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

SABRINA GILBERT, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

CENTRAL CALIFORNIA BAKING
COMPANY, an Oregon Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: VCU291467

[Assigned for all purposes to the Hon. John P.
Bianco, Department 2]

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

Date: October 30, 2023

Time: 8:30 a.m.

Dept.: 2

Complaint Filed: April 26, 2022

FAC Filed: August 21, 2023

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 30, 2023, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable John P. Bianco, judge presiding, in Department 2 of the above referenced Court, located at 221 S. Mooney Blvd., Visalia, California 93291, Plaintiff Sabrina Gilbert (“Plaintiff”) will seek an Order:

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

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

all non-exempt employees who worked for Central California Baking Company at any time in the State of California during the Class Period and who received any wage statements containing the following information: (1) FLSA Overtime and shift differential pay; or (2) FLSA Overtime and variance pay; or (3) FLSA Overtime, variance, and shift differential pay; or (4) shift differential and variance pay; or (5) only FLSA overtime pay; or (6) only variance pay;

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

(4) preliminarily approving the Settlement Agreement and the total Gross Settlement Amount of Four Hundred Thousand Dollars (\$400,000.00);

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

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

(7) appointing Phoenix Settlement Administrators as the Settlement Administrator; and

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

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

The basis for this Motion, filed without any opposition from Defendant Central California

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

8
9
10 DATED: October 6, 2023

DIVERSITY LAW GROUP, P.C.



11
12 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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

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

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

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

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

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

1 Approval of Class Action Settlement.

2 **II. PROCEDURAL HISTORY**

3 On April 18, 2022, Plaintiff filed a notice with the California Labor and Workforce
4 Development Agency (“LWDA”) alleging that Defendant violated Labor Code § 226, pursuant
5 to Labor Code § 2699 (“PAGA Notice”). The PAGA Notice alleged that whenever weighted
6 overtime and/or shift differential wages were paid, Defendant failed to identify the accurate total
7 hours worked, on wage statements issued to employees. In particular, when the hours shown on
8 the wage statements are added up, they do not appear to add up to the actual total hours worked.
9 Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 2.

10 On April 26, 2022, Plaintiff filed a class action complaint (the “Action”) against Defendant
11 in the Superior Court of the State of California, County of Tulare. The class action complaint
12 alleges a cause of action for violation of Labor Code § 226(a). *Id.* ¶ 3.

13 On June 22, 2022, Plaintiff filed a related action against Defendant in the Superior Court of
14 the State of California, County of Tulare, Case Number VCU292216 (the “PAGA Action”). *Id.* ¶
15 4. The PAGA Action is a representative action complaint and alleges a cause of action for
16 violation of Labor Code § 2698, *et seq.*, predicated on an underlying violation of Labor Code §
17 226. *Id.* ¶ 4.

18 Following the filing of the Action and PAGA Action, the Parties agreed to participate in
19 private mediation. In connection with mediation, the Parties agreed to conduct informal discovery
20 to allow Plaintiff to assess the claims and liability, as well as analyze the maximum exposure of
21 damages and penalties. *Id.* ¶ 6. Defendant produced class data, including the number of putative
22 class members and the number of wage statements issued to putative class members. *Id.* Plaintiff
23 reviewed the data and records and performed an analysis of Defendant’s maximum liability. *Id.*

24 On November 8, 2022, the Parties engaged in an all-day mediation session with neutral
25 Daniel J. Turner, Esq. *Id.* ¶ 7. After thorough investigation and evaluation of the facts and claims,
26 and negotiations with the assistance of Mr. Turner, the Parties and their counsel reached a
27 settlement and entered into a memorandum of understanding. *Id.* In resolution of Plaintiff’s class
28 and PAGA claims, the Parties entered into the Joint Stipulation of Class and Representative Action

Settlement, a true and correct copy of which is attached as **Exhibit A** to the Declaration of Nicholas Rosenthal. *Id.*, Ex. A.

On August 10, 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 PAGA Action. *Id.* ¶ 5. On August 21, 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.* The PAGA Action has been dismissed without prejudice. *Id.* ¶ 5.

III. DISCUSSION

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

Approval of class action settlements involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the 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.
(Fed. Jud. Ctr., 3rd ed. 1995).

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement

proposal contains some 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
2 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to
3 which the Parties stipulate to the Court’s provisional certification of the Class for the purposes of
4 this settlement only. Settlement Agreement ¶ C-54.

5 **A. Proposed Class Definition**

6 The current settlement is being settled on behalf of a Class of “all non-exempt employees
7 who worked for Central California Baking Company at any time in the State of California during
8 the Class Period and who received any wage statements containing the following information: (1)
9 FLSA Overtime and shift differential pay; or (2) FLSA Overtime and variance pay; or (3) FLSA
10 Overtime, variance, and shift differential pay; or (4) shift differential and variance pay; or (5) only
11 FLSA overtime pay; or (6) only variance pay.” See Settlement Agreement ¶ A-4.

12 **B. Settlement Terms and Evaluation**

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

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

1 strong initial presumption of fairness attaches to the proposed settlement...[citations] and ‘great
2 weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the
3 facts of the underlying litigation”).

4 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and
5 hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of
6 wage and hour class actions and have extensive litigation experience. Rosenthal Decl. ¶¶ 38, 39;
7 Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 7-9; Declaration of Kristen M. Agnew (“Agnew
8 Decl.”) ¶¶ 5-11; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 6-13.

9 Based on the class data provided by Defendant, Plaintiff estimated that Defendant would
10 face potential liability of up to approximately \$1,995,000 for Plaintiff’s class and PAGA claims if
11 Plaintiff succeeded at trial. Rosenthal Decl. ¶ 18. This number is based upon an analysis of the data
12 provided by Defendant regarding the putative class. Specifically, the approximate
13 damages/penalties for the class claim is \$989,000 for Labor Code § 226(e) penalties for wage
14 statement violations for employees based on 10,065 wage statements issued to approximately 350
15 employees during the Covered Period.¹ *Id.* The math for this is as follows: $(350 \times \$50) + (9,715 \times$
16 $\$100)$. *Id.*

17 With respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that
18 Defendant could face civil penalties of up to \$1,006,500 in PAGA penalties premised on 10,065
19 pay periods. *Id.* ¶ 19. The math for this is as follows: $10,065 \times \$100$.

20 Based thereon, the collective total amount of class and PAGA recovery is approximately
21 \$1,995,500. *Id.* ¶20.

22 However, Defendant denies liability as to all of Plaintiff’s claims and it has raised several
23 defenses that presented risk. Rosenthal Decl. ¶ 21. Defendant contends that class members could
24 easily determine the missing information via “simple math.” Rosenthal Decl. *Id.* Moreover,
25 Defendant maintains that Plaintiff cannot prove willfulness or injury, both of which are required
26 for any assignment of penalties under Labor Code Section 226(e). *Id.*

27
28 ¹ The number of pay periods is based on data provided to Plaintiff that went from April 26, 2021, to February 17, 2023.

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

12 The Gross Settlement Amount was premised with these risks in mind, associated with the
13 possibility of the Court significantly reducing Plaintiff’s PAGA penalties, along with other
14 attendant risks, even if Plaintiff were to prevail at trial. Rosenthal Decl., ¶ 24.

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

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

1 years of litigation. The case was remanded to superior court where class certification was denied
2 and plaintiffs' subsequent appeal also was denied.

3 Indeed, numerous courts have held that **gross** settlements approximating between only 8
4 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
5 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
6 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
7 settlement amounting to only a fraction of the potential recovery does not per se render the
8 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
9 assessed relative to risks of pursuing the litigation to judgment"; noting that whether the settlement
10 is fair and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor*
11 *Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding
12 that class action settlement recovering between 8.5% and 25% of the defendant's potential
13 exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161
14 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which
15 obtained **only 9.1%** of projected damages, given the risks of continued litigation); *Villegas v. J.P.*
16 *Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21,
17 2012) (holding that gross class action settlement of approximately 15% of the potential recovery
18 was fair and reasonable). Here, the Gross Settlement Amount is fair and reasonable as it is
19 approximately **20%** of the potential recovery of Plaintiff's class and PAGA claims if Plaintiff were
20 to fully succeed at trial. Rosenthal Decl. ¶ 26. If the Court reduced the PAGA penalties to 10%
21 like in *Carrington*, the percentage of recovery compared to the available penalties would be
22 greater.

23 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
24 Action Settlement ("Class Notice"), should any Class Member wish to pursue his or her own case
25 for the claims being released herein, each Class Member has the right to submit a request for
26 exclusion (*i.e.*, opt-out) from the settlement. Settlement Agreement ¶ C-18. Moreover, as set forth
27 in the Class Notice, Class Members are advised of their right to attend the final approval hearing
28 and object to any of the terms contained in the Settlement Agreement. Settlement Agreement ¶¶ C-

16, C-40.

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

The Settlement Agreement provides for Four Hundred Thousand Dollars (\$400,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ A-19. Defendant will fund the Gross Settlement Amount within twenty-eight (28) calendar days of the Effective Date of the Settlement Agreement. *Id.* ¶ C-3.

The Net Settlement Amount, calculated after deduction of attorneys' fees (up to \$133,333.00), costs (up to \$15,000.00), Class Representative Enhancement Payment (up to \$10,000.00), payment of PAGA penalties to the LWDA (\$15,000.00), and Settlement Administration Costs (up to \$10,000.00), is estimated to be approximately \$216,667.00. The Settlement Administrator will allocate the Individual Settlement Payments by distributing the Net Settlement Amount to the Class and Exempt Class on a pro-rata basis from two funds. The Net Settlement Amount will be split into a Class Amount and a PAGA Amount. The PAGA Amount will be 25% of the \$20,000 allocated for the satisfaction of claims for civil penalties under the PAGA, or \$5,000.

Each Participating Class Member who does not opt-out of the Settlement will be awarded a portion of the Net Settlement Amount on a pro-rata basis, based upon the number of pay periods each respective Participating Class Member worked during the Covered Period. *Id.* ¶ C-8. Each Non-Participating Class Member will receive only a pro rata portion of the PAGA Amount, based upon the number of pay periods worked during the Covered Period. *Id.* ¶ C-8.

Based thereon, on a raw average, each Participating Class Member may potentially recover approximately \$619.04. Rosenthal Decl. ¶ 29. The amount actually paid to each Participating Class Member may increase or decrease depending on the actual number of pay periods he or she worked during the Covered Period and/or the number of timely Requests for Exclusion received. *Id.*

Finally, the terms of the settlement provide that uncashed checks (upon the expiration date) shall be distributed to Legal Aid At Work. Settlement Agreement ¶ C-25.

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 ¶ C-2.

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
7 release “all claims, including penalties, interest, costs, and attorneys' fees related thereto, that were
8 or could have been brought under the facts and allegations made in the operative First Amended
9 Complaint for violation of Labor Code section 226(a) during the Class Period.” (“Released Class
10 Claims”). Settlement Agreement ¶ A-27. This release is appropriately limited, as it only applies
11 during the time period of April 26, 2021, through February 17, 2023, and only applies to the
12 claims alleged.

13 Settlement Aggrieved Employees, or Class Members who submit a valid Request for
14 Exclusion, shall waive and release “all claims for penalties under the California Private Attorneys
15 General Act, including interest, costs and attorneys' fees related thereto, predicated on the violation
16 of Labor Code section 226(a) that accrued during the PAGA Period and were alleged in the PAGA
17 Notice and operative First Amended Complaint” (“Released PAGA Claims”). Settlement
18 Agreement ¶ A-28

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

20 As Plaintiff's lawsuit only sought penalties, the Parties have agreed that the Individual
21 Settlement Payments to Participating Class Members and Settlement Aggrieved Employees shall
22 be classified 100% as penalties, for which an IRS Form 1099 will be distributed. Settlement
23 Agreement ¶ C-28.

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

26 As stated above, Class Members do not need to do anything should they wish to receive
27 their share of the settlement funds. Thus, this substantially decreases the amount of burden each
28 Class Member must bear in order to receive their settlement share. If a Class Member does not
 wish to take part in this settlement and be bound by the release, the Class Member must submit a

Request for Exclusion. Settlement Agreement ¶¶ A-30, C-18.

C. Notice to Class Members

Within twenty-eight (28) business days of the preliminary approval of this settlement, Defendant will confidentially transmit to the Settlement Administrator a spreadsheet containing each Class Member's full name, last known home address, telephone, Social Security Number, beginning and ending dates of employment, number of wage statements reflecting the payment of FLSA Overtime and/or variance pay during the Class Period, number of wage statements reflecting the payment of FLSA Overtime and/or variance pay during the PAGA Period, and any other data necessary for the Settlement Administrator to identify and/or contact the Class Members and Settlement Aggrieved Employees ("Class List"). Settlement Agreement ¶¶ A-7, C-13. Upon receipt of the information and prior to mailing the Notice of Class Action Settlement ("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.* ¶ C-15. Within ten (10) business days of receipt of the Class Data and List, the Settlement Administrator shall mail the Class Notice to all Class Members. *Id.* ¶ C-14. The Settlement Administrator will re-mail the Class Notice to Class Members for whom the notice is returned with a forwarding address and perform a skip-trace or other search on Class Members and re-mailing for whom a Class Notice is returned as undeliverable. *Id.* ¶ C-17.

As set forth in the Class Notice, Class Members will be allowed to opt out of the settlement by a certain deadline, or object to the settlement in writing or by appearing at the final approval hearing. Settlement Agreement ¶¶ C-18, C-21.

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 issuing defective wage statements. Declaration of Sabrina Gilbert ("Gilbert Decl.") ¶ 3. In other words, Plaintiff was subjected to the same policy and practice as other Class Members. Thus, Plaintiff's claims are typical to those of Class Members.

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

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

From the inception of the case, Class Counsel has zealously represented the interests of the class. The settlement was obtained for the benefit of the Class, as opposed to the individual Class Representative. Further, Class Counsel has 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. Rosenthal Decl. ¶¶ 38, 39; Lee Decl. ¶¶ 7-9; Agnew Decl. ¶¶ 5-11; Marder Decl. ¶¶ 6-13.

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);

1 *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable
2 doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs proportionally
3 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.”
4 *Vincent*, 557 F.2d at 769.

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

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

26 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent
27 of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a
28 multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily high

1 or low [should] the trial court [] consider whether the percentage method should be adjusted so as
2 to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

3 The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement
4 Amount (or \$133,333.00) for payment to Class Counsel as attorneys’ fees. The Parties have agreed
5 to a payment of the foregoing attorney’s fees and, thus, this payment should be presumed to be
6 fair.

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

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

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

14 Class Representative Sabrina Gilbert requests a service award of \$10,000.00. Settlement
15 Agreement ¶ C-5. The Class Representative met and conferred with Class Counsel on a number of
16 occasions to discuss the case, provided documents and information to Class Counsel, and reviewed
17 the Settlement Agreement. As part of her duties as Class Representative, Plaintiff provided
18 invaluable information and documents that resulted in this settlement. Gilbert Decl. ¶ 5. In addition
19 to the invaluable services that she provided, Plaintiff also took a significant risk, both
20 professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf
21 of the Class. Because the claims alleged by the Class Representative involved the payment of costs
22 to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant had she
23 not prevailed in this action.

24 Furthermore, given that future employers are much less likely to hire individuals who have
25 filed suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice
26 in the future from other potential employers. Plaintiff took this risk upon herself and the whole
27 Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual
28 lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the

1 potential for retaliation and not getting future employment had they filed a public lawsuit.

2 **3. Settlement Administration Costs**

3 The Parties have agreed to a maximum payment of \$10,000.00 to the Settlement
4 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
5 settlement. Settlement Agreement ¶¶ A-34, C-6. Phoenix Settlement Administrators is a well-
6 recognized class action settlement administrator. The Parties believe that the administration fee is
7 reasonable and should be approved.

8 **F. Notice to the LWDA**

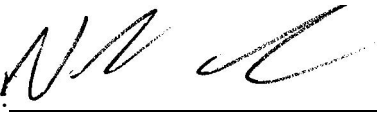
9 Concurrently with this filing, Plaintiff submitted the Motion and settlement agreement to
10 the LWDA. Rosenthal Decl. ¶ 42.

11 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
12 **PRELIMINARY APPROVAL**

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

20 DATED: October 6, 2023

DIVERSITY LAW GROUP, P.C.

21
22 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

1 **PROOF OF SERVICE**

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

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

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On October 6, 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 WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
15 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
16 **SETTLEMENT**
- 17 **3. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF PLAINTIFF'S**
18 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
19 **SETTLEMENT**
- 20 **4. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
21 **FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
- 22 **5. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
23 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
24 **SETTLEMENT**
- 25 **6. DECLARATION OF SABRINA GILBERT IN SUPPORT OF PLAINTIFF'S**
26 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
27 **SETTLEMENT**
- 28 **7. [PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS**
ACTION SETTLEMENT

on the interested parties in this action as follows:

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 6, 2023, at Los Angeles, California.


Erika Mejia