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Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

NICOLAS SERAFICA, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

HGST, INC., a Delaware corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 21CV386574

(Assigned to the Hon. Sunil R. Kulkarni,
Department 1)

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

Date: January 12, 2023

Time: 1:30 P.M.

Dept.: 1

Complaint Filed: September 9, 2021

FAC Filed: October 14, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on January 12, 2023, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Sunil R. Kulkarni, judge
4 presiding, in Department 1 of the above referenced Court, located at 191 North First Street,
5 San Jose, California 95113, Plaintiff Nicolas Serafica (“Plaintiff”) will and hereby does move
6 this Court for an Order:

- 7 1. granting final approval to the Class and PAGA Action Settlement Agreement
8 (“Settlement Agreement”) in this action;
- 9 2. approving distribution of the settlement funds to the Class Members pursuant to
10 the terms of the Settlement Agreement;
- 11 3. approving Plaintiff’s request for an award of the class representative
12 enhancement of \$10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;
- 13 4. approving Class Counsel’s request for an award of attorneys’ fees to Class
14 Counsel for one-third of the \$1,145,000.00 Gross Settlement Amount, and reimbursement of
15 litigation costs of \$8,221.12, pursuant to the terms of the Settlement Agreement;
- 16 5. approving Plaintiff’s request for payment of the settlement administration costs
17 to Phoenix Settlement Administrators in the amount of \$12,250.00 pursuant to the terms of the
18 Settlement Agreement;
- 19 6. approving Plaintiff’s request for payment to the California Labor & Workforce
20 Development Agency of \$30,000.00 pursuant to the terms of the Settlement Agreement; and
- 21 7. entering final judgment as to all members of the Settlement Class in this action.

22 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
23 provides for court approval of the settlement of a purported class action and allows the Court
24 to grant final certification of a class for settlement purposes. In light of the overwhelmingly
25 positive response, as shown by the lack of objections to the settlement and zero opt-outs, there
26 is no question that the settlement is fair, reasonable, and adequate and thus should be granted
27 final approval.

28 This Motion will be based on the attached Memorandum of Points and Authorities and
the supporting Declarations of Larry W. Lee, Kwanporn “Mai” Tulyathan, Max W. Gavron, B.

1 James Fitzpatrick, Laura L. Franklin, and Kevin Lee of Phoenix Settlement Administrators,
2 upon the oral arguments of counsel (should there be any), and on the complete records and file
3 herein.

4
5 Dated: December 19, 2022

DIVERSITY LAW GROUP, P.C.
FITZPATRICK & SWANSTON

6
7 By: _____

8 Larry W. Lee
9 B. James Fitzpatrick
10 Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 Plaintiff Nicolas Serafica (“Plaintiff”) now seeks the Court’s final approval of the
3 Class and PAGA Action Settlement Agreement (“Settlement Agreement”). The Settlement
4 Agreement provides for a \$1,145,000.00 fund to be created for the benefit of the Class, from
5 which attorneys’ fees, litigation costs, enhancement payment to the Plaintiff, payment to the
6 California Labor & Workforce Development Agency (“LWDA”), and costs of settlement
7 administration are to be paid. The entire net settlement fund after these deductions will be paid
8 to Class Members who did not opt-out of the settlement.

9 The history of this litigation was previously detailed in Plaintiff’s Preliminary
10 Approval Motion. This Court preliminarily approved this Settlement on September 12, 2022,
11 directing distribution of class notice and scheduling the hearing for final approval of
12 settlement (the “Preliminary Approval Order”).

13 As directed by the Court, the Settlement Administrator distributed the Notice of
14 Settlement (“Class Notice”) to 1,565 Class Members. (Declaration of Kevin Lee on behalf of
15 Phoenix Settlement Administrators (“Phoenix”) [“Admin Decl.”] ¶ 5.) To date, the Settlement
16 Administrator received 0 requests for exclusion, and there have been no objections filed.
17 (Admin Decl. ¶ 9.) As such, there is a 100% participation rate. Thus, an inference can be made
18 that the Class supports the Court’s Preliminary Approval Order finding that the Settlement
19 Agreement is fair and reasonable.

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

- 23 ▪ The settlement provides a total settlement sum of \$1,145,000.00;
- 24 ▪ The settlement is fair given that Settlement Class Members will receive (*after*
25 *deductions for fees, costs, etc.*) a substantial amount of money (on average, each
26 Settlement Class Member will receive approximately \$442.72) (*See* Admin
27 Decl. ¶ 15);
- 28 ▪ Class Members did not need to submit claim forms to participate in the

1 settlement, but are being paid automatically;

- 2 ▪ The allocation reflects that payment of claims will be paid to all Class Members
- 3 in proportion to the number of workweeks worked by each Class Member during
- 4 the Settlement Period;
- 5 ▪ Plaintiff conducted significant investigation in this case, including exchanging
- 6 informal discovery, analyzing class data, and performing a damage analysis for
- 7 the entire class necessary for Plaintiff to fully evaluate this case;
- 8 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was
- 9 retained for fees estimated to be \$12,250.00; and
- 10 ▪ California's LWDA will also be the beneficiary of this Settlement as it will
- 11 receive \$30,000.00, should this Settlement be granted final approval.

12 Accordingly, the Court should grant Final Approval consistent with the Preliminary
13 Approval Order.

14 **II. NOTICE TO THE CLASS AND LWDA**

15 As clearly stated in the Declaration of Kevin Lee, Phoenix Settlement Administrators
16 provided notice to Class Members, as required by the Preliminary Approval Order. On
17 October 12, 2022, the Settlement Administrator received a list of Confidential Data from
18 Defendant's counsel that included 1,565 Class Members. (Admin Decl. ¶ 3.) On October 19,
19 2022, each of the persons identified on the mailing list were sent the Class Notice via first
20 class mail. (*Id.* ¶ 5.) From the date of mailing, 27 Class Notices were returned due to incorrect
21 addresses and 21 Class Notices were re-mailed to updated addresses after performing address
22 traces and/or at the request of the Class Members. (*Id.* ¶ 7.) As of the date of this filing, six (6)
23 Class Notices remain undeliverable because they were returned a second time or no secondary
24 address could be located by performing skip tracing. (*Id.* ¶ 8.) Further, the Class Notice
25 provided Class Members with Class Counsel's contact information, where they could further
26 seek information regarding the class settlement, leave questions for the Settlement
27 Administrator, and update their address.

28 On November 8, 2022, the Settlement Administrator learned that the names and

addresses for 35 class members were incorrect due to a technical glitch. Admin Decl. ¶ 6. To rectify the issue, on November 14, 2022, the Settlement Administrator remailed corrected notices to the 35 class members and included a cover letter explaining that there had been an error. Admin Decl. ¶ 6; Ex. B (Cover Letter). Forty-five days after November 14, 2022 is December 29, 2022. Accordingly, the Settlement Administrator will provide a supplemental declaration after that date and before the hearing on this Motion informing the Court regarding whether it obtained any objections and/or requests for exclusion from the 35 impacted class members. Admin Decl. ¶ 6.

The provision of sending the notice to Class Members as described above meets the requirements for the “best notice practicable” in this case as necessary to protect the due process rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (provision of “best notice practicable” with description of the litigation and explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974) (individual notice must be sent to class members who can be identified through reasonable means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

Here, the Class Members were provided with a mailing regarding the settlement that explained the settlement and allowed Class Members to seek information, ask questions, and object, if so desired. As such, proper notice has been given to the Class Members. Thus, the Court may proceed to determine the fairness and adequacy of the Settlement and enter its Order granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the claims, exclusion, and the approval process.

Concurrently with the filing of this Motion, Plaintiff provided notice to the LWDA. Gavron Decl. ¶ 15.

//

1 **III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE**

2 **A. Strength of Plaintiff’s Case and Likelihood of Certifying the Class**

3 In order to proceed as a class, there are two requirements which must be met—
4 ascertainability and community of interest. *See Daar v. Yellow Cab Co.*, 67 Cal. 2d. 695, 704
5 (1967); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 809 (1971). “The community of interest
6 requirement embodies three factors: (1) predominant common questions of law or fact; (2)
7 class representatives with claims or defenses typical of the class; and (3) class representatives
8 who can adequately represent the class.” *Richmond v. Dart Industries*, 29 Cal. 3d. 462, 470
9 (1981).

10 **1. The Class is Ascertainable**

11 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure
12 section 382 “is determined by examining (1) class definition, (2) the size of the class, and (3)
13 the means available for identifying the class members.” *Reyes v. San Diego County Board of*
14 *Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). Here, the Class comprises 1,565
15 individuals. (Admin Decl. ¶ 3.) This is far more than the minimum required to certify a class.
16 Class Members have already been identified by Defendant and notice was provided to the
17 Class Members.

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

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

24 **a. There are Predominant Common Questions of Law and Fact**

25 “The ultimate question in every case of this type [class actions] is whether...the issues
26 which may be jointly tried, when compared with those requiring separate adjudication, are so
27 numerous and substantial that the maintenance of a class action would be advantageous to the
28 judicial process and to the litigants.” *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th

1 1096, 1104-05 (2003).

2 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or
3 procedure violated the Labor Code by its failure to pay wages for off-the-clock work in
4 connection with Defendant's security check procedures and Covid-19 screening procedures,
5 and failure to list the hours worked for shift differential wages on wage statements. Defendant
6 denies that it has any policy, practice, or procedure that violates the Labor Code. Defendant
7 asserted that employees did not suffer any injury with regard to its wage statements. Defendant
8 further denies that liability could be established on a class-wide basis and contends instead that
9 liability and damages would need to be conducted on a case-by-case basis.

10 **b. Plaintiff's Claims are Typical of the Class Claims**

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

20 Plaintiff was employed by Defendant and was subjected to the same policies as all
21 other Class Members. Specifically, like other members of the Class, Plaintiff was required to
22 undergo security and Covid-19 screening procedures that resulted in unpaid off-the-clock time
23 and meal periods of less than 30 minutes, and Plaintiff received wage statements that reflected
24 shift differential wages paid but did not show the applicable rates and/or hours worked. Thus,
25 Plaintiff's claims are typical to those of Class Members.

26 **c. Plaintiff Adequately Represented the Class**

27 The class representative, through qualified counsel, must be capable of "vigorously and
28 tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App.

3d 834, 846 (1984). Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented.

B. Defendant's Allegations and Unlikelihood of Class Certification

Defendant disputes Plaintiff's Covid-19 screening claim, arguing that Defendant is immune from suit for implementing a Covid-19 countermeasure under The Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d 6d, 247d-6e (2006) ("PREP Act"). Defendant maintains that the Covid-19 temperature readings were not done for Defendant's benefit and took a negligible amount of time during a limited time span when the practices were in place (through early Summer 2021). Defendant also disputes that its meal period policies and practices were unlawful, arguing that those employees who chose to go outside for meal breaks received no less than 30 minutes for their meal breaks, including temperature checks on the way out of and into the building. Defendant disputes that its wage statements were in any way inaccurate or that Plaintiff or any member of the Class suffered any injury based on purportedly inaccurate wage statements. Defendant further asserts that individualized issues predominate in this case, including without limitation, individualized circumstances associated with screening employees who entered through various building entrances each day. Based thereon, Defendant continues to maintain that it is not liable for the allegations made by the Plaintiff.

C. Risks, Expenses, and Complexity of Further Litigation

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

Defendant has maintained that there is no liability. As stated above, Defendant alleges that the policies, practices, or procedures, Plaintiff contends were applied to him did not exist, that he did not suffer any injury, and that a class could not have been certified for various

1 reasons. There is always a risk that the court will not grant certification of the class, wherein
2 the class will not be entitled to any damages. Based on the foregoing, there was a substantial
3 risk that Plaintiff would not have obtained the total amount of damages alleged, and a
4 substantial amount of complex issues that would have necessitated significant expenditure of
5 time and expenses. Therefore, the risks, expenses, and complexity of further litigation warrant
6 granting of this Motion.

7 **D. The Terms, Negotiation, and Reception of the Settlement by Class Members**
8 **Strongly Support the Conclusion that the Settlement is Fair, Adequate, and**
9 **Reasonable**

10 Without reiterating the Parties' showing that the Settlement Agreement and the
11 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion
12 for Preliminary Approval of Class Action Settlement, the Parties highlight the following facts.
13 The Settlement Agreement was the product of negotiation between highly able and
14 experienced attorneys on both sides who possessed the relevant data and extensive legal
15 research which they had carefully analyzed. (Declaration of Max W. Gavron ("Gavron Decl.")
16 ¶ 3.)

17 The results after mailing of the Class Notice support confirmation of the Court's
18 preliminary approval of the settlement with final approval of the settlement, as evidenced by
19 the fact that to date, zero requests for exclusion and no objections to the settlement have been
20 received. (Admin Decl. ¶¶ 9,10.) The Court may appropriately infer that the class action
21 settlement is fair, adequate, and reasonable, given that not a single class member has submitted
22 an objection. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

23 **E. Under Well-Established Legal Principles, the Court Should Grant Final**
24 **Approval of the Settlement**

25 **1. Standard of Review**

26 On a motion for final approval of a class action settlement under California Code of
27 Civil Procedure Section 382 and California Rule of Court 3.769, a court's inquiry is whether
28 the settlement is "fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm'n*,
688 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm'n*, 459 U.S.

1 1217 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final
2 approval, when “the interests of the class are better served by the settlement than by further
3 litigation.” *See Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed.
4 2004) (“MCL”). The law favors settlement, particularly in class actions and other complex
5 cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of
6 formal litigation. *See Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41
7 (2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van*
8 *Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

9 Although the Court possesses “broad discretion” in determining that a proposed class
10 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
11 reasoned judgment that the agreement is not the product of fraud or overreaching by, or
12 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
13 reasonable, and adequate to all concerned. *See Officers for Justice*, 688 F.2d at 625.

14 Accordingly, the Court should give due regard to what is otherwise a “private consensual
15 agreement” between the parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993
16 WL 149840 (N.D. Cal. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp.
17 1379 (D. Ariz. 1989), *aff’d sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The
18 judicial role in reviewing a proposed settlement is critical, but limited to approving the
19 proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite
20 the agreement”).

21 A court’s approval of a class action settlement will only be reversed for a clear abuse
22 of discretion. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Officers for*
23 *Justice*, 688 F.2d at 626 (“reverse only upon a strong showing that the district court’s decision
24 was a clear abuse of discretion”).

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

26 It cannot be overemphasized that neither the trial court in approving the settlement
27 nor this Court in reviewing that approval have the right or duty to reach any ultimate
28 conclusions on the issues of fact and law which underlie the merits of the dispute.
It is well settled that in the judicial consideration of proposed settlements, ‘the
[trial] judge does not try out or attempt to decide the merits of the controversy,’
[citation] and the appellate court ‘need not and should not reach any dispositive

conclusions on the admittedly unsettled legal issue.

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

2. The Settlement is Presumed to Be Fair

The Court should begin its analysis with the presumption that the settlement is fair and should be approved:

[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.

Dunk, 48 Cal. App. 4th at 1802; *accord*, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at 1387.

The settlement in the case at bar warrants approval and carries a presumption of fairness. As previously noted in the application for Preliminary Approval, this current settlement was negotiated at arm's length. (Gavron Decl. ¶¶ 3-4.) Class Counsel engaged in extensive factual investigation before settling, including engaging in informal discovery and reviewing class data. (*Id.*) Further, Class Counsel is highly experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has significant experience in class actions and employment wage and hour matters. (Gavron Decl. ¶¶ 8-14; Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 10-12; Declaration of Kwanporn "Mai" Tulyathan ("Tulyathan Decl.") ¶¶ 7-11; Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.") ¶ 4; Declaration of Laura L. Franklin ("Franklin Decl.") ¶¶ 3, 4.)

3. Two-Way Costs and Other Risks Inherent in Continued Litigation Favor Final Approval

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

1 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would
2 have been potentially responsible for Defendant's costs. If other class members decided to
3 pursue their claims individually, they too would be subject to this risk. Moreover, in cases like
4 this where the potential individual recovery is modest when compared to the financial and
5 temporal cost of litigation, the class mechanism provides a real benefit.

6 The risks of this case were weighed by Class Counsel and should be considered a
7 significant factor by the Court in its determination of final approval. Class Counsel obtained a
8 substantial settlement for the Class that resulted in a fair recovery which at the same time
9 provides for finality and no risk of costs by the Class Members or Class Representative.

10 The Settlement Agreement also affords the Class prompt, fair relief while avoiding
11 significant legal and factual battles that otherwise may have prevented the Class from
12 obtaining any recovery at all. While Class Counsel believe the Class Members' claims are
13 meritorious and can be successfully litigated, they are experienced and fully understand the
14 inherent risks and uncertainty involved with such matters as the resolution of class
15 certification, the outcome of a potential trial, and the outcome of any appeals that would
16 inevitably follow should the Class prevail at trial. Class Counsel has also assessed the same
17 risks in connection with the current settlement. Because the settlement provides immediate and
18 substantial relief, without the attendant risks and delay of continued litigation—not to mention
19 the threat of litigation fees and costs—Class Counsel believe that the settlement warrants the
20 Court's final approval.

21 **4. The Complexity, Expense, and Likely Duration of Continued**
22 **Litigation Against Defendant Favor Final Approval**

23 Another factor considered by courts in approving a settlement is the complexity,
24 expense, and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*,
25 521 F.2d at 157. In applying this factor, the Court must weigh the benefits of the settlement
26 against the expense and delay involved in achieving an equivalent or more favorable result at
27 trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

28 As noted above, continued litigation could have led to appeals on a number of issues.
On the other hand, the settlement that was reached provides to all Class Members—regardless

1 of their means—fair relief in a prompt and efficient manner. Were the Court to deny final
2 approval, the Class Members would be left without a remedy as a practical matter and courts
3 across the State would have to address the issues presented here in a piecemeal, costly, and
4 time-consuming manner. The settlement in this case is therefore consistent with the
5 “overriding public interest in settling and quieting litigation” that is “particularly true in class
6 action suits.” *See Van Bronkhorst*, 529 F.2d at 950 (footnote omitted); *see also 4 Newberg* at §
7 11.41.

8 **5. The Opinion of Experienced Counsel Favors Final Approval**

9 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
10 interest of the Class Members as a whole. (Gavron Decl. ¶ 4; Lee Decl. ¶ 5; Tulyathan Decl. ¶
11 5; Fitzpatrick Decl. ¶ 9; Franklin Decl. ¶ 2.) Similarly, counsel for Defendant is in favor of this
12 settlement. The endorsement of qualified and well-informed counsel of a settlement as fair,
13 reasonable, and adequate is entitled to significant weight by the Court in its final approval
14 determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F.
15 Supp. at 617; *Linney*, 151 F.3d at 1242.

16 **IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS** 17 **SHOULD BE APPROVED**

18 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
19 settlement funds remain after 180 days, the Parties have agreed that all funds shall escheat to
20 the *cy pres* recipient Legal Aid at Work. Class Counsel does not have any conflicts of interest
21 with Legal Aid at Work. (Gavron Decl. ¶ 16; Lee Decl. ¶ 14; Tulyathan Decl. ¶ 14;
22 Fitzpatrick Decl. ¶ 10; Franklin Decl. ¶ 6.)

23 **V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD** 24 **BE APPROVED**

25 Class Representative Nicolas Serafica requests a total enhancement of \$10,000.00. As
26 described previously in Plaintiff’s Motion for Preliminary Approval, Plaintiff met with Class
27 Counsel, including providing substantive information regarding Defendant’s practices.

28 In addition to the invaluable services that he provided, Plaintiff took significant risks,

1 both professionally and monetarily, in acting as Class Representative, seeking benefits on
2 behalf of the Class. Because the claims alleged by the Class Representative involved the
3 payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of
4 Defendant, had he not prevailed in this action.

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

16 As requested by the Court in its September 12, 2022 Order Concerning Plaintiff's
17 Motion for Preliminary Approval of Settlement of CLASS/PAGA Claims, concurrent with this
18 filing Plaintiff lodges a copy of the Confidential Settlement Agreement and General Release of
19 Claims for Nicolas Serafica. Gavron Decl. ¶ 17.

20 **VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

21 Class Counsel seeks a fee award calculated at one-third of the total value of the
22 settlement for the successful prosecution and resolution of this action. California state and
23 federal courts have recognized that an appropriate method for determining award of attorneys'
24 fees is based on a percentage of the total value of benefits to class members by the settlement.
25 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal.
26 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent*
27 *v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable
28 doctrine is to avoid unjust enrichment to the class and to "spread litigation costs proportionally

1 among all the beneficiaries so that the active beneficiary does not bear the entire burden
2 alone.” *Vincent v. Hughes Air West, Inc.*, *supra*, 557 F. 2d at 769.

3 Under California law, the award of attorneys’ fees in common fund wage and hour
4 class action settlements is proper under the percentage method. *See Laffitte v. Robert Half*
5 *Int’l*, 1 Cal. 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and
6 state courts in holding that when class action litigation establishes a monetary fund for the
7 benefit of the class members, and the trial court in its equitable powers awards class counsel a
8 fee out of that fund, the court may determine the amount of a reasonable fee by choosing an
9 appropriate percentage of the fund created”).

10 Here, the fee award representing one-third of the fund clearly falls within that range
11 and is consistent with other rulings of other courts and comprehensive surveys of class action
12 settlements and fee awards. *See Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796,
13 23 (S.D. Cal. June 9, 2011) (recognizing that “courts may award attorney’s fees in the 30-40%
14 range in wage and hour class actions that result in recovery of a common fund under \$10
15 million”); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An*
16 *Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent
17 studies of class action litigation nationwide conclude that fees in the range sought here are
18 consistent with market rates).

19 “[T]he response of the class members to attorneys’ fee notice, though not decisive, is
20 relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
21 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
22 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Class
23 Notice specifically notified Class Members that Class Counsel would be seeking \$381,666.67
24 in attorneys’ fees. To date, no Class Member has objected or opted out.

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

28 No one expects a lawyer whose compensation is contingent upon his success to
charge, when successful, as little as he would charge a client who had agreed to pay

1 for his services, regardless of success. Nor, particularly in complicated cases
2 producing large recoveries, is it just to make a fee depend solely on the reasonable
amount of time expended.

3 495 F. 2d 448, 470 (2d Cir. 1974). For Class Counsel, the fees here were wholly contingent in
4 nature and the case presented more risk than the usual contingency fee case. Among the risks
5 were the costs inherent in class action litigation, as well as a battle with a Defendant who had
6 retained a premier and highly experienced defense firm. As such, the requested fee should be
7 awarded.

8 As a secondary support for the percentage of the fund method, when fees are allocated
9 by percentage method, courts have discretion to “cross-check” the fees awarded through the
10 lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation,
11 when used in this manner, does not override the trial court’s primary determination of the fee
12 as a percentage of the common fund and thus does not impose an absolute maximum or
13 minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite*
14 *Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does
15 not trump the primary reliance on the percentage of common fund method”).

16 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
17 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
18 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
19 range, but the court is not necessarily required to make such an adjustment.” *Id.* Thus, a
20 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
21 required; in many cases, performing a cross-check “undermines” one of the primary reasons
22 for using the percentage method: aligning counsel’s incentives with the benefits delivered to
23 the class and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain the
24 discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
25 *Awarded Attorney Fees* 108 F.R.D. 237, 258 (1985); *Lealao*, 82 Cal. App. 4th 19, 29–30
26 (citing the recommendations of the Third Circuit Task Force with approval and observing that
27 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
28 authorities, who have been most vocal about the manner in which it exacerbates the problem

1 of ‘cheap settlements’ and burdens already overworked trial judge”).

2 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
3 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see*
4 *also, e.g., Sutter Health Uninsured Pricing Cases*, 171 Cal App.4th 495, 512 (2009) (applying
5 a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
6 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
7 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand).

8 With respect to Class Counsel’s lodestar, to date, approximately 267.8 hours have been
9 expended by Class Counsel this matter. (Gavron Decl. ¶ 6, Ex. A; Lee Decl. ¶ 7, Ex. A;
10 Tulyathan Decl. ¶ 12, Ex. A; Fitzpatrick Decl. ¶ 3, Ex. A.) Moreover, Class Counsel expect to
11 incur approximately 10 additional hours of attorney time in finalizing this settlement. (Lee
12 Decl. ¶ 8.) Mr. Lee requests hourly rates of \$750 per hour. (Lee Decl. ¶ 9.) Mr. Gavron
13 requests hourly rates of \$600 per hour. (Gavron Decl. ¶ 7.) Ms. Tulyathan requests hourly
14 rates of \$500 per hour. (Tulyathan Decl. ¶ 13.) Mr. Fitzpatrick and Ms. Franklin request
15 hourly rates of \$750 per hour. (Fitzpatrick Decl. ¶ 5.) The courts are quite liberal in the
16 evidence required to prove an attorney’s hours. Detailed time records are not required. An
17 attorney’s testimony alone may suffice: “Testimony of an attorney as to the number of hours
18 worked on a particular case is sufficient evidence to support an award of attorney fees, even in
19 the absence of detailed time records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

20 Reasonable hours include, in addition to time spent during litigation, the time spent
21 before the action is filed, including time spent interviewing the clients, investigating the facts
22 and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447
23 U.S. 54, 62 (1980). Further, the fee award should include fees incurred to establish and defend
24 the attorneys’ fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*].

25 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
26 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
27 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*,
28 the attorney’s skill and experience, the nature of the work performed, the relevant area of

1 expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*,
2 61 Cal. App. 4th 629, 632-33 (1998).

3 Class Counsel's skill and experience justify the requested rate. As shown in the
4 supporting declarations, Class Counsel have significant experience in the area of employment
5 and wage and hour class actions. Specifically, Class Counsel's practice focuses on
6 representing employees in employment matters, particularly wage and hour cases. (Gavron
7 Decl. ¶¶ 8-14; Lee Decl. ¶¶ 10-12; Tulyathan Decl. ¶ 6; Fitzpatrick Decl. ¶ 4; Franklin Decl.
8 ¶¶ 3, 4.) As such, based on the hours and applicable rate, the total lodestar to be expended by
9 Class Counsel through finalizing this settlement will be approximately \$179,117.50. (Gavron
10 Decl. ¶ 6, Ex. A; Lee Decl. ¶ 7, Ex. A; Tulyathan Decl. ¶ 12, Ex. A; Fitzpatrick Decl. ¶ 3, Ex.
11 A.)

12 Once the court establishes the lodestar amount, it may enhance the fee award by a
13 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at 48. The
14 pertinent factors include the difficulty of the questions involved and the skill in presenting
15 them, the contingent nature of the fee award, the extent to which the litigation precluded other
16 employment, and the percentage-of-the-fund the attorney would have received on the fair
17 market. *Id.*, *Lealao*, 82 Cal. App. 4th at 49. However, this list is not exhaustive and the court
18 can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24
19 Cal. 4th 1122, 1139 (2001).

20 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
21 the-benefit, namely, no objections by Class Members, commendable conduct by counsel, and
22 significant recoveries by Class Members, all of which were previously detailed above. *Lealao*,
23 82 Cal. App. 4th at 51-53. As in *Lealao*, the Class was notified of the settlement and attorneys'
24 fee with no objections. The extreme effort undertaken by counsel, as shown by their hours and
25 the significantly high amount of claims being paid out, shows commendable conduct.

26 It is also critical to note that prompt settlement cannot be used to diminish the fee or
27 the enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal. App. 4th at 52 (the
28 promptness of settlement "cannot be used to justify the refusal to apply a multiplier").

1 According to *Lealao*, courts placed “an extraordinarily high value” on settlement, and counsel
2 should be rewarded, not punished, for achieving this goal in a timely fashion. *Id.*

3 Here based upon Plaintiff’s counsel’s lodestar of \$179,117.50 Plaintiff’s request for a
4 multiplier of approximately 2.13 ($\$179,117.50 \times 2.13 = \$381,520.27$) is reasonable and fair,
5 particularly based on the factors described above. *Wershba v. Apple Computer, Inc.*, 91 Cal.
6 App. 4th 224 (Ct. App. 2001) (noting that courts using the lodestar method to calculate
7 attorney fees awards in class actions typically apply multipliers in the range of 2 to 4); *Boyd v.*
8 *Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33%
9 of the common fund, based on a multiplier of 2.58, in a wage and hour class action
10 settlement); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014)
11 (awarding 33% of the common fund, based on a multiplier of 2.52).

12 As such, the requested fee award is fair and reasonable, and should be awarded in its
13 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
14 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
15 Class Counsel’s request for attorneys’ fees in the amount of \$381,666.67 is fair, reasonable,
16 and adequate.

17 In its Order, the Court requested that Class Counsel provide information regarding
18 their fee-splitting arrangement. Order at 6. For purposes of this Action, Class Counsel and
19 Plaintiff have agreed to split the fees awarded by the Court as follows: 40% of the approved
20 fees to Fitzpatrick & Swanston and 60% of the approved fees to Diversity Law Group, P.C.
21 Lee Decl. ¶ 15.

22 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
23 **OF COSTS & SETTLEMENT ADMINISTRATOR FEES**

24 The request for reimbursement of costs, in the amount of \$8,221.12 is fair and
25 reasonable. The costs are all litigation related costs. (Lee Decl. ¶ 7, Ex. B.; Fitzpatrick Decl. ¶
26 7, Ex. B). The authority for the Court to award this is the Parties’ Settlement Agreement and
27 Labor Code Sections 226, 1194, and 2699. The difference of the amount requested and
28 provided for in the Settlement Agreement will revert to the Net Settlement Amount. As such,

1 this request should be approved.

2 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
3 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
4 funds. As shown on the Declaration of Kevin Lee, the settlement administration costs
5 expended in this matter amount to a total of \$12,250.00, which is an amount that was agreed
6 upon by the Parties. (Admin Decl. ¶ 18.) For such reasons, it is requested that the Settlement
7 Administrator's fees be approved.

8 **VIII. CONCLUSION**

9 Plaintiff respectfully submits that the standards for final approval have been met.

10
11 Dated: December 19, 2022

DIVERSITY LAW GROUP, P.C.
FITZPATRICK & SWANSTON

12
13 By: 

Larry W. Lee
B. James Fitzpatrick
Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

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

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

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

10 On December 19, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL**
OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
- 13 **3. DECLARATION OF MAX GAVRON IN SUPPORT OF PLAINTIFF'S MOTION**
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
- 14 **4. DECLARATION OF KWANPORN "MAI" TULYATHAN IN SUPPORT OF**
PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION
15 **SETTLEMENT**
- 16 **5. DECLARATION OF B. JAMES FITZPATRICK IN SUPPORT OF PLAINTIFF'S**
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
- 17 **6. DECLARATION OF LAURA L. FRANKLIN IN SUPPORT OF PLAINTIFF'S**
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
- 18 **7. DECLARATION OF KEVIN LEE REGARDING SETTLEMENT NOTICE**
ADMINISTRATION
- 19 **8. [PROPOSED] ORDER GRANTING FINAL APPROVAL OF SETTLEMENT**
AND JUDGMENT

20 on the interested parties in this action as follows:

21

22 23 24 25 26 27 28	Geoffrey C. Westbrook Brad D. Doucette Seyfarth Shaw LLP 400 Capitol Mall, Suite 2350	Andrew M. Paley Seyfarth Shaw LLP 2029 Century Park East, Suite 3500 Los Angeles, California 90067-3021
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1 Sacramento, California 95814-4428
2 Attorneys for Defendant HGST, Inc.

Attorneys for Defendant HGST, Inc.

3 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
4 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
5 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
6 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.

7 I declare under penalty of perjury under the laws of the State of California that the
8 above is true and correct. Executed on December 19, 2022, at Los Angeles, California.

9
10 
11 Erika Mejia