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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

RICARDO RODRIGUEZ-ALVAREZ, as
an individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

NORTHWEST CONFECTIONS
CALIFORNIA, LLC, a California limited
liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 34-2021-00300622-CU-OE-GDS

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

Date: January 4, 2023
Time: 9:00 a.m.
Dept.: 54

Reservation No.: 2690543

Complaint Filed: May 12, 2021
FAC Filed: June 11, 2021
Trial Date: None

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 4, 2023, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Christopher E. Krueger, in Department 54 of the above referenced Court located at 813 6th Street, Sacramento, California 95814, Plaintiff Ricardo Rodriguez-Alvarez (“Plaintiff”) will seek an Order: (1) approving the Joint Stipulation of Class Action and PAGA Settlement (“Agreement” or “Settlement Agreement”) in this matter; (2) conditionally certifying the following Class for settlement purposes only: “all current and former non-exempt employees of Defendants who were employed in the State of California at any time during the Class Period”; (3) appointing Plaintiff Ricardo Rodriguez-Alvarez as the Class Representative, and Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. and Kelsey A. Webber and Shaelyn A. Stewart of Webber Law Group as Class Counsel; (4) preliminarily approving the Agreement and the total Gross Settlement Amount in the amount of Two Hundred Fifty-Seven Thousand Five Hundred Dollars (\$257,500.00); (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 Class Representative incentive payment, attorneys’ fees and costs, settlement administration fees, 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 Administrators 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 Northwest Confections California, LLC (“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 Stipulation and the proposed

1 Class Notice, and the supporting Declarations of Larry W. Lee, Max W. Gavron, Kelsey A.
2 Webber, and Plaintiff Ricardo Rodriguez-Alvarez, and upon the oral arguments of counsel
3 (should there be any) and on the complete records and file herein.
4

5 DATED: December 9, 2022

DIVERSITY LAW GROUP, P.C.

6
7 By: 
8 Larry W. Lee
9 Max W. Gavron
10 Attorneys for Plaintiff and the Class
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	9
II. PROCEDURAL HISTORY	10
III. DISCUSSION	12
A. Proposed Class Definition	14
B. Settlement Terms and Evaluation	14
1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive	19
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendant	20
3. Scope of the Release of Class Members' Claims	20
4. Tax Treatment of Settlement Amounts.....	22
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations	22
C. Notice to Class Members.....	22
D. Typicality and Adequacy of Representation	23
1. Class Representative's Claims are Typical of the Class.....	23
2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Action.....	24
E. Costs and Fees	24
1. Attorneys' Fees and Costs	24
2. Proposed Payment to the Class Representative	26

1	3. Settlement Administration Fees.....	27
2	IV. NOTICE TO THE LWDA	27
3	V. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR	
4	PRELIMINARY APPROVAL	27
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157, 1209 (2008)	17
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	17
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	25
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	23
<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).....	18
<i>Laffitte v. Robert Half Int'l</i> (2016) 1 Cal.5th 480, 503	25, 26
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	23
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	25
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	23
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	23
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001).....	13, 25

Federal Cases

<i>Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.</i> 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009)	17
<i>Apodaca v. Costco Wholesale Corp.</i> , 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014)	16
<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....	18
<i>Bernstein v. Virgin Am., Inc.</i> , 3 F.4th 1127, 1144 (9th Cir. 2021).....	17
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	25
<i>Dalton v. Lee Publ'ns, Inc.</i> , 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011).....	17
<i>Greko v. Diesel U.S.A., Inc.</i> , No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013)	18
<i>Hammon v. Barry</i> , 752 F.Supp. 1087 (D.D.C. 1990)	14
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	23

1	<i>Harris v. Vector Mktg. Corp.</i> , 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009)	16
2	<i>Hill v. Walmart Inc.</i> , 32 F.4th 811, 823 (9th Cir. 2022)	16
3	<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	14
4	<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	13
5	<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	14
6	<i>Lesevic v. Spectraforce Techs., Inc.</i> , 2021 WL 1599310, at *3 (N.D. Cal. Apr. 23, 2021).....	18
7	<i>Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir.	
8	1987)	14
9	<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004).....	14
10	<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	14
11	<i>Ricaldai v. U.S. Investigations Servs., LLC</i> , 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012)	17
12	<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n</i> , 79 F.R.D. 571 (E.D. Pa. 1978)	14
13	<i>Steinberg v. Carey</i> , 470 F.Supp. 471 (S.D.N.Y. 1979).....	14
14	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) 18	
15	<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6	
16	(N.D. Cal. Nov. 21, 2012).....	18
17	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	25
18	<i>Wright v. Adventures Rolling Cross Country, Inc.</i> , 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24,	
19	2013)	16
20	Statutes	
21	Business and Professions Code § 17200, <i>et seq.</i>	10
22	California Civil Procedure § 384	20
23	Labor Code § 1194.....	10
24	Labor Code § 1197.....	10
25	Labor Code § 1197.1.....	10
26	Labor Code § 226.....	16
27	Labor Code § 226(a)	10
28	Labor Code § 227.3.....	10

1	Labor Code § 2698, <i>et seq.</i>	passim
2	Labor Code § 2699(e)(2)	17
3	Labor Code § 510.....	10
4	Labor Code § 558.....	10
5	Labor Code §§ 201-204	10
6	Labor Code § 226(e)	16
7	Other Authorities	
8	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)....	12, 13
9	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	13
10	<i>Newberg on Class Actions</i> , <i>supra</i> , at § 11.47	14
11	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
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Ricardo Rodriguez-Alvarez (“Plaintiff”) alleges that Defendant Northwest Confections
5 California, LLC (“Defendant”) (together with Plaintiff, the “Parties”) failed to pay all regular,
6 minimum, and overtime wages for all hours worked, failed to timely pay wages upon separation
7 of employment, and failed to provide accurate itemized wage statements. Plaintiff brings class
8 and PAGA claims based on these violations. The Parties have reached a proposed class and
9 PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
10 Class Action and PAGA Settlement (“Agreement” or “Settlement Agreement”).

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

- 21 • Gross Settlement Amount of \$257,500.00, which will be paid by Defendant and
22 distributed to the Class on a **non-reversionary** basis (*See* Agreement ¶ 36);
23 • Estimated Class of 455 individuals at the time of mediation (*Id.* ¶ 6);
24 • Class Members do not need to submit claim forms to participate in the settlement (*Id.*
25 ¶ 53 (explaining if a class member fails to opt out they will be bound by the
26 settlement and receive payment);
27 • Class Representative Enhancement Payment of up to \$10,000.00 (*Id.* ¶ 41);
28 • Class Counsel’s attorneys’ fees of up to \$85,833.33 (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 \$8,950.00 (*Id.* ¶ 42);
 - Payment to the LWDA of \$3,750.00, representing 75% of the total PAGA Payment of \$5,000.00 (*Id.* ¶ 43);
 - Net Settlement Amount of approximately \$122,716.67 (*Id.* ¶ 44); and
 - Raw average of \$269.71 ($\$122,716.67 \div 455$ Class Members) to each Participating Class Member.

The Parties believe that the settlement for the consideration and on the terms set forth in the Settlement Agreement is fair, adequate, and reasonable, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and his 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 April 16, 2021, Plaintiff submitted written notice to the California Labor and Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-204, 226(a), 227.3, 510, 558, 1194, 1197, and 1197.1, pursuant to the Private Attorneys General Act (“PAGA”), Labor Code § 2699 (“PAGA letter”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2.

On May 12, 2021, Plaintiff filed a class action complaint in the Superior Court of the State of California for the County of Sacramento on behalf of himself and all similarly situated employees. Gavron Decl. ¶ 3. Plaintiff asserted claims for: (1) failure to pay wages; (2) violation of Labor Code § 227.3; (3) violation of Labor Code § 226(a); and (5) violation of Business and Professions Code § 17200, *et seq.* On June 11, 2021, Plaintiff filed a First Amended Complaint adding a cause of action for violation of Labor Code § 2698, *et seq.* *Id.* ¶ 4. The First Amended

1 Complaint is the operative complaint.

2 Plaintiff's class and PAGA claims as pled in the First Amended Complaint are predicated
3 upon the following allegations. With respect to Plaintiff's failure to pay wages claim, Plaintiff
4 contends that Defendant subjected its employees to daily COVID-19 screening procedures prior
5 to entering the work premises. These screening procedures were conducted prior to the start of
6 the shift, and as such, employees were not paid minimum, regular, and/or overtime wages for the
7 time spent undergoing the procedures. With respect to Plaintiff's vacation wages claim, Plaintiff
8 contends that Defendant failed to pay all earned and unused vacation wages upon separation of
9 employment. With respect to Plaintiff's wage statement claims, Plaintiff contends that Defendant
10 issued deficient wage statements, as said wage statements do not correctly identify the number of
11 hours worked, total hours worked, and gross and net wages earned as a result of the
12 underpayment and/or nonpayment of wages. As a result of the alleged violations above, Plaintiff
13 seeks damages and penalties under the California Labor Code, the California Business &
14 Professions Code, and the PAGA, as well as attorneys' fees and costs. *Id.* ¶ 5.

15 After the Parties conferred regarding possible settlement discussions, they agreed to
16 exchange information informally to evaluate their respective claims and defenses. Gavron Decl.
17 ¶ 6. The Parties subsequently engaged in informal discovery for Plaintiff to assess the claims, as
18 well as the maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiff's
19 counsel with informal data and information pertaining to the putative class size and number of
20 pay periods, a sampling of time and pay records, Plaintiff's time records, and Defendants' wage
21 and hour policies and practices. *Id.* ¶ 6. Defendant's production of time records allowed Plaintiff
22 to conduct a damages analysis and extrapolate from the sample. *Id.*

23 On July 19, 2022, the Parties engaged in a full-day mediation with mediator Kelly A.
24 Knight, Esq., and continued settlement discussions thereafter facilitated by Mr. Knight. Gavron
25 Decl. ¶ 7. After thorough investigation and evaluation of the facts and claims, and as a result of
26 the arm's length negotiations facilitated by Mr. Knight, the Parties reached the current
27 settlement. *Id.*

28 //

1 **III. DISCUSSION**

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

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

17 (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
23 offer, or is presumptively valid subject only to any objections that may be raised at a final
24 hearing.” Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.
25 2002).

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

28 When the parties to an action reach a monetary settlement, they will
usually prepare 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, manner of
determining the effective date of settlement and any recapture
clause.

1
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 Agreement fully setting forth the agreement reached
5 among the Parties. The Agreement 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
9 provisionally approve certification of the class—conditional upon final approval of the
10 settlement. “[P]re-certification settlements are routinely approved if found to be fair and
11 reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk*
12 *v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached
13 before any “adversary certification,” the court was satisfied that it was “fair, adequate and
14 reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts
15 have employed this practice in the name of judicial efficiency in order to facilitate apparently
16 beneficial settlement proposals”). As further explained by Professor Newberg:

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

25 *4 Newberg on Class Actions* § 11.26.

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

//

1 **A. Proposed Class Definition**

2 The current settlement is being settled on behalf of “all current and former non-exempt
3 employees of Defendants¹ who were employed in the State of California at any time during the
4 Class Period.” *See* Agreement ¶ 6. The Class Period is defined as “the period commencing on
5 May 12, 2017, and ending on the date the Court signs an order granting preliminary approval
6 of the Settlement, or September 19, 2022, whichever is sooner.” *Id.* ¶ 8. There were
7 approximately 455 individuals that comprised the Class through June 18, 2022. *Id.* ¶ 37.

8 **B. Settlement Terms and Evaluation**

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

19 While the recommendations of counsel proposing the settlement are not conclusive, the
20 Court can properly take them into account, particularly where, as here, they have been involved
21 in informal discovery and negotiations for some period of time, appear to be competent, have
22 experience with this type of litigation, and have exchanged substantial evidence from the
23 opposing party. *See Newberg on Class Actions, supra* § 11.47; *Nat’l Rural Telecomms. Coop.*,
24 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is
25 preserved, however, a strong initial presumption of fairness attaches to the proposed
26

27 _____
28 ¹ The term “Defendants” is defined in the Joint Stipulation of Class Action and PAGA
Settlement, page 4, paragraph 12.

1 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who
2 are most closely acquainted with the facts of the underlying litigation”).

3 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
4 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
5 number of wage and hour class actions and have extensive litigation experience. Gavron Decl. ¶¶
6 28-34; Declaration Larry W. Lee (“Lee Decl.”) ¶¶ 6-8; Declaration of Kelsey A. Webber
7 (“Webber Decl.”) ¶¶ 3-8. Each side has apprised the other of their respective factual
8 contentions, legal theories, and def

9 enses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 9. Most
10 prominently, Defendant argued that the putative class members signed arbitration agreements
11 that would have precluded the class claims altogether and that it paid employees for the time
12 spent undergoing COVID screenings. *Id.* ¶ 10.

13 Based on the class data provided by Defendant and Defendant’s contention that it paid
14 employees for time spent undergoing COVID inspections, Plaintiff significantly discounted the
15 exposure on this claim. Gavron Decl. ¶ 10. Plaintiff estimated that if he was successful in
16 demonstrating liability for every shift an employee worked, the maximum liability could be as
17 high as approximately \$32,000 if employees were underpaid 2 minutes per shift and underwent
18 an inspection every shift. Defendant argued, and records supported, that Defendant paid
19 employees additional time spent undergoing COVID screenings and thus Plaintiff considered
20 this potentially dispositive defense in evaluating this claim. Gavron Decl. ¶ 10.

21 With respect to Plaintiff’s claim for failure to pay vested vacation wages, Plaintiff
22 estimated that Defendant could be liable for up to approximately \$347,904. *Id.* ¶ 11. At the time
23 of separation of employment, Plaintiff had accrued 64.00 hours of unused vacation time. *Id.* ¶ 11.
24 Assuming an hourly pay rate of \$18.00, Plaintiff was owed approximately \$1,152.00. Based on
25 the amount owed to him, Plaintiff estimated that the potential exposure on this claim was
26 approximately \$347,907, which he calculated based on 302 former employees, whose average
27 rate of pay was \$18.00 (302 employees x 64.00 hours x \$18.00 per hour). *Id.*

28 On the other hand, Defendant argued that Plaintiff’s theory of liability only impacted

1 employees, like Plaintiff, who separated within their first 90 days of employment. Defendant
2 contended that there were at maximum 151 such employees, and most of them worked 35 days
3 or less which would significantly reduce the amount of banked vacation pay that would be owed
4 upon separation of employment. *Id.* ¶ 12. These arguments, if successful, would have
5 diminished the value of this claim.

6 With respect to Plaintiff’s claim for waiting time penalties, Plaintiff estimated the
7 potential exposure on this claim was approximately \$1.3 million, which he calculated based on
8 302 former employees, whose average rate of pay was \$18.00 (302 employees x 8 hours x 30
9 days x \$18.00 per hour). *Id.* ¶ 13. To succeed on this claim, Plaintiff would have to defeat
10 Defendant’s argument that its alleged failure to pay any wages was subject to a “good faith”
11 defense. *See Hill v. Walmart Inc.*, 32 F.4th 811, 823 (9th Cir. 2022) (holding that defendant
12 presented good faith dispute precluding imposition of Section 203 penalties even where trial
13 court denied employer’s motion for summary judgment on same issue). Defendant argued that it
14 did not willfully fail to pay wages upon separation thus precluding penalties. Gavron Decl. ¶ 13.

15 With respect to Plaintiff’s claim for violation of Labor Code § 226, Plaintiff estimated the
16 penalties associated with this claim as approximately \$661,900, which was based on 6,619
17 alleged pay periods. *Id.* ¶ 14. This amount would likely end up lower than estimated because this
18 valuation assumed \$100 penalty a pay period, whereas Section 226(e) provides for a \$50 initial
19 penalty followed by \$100 for subsequent violations. Lab. Code § 226(e). Further, Defendant
20 would have argued that the violation was not “knowing and intentional” and thus would not
21 warrant Section 226(e) penalties. *See Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-
22 46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct
23 was not “knowing and intentional”). Defendant would have argued that it was entitled to a
24 “good faith” defense on this claim, too. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL
25 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is
26 not in violation of Section 226, any violation is not knowing and intentional.”); *Wright v.*
27 *Adventures Rolling Cross Country, Inc.*, 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013)
28 (same); *Ricaldai v. U.S. Investigations Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal.

2012) (same); *Dalton v. Lee Publ'ns, Inc.*, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same).

With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that Defendant could face civil penalties of up to \$661,900 if Plaintiff were successful at trial. Gavron Decl. ¶ 15. While the PAGA does provide for a heightened "subsequent" penalty, courts are hesitant to award that amount where there has not been a prior violation of the Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008); accord *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); see also *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling). Defendant argued no such prior violation occurred here warranting only the initial penalty, if anything at all. Gavron Decl. ¶ 15.

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

Although Plaintiff believes in the merits of the alleged claims and maintains that there is no reason for reducing PAGA penalties, Plaintiff is aware that Defendant would raise defenses to the claims and further with respect to the reduction of PAGA penalties and that those defenses could persuade the Court. Gavron Decl. ¶ 17. Thus, even if Plaintiff were to successfully prove his claims at trial, there is a possibility that the Court may only award a small percentage of

1 PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was
2 premised with this risk in mind, associated with the possibility of the Court significantly
3 reducing PAGA penalties.

4 The settlement is the result of extensive arm's length negotiations between the Parties
5 and their counsel and was facilitated by an experienced and neutral mediator. Although Plaintiff
6 believes that the class can be certified, Plaintiff also believes in the fairness of the settlement that
7 is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or
8 more of the causes of action or theories alleged in the operative Complaint, the possibility of
9 non-certification, and the potential for appeals. Gavron Decl. ¶ 18. These risks on class
10 certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank*
11 *Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and
12 subsequently prevailed at trial after eight years of litigation, but the judgment and the
13 certification ruling were reversed by the California Supreme Court after an additional five years
14 of litigation. The case was remanded to superior court where class certification was denied and
15 plaintiffs' subsequent appeal also was denied.

16 Indeed, numerous courts have held that gross settlements approximating between only 8
17 and 25% of the defendant's potential exposure are fair and reasonable. *See Lesevic v.*
18 *Spectraforce Techs., Inc.*, 2021 WL 1599310, at *3 (N.D. Cal. Apr. 23, 2021) (noting wage and
19 hour class fund of \$600,000 that compensated for 7% of maximum potential recovery was
20 reasonable); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at
21 p.*6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5%
22 and 25% of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*,
23 U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage
24 and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of
25 continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012
26 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
27 approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A.,*
28 *Inc.*, No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was

reasonable).

Here, the total amount of class and PAGA penalties amount to approximately \$3 million, without discounting for potentially losing on any of the causes of action. Gavron Decl. ¶ 19. The Gross Settlement Amount is \$257,500.00, which is approximately 9% of the maximum class and PAGA penalties. *Id.* If the Court were to reduce the PAGA penalties, like in *Carrington*, the Gross Settlement Amount is closer to 11% of the maximum exposure. Gavron Decl. ¶ 19. Thus, the settlement was negotiated at arm's length and the significantly high settlement percentage-to-recovery further supports that the settlement is fair and reasonable.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of 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, with the exception of the PAGA claims. *See* Class Notice, attached as **Exhibit A** to the Settlement Agreement. Moreover, as set forth in the Class Notice, Class Members are advised of their right to object to any of the terms contained in the Settlement Agreement and attend the final approval hearing. *Id.*

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 Two Hundred Fifty-Seven Thousand Five Hundred Dollars (\$257,500.00) as the Gross Settlement Amount. Agreement ¶ 15. The Net Settlement Amount (calculated after deduction of attorneys' fees (up to \$85,833.33), costs (up to \$25,000.00²), the Class Representative incentive payment (up to \$10,000.00), PAGA Payment (\$5,000.00), and settlement administration costs (up to \$8,950.00)) is estimated to be approximately \$122,716.67. Agreement ¶¶ 15, 40-44.

Pursuant to the Settlement Agreement, the Net Settlement Amount will be apportioned among the Class Members on a pro rata basis, based on the number of pay periods worked by

² Class Counsel anticipates the actual costs incurred will be less than the amount allotted for in the Agreement in which case the balance will revert to the Net Settlement Amount for distribution according to the terms of the agreement. Gavron Decl. ¶ 7.; Agreement ¶ 40.

each respective Class Member during the Class Period, as compared to the total number of pay periods worked by all Class Members during the Class Period. *See* Agreement ¶ 45.a. Based thereon, on a raw average, each Class Member potentially may recover approximately \$269.71 (\$122,716.67 ÷ 455 Class Members). Gavron Decl. ¶ 20. The amount actually paid to each Participating Class Member will increase or decrease depending on the number of pay periods he or she worked during the Class Period and the number of putative class members who choose not to participate in the settlement.

Additionally, as part of the PAGA Payment, 25% of the PAGA Payment, or \$1,250.00, shall be paid to PAGA Members who worked during the PAGA Period (the period commencing on April 16, 2020, and ending on the date the Court signs an order granting preliminary approval of the Settlement, or September 19, 2022, whichever is sooner), on a pro rata basis, based on the number of pay periods worked by each PAGA Member during the PAGA Period as compared to the total number of pay periods worked by all PAGA Members during the PAGA Period. Agreement ¶ 45.b.

Finally, uncashed checks (upon the expiration date) shall be sent to the *cy pres* recipient Legal Aid at Work, in accordance with California Civil Procedure § 384. *See* Agreement ¶ 58; *see* Gavron Decl. ¶ 23. Class Counsel does not have any conflicts of interest with the designated *cy pres* recipient. Gavron Decl. ¶ 23.

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

None of the settlement funds will revert to Defendant. Agreement ¶¶ 15, 36.

3. Scope of the Release of Class Members' Claims

As a condition of participating in this class action settlement, Class Members who do not opt out of the settlement ("Participating Class Members") will provide a limited release of the following claims against the Released Parties ("Released Claims"):

all claims, rights, demands, liabilities and causes of action that are alleged, or reasonably could have been alleged based on the facts and claims asserted in the operative complaint in this action including the following claims: (i) failure to pay overtime and/or minimum wages; (ii) failure to provide complete, accurate wage

statements or disclosures; (iii) failure to pay all vacation wages at separation of employment; (iv) failure to timely pay wages upon separation of employment; (v) unfair business practices that could have been premised on the claims, causes of action or legal theories of relief described above or any of the claims, causes of action or legal theories of relief pleaded in the operative complaint; (vi) all claims under the California Labor Code Private Attorneys General Act of 2004 (Labor Code §§ 2698, *et seq.*) or for civil penalties that could have been premised on the claims, causes of action or legal theories described above or any of the claims, causes of action or legal theories of relief pleaded in the operative complaint including Labor Code §§ 201, 202, 203, 204, 226, 227.3, 510, 558, 1194, 1197, 1197.1, and 2699, and the relevant Wage Orders issued by the Industrial Welfare Commission; and (vii) all claims for attorneys' fees and costs as provided for the preceding causes of action, including those provided by Labor Code §§ 218.5, 226, 1194, and 2699, Business & Professions Code §§ 17200, *et seq.*, and Code of Civil Procedure § 1021.5.

See Agreement ¶¶ 29, 63.

In addition, regardless of their decision to participate in the settlement, PAGA Members who worked during the PAGA Period will also provide the following release of PAGA claims ("PAGA Release"):

all claims, rights, demands, liabilities and causes of action that are alleged, or reasonably could have been alleged based on the facts and claims asserted in the PAGA letter, dated April 15, 2021, under the PAGA, Cal. Lab. Code §§ 2698, *et seq.*, which are premised on alleged violations of the California Labor Code for: (i) failure to pay overtime and/or minimum wages; (ii) failure to provide complete, accurate wage statements or disclosures; (iii) failure to pay all vacation wages at separation of employment; (iv) failure to timely pay wages upon separation of employment, including but not limited to Labor Code §§ 201, 202, 203, 204, 226, 227.3, 510, 558, 1194, 1197, 1197.1, and 2699, and the relevant Wage Orders issued by the Industrial Welfare Commission; and (v) all claims for attorneys' fees and costs as provided by the PAGA.

See Agreement ¶¶ 23, 63.

Given that the releases above are tailored to only claims pled or could arise out of the facts alleged in the operative Complaint and PAGA letter and that accrued during the Class and/or PAGA Period, the releases are appropriately limited.

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

3 The Parties have agreed that the Individual Settlement Payment to Participating Class
4 Members shall be allocated as follows: twenty percent (20%) wages, for which an IRS Form W-
5 2 will issue; twenty percent (20%) interest, for which an IRS Form 1099 will issue; and sixty
6 percent (60%) penalties, for which an IRS Form 1099 will issue (if applicable) to the
7 Participating Class Members. Agreement ¶ 45.c.

8 The employer's share of payroll taxes will be paid by Defendant from the Gross
9 Settlement Amount. *Id.* ¶¶ 36, 60.

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

12 As stated above, Class Members do not need to do anything should they wish to receive
13 their share of the settlement funds. In other words, because this is not a claims-made settlement,
14 Class Members will not be required to make a submission to participate in the settlement. Thus,
15 this substantially decreases the amount of burden each Class Member must bear in order to
16 receive their Individual Settlement Payment. If a Class Member does not wish to take part in this
17 settlement and be bound by the release, the Class Member must submit an exclusion request.
18 Agreement ¶¶ 31, 53.

19 **C. Notice to Class Members**

20 Should the Court grant the instant Motion, Defendant will provide the Settlement
21 Administrator with a list containing each Class Member's full name, last known home address,
22 last known telephone number, Social Security Number, start and end dates of active
23 employment, number of pay periods worked during the Class Period (or information sufficient to
24 calculate said number), and any other information needed by the Settlement Administrator to
25 administer the settlement ("Class List"). Agreement ¶ 5. Defendant shall provide this information
26 within fifteen (15) calendar days of preliminary approval of this settlement. *Id.* ¶ 48. Upon
27 receipt of the information and prior to mailing the Class Notice, the Settlement Administrator
28 shall perform a search based on the National Change of Address Database for information to

1 update and correct for any known or identifiable address changes. *Id.* ¶ 50. Within ten (10)
2 calendar days of receipt of the Class List, the Settlement Administrator shall mail the Class
3 Notice to all Class Members. *Id.* ¶ 49. Any Class Notices returned to the Settlement
4 Administrator as non-deliverable on or before the opt-out deadline shall be sent promptly via
5 regular first-class U.S. mail to the forwarding address affixed thereto and the Settlement
6 Administrator shall indicate the date of such re-mailing on the Class Notice. *Id.* ¶ 50. If no
7 forwarding address is provided, the Settlement Administrator shall promptly attempt to
8 determine the correct address using a skip trace or other search and perform a re-mailing. *Id.*

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

12 If Class Members need further information about the settlement and/or the lawsuit, Class
13 Counsel's contact information and the Settlement Administrator's contact information are
14 provided in the Class Notice. *See* Class Notice.

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 failing to pay minimum, regular, and overtime wages for all hours
2 worked, failing to timely pay wages upon separation of employment, including vacation wages,
3 failing to provide accurate itemized wage statements, and engaging in unfair business practices.
4 Declaration of Ricardo Rodriguez-Alvarez (“Rodriguez-Alvarez Decl.”) ¶¶ 3-5. As a result,
5 Plaintiff alleges that he is owed unpaid wages and penalties for the above violations. Rodriguez-
6 Alvarez Decl. ¶¶ 3-5.

7 In other words, Plaintiff contends that he was subjected to the same policy and practice as
8 other Class Members and that his claims are typical to those of the Class.

9 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
10 issues been raised or presented. Rodriguez-Alvarez Decl. ¶ 6. Plaintiff has taken all necessary
11 steps to represent the interests of the Class, and by providing information and documents to
12 Plaintiff’s counsel. *Id.* ¶ 7. For such reasons, Plaintiff has adequately represented the Class
13 Members and will continue to do so.

14 **2. Class Counsel Has Adequately Represented the Class and Has Experience**
15 **with Wage and Hour Class Action**

16 From the inception of the case, Class Counsel have zealously represented the interests of
17 the Class. Class Counsel have engaged in significant meet and confer discussions with opposing
18 counsel to obtain informal data and documents and to discuss the merits of the claims on behalf
19 of the Class. Gavron Decl. ¶ 25. The settlement was obtained for the benefit of the Class, as
20 opposed to the individual Class Representative. Further, Class Counsel have been approved as
21 class counsel on a number of prior cases, have litigated numerous other class action cases, and
22 are competent to represent the Class. Gavron Decl. ¶¶ 28-34; Lee Decl. ¶¶ 6-8; Webber Decl. ¶¶
23 3-8.

24 **E. Costs and Fees**

25 **1. Attorneys’ Fees and Costs**

26 California state and federal courts have recognized that an appropriate method for
27 determining award of attorneys’ fees is based on a percentage of the total value of benefits to
28 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254

(2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent*, 557 F.2d at 769.

The common fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits, she 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 p. 35; *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” The reasons for applying the common fund doctrine include:

Fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

Id.

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

1 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
2 percent of the fund. *Laffitte*, 1 Cal. 5th at p. 506. And this was based on a lodestar amount that
3 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
4 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
5 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at p.
6 505.

7 Here, the Parties have agreed to a payment of a maximum 33 1/3% of the Gross
8 Settlement Amount (\$85,833.33) for payment to Class Counsel as of attorneys’ fees.
9 Agreement ¶ 40. The Parties have agreed to a payment of the foregoing attorneys’ fees and,
10 thus, this payment should be presumed to be fair. Further, the Parties have agreed to
11 reimbursement of Class Counsel’s litigation costs up to \$25,000.00. *Id.* Class Counsel have, at
12 their own risk, expended costs, for example, to file this instant action and other pleadings in the
13 case, effect service of process, participate in mediation, and pay other litigation-related costs. If
14 Class Counsel’s actual costs are less than \$25,000.00, the remainder will go to the Class for
15 distribution. Agreement ¶ 40.

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

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

19 Class Representative Ricardo Rodriguez-Alvarez requests a modest enhancement of
20 \$10,000.00. Agreement ¶ 41. The Class Representative met and conferred with Class Counsel on
21 a number of occasions to discuss the case, provided documents and information to Class
22 Counsel, and reviewed the Settlement Agreement. As part of his duties as the Class
23 Representative, Plaintiff provided invaluable information, evidence, and documents that resulted
24 in this settlement. Rodriguez-Alvarez Decl. ¶ 8.

25 In addition to the invaluable services that he provided, Plaintiff also took a significant
26 risk, both professionally and monetarily, in acting as the Class Representative and seeking
27 benefits on behalf of the Class. Because the claims alleged by the Class Representative involved
28 the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs

of Defendants, had he not prevailed in this action.

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

Plaintiff also agreed to provide a general release of claims and waiver of the protections of Civil Code § 1542, which is something that was not required of the Class Members. Agreement ¶ 41.

3. Settlement Administration Fees

The Parties have agreed to an estimated payment of \$8,950.00 to the Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this settlement. Stipulation ¶ 34, 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. NOTICE TO THE LWDA

Concurrently with the filing of this motion, Plaintiff submitted the Settlement Agreement and supporting documents to the LWDA. Gavron Decl. ¶ 37; Ex. B

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

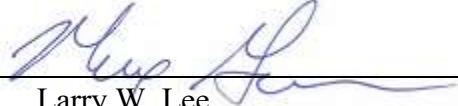
Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective parties who are 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

1 the proposed Class Notice, and set a date for a final approval hearing.

2
3 DATED: December 9, 2022

DIVERSITY LAW GROUP, P.C.

4
5 By: 

Larry W. Lee

6 Max W. Gavron

7 Attorneys for Plaintiff and the Class
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