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SUPERIOR COURT  
COUNTY OF SAN BERNARDINO  
SAN BERNARDINO DISTRICT

DEC 06 2021

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN BERNARDINO**

RAKESH RAY, as an individual and on  
behalf of all others similarly situated,

Plaintiffs,

vs.

C&W FACILITY SERVICES, INC.,  
Massachusetts corporation; and DOES 1  
through 50, inclusive,

Defendants.

Case No.: CIVSB2101321

[Assigned for all purposes to the Hon. David Cohn,  
Department S-26]

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

Date: December 29, 2021  
Time: 10:00 A.M.  
Dept.: S-26

Complaint Filed: January 28, 2021  
FAC Filed: April 22, 2021  
SAC Filed: October 1, 2021

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

**PLEASE TAKE NOTICE** that on December 29, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable David Cohn, judge presiding, in Department S-26 of the above referenced Court located at 247 West Third Street, San Bernardino, California 92415, Plaintiff Rakesh Ray (“Plaintiff”) will seek an Order: (1) approving the Joint Stipulation of Class Action Settlement and Release (“Agreement” or “Settlement Agreement”) in this matter; (2) conditionally certifying the following Class for settlement purposes only: “all current and former employees of Defendant in the State of California who received wages at any time between January 12, 2020, through February 14, 2021 and received paper copy wage statements (the “Class”); (3) appointing Plaintiff Rakesh Ray as the Class Representative and Larry W. Lee, Kristen M. Agnew, and Nicholas Rosenthal of Diversity Law Group, P.C. and William L. Marder of Polaris Law Group as Class Counsel; (4) preliminarily approving the Settlement Agreement and the total Gross Settlement Amount in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00); (5) finding on a preliminary basis that the Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative Enhancement Payment, Class Counsel fees and costs, the Settlement Administration Costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court; (6) approving the Notice of Class Action Settlement to be sent to Class Members; (7) appointing Phoenix Settlement Administration as the Settlement Administrator; and (8) setting the matter for a Final Fairness and Final Approval hearing.

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

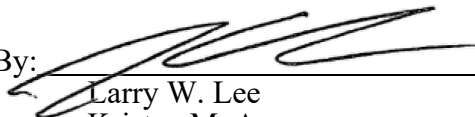
The basis for this Motion, filed without any opposition from Defendant C&W Facility Services, Inc. (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity of class members to participate in, opt-out of, or object to the settlement. This Motion will be based on the attached

Memorandum of Points and Authorities, the Settlement Agreement and the proposed Notice of Class Action Settlement, and the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, William L. Marder, and Plaintiff Rakesh Ray, and upon the oral arguments of counsel (should there be any) and on the complete records and file herein.

DATED: December 6, 2021

DIVERSITY LAW GROUP, P.C.

By:



Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

## TABLE OF CONTENTS

|                                                                                                                                                                                    | <u>Page</u> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <b>I. INTRODUCTION .....</b>                                                                                                                                                       | <b>8</b>    |
| <b>II. PROCEDURAL HISTORY.....</b>                                                                                                                                                 | <b>9</b>    |
| <b>III. DISCUSSION.....</b>                                                                                                                                                        | <b>10</b>   |
| <b>A. Proposed Class Definition .....</b>                                                                                                                                          | <b>12</b>   |
| <b>B. Settlement Terms and Evaluation.....</b>                                                                                                                                     | <b>12</b>   |
| <b>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 .....</b> | <b>17</b>   |
| <b>2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants.....</b>             | <b>18</b>   |
| <b>3. Scope of the Release of Class Members' Claims.....</b>                                                                                                                       | <b>18</b>   |
| <b>4. Tax Treatment of Settlement Amounts .....</b>                                                                                                                                | <b>18</b>   |
| <b>5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations .....</b>                                                | <b>18</b>   |
| <b>C. Notice to Class Members.....</b>                                                                                                                                             | <b>18</b>   |
| <b>D. Typicality and Adequacy of Representation .....</b>                                                                                                                          | <b>19</b>   |
| <b>1. Class Representative's Claims are Typical of the Class .....</b>                                                                                                             | <b>19</b>   |
| <b>2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Actions .....</b>                                                             | <b>20</b>   |
| <b>E. Costs and Fees.....</b>                                                                                                                                                      | <b>20</b>   |
| <b>1. Attorneys' Fees and Costs.....</b>                                                                                                                                           | <b>20</b>   |
| <b>2. Proposed Payment to the Class Representative.....</b>                                                                                                                        | <b>22</b>   |

|   |                                                               |    |
|---|---------------------------------------------------------------|----|
| 1 | 3. Settlement Administration Fees .....                       | 23 |
| 2 | IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR |    |
| 3 | PRELIMINARY APPROVAL .....                                    | 23 |

## TABLE OF AUTHORITIES

### Page(s)

#### **Federal Cases**

|                                                                                                                                  |        |
|----------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....          | 16     |
| <i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980) .....                                                                 | 20     |
| <i>Delgado v. New Albertson's, Inc.</i> , 2010 WL 11507599 at *7 (C.D. Cal. Mar. 15, 2010) .....                                 | 15     |
| <i>Hammon v. Barry</i> , 752 F. Supp. 1087 (D.D.C. 1990); <i>Steinberg v. Carey</i> , 470 F. Supp. 471 (S.D.N.Y. 1979).....      | 13     |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998) .....                                                               | 19     |
| <i>Harris v. Vector Mktg. Corp.</i> , 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009).....                                        | 15     |
| <i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979).....                                               | 13     |
| <i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984) .....                                                    | 12     |
| <i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980) .....                                              | 12     |
| <i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000).....                                                | 16     |
| <i>Magadia v. Wal-Mart Assocs.</i> , 999 F.3d 668, 680 (9 <sup>th</sup> Cir. 2021) .....                                         | 14     |
| <i>Mars Steel Corp. v. Continental Illinois Nat'l Bank &amp; Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987).....              | 12     |
| <i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004) .....                                | 13     |
| <i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989) .....                                                               | 12     |
| <i>Sommers v. Abraham Lincoln Federal Sav. &amp; Loan Ass'n</i> , 79 F.R.D. 571 (E.D. Pa. 1978) .....                            | 13     |
| <i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014).16                            |        |
| <i>Villegas v. J.P. Morgan Chase &amp; Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) ..... | 16     |
| <i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997).....                                                | 20, 21 |
| <i>Woods v. Vector Mktg. Corp.</i> , 2015 U.S. Dist. LEXIS 67303, at *8-9, *12-14 (N.D. Cal. May 22, 2015).....                  | 15     |

**State Cases**

|                                                                                                                                              |        |
|----------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Arias v. Superior Court</i> , 46 Cal. 4th 969,.....                                                                                       | 15     |
| <i>Brown v. Ralphs Grocery Co.</i> , 197 Cal. App. 4th 489, 1499 (2011) .....                                                                | 15     |
| <i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018) .....                                                                     | 14, 15 |
| <i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995) .....                                                          | 21     |
| <i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974); <i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971)..... | 19     |
| <i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974) .....                                                                 | 19     |
| <i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1803 (1996).....                                                                      | 12     |
| <i>Duran v. U.S. Bank Nat’l Ass’n</i> , 59 Cal. 4th 1 (2014) .....                                                                           | 16     |
| <i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016).....                                                                       | 21     |
| <i>Lopez v. Friant &amp; Associates, LLC</i> , 15 Cal. App. 5th 773, 784-85 (2017) .....                                                     | 15     |
| <i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981) .....                                                                  | 19     |
| <i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977).....                                                                                     | 20     |
| <i>Stephens v. Montgomery Ward &amp; Co.</i> , 193 Cal. App. 3d 411, 421 (1987).....                                                         | 19     |
| <i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....                                                               | 12, 20 |
| <i>ZB, N.A. v. Superior Ct.</i> , 8 Cal. 5th 175, 196 (2019).....                                                                            | 18     |

**Statutes**

|                                   |    |
|-----------------------------------|----|
| Cal. Labor Code § 2699(e)(2)..... | 15 |
|-----------------------------------|----|

**Other Authorities**

|                                                                                           |            |
|-------------------------------------------------------------------------------------------|------------|
| 4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , (4th ed. 2002) ..... | 11, 12, 13 |
| Manual for Complex Litigation (Third) § 30.41 .....                                       | 10, 11     |

1     **I.     INTRODUCTION**

2             This is a wage and hour class and representative action seeking statutory and civil  
3 penalties for wage statement violations. Plaintiff Rakesh Ray (“Plaintiff”) brought claims against  
4 Defendant C&W Facility Services, Inc. (“Defendant”) (together, Plaintiff and Defendant shall be  
5 referred to as the “Parties”) on a class-wide basis, alleging that Defendant had a policy and  
6 practice of issuing defective wage statements in violation of Labor Code § 226. Plaintiff also  
7 alleges an individual claim for violation for Labor Code §§ 201-203. Defendant denies each,  
8 every, and all of the allegations of the complaint.

9             Prior to the settlement of this action, the Parties thoroughly investigated the facts relating  
10 to the claims alleged in the operative Complaint and engaged in a thorough study of the legal  
11 principles applicable to the claims asserted against Defendant. Defendant provided information  
12 related to the number of Class Members and wage statements issued to the Class during the Class  
13 Period. Thereafter, the Parties commenced settlement negotiations and were ultimately able to  
14 reach the current settlement. **Significantly, this entire amount is non-reversionary, such that**  
15 **no monies will revert back to Defendant.**

16             The Parties believe that this amount is fair, adequate, and reasonable, especially given the  
17 risks and uncertainty of class certification and the merits of this case.

18             Although Plaintiff and his counsel believe that they can prevail on class certification, as  
19 well as on the merits, Plaintiff and his counsel recognize the inherent risks in drawn-out litigation  
20 and the specific risks that a class might not be certified and/or that Plaintiff could fail to establish  
21 liability. Defendant denies the allegations in the operative Complaint and believes that it can  
22 prevail at trial. Based on their own independent investigation and evaluation, the Parties and their  
23 respective counsel are of the opinion that the settlement for the consideration and on the terms  
24 set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interests  
25 of the Class and Defendant in light of all known circumstances and the expenses and risks  
26 inherent in litigation.

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

## II. PROCEDURAL HISTORY

On January 12, 2021, Plaintiff filed his written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging that Defendant failed to provide accurate itemized wage statements and pay all wages owed upon separation of employment, pursuant to Labor Code § 2698, *et seq.*, the Private Attorneys General Act (“PAGA”). Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 2. Thereafter, on January 28, 2021, Plaintiff filed a class and representative action complaint against Defendant alleging (1) violation of California Labor Code § 226; (2) violation of Labor Code §§ 201-203; and (3) violation of Labor Code § 2698, *et seq.* *Id.* ¶ 3. Specifically, Plaintiff’s complaint alleged that the wage statements issued by Defendant failed to identify the inclusive dates of the pay period and legal name and address of the employer. *Id.* The complaint also alleged that Defendant failed to timely pay Plaintiff and other employees all wages owed upon separation of employment, and sought penalties pursuant to PAGA for the underlying violations of Labor Code §§ 201-203 and 226. *Id.*

On or about February 14, 2021, Defendant filed a notice with the LWDA alleging that it cured the violation of Labor Code § 226. *Id.* ¶ 4.

On February 18, 2021, Plaintiff filed a response to Defendant’s alleged cure notice. *Id.* ¶ 5.

On March 5, 2021, the LWDA issued a decision determining that Defendant had not cured the violation of Labor Code § 226. The LWDA also issued a notice informing the Parties that it commenced an investigation into alleged Labor Code violations set forth in Plaintiff’s January 12, 2021 letter. *Id.* ¶ 6.

On April 22, 2021, Plaintiff filed a first amended complaint alleging claims for: (1) violation of Labor Code § 226 on a class-wide basis; and (2) violation of Labor Code §§ 201-203 on an individual basis, omitting the cause of action for violation of the PAGA. *Id.* ¶ 7.

On June 4, 2021, the LWDA issued a notice of case closure regarding the allegations set forth Plaintiff’s January 12, 2021 letter. The LWDA made no determination as to the merits of the January 12, 2021 letter, and stated that Plaintiff may commence a civil action pursuant to PAGA. *Id.* ¶ 8.

1           Following the filing of the complaint, Plaintiff’s counsel was contacted by Defendant’s  
2 counsel regarding informal settlement discussions. *Id.* ¶ 9. In connection therewith, Defendant  
3 produced documents related to its issuance of wage statements and data relating to the number of  
4 wage statements issued to putative class members. *Id.* This allowed Plaintiff to conduct a full  
5 damage analysis. *Id.*

6           After the exchange of further information and negotiations, on or about July 7, 2021, the  
7 Parties reached an agreement to settle this action in its entirety. *Id.* ¶ 10. In resolution of  
8 Plaintiff’s class, PAGA, and individual claims, the Parties entered into the Joint Settlement of  
9 Class Action Settlement and Release, a true and correct copy of which is attached as **Exhibit A**  
10 to the Declaration of Nicholas Rosenthal. Rosenthal Decl. ¶ 11.

11           In connection with the Settlement, the Parties agreed to allow the filing of a second  
12 amended complaint to reassert the PAGA cause of action. On October 1, 2021, Plaintiff filed the  
13 operative second amended complaint (“Complaint”). *Id.* ¶ 12. The second amended complaint  
14 alleges causes of action for (1) violation of California Labor Code § 226 on a class-wide basis;  
15 (2) violation of Labor Code §§ 201-203 on an individual basis; and (3) violation of Labor Code §  
16 2698, *et seq.* *Id.*

17           The Parties recognize the risk, expense, and delay in continuing litigation with the class  
18 and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. *Id.* ¶ 29.  
19 Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims  
20 arising from or relating to the class, PAGA, and individual claims as set forth in the Settlement  
21 Agreement.

### 22 **III. DISCUSSION**

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

27           Approval of class action settlements involves a two-step process. First, counsel  
28 submits the proposed terms of settlement and the court makes a preliminary  
fairness evaluation. If the preliminary evaluation of the proposed settlement does

1 not disclose grounds to doubt its fairness or other obvious deficiencies, such as  
2 unduly preferential treatment of class representatives or of segments of the class,  
3 or excessive compensation for attorneys, and appears to fall within the range of  
4 possible approval, the court should direct that notice...be given to the class  
members of a formal fairness hearing, at which arguments and evidence may be  
presented in support of and in opposition to the settlement.

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

6 Thus, the preliminary approval by the trial court is simply a conditional finding that the  
7 settlement appears to be within the range of acceptable settlements. As Professor Newberg  
8 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference  
9 concerning a tentative settlement proposal may vary. The court may find that the settlement  
10 proposal contains some merit, is within the range of reasonableness required for a settlement  
11 offer, or is presumptively valid subject only to any objections that may be raised at a final  
12 hearing.” Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.  
13 2002).

14 The procedures for the parties’ submission of a proposed settlement for preliminary  
15 approval by the court also are discussed in *4 Newberg on Class Actions*:

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

20 *Id.* § 11.24.

21 Here, the Parties have reached such an agreement and have submitted to this Court in  
22 connection with this Motion a copy of the Settlement Agreement fully setting forth the  
23 agreement reached among the Parties. The Settlement Agreement sets forth all terms of the  
24 agreement reached by the Parties, which include, among other things, the method for calculating  
25 the Class Members’ individual settlements.

26 The parties also may, at the preliminary approval stage, request that the court  
27 provisionally approve certification of the class—conditional upon final approval of the  
28 settlement. “[P]re-certification settlements are routinely approved if found to be fair and

reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached before any “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals”). As further explained by Professor Newberg:

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

4 *Newberg on Class Actions* § 11.26.

In addition to such terms as class identification, settlement amount and payment procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of this settlement only. *See* Settlement Agreement ¶ 92.

#### **A. Proposed Class Definition**

The current settlement is being settled on behalf of a Class of “all current and former employees of Defendant in the State of California who received wages at any time between January 12, 2020, through February 14, 2021 and received paper copy wage statements.” Settlement Agreement ¶ 3. There are approximately 414 individuals that comprise of the Class. *Id.*

#### **B. Settlement Terms and Evaluation**

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat’l Rural Telecomms.*

1 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp.  
2 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*  
3 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*  
4 *& Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

5 While the recommendations of counsel proposing the settlement are not conclusive, the  
6 Court can properly take them into account, particularly where, as here, they have been involved  
7 in formal and informal discovery and negotiations for some period of time, appear to be  
8 competent, have experience with this type of litigation, and have exchanged substantial evidence  
9 from the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural Telecomms.*  
10 *Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length negotiation process is  
11 preserved, however, a strong initial presumption of fairness attaches to the proposed  
12 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who  
13 are most closely acquainted with the facts of the underlying litigation”).

14 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage  
15 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a  
16 number of wage and hour class actions and have extensive litigation experience. Rosenthal Decl.  
17 ¶¶ 30-32; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 8-10; Declaration of Kristen M. Agnew  
18 (“Agnew Decl.”) ¶¶ 6-12; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 6-13. Each side  
19 has apprised the other of their respective factual contentions, legal theories and defenses,  
20 resulting in negotiations taking place between the Parties. Rosenthal Decl. ¶¶ 10.

21 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would  
22 face potential liability of up to approximately \$137,500 for Plaintiff’s class claims, pursuant to  
23 Labor Code § 226(e), which provides a \$50 penalty for the initial violation, followed by \$100  
24 penalties for subsequent violations, with each employee’s cumulative penalties totaling no more  
25 than \$4,000. Rosenthal Decl. ¶¶ 19. Plaintiff was able to estimate the potential damages and  
26 penalties based on data provided by Defendant, including the number of employees in the  
27 putative class and the number of wage statements at issue. *Id.* Specifically, the amount of Labor  
28 Code § 226(e) penalties are based on approximately 1,789 allegedly deficient wage statements

1 and approximately 414 class members. *Id.*

2 With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that  
3 Defendant could face civil penalties for violation of Labor Code § 226 of up to a maximum  
4 \$447,250 if Plaintiff were successful at trial, which is premised on a \$250 penalty per wage  
5 statement, pursuant to Labor Code § 226.3. *Id.* ¶ 20.

6 Thus, based on the data provided by Defendant, Plaintiff's counsel estimated total class  
7 and PAGA penalties to be approximately \$584,750, if the court awarded full penalties on both  
8 Plaintiff's class and PAGA claims. *Id.* Therefore, Plaintiff's settlement of \$150,000.00 is  
9 approximately 25.7% of the total estimated liability, which is an excellent result and consistent  
10 with other class settlements. *Id.*

11 Indeed, even assuming Plaintiff ultimately prevailed on his PAGA claim, the Court still  
12 has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court  
13 can decline to award PAGA penalties where "if, based on the facts and circumstances of the  
14 particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive,  
15 or confiscatory." As shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*,  
16 while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum  
17 PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the  
18 law. 30 Cal. App. 5th 504 (2018). Upon review, the Court of Appeal found such reduction to be  
19 proper. *Id.* at 539; *see also Magadia v. Wal-Mart Assocs.*, 999 F.3d 668, 680 (9<sup>th</sup> Cir. 2021)  
20 (entirely reversing award of PAGA penalties on appeal).

21 Although Plaintiff believes in the merits of the alleged claims and maintains that there is  
22 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to  
23 the wage statement claims and that with respect to the reduction of PAGA penalties, it could be  
24 persuasive to the Court. Rosenthal Decl. ¶ 21. Thus, even if Plaintiff was to successfully prove  
25 his claims at trial, there is a possibility that the Court may only award a small percentage of  
26 PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was  
27 premised with this risk in mind, associated with the possibility of the Court significantly  
28 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to

1 prevail at trial. *Id.*

2 Further, Defendant raised several defenses that presented risk, including that any alleged  
3 omission of information from the wage statements was not a “knowing and intentional failure”  
4 by Defendant to comply with Labor Code § 226, and that penalties are therefore unwarranted.  
5 Rosenthal Decl. ¶ 10; *see Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D.  
6 Cal. 2009) (summary adjudication warranted on Section 226(e) claim where record lacked  
7 evidence that conduct was knowing or willful); *Woods v. Vector Mktg. Corp.*, 2015 U.S. Dist.  
8 LEXIS 67303, at \*8-9, \*12-14 (N.D. Cal. May 22, 2015) (finding that when the defendant made  
9 a good faith claim that the employee was properly classified as exempt its failure to provide  
10 accurate wage statements was not knowing and intentional).

11 For the purpose of PAGA liability, a plaintiff need not establish the “knowing and  
12 intentional” and “injury” elements of Labor Code § 226(e) to prevail. *See Lopez v. Friant &*  
13 *Associates, LLC*, 15 Cal. App. 5th 773, 784-85 (2017). Nonetheless, the trial court has the  
14 discretion to reduce PAGA civil penalties “if, based on the facts and circumstances of the  
15 particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,  
16 or confiscatory.” *See* Cal. Labor Code § 2699(e)(2); *Delgado v. New Albertson’s, Inc.*, 2010 WL  
17 11507599 at \*7 (C.D. Cal. Mar. 15, 2010) (explaining that court’s discretion to reduce penalties  
18 under PAGA protects defendants from unconstitutionally excessive penalties); *Carrington*, 30  
19 Cal. App. 5th at 529 (affirming reduction of PAGA penalties where the trial court found the  
20 reduction was warranted based on the employer’s “good faith attempts” to comply with the  
21 Labor Code and “because the court found the violations were minimal”).<sup>1</sup>

22 Thus, the Settlement for each Class Member is fair, reasonable, and adequate, given the  
23 inherent risks of litigation, including the substantial risks relative to class certification and the  
24 merits of the claims, the costs of pursuing such litigation, and the risks associated with the

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25  
26 <sup>1</sup> As the California Supreme Court and Court of Appeal have held, the purpose of PAGA is not  
27 to seek wages or recovery for the individual employees. *Arias v. Superior Court*, 46 Cal. 4th 969,  
28 986 (2009) (holding that an action to recover civil penalties “is fundamentally a law enforcement  
action designed to protect the public and **not** to benefit private parties”) (emphasis added);  
*Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 1499 (2011).

1 Court's discretion to reduce PAGA penalties. The Settlement is the result of extensive arm's-  
2 length negotiations between the Parties and their counsel.

3 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the  
4 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff  
5 involved in not prevailing on one or more of the causes of action or theories alleged in the  
6 operative Complaint, the possibility of non-certification, and the potential for appeals. Rosenthal  
7 Decl. ¶ 23. These risks on class certification are compounded by the California Supreme Court's  
8 holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained  
9 class certification and subsequently prevailed at trial after eight years of litigation, but the  
10 judgment and the certification ruling were reversed by the California Supreme Court after an  
11 additional five years of litigation. The case was remanded back to superior court where class  
12 certification was denied and plaintiffs' subsequent appeal also was denied.

13 Indeed, numerous courts have held that **gross** settlements approximating between only 8  
14 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*  
15 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement  
16 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash  
17 settlement amounting to only a fraction of the potential recovery does not per se render the  
18 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be  
19 assessed relative to risks of pursuing the litigation to judgment"; noting that whether the  
20 settlement is fair and adequate depends on the "the difficulties in proving the case");  
21 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at \*6 (N.D.  
22 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of  
23 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.  
24 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour  
25 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued  
26 litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL  
27 5878390, at \*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of  
28 approximately 15% of the potential recovery was fair and reasonable). Here, the Gross

Settlement Amount is fair and reasonable as it is approximately **25.7%** of the potential recovery of Plaintiff's class and PAGA claims if Plaintiff was to fully succeed at trial. Rosenthal Decl. ¶ 22.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class Action Settlement, should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement. Settlement Agreement ¶ 63. Moreover, as set forth in the Notice Packet, Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the Settlement Agreement.

**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**

The Settlement Agreement provides for One Hundred Fifty Thousand Dollars (\$150,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ 45. The Net Settlement Amount, calculated after deduction of attorneys' fees (up to \$50,000.00), costs (up to \$5,000.00), Class Representative Enhancement Payment (up to \$15,000.00), payment to the LWDA (\$7,500.00), and Settlement Administration Costs (up to \$10,000.00), is estimated to be approximately \$62,500. *Id.* ¶¶ 18, 45, 47, 48, 49, 50. Each Participating Class Member who does not opt-out of the Settlement will be awarded a portion of the Net Settlement Amount based upon the number of paper copy wage statements each respective Participating Class Member received during the Class Period. *Id.* ¶ 51.

Based thereon, on a raw average, each Participating Class Member may potentially recover approximately \$150.96. Rosenthal Decl. ¶ 25. The amount actually paid to each Participating Class Member may increase or decrease depending on the actual number of paper copy wage statements he or she received during the Class Period and/or the number of timely Requests for Exclusion received. *Id.* at ¶ 26.

Finally, the terms of the settlement provide that uncashed checks (upon the expiration date) shall be distributed to the Legal Aid at Work, a non-profit legal services organization that provides legal services and policy advocacy for and on behalf of low-income workers.

Settlement Agreement ¶ 69.

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

None of the settlement funds will revert to Defendant. *See* Settlement Agreement ¶¶ 45, 69.

**3. Scope of the Release of Class Members' Claims**

As a condition of participating in this settlement, Class Members shall waive and release all claims, demands, rights, liabilities, and causes of action that were pled or could have been pled based on the factual allegations in the operative Complaint, during the applicable period from January 12, 2020, through February 14, 2021. Settlement Agreement ¶ 25. This release is appropriately limited, as it only applies during the time period of January 12, 2020, through February 14, 2021. All Class Members, including non-participants, are bound by the release of claims under the PAGA, but only with respect to recovery of civil penalties. *ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175, 196 (2019) (“Nonparty employees are bound by the judgment in an action under the PAGA”).

**4. Tax Treatment of Settlement Amounts**

As Plaintiff’s lawsuit sought solely statutory and civil penalties, the Parties have agreed that 100% of all settlement payments to Class Members shall be deemed as IRS Form 1099 income and not subject to withholdings and deductions. Settlement Agreement ¶ 52.

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

As stated above, Class Members do not need to do anything should they wish to receive their share of the settlement funds. Settlement Agreement ¶ 61. Thus, this substantially decreases the amount of burden each Class Member must bear in order to receive their settlement share. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit an exclusion request. *Id.* ¶ 63.

**C. Notice to Class Members**

Within fifteen (15) days of the preliminary approval of this settlement, Defendant will confidentially transmit to the Settlement Administrator a spreadsheet containing each Class

1 Member's full name, employee number, most recent mailing address, Social Security Number,  
2 and number of paper copy wage statements received during the period of January 12, 2020,  
3 through February 14, 2021 ("Class List and Data"). Settlement Agreement ¶¶ 6, 58. Upon receipt  
4 of the information and prior to mailing the Notice of Class Action Settlement ("Notice Packet"),  
5 the Settlement Administrator shall perform a search based on the National Change of Address  
6 Database for information to update and correct for any known or identifiable address changes. *Id.*  
7 ¶¶ 20, 60. Within ten (10) business days of receipt of the Class List and Data, the Settlement  
8 Administrator shall mail the Notice Packet to all Class Members. *Id.* ¶ 59. The Settlement  
9 Administrator will re-mail the Notice Packet to Class Members for whom the notice is returned  
10 with a forwarding address and perform a skip-trace or other search on Class Members and re-  
11 mailing for whom a Notice Packet is returned as undeliverable. *Id.* ¶ 62.

12 As set forth in the Notice Packet, Class Members will be allowed to opt out of the  
13 settlement by a certain deadline, or object to the settlement in writing or by appearing at the final  
14 approval hearing. Settlement Agreement ¶¶ 63, 65.

#### 15 **D. Typicality and Adequacy of Representation**

##### 16 **1. Class Representative's Claims are Typical of the Class**

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

28 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure

1 violated the Labor Code by issuing inaccurate itemized wage statements. Declaration of Rakesh  
2 Ray (“Ray Decl.”) ¶ 2. In other words, Plaintiff was subjected to the same policy and practice as  
3 other Class Members. Thus, Plaintiff’s claims are typical to those of Class Members.

4 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such  
5 issues been raised or presented. Ray Decl. ¶ 3. Plaintiff has taken all necessary steps to represent  
6 the interests of the Class, and by providing information and documents to Plaintiff’s counsel. *Id.*  
7 ¶ 4. For such reasons, Plaintiff has adequately represented the Class Members and will continue  
8 to do so.

9 **2. Class Counsel Has Adequately Represented the Class and Has**  
10 **Experience with Wage and Hour Class Actions**

11 From the inception of the case, Class Counsel has zealously represented the interests of  
12 the class. The settlement was obtained for the benefit of the class, as opposed to the individual  
13 Class Representative. Further, Class Counsel has been approved as class counsel on a number of  
14 prior cases, have litigated numerous other class action cases, and are competent to represent the  
15 class. Rosenthal Decl. ¶¶ 30-32; Lee Decl. ¶¶ 8-10; Agnew Decl. ¶¶ 6-12; Marder Decl. ¶¶ 6-13.

16 **E. Costs and Fees**

17 **1. Attorneys’ Fees and Costs**

18 California state and federal courts have recognized that an appropriate method for  
19 determining award of attorneys’ fees is based on a percentage of the total value of benefits to  
20 Class Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254  
21 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444  
22 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The  
23 purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread  
24 litigation costs proportionally among all the beneficiaries so that the active beneficiary does not  
25 bear the entire burden alone.” *Vincent*, 557 F.2d at 769.

26 The common fund doctrine is predicated on the principle of preventing unjust  
27 enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits,  
28 he may require the passive beneficiaries to compensate those who created the fund. Both  
California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;

1 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th  
2 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has  
3 been applied “consistently in California when an action brought by one party creates a fund in  
4 which other persons are entitled to share.” The reasons for applying the common fund doctrine  
5 include: “fairness to the successful litigant, who might otherwise receive no benefit because his  
6 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to  
7 the others who are entitled to share in the fund and who should bear their share of the burden of  
8 its recovery; encouragement of the attorney for the successful litigant who will be more willing  
9 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund  
10 if he is assured that he will be properly and directly compensated should his efforts be  
11 successful.” *Id.*

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

19 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3  
20 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that  
21 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is  
22 “extraordinarily high or low [should] the trial court [] consider whether the percentage method  
23 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

24 The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement  
25 Amount (or \$50,000.00) for payment to Class Counsel as attorneys’ fees. *See Settlement*  
26 *Agreement* ¶ 47. The Parties have agreed to a payment of the foregoing attorney’s fees and, thus,  
27 this payment should be presumed to be fair.

28 Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs in

1 an amount up to \$5,000.00. *Id.* Class Counsel have expended costs at their own risk, for  
2 example, to file this instant action, effect service of process, and pay of other litigation-related  
3 costs.

4 Based on the foregoing, the Court should preliminarily approve the attorneys' fees and  
5 costs being requested by the Parties. As part of the Motion for Final Approval, Plaintiff's  
6 Counsel will of course provide time and task charts demonstrating their hours expended on this  
7 matter and will perform a lodestar analysis.

## 8 **2. Proposed Payment to the Class Representative**

9 Class Representative Rakesh Ray requests a modest enhancement of \$15,000.00.  
10 Settlement Agreement ¶¶ 9, 48. The Class Representative met and conferred with Class Counsel  
11 on a number of occasions to discuss the case, provided documents and information to Class  
12 Counsel, and reviewed the Settlement Agreement. As part of his duties as the Class  
13 Representative, Plaintiff provided invaluable information and documents that resulted in this  
14 settlement. Ray Decl. ¶ 4. In addition to the invaluable services that Plaintiff provided, he also  
15 took a significant risk, both professionally and monetarily, in acting as the Class Representative  
16 and seeking benefits on behalf of the Class. Because the claims alleged by the Class  
17 Representative involved the payment of costs to the prevailing party, Plaintiff could have  
18 possibly faced paying the costs of Defendant had he not prevailed in this action.

19 Additionally, Plaintiff has an individual claim for violation of Labor Code § 203 that is  
20 resolved via the instant settlement.

21 Furthermore, given that future employers are much less likely to hire individuals who  
22 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face  
23 prejudice in the future from other potential employers. Plaintiff took this risk upon himself and  
24 the whole class benefited from these risks taken by Plaintiff. Class Members did not have to file  
25 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they  
26 have to face the potential for retaliation and not getting future employment had they filed a  
27 public lawsuit.

28 Finally, as part of this settlement, Plaintiff has agreed to provide a full, complete, and

1 general release of his individual claims, as well as a release of claim for violation of Labor Code  
2 § 203, something that the Class Members did not have to provide. This sacrifice by Plaintiff for  
3 the benefit of the Class further warrants the requested enhancement amount.

4 **3. Settlement Administration Fees**

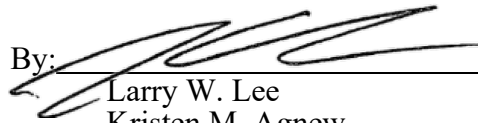
5 The Parties have agreed to an estimated payment of \$10,000.00 to the Settlement  
6 Administrator, Phoenix Settlement Administration, to send notices and to administer this  
7 settlement. Settlement Agreement ¶¶ 30, 49. Phoenix Settlement Administration is a well-  
8 recognized class action settlement administrator. The Parties believe that the administration fee  
9 is reasonable and should be approved.

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

12 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both  
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 respective  
15 parties who are experienced in wage and hour class action litigation. For the foregoing reasons,  
16 Plaintiff respectfully requests that the Court grant preliminary approval of the proposed  
17 settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice of  
18 Class Action Settlement, and set a date for a final approval hearing.

19  
20 DATED: December 6, 2021

DIVERSITY LAW GROUP, P.C.

21  
22 By:   
23 Larry W. Lee  
24 Kristen M. Agnew  
25 Nicholas Rosenthal  
26 Attorneys for Plaintiff and the Class  
27  
28