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on behalf of themselves and all similarly situated employees

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12
13 **SUPERIOR COURT OF CALIFORNIA**
14 **COUNTY OF MONTEREY**

15 MARIA MARAVILLA and JUAN TORRES
16 REYES on behalf of themselves and all similarly
situated employees,

17 v.

18 GREENGATE FRESH, LLLP; and DOES 1
19 through 50, inclusive,

20 Defendants.
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Case No. 21CV001258

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

Date: January 12, 2024

Time: 8:30 a.m.

Dept: 14

Complaint Filed: April 15, 2021

FAC Filed: May 20, 2022

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on January 12, 2024 at 8:30 a.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Carrie M. Panetta, judge presiding, in Department 14 of the
4 above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiffs Maria
5 Maravilla and Juan Torres Reyes (together, “Plaintiffs”) will and hereby do move this Court for the
6 following relief with respect to the Joint Stipulation and Stipulation of Settlement of Class Action and
7 PAGA Claims (“Stipulation of Settlement,” “Settlement,” or “Agreement”) entered into by Plaintiffs
8 and Defendant Greengate Fresh, LLLP (“Defendant”) (collectively with Plaintiffs, the “Parties”):

9 1. That the Court approve the Stipulation of Settlement referenced above;

10 2. That the Court certify the following class for settlement purposes: all current and former
11 non-exempt employees of Defendant Greengate Fresh LLLP who were employed in the State of
12 California at any time during the Class Period (the “Class” or “Class Members”);

13 3. That Plaintiffs Maria Maravilla and Juan Torres Reyes be appointed as Class
14 Representatives and B. James Fitzpatrick and Laura L. Franklin of Fitzpatrick & Swanston, and Larry
15 W. Lee and Max W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;

16 4. That the Court preliminarily approve the Stipulation of Settlement and the Gross
17 Settlement Amount in the amount of Six Hundred Ninety Thousand Dollars and Zero Cents
18 (\$690,000.00);

19 5. That the Court finds on a preliminary basis that the Stipulation of Settlement appears to
20 be within the range of reasonableness of a settlement, including the amount of the PAGA penalties,
21 attorneys’ fees and costs, settlement administration costs, and the allocation of payments to Class
22 Members, that could ultimately be given final approval by this Court;

23 6. That the Court approve the mailing of the proposed Notice of Pendency of Class Action,
24 also referred to as the “Notice of Proposed Settlement” or “Notice,” to be sent to Class Members;

25 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
26 Administrator; and

27 8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

28 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for

1 court approval of the settlement of a purported class action and allows the Court to preliminarily certify
2 a class for settlement purposes.

3 The basis for this Motion, filed without any opposition from Defendant, is that the proposed
4 settlement is fair, adequate, and reasonable, and the procedures proposed by the Parties are adequate to
5 ensure the opportunity of Class Members to participate in, opt-out of, or object to the settlement.

6 This Motion will be based on the attached Memorandum of Points and Authorities, the
7 Stipulation of Settlement and the proposed Notice, and the supporting Declarations of B. James
8 Fitzpatrick, Laura L. Franklin, Larry W. Lee, Max W. Gavron, Maria Maravilla, and Juan Torres Reyes,
9 upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

10
11 DATED: November 9, 2023

DIVERSITY LAW GROUP, P.C.

12
13 By: 

Larry W. Lee

14 Max W. Gavron

15 Attorneys for Plaintiffs Maria Maravilla and Juan Torres
16 Reyes
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative PAGA action arising from various alleged
3 Labor Code violations by Defendant Greengate Fresh, LLLP (“Defendant”). Plaintiffs Maria Maravilla
4 and Juan Torres Reyes (together, “Plaintiffs”) assert violations of Labor Code §§ 201, 202, 203, 204,
5 226, 226.7, 246, 1174, 1175, 1194, 1197, 1198, 1199, 2802, and 2698, *et seq.*, the Private Attorneys
6 General Act of 2004 (the “PAGA”), Business and Professions Code § 17200, *et seq.* (the “UCL”), and
7 common law. Defendant denies each, every, and all of the allegations of the operative Complaint and
8 contends that its wage and hour practices comply with the Labor Code.

9 Prior to the settlement of this action, Plaintiffs and Defendant (jointly referred to as the “Parties”)
10 thoroughly investigated and litigated the facts relating to the claims alleged in the operative Complaint
11 against Defendant. The Parties participated in a full-day mediation with neutral Tripper Ortman, Esq. on
12 May 9, 2022, but the case did not resolve. Thereafter, the Court compelled Plaintiffs’ individual claims
13 to arbitration and dismissed the putative class claims. Following this ruling, Plaintiffs filed arbitrations
14 along with several other former employees of Defendant. After further litigation and negotiation, the
15 Parties were ultimately able to reach the current settlement through continued negotiations Mr. Ortman
16 facilitated, which requires Defendant to pay a maximum total payment of \$690,000.00 to settle the class
17 and PAGA claims of the putative class members. The Parties believe that this amount is fair, adequate,
18 and reasonable, especially given the risks and uncertainty of class certification and the merits of this
19 case.

20 While Plaintiffs and their counsel believe they could prevail on the merits of the claims at trial,
21 they recognize the inherent risks in drawn-out litigation and the specific risk that Plaintiffs could fail to
22 establish liability and/or overturn the Court’s order dismissing the class claims on appeal. Based on their
23 own independent investigation and evaluation, the Parties and their respective counsel are of the opinion
24 that the settlement for the consideration and on the terms set forth in the Stipulation of Settlement is fair,
25 reasonable, and adequate and is in the best interests of the Class and Defendant in light of all known
26 circumstances and the expenses and risks inherent in litigation. Therefore, the Parties respectfully
27 request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

Defendant operates a packaging facility in Salinas, California, growing, processing, and packaging fresh vegetables. Plaintiff Maria Maravilla began employment with Defendant in about March 2017. *See* Declaration of Maria Maravilla (“Maravilla Decl.”) ¶ 2. Plaintiff Juan Torres Reyes was employed by Defendant from about August 2020, until about September 2020. *See* Declaration of Juan Torres Reyes (“Reyes Decl.”) ¶ 2.

On April 15, 2021, Plaintiffs filed a class and representative action complaint in the Superior Court of California, County of Monterey, on behalf of themselves and all similarly situated employees against Defendant (the “Action”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. Plaintiffs subsequently filed a first amended complaint on May 20, 2022. *Id.* ¶ 3. The first amended complaint is the operative complaint (“Complaint”). *Id.* ¶ 3.

The Complaint asserts class and representative action claims for: (1) failure to provide meal periods or compensation in lieu thereof, in violation of Labor Code §§ 226.7 and 1198; (2) failure to provide rest periods or compensation in lieu thereof, in violation of Labor Code §§ 226.7 and 1198 regarding rest periods and premiums; (3) failure to pay hourly and overtime wages, in violation of Labor Code §§ 1194 and 1198; (4) failure to pay minimum wages, in violation of Labor Code §§ 1194, 1197, and 1199; (5) failure to comply with itemized wage statement requirements, in violation of Labor Code §§ 226, 1174, and 1175; (6) failure to pay all wages upon termination, in violation of Labor Code §§ 201, 202, 203, and 246; (7) failure to pay wages timely, in violation of Labor Code § 204; (8) failure to reimburse work related expenses, in violation of Labor Code § 2802; (9) penalties under the PAGA, Labor Code § 2698; and (10) unfair business practices, in violation of Business and Professions Code § 17200, *et seq.*; as well as individual claims on behalf of Maria Maravilla for: (11) sex and gender discrimination, in violation of the Fair Employment and Housing Act (“FEHA”), Government Code § 12940(a); (12) sexual harassment, in violation of the FEHA; (13) failure to investigate and prevent harassment, in violation of the FEHA; (14) retaliation, in violation of the FEHA; and (15) intentional infliction of emotional distress. *Id.* ¶ 4.

Specifically, Plaintiffs allege that employees were required to call in to work to determine whether they were to report in. Employees were not paid for this mandatory activity, nor were they

1 reimbursed the costs of using personal cell phones for work purposes. Employees were also not provided
2 with proper meal and/or rest breaks, as they were required to remain on the premises and under
3 Defendant’s control. In addition, Plaintiffs allege the Defendant failed to properly calculate the regular
4 rate of pay for the purposes of paying sick pay wages, meal period premiums, and as a result, owe
5 additional wages. Moreover, Plaintiffs allege that Defendant failed to timely pay wages when due and
6 upon separation of employment. Finally, Plaintiffs allege that Defendant failed to provide accurate
7 itemized wage statements that included the applicable hourly rates of pay, as well as due to the above
8 practices. Gavron Decl. ¶ 5.

9 Since the initiation of the Action, the Parties have engaged in litigation and discovery, including
10 briefing a Motion to Compel Arbitration. Gavron Decl. ¶ 6. On May 9, 2022, the Parties participated in
11 private mediation with mediator Tripper Ortman, Esq. After a full day of mediation, the Parties were
12 unable to reach an agreement and resumed litigation. Gavron Decl. ¶ 7. On September 8, 2022, the
13 Court ordered Plaintiffs’ individual wage and hour and PAGA claims to arbitration and dismissed the
14 putative class claims. Plaintiffs’ non-individual, representative PAGA claims and a portion of Maria
15 Maravilla’s individual FEHA claim were stayed. *Id.* ¶ 7.¹

16 Following the Court’s ruling on Defendant’s Motion to Compel Arbitration, Plaintiffs demanded
17 arbitration with JAMS. *Id.* ¶ 8. On September 29, 2022, Guadalupe Gomar, Herminia Sanchez, Jesus
18 Baez, Juan Polanco Magana, Nancy Mendoza Perez, and Paulino Ibarra (“Non-Plaintiff Claimants”)
19 filed arbitration demands against Defendant for alleged violations of the Labor Code during their
20 employment. *Id.* ¶ 8. Thereafter, Plaintiffs and the Non-Plaintiff Claimants litigated their claims in
21 arbitration against Defendant. The Parties later reengaged with Mr. Ortman and arrived at the instant
22 proposed settlement. *Id.* ¶ 8. The Non-Plaintiff Claimants’ arbitration demands and Plaintiff Maravilla’s
23 FEHA claim were ultimately resolved by the Parties individually through confidential individual
24 settlement agreements. While not subject to formal Court approval like the class and PAGA settlement,
25 Plaintiffs disclose the existence of the Confidential Individual Settlements and Plaintiff Maravilla’s
26

27 ¹ The Court compelled Maria Maravilla’s individual employment claims to arbitration, but retained
28 jurisdiction of her sexual harassment claim based on any conduct alleged to have occurred after March
3, 2022.

1 FEHA claim for transparency. *See* Agreement ¶ 3.

2 After thorough investigation and evaluation of the facts and claims, as well as arm's length
3 negotiation, the Parties accepted a mediator's proposal and later memorialized the terms of their
4 agreement in the Joint Stipulation and Stipulation of Settlement of Class Action and PAGA Claims
5 ("Stipulation of Settlement," "Settlement," or "Agreement"). *Id.* ¶ 9. A true and correct copy of the
6 Stipulation of Settlement is attached as **Exhibit A** to the Declaration of Max W. Gavron ("Gavron
7 Decl.") submitted concurrently herewith. The Parties recognize the risk, expense, and delay in
8 continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable,
9 and adequate. Gavron Decl. ¶ 9. Accordingly, the Parties desire to settle, compromise, and discharge all
10 disputes and claims arising from or relating to the afore-referenced claims.

11 **III. DISCUSSION**

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

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

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

23 Thus, the preliminary approval by the trial court is simply a conditional finding that the
24 settlement appears to be within the range of acceptable settlements. As Professor Newberg comments,
25 "[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a
26 tentative settlement proposal may vary. The court may find that the settlement proposal contains some
27 merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid
28 subject only to any objections that may be raised at a final hearing." Alba Conte & Herbert B. Newberg,

1 *4 Newberg on Class Actions* § 11.26 (4th ed. 2002).

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

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

10 *Id.* § 11.24.

11 Here, the Parties have reached such an agreement and have submitted to this Court in connection
12 with this Motion a copy of the Stipulation of Settlement fully setting forth the agreement reached by the
13 Parties. The Stipulation of Settlement sets forth all terms of the agreement reached by the Parties, which
14 include, among other things, the method for calculating the Class Members' individual portions of the
15 Gross Settlement Amount.

16 **A. Proposed Class Definition**

17 The current settlement is being settled on behalf of "all current and former non-exempt
18 employees of Defendant Greengate Fresh LLLP who were employed in the State of California at any
19 time during the Class Period (the "Class")." *See* Agreement ¶ 4. The Class Period is defined as "the
20 period commencing on April 15, 2017, and ending on August 11, 2023." *See id.* ¶ 8.

21 **B. Settlement Terms and Evaluation**

22 Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence
23 to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v.*
24 *Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust*
25 *Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the
26 proponents, particularly where, as here, settlement has been reached with the participation of
27 experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221
28 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).

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

9 Here, both Plaintiffs’ and Defendant’s counsel have a great deal of experience in wage and hour
10 class action litigation. Plaintiffs’ counsel have been approved as class counsel in a number of wage and
11 hour class actions and have extensive litigation experience. Declaration of B. James Fitzpatrick
12 (“Fitzpatrick Decl.”) ¶¶ 4, 5; Declaration of Laura L. Franklin (“Franklin Decl.”) ¶¶ 3, 4; Declaration of
13 Larry W. Lee (“Lee Decl.”) ¶¶ 5-7; Gavron Decl. ¶¶ 33-39. Each side has apprised the other of and
14 litigated their respective factual contentions, legal theories, and defenses, resulting in negotiations taking
15 place between the Parties. Gavron Decl. ¶ 10.

16 In advance of mediation, Defendant provided data regarding the number of class members,
17 weeks worked, and a sampling of approximately 10% of time and pay records for the putative class.
18 Gavron Decl. ¶ 20. Based on the class data provided by Defendant, Plaintiffs estimated that Defendant
19 might face potential liability of up to approximately \$7.3 million for Plaintiffs’ class claims if Plaintiffs
20 succeeded at trial on every claim. Gavron Decl. ¶ 20. Plaintiffs were able to estimate the potential class
21 penalties based on class data and sample records provided by Defendant. *Id.* Specifically, this amount
22 was calculated based on the following breakdowns:

- 23 • \$1.37 million for meal period violations (40% violation rate (~200,000 shifts x .4) x \$17.12
24 (average rate of pay));
- 25 • \$1.37 million for rest period violations (40% violation rate (~200,000 shifts x .7) x \$17.12
26 (average rate of pay));
- 27 • \$171,201.28 for unpaid wages, including minimum wages and overtime (~200,000 shifts x ((.05
28 (3 minutes) x \$17.12) + (.05 (3 minutes) x \$25.68));

- \$1.77 million for Labor Code § 226(e) penalties ((~18,000 pay periods x \$100 penalty) – (~405 employees x \$50));
- \$200,000 for unreimbursed business expenses (40,000 workweeks x \$5.00); and
- \$2.49 million in waiting time penalties (~605 former employees x (30 days x 8 hours x \$17.12)).

See Gavron Decl. ¶ 20.

With respect to potential liability of Plaintiffs' PAGA claims, Plaintiffs estimated that Defendant could face civil penalties of up to approximately \$1.4 million (~14,000 pay periods x \$100 penalty). Gavron Decl. ¶ 21. This assumes complete victory at trial and that the Court would award the maximum penalty of \$100 per pay period, which is far from certain as discussed above. Further, while the PAGA provides for a heightened penalty for a "subsequent violation," courts are hesitant to award the heightened penalty absent a showing of a prior violation. *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).

Even assuming Plaintiffs ultimately prevailed on their PAGA claims, the Court still has discretion to reduce any PAGA penalties. 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. Thus, even if Plaintiffs were to successfully prove their claims at trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

Although Plaintiffs believe in the merits of the alleged claims and maintain that there is no

1 reason for reducing PAGA penalties, Plaintiffs are aware that Defendant may raise defenses to the
2 claims. Gavron Decl. ¶ 23. Thus, even if Plaintiffs were to successfully prove their claims at trial, there
3 is a possibility that the Court may only award a small percentage of PAGA penalties, as the Court has
4 discretion to do so. The Gross Settlement Amount was premised with this risk in mind, associated with
5 the possibility of the Court significantly reducing Plaintiffs' PAGA penalties, along with other attendant
6 risks, even if Plaintiffs were to prevail at trial. *Id.*

7 Further, Defendant raised several defenses that presented risk. Importantly, Defendant argued—
8 and the Court agreed—that Plaintiffs executed arbitration agreements that precluded class claims to be
9 asserted in court. If the Court's order dismissing the class claims and compelling the individual claims
10 to arbitration were left to stand on appeal, the potential for successfully asserting class claims is almost
11 non-existent. Thus, the potential exposure on the class claims must be recalibrated to consider this risk
12 factor, as demonstrated by the Parties' litigation history and the Court's order compelling the individual
13 claims to arbitration.

14 Defendant also would have argued that the waiting time penalties, which comprise a significant
15 portion of the estimated damages, are subject to a complete defense. Defendant would have argued that
16 a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiffs and the
17 class members considering Defendant's legally compliant policies. If Defendant was successful on the
18 good faith defense, the Court may not have awarded waiting time penalties at all, reducing the exposure
19 by \$2.49 million. *Hill v. Walmart, Inc.*, 32 F. 4th 811 (9th Cir. 2022) (upholding good faith defense
20 because defendant reasonably believed wages were not due and owing at time of separation of
21 employment); *Naranjo v. Spectrum Security Services, Inc.*, __ Cal. Rptr. 3d __, 2023 WL 2261253 (Feb.
22 27, 2023), review granted 2023 WL 3745105 (May 31, 2023); *Chavez v. Converse, Inc.*, 2020 WL
23 1233919, at *1 (N.D. Cal. 2020) (holding that an employer's failure to pay is not willful where there is
24 uncertainty in the law or a "good faith mistaken belief that wages are not owed").

25 Similarly, on Plaintiffs' wage statement claim, Plaintiffs would face the additional burden of
26 demonstrating that any alleged omission of information from the wage statements was a "knowing and
27 intentional failure" by Defendant to comply with Labor Code § 226(a). See *Harris v. Vector Mktg.*
28 *Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of
employer and finding its conduct was not "knowing and intentional"). Defendant also would have

1 argued that penalties under Section 226 are subject to a similar “good faith” defense as articulated above
2 in the context of Plaintiffs’ claims for waiting time penalties. *See, e.g., Apodaca v. Costco Wholesale*
3 *Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief
4 that it is not in violation of Section 226, any violation is not knowing and intentional.”); *Wright v.*
5 *Adventures Rolling Cross Country, Inc.*, 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same);
6 *Ricaldai v. U.S. Investigations Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (same);
7 *Dalton v. Lee Publ'ns, Inc.*, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same). *Naranjo* also
8 permitted a good faith defense to rebut the plaintiff’s claim for penalties, pursuant to Labor Code § 226.

9 Defendant also would have argued that Plaintiffs could not demonstrate an underlying violation
10 of the Labor Code to support their meal and rest period claims. *See Brinker Rest. Corp. v. Superior Ct.*,
11 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the employer is not obligated to
12 police meal breaks and ensure no work thereafter is performed.”). Defendant argued that it had legally
13 compliant written policies, which satisfied *Brinker* and that any failure to take a legally compliant meal
14 or rest period by employees was the result of individual choice and thus not capable of class resolution.
15 Defendant disputed that it had a captive rest period policy and argued that employees were free to leave
16 the premises during breaks so long as they were able to timely return to their workstation. Review of the
17 sampling of time and pay records provided by Defendant demonstrated a largely compliant workforce,
18 as it relates to meal periods. Accordingly, Plaintiffs’ estimation of a 40% violation rate addressed above
19 is likely on the high end and factors in Plaintiffs’ arguments, Defendant’s rebuttals, and the Court’s prior
20 order dismissing the putative class claims and sending the individual claims to arbitration.

21 Defendant also contended that it paid employees all minimum and overtime wages. Defendant
22 argued that any work performed off the clock was unauthorized and not subject to a uniform policy and
23 thus would not be susceptible of class resolution. To the extent any employees worked while off-the-
24 clock, Defendant argued that the practice was voluntary. Among other things, Defendant relied on its
25 employee handbook, which provided: “No off the clock work is permitted at any time. Employees are not
26 allowed to begin work or perform work related activities before clocking in, during their meal periods, or
27 after clocking out.”

28 On Plaintiffs’ reimbursement claim, Defendant argued that employees were not required to use
personal cell phones to communicate for purposes of employment. While Plaintiffs contended they

1 were required to use personal phones, Defendant argued that any decision to use their cell phone for
2 work purposes was voluntary and/or unique to them.

3 Although Plaintiffs believe that the Class could be certified if the Court's order compelling
4 arbitration were overturned on appeal, Plaintiffs also believe in the fairness of the settlement that is
5 based on factoring in the uncertainty and risks to Plaintiffs involved in not prevailing on one or more of
6 the causes of action or theories alleged in the operative Complaint, the possibility of non-certification,
7 and the potential for appeals. Gavron Decl. ¶ 30. These risks on class certification are compounded by
8 the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There,
9 the plaintiffs obtained class certification and subsequently prevailed at trial after eight years of litigation,
10 but the judgment and the certification ruling were reversed by the California Supreme Court after an
11 additional five years of litigation. The case was remanded to superior court where class certification was
12 denied and plaintiffs' subsequent appeal also was denied.

13 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the inherent
14 risks of litigation, including the substantial risks relative to class certification, the costs of pursuing such
15 litigation, and the risks associated with the Court's discretion to reduce PAGA penalties. The settlement
16 is the result of extensive arm's-length negotiations between the Parties and their counsel and was
17 facilitated by an experienced and neutral mediator. Gavron Decl. ¶ 31.

18 Indeed, numerous courts have held that **gross** settlements approximating between only 8 and
19 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp. Secs.*
20 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16% of
21 potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement amounting to
22 only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.
23 Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing
24 the litigation to judgment"; noting that whether the settlement is fair and adequate depends on the "the
25 difficulties in proving the case"); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015
26 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between
27 **8.5% and 25%** of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*,
28 U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting 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 p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable). Here, based on the amounts explained above, the total exposure for Plaintiffs' class and PAGA claims amount to approximately \$8.7 million, which assumes the Court would award \$100 a pay period for the PAGA claim. If the Court reduced the PAGA penalties to \$5 a pay period, like in *Carrington*, the total exposure would only amount to \$7.37 million. Had Plaintiffs not been able to overturn the Court's order dismissing the putative class claims, the potential exposure is reduced drastically and limited to the PAGA claim. The Gross Settlement Amount here is **\$690,000.00**, and thus amounts to approximately 8% of the maximum estimated liability and an even higher percentage depending on how one accounts for the various risk factors. Gavron Decl. ¶ 32. The percentage-to-recovery ratio of this settlement is within the range of fairness and reasonableness and should be approved by the Court. *Id.*

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Pendency of Class Action ("Notice of Proposed Settlement" or "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* Notice, attached as **Exhibit A** to the Agreement. Moreover, as set forth in the Notice, Class Members are advised of their right to attend the final approval hearing and/or object to any of the terms contained in the Stipulation of Settlement. *Id.*

1. Amount and Manner of Distribution of the Compensation to be Provided to Settlement Class Members Including the Amount, or an Estimate, of What Each Settlement Class Member Will Receive

The Stipulation of Settlement provides for Six Hundred Ninety Thousand Dollars (\$690,000.00) as the Gross Settlement Amount. *See* Agreement ¶ 15. The Net Settlement Amount (calculated after deduction of Class Counsel's attorneys' fees (up to \$230,000.00), costs (up to \$30,000.00), payment of PAGA Penalties (\$50,000.00), and Settlement Administration Costs (up to \$12,950.00) is estimated to be approximately \$367,050.00. *See id.* ¶¶ 6, 7, 15, 19, 24, 31. Each Class Member who does not opt-out of the Settlement will receive their share of the Net Settlement Amount based upon the number of workweeks employed during the Class Period. *See* Agreement ¶ 44.d.i; Gavron Decl. ¶ 15.

1 Based on a raw average, each Class Member may recover approximately \$491.37 (\$367,050.00 /
2 747 class members). Gavron Decl. ¶ 16. The amount actually paid to each Class Member will increase
3 or decrease depending on the actual number of workweeks he or she worked during the Class Period. *Id.*
4 ¶ 16.

5 Finally, funds from any checks that have not been cashed within 180 days of issuance shall be
6 paid to the Watsonville Law Center as the *cy pres* beneficiary. *See* Agreement ¶ 44.d.iii. Class Counsel
7 do not have any conflicts of interest with the proposed *cy pres* recipient. Fitzpatrick Decl. ¶ 6; Franklin
8 Decl. ¶ 5; Lee Decl. ¶ 8; Gavron Decl. ¶ 18.

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

11 Any Class Member who validly excludes him/herself from this settlement shall not be bound by
12 this Stipulation of Settlement, except for the PAGA Released Claims, and shall not be entitled to any
13 portion of the Net Settlement Amount. *See* Agreement ¶¶ 49, 55. PAGA Members will still receive their
14 portion of the PAGA Penalties even if they opt out. None of the settlement funds will revert to
15 Defendant.

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

17 As a condition of participating in this class action settlement, Class Members shall release the
18 following claims ("Released Claims"):

19 all claims, causes of action, demands, damages, or liabilities arising at any
20 time during the Class Period that were pled or which could have been pled
21 based on the factual allegations contained in the operative Complaint in the
Actions or any amendments thereto.

22 *See* Agreement ¶¶ 29, 54. Given that the release is tailored only to claims as pled in the operative
23 Complaint and during the Class Period and nothing more, the release is appropriately limited.

24 In addition, regardless of whether a valid and timely Request for Exclusion is submitted, Class
25 Members who are PAGA Members will also release the following claims ("PAGA Released Claims"):

26 all claims, causes of action, demands, damages, or liabilities arising at any
27 time during the PAGA Period that were pled or which could have been pled
28 based on the factual allegations contained in the operative Complaints in the
Action or any amendments thereto, for civil penalties under the PAGA
including claims premised on alleged violations of Labor Code §§ 201,

201.3, 202, 203, 204, 207, 208, 209, 216, 218, 218.5, 218.6, 223, 225.5, 226, 246, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1199, 2698 *et seq.*, 2699(f) and (g), 2800 and 2802, and the Wage Order.

See Agreement ¶¶ 26, 55.

4. Tax Treatment of Settlement Amounts

As Plaintiffs' lawsuit sought unpaid wages, interest, and penalties, the Parties have agreed that twenty percent (20%) of each Individual Settlement Payment shall be classified as wages, subject to required withholdings and deductions, and the remaining eighty percent (80%) shall be classified as penalties and interest. Agreement ¶ 44.d.iii. One hundred percent (100%) of each Individual PAGA Payment shall be classified as penalties. *Id.* ¶ 44.d.vii.1.

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

Class Members do not need to do anything should they wish to receive their share of the settlement funds. Because this is not a claims-made settlement, Class Members will not be required to make a submission to participate in the settlement. Thus, this substantially decreases the amount of burden each Class Member must bear to receive their Individual Settlement Payment. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit a request for exclusion. *See* Agreement ¶ 49.

C. Notice to Class Members

Should the Court grant the instant motion, Defendant will provide the Settlement Administrator with a list containing each Class Member's full names, last known addresses, Social Security numbers, total number of workweeks Class Members worked during the Class Period, and total number of pay periods PAGA Members worked during the PAGA Period ("Class List"). Agreement ¶ 45. Upon receipt of the information and prior to mailing the Notice to Class Members, the Settlement Administrator shall perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. *Id.* ¶ 47. Within ten (10) calendar days of receipt of the Class List from Defendant, the Settlement Administrator will mail the Notice out to Class Members. *Id.* Any Notice returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent via regular first-class U.S. mail to the forwarding address affixed thereto.

1 *Id.* If no forwarding address is provided, the Settlement Administrator shall perform an advanced skip
2 trace to locate the most current address and resend the Notice within five (5) calendar days. *Id.*

3 As set forth in the Notice, Class Members will be allowed to opt out of the settlement by a
4 certain deadline, or object to the settlement. Agreement at Exhibit A.

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

6 **1. Class Representatives' Claims are Typical of the Class**

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

17 Plaintiffs allege that Defendant, as a matter of its corporate policy, practice, or procedure
18 violated the Labor Code by failing to provide proper meal and rest periods or pay premium
19 compensation in lieu thereof, failing to pay minimum, hourly, and overtime wages owed, failing to
20 provide accurate wage statements, and failing to timely pay all wages when due and upon separation of
21 employment. Maravilla Decl. ¶¶ 3-7; Reyes Decl. ¶¶ 3-7. In other words, Plaintiffs contend that they
22 were subjected to the same policy and practice as other Class Members and that their claims are typical
23 to those of the Class.

24 Moreover, Plaintiffs do not have any interests adverse to the Class, nor have any such issues
25 been raised or presented. Maravilla Decl. ¶ 8; Reyes Decl. ¶ 8. Plaintiffs have taken all necessary steps
26 to represent the interests of the Class by providing information and documents to their counsel.
27 Maravilla Decl. ¶ 9; Reyes Decl. ¶ 9. For such reasons, Plaintiffs have adequately represented the Class
28 and will continue to do so.

1 **2. Class Counsel Have Adequately Represented the Settlement Class and Have**
2 **Experience with Wage and Hour Class Actions**

3 From the inception of the case, Class Counsel have zealously represented the interests of the
4 class. The settlement was obtained for the benefit of the Class. Further, Class Counsel have been
5 approved as class counsel on a number of prior cases, have litigated numerous other class action cases,
6 and are competent to represent the Class. Fitzpatrick Decl. ¶¶ 4, 5; Franklin Decl. ¶¶ 3, 4; Lee Decl. ¶¶
7 5-7; Gavron Decl. ¶¶ 33-39.

8 **E. Costs and Fees**

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

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

17 The Common Fund doctrine is predicated on the principle of preventing unjust enrichment.
18 When a litigant's efforts create or preserve a fund from which others derive benefits, she may require the
19 passive beneficiaries to compensate those who created the fund. Both California state and federal courts
20 have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769. Similarly, in *City*
21 *and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court
22 recognized that the common fund doctrine has been applied "consistently in California when an action
23 brought by one party creates a fund in which other persons are entitled to share." The reasons for
24 applying the common fund doctrine include: "fairness to the successful litigant, who might otherwise
25 receive no benefit because his recovery might be consumed by the expenses; correlative prevention of
26 an unfair advantage to the others who are entitled to share in the fund and who should bear their share of
27 the burden of its recovery; encouragement of the attorney for the successful litigant who will be more
28 willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund

1 if he is assured that he will be properly and directly compensated should his efforts be successful.” *Id.*

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

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

14 The Parties have agreed to a payment of a maximum of \$230,000.00, or 1/3 of the Gross
15 Settlement Amount for payment to Class Counsel as attorneys’ fees. Agreement ¶ 7. The Parties have
16 agreed to a payment of the foregoing attorneys’ fees and, thus, this payment should be presumed to be
17 fair. Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs up to
18 \$30,000.00. *Id.* ¶ 6. Class Counsel have, at their own risk, expended costs, for example, to file this
19 instant action, effectuate service of process, pay mediation fees, and pay other litigation-related costs.

20 Based on the foregoing, the Court should preliminarily approve the attorneys’ fees and costs
21 being requested by the Parties, which will be further supported and discussed in Plaintiff’s Motion for
22 Final Approval, should the Court grant this Motion.

23 **2. Settlement Administration Costs**

24 The Parties have agreed to an estimated payment of \$12,950.00 to the Settlement Administrator,
25 Phoenix Settlement Administrators, to send notices and to administer this settlement, which shall be paid
26 out of the Gross Settlement Amount. Agreement ¶¶ 31, 32. Phoenix is a well-recognized class action
27 settlement administrator. The Parties believe that the administration fee is reasonable and should be
28 approved. Gavron Decl. ¶ 19, **Ex. B** (Bid for Administration). The proposed cost for administration is

1 approximately \$17.33 per Class Member and includes the Notice being translated into Spanish. Gavron
2 Decl. ¶ 19.

3 **IV. PLAINTIFFS PROVIDED NOTICE TO THE LWDA**

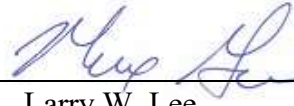
4 Concurrent with the filing of this Motion, Plaintiffs provided notice to the Labor and Workforce
5 Development Agency. Gavron Decl. ¶ 42.

6 **V. CONCLUSION AND ACTION REQUESTED**

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

13
14 DATED: November 9, 2023

DIVERSITY LAW GROUP, P.C.

15
16 By:  _____

Larry W. Lee

17 Max W. Gavron

18 Attorneys for Plaintiffs Maria Maravilla and Juan Torres
19 Reyes
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21
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23
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25
26
27
28

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 18
8 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250,
9 Los Angeles, California 90071.

10 On November 9, 2023, I served the following document(s) described as:

- 11 **1. PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
APPROVAL OF CLASS ACTION SETTLEMENT; AND MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFFS'**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 13 **3. DECLARATION OF LAURA L. FRANKLIN IN SUPPORT OF PLAINTIFFS'**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 14 **4. DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFFS'**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 15 **5. DECLARATION OF B. JAMES FITZPATRICK IN SUPPORT OF**
PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT
- 16 **6. DECLARATION OF MARIA MARAVILLA IN SUPPORT OF PLAINTIFFS'**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 17 **7. DECLARATION OF JUAN TORRES REYES IN SUPPORT OF PLAINTIFFS'**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 18 **8. [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS**
ACTION SETTLEMENT AND SETTING A SETTLEMENT FAIRNESS
HEARING

on the interested parties in this action as follows:

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 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website www.california.tylerhost.net, 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 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 November 9, 2023, at Los Angeles, California.



Erika Mejia