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

PERLA MARIN, individually and on behalf of
all others similarly situated,

Plaintiff,

vs.

HB LEISURE, INC., a Florida corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 37-2021-00048225-CU-OE-CTL

(Assigned to the Honorable Eddie C. Sturgeon,
Department 67)

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

Date: October 6, 2023

Time: 9:00 a.m.

Dept.: 67

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

2 **PLEASE TAKE NOTICE** that on October 6, 2023, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Eddie C. Sturgeon, judge presiding, in
4 Department 67 of the above referenced Court, located at 330 W. Broadway, San Diego,
5 California 92101, Plaintiff Perla Marin (“Plaintiff”) will seek an Order: (1) approving the Class
6 Action Settlement Agreement (“Stipulation” or “Settlement Agreement”)¹ in this matter; (2)
7 conditionally certifying the following Class for settlement purposes only: “all individuals who
8 are or previously were employed by Defendant who were classified as non-exempt employees
9 who were paid a bonus and overtime wages in the same period and who were employed in
10 California during the Class Period”; (3) appointing Plaintiff Perla Marin as the Class
11 Representative and Larry W. Lee and Christine S. Lee of Diversity Law Group, P.C., William L.
12 Marder of Polaris Law Group, and Edward W. Choi of the Law Offices of Choi & Associates as
13 Class Counsel; (4) preliminarily approving the Stipulation and the total Gross Settlement
14 Amount in the amount of Eighty-Five Thousand Dollars (\$85,000.00); (5) finding on a
15 preliminary basis that the Stipulation appears to be within the range of reasonableness of a
16 settlement, including the amount of the PAGA penalties, Class Representative Service Payment,
17 Class Counsel’s fees and costs, settlement administration costs, and allocation of payments to
18 Class Members, that could ultimately be given final approval by this Court; (6) approving the
19 Notice of Class Action and PAGA Settlement and Release to be sent to Class Members; (7)
20 appointing Phoenix Settlement Administrators as the Settlement Administrator; and (8) setting
21 the matter for a Final Approval hearing.

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

25 The basis for this Motion, filed without any opposition from Defendant HB Leisure, Inc.
26 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the
27 procedures proposed by the Plaintiff and Defendant are adequate to ensure the opportunity of
28

¹ The Settlement Agreement is attached as **Exhibit A** to the Declaration of Larry W. Lee.

1 Class Members to participate in, opt-out of, or object to the settlement.

2 This Motion will be based on the attached memorandum of points and authorities, the
3 Stipulation and the proposed Notice of Class Action and PAGA Settlement and Release, and the
4 supporting Declarations of Larry W. Lee, Christine S. Lee, William L. Marder, Edward W. Choi,
5 and Plaintiff Perla Marin, and upon the oral arguments of counsel (should there be any) and on
6 the complete records and file herein.

7
8 DATED: May 1, 2023

DIVERSITY LAW GROUP, P.C.

9
10 By: 

Larry W. Lee

Christine S. Lee

Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative action seeking unpaid wages and
3 penalties. Plaintiff Perla Marin (“Plaintiff”) brought her claims based on a class-wide basis for
4 violation of various Labor Code sections. Defendant HB Leisure, Inc. (“Defendant”) denies each,
5 every, and all of the allegations of the Complaint.

6 Prior to the settlement of this action, Plaintiff and Defendant (collectively, the “Parties”)
7 thoroughly investigated the facts relating to the claims alleged in the Complaint and engaged in a
8 thorough study of the legal principles applicable to the claims asserted against Defendant.
9 Through the exchange of formal and informal discovery, Defendant provided the necessary data,
10 including the number of putative class members, the number of weeks worked and pay periods at
11 issue, time and payroll records, the number of wage statements at issue, as well as information
12 pertaining to Defendant’s policies, practices, and procedures pertaining to overtime wages and
13 wage statement practices. The information provided by Defendant allowed Plaintiff to review
14 and analyze the liability and potential exposure. The Parties exchanged discovery and data
15 related to the class was provided. Thereafter, the Parties commenced direct negotiations and
16 were ultimately able to reach the current settlement. **Significantly, this entire amount is non-**
17 **reversionary, such that no monies will revert back to Defendant.**

18 The Parties believe that this amount is fair, adequate, and reasonable, especially given the
19 risks and uncertainty of class certification and the merits of this case.

20 Although Plaintiff and her counsel are confident that they could prevail on class
21 certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation
22 and the specific risks that a class might not be certified and/or that Plaintiff could fail to establish
23 liability. Based on their own independent investigation and evaluation, the Parties and their
24 respective counsel are of the opinion that the settlement for the consideration and on the terms
25 set forth in the Class Action Settlement Agreement (“Stipulation” or “Settlement Agreement”) is
26 fair, reasonable, and adequate and is in the best interests of the Class and Defendant in light of all
27 known circumstances and the expenses and risks inherent in litigation.

28 Therefore, the Parties respectfully request that the Court grant this Motion for

1 Preliminary Approval of Class Action Settlement.

2 **II. BACKGROUND**

3 On or about November 10, 2021, Plaintiff sent written notice to the California Labor &
4 Workforce Development Agency (“LWDA”) of Defendant’s violations of the Labor Code
5 sections described herein, pursuant to Labor Code § 2699.3. Declaration of Larry W. Lee (“L.
6 Lee Decl.”) ¶ 2.

7 On November 12, 2021, Plaintiff filed a wage and hour class action complaint, alleging
8 causes of action for: (1) violation of California Labor Code §§ 510, 558, 1194, 1197, 1197.1; (2)
9 violation of California Labor Code § 226; and (3) violation of California Business & Professions
10 Code § 17200, *et seq. Id.* ¶ 3. On January 10, 2022, Plaintiff filed a related action in the Superior
11 Court of the State of California for the County of San Diego bearing Case No. 37-2022-
12 00001086-CU-OE-CTL. *Id.* ¶ 4. The related complaint is a Representative Action for violation of
13 the Private Attorneys General Act (“PAGA”). *Id.*

14 The Parties engaged in both formal and informal discovery. *Id.* ¶ 5. Among other relevant
15 topics, the discovery required Defendant to provide documents and information relevant to class
16 certification, including the number of putative class members, the number of weeks worked and
17 pay periods at issue, time and payroll records, the number of wage statements at issue, as well as
18 information pertaining to Defendant’s policies, practices, and procedures pertaining to overtime
19 wages and wage statement practices. *Id.*

20 Defendant’s production allowed Plaintiff to conduct a damages analysis extrapolate from
21 the sample. *Id.* ¶ 6. After a thorough investigation and evaluation of the facts and claims and
22 negotiations conducted over the course of months, the Parties reached the current settlement. *Id.*
23 In resolution of Plaintiff’s class and PAGA claims, the Parties entered the Class Action
24 Settlement Agreement, a true and correct copy of which is attached as Exhibit A to the
25 Declaration of Larry W. Lee. *Id.* ¶ 8.

26 **III. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

27 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
28 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final

1 review after notice has been distributed to the class members for their comment or objections.

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

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

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

13 Thus, the preliminary approval by the trial court is simply a conditional finding that the
14 settlement appears to be within the range of acceptable settlements. As Professor Newberg
15 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
16 concerning a tentative settlement proposal may vary. The court may find that the settlement
17 proposal contains some merit, is within the range of reasonableness required for a settlement
18 offer, or is presumptively valid subject only to any objections that may be raised at a final
19 hearing.” Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.
20 2002).

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

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

29 *Id.* § 11.24.

30 Here, the Parties have reached such an agreement and have submitted to this Court in
31 connection with this Motion a copy of the Settlement Agreement fully setting forth the
32 agreement reached by the Parties. The Settlement Agreement sets forth all terms of the
33 agreement reached by the Parties, which include, among other things, the method for calculating

1 the Class Members' individual settlements.

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

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

20 **A. Proposed Class Definition**

21 The current settlement is being settled on behalf of “all individuals who are or previously
22 were employed by Defendant who were classified as non-exempt employees who were paid a
23 bonus and overtime wages in the same period and who were employed in California during the
24 Class Period.” Stipulation ¶ I.C. The Class Period is from November 12, 2017 to December 31,
25 2022. Stipulation ¶ I.J. There are approximately 94 individuals that comprise the Class.
26 Stipulation ¶ III.C.5. Pursuant to the Stipulation, Defendant has represented that Class Members
27 received approximately 1,193 pay periods during the Class Period. *Id.* Should the number of
28 applicable pay periods in the Class Period increase by more than 10.1% (120 pay periods) or

1 exceed the total of 1,313 pay periods, Defendant will have the option to increase the Gross
2 Settlement Amount by a proportionate additional amount for each additional qualifying pay
3 period or, if Defendant declines to exercise this option, the Gross Settlement Amount will cover
4 no more than 1,313 total pay periods (10.1% more than 1,193, the number of pay periods as of
5 July 22, 2022), and the end of the Class Period and PAGA Period will be moved back to only
6 cover the Class Period and PAGA Period during which no more than 1,313 pay periods were
7 received by the Class Members. *Id.*

8 **B. Settlement Terms and Evaluation**

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

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

28 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage

1 and hour class action litigation. Plaintiff's counsel have been approved as class counsel in a
2 number of wage and hour class actions and have extensive litigation experience. L. Lee Decl. ¶¶
3 29, 34-36; Declaration of Christine S. Lee ("C. Lee Decl.") ¶¶ 5-7; Declaration of William L.
4 Marder ("Marder Decl.") ¶¶ 7-14; Declaration of Edward W. Choi ("Choi Decl.") ¶¶ 5-6. Each
5 side has apprised the other of their respective factual contentions, legal theories, and defenses,
6 resulting in negotiations taking place between the Parties. L. Lee Decl. ¶ 33.

7 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
8 face potential liability of up to approximately \$274,056 for Plaintiff's class claims, which is
9 based on approximately \$159,456 in unpaid wages and \$114,600 in Labor Code § 226 penalties.
10 L. Lee Decl. ¶ 17. Plaintiff was able to estimate the potential damages and penalties based on
11 data provided by Defendant, including the number of employees in the putative class, the
12 average rate of pay and the number of wage statements at issue. *Id.* Defendant's position was that
13 all bonuses paid to the Class Members were discretionary, and therefore properly not included in
14 the calculation for overtime pay, resulting in no liability.

15 With respect to potential liability of Plaintiff's PAGA claims, Plaintiff estimated that
16 Defendant could face civil penalties of up to a maximum \$123,700 if Plaintiff were successful at
17 trial, and without any reduction by the Court. *Id.* ¶ 18.

18 Thus, based on the data provided by Defendant, Plaintiff's counsel estimated total class
19 and PAGA penalties to be approximately \$397,756. *Id.* ¶ 19.

20 Even assuming Plaintiff prevailed on her PAGA claim, the Court still has discretion to
21 reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to
22 award PAGA penalties where "if, based on the facts and circumstances of the particular case, to
23 do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory."
24 Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, 30 Cal.
25 App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court
26 reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt
27 at complying with the law. *Id.* at p. 517. Upon review, the Court of Appeal found such reduction
28 to be proper. *Id.* at p. 539.

1 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
2 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
3 involved in not prevailing on one or more of the causes of action or theories alleged in the
4 operative Complaint, the possibility of non-certification, and potential for appeals. L. Lee Decl.
5 ¶¶ 27-28, 32. These risks on class certification are compounded by the California Supreme
6 Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs
7 obtained class certification and subsequently prevailed at trial after eight years of litigation, but
8 the judgment and the certification ruling were reversed by the California Supreme Court after an
9 additional five years of litigation. The case was remanded back to superior court where class
10 certification was denied and plaintiffs' subsequent appeal also was denied.

11 Indeed, numerous courts have held that **gross** settlements approximating between only
12 8% and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego*
13 *Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
14 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
15 settlement amounting to only a fraction of the potential recovery does not per se render the
16 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
17 assessed relative to risks of pursuing the litigation to judgment"; noting that whether the
18 settlement is fair and adequate depends on the "the difficulties in proving the case");
19 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
20 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
21 the Defendants' potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
22 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
23 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
24 litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
25 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
26 approximately 15% of the potential recovery was fair and reasonable). Here, the \$85,000.00
27 gross settlement is approximately 21% of the maximum potential damages and statutory
28 penalties.

1 Despite the asserted fairness of the settlement terms, as set forth in the Notice of
2 Proposed Settlement of Class Action and Hearing Date for Final Court Approval (“Settlement
3 Notice”), should any Class Member wish to pursue his or her own case for the claims being
4 released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out)
5 from the settlement. Stipulation ¶ III.E.3.c. Moreover, as set forth in the Settlement Notice, Class
6 Members are advised of their right to object to any of the terms contained in the Settlement
7 Agreement. *Id.* ¶ III.E.3a.

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

11 The Settlement Agreement provides for Eighty-Five Thousand Dollars (\$85,000.00) as
12 the Gross Settlement Amount. Stipulation ¶ I.S. The Net Settlement Amount (calculated after
13 deduction of attorneys’ fees (up to \$28,333.33) and costs (up to \$15,000.00), Class
14 Representative Service Payment (up to \$5,000.00), PAGA Payment (\$4,000.00), and Settlement
15 Administration Costs (\$5,950.00) was estimated to be approximately \$26,716.67. Stipulation ¶
16 I.U. To determine the amount that each Class Member is entitled from the Net Settlement
17 Amount, the Settlement Administrator will first divide the Net Settlement Amount by the total
18 number of pay periods, to arrive at the Pay Period Rate. *Id.* ¶ III.C.2. The number of pay periods
19 by each Class Member will be multiplied by the Pay Period Rate, to arrive at the Individual Class
20 Payment for that Class Member. *Id.*

21 Separate from the Individual Class Payment, PAGA Members will be entitled to receive
22 an Individual PAGA Payment. The Individual PAGA Payment will be calculated by the
23 Settlement Administrator by dividing 25% of the PAGA Payment (or \$1,000.00) by the total
24 number of pay periods worked by PAGA Members during the PAGA Period, to arrive at the
25 PAGA Pay Period Value. Stipulation ¶ III.B.3. The PAGA Pay Period Value will be multiplied
26 by the individual number of pay periods worked by each PAGA Member during the PAGA
27 Period, to arrive at the Individual PAGA Payment for that PAGA Member. *Id.*

28 Based thereon, on a raw average, each Class Member may recover approximately
\$284.22 per person and each PAGA Member may recover approximately \$10.64 per person. L.

Lee ¶ 23. The amount actually paid to each Participating Class Member will increase or decrease depending on his or her number of pay periods, as well as the number of opt-outs received and fees and costs approved by the Court. Stipulation ¶ III.C.2. Finally, uncashed checks (upon the expiration date) shall be paid as follows:

Twenty-five percent (25%) to the State Treasury for deposit in the Trial Court Improvement and Modernization Fund established in Section 77209 of the Government Code, and subject to appropriation in the annual Budget Act for the Judicial Council to provide grants to trial courts for new or expanded collaborative court or grants for Sargent Shriver Civil Counsel; and seventy-five percent (75%) to Free to Thrive, a non-profit organization helping survivors of human trafficking by providing restorative justice by expunging their criminal records to enable them to become gainfully employed and to rejoin the community. *Id.* ¶ III.E.10.

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

None of the settlement funds will revert to Defendant. Stipulation ¶ III.A.

3. Scope of the Release of Class Members' Claims

As a condition of participating in this class action settlement, Participating Class Members shall waive and release “all claims and/or causes of action occurring during the Class Period based on facts that were pled in the operative class action including, the failure to pay overtime compensation, the failure to provide accurate itemized statements, waiting-time penalties, Business and Professions Code section 17200 predicated on the claims pled in the operative class action complaint. This release expressly excludes claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers’ compensation, and class claims outside of the Class Period (“Released Class Claims”). Stipulation ¶ III.F.1. The Class Period is defined as the period of November 12, 2017 through December 31, 2022. *Id.* ¶ I.J.

With respect to the PAGA Claims, “Upon funding of the Gross Settlement Amount, Defendant shall receive a release from the State of California of all PAGA claims pled in the operative complaint and PAGA letter sent by the Plaintiff that occurred during the PAGA Period

as to the Class Members, and expressly excluding claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside of the Class Period and PAGA claims outside of the PAGA Period."

Stipulation ¶ III.F.2. The PAGA Period is November 8, 2020 to December 31, 2022. *Id.* ¶ I.W.

Class Members who timely and validly opt out of the settlement will remain PAGA Members, receive Individual PAGA Payments, and be bound by the PAGA Released Claims.

Stipulation ¶¶ III.B.3, III.E.3.c.

4. Tax Treatment of Settlement Amounts

Ten percent (10%) of each Class Member's Settlement Share is in settlement of wage claims and subject to wage withholdings, five percent (5%) of each Participating Class Member's Settlement Share is in settlement of claims for interest, and eighty-five percent (85%) of each Participating Class Member's Settlement Share is in settlement of claims for penalties.

Stipulation ¶ III.C.3.

The Individual PAGA Payments shall be allocated as one hundred percent (100%) penalties and reported on IRS Form 1099. III.B.3.

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

As stated above, Class Members do not need to do anything should they wish to receive their share of the settlement funds. This substantially decreases the amount of burden each Class Member must bear in order to receive their settlement share. If a Class Member does not wish to take part in this settlement and be bound by the Released Claims, the Class Member must submit a Request for Exclusion. Stipulation ¶ III.E.3.c. Class Members who timely and validly submit a Request for Exclusion, however, will still receive Individual PAGA Payments and be bound by the PAGA Released Claims. *Id.* ¶ III.B.3.

C. Notice to Class Members

Within thirty (30) calendar days of the preliminary approval of this settlement, Defendant will confidentially transmit to the Settlement Administrator a list containing for each Class Member the following information: his or her name; last-known mailing address; Social Security

number; his or her employee identification number; his or her email address (if known); and the number of pay periods a Class Member was paid a bonus and overtime wages in the same pay period during the Class Period, and the number of pay periods an Aggrieved Employee was paid a bonus and overtime wages in the same pay period during the PAGA Period, exclusive of any pay periods previously released (“Class Data”). Stipulation ¶¶ I.F, III.E.2.a.

Upon receipt of the information and prior to mailing the Notice of Proposed Settlement of Class Action and Hearing Date for Final Court Approval (“Settlement Notice”), the Settlement Administrator shall perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. Stipulation ¶ III.E.2.b. Within fourteen (14) after receiving the Class List from Defendant, the Settlement Administrator shall mail the Settlement Notice to all Class Members via regular First-Class U.S. Mail. *Id.* The Settlement Administrator will re-mail the Settlement Notice to the forwarding address provided for returned notices within seven calendars days of receipt of the returned Settlement Notice. Stipulation ¶ III.E.2.c. Settlement Notices that are returned without a forwarding address will be re-mailed to a corrected address obtained by the Settlement Administrator after performing a skip-trace or other automated search. *Id.*

As set forth in the Settlement Notice, Class Members will be allowed to opt out of the settlement by a certain deadline or object to the settlement in writing. Stipulation ¶ III.E.3.c.

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.*, 150 F.3d 1011, 1019 (1998) (“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.*, 29 Cal. 3d 462, 473 (1981). Defendant’s conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971).

1 Where the employer's conduct is uniformly directed at a class of employees, as it is here, the
2 class wide impact of the defendant's policies satisfies the commonality requirement. *See*
3 *Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

4 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure
5 violated the Labor Code by failing to proper overtime wages at the correct regular rate of pay,
6 pay all wages upon separation of employment due to the underpaid wages, and inaccurate wage
7 statements. Declaration of Perla Marin ("Marin Decl.") ¶¶ 3-5.

8 In other words, Plaintiff was subjected to the same policy and practice as other Class
9 Members. Thus, Plaintiff's claims are typical to those of Class Members.

10 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
11 issues been raised or presented. Marin Decl. ¶ 6. Plaintiff has taken all necessary steps to
12 represent the interests of the Class, and provided information and documents to her counsel. *Id.* ¶
13 7. Finally, Plaintiff has no relationship of any kind with Free to Thrive. *Id.* ¶ 9. For such reasons,
14 Plaintiff has adequately represented the Class Members and will continue to do so.

15 **2. Class Counsel Have Adequately Represented the Class and Have**
16 **Experience with Wage and Hour Class Actions**

17 From the inception of the case, Class Counsel have zealously represented the interests of
18 the Class. The settlement was obtained for the benefit of the Class, as opposed to the individual
19 Class Representative. Further, Class Counsel have been approved as class counsel on a number
20 of prior cases, have litigated numerous other class action cases, and are competent to represent
21 the class. L. Lee Decl. ¶¶ 30, 34-36; Marder Decl. ¶¶ 7-14; C. Lee Decl. ¶¶ 6-7; Choi Decl. ¶¶ 5-
22 6. Class Counsel do not have any relationship of any kind with Free to Thrive. L. Lee Decl. ¶
23 37; Marder Decl. ¶ 6; C. Lee Decl. ¶ 9; Choi Decl. ¶ 7. Finally, Class Counsel has provided
24 notice of this settlement to the LWDA concurrent with the filing of this Motion. L. Lee Decl. ¶
25 38.

26 **E. Costs and Fees**

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

28 California state and federal courts have recognized that an appropriate method for

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

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

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

of a reasonable fee by choosing an appropriate percentage of the fund created”).

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

The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount (or \$28,333.33) for payment to Class Counsel as attorneys’ fees. The Parties have agreed to a payment of the foregoing attorney’s fees and, thus, this payment should be presumed to be fair.

Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs in an amount up to \$15,000.00. Class Counsel have, at their own risk, expended costs, for example, to file this instant action, effect service of process, and pay other litigation related costs.

Based on the foregoing, the Court should preliminarily approve the attorneys’ fees and costs being requested by the Parties.

2. Proposed Payment to the Class Representative

Plaintiff Perla Marin requests a modest enhancement of \$5,000.00. Stipulation ¶ III.B.1. The Class Representative met and conferred with Class Counsel on a number of occasions to discuss the case, provided documents and information to Class Counsel, and reviewed the Settlement Agreement. As part of her duties as Class Representatives Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. Marin Decl. ¶¶ 7-8. In addition to the invaluable services that she provided, Plaintiff also took a significant risk, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant had she not prevailed in this action.

Furthermore, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face

1 prejudice in the future from other potential employers. Plaintiff assumed these risks and the
2 whole class benefited from these risks taken by Plaintiff. Class Members did not have to file
3 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
4 have to face the potential for retaliation and not getting future employment had they filed a
5 public lawsuit.

6 Finally, as part of this settlement, Plaintiff has executed a general release of her
7 individual claims, including as to Civil Code § 1542, something that the Class Members did not
8 have to provide. Plaintiff's sacrifice for the benefit of the Class further warrants the requested
9 enhancement amount.

10 **3. Settlement Administration Costs**

11 The Parties have agreed to an estimated payment of \$5,950.00 to the Settlement
12 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
13 settlement. Stipulation ¶¶ III.B.4. Phoenix Settlement Administrators is a well-recognized class
14 action settlement administrator. The Parties believe that the administration fee is reasonable and
15 should be approved.

16 **F. Notice to the LWDA Has Been Provided**

17 Pursuant to California Labor Code § 2699(1), on May 1, 2023, Plaintiff uploaded the
18 instant motion, Settlement Agreement, and proposed order to the LWDA's website. L. Lee Decl.
19 ¶ 38. In addition, Plaintiff shall submit to the LWDA a copy of the Court's judgment and order
20 approving the Settlement Agreement within ten (10) days after entry of judgment or order. *Id.*

21 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**

22 **PRELIMINARY APPROVAL**

23 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
24 substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
25 result of informed, extensive, and arm's-length negotiations conducted by counsel for respective
26 parties who are experienced in wage and hour class action litigation. For the foregoing reasons,
27 Plaintiff respectfully requests that the Court grant preliminary approval of the proposed
28 settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice of

1 Class Action and PAGA Settlement and Release, and set a date for the Final Approval Hearing
2 on or after March 4, 2024.

3
4 DATED: May 1, 2023

DIVERSITY LAW GROUP, P.C.

5
6 By: 

Larry W. Lee

Christine S. Lee

Attorneys for Plaintiff and the Class
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1 **PROOF OF SERVICE**

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

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

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

9 On May 1, 2023, I served the following document(s) described as:

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

13 **2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S**
14 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

15 **3. DECLARATION OF CHRISTINE S. LEE IN SUPPORT OF PLAINTIFF'S**
16 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

17 **4. DECLARATION OF EDWARD W. CHOI IN SUPPORT OF MOTION**
18 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

19 **5. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF**
20 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
21 **SETTLEMENT**

22 **6. DECLARATION OF PERLA MARIN IN SUPPORT OF PLAINTIFF'S**
23 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

24 **7. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR**
25 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

26 on the interested parties in this action as follows:

27 Paul Sorrentino
28 Melissa D. Owens
Suzanne Holderby
Ece Townsend
Jackson Lewis P.C.
225 Broadway, Suite 2000

Attorneys for Defendant HB Leisure, Inc.

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Suzanne.Holderby@Jacksonlewis.com
Ece.Townsend@jacksonlewis.com

1 San Diego, CA 92101

2 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
3 entitled document(s) to be served through the One Legal E-Filing System at the website
4 www.onelegal.com, addressed to all parties appearing on the electronic service list for the above-
5 entitled case. The service transmission was reported as complete and a copy of the filing
6 receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this
7 office.

8 I declare under penalty of perjury under the laws of the State of California that the above
9 is true and correct. Executed on May 1, 2023, at Los Angeles, California.

10 
11 _____
12 Linda Lee