement funds to the Settlement Class Members and Aggrieved Employees pursuant to the terms of the Settlement Agreement;
3. Approving Plaintiff's request for an award of the class representative enhancement of \$20,000.00, with payment pursuant to the terms of the Settlement Agreement;
4. Approving Class Counsel's request for an award to Class Counsel for \$1,333,333.33 in attorneys' fees and \$5,508.09 in costs, with payment pursuant to the terms of the Settlement Agreement;
5. Approving Plaintiff's request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of \$28,950.00, with payment pursuant to the terms of the Settlement Agreement;
6. Approving Plaintiff's request for payment to the LWDA for \$150,000.00, with payment pursuant to the terms of the Settlement Agreement; and
7. Entering final judgment in this action.

DATED: January 6, 2023

DIVERSITY LAW GROUP, P.C.



By: _____

Larry W. Lee
Mai Tulyathan
Attorneys for Plaintiff, the Class, and Aggrieved
Employees