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

JOHN COOK, individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

APPLE INC., a California corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No. 34-2021-00311177-CU-OE-GDS

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

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

Date: September 1, 2023

Time: 9:00 a.m.

Dept.: 28

Reservation No. A-311177-001

Complaint Filed: November 17, 2021

FAC Filed: May 18, 2023

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on September 1, 2023, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Lauri A. Damrell, judge presiding, in Department 28 of
4 the above referenced Court, located at 720 Ninth Street, Sacramento, California 95814, Plaintiff John
5 Cook (“Plaintiff”) will seek an Order:

6 (1) approving the Joint Stipulation of Class and Representative Action Settlement
7 (“Agreement” or “Settlement Agreement”) in this matter;

8 (2) conditionally certifying the following Class for settlement purposes only:

9 all current and former California employees of Defendant, who worked at Defendant's call
10 center, which is located at Apple's Sacramento Campus, who were paid overtime and/or
11 double-time wages at any time from November 12, 2020, through January 1, 2022.

12 (3) appointing Plaintiff John Cook as the Class Representative and Larry W. Lee, Kristen M.
13 Agnew, and Nicholas Rosenthal of Diversity Law Group, P.C., and William L. Marder of Polaris Law
14 Group as Class Counsel;

15 (4) preliminarily approving the Settlement Agreement and the total Gross Settlement Amount
16 of Four Hundred Ninety Five Thousand Dollars (\$495,000.00);

17 (5) finding on a preliminary basis that the Agreement appears to be within the range of
18 reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative
19 Service Award, Class Counsel Award, Settlement Administration Costs, and the allocation of
20 payments to Class Members that could ultimately be given final approval by this Court;

21 (6) approving the Notice of Class Action Settlement to be sent to Class Members;

22 (7) appointing ILYM Group, Inc. as the Settlement Administrator; and

23 (8) setting the matter for a Final Fairness and Final Approval hearing.

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

27 The basis for this Motion, filed without any opposition from Defendant Apple Inc.
28 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures

1 proposed by the Parties are adequate to ensure the opportunity of Class Members to participate in, opt-
2 out of, or object to the settlement. This Motion will be based on the attached Memorandum of Points
3 and Authorities, the Settlement Agreement and the proposed Notice of Class Action Settlement, and
4 the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, William
5 Marder, and John Cook, and upon the oral arguments of counsel (should there be any) and on the
6 complete records and file herein.

7 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
8 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the
9 department may be downloaded off the court's website. If the party does not have online access, they
10 may call the dedicated phone number for the department as referenced in the local telephone directory
11 between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the
12 tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before
13 the hearing, no hearing will be held.

14
15
16 DATED: August 10, 2023

DIVERSITY LAW GROUP, P.C.
POLARIS LAW GROUP

17
18 By: 
19 Larry W. Lee
20 Kristen M. Agnew
21 Nick Rosenthal
22 William L. Marder
23 Attorneys for Plaintiff, the Class, and Aggrieved
24 Employees
25
26
27
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1 **I. INTRODUCTION**

2 Plaintiff John Cook (“Plaintiff”) brings class and representative action claims against
3 Defendant Apple Inc. (“Defendant”) under the California Labor Code (Plaintiff and Defendant shall
4 be jointly referred to as the “Parties”). Plaintiff alleges in this lawsuit that Defendant had a policy and
5 practice of issuing defective wage statements in violation of Labor Code §§ 226 and 2698, *et seq.*, the
6 Private Attorneys General Act (“PAGA”). Plaintiff now moves for preliminary approval of the
7 proposed class and representative settlement after thorough investigation of the claims alleged,
8 mediation and extended negotiations.

9 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating to the
10 claims alleged in the operative Complaint and engaged in a thorough study of the legal principles
11 applicable to the claims asserted against Defendant. Defendant provided data related to the number of
12 putative class members and wage statements issued to each class member. Thereafter, the Parties
13 commenced settlement negotiations through a private mediator and were ultimately able to reach the
14 current settlement after continued negotiations conducted post-mediation. **Significantly, this entire**
15 **amount is non-reversionary, such that no monies will revert to Defendant.**

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

18 Although Plaintiff and his counsel believe that they can prevail on class certification, as well as
19 on the merits, Plaintiff and his counsel recognize the inherent risks in drawn-out litigation and the
20 specific risks that a class might not be certified and/or that Plaintiff could fail to establish liability.
21 Defendant denies the allegations in the operative Complaint and believes that it can prevail at trial.
22 Based on their own independent investigation and evaluation, the Parties and their respective counsel
23 are of the opinion that the settlement for the consideration and on the terms set forth in the Settlement
24 Agreement is fair, reasonable, and adequate and is in the best interests of the Class and Defendant in
25 light of all known circumstances and the expenses and risks inherent in litigation.

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

28 //

II. PROCEDURAL HISTORY

On November 8, 2021, Plaintiff filed a notice with the California Labor and Workforce Development Agency (“LWDA”) alleging that Defendant violated Labor Code § 226, pursuant to Labor Code § 2699 (“PAGA Notice”). The PAGA Notice alleged that Defendant failed to identify the correct total hours worked whenever overtime wages were paid, on wage statements issued to employees. Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 2. Attached as **Exhibit A** to the Declaration of Nicholas Rosenthal is a true and correct copy of the LWDA letter submitted by Plaintiff.

On November 17, 2021, Plaintiff filed a class action complaint against Defendant in the Superior Court of the State of California, County of Sacramento (the “Action”). The class action complaint alleges a single of action for violation of Labor Code § 226. *Id.* ¶ 3.

On January 13, 2022, Plaintiff filed a related action against Defendant in the Superior Court of the State of California, County of Sacramento, Case Number 34-2022-00313863 (the “PAGA Action”). *Id.* ¶ 4. The PAGA Action is a representative action complaint and alleges a cause of action for violation of Labor Code § 2698, *et seq.*, predicated on an underlying violation of Labor Code § 226. *Id.* ¶ 4.

On May 18, 2023, Plaintiff filed a Joint Stipulation for Leave to File First Amended Complaint, in which the Parties agreed to allow Plaintiff to file a first amended complaint in the Action solely for the purpose of obtaining the Court’s approval of the Parties’ settlement agreement. *Id.* ¶ 5. The first amended complaint alleges two causes of action for violation of Labor Code §§ 226 and 2698, *et seq.*, and combines the allegations of the Action and the PAGA Action. *Id.* ¶ 5. On May 18, 2023, the Court signed the order granting the Parties’ stipulation, and the first amended complaint was deemed to have been filed. The first amended complaint is the operative Complaint (“Complaint”). As alleged in the Complaint, Plaintiff seeks to represent the Class Members and other aggrieved employees. Plaintiff further seeks damages, penalties, interest, attorneys’ fees, and costs. *Id.*

Dismissal of the PAGA Action without prejudice was entered on June 22, 2023. *Id.* ¶ 9.

Following the filing of the Action and PAGA Action, the Parties agreed to participate in

1 private mediation. In connection with mediation, the Parties agreed to conduct informal discovery to
2 allow Plaintiff to assess the claims and liability, as well as analyze the maximum exposure of damages
3 and penalties. *Id.* ¶ 6. Defendant produced class data, including the number of putative class members
4 and the number of wage statements issued to putative class members. *Id.* Plaintiff reviewed the data
5 and records and performed an analysis of Defendant’s maximum liability. *Id.*

6 On January 4, 2023, the Parties engaged in an all-day mediation session with neutral Tripper
7 Ortman. *Id.* ¶ 7. After thorough investigation and evaluation of the facts and claims, and negotiations
8 with the assistance of Mr. Ortman, the Parties and their counsel reached a settlement and entered into
9 a memorandum of understanding. *Id.* In resolution of Plaintiff’s class and PAGA claims, the Parties
10 entered into the Joint Stipulation of Class Action and PAGA Settlement, a true and correct copy of
11 which is attached as **Exhibit B** to the Declaration of Nicholas Rosenthal. *Id.*, Exh. B.

12 **III. DISCUSSION**

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

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

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

24 Thus, the preliminary approval by the trial court is simply a conditional finding that the
25 settlement appears to be within the range of acceptable settlements. As Professor Newberg comments,
26 “[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a
27 tentative settlement proposal may vary. The court may find that the settlement proposal contains some
28 merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid

subject only to any objections that may be raised at a final hearing.” 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.26 (4th ed. 2002).

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

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

Id. § 11.24.

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

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

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

4 *Newberg on Class Actions* § 11.26.

1 In addition to such terms as class identification, settlement amount and payment procedures,
2 the Settlement Agreement reached among the Parties contains a provision pursuant to which the
3 Parties stipulate to the Court’s provisional certification of the Class for the purposes of this settlement
4 only. Settlement Agreement ¶ 16.

5 **A. Proposed Class Definition**

6 The current settlement is being settled on behalf of a Class of “all current and former
7 California employees of Defendant, who worked at Defendant's call center, which is located at Apple's
8 Sacramento Campus, who were paid overtime and/or double-time wages at any time from November
9 12, 2020, through January 1, 2022.” See Settlement Agreement ¶ 2.6.

10 **B. Settlement Terms and Evaluation**

11 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
12 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel*
13 *Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken*
14 *Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for
15 that of the proponents, particularly where, as here, settlement has been reached with the participation
16 of experienced counsel familiar with the litigation. *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,
17 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg*
18 *v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357
19 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa.
20 1978).

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

litigation”).

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and have extensive litigation experience. Rosenthal Decl. ¶¶ 39, 40; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 7-9; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶¶ 6-11; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 6-13.

Based on the class data provided by Defendant, Plaintiff estimated that Defendant would face potential liability of up to approximately \$3,129,050 for Plaintiff’s class and PAGA claims if Plaintiff succeeded at trial. Rosenthal Decl. ¶ 19. This number is based upon an analysis of the data provided by Defendant regarding the putative class. Specifically, the approximate damages/penalties for the class claim is \$1,545,550 for Labor Code § 226(e) penalties for wage statement violations for employees based on 15,835 wage statements issued to 759 employees during the Covered Period. *Id.* The specific calculation to arrive at this number for class damages is as follows: $759 \times \$50 + 15,076 \times \100 .

With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that Defendant could face civil penalties of up to \$1,583,500 in PAGA penalties premised on 15,835 pay periods. *Id.* ¶ 19. This is based on a calculation of \$100 per pay period per violation ($15,835 \times \$100$).

Based thereon, the collective total amount of class and PAGA recovery is approximately \$3,129,050. *Id.* ¶ 20.

However, Defendant denies liability as to all of Plaintiff’s claims and it has raised several defenses that presented risk. Rosenthal Decl. ¶ 22. Defendant contends that an employee would understand how to determine their total hours worked when overtime was paid. Rosenthal Decl. *Id.* Moreover, Defendant maintains that Plaintiff cannot prove willfulness or injury, both of which are required for any assignment of penalties under Labor Code Section 226(e). *Id.* Further, Defendant contends that a large proportion of the class signed an arbitration agreement containing a class action waiver. *Id.* Specifically, 351 of the 759 class members signed the arbitration agreement. Were the case to proceed, Defendant would seek to enforce this agreement and potentially reduce the size of the class by 46 percent.

1 Further, even assuming Plaintiff ultimately prevails on his PAGA claims, the Court still has
2 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline
3 to award PAGA penalties where “if, based on the facts and circumstances of the particular case, to do
4 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed,
5 as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504
6 (2018), while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
7 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with
8 the law. *Id.* at p. 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at p.
9 539. Thus, even if Plaintiff were to successfully prove his claims at trial, there is a possibility that the
10 Court may only award a small percentage of PAGA penalties, as the Court has discretion to do so.

11 The Gross Settlement Amount was premised with these risks in mind, associated with the
12 possibility of the Court significantly reducing Plaintiff’s PAGA penalties, along with other attendant
13 risks, even if Plaintiff were to prevail at trial. Rosenthal Decl., ¶ 25.

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

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

1 Indeed, numerous courts have held that **gross** settlements approximating between only 8 and
2 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp.*
3 *Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement recovering 16% of
4 potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement amounting to
5 only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.
6 Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing
7 the litigation to judgment”; noting that whether the settlement is fair and adequate depends on the “the
8 difficulties in proving the case”); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015
9 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering
10 between 8.5% and 25% of the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien*
11 *Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary
12 approval of wage and hour class settlement which obtained **only 9.1%** of projected damages, given the
13 risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC,
14 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
15 approximately 15% of the potential recovery was fair and reasonable). Here, the Gross Settlement
16 Amount is fair and reasonable as it is approximately **15.8%** of the potential recovery of Plaintiff’s
17 class and PAGA claims if Plaintiff were to fully succeed at trial. Rosenthal Decl. ¶ 27. If PAGA
18 penalties are excluded, the settlement represents a **32.0%** recovery on Plaintiff’s class claims.

19 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class Action
20 Settlement (“Class Notice”), should any Class Member wish to pursue his or her own case for the
21 claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*,
22 opt-out) from the settlement. Settlement Agreement ¶ 7.2.5. Moreover, as set forth in the Class Notice,
23 Class Members are advised of their right to attend the final approval hearing and object to any of the
24 terms contained in the Settlement Agreement. Settlement Agreement ¶ 7.2.4.

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

28 The Settlement Agreement provides for Four Hundred Ninety-Five Thousand Dollars
(\$495,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ 6.1. Defendant will fund the

1 Gross Settlement Amount by the Effective Date of the Settlement Agreement. *Id.* ¶ 7.4.2.

2 The Net Settlement Amount, calculated after deduction of attorneys' fees (up to \$173,250.00),
3 costs (up to \$25,000.00), Class Representative Service Award (up to \$10,000.00), payment of PAGA
4 penalties to the LWDA and Aggrieved Employees (\$20,000), and Settlement Administration Costs
5 (up to \$14,000.00), is estimated to be approximately \$252,750.00. Settlement Agreement ¶ 6.7.1. The
6 Settlement Administrator will allocate the Individual Settlement Payments by distributing the Net
7 Settlement Amount to the Class and Exempt Class on a pro-rata basis from two funds. The Net
8 Settlement Amount will be split into a Class Amount and a PAGA Amount. The PAGA Amount will
9 be 25% of the total amount allocated for the satisfaction of claims for civil penalties under the PAGA,
10 which is currently estimated to total Five Thousand Dollars (\$5,000.00). The Class Amount will be
11 the remaining Net Settlement Amount after deduction of the PAGA Amount and is currently estimated
12 to be \$247,750.00. Settlement Agreement ¶ 6.7.1.

13 Each Participating Class Member who does not opt-out of the Settlement will be awarded a
14 portion of the Net Settlement Amount on a pro-rata basis, based upon the number of pay periods each
15 respective Participating Class Member worked during the Covered Period. *Id.* ¶ 6.7.2. Each Non-
16 Participating Class Member will receive only a pro rata portion of the PAGA Amount, based upon the
17 number of pay periods worked during the Covered Period. *Id.* ¶¶ 6.7.3.

18 Based thereon, on a raw average, each Participating Class Member may potentially recover
19 approximately \$333.00. Rosenthal Decl. ¶ 30. The amount actually paid to each Participating Class
20 Member may increase or decrease depending on the actual number of pay periods he or she worked
21 during the Covered Period and/or the number of timely Requests for Exclusion received. *Id.*

22 Finally, the terms of the settlement provide that uncashed checks (upon the expiration date)
23 shall be sent to the Unclaimed Property Fund at the California State Controller in the name of the
24 applicable Participating Settlement Class Member or Aggrieved Employee. Outside of being citizens
25 and residents of California, Plaintiff's counsel have no relationship with the California State
26 Controller.

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

4 None of the settlement funds will revert to Defendant. Settlement Agreement ¶ 6.1.

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

6 As a condition of participating in this settlement, members of the Class shall waive and release
7 “all claims that were pled in the Class Action Complaint or the First Amended Complaint for violation
8 of Labor Code section 226(a)(2), based on Defendant's alleged failure to accurately display the total
9 hours worked on wage statements that reflect the payment of overtime and/or double overtime wages,
10 and that accrued during the Class Release Period. The Released Class Claims include a release of
11 statutory penalties, attorneys' fees, and costs.” (“Settled Class Claims”). Settlement Agreement ¶ 2.33.
12 This release is appropriately limited, as it only applies during the time period of November 12, 2020,
13 through January 4, 2023, and only applies to the claims alleged.

14 Settlement Aggrieved Employees, or Class Members who submit a valid Request for
15 Exclusion, shall waive and release “all claims for civil penalties or other remedies recoverable under
16 Labor Code section 2698, et seq. (PAGA), which were pled in the PAGA Action Complaint, the First
17 Amended Complaint and/or the LWDA Letter sent by Plaintiff, dated November 8, 2021, for violation
18 of Labor Code section 226(a)(2), based on Defendant's alleged failure to accurately display the total
19 hours worked on wage statements that reflect the payment of overtime and/or double overtime wages,
20 and that accrued during the PAGA Release Period. The Released PAGA Claims include a release of
21 civil penalties, attorneys' fees, and costs” (“Settled PAGA Claims”). Settlement Agreement ¶ 2.34.
22 This release is appropriately limited, as it only applies during the time period of November 8, 2020,
23 through January 4, 2023, and only applies to the claims alleged.

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

25 As Plaintiff's lawsuit only sought penalties, the Parties have agreed that the Individual
26 Settlement Payments to Participating Class Members and Settlement Aggrieved Employees shall be
27 classified 100% as non-economic damages, penalties, and interest, for which an IRS Form 1099 will
28 be distributed. Settlement Agreement ¶ 6.8.

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

3 As stated above, Class Members do not need to do anything should they wish to receive their
4 share of the settlement funds. Thus, this substantially decreases the amount of burden each Class
5 Member must bear in order to receive their settlement share. If a Class Member does not wish to take
6 part in this settlement and be bound by the release, the Class Member must submit a Request for
7 Exclusion. Settlement Agreement ¶¶ 7.2.4 & 7.2.5.

8 **C. Notice to Class Members**

9 Within twenty-one (21) calendar days of the preliminary approval of this settlement,
10 Defendant will confidentially transmit to the Settlement Administrator a spreadsheet containing each
11 Class Member's full name, last known home address, telephone, Social Security Number, number of
12 Qualifying Pay Periods worked during the Covered Period, and any other data necessary for the
13 Settlement Administrator to identify and/or contact the Class Members and Settlement Aggrieved
14 Employees ("Class List"). Settlement Agreement ¶¶ 2.10, 7.2.1. Upon receipt of the information and
15 prior to mailing the Notice of Class Action Settlement ("Class Notice"), the Settlement Administrator
16 shall check the names of Settlement Class Members with the U.S. Postal Service National Change of
17 Address Database and update any addresses with any new information found regarding the location of
18 those Settlement Class Members.. *Id.* ¶ 7.2.1. Within fifteen (15) calendar days of receipt of the Class
19 List, the Settlement Administrator shall mail the Court-approved Class Notice to the Settlement Class
20 Members. *Id.* ¶ 7.2.2. The notice need not be in any language other than English, as fluency in English
21 was a required part of the work performed by the Class. (Rosenthal Decl. ¶ 14.) The Settlement
22 Administrator will re-mail the Class Notice to Class Members for whom the notice is returned with a
23 forwarding address and perform a skip-trace or other search on Class Members and re-mailing for
24 whom a Class Notice is returned as undeliverable. *Id.* ¶ 7.2.3.

25 As set forth in the Class Notice, Class Members will be allowed to opt out of the settlement by
26 a certain deadline, or object to the settlement in writing or by appearing at the final approval hearing.
27 Settlement Agreement ¶¶ 7.2.4, 7.2.5.

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1 **D. Typicality and Adequacy of Representation**

2 **1. Class Representative’s Claims are Typical of the Class**

3 The commonality requirement is met when there are questions of law and fact common to the
4 class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) (“The existence of shared legal
5 issues with divergent legal factual predicates is sufficient, as is a common core of salient facts couple
6 with disparate legal remedies within the class”). Commonality requires only that some common legal
7 or factual questions exist; the plaintiffs need not show that all issues in the litigation are identical. *See*
8 *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant’s conduct is central to the
9 commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v.*
10 *Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer’s conduct is uniformly directed at
11 a class of employees, as it is here, the class wide impact of the Defendant’s policies satisfies the
12 commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421
13 (1987).

14 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure
15 violated the Labor Code by issuing defective wage statements. Declaration of John Cook (“Cook
16 Decl.”) ¶ 3. In other words, Plaintiff was subjected to the same policy and practice as other Class
17 Members. Thus, Plaintiff’s claims are typical to those of Class Members.

18 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues
19 been raised or presented. Cook Decl. ¶ 4. Plaintiff has taken all necessary steps to represent the
20 interests of the Class, and by providing information and documents to Plaintiff’s counsel. *Id.* ¶ 5. For
21 such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.
22 Defendant denies that the claims are typical, but agrees to certification of the class for settlement
23 purposes only.

24 **2. Class Counsel Has Adequately Represented the Class and Has Experience**
 with Wage and Hour Class Actions

25 From the inception of the case, Class Counsel has zealously represented the interests of the
26 class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class
27 Representative. Further, Class Counsel has been approved as class counsel on a number of prior cases,
28

1 have litigated numerous other class action cases, and are competent to represent the Class. Rosenthal
2 Decl. ¶¶ 39, 40; Lee Decl. ¶¶ 7-9; Agnew Decl. ¶¶ 6-11; Marder Decl. ¶¶ 6-13.

3 **E. Costs and Fees**

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

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

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

26 Indeed, most recently, the California Supreme Court has also now held that the award of
27 attorneys' fees in common fund wage and hour class action settlements should start with the
28 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the

1 overwhelming majority of federal and state courts in holding that when class action litigation
2 establishes a monetary fund for the benefit of the class members, and the trial court in its equitable
3 powers awards class counsel a fee out of that fund, the court may determine the amount of a
4 reasonable fee by choosing an appropriate percentage of the fund created”).

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

10 The Parties have agreed to a payment of a maximum of 35% of the Gross Settlement Amount
11 (or \$173,250.00) for payment to Class Counsel as attorneys’ fees. The Parties have agreed to a
12 payment of the foregoing attorney’s fees and, thus, this payment should be presumed to be fair. Any
13 fee award issued by the Court will be split with 65 percent going Diversity Law Group and 35 percent
14 going to Polaris Law Group. (Rosenthal Decl. ¶ 42.)

15 Further, the Parties have agreed to reimbursement of Class Counsel’s litigation costs in an
16 amount up to \$25,000.00. Class Counsel has expended costs at their own risk, for example, to file this
17 instant action, effect service of process, pay the mediation fee, and pay of other litigation-related costs.

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

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

21 Class Representative John Cook requests a service award of \$10,000.00. Settlement
22 Agreement ¶ 6.2. The Class Representative met and conferred with Class Counsel on a number of
23 occasions to discuss the case, provided documents and information to Class Counsel, and reviewed the
24 Settlement Agreement. As part of his duties as Class Representative, Plaintiff provided invaluable
25 information and documents that resulted in this settlement. Cook Decl. ¶ 5. In addition to the
26 invaluable services that he provided, Plaintiff also took a significant risk, both professionally and
27 monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. Because
28 the claims alleged by the Class Representative involved the payment of costs to the prevailing party,

1 Plaintiff could have possibly faced paying the costs of Defendant had he not prevailed in this action.

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

8 Subsequent to the Parties having reached an agreement relating to the Class and PAGA claims,
9 Defendant made an offer to Plaintiff for an individual settlement in return for his separation of
10 employment from Defendant. *Id* at ¶ 7. Up to the point at which a class settlement was reached,
11 Plaintiff was not aware that Defendant was going to make an offer relating to his individual
12 employment. *Id*. Indeed, Plaintiff did not allege any individual claims in the operative Complaint or
13 any other lawsuit. *Id*. Plaintiff did not attend mediation for the class case with any expectation that an
14 offer would be made by Defendant relating to him individually. *Id*. As such, this individual offer had
15 no impact on Plaintiff's representation of the Class and did not (and does not) create a conflict
16 between him and the Class. Plaintiff includes this information simply to be as transparent with the
17 Court as possible.

18 3. Settlement Administration Costs

19 The Parties have agreed to a maximum payment of \$14,000.00 to the Settlement
20 Administrator, ILYM Group, Inc., to send notices and to administer this settlement. Settlement
21 Agreement ¶ 6.5.1. ILYM Group, Inc. is a well-recognized class action settlement administrator. The
22 Parties believe that the administration fee is reasonable and should be approved.

23 F. Notice to the LWDA

24 Concurrently with this filing, Plaintiff submitted the Motion and settlement agreement to the
25 LWDA. Rosenthal Decl. ¶ 44.

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

3 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial
4 monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed,
5 extensive, and arm's length negotiations conducted by counsel for respective parties who are
6 experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully
7 requests that the Court grant preliminary approval of the proposed settlement, sign the proposed
8 Order, approve and authorize mailing of the proposed Notice of Class Action Settlement, and set a
9 date for a final approval hearing.

10
11 DATED: August 10, 2023

DIVERSITY LAW GROUP, P.C.
POLARIS LAW GROUP

12
13 By: 

Larry W. Lee
Kristen M. Agnew
Nick Rosenthal
William L. Marder

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16 Attorneys for Plaintiff, the Class, and Aggrieved
17 Employees
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1 **PROOF OF SERVICE**

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

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

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 within action; my business address is 515 S. Figueroa Street, Suite 1250,
9 Los Angeles, California 90071.

10 On August 10, 2023, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
12 **APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT THEREOF**
14 **2. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
17 **3. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF**
18 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**
19 **ACTION SETTLEMENT**
20 **4. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
21 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
22 **SETTLEMENT**
23 **5. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF**
24 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**
25 **ACTION SETTLEMENT**
26 **6. DECLARATION OF JOHN COOK IN SUPPORT OF PLAINTIFF'S MOTION**
27 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
28 **7. [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS**
ACTION SETTLEMENT

on the interested parties in this action as follows:

Kent J. Sprinkle
M. Leah Cameron
Desiree J. Ho
CDF LABOR LAW LLP
4660 La Jolla Village Drive, Suite 740
San Diego, CA 92122
ksprinkle@cdflaborlaw.com
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dho@cdflaborlaw.com
Attorneys for Defendant Apple Inc.

1
2 X BY ELECTRONIC MAIL: by personally sending a true and correct copy
3 of the above-described document(s) to the party(ies) listed above or on the attached mailing list
4 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
5 indicated above or on the attached mailing list. I certify that said electronic transmission was
6 completed and that all pages were received by the party(ies) identified herein or on the attached
7 mailing list.

8
9 I declare under penalty of perjury under the laws of the State of California that the above
10 is true and correct. Executed on August 10, 2023, at Los Angeles, California.
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Erika Mejia