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

LATOYIA KIMII BROWN, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

HP HOOD LLC, a Delaware limited
liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 34-2022-00315068-CU-OE-GDS

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

Date: March 8, 2024

Time: 9:00 a.m.

Dept.: 22

Reservation No.: A-315068-001

Action Filed: February 4, 2022

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on March 8, 2024 at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Lauri A. Damrell, in Department 22 of the above
4 referenced Court located at 720 Ninth Street, Sacramento, CA 95814, Plaintiff Latoyia Kimii
5 Brown (“Plaintiff”) will seek an Order: (1) approving the Joint Stipulation of Class and PAGA
6 Settlement (“Agreement” or “Settlement”) in this matter; (2) conditionally certifying the
7 following Class for settlement purposes only: “all RROP Class and COVID Class Members”¹;
8 (3) appointing Plaintiff Latoyia Kimii Brown as the Class Representative, and Larry W. Lee and
9 Christine S. Lee of Diversity Law Group, P.C. as Class Counsel; (4) preliminarily approving the
10 Agreement and the total Maximum Settlement Amount in the amount of Four Hundred Eighty-
11 Nine Thousand Seven Hundred Eighty Dollars (\$489,780.00); (5) finding on a preliminary basis
12 that the Agreement appears to be within the range of reasonableness of a settlement, including
13 the amount of Plaintiff’s enhancement award, attorneys’ fees and costs, settlement administration
14 fees, and the allocation of payments to Class Members, that could ultimately be given final
15 approval by this Court; (6) approving the Class Notice to be sent to Class Members; (7)
16 appointing CPT Group, Inc. as the Settlement Administrator; and (8) setting the matter for a
17 Final Fairness and Final Approval hearing.

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

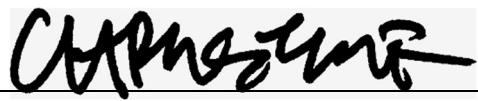
21 The basis for this Motion, filed without any opposition from Defendant HP Hood LLC
22 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the
23

24
25 ¹ RROP Class Members are “all current and former hourly or nonexempt employees of
26 Defendant who worked in the State of California who earned non-discretionary remuneration and
27 meal and/or rest period premium pay during the same workweek at any time from February 4,
2018 through August 29, 2022.” Agreement ¶ 40. COVID Class Members are “all current and
former hourly or non-exempt employees of Defendant who worked in the State of California at
any time from January 31, 2021 through April 10, 2022.” *Id.* ¶ 11.

1 procedures proposed by the Parties are adequate to ensure the opportunity of Class Members to
2 participate in, opt-out of, or object to the settlement. This Motion will be based on the attached
3 Memorandum of Points and Authorities, the Stipulation and the proposed Class Notice, and the
4 supporting Declarations of Larry W. Lee, Christine S. Lee, and Plaintiff Latoyia Kimii Brown,
5 and upon the oral arguments of counsel (should there be any) and on the complete records and
6 file herein.

7
8 DATED: February 9, 2024

DIVERSITY LAW GROUP, P.C.

9
10 By: 

Larry W. Lee

Christine S. Lee

11 Attorneys for Plaintiff, the Class, and the
12 Aggrieved Employees
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 Latoyia Kimii Brown (“Plaintiff”) alleges that Defendant HP Hood LLC (“Defendant”) (together
5 with Plaintiff, the “Parties”) failed to pay minimum, regular, and overtime wages for all hours
6 worked, failed to reimburse business expenses, failed to pay meal and rest period premium pay at
7 the regular rate of pay, and failed to provide accurate itemized wage statements. Plaintiff brings
8 class and PAGA claims based on these violations. The Parties have reached a proposed class and
9 PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
10 Class and PAGA Settlement (“Agreement” or “Settlement”).

11 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
12 to the class and PAGA claims alleged in the lawsuit and engaged in a thorough study of legal
13 principles applicable to the claims asserted against Defendant. Through the exchange of informal
14 discovery, Defendant provided necessary data pertaining to the number of putative class
15 members and number of workweeks at issue, a sampling of time and pay records for purposes of
16 performing an analysis of the alleged violations and penalties resulting therefrom, as well as
17 information pertaining to Defendant’s payroll policies and practices. Thereafter, the Parties
18 attended a full day of mediation with neutral Brandon McKelvey, Esq., after which the Parties
19 were able to reach the current settlement of Plaintiff’s class and PAGA claims through a
20 mediator’s proposal. The following represents the key terms of the settlement:

- 21 • Maximum Settlement Amount of \$489,780.00, which will be paid by Defendant
- 22 and distributed to the Class on a **non-reversionary** basis (*See* Agreement ¶ 54);
- 23 • Estimated Class of 405 individuals (*Id.* ¶ 55);
- 24 • Class Members do not need to submit claim forms to participate in the settlement;
- 25 • Plaintiff’s Enhancement Award of up to \$10,000.00 (*Id.* ¶ 54.C);
- 26 • Class Counsel’s attorneys’ fees of up to \$163,260.00 (1/3 of Maximum
- 27 Settlement Amount) (*Id.* ¶ 54.B);

- Class Counsel’s litigation costs of up to \$20,000.00 (*Id.* ¶ 54.B);
- Settlement Administration Expenses of up to \$10,000.00 (*Id.* ¶ 54.A);
- Payment to the LWDA of \$30,000.00, representing 75% of the total PAGA Allocation of \$40,000.00 (*Id.* ¶ 54.D.i);
- Net Settlement Amount of approximately \$246,520.00 (*Id.* ¶ 24); and
- Raw average of \$608.69 ($\$246,520.00 \div 405$ Class Members) to each Participating Class Member.

The Parties believe that the settlement for the consideration and on the terms set forth in the Agreement is fair, adequate, and reasonable, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they could prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that a class might not be certified, that Plaintiff could fail to establish liability, and/or that Plaintiff would be unable to prove damages in the amounts sought. Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On February 1, 2022, Plaintiff submitted written notice to the California Labor and Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 201-204, 226(a), 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2802, pursuant to the Private Attorneys General Act, Labor Code § 2699 (“PAGA Letter”). Declaration of Christine S. Lee (“C. Lee Decl.”) ¶ 2.

On February 4, 2022, Plaintiff filed a class action complaint in the Superior Court of the State of California for the County of Sacramento on behalf of herself and all similarly situated employees. C. Lee Decl. ¶ 3. Plaintiff asserted claims for: (1) violation of Labor Code §§ 201-204, 510, 558, 1194, 1197, and 1197.1; (2) violation of Labor Code § 2802; (3) violation of Labor Code §§ 226.7 and 512; (4) violation of Labor Code § 226(a); and (5) violation of Business and Professions Code § 17200, *et seq.* On June 14, 2022, Plaintiff filed a First

1 Amended Complaint adding a cause of action for violation of Labor Code § 2698, *et seq.* *Id.* ¶ 4.
2 The First Amended Complaint is the operative complaint. *Id.*

3 Plaintiff's class and PAGA claims as pled in the First Amended Complaint are predicated
4 upon the following allegations. *Id.* ¶ 5. With respect to Plaintiff's failure to pay wages claim,
5 Plaintiff contends that Defendant subjected its employees to daily COVID-19 screening
6 procedures prior to entering the work premises. *Id.* Plaintiff contends these screening procedures
7 were conducted prior to the start of each shift, and as such, employees were not paid minimum,
8 regular, and/or overtime wages for the time spent undergoing the procedures. *Id.* With respect to
9 Plaintiff's meal and rest period claim, Plaintiff contends that Defendant failed to include all non-
10 discretionary remuneration into the calculation of the regular rate of pay for the purposes of
11 paying meal and rest period premiums. *Id.* With respect to Plaintiff's business reimbursement
12 claim, Plaintiff contends that Defendant failed to reimburse employees for costs incurred when
13 using their personal phones to download and access an app to perform COVID screenings. *Id.*
14 With respect to Plaintiff's wage statement claims, Plaintiff contends that Defendant issued
15 deficient wage statements, as said wage statements do not correctly identify all applicable rates
16 of pay and the number of hours worked at each rate, total hours worked, and gross and net wages
17 earned as a result of the underpayment and/or nonpayment of wages and meal and rest period
18 premiums. *Id.* As a result of the alleged violations above, Plaintiff seeks damages and penalties
19 under the California Labor Code, the California Business & Professions Code, and the PAGA, as
20 well as attorneys' fees and costs. *Id.* Defendant has denied Plaintiff's contentions and asserted
21 factual and legal defenses to the above claims. *Id.*

22 After the Parties conferred regarding possible settlement discussions, they agreed to
23 exchange information informally to evaluate their respective claims and defenses. C. Lee Decl. ¶
24 6. The Parties subsequently engaged in informal discovery for Plaintiff to assess the claims, as
25 well as the maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiff's
26 counsel with informal data and information pertaining to the putative class size and number of
27 pay periods, a sampling of time and pay records, Plaintiff's time records, and Defendant's wage

1 and hour policies and practices. *Id.* Defendant’s production of time records allowed Plaintiff to
2 conduct a damages analysis and extrapolate from the sample. *Id.*

3 On June 12, 2023, the Parties engaged in a full-day mediation with mediator Brandon
4 McKelvey, Esq., and continued settlement discussions thereafter facilitated by Mr. McKelvey. C.
5 Lee Decl. ¶ 7. After thorough investigation and evaluation of the facts and claims, and as a result
6 of the arm’s length negotiations facilitated by Mr. McKelvey, the Parties reached the current
7 settlement. *Id.*

8 **III. DISCUSSION**

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

13 Approval of class action settlements involves a two-step process.
14 First, counsel submits the proposed terms of settlement and the court
15 makes a preliminary fairness evaluation. If the preliminary
16 evaluation of the proposed settlement does not disclose grounds to
17 doubt its fairness or other obvious deficiencies, such as unduly
18 preferential treatment of class representatives or of segments of the
19 class, or excessive compensation for attorneys, and 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.

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

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

1 2002).

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

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

9 *Id.* § 11.24.

10 Here, the Parties have reached such an agreement and have submitted to this Court in
11 connection with this Motion a copy of the Agreement fully setting forth the agreement reached
12 among the Parties. The Agreement sets forth all terms of the agreement reached by the Parties,
13 which include, among other things, the method for calculating the Class Members' Individual
14 Class Award payments.

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

24 The strength of the findings made by a judge at a preliminary
25 hearing or conference concerning a tentative settlement
26 proposal...may be set out in conditional orders granting tentative
27 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,

1 the proposed settlement, and the class counsel’s application for fees
2 and expenses.

3 *4 Newberg on Class Actions* § 11.26.

4 In addition to such terms as class identification, settlement amount, and payment
5 procedures, the Agreement reached among the Parties contains a provision pursuant to which the
6 Parties stipulate to the Court’s provisional certification of the Class for the purposes of this
7 settlement only. Agreement ¶ 52. Defendant has reserved its right to contest class certification in
8 the event that the settlement is not approved and litigation resumes.

9 **A. Proposed Class Definition**

10 The current settlement is being settled on behalf of “all RROP Class and COVID Class
11 Members.”² See Agreement ¶ 5. The Class Period is defined as February 4, 2018 through
12 August 29, 2022. *Id.* ¶ 9. Defendant estimates that there are approximately 405 individuals that
13 comprise the Class. *Id.* ¶ 55.

14 **B. Settlement Terms and Evaluation**

15 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
16 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
17 *Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
18 *re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
19 judgment for that of the proponents, particularly where, as here, settlement has been reached
20 with the participation of experienced counsel familiar with the litigation. *Nat’l Rural Telecomms.*
21 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp.
22 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
23 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*

24 ² RROP Class Members are “all current and former hourly or nonexempt employees of
25 Defendant who worked in the State of California who earned non-discretionary remuneration and
26 meal and/or rest period premium pay during the same workweek at any time from February 4,
27 2018 through August 29, 2022.” Agreement ¶ 40. COVID Class Members are “all current and
former hourly or non-exempt employees of Defendant who worked in the State of California at
any time from January 31, 2021 through April 10, 2022.” *Id.* ¶ 11.

1 & *Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

2 While the recommendations of counsel proposing the settlement are not conclusive, the
3 Court can properly take them into account, particularly where, as here, they have been involved
4 in informal discovery and negotiations for some period of time, appear to be competent, have
5 experience with this type of litigation, and have exchanged substantial evidence from the
6 opposing party. *See 4 Newberg on Class Actions*, *supra* § 11.47; *Nat'l Rural Telecomms. Coop.*,
7 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is
8 preserved, however, a strong initial presumption of fairness attaches to the proposed
9 settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who
10 are most closely acquainted with the facts of the underlying litigation”).

11 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
12 and hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a
13 number of wage and hour class actions and have extensive litigation experience. C. Lee Decl. ¶¶
14 29-31; Declaration Larry W. Lee (“L. Lee Decl.”) ¶¶ 6-8. Each side has apprised the other of
15 their respective factual contentions, legal theories, and defenses, resulting in negotiations taking
16 place between the Parties. C. Lee Decl. ¶ 9.

17 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
18 face liability in the amount of approximately \$4 million. C. Lee Decl. ¶ 10. This number is based
19 upon an analysis of the payroll records for the putative class.

20 With respect to Plaintiff’s claim for unpaid wages, Plaintiff estimated that Defendant
21 could be liable for approximately \$493,924.61, if employees worked 5 minutes of unpaid time
22 per day based on an average hourly pay rate of \$27.36. *Id.* ¶ 11.

23 With respect to Plaintiff’s regular rate claim, based on information received from
24 Defendant, Plaintiff estimates potential liability of approximately \$3,944.42 in underpaid meal
25 and rest period premiums. C. Lee Decl. ¶ 12.

26 With respect to Plaintiff’s claim for waiting time penalties, Plaintiff estimated the
27 potential exposure on this claim was approximately \$1.1 million, which she calculated based on

1 106 former employees who were subjected to daily COVID checks and 66 former employees
2 who were underpaid meal and rest break premiums, whose average rate of pay was \$27.36 [(106
3 employees + 66 employees) x 8 hours x 30 days x \$27.36 per hour]. C. Lee Decl. ¶ 13. To
4 succeed on this claim, Plaintiff would have to defeat Defendant’s argument that its alleged
5 failure to pay any wages was subject to a “good faith” defense. *See Hill v. Walmart Inc.*, 32 F.4th
6 811, 823 (9th Cir. 2022) (holding that defendant presented good faith dispute precluding
7 imposition of Section 203 penalties even where trial court denied employer’s motion for
8 summary judgment on same issue). Defendant argued that it did not willfully fail to pay wages
9 upon separation, thus precluding penalties. C. Lee Decl. ¶ 14.

10 With respect to Plaintiff’s claim for violation of Labor Code § 226, Plaintiff estimated the
11 maximum penalties associated with this claim as approximately \$2.3 million, which was based
12 on 582 individuals calculated with the allowable \$4,000.00 maximum penalty pursuant to Labor
13 Code §226(e). C. Lee Decl. ¶ 15. This amount would likely end up lower than estimated as not
14 every individual would have incurred violations on every pay period and Defendant argued that
15 the violation was not “knowing and intentional” and thus would not warrant Section 226(e)
16 penalties. *See Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009)
17 (granting summary judgment in favor of employer and finding its conduct was not “knowing and
18 intentional”). Defendant argued that it was entitled to a “good faith” defense on this claim, too.
19 *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014)
20 (“Where an employer has a good faith belief that it is not in violation of Section 226, any
21 violation is not knowing and intentional.”); *Wright v. Adventures Rolling Cross Country, Inc.*,
22 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same); *Ricaldai v. U.S. Investigations*
23 *Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (same); *Dalton v. Lee Publ'ns, Inc.*,
24 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same).

25 With respect to potential liability of Plaintiff’s PAGA claims, Plaintiff estimated that
26 Defendant could face civil penalties of approximately \$3.3 million if Plaintiff were successful at
27 trial. C. Lee Decl. ¶ 16. While the PAGA does provide for a heightened “subsequent” penalty,

1 courts are hesitant to award that amount where there has not been a prior violation of the Labor
2 Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); accord *Amalgamated*
3 *Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* 2009 WL 2448430, at *9 (S.D. Cal.
4 Aug. 10, 2009) (“[u]nder California law, courts have held that employers are not subject to
5 heightened penalties for subsequent violations unless and until a court or commissioner notifies
6 the employer that it is in violation of the Labor Code”); see also *Bernstein v. Virgin Am., Inc.*, 3
7 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court
8 ruling). Defendant argued no such prior violation occurred here warranting only the initial
9 penalty, if anything at all. C. Lee Decl. ¶ 16.

10 Even assuming Plaintiff ultimately prevails on her PAGA claims, the Court still has
11 discretion to reduce any PAGA penalties. C. Lee Decl. ¶ 17. Pursuant to Labor Code §
12 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts and
13 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
14 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
15 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his
16 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
17 citing the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review,
18 the Court of Appeal found such reduction to be proper. *Id.* at p. 539. Thus, the realistic value of
19 Plaintiff’s PAGA claims, taking into the Court’s discretion to reduce such penalties, was
20 approximately \$330,000. C. Lee Decl. ¶ 17.

21 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
22 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant has raised defenses to
23 the claims and further with respect to the reduction of PAGA penalties and that those defenses
24 could persuade the Court. C. Lee Decl. ¶ 18. Thus, even if Plaintiff were to successfully prove
25 her claims at trial, there is a possibility that the Court may only award a small percentage of
26 PAGA penalties, as the Court has discretion to do so. The Maximum Settlement Amount was
27 premised with this risk in mind, associated with the possibility of the Court significantly

1 reducing PAGA penalties.

2 The settlement is the result of extensive arm's length negotiations between the Parties
3 and their counsel and was facilitated by an experienced and neutral mediator. Although Plaintiff
4 believes that the class can be certified, Plaintiff also believes in the fairness of the settlement that
5 is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or
6 more of the causes of action or theories alleged in the operative Complaint, the possibility of
7 non-certification, and the potential for appeals. C. Lee Decl. ¶ 19. These risks on class
8 certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank*
9 *Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class certification and
10 subsequently prevailed at trial after eight years of litigation, but the judgment and the
11 certification ruling were reversed by the California Supreme Court after an additional five years
12 of litigation. The case was remanded to superior court where class certification was denied and
13 plaintiffs' subsequent appeal also was denied.

14 Indeed, numerous courts have held that **gross** settlements approximating between only 8
15 and 25% of the defendant's potential exposure are fair and reasonable. *See Lesevic v.*
16 *Spectraforce Techs., Inc.*, 2021 WL 1599310, at *3 (N.D. Cal. Apr. 23, 2021) (noting wage and
17 hour class fund of \$600,000 that compensated for 7% of maximum potential recovery was
18 reasonable); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at
19 p.*6 (N.D. Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5%
20 and 25% of the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*,
21 U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage
22 and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of
23 continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012
24 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
25 approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A.,*
26 *Inc.*, No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was
27 reasonable).

1 Here, the total amount of class and PAGA penalties amount to approximately \$4.2
2 million, without discounting for potentially losing on any of the causes of action. C. Lee Decl. ¶
3 20. The Maximum Settlement Amount is \$489,780.00, which is approximately 11.4% of the
4 maximum class and PAGA penalties. *Id.* Thus, the settlement was negotiated at arm's length and
5 the significantly high settlement percentage-to-recovery further supports that the settlement is
6 fair and reasonable.

7 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
8 Action Settlement and Hearing Date for Final Court Approval ("Class Notice"), should any Class
9 Member wish to pursue his or her own case for the claims being released herein, each Class
10 Member has the right to submit a Request for Exclusion (*i.e.*, opt-out) from the settlement, with
11 the exception of the PAGA claims. *See* Class Notice, attached as **Exhibit B** to the Settlement
12 Agreement. Moreover, as set forth in the Class Notice, Class Members are advised of their right
13 to object to any of the terms contained in the Settlement Agreement and attend the final approval
14 hearing. *Id.*

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

17 The Agreement provides for Four Hundred Eighty-Nine Thousand Seven Hundred Eighty
18 Dollars (\$489,780.00) as the Maximum Settlement Amount. Agreement ¶ 54. The Net
19 Settlement Amount (calculated after deduction of attorneys' fees (up to \$163,260.00), costs (up
20 to \$20,000.00), the Plaintiff's enhancement award (up to \$10,000.00), PAGA Allocation
21 (\$40,000.00), and settlement administration costs (up to \$10,000.00)) is estimated to be
22 approximately \$246,520.00. Agreement ¶¶ 24, 54, 54.A-54.D.

23 Pursuant to the Agreement, the Net Settlement Amount will be apportioned among the
24 Class Members on a pro rata basis, based on the number of Workweeks worked by all
25 Participating Class Members during the Class Period, as compared to the total number of
26 Workweeks worked by all Participating Class Members during the Class Period. *See* Agreement
27 ¶ 54.E. Based thereon, on a raw average, each Class Member potentially may recover

approximately \$608.69 ($\$246,520.00 \div 405$ Class Members). C. Lee Decl. ¶ 21. The amount actually paid to each Participating Class Member will increase or decrease depending on the number of Workweeks he or she worked during the Class Period.

Additionally, as part of the payment of PAGA penalties, 25% of the PAGA Allocation, or \$10,000.00, shall be paid to PAGA Members³ on a pro rata basis, based on the number of pay periods worked by each PAGA Member during the PAGA Period as compared to the total number of pay periods worked by all PAGA Members during the PAGA Period. Agreement ¶ 54.D.ii.

Finally, the funds from uncashed checks (upon the expiration date) shall be sent to the California State Controller's Office's Unclaimed Property Division in the name of the corresponding Class and/or PAGA Member. *See* Agreement ¶ 79.

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

None of the settlement funds will revert to Defendant. Agreement ¶ 54.

3. Scope of the Release of Class Members' Claims

As a condition of participating in this class action settlement, Class Members who do not opt out of the settlement ("Participating Class Members") will provide a limited release of the following claims against the Released Parties. *See* Agreement ¶ 30. RROP Class Members will release:

all claims under the California Labor Code, Wage Orders, regulations, and/or any other provisions of state and federal law against the Released Parties that were alleged in the Action and that reasonably could have been alleged in the Action based on the factual allegations asserted in the Action related to failing to properly pay meal and/or rest break premiums, including, but not limited to, all claims related thereto for: (1) regular rate of pay, (2) meal periods and meal period premiums, (3) rest breaks and rest break premiums, (4) inaccurate wage statements, (5) timely payment

³ "PAGA Class" and "PAGA Members" are all current and former Class Members employed by Defendant at any time from February 2, 2021 through August 29, 2022. Agreement ¶ 29. The PAGA Period is February 2, 2021 through August 29, 2022. *Id.* ¶ 28.

1 of wages during employment and at separation, (6) violation of the
2 Unfair Competition Law, and (7) any other Labor Code violations
3 including, but are not limited to, alleged violations of Labor Code
4 sections 201, 202, 203, 204, 226, 226.3, 226.7, 512 and Business
5 and Professions Code section 17200, *et seq.*, that accrued at any time
6 between February 4, 2018 and August 29, 2022 (“RROP Class
7 Released Claims”).

8 *See id.* ¶¶ 41 and 58.

9 COVID Class Members will release:

10 all claims under the California Labor Code, Wage Orders,
11 regulations, and/or any other provisions of state and federal law
12 against the Released Parties that were alleged in the Action and that
13 reasonably could have been alleged in the Action based on the
14 factual allegations asserted in the Action related to failing to pay
15 wages and reimbursements for undergoing COVID screenings and
16 temperature checks, including, but not limited to, all claims related
17 thereto for: (1) off-the-clock work, (2) unpaid minimum wages, (3)
18 unpaid regular wages, (4) unpaid overtime, (5) unpaid double time,
19 (6) business expense reimbursements, (7) inaccurate wage
20 statements, (8) timely payment of wages during employment and at
21 separation, (9) violation of the Unfair Competition Law, and (10)
22 any other Labor Code violations including, but are not limited to,
23 alleged violations of Labor Code sections 201, 202, 203, 204, 218.5,
24 226, 226.3, 510, 558, 1194, 1197, 1197.1, 2802, and Business and
25 Professions Code section 17200, *et seq.*, that accrued at any time
26 between January 31, 2021 and April 10, 2022 (“COVID Class
27 Released Claims”).

28 *Id.* ¶¶ 12 and 59.

29 In addition, regardless of their decision to participate in the settlement, PAGA Members
30 will release the following PAGA claims:

31 all claims for civil penalties they may have under the California
32 Labor Code, Wage Orders, regulations, and/or any other provisions
33 of state and federal law against the Released Parties that were
34 alleged in the Action and that reasonably could have been alleged in
35 the Action based on the factual allegations contained in the LWDA
36 Letter and the operative complaint in the Action and any
37 amendments thereto, including, without limitation, all claims for
38 civil penalties under PAGA (Labor Code § 2698 *et seq.*), related to
39 failing to properly pay meal and/or rest break premiums and failing
40 to pay wages and reimbursements for undergoing COVID

1 screenings and temperature checks, including, but not limited to, all
2 claims for: (1) regular rate of pay, (2) meal periods and meal period
3 premiums, (3) rest breaks and rest break premiums, (4) off-the-clock
4 work, (5) unpaid minimum wages, (6) unpaid regular wages, (7)
5 unpaid overtime, (8) unpaid double time, (9) business expense
6 reimbursements, (10) inaccurate wage statements, (11) timely
7 payment of wages during employment and at separation, and (12)
8 any other Labor Code violations that were alleged in that Action, or
that could have been alleged in the Action based on the facts alleged
in the Action, which include, but are not limited to, alleged
violations of Labor Code sections 201, 202, 203, 204, 218.5, 226,
226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2802, that
accrued during the PAGA Period (“Released PAGA Claims”).

9 *Id.* ¶¶ 36 and 61.

10 Given that the releases above are tailored to only claims pled or could arise out of the
11 facts alleged in the Action and PAGA Letter and that accrued during limited periods of time, the
12 releases are appropriately tailored.

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

14 The Parties have agreed that the settlement payments to Participating Class Members
15 (“Individual Class Awards”) shall be allocated as follows: five percent (5%) wages, for which an
16 IRS Form W-2 will issue and from which payroll taxes will be deducted; and ninety-five percent
17 (95%) penalties and interest, for which an IRS Form 1099 will issue. Agreement ¶ 54.E.

18 The payment of PAGA penalties to PAGA Members (“Individual PAGA Awards”) will
19 be accompanied by IRS Forms 1099-MISC. *Id.* ¶ 54.D.ii.

20 **5. Affirmative Obligations to be Undertaken by Class Members or Class** 21 **Counsel and the Reasons for Any Such Obligations**

22 As stated above, Class Members do not need to do anything should they wish to receive
23 their share of the settlement funds. In other words, because this is not a claims-made settlement,
24 Class Members will not be required to make a submission to participate in the settlement. Thus,
25 this substantially decreases the amount of burden each Class Member must bear in order to
26 receive their Individual Class Award. If a Class Member does not wish to take part in this
27 settlement and be bound by the release, the Class Member must submit a Request for Exclusion.

Agreement ¶¶ 38 and 69.B.

C. Notice to Class Members

Should the Court grant the instant Motion, Defendant will provide the Settlement Administrator with a list containing each Class Member’s name, last-known mailing address, Social Security Number, number of PAGA Period pay periods and/or Class Period work weeks (“Class Data”). Agreement ¶ 8. Defendant shall provide this information within twenty (20) calendar days of preliminary approval of this settlement. *Id.* ¶ 67. Upon receipt of the information and prior to mailing the Class 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. *Id.* ¶ 68. Within forty-five (45) calendar days of preliminary approval of the settlement, the Settlement Administrator shall mail the Class Notice to all Class Members. *Id.* ¶ 69. Any Class Notices returned to the Settlement Administrator as non-deliverable on or before the opt-out deadline shall be sent promptly via regular first-class U.S. mail to the forwarding address affixed thereto. *Id.* ¶ 70. If no forwarding address is provided, the Settlement Administrator shall promptly attempt to determine the correct address using a skip trace or other search and perform a re-mailing. *Id.*

The Class Notice will describe the terms of the settlement and advise Class Members of their opportunity to opt out of the Settlement, object to the Settlement, and/or dispute the number of workweeks and/or pay periods credited to them. *Id.* ¶ 69.

If Class Members need further information about the settlement and/or the lawsuit, Class Counsel’s contact information and the Settlement Administrator’s contact information are provided in the Class Notice. *See* Class Notice.

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

Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure, violated the Labor Code by failing to pay minimum, regular, and overtime wages for all hours worked, failing to reimburse business expenses, failing to pay meal and rest period premium pay at the regular rate of pay, failing to provide accurate itemized wage statements, and engaging in unfair business practices. Declaration of Latoyia Kimii Brown (“Brown Decl.”) ¶¶ 2-6. As a result, Plaintiff alleges that she is owed unpaid wages and penalties for the above violations. Brown Decl. *Id.*

In other words, Plaintiff contends that she was subjected to the same policy and practice as other Class Members and that her claims are typical to those of the Class.

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

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

From the inception of the case, Class Counsel have zealously represented the interests of the Class. Class Counsel have engaged in significant meet and confer discussions with Defense Counsel to obtain informal data and documents and to discuss the merits of the claims on behalf

of the Class. C. Lee Decl. ¶ 26. The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Further, Class Counsel have been approved as class counsel on a number of prior cases, have litigated numerous other class action cases, and are competent to represent the Class. C. Lee Decl. ¶¶ 29-31; L. Lee Decl. ¶¶ 6-8.

E. Costs and Fees

1. Attorneys' Fees and Costs

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); *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, she 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 p. 35; *Vincent*, 557 F.2d at p. 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

1 diligently prosecute proper litigation for the protection or recovery
2 of the fund if he is assured that he will be properly and directly
3 compensated should his efforts be successful.

4 *Id.*

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

12 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
13 percent of the fund. *Laffitte*, 1 Cal. 5th at p. 506. And this was based on a lodestar amount that
14 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
15 "extraordinarily high or low [should] the trial court [] consider whether the percentage method
16 should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at p.
17 505.

18 Here, the Parties have agreed to a payment of a maximum one-third of the Maximum
19 Settlement Amount (or \$163,260.00) for payment to Class Counsel as of attorneys' fees.
20 Agreement ¶ 54.B. The Parties have agreed to a payment of the foregoing attorneys' fees and,
21 thus, this payment should be presumed to be fair. Further, the Parties have agreed to
22 reimbursement of Class Counsel's litigation costs up to \$20,000.00. *Id.* Class Counsel have, at
23 their own risk, expended costs, for example, to file this instant action and other pleadings in the
24 case, effect service of process, participate in mediation, and pay other litigation-related costs. If
25 Class Counsel's actual costs are less than \$20,000.00, the remainder will go to the Class for
26 distribution. *Id.*

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

costs as requested by the Parties.

2. Proposed Payment to the Class Representative

Plaintiff and Class Representative Latoyia Kimii Brown requests a modest enhancement of \$10,000.00. Agreement ¶ 54.C. 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 the Class Representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. Brown Decl. ¶¶ 8-9.

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 prejudice in the future from other potential employers. Plaintiff took this risk upon herself and the whole Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a public lawsuit.

Plaintiff also agreed to provide a general release of claims and waiver of the protections of Civil Code § 1542, which is something that was not required of the Class Members. Agreement ¶ 63. Brown Decl. ¶ 11.

3. Settlement Administration Fees

The Parties have agreed to an estimated payment of \$10,000.00 to the Settlement Administrator, CPT Group, Inc., to send notices and to administer this settlement. Agreement ¶¶ 3 and 54.A. CPT Group, Inc. is a well-recognized class action settlement administrator. The

Parties believe that the administration fee is reasonable and should be approved.

IV. NOTICE TO THE LWDA

Concurrently with the filing of this motion, Plaintiff submitted the Agreement and supporting documents to the LWDA. C. Lee Decl. ¶ 33; Ex. B.

V. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for the respective parties who are experienced in wage and hour class action litigation.

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

DATED: February 9, 2024

DIVERSITY LAW GROUP, P.C.

By: _____



Larry W. Lee

Christine S. Lee

Attorneys for Plaintiff, the Class, and the
Aggrieved Employees