

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Emil Davtyan (State Bar No. 299363)
D. LAW, INC.
400 N. Brand Blvd, Suite 700
Glendale, CA 91203
Telephone: (818) 875-2008
Facsimile: (818) 722-3974

David J. Lee, Esq. (State Bar No. 296294)
david@davidjleelaw.com
DAVID LEE LAW, APC
515 S. Flower Street, Suite 1900
Los Angeles, California 90071
T: (213) 236-3536
F: (866) 658-4722

Attorneys for Plaintiffs
JED ASIS, JUSTIN WATSON, AND KEVIN JOHNSON

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

JED ASIS and JUSTIN WATSON

Plaintiff,

vs.

FOOT LOCKER RETAIL, INC., and DOES
1 through 50, inclusive,

Defendants.

Case No. STK-CV-UOE-2023-0000627

(Assigned to the Hon. George J. Abdallah, Dept.
10A)

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

Date: January 18, 2024
Time: 9:00 a.m.
Dept.: 10A

Action Filed: January 26, 2023
Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on January 18, 2024, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable George J. Abdallah, judge presiding, in
4 Department 10A of the above referenced Court located at 180 E. Weber Avenue, Stockton,
5 California 95202, Plaintiffs Jed Asis, Kevin Johnson, and Justin Watson (collectively,
6 “Plaintiffs”) will seek an Order:

7 (1) granting final approval of the Joint Stipulation of Class Action and PAGA
8 Settlement and Release (“Agreement” or “Settlement Agreement”) in this matter;

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

11 (3) approving Plaintiffs’ request for an Incentive Payment of \$10,000.00 each,
12 pursuant to the terms of the Settlement Agreement;

13 (4) approving Class Counsel’s request for an award of attorneys’ fees in the amount
14 of approximately thirty-five percent of the \$8,970,000.00 Gross Settlement Amount, or
15 \$3,139,500.00, and reimbursement of actual litigation costs in the amount of \$26,743.62,
16 pursuant to the terms of the Settlement Agreement;

17 (5) approving the \$500,000.00 PAGA Penalties payment, with the sum of
18 \$375,000.00 to be paid to the California Labor and Workforce Development Agency (“LWDA”)
19 and the remaining sum of \$125,000.00 to be paid to PAGA Members, pursuant to the terms of
20 the Settlement Agreement;

21 (6) approving Plaintiffs’ request for payment of the Settlement Administration Costs
22 to Phoenix Settlement Administrators in the amount of \$65,000.00, pursuant to the terms of the
23 Settlement Agreement; and

24 (7) entering final judgment as to all members of the Participating Class and PAGA
25 Members in this action.

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

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

4 This Motion will be based on the attached Memorandum of Points and Authorities and
5 the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, Max W.
6 Gavron, Emil Davtyan, David J. Lee, Plaintiff Jed Asis, Plaintiff Justin Watson, Plaintiff Kevin
7 Johnson, and Phoenix Settlement Administrators (Yami Burns), and upon the oral arguments of
8 counsel (should there be any) and on the complete records and file herein.

9
10 Dated: December 22, 2023

DIVERSITY LAW GROUP, P.C.
DAVTYAN LAW FIRM, INC.
DAVID LEE LAW, APC

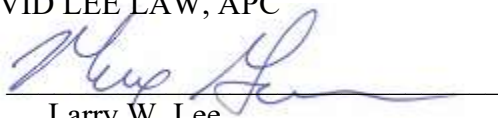
11
12 By: 
13 Larry W. Lee
14 Max W. Gavron
15 Emil Davtyan
16 David J. Lee
Attorneys for Plaintiffs JED ASIS, KEVIN
JOHNSON, and JUSTIN WATSON

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1 **I. INTRODUCTION**

2 Plaintiffs Jed Asis, Kevin Johnson, and Justin Watson (collectively, “Plaintiffs”) seek the
3 Court’s final approval of the class and representative PAGA action settlement with Defendant
4 Foot Locker Retail, Inc. (“Defendant”). The settlement provides for a \$8,970,000.00 **non-**
5 **reversionary** fund to be created for the benefit of the Class, from which attorneys’ fees,
6 litigation costs, Incentive Payments to Plaintiffs, Settlement Administration Costs, and PAGA
7 penalties are to be paid. After these deductions, the Net Settlement Amount will be paid to all
8 Class Members who did not opt-out of the settlement.

9 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
10 Approval of Class and Representative Action Settlement. The Court preliminarily approved this
11 Settlement on October 5, 2023, directing distribution of the Class Notice and scheduling the
12 hearing for final approval of settlement (the “Preliminary Approval Order”).

13 As directed by the Court, the Settlement Administrator distributed the Class Notice to
14 thirteen thousand seven hundred twenty-five (13,725) Class Members. Declaration of Yami
15 Burns (“Admin Decl.”) ¶ 5. To date, one (1) request for exclusion has been received. *Id.* ¶ 8.
16 Zero (0) objections to the settlement were received. *Id.* ¶ 9. Thus, there is a 99.99% participation
17 rate. *Id.* ¶ 11. This favorable response by the Class supports the Court’s Preliminary Approval
18 Order finding that the settlement was fair, adequate, and reasonable and the granting of the
19 instant Motion.

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

- 23 ■ The settlement provides a non-reversionary Gross Settlement Amount of
24 \$8,970,000.00 for a class size of 13,725 Class Members;
- 25 ■ Participating Class Members will receive (*after deductions for fees, costs, etc.*) a
26 substantial amount of money (on average, each Participating Class Member will
27
28

receive approximately \$379.54)¹;

- Class Members did not need to submit claim forms to participate in the settlement, but are being paid automatically;
- The allocation reflects that payment of claims will be paid to all Participating Class Members in proportion to the number of workweeks each Participating Class Member worked in a non-exempt position during the Class Period;
- Plaintiffs conducted significant investigation in this case, including conducting formal and informal discovery and review of class data necessary for Plaintiffs to fully evaluate this case;
- In conjunction with this Motion, Plaintiffs will upload a copy of this motion to the LWDA's online portal; and
- A highly regarded administrator, Phoenix Settlement Administrators, was retained for the sum of \$65,000.00.

With this additional information, Plaintiffs respectfully request the Court to grant Final Approval consistent with the Preliminary Approval Order.

II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that the Class Notice be sent to all Class Members by first class mail, as specified in the Settlement Agreement. The Preliminary Approval Order further contemplated that Phoenix Settlement Administrators would serve as the Settlement Administrator.

As clearly stated in the Admin Declaration, notice was provided to Class Members, as

¹ In addition, all Class Members who worked during the PAGA Period ("PAGA Members") will receive an Individual PAGA Payment based on the number of workweeks the employee worked in a non-exempt position during the PAGA Period. There are eleven thousand nine hundred nineteen (11,919) PAGA Members. The average Individual PAGA Payment to these individuals is \$10,49. *See* Admin Decl. ¶ 14.

1 required by the Preliminary Approval Order. On October 11, 2023, the Settlement Administrator
2 received a Class List from Defendant’s counsel that included thirteen thousand seven hundred
3 twenty-five (13,725) Class Members. Admin Decl. ¶ 3. On October 23, 2023, each of the persons
4 identified on the mailing list were sent the Class Notice via first class mail. *Id.* ¶ 5. From the date
5 of mailing, 330 Class Notices were returned due to an incorrect address and 288 Class Notices
6 were then re-mailed to an updated address after performing an address trace and/or using the
7 forwarding address provided by the Post Office. *Id.* ¶ 6. As of the date of this filing, forty-two
8 (42) Class Notices remain undeliverable because an updated address could not be located despite
9 skip tracing efforts. *Id.* ¶ 7. Further, the Class Notice provided Class Members with the Class
10 Counsel’s contact information, where they could further seek information regarding the
11 settlement, leave questions for the Settlement Administrator, and update their address.

12 The provision of sending the notice to Class Members as described above meets the
13 requirements for the “best notice practicable” in this case as necessary to protect the due process
14 rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)
15 (provision of “best notice practicable” with description of the litigation and explanation of opt-
16 out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)
17 (individual notice must be sent to class members who can be identified through reasonable
18 means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best
19 practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise
20 interested parties of the pendency of the action and afford them an opportunity to present their
21 objections”). The Class Members were provided with a mailing regarding the settlement that
22 explained the settlement and allowed Class Members to seek information, ask questions, seek
23 additional forms, and object, if so desired. As such, proper notice has been given to the Class
24 Members.

25 Thus, the Court may proceed to determine the fairness and adequacy of the settlement
26 and enter its Order granting final approval, secure in the knowledge that absent Class Members
27 have been given the opportunity to participate fully in the claims, exclusion, and the approval
28 process.

1 **III. THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

2 **A. The Strength of the Case and Likelihood of Class Certification Support**
3 **Approval**

4 The Court already addressed the requirements for certifying a class for settlement
5 purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements
6 again here.

7 **1. The Class is Ascertainable**

8 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure § 382
9 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
10 available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors*,
11 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class is defined as: “all current and former non-
12 exempt employees of Defendant Foot Locker Retail, Inc. who were employed in the State of
13 California at any time during the Class Period.”² There are 13,725 individuals that comprise the
14 Class. Admin Decl. ¶ 3. This is more than the minimum required to certify a class. Within the
15 context of manageability, the issue is whether there exists sufficient means for identifying class
16 members at the remedial stage. *Reyes*, 196 Cal. App. 3d at 1274-75. Class Members have already
17 been identified by Defendant and notice was provided to all of the above Class Members.

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

19 The “community of interest” requirement embodies three separate factors: (1)
20 predominant common questions of law or fact; (2) class representatives whose claims are typical
21 of the class; and (3) class representatives who can adequately represent the class. *Richmond v.*
22 *Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App.
23 4th 1225, 1234 (1999).

24 **3. There Are Predominant Common Questions of Law and Fact**

25 “The ultimate question in every case of this type [class actions] is whether...the issues
26

27
28 ² The Class Period is deemed to be the time period commencing on October 19, 2018, and
ending February 27, 2023.

1 which may be jointly tried, when compared with those requiring separate adjudication, are so
2 numerous and substantial that the maintenance of a class action would be advantageous to the
3 judicial process and to the litigants.” *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096,
4 1104-05 (2003).

5 Plaintiffs allege that Defendant, as a matter of its corporate policy, practice, or procedure,
6 violated the Labor Code by its failure to pay overtime wages for all hours worked and at the
7 correct rate of pay for off-the-clock work, including but not limited to time spent undergoing
8 COVID screenings, temperature checks, and answering work-related trivia questions; failure to
9 provide timely and full-length meal and rest breaks to employees; failure to pay meal and rest
10 period premiums at the regular rate of pay when employees also earned non-discretionary pay
11 during the same pay period; failure to provide accurate itemized wage statements; failure to pay
12 all wages owed upon separation of employment, including sick pay wages, overtime wages, and
13 meal and rest period compensation; failure to reimburse employees for work-related expenses;
14 and for engaging in unfair business practices. Defendant denies that liability could be established
15 on a class-wide basis and contends instead that liability and damages would need to be
16 conducted on a case-by-case basis.

17 **4. Plaintiffs’ Claims are Typical of the Class Claims**

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

26 Plaintiffs were employed by Defendant and allege that they were subjected to the same
27 payroll policies as all other Class Members. Specifically, like other members of the Class,
28 Plaintiffs allege that they were required to perform off-the-clock work, such as undergoing

COVID screenings, temperature checks, and answering work-related trivia questions, and were not paid for their time. Declaration of Jed Asis (“Asis Decl.”) ¶ 3; Declaration of Justin Watson (“Watson Decl.”) ¶ 3; Declaration of Kevin Johnson (“Johnson Decl.”) ¶3. Plaintiffs also allege that non-discretionary wages, such as bonuses and commissions, were not included in the regular rate of pay for the purposes of paying overtime wages, meal and rest period premiums, and sick pay. Asis Decl. ¶ 5; Watson Decl. ¶ 5; Johnson Decl. ¶ 5. Further, Plaintiffs allege that Defendant required Class Members to use their personal cell phones for work-related purposes but did not reimburse employees for the associated costs. Asis Decl. ¶ 7; Watson Decl. ¶ 7; Johnson Decl. ¶ 7. As a result of the above, Plaintiffs received inaccurate wage statements. Asis Decl. ¶ 6; Watson Decl. ¶ 6; Johnson Decl. ¶ 6. Plaintiffs allege they were subjected to the same policies and practices as other Class Members. Thus, Plaintiffs’ claims are typical to those of Class Members.

5. Plaintiffs Adequately Represented the Class

The class representative, through qualified counsel, must be capable of “vigorously and tenaciously” protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App. 3d 834, 846 (1984). Here, Plaintiffs do not have any interests adverse to the Class, nor have any such issues been raised or presented. Plaintiffs have taken all necessary steps to represent the interests of the Class, including providing information and documents to their counsel and reviewing pleadings in this case. Asis Decl. ¶ 8; Watson Decl. ¶ 8; Johnson Decl. ¶ 8. For such reasons, Plaintiffs have adequately represented the Class Members and will continue to do so.

B. Defendant’s Allegations and Position on Class Certification Support Approval

Defendant denies that it failed to pay wages for off-the-clock work, overtime wages at the regular rate of pay, meal and rest period premiums at the regular rate of pay, and reimbursement of work-related costs. Defendant argues that these claims are not suitable for class treatment because individual questions predominate. Defendant also argues that there is no private right of action for sick leave, and that even if Plaintiffs could establish an underpayment, Plaintiffs cannot prove a willful failure to pay wages at separation of employment. Moreover, Defendant

1 asserts that even assuming that a class could have been certified, Plaintiffs would be unable to
2 establish a “knowing and intentional” violation of Labor Code § 226. Based thereon, Defendant
3 continues to maintain that it is not liable for the allegations made by the Plaintiffs.

4 **C. Risks, Expenses, and Complexity of Further Litigation Support Approval**

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

11 Defendant alleges that a class could not have been certified. There is always a risk that
12 the court will not grant certification of the class, wherein the class will not be entitled to any
13 damages. Based on the foregoing, there was a substantial risk that Plaintiff would not have
14 obtained the total amount of damages alleged, and a substantial number of complex issues that
15 would have necessitated significant expenditure of time and expenses. Therefore, the risks,
16 expenses, and complexity of further litigation warrant granting of this motion.

17 **D. The Settlement Terms and Negotiation – as Well as the Class Member**
18 **Response – All Support the Conclusion that the Settlement is Fair, Adequate,**
19 **and Reasonable**

20 Without reiterating the Parties’ showing that the Settlement Agreement and the
21 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
22 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
23 Settlement Agreement was the product of negotiation between highly able and experienced
24 attorneys on both sides who possessed the relevant data and extensive legal research which they
25 had carefully analyzed. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2.

26 The results after mailing of the Class Notice support confirmation of the Court’s
27 preliminary approval of the settlement with final approval of the settlement, as evidenced by the
28 fact that to date, only one request for exclusion and zero objections to the settlement have been

received. Admin Decl. ¶¶ 8, 9. The Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single Class Member has submitted an objection. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

IV. WELL-ESTABLISHED LEGAL PRINCIPLES SUPPORT FINAL APPROVAL OF THE SETTLEMENT

On a motion for final approval of a class action settlement under California Code of Civil Procedure § 382 and California Rule of Court 3.769, a court’s inquiry is whether the settlement is “fair, adequate and reasonable.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*; *Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when “the interests of the class are better served by the settlement than by further litigation.” *See Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”). The law favors settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41 (4th ed. 2002); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

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

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

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

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

17 85 Cal. App. 4th 1135, 1146 (2000).

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

19 The Court should begin its analysis with the presumption that the settlement is fair and
20 should be approved: "[A] presumption of fairness exists where: (1) the settlement is reached
21 through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel
22 and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the
23 percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802; *accord, Ellis v. Naval Air*
24 *Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F.
25 Supp. at 1387.

26 The settlement in the case at bar warrants approval and carries a presumption of fairness.
27 As previously noted in the application for Preliminary Approval, this current settlement was
28 negotiated at arm's length. Gavron Decl. ¶ 6.

Second, Class Counsel engaged in extensive factual investigation before settling,
including the exchange of formal and informal discovery and reviewing class data. Gavron Decl.
¶ 2. Further, Class Counsel is highly experienced in this type of litigation. As shown in the

1 supporting declarations, Class Counsel have significant experience in class actions and
2 employment wage and hour matters. Gavron Decl. ¶ 10-16; Declaration of Larry W. Lee (“L.
3 Lee Decl.”) ¶ 5-7; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 3-8; Declaration of
4 Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 3-4; Declaration of Emil Davtyan (“Davtyan Decl.”) ¶
5 2-6; Declaration of David J. Lee (“D. Lee Decl.”) ¶ 7-12.

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

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

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

23 The Settlement Agreement also affords the Class prompt, fair relief, while avoiding
24 significant legal and factual battles that otherwise may have prevented the Class from obtaining
25 any recovery at all. While Class Counsel believe the Class Members’ claims are meritorious and
26 can be successfully litigated, they are experienced and fully understand the inherent risks and
27 uncertainty involved with such matters as the resolution of class certification, the outcome of a
28 potential trial, and the outcome of any appeals that would inevitably follow should the Class

1 prevail at trial. Gavron Decl. ¶ 7.

2 Class Counsel have also assessed the same risks in connection with the current
3 settlement. Because the settlement provides immediate and substantial relief, without the
4 attendant risks and delay of continued litigation – not to mention the threat of litigation costs –
5 Class Counsel believe that the settlement warrants the Court’s final approval.

6 **C. The Complexity, Expense, and Likely Duration of Continued Litigation**
7 **Against Defendant Favor Final Approval**

8 Another factor considered by courts in approving a settlement is the complexity, expense,
9 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at
10 157. In applying this factor, the Court must weigh the benefits of the settlement against the
11 expense and delay involved in achieving an equivalent or more favorable result at trial. *See*
12 *Young v. Katz*, 447 F.2d 431, 433-434 (5th Cir. 1971).

13 As noted in the Motion for Preliminary Approval, continued litigation could have led to
14 appeals on a number of issues. On the other hand, the settlement that was reached provides to all
15 Class Members — regardless of their means — fair relief in a prompt and efficient manner.
16 Were the Court to deny final approval, the Class Members would be left without a remedy as a
17 practical matter and courts across the State would have to address the issues presented here in a
18 piecemeal, costly, and time-consuming manner. The settlement in this case is therefore
19 consistent with the “overriding public interest in settling and quieting litigation” that is
20 “particularly true in class action suits.” *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d at 950
21 (footnote omitted); *see also 4 Newberg* § 11.41.

22 **D. The Opinion of Experienced Counsel Favors Final Approval**

23 Class Counsel support the settlement as fair, reasonable, and adequate, and in the best
24 interest of the Class Members as a whole. Gavron Decl. ¶ 7; L. Lee Decl. ¶ 2; Agnew Decl. ¶ 10;
25 Rosenthal Decl. ¶ 6; Davtyan Decl. ¶ 10; D. Lee Decl. ¶ 5. Similarly, counsel for Defendant is
26 also in favor of this settlement. The endorsement of qualified and well-informed counsel of a
27 settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its
28 final approval determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18;

1 *Boyd*, 485 F. Supp. at 617; *Linney*, 151 F.3d at 1242.

2 **V. THE PROPOSED PAYMENTS AND PROCEDURES SHOULD BE APPROVED**

3 **A. The Proposed Procedure for Uncashed Checks Should Be Approved**

4 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
5 settlement funds remain after 180 days, the Parties have agreed that the funds (upon the
6 expiration date) would escheat to the designated *cy pres* recipient, Legal Aid at Work. None of
7 the settlement funds will revert to Defendant, and class counsel does not have any conflicts of
8 interest with the proposed recipient. Gavron Decl. ¶ 8; L. Lee Decl. ¶ 8; Agnew Decl. ¶ 9;
9 Rosenthal Decl. ¶ 5; Davtyan Decl. ¶ 9; D. Lee Decl. ¶ 3.

10 **B. The Requested Class Representative Incentive Payments Should Be**
11 **Approved**

12 Plaintiffs request an Incentive Payment in the amount of \$10,000.00 for each Plaintiff.
13 Plaintiffs met with Class Counsel, including providing substantive information regarding
14 Defendant's practices. Asis Decl. ¶ 8; Watson Decl. ¶ 8; Johnson Decl. ¶ 8. Accordingly,
15 Plaintiffs provided invaluable information, evidence, and documents that resulted in this
16 settlement.

17 In addition to the invaluable services they provided, Plaintiffs also took a significant risk,
18 both professionally and monetarily, in acting as Class Representatives. Because the claims
19 alleged by Plaintiffs involved the payment of costs to the prevailing party, Plaintiffs could have
20 possibly faced paying the costs of Defendant had they not prevailed in this action. Asis Decl. ¶
21 12; Watson Decl. ¶ 12; Johnson Decl. ¶ 12. Moreover, Plaintiffs understood that an individual
22 case would have resolved much faster than a class action and involved much less financial risk
23 than a class action. Asis Decl. ¶ 12; Watson Decl. ¶ 12; Johnson Decl. ¶ 12. Despite this,
24 however, Plaintiffs agreed to pursue this case on behalf of the Class.

25 Also, given that future employers are much less likely to hire individuals who have filed
26 employment-related lawsuits, particularly cases of this nature, the Class Representative also
27 faces significant risk in not being able to find suitable employment, all as a result of filing of this
28 case against Defendant. Plaintiffs took these risks upon themselves to the benefit of the Class.

1 Asis Decl. ¶ 13; Watson Decl. ¶ 13; Johnson Decl. ¶ 13. Class Members did not have to file
2 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
3 have to face the potential for retaliation and not getting future employment had they filed a
4 lawsuit which is a public record. These are significant benefits that weigh in favor of granting the
5 requested enhancement. Moreover, this litigation has resulted in a significantly valuable benefit
6 to the Class, and Plaintiffs took on substantial risks in helping to get this financial benefit to the
7 Class. As such, the enhancement should be awarded to Plaintiffs for their commitment,
8 dedication, and risks taken for this litigation.

9 Finally, Plaintiffs provided a general release and waiver of the protections of Civil Code
10 § 1542. SA § D-1. This is a more extensive release than that provided by the Class at large, also
11 supporting the request for the award. Asis Decl. ¶ 14; Watson Decl. ¶ 14; Johnson Decl. ¶ 14.

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

23 **C. The Requested Attorneys' Fees Should Be Approved**

24 Class Counsel seek a fee award calculated at thirty-five percent (35%) of the Gross
25 Settlement Amount for the successful prosecution and resolution of this action. Plaintiffs and the
26 Settlement Class members are entitled to recover their attorneys' fees and costs for their wage
27 claims. *See* Labor Code §§ 226(e), 1194, and 2699(g). A fee award is justified where the legal
28 action has produced its benefits by way of a voluntary settlement. *See, e.g., Maria P. v. Riles*

(1987) 43 Cal.3d 1281, 1290-91; *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352-53; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (finding that “when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees out of the fund.”).

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. *Chavez v. Netflix, Inc.*, (2008) 162 Cal.App.4th 43, 66, fn. 11; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment 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 769.

The California Supreme Court has provided guidance regarding the award of attorneys’ fees in wage and hour class action settlements. Under California law, the award of attorneys’ fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“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 created.”). Under the percentage of the fund method, the Court’s objective remains to “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will set.... The judge, in other words, is trying to mimic the market in legal services.”).

Here, the fee award representing 35% of the fund clearly falls within that range and is consistent with other rulings of other courts and comprehensive surveys of class action

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

8 The results delivered by Class Counsel also support the requested percentage of the fund.
9 Here, Plaintiffs and their counsel secured a \$8,970,000.00 settlement and only one Class
10 Member chose to opt out and none chose to object.

11 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
12 is relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
13 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
14 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Class
15 Notice specifically notified Class Members that Class Counsel would be seeking 35% of the
16 Gross Settlement Amount as attorneys’ fees. To date, no Class Member has objected to the
17 settlement. This strong favorable response also supports the requested fees.

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

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

25 495 F. 2d 448, 470 (2d Cir. 1974). Here, it is clear that a common fund of \$8,970,000.00 has
26 been created. For Class Counsel, the fees here were wholly contingent in nature and the case
27 presented more risk than the usual contingent fee case. Among the risks was the cost inherent in
28 class action litigation, as well as a long battle with corporate Defendant who retained a premier

1 and highly experienced defense firm. For such reasons, Class Counsel's request for attorneys'
2 fees in the amount of \$8,970,000.00 is fair, reasonable, and adequate.

3 **D. The Court Should Approve the Request for Reimbursement of Costs**

4 The request for reimbursement of costs, in the amount of \$26,743.62 is fair and
5 reasonable, especially in light of the fact that the Parties agreed that Plaintiffs' Counsel may seek
6 up to \$35,000.00 as reimbursement for litigation costs under the Settlement Agreement. As set
7 forth in Class Counsel's declarations, the costs were all directly incurred in the prosecution of
8 this action. L. Lee Decl. ¶ 4, Ex. A; D. Lee Decl. ¶ 13, Ex. A. The authority for the Court to
9 award this is the Parties' Settlement Agreement and Labor Code §§ 226 and 2699. As such, this
10 request should be approved.

11 **E. The Settlement Administrator's Fees and Costs Should Be Approved**

12 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
13 Administrator, Phoenix Settlement Administrators, are to be paid out of the Gross Settlement
14 Amount. As shown on the Declaration of Yami Burns, the settlement administration fees
15 expended in this matter amount to a total of \$65,000.00, which is the amount that was agreed
16 upon by the Parties. Admin Decl. ¶ 16, Ex B. For such reasons, it is requested that the Settlement
17 Administrator's fees be approved.

18 **VI. NOTICE TO THE LWDA & FINAL JUDGMENT**

19 On October 9, 2023, Plaintiffs uploaded the Order Granting Plaintiff's Motion for
20 Preliminary Approval of Class Action Settlement to the LWDA's website. Gavron Decl. ¶ 17.
21 Concurrent with the filing of this Motion, Plaintiffs will provide notice to the LWDA. *Id.*

22 **VII. CONCLUSION**

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

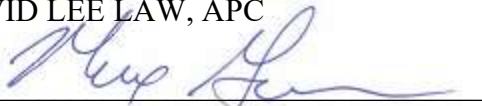
26 Accordingly, Plaintiffs respectfully request that the Court enter an Order in the form
27 proposed and submitted:

- 28 1. Granting final approval to the proposed Settlement Agreement in this action;

2. Approving the Gross Settlement Amount of \$8,970,000.00;
3. Approving distribution of the Net Settlement Amount to the Participating Class Members, with payment pursuant to the terms of the Settlement Agreement;
4. Approving the award of the Incentive Payment in the amount \$10,000.00 to each Plaintiff, with payment pursuant to the terms of the Settlement Agreement;
5. Approving the award of attorneys' fees in the amount of \$3,139,500.00 and actual litigation costs in the amount of \$26,743.62 to Class Counsel, with payment pursuant to the terms of the Settlement Agreement;
6. Approving the payment Settlement Administration Costs in the amount of \$65,000.00 to Phoenix Settlement Administrators, with payment pursuant to the terms of the Settlement Agreement;
7. Approving the \$500,000.00 PAGA Penalties payment, with the sum of \$375,000.00 to be paid to the California Labor and Workforce Development Agency and the remaining sum of \$125,000.00 to be paid to PAGA Members, pursuant to the terms of the Settlement Agreement; and
8. Entering final judgment as to all members of the Class in this action.

Dated: December 22, 2023

DIVERSITY LAW GROUP, P.C.
DAVTYAN LAW FIRM, INC.
DAVID LEE LAW, APC

By: 

Larry W. Lee

Max W. Gavron

Emil Davtyan

David J. Lee

Attorneys for Plaintiffs JED ASIS, KEVIN
JOHNSON, and JUSTIN WATSON