

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

Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

CASSANDRA NEGRETE, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

WINSUPPLY INC., a Delaware
corporation; ORANGE COUNTY
WINDUSTRIAL CO., a Delaware
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 30-2021-01188066-CU-OE-CXC

(Assigned for all purposes to the Hon. Randall J.
Sherman, Dept. CX105)

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

Date: August 19, 2022
Time: 10:00 a.m.
Dept.: CX105

Reservation Number: 73761897

Complaint Filed: March 9, 2021
FAC Filed: April 13, 2022
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 19, 2022, at 10:00 a.m., or as soon thereafter as
the matter may be heard, before the Honorable Randall J. Sherman, judge presiding, in Department
CX105 of the above referenced Court located at 751 W. Santa Ana Blvd., Santa Ana, California
92701, Plaintiff Cassandra Negrete ("Plaintiff") will seek an Order: (1) approving the Joint
Stipulation of Class Action and PAGA Settlement ("Stipulation" or "Settlement Agreement") in

1 this matter; (2) conditionally certifying the following Class for settlement purposes only: “all
2 current and former hourly-paid, non-exempt employees of Defendants employed in the State of
3 California at any time during the Class Period”; (3) appointing Plaintiff Cassandra Negrete as the
4 Class Representative, and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. as Class
5 Counsel; (4) preliminarily approving the Stipulation and the total Gross Settlement Amount in the
6 amount of Two Million Dollars (\$2,000,000.00); (5) finding on a preliminary basis that the
7 Stipulation appears to be within the range of reasonableness of a settlement, including the amount
8 of the Class Representative enhancement payment, attorneys’ fees and costs, settlement
9 administration fees, and the allocation of payments to Class Members, that could ultimately be
10 given final approval by this Court; (6) approving the Notice of Proposed Class Action Settlement to
11 be sent to Class Members; (7) appointing Phoenix Settlement Administrators as the Settlement
12 Administrator; and (8) setting the matter for a Final Fairness and Final Approval hearing.

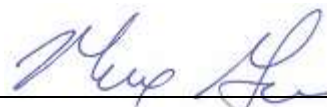
13 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
14 provides for court approval of the settlement of a purported class action and allows the Court to
15 preliminarily certify a class for settlement purposes.

16 The basis for this Motion, filed without any opposition from Defendants Winsupply Inc. and
17 Orange County Windustrial Co. and their affiliates (collectively, “Defendants”), is that the
18 proposed settlement is fair, adequate, and reasonable and the procedures proposed by the Parties are
19 adequate to ensure the opportunity of Class Members to participate in, opt-out of, or object to the
20 settlement.

21 This Motion will be based on the attached Memorandum of Points and Authorities, the
22 Stipulation and the proposed Class Notice, and the supporting Declarations of Larry W. Lee, Max
23 W. Gavron, and Plaintiff Cassandra Negrete, and upon the oral arguments of counsel (should there
24 be any) and on the complete records and file herein.

25 DATED: May 17, 2022

DIVERSITY LAW GROUP, P.C.

26
27 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	9
II. PROCEDURAL HISTORY	10
III. DISCUSSION	12
A. Proposed Class Definition	13
B. Numerosity.....	14
C. Ascertainability	14
D. Typicality and Adequacy of Representation	14
1. Class Representative’s Claims are Typical of the Class.....	14
2. Class Counsel Have Adequately Represented the Class and Have Experience with Wage and Hour Class Actions	15
E. Superiority	16
F. Summary of the Case, Investigation and Discovery, and Reasonable Estimate of the Nature and Amount of Recovery	16
G. The Settlement Was Negotiated at Arm’s Length and Is Not Collusive.....	21
H. Settlement Terms and Evaluation	23
1. Proposed Terms of the Settlement.....	23
2. Nature of Any Injunctive Relief.....	24
3. Amount and Manner of Distribution of the Compensation to be Provided to Class Members, Including the Estimated Amount Each Class Member Will Receive ..	24
4. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants	24
5. Scope of the Release of Class Members’ Claims	24

1	6. Tax Treatment of Settlement Amounts.....	26
2	7. Affirmative Obligations to be Undertaken by Class Members or Class Counsel	
3	and the Reasons for Any Such Obligations	26
4	I. Automatic Payment and Submission of Exclusions/Objections	26
5	J. Code of Civil Procedure § 384	27
6	K. Notice to Class Members	27
7	L. Costs and Fees	28
8	1. Attorneys' Fees and Costs	28
9	2. Proposed Payment to the Class Representative	29
10	3. Settlement Administration Fees.....	30
11	IV. THE LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION	30
12	V. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTIONS, OPT OUT, AND	
13	MOTION FOR APPROVAL, ATTORNEYS' FEES, AND FINAL ACCOUNTING.....	31
14	VI. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR	
15	PRELIMINARY APPROVAL	31
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	20
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	15
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1803 (1996)	13
<i>Duran v. U.S. Bank Nat'l Ass'n</i> , 59 Cal. 4th 1 (2014).....	20
<i>Faulkinbury v. Boyd & Assocs., Inc.</i> , 216 Cal. App. 4th 220, 240 (2013)	15
<i>Gentry v. Sup. Ct.</i> , 42 Cal. 4th 443, 462 (2007).....	17
<i>Jaimez v. DAIOHS USA, Inc.</i> , 181 Cal. App. 4th 1286, 1308 (2010).....	16
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130, 133 (2008).....	17, 18
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal. 5th 480, 503 (2016)	29
<i>Lee v. Dynamex, Inc.</i> , 166 Cal. App. 4th 1325, 1334 (2008).....	15
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	15
<i>Sav-On Drug Stores, Inc.</i> , 34 Cal. 4th 319, 326 (2004).....	16
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	28
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	15
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	15
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	13, 28

Federal Cases

<i>Ark. Educ. Ass'n v. Bd. of Educ. of the Portland</i> , 446 F.2d 763, 765-66 (8th Cir. 1971)	14
<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....	21
<i>Bernstein v. Virgin Am., Inc.</i> , 3 F.4th 1127, 1144 (9th Cir. 2021).....	19
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	28
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001)	30
<i>Cook v. Niedert</i> , 142 F.3d 1004, 1016 (7th Cir. 1998)	31

1	<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> , 137 F.R.D. 240, 251-52 (S.D. Ohio	
2	1991)	30
3	<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan.	
4	27, 2007)	30
5	<i>Greko v. Diesel U.S.A., Inc.</i> , No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26,	
6	2013)	21
7	<i>Hammon v. Barry</i> , 752 F. Supp. 1087 (D.D.C. 1990)	22
8	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	15
9	<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	22
10	<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	13
11	<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	22
12	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990)	30
13	<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000)	21
14	<i>Jordan v. L.A. County</i> , 669 F.2d 1311, 1320 (9th Cir. 1982)	14
15	<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund</i> , 244 F.3d 1152, 1163 (9th Cir. 2001).....	17
16	<i>Magadia v. Wal-Mart Assocs. et al.</i> , 2019 U.S. Dist. Lexis 91792	21
17	<i>Magadia v. Wal-Mart Assocs., Inc.</i> , 999 F.3d 668, 677 (9th Cir. 2021)	21
18	<i>Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.</i> , 834 F.2d 677 (7th Cir. 1987)	22
19	<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004).....	22
20	<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	22
21	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	22
22	<i>Steinberg v. Carey</i> , 470 F. Supp. 471 (S.D.N.Y. 1979).....	22
23	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)	21
24	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	30
25	<i>Villalpando v. Excel Direct Inc.</i> , 303 F.R.D. 588, 605-606 (N.D. Cal. 2014).....	14
26	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6	
27	(N.D. Cal. Nov. 21, 2012).....	21
28	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	28, 29

Statutes

Business and Professions Code § 17200, <i>et seq.</i>	11, 17, 25
California Code of Civil Procedure § 1021	25
California Rules of Court Rule 3.766(d) and (e)	28
Civil Code § 1021.5	25
Civil Code § 1542	26, 30
Code of Civil Procedure § 384.....	27
Labor Code § 1194.....	11, 17, 25, 26
Labor Code § 1194.2.....	11, 17, 25
Labor Code § 1197.1.....	11, 17, 25
Labor Code § 226.....	passim
Labor Code § 226.7.....	11, 17, 25, 26
Labor Code § 2698, <i>et seq.</i>	passim
Labor Code § 2699(f)(2)	20
Labor Code § 2802.....	11, 17, 25, 26
Labor Code § 510.....	11, 17, 25, 26
Labor Code § 512.....	11, 17, 25, 26
Labor Code § 558.....	11, 17, 25, 26
Labor Code §§ 201-203	11, 17, 25, 26
Labor Code § 218.5.....	25
Labor Code § 226.3.....	25
Labor Code § 2699.....	25, 26

Other Authorities

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002).....	13, 14
4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	13
4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.47	22
Eisenberg & Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008</i> , 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010)	29

Fitzpatrick, <i>An Empirical Study of Class Action Settlements and Their Fee Award</i> , 7 J. Empirical	
Leg. Stud. 811, 833 (2010)	29
Manual for Complex Litigation (Third) § 30.41	12

1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act (“PAGA”)
3 action seeking statutory and civil penalties under the California Labor Code. Plaintiff Cassandra
4 Negrete (“Plaintiff”) alleges that Defendants Winsupply Inc. and Orange County Windustrial Co.
5 (collectively, “Defendants”) (together with Plaintiff, the “Parties”) failed to provide off-duty meal
6 and rest breaks, failed to pay all regular, minimum, and overtime wages owed, failed to pay all
7 wages owed upon separation of employment, failed to reimburse business expenses, failed to
8 provide accurate itemized wage statements, and engaged in unfair business practices. Plaintiff
9 brings class and PAGA claims based on these violations. The Parties have reached a proposed class
10 and PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
11 Class Action and PAGA Settlement (“Stipulation” or “Settlement Agreement”).

12 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating to
13 the class and PAGA claims alleged in the lawsuit and engaged in a thorough study of legal
14 principles applicable to the claims asserted against Defendants. Through the exchange of informal
15 discovery, Defendants provided necessary data pertaining to the number of putative class members
16 and number of workweeks at issue, a sampling of time and pay records for purposes of performing
17 an analysis of the alleged violations and penalties resulting therefrom, as well as information
18 pertaining to Defendants’ payroll policies and practices. Thereafter, the Parties attended a full-day
19 of mediation with well-respected mediator Steven Rottman, Esq. The Parties continued settlement
20 negotiations facilitated by Mr. Rottman, after which the Parties were able to reach the current
21 settlement of Plaintiff’s class and PAGA claims. The following represents the key terms of the
22 settlement:

- 23 • Gross Settlement Amount of \$2,000,000.00, which will be paid by Defendants and
24 distributed to the Class on a **non-reversionary** basis (*See* Stipulation ¶ 14);
25 • Estimated Class of 763 individuals at the time of mediation¹ (*Id.* ¶ 6);
26

27 ¹ The Parties obtained an estimate for distribution of the class notice premised on 780 individuals,
28 which would provide sufficient buffer for any increase in class members between the day of

- Class Members do not need to submit claim forms to participate in the settlement (*Id.* ¶ 45);
- Class Representative Enhancement Payment of up to \$10,000.00 (*Id.* ¶ 41);
- Class Counsel’s attorneys’ fees of up to \$666,667.00 (33 1/3% of Gross Settlement Amount) (*Id.* ¶ 40);
- Class Counsel’s litigation costs of up to \$25,000.00 (*Id.* ¶ 40);
- Settlement Administration Costs of up to \$12,500.00 (*Id.* ¶ 42);
- Payment to the LWDA of \$112,500.00, representing 75% of the total PAGA Payment of \$150,000.00 (*Id.* ¶ 43);
- Net Settlement Amount of approximately \$1,135,833.00 (*Id.* ¶ 44); and
- Raw average of \$1,488.64 (\$1,135,833.00 / 763 class members) to each Participating Class Member.

The Parties believe that the settlement for the consideration and on the terms set forth in the Stipulation is fair, adequate, and reasonable, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they could prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that a class might not be certified, that Plaintiff could fail to establish liability, and/or that Plaintiff would be unable to prove damages in the amounts sought.

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

II. PROCEDURAL HISTORY

On March 9, 2021, Plaintiff filed a complaint in the Superior Court of the State of California for the County of Orange on behalf of herself and all similarly situated employees. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 4. Plaintiff asserted claims for: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 226.7; (3) violation of Labor Code §§ 510, 558, and

mediation and end of the class period. Plaintiff premises her damages calculations and exposure analysis on the number of individuals identified at the time of mediation, 763.

1 1194; (4) violation of Labor Code § 226; (5) violation of Labor Code §§ 201-203; (6) violation of
2 Business and Professions Code § 17200, *et seq.*; (7) violation of Labor Code § 2698, *et seq.* On
3 April 13, 2022, Plaintiff filed a First Amended Complaint adding claims for violation of Labor
4 Code §§ 1194.2, 1197.1, and 2802. *Id.* The First Amended Complaint is the operative complaint.

5 Plaintiff's class and PAGA claims as pled in the First Amended Complaint are predicated
6 upon the following allegations. With respect to Plaintiff's meal and rest break claims, Plaintiff
7 contends that Defendants routinely denied employees off-duty meal breaks of at least 30 minutes
8 for shifts of 5 hours or longer and off-duty rest breaks of 10 minutes for each 3.5 hours worked due
9 to the staffing and other operational needs of the employer. Plaintiff also alleges that Defendants
10 failed to pay premium compensation in lieu of the off-duty meal and rest breaks. With respect to
11 Plaintiff's regular rate claim, Plaintiff contends that Defendants failed to factor non-discretionary
12 remuneration, such as bonuses, into the calculation of the regular rate for purposes of paying
13 minimum and overtime wages, and thus Plaintiff and employees were underpaid said wages. With
14 respect to Plaintiff's wage statement claims, Plaintiff contends that Defendants issued deficient
15 wage statements, as said wage statements do not correctly identify the overtime rate of pay, gross
16 and net wages earned, and inclusive pay period dates. With respect to Plaintiff's business
17 reimbursement claims, Plaintiff contends that Defendants required employees to use their personal
18 cell phones in order to perform their jobs but failed to reimburse them for the cost of said use.
19 Lastly, Plaintiff contends that Defendants failed to pay all wages owed upon separation of
20 employment. As a result of the alleged violations above, Plaintiff seeks damages and penalties
21 under the California Labor Code, the California Business & Professions Code, and the PAGA, as
22 well as attorneys' fees and costs. *Id.* ¶ 7.

23 After the Parties conferred regarding possible settlement discussions, they agreed to
24 exchange information informally to evaluate their respective claims and defenses. Gavron Decl. ¶ 8.
25 The Parties subsequently engaged in informal discovery for Plaintiff to assess the claims, as well as
26 the maximum exposure of damages and penalties. *Id.* Defendants provided Plaintiff's counsel with
27 informal data and information pertaining to the putative class size and number of pay periods, a
28 sampling of time and pay records from different locations where Defendants operated in California,

1 and Defendants’ wage and hour policies and practices. *Id.* ¶ 8. Defendants’ production of time and
2 pay records allowed Plaintiff to conduct a damages analysis and extrapolate from the sample. *Id.*

3 On February 3, 2022, the Parties engaged in a full-day mediation with mediator Steven
4 Rottman, Esq., and continued settlement discussions thereafter facilitated by Mr. Rottman. Gavron
5 Decl. ¶ 9. After thorough investigation and evaluation of the facts and claims, and as a result of the
6 arm’s length negotiations facilitated by Mr. Rottman, the Parties reached the current settlement. *Id.*

7 **III. DISCUSSION**

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

12 Approval of class action settlements involves a two-step process. First, counsel
13 submits the proposed terms of settlement and the court makes a preliminary fairness
14 evaluation. If the preliminary evaluation of the proposed settlement does not disclose
15 grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential
16 treatment of class representatives or of segments of the class, or excessive
17 compensation for attorneys, and appears to fall within the range of possible approval,
(Fed. Jud. Ctr., 3rd ed. 1995).

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

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

27 When the parties to an action reach a monetary settlement, they will usually prepare
28 and execute a joint stipulation of settlement, which is submitted to the court for
preliminary approval. The stipulation should set forth the central terms of the
agreement, including but not limited to, the amount of settlement, form of payment,

1 manner of determining the effective date of settlement and any recapture clause.
2 *Id.* § 11.24.

3 Here, the Parties have reached such an agreement and have submitted to this Court in
4 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached
5 among the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties,
6 which include, among other things, the method for calculating the Class Members' Individual
7 Settlements Payments.

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

17 The strength of the findings made by a judge at a preliminary hearing or conference
18 concerning a tentative settlement proposal...may be set out in conditional orders
19 granting tentative approval to the various items submitted to the court. Three basic
20 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.

21 *4 Newberg on Class Actions* § 11.26.

22 In addition to such terms as class identification, settlement amount, and payment
23 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to
24 which the Parties stipulate to the Court's provisional certification of the Class, but do so for the
25 purposes of this settlement only. Defendant has reserved its right to contest class certification in the
26 event that the settlement is not approved and litigation resumes.

27 **A. Proposed Class Definition**

28 The current settlement is being settled on behalf of “all current and former hourly-paid, non-

1 exempt employees of Defendants² employed in the State of California at any time during the Class
2 Period.” See Stipulation ¶ 6. The Class Period is defined as “the period from September 12, 2016,
3 to the date the Court signs an order granting preliminary approval of the Settlement or May 1,
4 2022, whichever is sooner.” *Id.* ¶ 7. There were approximately 763 individuals that comprised the
5 Class at the time of mediation. *Id.* ¶ 10.

6 **B. Numerosity**

7 Courts generally find that numerosity is satisfied if the class includes forty or more
8 members. See *Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606 (N.D. Cal. 2014); see also
9 *Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir. 1982) (noting, in dicta, that the court “would
10 be inclined to find the numerosity requirement...satisfied solely on the basis of [39] ascertained
11 class members”), *vacated on other grounds*, 459 U.S. 810 (1982); *Ark. Educ. Ass’n v. Bd. of Educ.*
12 *of the Portland*, 446 F.2d 763, 765-66 (8th Cir. 1971) (approving class of 20 members).

13 In this case, there are at least 763 individual class members, therefore, numerosity is
14 satisfied. Gavron Decl. ¶ 10.

15 **C. Ascertainability**

16 Class members are ascertainable where they may be “readily identified without
17 unreasonable expense or time by reference to official records.” *Lee v. Dynamex, Inc.*, 166 Cal. App.
18 4th 1325, 1334 (2008); see also *Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240
19 (2013).

20 Here, the identity of class members is clearly ascertainable from Defendants’ payroll records
21 and have already been identified during the mediation process.

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

23 **1. Class Representative’s Claims are Typical of the Class**

24 The commonality requirement is met when there are questions of law and fact common to
25 the class. See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared
26

27 ² The term “Defendants” is defined in the Joint Stipulation of Class Action and PAGA
28 Settlement, page 3, paragraph 11.

1 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
2 couple with disparate legal remedies within the class”). Commonality requires only that some
3 common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation
4 are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 473 (1981). Defendant’s
5 conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d
6 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s
7 conduct is uniformly directed at a class of employees, as it is here, the class wide impact of the
8 Defendant’s policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward &*
9 *Co.*, 193 Cal. App. 3d 411, 421 (1987).

10 Plaintiff alleges that Defendants, as a matter of its corporate policy, practice, or procedure,
11 violated the Labor Code by failing to provide off-duty meal and rest breaks, failing to pay all
12 regular, minimum, and overtime wages owed, failing to pay all wages owed upon separation of
13 employment, failing to reimburse business expenses, failing to provide accurate itemized wage
14 statements, and engaging in unfair business practices. Declaration of Cassandra Negrete (“Negrete
15 Decl.”) ¶ 3. As a result, Plaintiff alleges that she is owed unpaid wages and penalties for the above
16 violations. Negrete Decl. ¶ 3.

17 In other words, Plaintiff contends that she was subjected to the same policy and practice as
18 other Class Members and that her claims are typical to those of the Class.

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

24 **2. Class Counsel Have Adequately Represented the Class and Have** 25 **Experience with Wage and Hour Class Actions**

26 From the inception of the case, Class Counsel have zealously represented the interests of the
27 Class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class
28 Representative. Following an exchange of informal discovery and mediation data to assess potential
class-wide damages, the Parties participated in a private mediation with mediator, Steven Rottman,

Esq. on February 3, 2022. Gavron Decl. ¶ 3.

Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the Class. Gavron Decl. ¶ 33-39; Declaration Larry W. Lee (“Lee Decl.”) ¶¶ 7-9.

E. Superiority

Class treatment is clearly superior to any other method of resolving Plaintiff’s claims. *Sav-On Drug Stores, Inc.*, 34 Cal. 4th 319, 326 (2004). In employment actions, class actions are in fact encouraged. *Jaimez v. DAIOWS USA, Inc.*, 181 Cal. App. 4th 1286, 1308 (2010) (“In light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication. Doing so would further judicial economy by avoiding repetitious suits, would unify what would otherwise be a series of small claims so as to enhance the class members’ access to redress...”).

Here, Plaintiff’s claims are based on the system-wide policies, procedures, and practices that apply to all class members and can be most efficiently litigated on a class-wide basis. The alternative would be the unrealistic filing of numerous individual claims. Since the putative class members are employees with relatively modest individual claims and limited resources, there is a strong likelihood that individual claims would never be brought. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d 1152, 1163 (9th Cir. 2001) (superiority requirement met where class members would recover, at most, about \$1,330); *see also Gentry v. Sup. Ct.*, 42 Cal. 4th 443, 462 (2007).

F. Summary of the Case, Investigation and Discovery, and Reasonable Estimate of the Nature and Amount of Recovery

The operative Complaint alleges the following causes of action: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 226.7; (3) violation of Labor Code §§ 510, 558, 1194, 1194.2, and 1197.1; (4) violation of Labor Code § 226; (5) violation of Labor Code §§ 201-203; (6) violation of Business and Professions Code § 17200, *et seq.*; (7) violation of Labor Code § 2802; and (8) violation of Labor Code § 2698, *et seq.* Defendants deny the allegations in the action and have been, and are, prepared to continue to defend the action vigorously.

1 After the filing of the lawsuit, the Parties met and conferred and agreed to participate in an
2 informal exchange of information and early mediation effort. Gavron Decl. ¶ 6. Defendants
3 produced policies and information, including a sampling of putative class member time and pay
4 records. *Id.* ¶ 6. Thereafter, the Parties engaged in a full day mediation with mediator Steven
5 Rottman, Esq. on February 3, 2022. *Id.* ¶ 9. Through continued negotiations with the assistance of
6 the mediator, the Parties were ultimately able to reach the instant settlement. *Id.*

7 Based on their own independent investigations and evaluations, Plaintiff and her counsel are
8 of the opinion that settlement for the consideration and on the terms set forth in the Stipulation is
9 fair, reasonable, and adequate and is in the best interests of the Class in light of all known facts and
10 circumstances and the expenses and risks inherent in litigation. Gavron Decl. ¶ 9.

11 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th
12 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has conducted
13 sufficient discovery and the settlement is reasonable in light of the strengths of the plaintiff's
14 claims. As discussed herein, Plaintiff's counsel have conducted extensive discovery and
15 investigation and, in light of the strength and weaknesses of Plaintiff's claims, Plaintiff's attorneys
16 submit that this settlement is fair pursuant to *Kullar*.

17 Prior to the mediation, Plaintiff was provided with a twenty (20%) sampling of time and pay
18 data for the putative class, which included records for approximately 125 employees across
19 California. Gavron Decl. ¶ 8. From this data, Plaintiff was able to investigate the claims asserted
20 and conduct an exposure analysis that informed Plaintiff's position at mediation. *Id.* Plaintiff was
21 also able to extrapolate from the sampling to support her position with respect to the alleged Labor
22 Code violations for the putative class.

23 Plaintiff analyzed Defendant's potential maximum exposure as follows:

24 Meal & Rest Period Claims: Plaintiff alleged she and similarly situated employees were
25 routinely not provided duty-free and/or timely meal/rest periods because Defendants' scheduling
26 practices did not provide sufficient staffing to permit duty-free breaks. Defendants allege that they
27 maintained compliant meal and rest break policies that would have defeated class certification and
28 placed very little, if not zero value to these class claims. Plaintiff calculated approximately

1 350,000 shifts where a putative class member would have been entitled to receive a meal or rest
2 period, and determined there to be an alleged violation rate of meal periods of approximately 47%
3 of shifts. Gavron Decl. ¶ 12. From this, Plaintiff estimated approximately 164,500 shifts where a
4 meal period premium should have been paid, which resulted in approximately \$3.27M in unpaid
5 meal period premiums (164,500 shifts x \$19.89 average rate of pay). *Id.* Plaintiff applied the same
6 violation rate and penalty calculation to the rest period claim, for a total of approximately \$3.27M
7 in rest period premium penalties. *Id.*

8 Failure to pay all regular, minimum, and overtime wages owed: Plaintiff alleges that
9 Defendants failed to accurately calculate the regular rate of pay by failing to factor in non-
10 discretionary income, which resulted in a failure to pay proper minimum and overtime wages. *Id.* ¶
11 13. Plaintiff and the Class also earned additional non-discretionary incentive pay, including
12 without limitation, bonuses, but Defendants did not calculate and/or factor such remuneration into
13 the regular rate of pay for purposes of paying overtime wages. *Id.* The amount of wages withheld
14 was minimal when compared to the penalties associated with Defendants' alleged failure to pay all
15 wages due and owing at separation of employment, as detailed below. Based on an analysis of the
16 data performed by a consultant who analyzed the data at Plaintiff's request, Plaintiff estimated that
17 the amount of back wages owed was approximately \$200,000, which was calculated taking into
18 account the frequency of the alleged underpayments. *Id.*

19 Waiting time penalties: Plaintiff also alleged that Defendants failed to pay all wages owed
20 upon separation of employment. *Id.* at ¶ 14. Plaintiff estimated that the potential exposure on this
21 claim was approximately \$1.17M, which she calculated based on 246 former employees, whose
22 average rate of pay was \$19.89 (246 employees x 8 hours x 30 days x \$19.89 per hour). *Id.*

23 Section 226 Penalties: Plaintiff also alleged that Defendants would be subject to penalties,
24 pursuant to Labor Code § 226, because the wage statements it distributed to employees did not state
25 the pay period start date or provide the applicable overtime rates of pay. Plaintiff estimated the
26 penalties associated with this claim as approximately \$780,000, which was based on 8,099 alleged
27 pay periods. *Id.* at ¶ 15.

28 Section 2802: Plaintiff alleges that employees were required to use their own personal

cellular phones to carry out their job duties, but Defendants failed to reimburse them for the costs of their work-related cell phone expenses. Plaintiff calculated the total exposure for this claim as approximately \$200,000, which contemplates a \$10.00 per month reimbursement for use of personal telephones (\$5.00 x 41,000 pay periods). *Id.* at ¶ 16.

With respect to Plaintiff's claim under the PAGA, Plaintiff calculated the maximum potential penalties available in relation to the approximately 18,000 pay periods at issue during the PAGA period. *Id.* at ¶ 17. If the Court were to award separate PAGA penalties for each alleged Labor Code violation (aka "stack" penalties), the potentially available PAGA penalties could rise as high as \$4.5M. If, on the other hand, the Court only awarded one penalty per pay period regardless of the number of alleged violations occurring during the pay period, the potentially available PAGA penalties could total approximately \$1.8M. These scenarios do not account for the imposition of the subsequent penalty amount given recent authority indicating this increased penalty may only be available where there is a prior citation for a Labor Code violation. *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no heightened penalty because the Labor Commissioner nor any court warned the defendant that it was subject to the Labor Code until the court handling the case at issue). Both these scenarios do not account for the possibility that the Court would reduce the PAGA penalties, pursuant to its discretion, which is discussed further below.

Despite Plaintiff's theories of liability and allegations, Defendants contended that they complied with the Labor Code. For example, Defendants produced policies showing, among other things, that Defendants prohibited off-the-clock work, provided off-duty meal and rest periods, and made efforts to ensure employees' rights under the Labor Code were not impinged. *Id.* ¶ 18. Defendants also would have argued if the case continued that it was not suited for class certification. Defendants operate different wholesalers throughout California, which Defendants contended operate independently from each other. Each location is its own entity. Each has its own separate ownership structure with local owners at each location. Employment related decisions are made locally by each company President/owner. Plaintiff contended, on the other hand, that Defendants operated with a unified payroll system, such that Plaintiff's allegations were

1 applicable to all nonexempt California employees. *Id.* ¶ 19. These risks on class certification are
2 compounded by the California Supreme Court’s holding in *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal.
3 4th 1 (2014). There, the plaintiffs obtained class certification and subsequently prevailed at trial
4 after eight years of litigation, but the judgment and the certification ruling were reversed by the
5 California Supreme Court after an additional five years of litigation. The case was remanded to
6 superior court where class certification was denied and plaintiffs’ subsequent appeal also was
7 denied.

8 Defendants also alleged that the Court would not have awarded the full amount of PAGA
9 penalties. *Id.* Pursuant to Labor Code § 2699(f)(2) the Court can decline to award PAGA penalties
10 where “...if, based on the facts and circumstances of the particular case, to do otherwise, would
11 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the
12 Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while
13 the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA
14 penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. *Id.* at
15 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.

16 Courts routinely award far less than the statutory maximum amount of civil penalties, even
17 where an underlying violation of the Labor Code is found. In *Magadia v. Wal-Mart Assocs., et al.*,
18 while the trial court imposed substantial PAGA penalties upon the defendant, such amount still
19 represented reductions of 67% and 80% of the potential PAGA penalties at issue. 2019 U.S. Dist.
20 Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019). Moreover, this was only after the plaintiff in
21 *Magadia* had prevailed after trial. Thereafter, the Ninth Circuit reversed the trial court’s ruling,
22 which demonstrates the significant risk presented in moving forward with litigation. *Magadia v.*
23 *Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021).

24 Numerous courts have held that **gross** settlements approximating between only 8 and 25%
25 of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs.*
26 *Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement recovering 16% of
27 potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement amounting
28 to only a fraction of the potential recovery does not per se render the settlement inadequate or

unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the settlement is fair and adequate depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of the Defendants’ potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which obtained *only* 9.1% of projected damages, given the risks of continued litigation) *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was reasonable).

In the present case, the total amount of Labor Code penalties amounts to approximately \$8.55M without discounting for potentially losing some of the causes of action. Gavron Decl. ¶ 22. The total exposure for PAGA penalties ranges from 1.8M on the low end to \$4.5M on the higher end, if the Court were to “stack” penalties. Thus, the total amount of underlying Labor Code damages along with PAGA penalties would have amounted to between \$10.35M to \$13.5M. *Id.* As such, the gross settlement amount ranges between approximately 19% to 14.8% of the maximum penalty exposure. *Id.* This is well within the range of reasonableness and therefore, the Court should grant approval of this settlement. *Id.*

G. The Settlement Was Negotiated at Arm’s Length and Is Not Collusive

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. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087

(D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See 4 Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”).

Here, both Plaintiff’s and Defendants’ counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. Gavron Decl. ¶¶ 33-38; Lee Decl. ¶¶ 7-9. Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 24.

The settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risks of litigation, including the substantial risks relative to class certification, and the costs of pursuing such litigation. The settlement is the result of extensive arm’s length negotiations between the Parties and their counsel, which was achieved after a full day of mediation before a highly regarded mediator.

Although Plaintiff believes that a class can be certified, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the operative Complaint, the possibility of non-certification, and potential for appeals. Gavron Decl. ¶ 23. Despite the asserted fairness of the settlement terms, as set forth in the Notice of Proposed Class Action Settlement (“Class Notice”), 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. *See Ex. A* to the Stipulation. Moreover, as set forth in the Class Notice, Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the Stipulation.

H. Settlement Terms and Evaluation

1. Proposed Terms of the Settlement

This is a non-reversionary settlement wherein Class Members will be automatically paid out of the settlement if they do not opt-out of the settlement. The key terms of the settlement are as follows.

The Parties negotiated the amount to be paid to the Class for the Labor Code violations and PAGA penalties, including the attorneys' fees and costs, Class Representative Enhancement Payment, and Settlement Administration Costs. Gavron Decl. ¶ 25. The Stipulation provides for a Gross Settlement Amount of Two Million Dollars (\$2,000,000.00). Stipulation ¶ 14. The Stipulation provides that each Participating Class Member will receive a share of the Net Settlement Amount of approximately \$1,135,833.00. Gavron Decl. ¶ 25. Attorneys' fees of up to 33 1/3% of the Gross Settlement Amount, or \$666,667.00, will be paid to Class Counsel along with litigation costs of up to \$25,000.00. Stipulation ¶ 40. The Class Representative Enhancement Payment will be up to \$10,000.00. *Id.* ¶ 41. The Settlement Administrator will be paid up to \$12,500.00 for the costs of administering this settlement. *Id.* ¶¶ 33, 42. The LWDA will receive \$112,500.00 of the \$150,000.00 PAGA Payment. *Id.* ¶ 43. The PAGA Payment is allocated as \$150,000.00, of which 75% shall be paid to the LWDA and 25% shall be paid to PAGA Members on a *pro rata* basis, based on the number of Pay Periods they worked during the PAGA Period. *Id.* ¶ 43. After deduction of the foregoing, the remainder will be distributed to Class Members who do not opt-out of the Settlement Agreement by multiplying the Net Settlement Amount by a fraction, the numerator of which is the number of pay periods worked by a Participating Class Member during the Class Period, and the denominator of which is the number of pay periods worked by all Participating Class Members during the Class Period. Stipulation ¶ 45.a. Pay periods shall be calculated based on Defendants' records.

1 **2. Nature of Any Injunctive Relief**

2 The Settlement Agreement does not provide for any injunctive relief.

3 **3. Amount and Manner of Distribution of the Compensation to be**
4 **Provided to Class Members, Including the Estimated Amount Each**
5 **Class Member Will Receive**

6 The Stipulation provides for Two Million Dollars (\$2,000,000.00) as the Gross Settlement
7 Amount. Stipulation ¶ 14. The Net Settlement Amount (calculated after deduction of attorneys' fees
8 (up to \$666,667.00), costs (up to \$25,000.00), the Class Representative enhancement payment (up
9 to \$10,000.00, PAGA Payment (\$150,000.00), and settlement administration costs (up to
10 \$12,500.00)) is estimated to be approximately \$1,135,833.00. Stipulation ¶¶ 14, 40, 41, 42, 43, 44.
11 The amount allocated to each Participating Class Member will be based on the number of pay
12 periods worked by each Class Member during the Class Period. Stipulation ¶ 45.a.

13 Based thereon, on a raw average, each Class Member potentially may recover
14 approximately \$1.488.64 (\$1,135,833.00 / 763 class members). Gavron Decl. ¶ 26. The amount
15 actually paid to each Participating Class Member will increase or decrease depending on the
16 number of pay periods he or she worked during the Class Period and the number of putative class
17 members that choose not to participate in the settlement. Finally, uncashed checks (upon the
18 expiration date) shall be sent to the Controller of the State of California to be held pursuant to the
19 Unclaimed Property Law. Stipulation ¶ 58.

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

23 None of the settlement funds will revert to Defendants. Stipulation ¶¶ 14, 36.

24 **5. Scope of the Release of Class Members' Claims**

25 As a condition of participating in this class action settlement, Participating Class Members
26 shall waive and release Released Parties from the Released Claims. Stipulation ¶¶ 28, 29, 63.
27 "Released Claims," as defined in the Stipulation, includes "claims, rights, demands, liabilities and
28 causes of actions that are alleged or reasonably could have been alleged based on the facts and
claims asserted in the operative complaint in the Action including the following claims: (i) failure
to pay all regular wages, minimum wages and overtime wages due; (ii) failure to provide meal

1 periods or compensation in lieu thereof; (iii) failure to provide rest periods or compensation in lieu
2 thereof; (iv) failure to provide complete, accurate wage statements or disclosures; (v) failure to pay
3 wages timely at time of termination or resignation (Labor Code [Section] 203); (vi) unfair business
4 practices that could have been premised on the claims, causes of action or legal theories of relief
5 described above or any of the claims, causes of action or legal theories of relief pleaded in the
6 operative complaint; (vii) Failure to Reimburse for Business Expenses under Labor Code Section
7 2802; (viii) all claims under the California Labor Code Private Attorneys General Act of 2004
8 (Labor Code [Section] 2698, et. seq.) for civil penalties that could have been premised on the
9 claims, causes of action or legal theories described above or any of the claims, causes of action or
10 legal theories of relief based on the facts alleged in the operative complaint including but not
11 limited to Labor Code sections 201-203, 218.5, 226, 226.3, 226.7, 510, 512, 558, 1194, 1194.2,
12 1197.1, 2802, and 2699, B&P Code [Section] 17200, et. seq., Civil Code [Section] 1021.5, claims
13 regarding bonuses and commissions, as they relate to the factual allegations in the operative
14 complaint, and the relevant Wage Orders issued by the Industrial Welfare Commission, any and all
15 claims for attorneys' fees and costs, and/or California Code of Civil Procedure section 1021, which
16 are premised on the factual allegations of the operative complaint. This release shall apply to claims
17 arising during the Class Period" *Id.* ¶ 28.

18 In addition, regardless of their decision to participate in the settlement, PAGA Members will
19 release claims arising under PAGA during the PAGA Period. *Id.* ¶ 22, 63. PAGA Members are
20 defined as "all current and former hourly paid, non-exempt employees of Defendants employed in
21 the State of California at any time during the PAGA Period" (the period from September 7, 2019,
22 and ending on the date the Court signs an order granting preliminary approval of the Settlement, or
23 May 1, 2022, whichever is sooner). *Id.* ¶¶ 20, 21. The PAGA Release encompasses "all claims,
24 rights, demands, liabilities and causes of action for civil penalties that are alleged, or reasonably
25 could have been alleged based on the facts and claims asserted in the PAGA letter, dated March
26 3, 2021, under the PAGA, Cal. Lab. Code §§ 2698, et seq., which are premised on alleged
27 violations of the California Labor Code for: (i) failure to pay all regular wages, minimum wages
28 and overtime wages due; (ii) failure to provide meal periods or compensation in lieu thereof; (iii)

1 failure to provide rest periods or compensation in lieu thereof; (iv) failure to provide complete,
2 accurate wage statements or disclosures; (v) failure to pay wages timely at time of termination or
3 resignation (Labor Code [Section] 203); and (vi) for civil penalties that could have been alleged
4 based on the facts and claims asserted in the PAGA letter, dated March 3, 2021, including but not
5 limited to Labor Code sections 201-203, 226, 226.7, 510, 512, 558, 1194, 2802 and 2699, and
6 the relevant Wage Orders issued by the Industrial Welfare Commission, any and all claims for
7 attorneys' fees and costs, which are premised a violation of the PAGA based on the factual
8 allegations of the operative complaint." *Id.* ¶ 22.

9 As shown, the scope of the release is limited by the claims asserted in the operative
10 complaint. Further, the scope of the Release does not waive Civil Code § 1542 for Participating
11 Class Members.

12 **6. Tax Treatment of Settlement Amounts**

13 Each Individual Settlement Payment will be allocated as follows for tax purposes: thirty
14 percent (30%) wages, as to which IRS Forms W-2 will issue; twenty percent (20%) interest, as to
15 which IRS Form 1099 will issue; and fifty percent (50%) penalties, as to which IRS Forms 1099
16 will issue (if applicable) to the Participating Class Members. Stipulation ¶ 45.c.

17 The employer's share of payroll taxes will be paid by Defendants separate from the Gross
18 Settlement Amount. *Id.* ¶¶ 36, 60.

19 **7. Affirmative Obligations to be Undertaken by Class Members or Class** 20 **Counsel and the Reasons for Any Such Obligations**

21 As stated above, Class Members do not need to do anything should they wish to receive
22 their share of the settlement funds. In other words, because this is not a claims-made settlement,
23 Class Members will not be required to make a submission to participate in the settlement. Thus, this
24 substantially decreases the amount of burden each Class Member must bear in order to receive their
25 Individual Settlement Payment. If a Class Member does not wish to take part in this settlement and
26 be bound by the release, the Class Member must submit an exclusion request. Stipulation ¶¶ 30, 53.

27 **I. Automatic Payment and Submission of Exclusions/Objections**

28 Class Members will not be required to submit a claim form to receive compensation. The
Net Settlement Amount will be fully distributed to Class Members who choose not to opt out of the

1 Settlement and the PAGA Payment will be distributed to PAGA Members. Stipulation ¶¶ 45.
2 Further, this is a non-reversionary settlement. *Id.* ¶¶ 14, 36. Given that this is a non-reversionary
3 settlement, the Parties believe that 45 calendar days is sufficient time for Class Members to object
4 to or opt-out of the settlement. *Id.* ¶ 14. Lastly, Class Members will be notified of the final approval
5 hearing and will have an opportunity to appear at the final approval hearing. *Id.* ¶¶ 51, 56.

6 **J. Code of Civil Procedure § 384**

7 Code of Civil Procedure § 384 mandates that unpaid cash residue and unclaimed or
8 abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner
9 designed either to further the purposes of the underlying class action or causes of action, or to
10 promote justice for all Californians.

11 Individual Settlement Payment checks issued to Participating Class Members will be valid
12 for one hundred and eighty (180) calendar days after such checks are mailed by the Settlement
13 Administrator. Stipulation ¶ 58. Thereafter, the checks shall become void, and the uncashed funds
14 shall be sent to the Controller of the State of California to be held pursuant to the Unclaimed
15 Property Law in that person's name. *Id.*

16 **K. Notice to Class Members**

17 Should the Court grant the instant Motion, Defendants will provide the Settlement
18 Administrator with a list containing each Class Member's full name, last known home address, last
19 known telephone number (if available), Social Security Number, and the number of pay periods
20 worked during the Class Period (or information sufficient to calculate said number) ("Class List").
21 Stipulation ¶ 5. Defendants shall provide this information within fifteen (15) calendar days of
22 preliminary approval of this settlement. *Id.* ¶ 48. Upon receipt of the information and prior to
23 mailing the Class Notice, the Settlement Administrator shall perform a search based on the National
24 Change of Address Database for information to update and correct for any known or identifiable
25 address changes. *Id.* ¶ 50. Within ten (10) calendar days of receipt of the Class List, the Settlement
26 Administrator shall mail the Class Notice to all Class Members. *Id.* ¶ 49. Any Class Notices
27 returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall
28 be sent promptly via regular first-class U.S. mail to the forwarding address affixed thereto and the

1 Settlement Administrator shall indicate the date of such re-mailing on the Class Notice. *Id.* ¶ 50. If
2 no forwarding address is provided, the Settlement Administrator shall promptly attempt to
3 determine the correct address using a skip trace or other search and perform a re-mailing. *Id.*

4 The Class Notice will describe the terms of the settlement and advise Class Members of
5 their estimated Individual Settlement Payment and their opportunity to opt out of the Settlement,
6 object to the Settlement, and/or dispute the number of pay periods credited to them. *Id.* ¶ 51.

7 Based on the foregoing, the Class Notice procedures fully comply with California Rules of
8 Court Rule 3.766(d) and (e).

9 **L. Costs and Fees**

10 **1. Attorneys' Fees and Costs**

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

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

26 Here, the Parties have agreed to a payment of a maximum 33 1/3% of the Gross Settlement
27 Amount (\$666,667.00) for payment to Class Counsel as of attorneys' fees. Stipulation ¶ 40. The fee
28 award representing 33 1/3% of the Gross Settlement Amount fund clearly falls within that range and

1 is consistent with other comprehensive surveys of class action settlements and fee awards. *See*
2 Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical
3 Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost
4 fee awards were between 25 percent and 35 percent, with almost no awards more than 35
5 percent.”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study:*
6 *1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action
7 litigation nationwide conclude that fees representing one-third of the total recovery is consistent
8 with market rates).

9 Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs not to
10 exceed \$25,000.00. Stipulation ¶ 40. Class Counsel have, at their own risk, expended costs, for
11 example, to file this instant action, perform service of process, and pay mediation fees and other
12 litigation-related costs, and will be submitting detailed a cost sheet for the costs incurred at the time
13 of filing Plaintiff’s Motion for Final Approval. Based on the foregoing, the court should
14 preliminarily approve the attorneys’ fees and costs being requested by the Parties.

15 **2. Proposed Payment to the Class Representative**

16 Class Representative Cassandra Negrete requests a modest enhancement of \$10,000.00.
17 Stipulation ¶ 41. The Class Representative met and conferred with Class Counsel on a number of
18 occasions to discuss the case, provided documents and information to Class Counsel, and reviewed
19 the Settlement Agreement. As part of her duties as the Class Representative, Plaintiff provided
20 invaluable information, evidence, and documents that resulted in this settlement. Negrete Decl. ¶ 5.
21 In addition to the invaluable services that she provided, Plaintiff also took a significant risk, both
22 professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf
23 of the Class. Because the claims alleged by the Class Representative involved the payment of costs
24 to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendants, had she
25 not prevailed in this action.

26 Plaintiff also agreed to provide a general release as part of the settlement, which contains a
27 waiver of the protections of Civil Code § 1542—something class members will not have to do to
28 participate in the settlement.

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

Notably, courts have routinely granted approval of representative enhancements for far greater amounts than the \$10,000.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$ 35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff requests a modest enhancement of \$10,000.00, which is “presumptively reasonable” and consistent with case law. As part of the final approval motion, Plaintiff will submit a detailed declaration to further support her request for the enhancement.

3. Settlement Administration Fees

The Parties have agreed to an estimated payment of \$12,500.00 to the Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this settlement. Stipulation ¶ 33, 42. Phoenix Settlement Administrators is a well-recognized class action settlement administrator. The Parties believe that the administration fee is reasonable and should be approved.

IV. THE LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION

On May 17, 2022, Plaintiff provided notice of this motion to the LWDA. Gavron Decl. ¶ 43.

//

V. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTIONS, OPT OUT, AND MOTION FOR APPROVAL, ATTORNEYS' FEES, AND FINAL ACCOUNTING

Description	Date	Details
Preliminary Approval Date		
Class List to Settlement Administrator		15 calendar days
Distribution of Class Notice		10 days after receiving Class List
Request for Exclusion / Objection Deadline		45 days after mailing of Class Notice
Final Approval Hearing		Approximately 100-120 days after preliminary approval
Compliance Hearing / Final Distribution and Judgment	~12 months after final approval	

VI. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Class Notice, and set a date for a final approval hearing.

DATED: May 17, 2022

DIVERSITY LAW GROUP, P.C.

By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On May 17, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
12 **APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT**
- 14 **2. DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
- 17 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
18 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 19 **4. DECLARATION OF CASSANDRA NEGRETE IN SUPPORT OF PLAINTIFF'S**
20 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
21 **SETTLEMENT**
- 22 **5. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR**
23 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

24 on the interested parties in this action as follows:

25 Rachel J. Lee
26 Rachel.Lee@lewisbrisbois.com
27 Vi N. Applen
28 Vi.Applen@lewisbrisbois.com
Speros G. Mantas
Speros.Mantas@lewisbrisbois.com
Lewis Brisbois Bisgaard & Smith LLP
633 West 5th Street, Suite 4000
Los Angeles, California 90071

Attorneys for Defendant Winsupply Inc. and Orange County Windustrial Co.

X BY ELECTRONIC SERVICE VIA ONE LEGAL: I caused the above-entitled document(s) to be served through One Legal at the website www.onelegal.com, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the One Legal Filing Receipt/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 17, 2022, at Los Angeles, California.


Erika Mejía