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

AMY OROZCO, as an individual and on  
behalf of all others similarly situated,

Plaintiff,

vs.

BETTS COMPANY, a California  
corporation; and DOES 1 through 50,  
inclusive,

Defendants.

Case No.: 34-2021-00309846

(Assigned to the Hon. Lauri A. Damrell, Dept. 28)

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

Date: May 5, 2023

Time: 9:00 a.m.

Dept.: 28

**Reservation No.: 2713039**

Complaint Filed: October 15, 2021

FAC Filed: December 27, 2021

SAC Filed: March 9, 2022

Trial Date: Not Set

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

**PLEASE TAKE NOTICE** that on May 5, 2023, at 9:00 a.m. before the Honorable Lauri A. Damrell, judge presiding in Department 28 of the above-referenced Court, located at 720 Ninth Street, Sacramento, California 95814, Plaintiff Amy Orozco (“Plaintiff”) will and hereby does move the Court for the following relief with respect to the Joint Stipulation of Class Action and PAGA Settlement and Release (“Stipulation” or “Settlement Agreement”) entered into by Plaintiff and Defendant Betts Company (“Defendant”) (together with Plaintiff, the “Parties”):

1. That the Court approve the Stipulation referenced above;

2. That the Court conditionally certify the following Class for settlement purposes only: all current and former non-exempt employees of Defendant in the State of California who were paid “Opt-Out OT” wages and/or who received Opt-Out wages or other bonuses in the same pay period as a meal/rest period premium and/or paid sick leave wages anytime during the Class Period (the period from May 21, 2020, through October 31, 2022).

3. That Plaintiff Amy Orozco be appointed as the Class Representative, and Larry W. Lee, Kristen M. Agnew, and Nicholas Rosenthal of Diversity Law Group, P.C., and Kelsey A. Webber and Shaelyn A. Stewart of Webber Law Group be appointed as Class Counsel;

4. That the Court preliminary approve the Stipulation and the total Gross Settlement Amount in the amount of Ninety Thousand Dollars (\$90,000.00);

5. That the Court finds on a preliminary basis that the Stipulation appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, the enhancement payment to the Class Representative, Class Counsel award of attorneys’ fees, settlement administration costs, and the allocation of individual payments to Class Members, that could ultimately be given final approval by this Court;

6. That the Court approve the mailing of the proposed Notice of Class Action Settlement (“Notice Packet”) to be sent to Class Members;

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

8. That the Court schedule the matter for a final approval hearing.

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

4 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and  
5 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of  
6 Class Members to participate in, opt out of, or object to the settlement. This Motion is based on  
7 the Memorandum of Points and Authorities included herein, the Stipulation and the proposed  
8 Notice Packet, and the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas  
9 Rosenthal, Kelsey A. Webber, and Plaintiff Amy Orozco, and upon the oral arguments of  
10 counsel (should there be any), and on the complete records and file herein.

11  
12 DATED: April 12, 2023

DIVERSITY LAW GROUP, P.C.

13  
14 By:   
15 Larry W. Lee  
16 Kristen M. Agnew  
17 Nicholas Rosenthal  
18 Attorneys for Plaintiff and the Class  
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1     **I.     INTRODUCTION**

2             This is a wage and hour class and representative Private Attorneys General Act (“PAGA”)  
3     action under the California Labor Code. Plaintiff Amy Orozco (“Plaintiff”) alleges that Defendant  
4     Betts Company (“Defendant”) failed to provide accurate, itemized wage statements in violation of  
5     Labor Code § 226(a), failed to pay meal and rest period premium at the regular rate of pay in  
6     violation of Labor Code §§ 226.7 and 512, failed to pay sick pay at the regular rate of pay in  
7     violation of Labor Code §§ 201-204 and 246, and engaged in Unfair Business Practices in  
8     violation of the California Labor Code, the applicable Industrial Wage Commission (“IWC”)  
9     Wage Orders, and the Unfair Competition Law (“UCL”). Based on these violations, Plaintiff  
10    asserts class and PAGA claims for violation of Labor Code §§ 201-204, 226(a), 226.7, 246, 512,  
11    and 2698, *et seq.* Defendant denied all material allegations. The Parties have reached a class and  
12    PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of Class  
13    Action and PAGA Settlement and Release (“Stipulation” or “Settlement Agreement”).

14            Prior to the settlement of this action, the Parties thoroughly investigated the facts relating  
15    to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal  
16    principles applicable to the claims asserted against Defendant. Through the exchange of informal  
17    discovery in connection with mediation, Defendant provided necessary data pertaining to the  
18    number of putative class members, the hourly rates of pay, number of workweeks, payroll data  
19    for the putative class, and pertinent policies regarding meal and rest periods, Opt-Out pay, and  
20    sick leave. The information provided by Defendant allowed Plaintiff to review and analyze the  
21    liability and potential exposure. Thereafter, the Parties attended a full day of mediation with  
22    experienced mediator Tripper Ortman, Esq., after which the Parties were able to reach the  
23    current settlement.

24            The terms of the Settlement Agreement provide that Defendant pay a Gross Settlement  
25    Amount of Ninety Thousand Dollars (\$90,000.00) to resolve the class and PAGA claims.  
26    Significantly, the entire Gross Settlement Amount will be distributed to the class on a **non-**  
27    **reversionary** basis, such that no remaining monies will revert to Defendant. Further, no  
28    claim forms are required. The following represents the key terms of the Settlement:

- Gross Settlement Amount of \$90,000.00;
- Estimated class size of 75 individuals;
- Enhancement payment to the Class Representative of up to \$5,000.00;
- Class Counsel’s attorneys’ fees of one-third of the Gross Settlement Amount, up to \$30,000.00;
- Class Counsel’s costs of up to \$20,000.00;
- Settlement Administration costs of up to \$6,500.00;
- PAGA Payment of \$5,000.00, of which 75%, or \$3,750.00, will be paid to the Labor & Workforce Development Agency (“LWDA”), and the remaining 25%, or \$1,250.00, will be distributed to Class Members who worked during the PAGA Period on a pro rata basis, based on the number of weeks worked by the Class Member during the PAGA Period;
- Net Settlement Amount of approximately \$23,500.00 to be distributed to Class Members on a pro rata basis, based on the number of weeks worked by Class Members during the Class Period; and
- Raw average of at least **\$313.33** from the Net Settlement Amount to be paid to each Participating Class Member.

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

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

## **II. PROCEDURAL HISTORY**

On September 27, 2021, Plaintiff submitted her written notice to the LWDA, alleging violations of Labor Code §§ 201-204, 226, 226.7, 246, and 512, pursuant to the PAGA, Labor

Code § 2699. Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 2. Thereafter, on October 15, 2021, Plaintiff filed a class action complaint against Defendant in the Sacramento County Superior Court, alleging three causes of action for: (1) violation of Labor Code § 226; (2) violation of Labor Code §§ 226.7 and 512; and (3) violation of Labor Code §§ 201-204 and 246. *Id.* ¶ 3. Defendant filed its Answer on or about December 22, 2021. *Id.* ¶ 3.

On December 22, 2021, Plaintiff filed a first amended complaint to add a fourth cause of action for violation of Labor Code § 2698, *et seq.* *Id.* ¶ 4.

On February 22, 2022, the Parties submitted a joint stipulation granting Plaintiff leave to file a second amended complaint to add a cause of action for violation of Business and Professions Code § 17200, *et seq.* *Id.* ¶ 5. The second amended complaint was filed on March 9, 2022. *Id.* The second amended complaint is the operative Complaint (“Complaint”).

Plaintiff’s class and PAGA claims as pled in the Complaint are predicated upon the following allegations. With respect to Plaintiff’s claims under Labor Code §§ 226.7 and 512, Plaintiff alleges that Defendant failed to pay meal and rest period premiums at the correct regular rate of pay. In this regard, Plaintiff contends that Defendant failed to factor non-discretionary remuneration, including “Opt-Out” wages, into the calculation of the regular rate for purposes of paying meal and rest period premiums, and thus Plaintiff and employees were underpaid meal and rest period premiums. *Id.* ¶ 6.

Likewise, when Plaintiff and employees received sick pay wages, Defendant failed to pay such wages at the correct regular rate of pay. Plaintiff contends that Defendant failed to factor non-discretionary remuneration, including “Opt-Out” wages, into the calculation of the regular rate for purposes of paying sick pay wages, and thus Plaintiff and employees were underpaid sick pay wages. *Id.* ¶ 7.

Plaintiff also alleges derivative and independent wage statement claims under Labor Code § 226(a). Specifically, as a result of the regular rate claims, Plaintiff asserts that the corresponding wage statements issued to Plaintiff and other employees failed to identify the required information under Labor Code § 226(a). With respect to the independent 226(a) claim, Plaintiff asserts that Defendant issued inaccurate wage statements whenever “Opt-Out OT”

1 wages were paid. In this regard, whenever “Opt-Out OT” wages were paid, Defendant allegedly  
2 failed to list the applicable rate of pay and corresponding hours worked on wage statements in  
3 violation of Labor Code § 226(a). *Id.* ¶ 8. As a result of these alleged violations, Plaintiff seeks  
4 unpaid wages, waiting time penalties, statutory penalties, and civil penalties under the California  
5 Labor Code and PAGA, as well as attorneys’ fees and costs. *Id.*

6 After Plaintiff filed the operative Complaint, the Parties agreed to participate in private  
7 mediation. In connection with mediation, the Parties agreed to conduct informal discovery to  
8 allow Plaintiff to assess the claims and liability, as well as analyze the maximum exposure of  
9 damages and penalties. Rosenthal Decl. ¶ 9. Defendant produced class data, including data  
10 pertaining to the number of putative class members, the hourly rates of pay, number of  
11 workweeks, payroll data for the putative class, and pertinent policies regarding meal and rest  
12 periods, Opt-Out pay, and sick leave. *Id.* Plaintiff reviewed the data and records and performed an  
13 analysis of Defendant’s maximum liability. *Id.*

14 On September 24, 2022, the Parties engaged in a full-day mediation with mediator  
15 Tripper Ortman, Esq. Rosenthal Decl. ¶ 10. Prior to mediation, it was agreed that because of a  
16 prior settlement entered into by Defendant, the time period for any settlement would begin on  
17 May 21, 2020. After thorough investigation and evaluation of the facts and claims, and  
18 negotiations with the assistance of Mr. Ortman, the Parties and their counsel reached a settlement  
19 and entered into a memorandum of understanding. *Id.* In resolution of Plaintiff’s class and  
20 PAGA claims, the Parties entered into the Joint Stipulation of Class Action and PAGA  
21 Settlement and Release, a true and correct copy of which is attached as **Exhibit A** to the  
22 Declaration of Nicholas Rosenthal. *Id.*

23 The Parties recognize the risk, expense, and delay in continuing litigation with the class  
24 and PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. *Id.* ¶ 11.  
25 Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims  
26 arising from or relating to the class and PAGA claims as set forth in the Settlement Agreement.

### 27 **III. DISCUSSION**

28 Any settlement of a class action lawsuit must be reviewed and approved by the Court.

1 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final  
2 review after notice has been distributed to the class members for their comment or objections.

3 The *Manual for Complex Litigation, Third* § 30.41 states:

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

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

16           Thus, the preliminary approval by the trial court is simply a conditional finding that the  
17          settlement appears to be within the range of acceptable settlements. As Professor Newberg  
18          comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference  
19          concerning a tentative settlement proposal may vary. The court may find that the settlement  
20          proposal contains some merit, is within the range of reasonableness required for a settlement  
21          offer, or is presumptively valid subject only to any objections that may be raised at a final  
22          hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed.  
23          2004).

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

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

33 *Id.* § 11.24.

34           Here, the Parties have reached such an agreement and have submitted to this Court in

1 connection with this Motion a copy of the Stipulation fully setting forth the agreement reached  
2 by the Parties. The Stipulation sets forth all terms of the agreement reached by the Parties as to  
3 settlement of the class and PAGA claims. Said terms in the Stipulation include, among other  
4 things, the method for calculating the Class Members' individual portions of the settlement  
5 payment.

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

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

20 4 *Newberg on Class Actions* § 11.26.

21 In addition to such terms as class identification, settlement amount, and payment  
22 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to  
23 which the Parties stipulate to the Court's provisional certification of the Class for the purposes of  
24 this settlement only. *See* Stipulation ¶ 93.

25 **A. Proposed Class Definition**

26 The current settlement is being settled on behalf of the following Class: all current and  
27 former non-exempt employees of Defendant in the State of California who were paid “Opt-Out  
28 OT” wages and/or who received Opt-Out wages or other bonuses in the same pay period as a

1 meal/rest period premium and/or paid sick leave wages anytime during the Class Period (the  
2 “Class”). Stipulation ¶ 4. The Class Period means the period from May 21, 2020, through October  
3 31, 2022. *Id.* ¶ 8.

4 Pursuant to the Stipulation, Defendant has represented that there are approximately 75  
5 individuals that comprise the Class. Stipulation ¶ 4.

6 **B. Settlement Terms and Evaluation**

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

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

26 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage  
27 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a  
28 number of wage and hour class actions and have extensive litigation experience. Declaration of

1 Larry W. Lee (“Lee Decl.”) ¶¶ 6-8; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶¶ 6-11;  
2 Rosenthal Decl. ¶¶ 30, 31; Declaration of Kelsey A. Webber (“Webber Decl.”) ¶¶ 2-8. Each side  
3 has apprised the other of their respective factual contentions, legal theories, and defenses,  
4 resulting in negotiations taking place between the Parties. Rosenthal Decl. ¶ 12.

5 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would  
6 face potential liability of up to approximately \$234,950 for Plaintiff’s class claims if Plaintiff  
7 succeeded at trial. Rosenthal Decl. ¶ 13. Plaintiff was able to estimate the potential class  
8 penalties based on class data provided by Defendant. *Id.* Specifically, for Plaintiff’s wage  
9 statement claim, 72 employees received a total of 1,392 wage statements containing payments  
10 for “opt-out” wages. *Id.* This amounts to \$135,600 in penalties under Labor Code Section 226(e).  
11 Further penalties under Section 226(e) for wage statements in which employees received “opt-  
12 out” wages and either meal/rest premiums or sick pay wages amount to \$24,400. *Id.*  
13 Additionally, penalties under Labor Code Section 203 amount to \$74,949.80 based on 17  
14 separated employees (who received “opt-out” wages and meal/rest premiums or sick pay wages  
15 in the same pay period) with an average hourly rate of \$18.37. Rosenthal Decl. ¶14.

16 With respect to potential liability of Plaintiff’s PAGA claims, Plaintiff estimated that  
17 Defendant could face civil penalties of up to a maximum \$165,300 if Plaintiff were successful at  
18 trial on all claims. Rosenthal Decl. ¶ 15. However, even assuming Plaintiff ultimately prevails on  
19 her PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor  
20 Code § 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts  
21 and circumstances of the particular case, to do otherwise, would result in an award that is unjust,  
22 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in  
23 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his  
24 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,  
25 citing the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review,  
26 the Court of Appeal found such reduction to be proper. *Id.* at p. 539.

27 Although Plaintiff believes in the merits of the alleged claims and maintains that there is  
28 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to

1 the claims and further with respect to the reduction of PAGA penalties and that it could be  
2 persuasive to the Court. Rosenthal Decl. ¶ 17. Thus, even if Plaintiff were to successfully prove  
3 her claims at trial, there is a possibility that the Court may only award a small percentage of  
4 PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was  
5 premised with this risk in mind, associated with the possibility of the Court significantly  
6 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to  
7 prevail at trial. *Id.*

8 Further, Defendant raised several defenses that presented risk as to liability on the class  
9 claims. The primary defense was that the vast majority of the class signed arbitration agreements.  
10 Plaintiff's counsel reviewed the arbitration agreements and agrees that there is a significant  
11 likelihood they would be enforced by the Court. Assuming that the arbitration agreements were  
12 enforced, total potential class liability would drop from \$234,950 to \$75,528.

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

19 Although Plaintiff believes that the class can be certified, Plaintiff also believes in the  
20 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff  
21 involved in not prevailing on one or more of the causes of action or theories alleged in the  
22 operative Complaint, the possibility of non-certification, and the potential for appeals. Rosenthal  
23 Decl. ¶ 19. These risks on class certification are compounded by the California Supreme Court's  
24 holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained  
25 class certification and subsequently prevailed at trial after eight years of litigation, but the  
26 judgment and the certification ruling were reversed by the California Supreme Court after an  
27 additional five years of litigation. The case was remanded back to superior court where class  
28 certification was denied and plaintiffs' subsequent appeal also was denied.

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

17 Here, the total amount of class and PAGA penalties amount to approximately \$400,250,  
18 without discounting for potentially losing on any of the causes of action. Rosenthal Decl. ¶ 16.  
19 The Gross Settlement Amount is \$90,000.00, which is approximately **22.5%** of the maximum  
20 class and PAGA penalties. *Id.* Thus, the Settlement was negotiated at arm's length and the  
21 significantly high settlement percentage-to-recovery further supports that the settlement is fair  
22 and reasonable.

23 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class  
24 Action Settlement ("Notice Packet"), should any Class Member wish to pursue his or her own  
25 case for the claims being released herein, each Class Member has the right to submit a Request  
26 for Exclusion (*i.e.*, opt-out) from the settlement, with the exception of the PAGA claims. *See*  
27 Notice Packet, attached as **Exhibit B** to Rosenthal Decl. Moreover, as set forth in the Notice  
28 Packet, Class Members are advised of their right to object to any of the terms contained in the

1 Stipulation and attend the final approval hearing. *Id.*

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

5 The Stipulation provides for Ninety Thousand Dollars (\$90,000.00) as the Gross  
6 Settlement Amount. *See* Stipulation ¶ 17. The Net Settlement Amount, calculated after deduction  
7 of attorneys' fees (up to \$30,000.00), litigation costs (up to \$20,000.00), the enhancement  
8 payment to the Class Representative (up to \$5,000.00), the PAGA Payment (\$5,000.00), and  
9 Settlement Administration costs (up to \$6,500.00), is estimated to be approximately **\$23,500.00**.  
10 *Id.* ¶¶ 6, 10, 17, 19, 22, 34.

11 Pursuant to the Stipulation, the Net Settlement Amount will be apportioned among the  
12 Class Members on a pro rata basis, based on the number of weeks worked by each respective  
13 Participating Class Member during the Class Period, as compared to the total number of weeks  
14 worked by all Participating Class Members during the Class Period. *See* Stipulation ¶ 50. Based  
15 thereon, on a raw average, each Class Member may potentially recover approximately \$313.33.  
16 Rosenthal Decl. ¶ 20. The amount actually paid to each Class Member may increase or decrease  
17 depending on the actual number of weeks worked during the Class Period and the number of opt-  
18 outs received. *Id.* As Class Counsel's costs are significantly lower than the \$20,000 cap, it is  
19 expected that the Net Settlement Amount will increase substantially.

20 Additionally, as part of the PAGA Payment, 25% of the PAGA Payment, or \$1,250.00,  
21 shall be paid to Class Members who worked during the PAGA Period (September 20, 2020,  
22 through October 31, 2022), on a pro rata basis, based on the number of weeks worked by each  
23 Class Member during the PAGA Period as compared to the total number of weeks worked by all  
24 Class Members during the PAGA Period. Stipulation ¶ 49.

25 Finally, the terms of the Settlement provide that uncashed checks (upon the expiration  
26 date) shall be distributed to the Boys and Girls Clubs of Fresno County, a non-profit organization  
27 that provides social and educational programs for youth development, in accordance with  
28 California Civil Procedure § 384. *See* Stipulation ¶ 68; *see* Rosenthal Decl. ¶ 24.

//

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

4                   This Settlement is non-reversionary, meaning that none of the settlement funds will revert  
5                   back to Defendant. *See* Stipulation ¶ 44.

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

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

10                   all claims, including penalties, interest, damages, liquidated  
11                   damages, costs, and attorneys' fees related thereto, that were or  
12                   could have been brought under the facts and allegation made in the  
13                   operative Second Amended Complaint for violation of Labor Code  
14                   §§ 201, 202, 203, 204, 226, 226.7, 246, and 512 that accrued  
15                   during the Class Period.

16                   *See* Stipulation ¶¶ 27, 72.

17                   In consideration of the PAGA Payment, Class Members who worked during the PAGA  
18                   Period will also provide the following release of PAGA claims ("Released PAGA Claims") as of  
19                   the Effective Date:

20                   all claims for penalties under the California Private Attorneys  
21                   General Act, including interest, damages, liquidated damages,  
22                   costs, and attorneys' fees related thereto, predicated on the  
23                   violation of Labor Code §§ 201, 202, 203, 204, 226, 226.7, 246,  
24                   and 512 that accrued during the PAGA Period and were or could  
25                   have been alleged in the operative Second Amended Complaint.

26                   *See* Stipulation ¶¶ 28, 73.

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

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

31                   The Parties have agreed that the Individual Settlement Payment to Class Members shall be  
32                   allocated as follows: ten percent (10%) as payment for wages, less withholdings and deductions,  
33                   for which an IRS Form W-2 shall issue, and ninety percent (90%) as payment of non-wage

1 compensation, including penalties and interest, for which an IRS Form 1099 shall issue. *See*  
2 Stipulation ¶ 51. With respect to PAGA payments distributed to Class Members who worked  
3 during the PAGA Period, one hundred percent (100%) of those payments shall be allocated as  
4 penalties and shall be deemed IRS Form 1099 income. *Id.*

5 Pursuant to the Stipulation, the Settlement Administrator will calculate, and Defendant  
6 will separately pay, the amount of employer-side payroll taxes on the wage portion of the  
7 Individual Settlement Payments paid to Class Members. *See id.*; Rosenthal Decl. ¶ 25.

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

10 As stated above, Class Members do **not** need to do anything should they wish to receive  
11 their share of the settlement funds. In other words, because this is not a claims-made settlement,  
12 Class Members will not be required to make a submission to participate in the settlement. No  
13 claim forms are required. Thus, this substantially decreases the amount of burden each Class  
14 Member must bear in order to receive their share of the settlement funds. If a Class Member does  
15 not wish to take part in this Settlement or be bound by the releases (with the exception of the  
16 Released PAGA Claims for Class Members who worked during the PAGA Period), the Class  
17 Member must submit a Request for Exclusion. *See* Stipulation ¶¶ 30, 62.

18 **C. Notice to Class Members**

19 Should the Court grant the instant motion, Defendant will provide the Settlement  
20 Administrator with a list containing each Class Member's full name, most recent mailing  
21 address, employee number, Social Security Number, the number of weeks he/she worked during  
22 the Class Period, and the number of weeks he/she worked during the PAGA Period (if  
23 applicable) ("Class List and Data"). *See* Stipulation ¶¶ 7, 57. Pursuant to the Stipulation,  
24 Defendant will provide said Class List and Data within fourteen (14) calendar days of  
25 preliminary approval. *Id.* ¶ 57. Upon receipt of the information and prior to mailing the Notice  
26 Packet to Class Members, the Settlement Administrator shall perform a search based on the  
27 National Change of Address Database for information to update and correct for any known or  
28 identifiable address changes. *Id.* ¶ 59.

1           Within five (5) business days of receipt of the Class List and Data from Defendant, the  
2 Settlement Administrator will mail the Notice Packet out to Class Members using the most  
3 current, known mailing address, via First-Class U.S. mail. *See* Stipulation ¶ 58. Any Notice  
4 Packets returned to the Settlement Administrator as non-deliverable on or before the response  
5 deadline shall be re-sent via regular First-Class U.S. mail to the forwarding address affixed  
6 thereto. *Id.* ¶ 61. If no forwarding address is provided, the Settlement Administrator will attempt  
7 to find the correct address using a skip-trace or other comparable search to locate the most  
8 current address to re-mail the Notice Packet. *Id.*

9           The Notice Packet will advise Class Members of what the litigation is about, their rights  
10 under the settlement, a summary of the principal terms and the monetary terms of the Settlement,  
11 their expected settlement payment share, including their share of the PAGA Payment (if  
12 applicable), their opportunity to and procedures to opt out or to object to the settlement, and the  
13 release of claims. *See* Notice Packet. As set forth in the Notice Packet, Class Members will be  
14 allowed to opt out of or object to the Settlement by a certain deadline, which is 60 calendar days  
15 after the initial mailing of the Notice Packet. *See* Stipulation ¶ 31. Class Members who received  
16 a re-mailed Notice Packet will have that deadline extended by 15 calendar days from the original  
17 response deadline. *Id.* ¶ 61. With respect to objections, Class Members are also informed in the  
18 Notice Packet that they may object in writing or appear at the final approval hearing to present  
19 their oral objections to the Court. *Id.* ¶ 64; *see* Notice Packet.

20           If Class Members need further information about the settlement and/or the lawsuit, Class  
21 Counsel's contact information and the Settlement Administrator's contact information are  
22 provided in the Notice Packet.

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

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

25           The commonality requirement is met when there are questions of law and fact common to  
26 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared  
27 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient  
28 facts couple with disparate legal remedies within the class"). Commonality requires only that

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

8         In the present case, Plaintiff alleges that Defendant is liable to the Class for (i) failure to  
9 provide accurate, itemized wage statements in violation of Labor Code § 226(a); (ii) failure to  
10 pay meal and rest period premium at the regular rate of pay in violation of Labor Code §§ 226.7  
11 and 512; (iii) failure to pay sick pay at the regular rate of pay in violation of Labor Code §§ 201-  
12 204 and 246; and (iv) engaging in Unfair Business Practices in violation of the California Labor  
13 Code, the applicable IWC Wage Orders, and the UCL. Like all Class Members, Plaintiff was  
14 subjected to these same policies and practices. Declaration of Amy Orozco (“Orozco Decl.”) ¶¶  
15 2-4. In particular, Plaintiff alleges that Defendant miscalculated the regular rate of pay when  
16 paying meal and rest period premiums and sick pay wages to Plaintiff whenever non-  
17 discretionary remuneration, such as “Opt-Out” wages, were paid to Plaintiff. *Id.* ¶ 3. Plaintiff  
18 also claims she was issued inaccurate wage statements that did not comply with Labor Code §  
19 226(a). *Id.* ¶ 4. In other words, Plaintiff contends that she was subjected to the same policies and  
20 practices as other Class Members and thus, the typicality requirement is met.

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

26                 **2. Class Counsel Has Adequately Represented the Class and Has Experience**  
27                 **with Wage and Hour Class Action**

28                 From the inception of the case, Class Counsel has zealously represented the interests of

1 the Class. Class Counsel has engaged in significant meet and confer discussions with opposing  
2 counsel to obtain informal data and documents and to discuss the merits of the claims on behalf  
3 of the Class. Rosenthal Decl. ¶ 27. The Settlement was obtained for the benefit of the Class, as  
4 opposed to the individual Class Representative. Further, Class Counsel has been approved as  
5 class counsel on a number of prior cases, have litigated numerous other class action cases, and  
6 are competent to represent the class. Lee Decl. ¶¶ 6-8; Agnew Decl. ¶¶ 6-11; Rosenthal Decl. ¶¶  
7 30, 31; Webber Decl. ¶¶ 2-8.

## 8 **E. Costs and Fees**

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

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

18 The common fund doctrine is predicated on the principle of preventing unjust  
19 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,  
20 she may require the passive beneficiaries to compensate those who created the fund. Both  
21 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at p. 35;  
22 *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th  
23 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has  
24 been applied "consistently in California when an action brought by one party creates a fund in  
25 which other persons are entitled to share." The reasons for applying the common fund doctrine  
26 include:

27 Fairness to the successful litigant, who might otherwise receive no  
28 benefit because his recovery might be consumed by the expenses;  
correlative prevention of an unfair advantage to the others who are

entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

*Id.*

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

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

The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount, or \$30,000.00, for payment to Class Counsel as attorneys' fees. *See* Stipulation ¶¶ 6, 46. The Parties have agreed to a payment of the foregoing attorneys' fees and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs up to \$20,000.00. *Id.* Class Counsel have, at their own risk, expended costs, for example, to file this instant action and other pleadings in the case, effect service of process, participate in mediation, and advance other litigation-related costs. If Class Counsel's actual costs are less than \$20,000.00, as is anticipated, the remainder will go to the Class for distribution.

Based on the foregoing, the Court should preliminarily approve the attorney's fees and

costs as requested by the Parties.

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

Class Representative Amy Orozco requests a modest enhancement of \$5,000.00. *See* Stipulation ¶¶ 10, 47. The Class Representative met and conferred with her counsel on a number of occasions to discuss the case, provided documents and information to her counsel, and reviewed pleadings and documents, including the Settlement Agreement. Orozco Decl. ¶¶ 6-8. As part of her duties as the Class Representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this Settlement. Furthermore, in consideration for her service payment, Plaintiff also executed an individual general release of all claims including a California Civil Code § 1542 waiver, which other members of the Class did not have to do. *See* Stipulation ¶ 74; Orozco Decl. ¶ 9.

In addition to the invaluable services that Plaintiff provided, she also took a significant risk, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had she not prevailed in this action.

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

## **3. Settlement Administration Fees**

The Parties have agreed to an estimated payment of no more than \$6,500.00 to the Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this settlement. *See* Stipulation ¶¶ 33, 34, 48. Phoenix Settlement Administrators is a well-recognized class action settlement administrator. The Parties believe that the administration fee

1 is reasonable and should be approved.

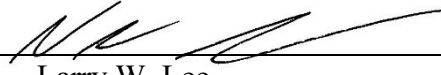
2 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**  
3 **PRELIMINARY APPROVAL**

4 The Settlement presented here is fair, adequate, and reasonable. The Settlement will  
5 result in both substantial monetary benefits to Class Members; it is non-collusive; and it was  
6 achieved as the result of informed, extensive, and arm's length negotiations conducted by  
7 counsel for the respective Parties who are experienced in wage and hour class action litigation  
8 and facilitated by an experienced and neutral mediator.

9 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary  
10 approval of the proposed Settlement, sign the proposed Order, approve and authorize mailing of  
11 the proposed Notice Packet, and set a date for a final approval hearing.

12  
13 DATED: April 12, 2023

DIVERSITY LAW GROUP, P.C.

14  
15 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

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