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

DAVID MONTOYA, 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 FINAL APPROVAL OF CLASS
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

Date: April 11, 2024

Time: 9:00 A.M.

Dept.: 3

Complaint Filed: October 25, 2021

FAC Filed: December 7, 2021

Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 11, 2024, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Susan L. Greenberg in Department 3 of the above-entitled court, located at 400 County Center, Redwood City, California 94063, Plaintiff David Montoya (“Plaintiff”) will seek an Order:

(1) Granting final approval to the Joint Stipulation of Settlement and Release of Class Action and Representative PAGA Action and the Amendment to Joint Stipulation of Settlement and Release of Class Action and Representative PAGA Action (together, the “Stipulation” or “Settlement Agreement”) in this matter;

(2) Approving distribution of the settlement funds to the Class Members, pursuant to the terms of the Settlement Agreement;

(3) Approving Plaintiff’s request for an award of the service payment of \$10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

(4) Approving Class Counsel’s request for an award of attorneys’ fees to Class Counsel for one-third (1/3) of the \$300,000.00 Gross Settlement Amount, or \$100,000.00, and reimbursement of litigation costs of \$7,112.50, pursuant to the terms of the Settlement Agreement;

(5) Approving Plaintiff’s request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of \$13,500.00, pursuant to the terms of the Settlement Agreement;

(6) Approving Plaintiff’s request for payment of PAGA penalties of \$15,000.00 to the California Labor and Workforce Development Agency (“LWDA”) and \$5,000.00 to the PAGA Settlement Group, pursuant to the terms of the Settlement Agreement; and

(7) Entering final judgment as to all members of the Class in this action.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to grant final certification of a class for settlement purposes. In light of the overwhelmingly positive response from Class Members, as shown by the lack of objections to the settlement and only one

1 opt-out, there is no question that the settlement is fair, reasonable, and adequate and thus should
2 be granted final approval.

3 This Motion will be based on the attached Memorandum of Point and Authorities and the
4 supporting Declarations of Larry W. Lee, Max W. Gavron, Mai Tulyathan, William L. Marder,
5 Plaintiff David Montoya, and Yami Burns of Phoenix Settlement Administrators, and upon the
6 oral arguments of counsel (should there be any), and on the complete records and file herein.

7
8 DATED: March 11, 2024

DIVERSITY LAW GROUP, P.C.

9
10 By:  _____

Larry W. Lee

Max W. Gavron

Mai Tulyathan

11
12 Attorneys for Plaintiff, the Class, and Aggrieved
13 Employees

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1 **I. INTRODUCTION**

2 Plaintiff David Montoya (“Plaintiff”) now seeks the Court’s final approval of the Joint
3 Stipulation of Settlement and Release of Class Action and Representative PAGA Action and the
4 Amendment to Joint Stipulation of Settlement and Release of Class Action and Representative
5 PAGA Action (together, the “Stipulation” or “Settlement Agreement”). The settlement provides
6 for a \$300,000.00 **non-reversionary** fund to be created for the benefit of the Class, from which
7 attorneys’ fees, litigation costs, enhancement payment to the named Plaintiff, payment of PAGA
8 penalties to the California Labor & Workforce Development Agency (“LWDA”) and PAGA
9 Settlement Group, and costs of settlement administration are to be paid. The net settlement fund
10 after these deductions will be paid to all Class Members who did not opt-out of the settlement.

11 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
12 Approval of Class Action Settlement. The Court preliminarily approved this settlement on
13 November 30, 2023, directing distribution of the Class Notice and scheduling the hearing for
14 final approval of settlement (the “Preliminary Approval Order”).

15 As directed by the Court, the Settlement Administrator selected by the Parties—Phoenix
16 Settlement Administrators—distributed the Class Notice to 472 Class Members¹. (Declaration of
17 Yami Burns on behalf of Phoenix Settlement Administrators (“Admin. Decl.”) at ¶ 3.) To date,
18 one request for exclusion has been received. (*Id.* at ¶ 8.) There here have been *zero* (0)
19 objections filed by any Class Member. (*Id.* at ¶ 9.) As such, the settlement has a significantly
20 high participation rate of **99.79 percent**. (*Id.* at ¶ 12.) In light of this positive response from
21 Class Members, an inference can be made that the Class supports the Court’s Preliminary
22 Approval Order finding that the Settlement Agreement is fair and reasonable. (Declaration of
23 Mai Tulyathan (“Tulyathan Decl.”) at ¶ 10.)

24 In addition to the results of the notice process, for the same reasons as set forth earlier in
25 Plaintiff’s Motion for Preliminary Approval, the following represents the basic points supporting
26

27
28 ¹ The decrease in class membership is addressed herein in Section II.

final approval of the settlement:

- The settlement provides a total settlement sum of \$300,000.00 which is **non-reversionary**;

- The settlement is fair given that participating Class Members will receive (*after deductions for fees, costs, etc.*), on average, approximately \$317.17² per each participating Class Member, with the highest individual settlement share estimated at \$2,643.11 (Admin. Decl. at ¶ 14);

- Class Members did not need to submit claim forms to participate in the settlement, but will automatically receive a check for their individual share of the settlement;

- The allocation reflects that payment of individual settlement amounts will be paid to Class Members on a *pro rata* basis, based on the number of pay periods worked by each Class Member;

- Plaintiff conducted significant investigation to fully evaluate the case. This included conducting informal discovery and exchanges of information, including data pertaining to the class, number of pay periods at issue, hourly rates of pay, data and analysis pertaining to amount of meal and rest period premium underpayments owed to class members, sample wage statements, and information regarding Defendant's relevant policies and practices;

- A highly regarded administrator, Phoenix Settlement Administrators, was retained to administer the settlement for approximately \$13,500.00 (Admin. Decl. at ¶ 17); and

- The State of California's LWDA will also be the beneficiary of this settlement, as it will receive \$15,000.00 under the allocation for PAGA, should this settlement be granted final approval. Timely notice of the PAGA settlement was provided to the LWDA in accordance with PAGA, and no objections to the settlement by the LWDA were received by Plaintiff's counsel. (Tulyathan Decl. at ¶¶ 22-24.)

² The estimated individual settlement payment to each participating Class Member increased from approximately \$139.00 per person (the estimated amount at preliminary approval), to approximately \$317.17 per person, in light of the decrease in the number of individuals in the settlement class. (Tulyathan Decl. at ¶ 8; Admin. Decl. at ¶ 14.)

Accordingly, the Court should grant final approval consistent with the Preliminary Approval Order.

II. THE DECREASE IN CLASS MEMBERSHIP DOES NOT DILUTE THE SETTLEMENT VALUE

With respect to the decrease in class membership from preliminary approval, the Parties previously provided the Court at preliminary approval with an estimate of 982 class members during the settlement period. When the class list was provided by Defendant to the Settlement Administrator after preliminary approval, the Parties discovered the decrease in class count to 472 due to Defendant's error. (*See* Admin. Decl. at ¶ 3.) According to Defendant, the 982 class count represents all non-exempt employees of Defendant, and the 472 class count represents all non-exempt employees of Defendant who received a meal and/or rest period premium payment during the settlement period. Thus, Defendant has represented that the settlement should be premised on the 472 class count. (Tulyathan Decl. at ¶ 7.)

Based on the prior class count, at preliminary approval, the average individual settlement share represented to the Court is approximately \$139.00 per participating Class Member. Given that the actual class membership count has decreased to 472, the average individual settlement share has increased to approximately \$317.17 per participating Class Member. (*See* Admin. Decl. at ¶ 14; Tulyathan Decl. at ¶ 8.) As a result, class members who do not opt out of the settlement will actually recover a higher amount of individual settlement share. (Tulyathan Decl. at ¶ 8.) In light of this, the Court should grant final approval of the settlement.

III. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that the Class Notice, as approved in the Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in the settlement. The Preliminary Approval Order contemplated, further, that Phoenix Settlement Administrators would serve as the Settlement Administrator.

1 As clearly stated in the Declaration of Yami Burns, notice was provided to Class
2 Members, as required by the Preliminary Approval Order. On December 15, 2023, the
3 Settlement Administrator received a Class Member mailing list from Defendants' counsel that
4 included 472 Class Members. (Admin. Decl. at ¶ 3.) Prior to mailing the Class Notice, the
5 Settlement Administrator conducted a National Change of Address (NCOA) search to correct
6 and/or update the class list in case of any address changes. (*Id.* at ¶ 4.) On or about January 2,
7 2024, the Settlement Administrator mailed the Class Notice in English and Spanish to all class
8 members on the class list via first class mail. (*Id.* at ¶ 5.) From the date of mailing, 25 Class
9 Notices were returned due to incorrect addresses. (*Id.* at ¶ 6.) The Settlement Administrator
10 conducted skip tracing to updated addresses for the Class Notices that were returned, and
11 subsequently remailed them via U.S. first class mail. (*Id.* at ¶ 6.) As of the date of this filing, 3
12 Class Notices remain undeliverable as updated addresses could not be obtained. (*Id.* at ¶¶ 6-7.)
13 Further, the Class Notice provided Class Members with the Class Counsel's and the Settlement
14 Administrator's contact information, where they could further seek information regarding the
15 settlement, ask questions and review pleadings in the case, and update their addresses.

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

26 Here, the Class Members were provided with a mailing regarding the settlement that
27 explained the settlement and allowed Class Members to seek information, ask questions, and
28 exclude themselves and/or object to the settlement, if so desired. As such, proper notice has

1 been given to the Class Members. Thus, the Court may proceed to determine the fairness and
2 adequacy of the settlement and enter its Order granting final approval, secure in the knowledge
3 that all absent Class Members have been given the opportunity to participate fully in the
4 settlement, exclusion, and approval process.

5 **IV. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE,**
6 **AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

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

8 In order to proceed as a class, there are two requirements which must be met—
9 ascertainability and community of interest. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d. 695,
10 704; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809.) “The community of interest
11 requirement embodies three factors: (1) predominant common questions of law or fact; (2) class
12 representatives with claims or defenses typical of the class; and (3) class representatives who can
13 adequately represent the class.” (*Richmond v. Dart Industries* (1981) 29 Cal. 3d. 462, 470.)

14 **1. The Class is Ascertainable**

15 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section
16 382 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
17 available for identifying the class members.” (*Reyes v. San Diego County Board of Supervisors*
18 (1987) 196 Cal.App.3d 1263, 1271.)

19 Here, the Class is defined as: “All non-exempt employees, who are or were employed by
20 Defendant Draeger’s Super Markets (“Defendant”) and received a meal and/or rest period
21 premium payment during any pay period during the period from October 25, 2017, through
22 January 30, 2022 (the “Class Period”).” There are 472 individuals that comprise of the Class.
23 (Admin. Decl. at ¶ 3.) This is far more than the minimum required to certify a class. Within the
24 context of manageability, the issue is whether there exists sufficient means for identifying class
25 members at the remedial stage. (*Reyes*, 196 Cal.App.3d at pp. 1274-75.) Class members have
26 already been identified by Defendant and notice was provided to all of the above Class Members.

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

28 The “community of interest” requirement embodies three separate factors: (1)

1 predominant common questions of law or fact; (2) class representatives whose claims are typical
2 of the class; and (3) class representatives who can adequately represent the class. (*Richmond*, 29
3 Cal.3d at p. 470; *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1234.)

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

5 “The ultimate question in every case of this type [class actions] is whether...the issues
6 which may be jointly tried, when compared with those requiring separate adjudication, are so
7 numerous and substantial that the maintenance of a class action would be advantageous to the
8 judicial process and to the litigants.” (*Lockheed Martin Corp. v. Superior Court* (2003) 29
9 Cal.4th 1096, 1104-05.)

10 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure
11 violated the Labor Code by its failure to pay meal and rest break premium compensation at the
12 correct regular rate of pay and provide accurate itemized wage statements. Plaintiff also alleges
13 that Defendant engaged in unfair business practices. Defendant denies that liability could be
14 established on a class-wide basis and contends that liability and damages would need to be
15 conducted on a case-by-case basis.

16 **b. Plaintiff’s Claims are Typical of the Class Claims**

17 The purported class representative’s claim must be “typical” but not necessarily identical
18 to the claims of other class members; it is sufficient that the representative is similarly situated so
19 that he or she will have the motive to litigate on behalf of the class. (*Classen v. Weller* (1983)
20 145 Cal.App.3d 27, 45.) Courts look to whether class members have similar injuries, “whether
21 the action is based on conduct which is not unique to the named Plaintiff,” and whether other
22 class members were injured by the same conduct. (*Hanon v. Dataproducts Corp.* (9th Cir. 1992)
23 976 F.2d 497, 508.) The purpose of the typicality requirement “is to assure that the interest of
24 the named representative aligns with the interests of the class.” (*Id.* at p. 508.)

25 Plaintiff was employed by Defendant and was subjected to the same payroll policies as
26 all other class members. Specifically, like other members of the class, Plaintiff regularly earned
27 non-discretionary incentive payments and was paid meal and rest period premium compensation
28 during the same workweek. Plaintiff alleges that Defendant miscalculated the regular rate of pay

1 when paying meal and/or rest period premium compensation. (Declaration of David Montoya
2 (“Montoya Decl.”) at ¶ 3.) Plaintiff also claims that he was issued inaccurate wage statements
3 that did not comply with Labor Code § 226(a). (*Id.* at ¶ 4.)

4 In other words, Plaintiff was subjected to the same policies and practices as other Class
5 Members. Accordingly, Plaintiff’s claims are aligned with the interests of the class and
6 typicality is satisfied.

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

8 The class representative, through qualified counsel, must be capable of “vigorously and
9 tenaciously” protecting the interests of the class members. (*Simons v. Horowitz* (1984) 15 1
10 Cal.App.3d 834, 846.)

11 Here, Plaintiff does not have any interests adverse to the Class, nor has any such issues
12 been raised or presented. (Montoya Decl. at ¶ 5.) Plaintiff has taken all necessary steps to
13 represent the interests of the Class, including providing information and documents to his
14 counsel, and reviewing pleadings in this case. (*Id.* at ¶ 7.) For such reasons, Plaintiff has
15 adequately represented the Class Members and will continue to do so.

16 **B. Defendant’s Defenses and Unlikelihood of Class Certification**

17 As previously explained in Plaintiff’s Preliminary Approval Motion, Defendant raised
18 several defenses as to damages and liability on the claims, including as to class certification.
19 Defendant asserts that individualized issues predominate in this case.

20 Significantly, Defendant also argued that Plaintiff cannot establish that Defendant
21 “willfully” failed to pay wages at separation of employment, and thus Plaintiff cannot recover
22 waiting time penalties under Section 203. (*Naranjo v. Spectrum Security Services, Inc.* (Feb. 27,
23 2023) __ Cal. Rptr. 3d __, 2023 WL 2261253, review granted 2023 WL 3745105 (May 31,
24 2023) (upholding employer’s good faith defense to rebut plaintiff’s claim for waiting time
25 penalties under Labor Code § 203 and to rebut penalties under Labor Code § 226.) Should
26 Defendant succeed on the good faith defense, class members would recover \$0 for waiting time
27 penalties under Labor Code § 203 and statutory penalties under Labor Code § 226. With respect
28 to the wage statement claim, it is Defendant’s position that its wage statements complied with the

1 law, that there was no “knowing and intentional” violation on its part, and that employees did not
2 suffer any “injury” as defined by Labor Code § 226(e).

3 Based thereon, Defendant continues to maintain that it is not liable for the claims and
4 allegations made by the Plaintiff.

5 **C. Risks, Expenses, and Complexity of Further Litigation**

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

12 Defendant has maintained that there is no liability. As stated above, Defendant alleges
13 that a class could not have been certified. There is always a risk that the court will not grant
14 certification of the class, wherein the class will not be entitled to any damages. Based on the
15 foregoing, there was a substantial risk that Plaintiff would not have obtained the total amount of
16 damages alleged and a number of complex issues that would have necessitated significant
17 expenditure of time and expenses. Therefore, the risks, expenses, and complexity of further
18 litigation warrant granting of this Motion.

19 **D. The Terms, Negotiation, and Reception of the Settlement by Class Members**
20 **All Strongly Support the Conclusion that the Settlement is Fair, Adequate,**
21 **and Reasonable**

22 Without reiterating the Parties’ showing that the Settlement Agreement and the
23 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
24 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
25 Settlement Agreement was the product of negotiation between highly able and experienced
26 attorneys on both sides who possessed the relevant data and extensive legal research which they
27 had carefully analyzed. (Tulyathan Decl. at ¶ 3.) The Parties engaged in arm’s length
28 negotiations at mediation and post-mediation negotiations with the assistance of wage and hour

mediation, Daniel Turner, Esq. (*Id.* at ¶ 4.)

The results after mailing of the Class Notice support confirmation of the Court’s preliminary approval of the settlement with final approval of the settlement, as evidenced by the fact that only one class member opted out and zero class members submitted any written objections to the settlement. (Admin. Decl. at ¶¶ 8-9.) With the significantly high rate of participation in the settlement by class members (99.79%), the Court may appropriately infer that the settlement is fair, adequate, and reasonable. (*See Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291; *Churchill Vill. LLC v. Gen. Elec.* (9th Cir. 2004) 361 F.3d 566, 577 (approving settlement with 45 objections and 500 opt-outs from a 90,000-person class, representing 0.05% and 0.56% of the class, respectively); *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F. Supp. 2d 848, 852 (where 16 of 329 class members opted out, court found that positive class reaction “strongly supports settlement”).) Here, the lack of any objections and only one opt-out to this current settlement indicates that Class Members themselves view the settlement as fair, adequate, and reasonable.

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

1. Standard of Review

On a motion for final approval of a class action settlement under California Code of Civil Procedure Section 382 and California Rule of Court 3.769, a court’s inquiry is whether the settlement is “fair, adequate and reasonable.” (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625, *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n* (1983) 459 U.S. 1217.) A settlement is fair, adequate, and reasonable, and therefore merits final approval, when “the interests of the class are better served by the settlement than by further litigation.” (*See Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”).) The law favors settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. (*See Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41 (4th ed. 2002); *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco*

1 *Corp.* (9th Cir. 1976) 529 F.2d 943, 950.)

2 Although the Court possesses “broad discretion” in determining that a proposed class
3 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
4 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
5 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
6 adequate to all concerned. (*See Officers for Justice*, 688 F.2d at p. 625.) Accordingly, the Court
7 should give due regard to what is otherwise a “private consensual agreement” between the
8 parties. (*Id.*; *see also Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1993) 1993 WL
9 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720 F.Supp. 1379, *aff’d*
10 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
11 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
12 or imposing conditions on it. The judge cannot rewrite the agreement”).)

13 A court’s approval of a class action settlement will only be reversed for a clear abuse of
14 discretion. (*See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Officers for Justice*,
15 688 F.2d at p. 626 (“reverse only upon a strong showing that the district court’s decision was a
16 clear abuse of discretion”); *City of Seattle*, 955 F.2d at p. 1276; *Ackerman v. Kassar* (9th Cir.
17 1993) 1993 WL 326453; *Linney v. Cellular Alaska P’ship* (9th Cir. 1998) 151 F.3d 1234, 1238.)

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

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

28 (*7-Eleven Owners for Fair Franchising v. Southland Corp* (2000) 85 Cal.App.4th 1135, 1146.)

2. The Settlement is Presumed to Be Fair

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

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

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

The settlement in the case at bar warrants approval and carries a presumption of fairness. As previously noted in the application for Preliminary Approval, this current settlement was negotiated at arm's length and facilitated by an experienced wage and hour mediator, Daniel Turner, Esq. (Tulyathan Decl. at ¶ 4.)

Additionally, Class Counsel engaged in extensive factual investigation before settling, including conducting informal discovery and reviewing class data and Defendant's policies and practices. (*Id.* at ¶ 3.) Further, Class Counsel is highly experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has significant experience in class actions and employment wage and hour matters. (Tulyathan Decl. at ¶¶ 13-17; Declaration of Larry W. Lee ("Lee Decl.") at ¶¶ 7-8; Declaration of Max W. Gavron ("Gavron Decl.") at ¶¶ 12-14.)

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

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

If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would have been potentially responsible for Defendant's costs. As such, should individual current or former employees of Defendant bring individual claims on the same causes of action, they would each

1 face the uncertainty of prevailing and the possibility of paying costs to Defendant. Accordingly,
2 such claims likely would not be brought by many of these current and former employees—thus,
3 this lawsuit achieves a true benefit for the class that they might not otherwise get or seek as
4 individuals. Here, given that a fair and reasonable settlement has been reached, neither Plaintiff
5 nor any of the class members will be required to pay for Defendant’s litigation costs.

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

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

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

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

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

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

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

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

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

18 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
19 settlement funds remain after 180 days, the Parties have agreed that all funds shall be distributed
20 to the *cy pres* beneficiary—Legal Aid At Work, a non-profit legal services organization that
21 provides legal services and policy advocacy for and on behalf of California low-income
22 individuals and/or low-wage earners. (Tulyathan Decl. at ¶ 11.)

23 **VI. THE REQUESTED CLASS REPRESENTATIVE INCENTIVE AWARD SHOULD** 24 **BE APPROVED**

25 Class Representative David Montoya requests an incentive award of \$10,000.00.
26 Plaintiff met and conferred with Class Counsel on numerous occasions, searched for and
27 provided information and documents to Class Counsel, and reviewed various pleadings and
28 documents including his employment records, PAGA letter, complaint, the Settlement

1 Agreement, and his declarations submitted in this matter. (Montoya Decl. at ¶ 7.) Accordingly,
2 Plaintiff provided invaluable information, evidence, and documents that resulted in this
3 settlement.

4 In addition to the invaluable services that he provided, Plaintiff also took significant risks
5 in acting as the Class Representative, seeking benefits on behalf of the Class. (*Id.* at ¶¶ 5, 9-10.)
6 Because the claims alleged by the Class Representative provide for the payment of fees and costs
7 to the prevailing party, Plaintiff undertook the risk that he may be required to pay Defendant's
8 fees and costs in the event that Defendant prevailed in this action. (*Id.*)

9 Also, given that future employers are much less likely to hire individuals who have filed
10 employment-related lawsuits, particularly cases of this nature, the Class Representative also
11 faced significant risk in not being able to find suitable employment, all as a result of filing of this
12 case against Defendant. Plaintiff took these risks upon himself to the benefit of the class. (*Id.*)
13 Class members did not have to file individual lawsuits and bear the risks of payment of costs if
14 they did not prevail, nor did they have to face the potential for retaliation and not getting future
15 employment had they filed a lawsuit which is a public record. These are significant benefits that
16 weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a
17 significantly valuable benefit to the class, and Plaintiff took on substantial risks in helping to get
18 this financial benefit to the class. As such, the enhancement should be awarded to Plaintiff for
19 his commitment, dedication, and risks taken for this litigation.

20 Finally, Plaintiff provided a general release and waiver of the protections of Civil Code
21 § 1542, which other Class Members did not have to do. (Montoya Decl. at ¶ 11.) This is a more
22 extensive release than that provided by the Class at large, also supporting the request for the
23 enhancement.

24 Courts have routinely granted approval of settlements containing such enhancements.
25 (*See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299-300
26 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio
27 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three incentive awards of
28 \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F.Supp.2d 907, 913-14 (granting a

1 \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio
2 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
3 *Servs.* (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52
4 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th
5 Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award to class representative in
6 ERISA case).)

7 **VII. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

8 Class Counsel seeks a fee award calculated at one-third of the total value of the
9 settlement fund, or \$100,000.00, for the successful prosecution and resolution of this action.
10 California state and federal courts have recognized that an appropriate method for determining
11 award of attorneys' fees is based on a percentage of the total value of benefits to class members
12 by the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Serrano*
13 *v. Priest* (1977) 20 Cal.3d 25, 34 [*Serrano III*]; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472,
14 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F.2d 759, 769.) The purpose of this
15 equitable doctrine is to avoid unjust enrichment to the Class 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 v. Hughes Air West, Inc., supra*, 557 F.2d at p. 769.)

18 The California Supreme Court issued its ruling regarding the award of attorney's fees in
19 wage and hour class action settlements in *Laffitte*. Under California law, the award of attorneys'
20 fees in common fund wage and hour class action settlements is proper under the percentage
21 method. (*See Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480, 503 ("We join the overwhelming
22 majority of federal and state courts in holding that when class action litigation establishes a
23 monetary fund for the benefit of the class members, and the trial court in its equitable powers
24 awards class counsel a fee out of that fund, the court may determine the amount of a reasonable
25 fee by choosing an appropriate percentage of the fund created").) Under the percentage of the
26 fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee.
27 (*See Gaskill v. Gordon* (7th Cir. 1998) 160 F.3d 361, 363 (J. Posner) ("When a fee is set by a
28 court rather than by contract, the object is to set it at a level that will approximate what the

1 market will set....The judge, in other words, is trying to mimic the market in legal services.”.)

2 Here, the fee award representing one-third of the fund clearly falls within that range and
3 is consistent with other rulings of other courts and comprehensive surveys of class action
4 settlements and fee awards. (*See Martin v. AmeriPride Servs.* (S.D. Cal. 2011) 2011 U.S. Dist.
5 LEXIS 61796, 23 (recognizing that “courts may award attorney’s fees in the 30-40% range in
6 wage and hour class actions that result in recovery of a common fund under \$10 million”); *see*
7 *also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-*
8 *2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action
9 litigation nationwide conclude that fees in the range sought here are consistent with market
10 rates).)

11 The results delivered by Class Counsel also support the requested percentage of the fund.
12 Here, Plaintiff and his counsel secured a \$300,000.00 non-reversionary common fund settlement.

13 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
14 is relevant to the... reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
15 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
16 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class
17 Notice specifically notified Class Members that Class Counsel would be seeking \$100,000.00 in
18 attorneys’ fees. To date, no Class Member has objected to the settlement or the request for
19 attorneys’ fees. This strong favorable response also supports the requested fees.

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

23 No one expects a lawyer whose compensation is contingent upon his
24 success to charge, when successful, as little as he would charge a
25 client who had agreed to pay for his services, regardless of success.
26 Nor, particularly in complicated cases producing large recoveries, is
it just to make a fee depend solely on the reasonable amount of time
expended.

27 (*City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470.) Here, it is clear that a
28 common fund of \$300,000.00 has been created as the entire amount is to be paid out without any

1 reversions. For Class Counsel, the fees here were wholly contingent in nature and the case
2 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
3 in class action litigation, as well as a potentially drawn-out battle with a corporate defendant. As
4 such, the requested fee should be awarded.

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

12 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
13 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
14 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
15 court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a lodestar cross-check
16 is aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
17 performing a cross-check “undermines” one of the primary reasons for using the percentage
18 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
19 protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the discretion to forgo a lodestar
20 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (1985) 108
21 F.R.D. 237, 258; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 29-30 (citing
22 the recommendations of the Third Circuit Task Force with approval and observing that “[t]he
23 criticisms of the lodestar approach set forth in this Report are now echoed by many authorities,
24 who have been most vocal about the manner in which it exacerbates the problem of ‘cheap
25 settlements’ and burdens already overworked trial judge”).)

26 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
27 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see also*,
28 *e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying a 2.52

multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at p. 60 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (affirming a 2.34 multiplier without remand).) The intermediate court in *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. (*Laffitte*, 231 Cal.App.4th at pp. 881-82.) The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

With respect to Class Counsel’s lodestar, to date, approximately 217.1 hours have been expended by Class Counsel in this matter. (Lee Decl. at ¶ 9, Ex. A; Tulyathan Decl. at ¶ 18, Ex. A; Gavron Decl. at ¶ 15, Ex. A.) Moreover, Class Counsel expects to incur approximately 23 additional hours of attorney time in finalizing this settlement. (Tulyathan Decl. at ¶ 19; Gavron Decl. at ¶ 16.) Mr. Lee requests an hourly rate of \$900.00 per hour. (Lee Decl. at ¶ 11.) Ms. Tulyathan and Mr. Gavron request an hourly rate of \$600.00 per hour. (Tulyathan Decl. at ¶ 20; Gavron Decl. at ¶ 17.) The courts are quite liberal in the evidence required to prove an attorney’s hours. Detailed time records are not required. An attorney’s testimony alone may suffice: “Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.)

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

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

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

3 Class Counsel's skill and experience justify the requested rate. As shown in the
4 supporting declarations, Class Counsel have significant experience in the area of employment
5 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
6 employees in employment matters, particularly wage and hour cases. (Lee Decl. at ¶¶ 7-8;
7 Tulyathan Decl. at ¶¶ 13-17; Gavron Decl. at ¶¶ 12-14.) As such, based on the hours and
8 applicable rate, the total lodestar to be expended by Class Counsel through finalizing this
9 settlement will be approximately **\$161,070.00**, based on 240.1 total hours. (Lee Decl. at ¶¶ 9-12;
10 Ex. A; Tulyathan Decl. at ¶¶ 18-20, Ex. A; Gavron Decl. at ¶¶ 15, Ex. A.)

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

19 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
20 enhancement based on a percentage-of-the-fund. (*Lealao*, 82 Cal.App.4th at p. 52 (the
21 promptness of settlement "cannot be used to justify the refusal to apply a multiplier").)
22 According to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel
23 should be rewarded, not punished, for achieving this goal in a timely fashion. (*Id.*)

24 Here based upon Class Counsel's lodestar of \$161,070.00, Plaintiff's request for a fee
25 award of \$100,000.00 is more than reasonable and fair. As the Court can see, the lodestar *well*
26 *exceeds* the requested fee amount, such that it would result in a **negative** multiplier. As such, the
27 requested fee award is fair and reasonable, and should be awarded in its entirety. Class Counsel
28 risked not only a great deal of time, but also a great deal of expense to ensure the successful

litigation of this action on behalf of all Class Members. For these reasons, Class Counsel's request for attorneys' fees in the amount of \$100,000.00 should be approved as fair, reasonable, and adequate.

VIII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

The request for reimbursement of costs, in the amount of \$7,112.50, is fair and reasonable. The costs are all litigation related costs. As set forth in Plaintiff's counsel's declaration, the costs were all directly incurred in the prosecution of this action, including but not limited to, filing and service fees, court fees, postage fees, and costs associated with mediation. (Tulyathan Decl. at ¶ 21, Ex. B.) As such, this request should be approved.

IX. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE APPROVED

Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement Administrator, Phoenix Settlement Administrators, are to be paid out of the Gross Settlement Amount. As shown in the Declaration of Yami Burns, the settlement administration fees expended in this matter amount to a total of \$13,500.00, which is an amount that was agreed upon by the Parties. (Admin. Decl. at ¶ 17, Ex. B.) For such reasons, it is requested that the Settlement Administrator's fees be approved.

X. CONCLUSION

For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff respectfully submits that the standards for final approval have been met and the terms of the Settlement Agreement are fair, adequate, and reasonable.

Accordingly, Plaintiff respectfully request that the Court enter an Order in the form proposed and submitted:

1. Granting final approval to the proposed Settlement Agreement in this action;
2. Approving distribution of the settlement funds to Participating Class Members pursuant to the terms of the Settlement Agreement;
3. Approving Plaintiff's request for an award of an enhancement of \$10,000.00, with

1 payment pursuant to the terms of the Settlement Agreement;

2 4. Approving Plaintiff's request for an award to Class Counsel of \$100,000.00 in
3 attorneys' fees and \$7,112.50 in costs, with payment pursuant to the terms of the Settlement
4 Agreement;

5 5. Approving Plaintiff's request for payment of the settlement administration costs
6 to Phoenix Settlement Administrators in the amount of \$13,500.00, with payment pursuant to the
7 terms of the Settlement Agreement;

8 6. Approving Plaintiff's request for payment of PAGA penalties to the LWDA of
9 \$15,000.00 and to the PAGA Settlement Group of \$5,000.00, with payment pursuant to the terms
10 of the Settlement Agreement; and

11 7. Entering final judgment as to all members of the Class in this action.
12

13 DATED: March 11, 2024

DIVERSITY LAW GROUP, P.C.

14
15 By: 

Larry W. Lee

Max W. Gavron

Mai Tulyathan

Attorneys for Plaintiff, the Class, and Aggrieved
Employees
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