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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

DAVID MONTROYA, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

DRAEGER’S SUPER MARKETS, a
California corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 21-CIV-05746

[Assigned for all purposes to the Honorable Susan
L. Greenberg, Department 3]

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

Date: November 16, 2023
Time: 9:00 A.M.
Dept.: 3

Complaint Filed: October 25, 2021
FAC Filed: December 7, 2021
Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on November 16, 2023, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Susan L. Greenberg in Department 3
4 of the above-entitled court, located at 400 County Center, Redwood City, California 94063,
5 Plaintiff David Montoya (“Plaintiff”) will and hereby does move the Court for the following
6 relief with respect to the Joint Stipulation of Settlement and Release of Class Action and
7 Representative PAGA Action (“Stipulation” or “Settlement Agreement”) entered into by
8 Plaintiff and Defendant Draeger’s Super Markets (“Defendant”) (together with Plaintiff, the
9 “Parties”):

- 10 1. That the Court approve the Settlement Agreement referenced above;
- 11 2. That the Court conditionally certify the following class for settlement purposes
12 only: all non-exempt employees, who are or were employed by Defendant Draeger’s Super
13 Markets (“Defendant”) and received a meal and/or rest period premium payment during any pay
14 period during the period from October 25, 2017, through January 30, 2022 (the “Class”);
- 15 3. That Plaintiff David Montoya by appointed as the Class Representative, and Larry
16 W. Lee, Max W. Gavron, and Mai Tulyathan of Diversity Law Group, P.C., and William L.
17 Marder of Polaris Law Group be appointed as Class Counsel;
- 18 4. That the Court preliminary approve the Settlement Agreement and the total Gross
19 Settlement Amount in the amount of Three Hundred Thousand Dollars (\$300,000.00);
- 20 5. That the Court finds on a preliminary basis that the Settlement Agreement appears
21 to be within the range of reasonableness of a settlement, including the amount of the PAGA
22 penalties, the incentive award to the Class Representative, Class Counsel award of attorneys’ fees
23 and litigation costs, settlement administration costs, and the allocation of payments to Class
24 Members, that could ultimately be given final approval by this Court;
- 25 6. That the Court approve the mailing of the proposed Notice of Proposed Class
26 Action Settlement (“Class Notice”) to be sent to Class Members;
- 27 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
28 Administrator; and

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

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

5 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
6 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
7 Class Members to participate in, opt out of, or object to the settlement. This Motion is based on
8 the Memorandum of Points and Authorities included herein, the Settlement Agreement and the
9 proposed Class Notice, the supporting Declarations of Larry W. Lee, Max W. Gavron, Mai
10 Tulyathan, William L. Marder, and Plaintiff David Montoya, and upon the oral arguments of
11 counsel (should there be any), and on the complete records and file herein.

12
13 DATED: October 18, 2023

DIVERSITY LAW GROUP, P.C.

14
15 By: 

Larry W. Lee

Max W. Gavron

Mai Tulyathan

16
17 Attorneys for Plaintiff, the Class, and Aggrieved
18 Employees

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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action under the California Labor Code. Plaintiff David Montoya (“Plaintiff”) alleges
4 that Defendant Draeger’s Super Markets (“Defendant”) failed to pay meal and rest break
5 premium compensation at the correct regular rate of pay in violation of Labor Code §§ 201-203,
6 226.7, and 512, failed to provide accurate itemized wage statements in violation of Labor Code §
7 226(a), and engaged in unfair business practices in violation of Business and Professions Code §
8 17200, *et seq.*, the California Labor Code, and the applicable IWC Wage Orders. Based on these
9 violations, Plaintiff asserts class and PAGA claims for violations of Labor Code §§ 201-203,
10 226, **Error! Bookmark not defined.** 226.7, and 512. The Parties have reached a class and
11 PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
12 Settlement and Release of Class Action and Representative PAGA Action (“Stipulation” or
13 “Settlement Agreement”).¹

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
17 informal discovery in connection with mediation, Defendant provided necessary data pertaining
18 to the number of putative class members, number of pay periods at issue, number of wage
19 statements at issue, hourly rates of pay of putative class members, sample wage statements, and
20 information regarding Defendant’s relevant policies and practices. The information provided by
21 Defendant allowed Plaintiff to review and analyze the liability and potential exposure.
22 Thereafter, on April 18, 2023, the Parties attended a full day of mediation with the mediator
23 Daniel Turner, Esq. After continued arm’s length negotiations post-mediation facilitated by Mr.
24 Turner, the Parties were able to reach the current settlement.

25 The terms of the Settlement Agreement provide that Defendant pay a Gross Settlement
26

27
28 ¹ The Parties’ Joint Stipulation of Settlement and Release of Class Action and Representative PAGA
Action is attached to the Declaration of Mai Tulyathan as **Exhibit C**.

Amount of Three Hundred Thousand Dollars (\$300,000.00) to resolve the class and PAGA claims. Significantly, the entire Gross Settlement Amount will be distributed to the class on a **non-reversionary** basis, such that no remaining monies will revert to Defendant. Further, no claim forms are required by class members to participate in the Settlement. The following represents the key terms of the Settlement:

- Gross Settlement Amount of \$300,000.00;
- Settlement class size of 982 individuals;
- Service payment to the Class Representative of up to \$10,000.00;
- Class Counsel's attorneys' fees of one-third of the Gross Settlement Amount, up to \$100,000.00;
- Class Counsel's litigation costs of up to \$20,000.00;
- Settlement administration costs of up to \$13,500.00;
- PAGA allocation of \$20,000.00, of which 75 percent, or \$15,000.00, will be paid to the Labor & Workforce Development Agency ("LWDA"), and the remaining 25 percent, or \$5,000.00, will be distributed to PAGA Settlement Group Members² on a *pro rata* basis;
- Net Settlement Amount of approximately \$136,500.00, to be distributed to Class Members on a *pro rata* basis, based on the number of pay periods worked by Class Members during the Class Period; and
- Raw average of approximately **\$139.00** 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 his counsel are confident that they can prevail on class certification, as well as on the merits,

² The "PAGA Settlement Group" is defined to include all non-exempt employees, who are or were employed by Defendant and received a meal and/or rest period premium payment during any pay period, during the period of December 7, 2020, through January 30, 2022.

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 14, 2021, Plaintiff submitted his written notice to the LWDA, alleging violations of Labor Code §§ 201-203, 226, 226.7, and 512, pursuant to the PAGA, Labor Code § 2699. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2, Ex. A.) Thereafter, on October 25, 2021, Plaintiff filed a class action complaint against Defendant in the San Mateo County Superior Court, alleging the following causes of action: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 226.7; (3) violation of Labor Code § 226(a); and (4) violation of Business & Professions Code § 17200, *et seq.* (the “Action”). (*Id.* at ¶ 3.) On December 7, 2021, Plaintiff filed a First Amended Complaint (“FAC”), adding a cause of action for violation of the Private Attorneys General Act (the “PAGA”), Labor Code § 2698, *et seq.*, predicated on the same Labor Code violations. (*Id.* at ¶ 4.) The First Amended Complaint is the operative complaint. (*Id.*)

Plaintiff’s class and PAGA claims as pled in the FAC are predicated upon the following allegations. With respect to Plaintiff’s meal and rest period claims, Plaintiff contends that Defendant failed to pay meal and rest period premium compensation at the correct regular rate of pay. In this regard, Plaintiff contends that Defendant failed to correctly calculate the regular rate of pay, based on a combination of all shift differentials and non-discretionary pay. Thus, Plaintiff and other employees were underpaid meal and rest period premiums. (Tulyathan Decl. at ¶ 6.)

Plaintiff also alleges derivative wage statement claims under Labor Code § 226(a). Specifically, as a result of the meal and rest period premium 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). As a result of these alleged violations, Plaintiff seeks unpaid wages, waiting time penalties, statutory penalties, and civil penalties under

1 the California Labor Code and PAGA, as well as attorneys' fees and costs. (*Id.* at ¶ 7.)

2 After Plaintiff initiated the Action, the Parties met and conferred and agreed to participate
3 in private mediation. In connection with mediation, the Parties agreed to conduct informal
4 discovery to allow Plaintiff to assess the claims and liability, as well as analyze the maximum
5 exposure of damages and penalties. (Tulyathan Decl. at ¶ 8.) In this regard, Defendant produced
6 the number of putative class members, number of pay periods at issue, number of wage
7 statements at issue, hourly rates of pay of putative class members, sample wage statements, and
8 information regarding Defendant's relevant policies and practices. (*Id.* at ¶ 9.) Significantly,
9 Defendant also provided data and analysis pertaining to the amount of meal and rest period
10 premium underpayments owed to class members during the relevant time period. (*Id.*) Plaintiff
11 subsequently analyzed said data to calculate the maximum class and PAGA penalties available in
12 this case. (*Id.* at ¶ 10.)

13 On April 18, 2023, the Parties engaged in a full-day mediation with neutral Daniel
14 Turner, Esq. (Tulyathan Decl. at ¶ 11.) After thorough investigation and evaluation of the facts
15 and claims and further negotiations post-mediation facilitated by the mediator, the Parties and
16 their counsel reached the current settlement. (*Id.*) In resolution of Plaintiff's class and PAGA
17 claims, the Parties entered into the Settlement Agreement, a true and correct copy of which is
18 attached as **Exhibit C** to the Declaration of Mai Tulyathan. (*Id.* at ¶ 12.)

19 The Parties recognize the risk, expense, and delay in continuing litigation with the class
20 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. (Tulyathan
21 Decl. at ¶ 13.) Accordingly, the Parties desire to settle, compromise, and discharge all disputes
22 and claims arising from or relating to the class and PAGA claims as set forth in the Settlement
23 Agreement.

24 **III. DISCUSSION**

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

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

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

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

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

(*Id.* at § 11.24.)

29 Here, the Parties have reached such an agreement and have submitted to this Court in
30 connection with this Motion a copy of the Settlement Agreement fully setting forth all terms of
31 the agreement reached by the Parties as to settlement of the class and PAGA claims. Said terms
32 in the Settlement Agreement include, among other things, the method for calculating the Class
33 Members’ individual portions of the settlement payment.

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

10 The strength of the findings made by a judge at a preliminary
11 hearing or conference concerning a tentative settlement
12 proposal...may be set out in conditional orders granting tentative
13 approval to the various items submitted to the court. Three basic
14 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.

15 (4 *Newberg on Class Actions*, at § 11.26.)

16 In addition to such terms as class identification, settlement amount, and payment
17 procedures, the Settlement Agreement reached by the Parties contains a provision pursuant to
18 which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of
19 this settlement only. (*See* Stipulation at ¶ III.1.)

20 **A. Proposed Class Definition**

21 The current settlement is being settled on behalf of the following class: all non-exempt
22 employees, who are or were employed by Defendant and received a meal and/or rest period
23 premium payment during any pay period during the Class Period (the “Class” or “Settlement
24 Class”). (Stipulation at ¶ I.4.) The Class Period means the period from October 25, 2017,
25 through January 30, 2022³. (*Id.* at ¶ I.11.)

27 ³ Defendant has represented that it has revised its payroll practices at the end of January 2022, to include
28 shift differentials and non-discretionary incentives into the meal and rest period premium regular rate of
pay. (Tulyathan Decl. at ¶ 26.)

Pursuant to the Settlement Agreement, Defendant has represented that there are no more than 982 individuals that comprise the Class. (Stipulation at ¶ I.4.)

B. Settlement Terms and Evaluation

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

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

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. (Declaration of Larry W. Lee (“Lee Decl.”) at ¶¶ 6-7; Tulyathan Decl. at ¶¶ 40-43; Declaration of Max W. Gavron (“Gavron Decl.”) at ¶¶ 4-10; Declaration of William L. Marder (“Marder Decl.”) at ¶ 9.) Each side has apprised the other of their respective factual contentions, legal theories and

1 defenses, resulting in negotiations taking place between the Parties. (Tulyathan Decl. at ¶ 14.)

2 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
3 face potential liability of up to approximately \$2,467,506 for Plaintiff's class claims if Plaintiff
4 succeeded at trial. (Tulyathan Decl. at ¶ 15.) Plaintiff was able to estimate the potential class
5 penalties based on class data provided by Defendant. (*Id.*) The following represents a
6 breakdown of the estimated class-wide damages/penalties based on data and records provided by
7 Defendant:

- 8 • Approximately \$2,449,056 in waiting time penalties for Plaintiff's meal and rest
9 period premium regular rate claims⁴ (calculated based on 485 former employees
10 in the putative class and an average hourly rate of pay of \$21.06); and
- 11 • Approximately \$331,550 for Labor Code § 226(e) penalties resulting from
12 deficient wage statements as a result of the underpaid wages (calculated based on
13 approximately 3,500 pay periods at issue).

14 (*Id.* at ¶ 16.)

15 With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that
16 Defendant could face civil penalties of up at least \$791,350 if Plaintiff were successful at trial on
17 all claims. (Tulyathan Decl. at ¶ 17.) However, even assuming Plaintiff ultimately prevails on
18 his PAGA claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to
19 Labor Code § 2699(e)(2), the Court can decline to award PAGA penalties where "if, based on
20 the facts and circumstances of the particular case, to do otherwise, would result in an award that
21 is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's
22 decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, while the plaintiff
23 prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty
24 amount by 90%, citing the employer's good faith attempt at complying with the law. (*Id.* at p.
25 517.) Upon review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

26
27 ⁴ For Plaintiff's regular rate claims, the main claim and/or damages to be recovered are waiting
28 time penalties under Labor Code § 203. The amount of underpaid meal and rest period
premiums is typically minimal.

1 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
2 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
3 the claims and further with respect to the reduction of PAGA penalties and that it could be
4 persuasive to the Court. (Tulyathan Decl. at ¶ 19.) Thus, even if Plaintiff were to successfully
5 prove his claims at trial, there is a possibility that the Court may only award a small percentage
6 of PAGA penalties, as the Court has discretion to do so. The Gross Settlement Amount was
7 premised with this risk in mind, associated with the possibility of the Court significantly
8 reducing Plaintiff's PAGA penalties, along with other attendant risks, even if Plaintiff was to
9 prevail at trial. (*Id.*)

10 Further, Defendant raised several defenses that presented risk as to liability and damages
11 on the claims. (Tulyathan Decl. at ¶ 20.) In this regard, Defendant argues that it appropriately
12 paid the premium payments for missed meal and rest periods. Defendant also argues that it
13 corrected its practices as of the end of January 2022 as to how it pays out meal and rest period
14 premiums. Based on that, it is Defendant's position that a portion of the employees that are part
15 of the putative class pled in Plaintiff's case are not even owed any underpaid premiums as
16 Defendant has corrected its practices. (*Id.*)

17 Significantly, Defendant also argued that Plaintiff cannot establish that Defendant
18 "willfully" failed to pay wages at separation of employment, and thus Plaintiff cannot recover
19 waiting time penalties under Section 203. In *Naranjo v. Spectrum Security Services, Inc.*, __
20 Cal. Rptr. 3d __, 2023 WL 2261253 (Feb. 27, 2023), *review granted* 2023 WL 3745105 (May
21 31, 2023), the court upheld an employer's good faith defense to the plaintiff's claim for waiting
22 time penalties, pursuant to Labor Code § 203. The employer argued that it had a viable legal
23 defense, which precluded the imposition of waiting time penalties because its acts were not
24 "willful" within the meaning of the statute. *Naranjo* also permitted a good faith defense to rebut
25 the plaintiff's claim for penalties, pursuant to Labor Code § 226. Based on *Naranjo*, it is
26 Defendant's position that there is no "willful" violation here as prior to the *Ferra v. Loews*
27 *Hollywood Hotel, LLC* (2021) 11 Cal.5th 858 decision, California courts and the Labor
28 Commissioner had not interpreted that penalties paid for missed meal and rest breaks constitute

1 “wages” under Labor Code § 226.7, such that they must be paid at the “regular” rate of pay.
2 Defendant contends that it had a good faith belief that Plaintiff and other employees were not
3 entitled to any additional premium pay. (Tulyathan Decl. at ¶ 21.) Should Defendants succeed
4 on these arguments above, class members would recover \$0 for waiting time penalties under
5 Labor Code § 203 and statutory penalties under Labor Code § 226. (*Id.*) With respect to the
6 wage statement claim, it is Defendant’s position that its wage statements complied with the law,
7 that there was no “knowing and intentional” violation on its part, and that employees did not
8 suffer any “injury” as defined by Labor Code § 226(e). Thus, while Plaintiff believes that a class
9 can be certified, there is a possibility that the Court will not grant class certification on Plaintiff’s
10 regular rate claim here. (Tulyathan Decl. at ¶ 22.)

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

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

27 Indeed, numerous courts have held that **gross** settlements approximating between only 8
28 and 25% of the defendant’s potential exposure are fair and reasonable. (*See, e.g., In re Mego*

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

15 Here, the total amount of class and PAGA penalties amount to approximately \$3.25
16 million without discounting for potentially losing on any of the causes of action. (Tulyathan
17 Decl. at ¶ 18.) The Gross Settlement Amount is \$300,000.00, which is approximately **9.2%** of
18 the estimated class and PAGA penalties. (*Id.*) Thus, the settlement was negotiated at arms’
19 length and the settlement’s percentage-to-recovery further supports that the settlement is fair and
20 reasonable.

21 Despite the asserted fairness of the settlement terms, as set forth in the Notice of
22 Proposed Class Action Settlement (“Class Notice”), should any Class Member wish to pursue his
23 or her own case for the claims being released herein, each Class Member has the right to submit
24 a request for exclusion (*i.e.*, opt-out) from the settlement, with the exception of the PAGA
25 claims. (See Class Notice, attached as **Exhibit D** to Tulyathan Decl.) Moreover, as set forth in
26 the Notice, Class Members are advised of their right to object to any of the terms contained in
27 the Settlement Agreement and attend the final approval hearing. (*Id.*)

28 //

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

4 The Settlement Agreement provides for Three Hundred Thousand Dollars (\$300,000.00)
5 as the Gross Settlement Amount. (*See* Stipulation at ¶ I.39.) The Net Settlement Amount,
6 calculated after deduction of attorneys' fees (up to \$100,000.00), litigation costs (up to
7 \$20,000.00), an incentive award to the Class Representative (up to \$10,000.00), allocation of the
8 PAGA payment (\$20,000.00), and settlement administration costs (up to \$13,500.00), is
9 estimated to be approximately **\$136,500.00**. (*Id.* at ¶¶ I.2, I.24, I.27, I.39, IV.2, IV.6; Tulyathan
10 Decl. at ¶ 24.)

11 Pursuant to the Settlement Agreement, the Net Settlement Amount will be apportioned
12 among Participating Class Members on a *pro rata* basis, based on the number of pay periods
13 worked by each respective Participating Class Member during the Class Period, as compared to
14 the total number of pay periods worked by all Participating Class Members during the Class
15 Period. (*See* Stipulation at ¶ VII.2.) Based thereon, on a raw average, each Class Member may
16 potentially recover approximately **\$139.00**. (Tulyathan Decl. at ¶ 28.) The amount actually paid
17 to each Participating Class Member may increase or decrease depending on the actual number of
18 pay periods worked during the Class Period and the number of opt-outs received. (*Id.*)

19 Separate from the Individual Settlement Amount, Class Members who are also part of the
20 PAGA Settlement Group will receive an individual share of the PAGA Payment Amount. The
21 PAGA Settlement Group is defined as all non-exempt employees, who are or were employed by
22 Defendant and received a meal and/or rest period premium payment during any pay period
23 during the time period of December 7, 2020, through January 30, 2022 (the "PAGA Period").
24 (Stipulation at ¶¶ I.5, I.26.) Twenty-five percent (25%) of the PAGA Payment Amount, or
25 \$5,000.00, will be distributed to PAGA Settlement Group Members, based on the number of pay
26 periods worked by each respective PAGA Settlement Group Member during the PAGA Period,
27 as compared to the total number of pay periods worked by all PAGA Settlement Group members
28 during the PAGA Period. (*Id.* at ¶¶ I.27, VII.2.)

Finally, the terms of the settlement provide that uncashed checks (upon the expiration

1 date) shall be distributed to the *cy pres* beneficiary—Legal Aid at Work, in accordance with
2 California Civil Procedure § 384. (See Stipulation ¶ VII.7; see Tulyathan Decl. at ¶ 32.)

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

6 This settlement is non-reversionary, meaning that **none of the settlement funds will**
7 **revert back to Defendant.** (See Stipulation at ¶¶ I.39, IV.1.)

8 **3. Scope of the Release of Class Members’ Claims**

9 As a condition of participating in this settlement, Class Members who do not opt out of
10 the settlement (“Participating Class Members”) will provide a limited release of the following
11 claims against the Released Parties (“Released Claims”):

12 [A]ll claims that accrued during the Class Period and were alleged
13 in the operative First Amended Complaint, as well as all claims that
14 could have been pled arising out of the same operative facts,
15 including: (1) Failure to pay missed meal period penalties at the
16 correct rate of pay in violation of Labor Code §§ 226.7 and 512; (2)
17 Failure to pay missed rest period penalties at the correct rate of pay
18 in violation of Labor Code § 226.7; (3) Failure to furnish accurate
19 itemized wage statements in violation of Labor Code § 226(a); (4)
20 Violation of California’s Business & Professions Code §§ 17200 *et*
21 *seq.* (the Unfair Competition Law); and (5) Civil penalties under
22 PAGA based on the same Labor Code violations.

23 (See Stipulation at ¶¶ I.32, I.34, X.1.)

24 Moreover, with respect to PAGA Settlement Group Members, said individuals will
25 provide the following limited release (“Released PAGA Claims”):

26 [A]ll claims that accrued during the PAGA Period and were alleged
27 in the PAGA notice, as well as all claims that could have been pled
28 arising out of the same operative facts, for civil penalties under the
California Private Attorneys’ General Act predicated on violations
of Labor Code §§ 201-203, 226, 226.7 and 512.

(See Stipulation at ¶¶ I.33, X.3.)

Given that the releases above are tailored to only claims pled in the FAC and Plaintiff’s
PAGA notice, and that accrued during the Class Period and PAGA Period, respectively, the
releases are appropriately limited.

//

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

2 The Parties have agreed that the Individual Settlement Amounts to Participating Class
3 Members shall be allocated as follows: five percent (5%) as payment for wages, less withholdings
4 and deductions, for which an IRS Form W-2 shall issue, and ninety-five percent (95%) as
5 payment of penalties, for which an IRS Form 1099 shall issue. (*See Stipulation at ¶ IV.4.*)

6 Individual shares of the PAGA Payment Amount will be allocated as one hundred percent
7 (100%) penalties, for which an IRS Form 1099 shall issue. (*Id.*)

8 Pursuant to the Settlement Agreement, employer-side payroll taxes on the wage portion of
9 the Individual Settlement Amounts paid to Participating Class Members shall be paid by
10 Defendant separate from and in addition to the Gross Settlement Amount. (*See Stipulation at ¶¶*
11 *I.20, IV.4.*)

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

14 As stated above, Class Members do **not** need to do anything should they wish to receive
15 their share of the settlement funds. In other words, because this is not a claims-made settlement,
16 Class Members will not be required to make a submission to participate in the settlement. No
17 claim forms are required. Thus, this substantially decreases the amount of burden each Class
18 Member must bear in order to receive their share of the settlement funds.

19 If a Class Member does not wish to take part in this Settlement or be bound by the
20 Released Claims (with the exception of PAGA Settlement Group Members as to the Released
21 PAGA Claims), the Class Member must submit a request for exclusion. (*See Stipulation at ¶¶*
22 *I.25, VI.3; see also Class Notice, at p. 6.*)

23 **C. Notice to Class Members**

24 Should the Court grant the instant motion, Defendant will provide the Settlement
25 Administrator with an updated list containing each Class Member's name, Social Security
26 number, dates of employment, last-known addresses and phone numbers, and the number of pay
27 periods in which the Class Member received a meal or rest period premium during the Class
28 Period and/or PAGA Period ("Database"). (*See Stipulation at ¶ VI.2.*) Pursuant to the

Settlement Agreement, Defendant will provide said Class List and Data within fourteen (14) days after the Court grants preliminary approval. (*Id.*)

Within seven (7) days of receipt of the Database from Defendant, the Settlement Administrator will mail the Class Notice out to Class Members via First-Class U.S. mail. (*Id.*) Any Class Notices returned to the Settlement Administrator as non-deliverable on or before the response deadline shall be re-sent via regular First-Class U.S. mail to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator will attempt to find the correct address using a skip-trace or other comparable search to locate the most current address to re-mail the Notice. (*See* Stipulation at ¶ VI.2, VI.3.)

The Class Notice will advise Class Members of what the litigation is about, their rights under the settlement, a summary of the principal terms and the monetary terms of the settlement, their expected settlement payment share, their opportunity to and procedures to opt out or to object to the settlement, and the release of claims. (*See generally*, Class Notice.) As set forth in the Class Notice, Class Members will be allowed to opt out of or object to the Settlement by a certain deadline, which is 30 days after the initial mailing of the Class Notice. (*See* Stipulation at ¶ I.35.) Class Members who received a re-mailed Class Notice will have that deadline extended by 14 calendar days from the original response deadline. (*Id.* at ¶ V.3.)

If Class Members need further information about the settlement and/or the lawsuit, Class Counsel's contact information and the Settlement Administrator's contact information are provided in the Class Notice. (*See* Class Notice, at p. 7.)

D. Typicality and Adequacy of Representation

1. Class Representative's Claims are Typical of the Class

The commonality requirement is met when there are questions of law and fact common to the class. (*See Hanlon v. Chrysler Corp.* (1998) 150 F.3d 1011, 1019 ("The existence of shared legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple with disparate legal remedies within the class").) Commonality requires only that some common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. (*See Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 473.)

Defendant's conduct is central to the commonality inquiry. (*See City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 460; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 812-13.) Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges here, the class-wide impact of the Defendant's policies satisfies the commonality requirement. (*See Stephens v. Montgomery Ward & Co.* (1987) 193 Cal. App. 3d 411, 421.)

In the present case, Plaintiff alleges that Defendant is liable to the Class for failure to pay meal and rest break premium compensation at the correct regular rate of pay in violation of Labor Code §§ 201-203, 226.7, and 512, and failure to provide accurate itemized wage statements in violation of Labor Code § 226(a). Like all Class Members, Plaintiff was subjected to these same policies and practices. (Declaration of David Montoya ("Montoya Decl.") at ¶¶ 3-4.) More specifically, Plaintiff alleges that Defendant miscalculated the regular rate of pay when paying meal and/or rest period premium compensation. (*Id.* at ¶ 3.) Plaintiff also claims that he was issued inaccurate wage statements that did not comply with Labor Code § 226(a). (*Id.* at ¶ 4.) In other words, Plaintiff contends that he was subjected to the same policies and practices as other Class Members and thus, the typicality requirement is met.

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

2. Class Counsel Have Adequately Represented the Class and Have Experience with Wage and Hour Class Action

From the inception of the case, Class Counsel have zealously represented the interests of the Class. Class Counsel have engaged in discovery as well as significant meet and confer discussions with opposing counsel to obtain informal data and documents and to discuss the merits of the claims on behalf of the Class. (Tulyathan Decl. at ¶ 35.) The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated

1 numerous other class action cases, and are competent to represent the class. (Lee Decl. at ¶¶ 6-7;
2 Tulyathan Decl. at ¶¶ 40-43; Gavron Decl. at ¶¶ 4-10; Marder Decl. at ¶ 9.)

3 **E. Costs and Fees**

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

5 California state and federal courts have recognized that an appropriate method for
6 determining award of attorneys' fees is based on a percentage of the total value of benefits to
7 class members by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th
8 224, 254 ; *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S.
9 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of
10 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
11 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
12 burden alone." (*Vincent*, 557 F.2d at p. 769.)

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

22 Fairness to the successful litigant, who might otherwise receive no
23 benefit because his recovery might be consumed by the expenses;
24 correlative prevention of an unfair advantage to the others who are
25 entitled to share in the fund and who should bear their share of the
26 burden of its recovery; encouragement of the attorney for the
27 successful litigant who will be more willing to undertake and
28 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.*)

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

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

14 The Parties have agreed to a payment of a maximum of one-third of the Gross
15 Settlement Amount, or \$100,000.00, for payment to Class Counsel as attorneys' fees. (*See*
16 Stipulation at ¶ IV.6.) The Parties have agreed to a payment of the foregoing attorneys' fees
17 and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to
18 reimbursement of Class Counsel's litigation costs up to \$20,000.00. (*Id.*) Class Counsel have,
19 at their own risk, expended costs, for example, to file this instant action and other pleadings in
20 the case, effect service of process, participate in mediation, and advance other litigation-related
21 costs. If Class Counsel's actual costs are less than \$20,000.00, the remainder will go to the
22 Class for distribution.

23 Based on the foregoing, the Court should preliminarily approve the attorney's fees and
24 costs as requested by the Parties.

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

26 Class Representative David Montoya requests a reasonable enhancement of \$10,000.00.
27 (*See* Stipulation at ¶ IV.2.) The Class Representative met and conferred with his counsel on a
28 number of occasions to discuss the case, searched for and provided documents and information

1 to his counsel, and reviewed pleadings and documents, including the PAGA letter, complaint,
2 and Settlement Agreement. (Montoya Decl. at ¶¶ 6-7.) As part of his duties as the Class
3 Representative, Plaintiff provided invaluable information, evidence, and documents that resulted
4 in this settlement. Furthermore, in consideration for his service payment, Plaintiff also executed
5 an individual general release of all claims including a California Civil Code § 1542 waiver,
6 which other members of the Class did not have to do. (See Stipulation at ¶ X.2; Montoya Decl.
7 at ¶ 9.)

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

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

20 3. Settlement Administration Costs

21 The Parties have agreed to an estimated payment of no more than \$13,500.00 to the
22 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
23 this settlement. (See Stipulation ¶¶ I.2, I.38.) Plaintiff's counsel obtained a quote from Phoenix
24 Settlement Administrators for a capped fee of \$13,500.00 to administer the settlement.
25 (Tulyathan Decl. ¶ 31, Ex. E.) Phoenix Settlement Administrators is a well-recognized class
26 action settlement administrator. The Parties believe that the administration fee is reasonable and
27 should be approved.

28 //

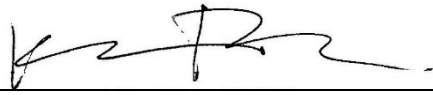
1 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
2 **PRELIMINARY APPROVAL**

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

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

11
12 DATED: October 18, 2023

DIVERSITY LAW GROUP, P.C.

13
14 By: 

Larry W. Lee

Max W. Gavron

Mai Tulyathan

15
16 Attorneys for Plaintiff, the Class, and Aggrieved
17 Employees