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

HECTOR J. MEJIA on behalf of himself
and all others similarly situated,

Plaintiffs,

v.

WALMART INC., a Delaware corporation;
and DOES 1 through 10, inclusive,

Defendant.

Case No.: CIVSB-2207614

[Assigned for all purposes to the Hon. David E.
Driscoll, Dept. S22]

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 16, 2024

Time: 8:30 a.m.

Dept.: S22

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 16, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable David E. Driscoll, judge presiding, in Department S-22 of the above referenced Court located at 247 W. Third Street, San Bernardino, CA 92415, Plaintiffs Hector J. Mejia, Dearl Powell, Christina Gast, and Elijha Gonzalez (collectively, “Plaintiffs”) will seek an Order: (1) granting final approval to the Joint Stipulation of Class and Representative Action Settlement (“Agreement” or “Settlement Agreement”) in this action; (2) approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement; (3) approving Plaintiffs’ request for an award of the Class Representative Service Awards of \$10,000.00 to each Plaintiff pursuant to the terms of the Settlement Agreement; (4) approving Class Counsel’s request for an award of attorneys’ fees of approximately 35% of the \$12,000,000.00 Maximum Settlement Amount, and reimbursement of litigation costs of \$45,762.93, pursuant to the terms of the Settlement Agreement; (5) approving Plaintiffs’ request for payment of the Settlement Administration Costs to Phoenix Settlement Administrators in the amount of \$431,950.00 pursuant to the terms of the Settlement Agreement; (6) approving Plaintiffs’ request for payment to the California Labor and Workforce Development Agency for \$300,000.00 pursuant to the terms of the Settlement Agreement; and (7) entering final judgment as to all members of the Class in this action.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to grant final certification of a class for settlement purposes. In light of the overwhelmingly positive response, as shown by the lack of objections and opt-outs to the settlement, there is no question that the settlement is fair, reasonable, and adequate and thus should be granted final approval.

This Motion will be based on the attached Memorandum of Points and Authorities and the supporting Declarations of Marcus Bradley, Larry W. Lee, Mai Tulyathan, Dennis S. Hyun, B. James Fitzpatrick, Laura L. Franklin, Plaintiffs, and Taylor Mitzner of Phoenix Settlement Administrators, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

1 DATED: March 22, 2024

BRADLEY/GROMBACHER, LLP

2
3 By: /s/ Marcus J. Bradley
4 Marcus J. Bradley, Esq.

5 Attorneys for Plaintiff
6 HECTOR MEJIA

7 DATED: March 22, 2024

DIVERSITY LAW GROUP, P.C.

8 By: /s/ Mai Tulyathan
9 Larry W. Lee, Esq.
10 Mai Tulyathan, Esq.

11 Attorneys for Plaintiffs
12 DEARL POWELL; CHRISTINA GAST and
13 ELIJHA GONZALEZ
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1 **I. INTRODUCTION**

2 On June 26, 2023, Plaintiffs Hector J. Mejia (“Mejia”), Dearl Powell (“Powell”),
3 Christina Gast (“Gast”), and Elijha Gonzalez (“Gonzalez”) (collectively, “Plaintiffs”) filed the
4 operative First Amended Complaint in this action (the “Complaint”). As detailed previously, the
5 Complaint alleges (1) violation of Labor Code § 246; (2) violation of Labor Code §§ 201-203;
6 (3) violation of Labor Code §§ 226(a) and 1174; (4) violation of Business and Professions Code
7 § 17200, *et seq.*; and (5) violation of Labor Code § 2698, *et seq.*, the Private Attorneys General
8 Act (“PAGA”). Specifically, the Complaint alleged that Defendants Walmart Inc., Wal-Mart
9 Associates, Inc., and Wal-Mart Stores, Inc. (“Defendants” or “Walmart”) failed to pay sick pay
10 at the “regular rate” of pay, timely pay owed wages upon separation of employment, and provide
11 accurate itemized wage statements to employees. Plaintiffs seek to represent all other similarly
12 situated individuals and aggrieved employees.

13 On December 10, 2023, the Court granted preliminary approval of the proposed class
14 action settlement (the “Preliminary Approval Order”). Having provided notice to the Class and
15 having received a positive response with zero objections and a high participation rate from Class
16 Members, Plaintiffs now move for final approval of the Joint Stipulation of Class and
17 Representative Action Settlement (“Agreement” or “Settlement Agreement”)¹.

18 Significantly, the Settlement Agreement provides for a \$12,000,000.00 **non-**
19 **reversionary** fund to be created for the benefit of the Class, from which attorneys’ fees,
20 litigation costs, service award to the Class Representatives, payment of PAGA penalties to the
21 California Labor and Workforce Development Agency (“LWDA”) and Aggrieved Employees,
22 and costs of settlement administration are to be paid. The entire net settlement fund after these
23 deductions will be paid to all Class Members who did not opt-out of the settlement and no funds
24 shall revert to Defendants.

25 As directed by the Court, the Settlement Administrator distributed the Notice of Class
26
27

28 ¹ Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in
the Settlement Agreement.

1 and Representative Action Settlement and Final Hearing Date (“Class Notice”) to 109,222 Class
2 Members. (Declaration of Taylor Mitzner on Behalf of Settlement Administrator (“Admin.
3 Decl.”) ¶ 3.) To date, ten (10) requests for exclusion have been received and zero objections have
4 been filed. (Admin. Decl. ¶¶ 8-9.) As such, there is a 99.99% participation rate. (*Id.* ¶ 11.)
5 Thus, an inference can be made that the Class supports the Court’s Preliminary Approval Order
6 finding that the Settlement Agreement is fair and reasonable.

7 In addition to the results of the notice process, for the same reasons as set forth earlier in
8 Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, the following represent
9 the basic points supporting final approval of the settlement:

- 10 ■ The settlement provides a total settlement sum of \$12,000,000.00 which is **non-**
11 **reversionary**;
- 12 ■ The settlement is fair given that Participating Class Members will receive (*after*
13 *deductions for fees, costs, etc.*) on average \$63.02) (*see* Admin. Decl. ¶ 15);
- 14 ■ Class Members did not need to submit claim forms to participate in the
15 settlement, but will automatically receive a check for their individual share of the
16 settlement;
- 17 ■ The allocation reflects that payment of individual settlement shares will be paid to
18 all Sick Pay Class Members in proportion to the number of pay periods in which
19 each Sick Pay Class Member was paid sick pay wages and incentive pay during
20 the same time period and to all Former Employee Sick Pay Class Members in
21 proportion to the number of Former Employee Sick Pay Class Members;²

22
23
24 ² Pursuant to the Preliminary Approval Order, Class Members include the following: (a) All of
25 Defendants’ California non-exempt Walmart retail store employees whose employment ended,
26 either voluntarily or involuntarily, at any time during the period of time from April 6, 2017,
27 through December 31, 2022, received payment of Paid Sick Days in the same quarter in which
28 he/she earned a MyShare incentive (the “Former Employee Sick Pay Class”); and (b) all of
Defendants’ current and former California non-exempt Walmart retail store employees as of
December 31, 2022, who, on at least one occasion between April 12, 2018 and December 31,
2022, received a payment of Paid Sick Days in the same quarter in which they earned a MyShare
incentive or within 90 days after receipt of any incentive pay (the “Sick Pay Class”).

- 1 ▪ Plaintiffs conducted significant investigation in this case, including formal and
- 2 informal discovery, several depositions including of Defendants’ Person Most
- 3 Knowledgeable, briefing class certification, and exchanges of information by
- 4 Plaintiffs and Defendants of class data necessary for Plaintiffs to fully evaluate
- 5 this case;
- 6 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was retained
- 7 for fees estimated to be \$431,950.00 (*see* Admin. Decl. ¶ 18); and
- 8 ▪ The State of California’s LWDA will also be the beneficiary of this settlement as
- 9 it will receive \$300,000.00 under the allocation for PAGA, should this settlement
- 10 be granted final approval. Timely notice of the PAGA settlement was provided to
- 11 the LWDA in accordance with PAGA, and no objections to the settlement by the
- 12 LWDA were received by Plaintiffs’ counsel. (Declaration of Larry W. Lee (“Lee
- 13 Decl.”) at ¶¶ 16-17.)

14 Accordingly, the Court should grant Final Approval consistent with the Preliminary
15 Approval Order.

16 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**
17 **SETTLEMENT**

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

24 As clearly stated in the Declaration of Taylor Mitzner, notice was provided to Class
25 Members, as required by the Preliminary Approval Order. On January 11, 2024, the Settlement
26 Administrator received a Class Member mailing list from Defendants’ counsel that included
27 109,222 Class Members. (Admin. Decl. ¶ 3.) On January 18, 2024, the Settlement Administrator
28 conducted a National Change of address search to confirm the addresses were accurate. (Admin.

1 Decl. ¶ 4.) On February 9, 2024, the Settlement Administrator mailed the Class Notice to all
2 109,222 Class Members via first class mail. (*Id.* ¶ 5.) From the date of mailing, four hundred
3 ninety-six (496) Class Notices were returned due to incorrect addresses. Address traces were
4 performed for the four hundred ninety-six (496) Class Notices. As of the date of this filing,
5 eighty-three (83) Class Notices are deemed undeliverable because the Settlement Administrator
6 could not obtain updated addresses through skip tracing. (*Id.* ¶¶ 6-7.) To date, only ten (10) Class
7 Members requested to be excluded from the settlement and no Class Members have objected.
8 (*Id.* ¶¶ 8-9.) Further, the Class Notice provided Class Members with Class Counsel’s contact
9 information and the Administrator’s website address, where they could further seek information
10 regarding the class settlement, leave questions for the Settlement Administrator, and update their
11 addresses. (*Id.* ¶ 5, Exh. A.)

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

22 Here, the Class Members were provided with a mailing regarding the settlement that
23 explained the settlement and allowed Class Members to seek information, ask questions, and
24 object, if so desired. As such, proper notice has been given to the Class Members. Thus, the
25 Court may proceed to determine the fairness and adequacy of the settlement and enter its Order
26 granting final approval, secure in the knowledge that all absent Class Members have been given
27 the opportunity to participate fully in the settlement, exclusion, and the approval process.

28 //

1 **III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE,**
2 **AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

3 **A. Strength of Plaintiffs' Case and Likelihood of Certifying the Class**

4 In order to proceed as a class, there are two requirements which must be met—
5 ascertainability and community of interest. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d. 695,
6 704; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809.) “The community of interest
7 requirement embodies three factors: (1) predominant common questions of law or fact; (2) class
8 representatives with claims or defenses typical of the class; and (3) class representatives who can
9 adequately represent the class.” (*Richmond v. Dart Industries* (1981) 29 Cal. 3d. 462, 470.)

10 **1. The Class is Ascertainable**

11 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section
12 382 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
13 available for identifying the class members.” (*Reyes v. San Diego County Board of Supervisors*
14 (1987) 196 Cal.App.3d 1263, 1271.)

15 Here, the Class is comprised of “(a) all of Defendants’ California non-exempt Walmart
16 retail store employees whose employment ended, either voluntarily or involuntarily, at any time
17 during the period of time from April 6, 2017, through December 31, 2022, and who during their
18 employment with Walmart at any time between April 6, 2017, through December 31, 2022,
19 received payment of Paid Sick Days in the same quarter in which he/she earned a MyShare
20 incentive (the “Former Employee Sick Pay Class”); and (b) all of Defendants’ current and former
21 California non-exempt Walmart retail store employees as of December 31, 2022, who, on at least
22 one occasion between April 12, 2018 and December 31, 2022, received a payment of Paid Sick
23 Days in the same quarter in which they earned a MyShare incentive or within 90 days after
24 receipt of any incentive pay (the “Sick Pay Class”). There are 109,222 individuals that comprise
25 the Class. (Admin. Decl. ¶ 3.) This is far more than the minimum required to certify a class.
26 Within the context of manageability, the issue is whether there exists sufficient means for
27 identifying class members at the remedial stage. (*Reyes*, 196 Cal.App.3d at pp. 1274-75.) Class
28 Members have already been identified by Defendants and notice was provided to all Class

Members.

2. There is a Community of Interest

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

a. There are Predominant Common Questions of Law and Fact

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

Plaintiffs allege that Defendants, as a matter of its corporate policy, practice, or procedure violated the Labor Code by its failure to pay sick pay at the “regular rate” of pay, timely pay owed wages upon separation of employment, and provide accurate itemized wage statements to employees. Defendants deny liability and argue that their formula for calculating sick pay was lawful and that there is no private right of action for sick pay under the Healthy Workplace Healthy Family Act or the California Labor Code. Defendants also contend that Plaintiffs cannot prove willfulness and thus would not be subject to waiting time penalties.

b. Plaintiffs’ Claims are Typical of the Class Claims

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

1 Plaintiffs were employed by Defendant and were subjected to the same payroll policies as
2 all other Class Members. Specifically, like other members of the Class, Plaintiffs were not paid
3 sick pay at the regular rate of pay during periods when non-discretionary incentive wages were
4 earned and thus, are owed additional sick pay wages and penalties. As a result of the
5 underpayment, Plaintiffs did not receive accurate wage statements. Plaintiffs were subjected to
6 the same policies and practices as other Class Members. Thus, Plaintiffs' claims are typical to
7 those of Class Members.

8 **c. Plaintiffs Adequately Represented the Class**

9 The class representative, through qualified counsel, must be capable of "vigorously and
10 tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 15 1
11 Cal.App.3d 834, 846.) Here, Plaintiffs do not have any interests adverse to the Class, nor have
12 any such issues been raised or presented. Plaintiffs have taken all necessary steps to represent the
13 interests of the Class, including providing information and documents to their counsel, reviewing
14 pleadings and documents in this case, participating in discovery by searching for and providing
15 documents and providing responses, and providing declarations in this case including in support
16 of class certification. (Declaration of Hector J. Mejia ("Mejia Decl.") ¶¶ 10-17; Declaration of
17 Dearl Powell ("Powell Decl.") ¶¶ 4-8; Declaration of Christina Gast ("Gast Decl.") ¶¶ 4-8;
18 Declaration of Elijha Gonzalez ("Gonzalez Decl.") ¶¶ 4-8.) For such reasons, Plaintiffs have
19 adequately represented the Class Members and will continue to do so.

20 **B. Defendants' Allegations and Unlikelihood of Class Certification**

21 Defendants assert that they maintained lawful policies regarding the payment of sick pay
22 wages, and further, that even if Defendants underpaid sick pay wages, such underpayment was
23 not willful. Based thereon, Defendants continue to maintain that they are not liable for the
24 allegations made by the Plaintiffs.

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

26 Plaintiffs believe that a class can be certified; however, Plaintiffs also believe in the
27 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiffs
28 involved in not prevailing on one or more of the causes of action or theories alleged in the

operative Complaint, the possibility of non-certification, and potential for appeals. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal. 4th 1.

Defendants have maintained that there is no liability. As stated above, Defendants allege that a class could not have been certified. There is always a risk that the court will not grant certification of the class, wherein the class will not be entitled to any damages. Based on the foregoing, there was a substantial risk that Plaintiffs would not have obtained the total amount of damages alleged, and a substantial number of complex issues that would have necessitated significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of further litigation warrant granting of this motion.

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

Without reiterating the Parties' showing that the Settlement Agreement and the negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The Settlement Agreement was the product of negotiation between highly able and experienced attorneys on both sides who possessed the relevant data and extensive legal research which they had carefully analyzed. (Lee Decl. ¶ 4.)

The results after mailing of the Class Notice support confirmation of the Court's preliminary approval of the settlement with final approval of the settlement, as evidenced by the fact that to date, only ten (10) requests for exclusion to the settlement have been received. (Admin. Decl. ¶¶ 8-9.) Zero class members submitted any written objections to the settlement. (*Id.*) With the significantly high rate of participation in the settlement by class members (99.99%), the Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single class member has submitted an objection. (*See Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1291; *Churchill Vill. LLC v. Gen. Elec.* (9th Cir. 2004) 361 F.3d 566, 577 (approving settlement with 45 objections and 500 opt-outs from a 90,000-person class, representing 0.05% and 0.56% of the class, respectively); *Chun-Hoon v.*

1 *McKee Foods Corp.* (N.D. Cal. 2010) 716 F. Supp. 2d 848, 852 (where 16 of 329 class members
2 opted out, court found that positive class reaction “strongly supports settlement”).)

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

5 **1. Standard of Review**

6 On a motion for final approval of a class action settlement under California Code of Civil
7 Procedure Section 382 and California Rule of Court 3.769, a court’s inquiry is whether the
8 settlement is “fair, adequate and reasonable.” (*Officers for Justice v. Civil Serv. Comm’n* (9th
9 Cir. 1982) 688 F.2d 615, 625, *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n* (1983) 459 U.S.
10 1217.) A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
11 “the interests of the class are better served by the settlement than by further litigation.” (*See*
12 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”).)
13 The law favors settlement, particularly in class actions and other complex cases, where
14 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
15 (*See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.41 (4th ed. 2002);
16 *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276; *Van Bronkhorst v. Safeco*
17 *Corp.* (9th Cir. 1976) 529 F.2d 943, 950.)

18 Although the Court possesses “broad discretion” in determining that a proposed class
19 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
20 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
21 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
22 adequate to all concerned. (*See Officers for Justice*, 688 F.2d at p. 625.) Accordingly, the Court
23 should give due regard to what is otherwise a “private consensual agreement” between the
24 parties. (*Id.*; *see also Church v. Consolidated Freightways, Inc.* (N.D. Cal. 1993) 1993 WL
25 149840; *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (D. Ariz. 1989) 720 F.Supp. 1379, *aff’d*
26 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
27 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
28 or imposing conditions on it. The judge cannot rewrite the agreement”).)

1 A court's approval of a class action settlement will only be reversed for a clear abuse of
2 discretion. (*See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Officers for Justice*,
3 688 F.2d at p. 626 ("reverse only upon a strong showing that the district court's decision was a
4 clear abuse of discretion"); *City of Seattle*, 955 F.2d at p. 1276; *Ackerman v. Kassar* (9th Cir.
5 1993) 1993 WL 326453; *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1238.)

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

7 It cannot be overemphasized that neither the trial court in approving
8 the settlement nor this Court in reviewing that approval have the
9 right or duty to reach any ultimate conclusions on the issues of fact
10 and law which underlie the merits of the dispute. It is well settled
11 that in the judicial consideration of proposed settlements, 'the [trial]
judge does not try out or attempt to decide the merits of the
controversy,' [citation] and the appellate court 'need not and should
not reach any dispositive conclusions on the admittedly unsettled
legal issue.

12 (*7-Eleven Owners for Fair Franchising v. Southland Corp* (2000) 85 Cal.App.4th 1135, 1146.)

13 **2. The Settlement is Presumed to Be Fair**

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

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

19 (*Dunk*, 48 Cal.App.4th at p. 1802; *accord*, *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980)
20 87 F.R.D. 15, 18; *In re Wash. Pub Power Supply*, 720 F.Supp. at p. 1387.)

21 The settlement in the case at bar warrants approval and carries a presumption of fairness.
22 As previously noted in the application for Preliminary Approval, this current settlement was
23 negotiated at arm's length and resulted only after a failed mediation attempt and further litigation
24 and negotiations. (Lee Decl. ¶ 5.)

25 Second, Class Counsel engaged in extensive factual investigation before settling,
26 including reviewing class data. (Lee Decl. ¶ 4.) Further, Class Counsel is highly experienced in
27 this type of litigation. As shown in the supporting declarations, Class Counsel has significant
28 experience in class actions and employment wage and hour matters. (Lee Decl. ¶¶ 10-13;

1 Declaration of Marcus J. Bradley (“Bradley Decl.”) ¶¶ 2-7; Declaration of Mai Tulyathan
2 (“Tulyathan Decl.”) ¶¶ 10-13; Declaration of Dennis S. Hyun (“Hyun Decl.”) ¶¶ 3-6; Declaration
3 of B. James Fitzpatrick (“Fitzpatrick Decl.”) ¶¶ 6; Declaration of Laura L. Franklin (“Franklin
4 Decl.”) ¶¶ 3-4.)

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

7 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
8 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
9 the risks inherent in continued litigation. (*See also In re General Motors Corp.* (3d Cir. 1995) 55
10 F.3d 768, 806 (“present value of the damages plaintiffs would likely recover if successful,
11 appropriately discounted for the risk of not prevailing, should be compared with the amount of
12 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson* (3d Cir. 1975) 521 F.2d 1
13 53, 157; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F.Supp. 610, 616-17.)

14 If Plaintiffs pursued this case without settlement and failed to prevail, Plaintiffs would
15 have been potentially responsible for Defendants’ costs. As such, should individual current or
16 former employees of Defendants bring individual claims on the same causes of action, they
17 would each face the uncertainty of prevailing and the possibility of paying costs to Defendants.
18 Accordingly, such claims likely would not be brought by many of these current and former
19 employees – thus, this lawsuit achieves a true benefit for the Class that they might not otherwise
20 get or seek as individuals. Here, given that a fair and reasonable settlement has been reached,
21 neither Plaintiffs nor any of the Class Members will be required to pay Defendants’ litigation
22 costs.

23 The risks of this case were weighed by Class Counsel and should be considered a
24 significant factor by the Court in its determination of final approval. Class Counsel obtained a
25 very substantial settlement for the Class that resulted in a fair recovery which at the same time
26 provides for finality and no risk of costs by Class Members or Class Representatives.

27 The Settlement Agreement also affords the Class prompt, fair relief while avoiding
28 significant legal and factual battles that otherwise may have prevented the Class from obtaining

any recovery at all. While Class Counsel believe the Class Members' claims are meritorious and can be successfully litigated, they are experienced and fully understand the inherent risks and uncertainty involved with such matters as the resolution of class certification, the outcome of a potential trial, and the outcome of any appeals that would inevitably follow should the Class prevail at trial. Because the settlement provides immediate and substantial relief, without the attendant risks and delay of continued litigation – not to mention the threat of litigation fees and costs – Class Counsel believe that the settlement warrants the Court's final approval.

4. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendant Favor Final Approval

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

As noted above, continued litigation could have led to appeals on a number of issues. On the other hand, the settlement that was reached provides to all Class Members – regardless of their means – fair relief in a prompt and efficient manner. Were the Court to deny final approval, Class Members would be left without a remedy as a practical matter and courts across the State would have to address the issues presented here in a piecemeal, costly, and time-consuming manner. The settlement in this case is therefore consistent with the “overriding public interest in settling and quieting litigation” that is “particularly true in class action suits.” (*See Van Bronkhorst*, 529 F.2d at p. 950 (footnote omitted); *see also 4 Newberg* at § 11.41.) Here, this case would have likely involved continued litigation and possible appeals given the ever-evolving nature of wage and hour law.

5. The Opinion of Experienced Counsel Favors Final Approval

Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best interest of the Class Members as a whole. (Lee Decl. ¶ 5; Bradley Decl. ¶ 14; Tulyathan Decl. ¶ 7; Hyun Decl. ¶¶ 7-8; Fitzpatrick Decl. ¶ 2; Franklin Decl. ¶ 2.) Similarly, counsel for

Defendants are in favor of this settlement. The endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its final approval determination. (*See Officers for Justice*, 688 F.2d at p. 625; *Ellis*, 87 F.R.D. at p. 18; *Boyd*, 485 F.Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.)

IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS SHOULD BE APPROVED

As referenced in the Motion for Preliminary Approval, to the extent any uncashed settlement funds remain after 180 days, the Parties have agreed that the funds shall be transferred to the California State Controller's Unclaimed Property Fund in the names of the respective Participating Class Members to whom the funds belong.

V. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS SHOULD BE APPROVED

Class Representatives Hector J. Mejia, Dearl Powell, Christina Gast, and Elijha Gonzalez each request a service award of \$10,000.00. Plaintiffs regularly conferred with Class Counsel, including providing substantive information regarding Defendants' practices. (Mejia Decl. ¶ 12; Powell Decl. ¶¶ 4-8; Gast Decl. ¶¶ 4-8; Gonzalez Decl. ¶¶ 4-8.) Plaintiffs regularly conferred with their attorneys to discuss the status of the case, offer their input, and assist their attorneys in gathering evidence that supported the class claims. (Mejia Decl. ¶¶ 12-13; Powell Decl. ¶¶ 4-8; Gast Decl. ¶¶ 4-8; Gonzalez Decl. ¶¶ 4-8.) For example, Plaintiffs discussed Defendants' policies and practices related to the payment of sick pay wages to prepare documents necessary to the lawsuit. (Mejia Decl. ¶ 12; Powell Decl. ¶ 7; Gast Decl. ¶ 7; Gonzalez Decl. ¶ 7.) Plaintiffs also conferred with their attorneys regarding the proposed settlement. (Mejia Decl. ¶ 16; Powell Decl. ¶ 6; Gast Decl. ¶ 6; Gonzalez Decl. ¶ 6.) Plaintiffs also assisted counsel to draft responses to written discovery, searched for documents, and reviewed the responses and verified their contents. (Mejia Decl. ¶ 13; Powell Decl. ¶ 7; Gast Decl. ¶ 7; Gonzalez Decl. ¶ 7.) Additionally, Plaintiffs also reviewed various pleadings and submitted declarations in this case, including in support of class certification. (Powell Decl. ¶ 14; Gast Decl. ¶¶ 7-8; Gonzalez Decl. ¶¶ 7-8.) Accordingly, Plaintiffs provided invaluable information, evidence, and documents that resulted

1 in this settlement.

2 In addition to the invaluable services that they provided, Plaintiffs took significant risks,
3 both professionally and monetarily, in acting as Class Representatives, seeking benefits on behalf
4 of the Class. Because the claims alleged by the Class Representatives involved the payment of
5 costs to the prevailing party, Plaintiffs could have possibly faced paying the costs of Defendants,
6 had they not prevailed in this action. Despite this, however, Plaintiffs agreed to pursue this case
7 on behalf of the Class. (Mejia Decl. ¶ 22; Powell Decl. ¶ 11; Gast Decl. ¶ 11; Gonzalez Decl. ¶
8 11.)

9 Also, given that future employers are much less likely to hire individuals who have filed
10 employment-related lawsuits, particularly cases of this nature, the Class Representatives also
11 faced significant risk in not being able to find suitable employment as a result of filing of this
12 case against Defendants. (Mejia Decl. ¶ 22; Powell Decl. ¶ 11; Gast Decl. ¶ 11; Gonzalez Decl. ¶
13 11.) Plaintiffs took these risks upon themselves to the benefit of the Class. Class Members did
14 not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail,
15 nor did they have to face the potential for retaliation or face obstacles in obtaining future
16 employment had they filed a lawsuit, which is a public record. These are significant benefits that
17 weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a
18 significantly valuable benefit to the Class, and Plaintiffs took on substantial risks in helping to
19 get this financial benefit to the Class. As such, the enhancement should be awarded to Plaintiffs
20 for their commitment, dedication, and risks taken for this litigation.

21 Courts have routinely granted approval of settlements containing such enhancements.
22 (*See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299-300
23 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio
24 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three incentive awards of
25 \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F.Supp.2d 907, 913-14 (granting a
26 \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio
27 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
28 *Servs.* (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52

1 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th
2 Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award to class representative in
3 ERISA case).)

4 **VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

5 Class Counsel seeks a fee award calculated at 35% of the Maximum Settlement Amount,
6 or \$4,200,000.00, for the successful prosecution and resolution of this action. California state and
7 federal courts have recognized that an appropriate method for determining award of attorneys'
8 fees is based on a percentage of the total value of benefits to class members by the settlement.
9 (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v. Priest* (1977) 20
10 Cal. 3d 25, 34 (“*Serrano III*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v.*
11 *Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose of this equitable doctrine
12 is to avoid unjust enrichment to the class and to “spread litigation costs proportionally among all
13 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,
14 557 F. 2d at p. 769.)

15 The California Supreme Court issued its ruling regarding the award of attorney’s fees in
16 wage and hour class action settlements. Under California law, the award of attorneys’ fees in
17 common fund wage and hour class action settlements is proper under the percentage method.
18 (*See Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (“We join the overwhelming majority
19 of federal and state courts in holding that when class action litigation establishes a monetary fund
20 for the benefit of the class members, and the trial court in its equitable powers awards class
21 counsel a fee out of that fund, the court may determine the amount of a reasonable fee by
22 choosing an appropriate percentage of the fund created”).) Under the percentage of the fund
23 method, the Court’s objective remains to “mimic the market” in fixing a reasonable fee. (*See*
24 *Gaskill v. Gordon* (7th Cir. 1998) 160 F.3d 361, 363 (“When a fee is set by a court rather than by
25 contract, the object is to set it at a level that will approximate what the market will set...The
26 judge, in other words, is trying to mimic the market in legal services”).) Both California state and
27 federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at p. 35; *Vincent*, 557 F.2d at
28 p. 769.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal. 4th 105, 110,

1 the California Supreme Court recognized that the common fund doctrine has been applied
2 “consistently in California when an action brought by one party creates a fund in which other
3 persons are entitled to share.” The reasons for applying the common fund doctrine include:
4 “fairness to the successful litigant, who might otherwise receive no benefit because his recovery
5 might be consumed by the expenses; correlative prevention of an unfair advantage to the others
6 who are entitled to share in the fund and who should bear their share of the burden of its
7 recovery; encouragement of the attorney for the successful litigant who will be more willing to
8 undertake and diligently prosecute proper litigation for the protection or recovery of the fund if
9 he is assured that he will be properly and directly compensated should his efforts be successful.”
10 (*Id.*)

11 Here, the fee award representing thirty-five percent (35%) of the Maximum Settlement
12 Amount clearly falls within that range and is consistent with other rulings of other courts and
13 comprehensive surveys of class action settlements and fee awards. (*See Martin v. AmeriPride*
14 *Servs.* (S.D. Cal. June 9, 2011) (recognizing that “courts may award attorney’s fees in the 30-
15 40% range in wage and hour class actions that result in recovery of a common fund under \$10
16 million”); *see also* Eisenberg & Miller (2010) *Attorney Fees in Class Action Settlements: An*
17 *Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (independent studies of
18 class action litigation nationwide conclude that fees in that range sought here are consistent with
19 market rates).)

20 The results delivered by Class Counsel also support the requested percentage of the fund.
21 Here, Plaintiffs and their counsel secured a \$12,000,000.00 non-reversionary common fund
22 settlement.

23 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
24 is relevant to the...reasonable determination” regarding fees. (*Swedish Hospital v. Shalala* (D.C.
25 Cir. 1993) 1 F.3d 1261, 1272.) A positive response rate tends to suggest that the court’s
26 “approximation of the market” for fees is well supported. (*Id.* at p. 1269.) In this case, the Class
27 Notice specifically notified Class Members that Class Counsel would be seeking \$4,200,000.00
28 in attorneys’ fees. To date, no Class Member has objected to the settlement and only 10 class

1 members have requested exclusion. This strong favorable response also supports the requested
2 fees.

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

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

10 (*City of Detroit v. Grinnell Corp* (2d Cir. 1974) 495 F.2d 448, 470.) Here, it is clear that a
11 settlement fund of \$12,000,000.00 has been created. For Class Counsel, the fees here were
12 wholly contingent in nature and the case presented far more risk than the usual contingent fee
13 case. Among the risks was the cost inherent in class action litigation, as well as a long battle with
14 corporate Defendants who had retained a highly experienced defense firm. As such, the
15 requested fee should be awarded.

16 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
17 **OF COSTS**

18 The request for reimbursement of costs, in the amount of \$45,762.93 is fair and
19 reasonable, especially in light of the fact that the Parties agreed that Plaintiffs' counsel may seek
20 up to \$100,000.00 as reimbursement for litigation costs under the Settlement Agreement.
21 Diversity Law Group, P.C. incurred actual litigation costs in the amount of \$35,141.44,
22 Bradley/Grombacher, LLP incurred actual litigation costs in the amount of \$4,000.27, and Hyun
23 Legal, APC incurred actual litigation costs in the amount of \$6,621.11, totaling \$45,762.93,
24 which are costs that were directly incurred in the prosecution and/or settlement of this action.
25 (Lee Decl. ¶ 14, Ex. A; Bradley Decl. ¶ 9, Ex. 1; Hyun Decl. ¶ 11.) The authority for the Court to
26 award this is the Parties' Settlement Agreement and Labor Code §§ 226 and 2699. As such, this
27 request should be approved.

28 //

1 **VIII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
2 **APPROVED**

3 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
4 Administrator, Phoenix Settlement Administrators, are to be paid out of the Maximum
5 Settlement Amount. As shown in the Declaration of Taylor Mitzner, the settlement
6 administration fees expended in this matter amount to a total of \$431,950.00, which is an amount
7 that was agreed upon by the Parties. (Admin. Decl. ¶ 18, Exh. B.) For such reasons, it is
8 requested that the Settlement Administrator's fees be approved.

9 **IX. NOTICE TO LWDA**

10 Concurrent with the filing of this Motion, Plaintiffs provided notice to the LWDA. (Lee
11 Decl. ¶ 16.)

12 **X. CONCLUSION**

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

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

- 18 1. Granting final approval to the proposed Settlement Agreement in this action;
- 19 2. Approving distribution of the settlement funds to the Class Members pursuant to
20 the terms of the Settlement Agreement;
- 21 3. Approving Plaintiffs' request for an award of the Class Representative Service
22 Awards of \$10,000.00 to each Plaintiff, with payments pursuant to the terms of the Settlement
23 Agreement;
- 24 4. Approving Class Counsel's request for an award to Class Counsel for
25 \$4,200,000.00 in attorneys' fees and \$45,762.93 in costs with payment pursuant to the terms of
26 the Settlement Agreement;
- 27 5. Approving Plaintiffs' request for payment of the settlement administration costs
28 to Phoenix Settlement Administrators in the amount of \$431,950.00 with payment pursuant to

1 the terms of the Settlement Agreement;

2 6. Approving Plaintiffs' request for payment to the LWDA for \$300,000.00 with
3 payment pursuant to the terms of the Settlement Agreement; and

4 7. Entering final judgment as to all members of the Class in this action.
5

6 DATED: March 22, 2024

BRADLEY/GROMBACHER, LLP

7
8 By: /s/ Marcus J. Bradley

Marcus J. Bradley, Esq.

9 Attorneys for Plaintiff

10 HECTOR MEJIA

11 DATED: March 22, 2024

DIVERSITY LAW GROUP, P.C.

12
13 By: /s/ Mai Tulyathan

Larry W. Lee, Esq.

Mai Tulyathan, Esq.

14 Attorneys for Plaintiffs

15 DEARL POWELL; CHRISTINA GAST and

16 ELIJHA GONZALEZ
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